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

9 In the Matter of:

Supreme Court No. R-17-0044

10 **PETITION TO AMEND RULE 43**
11 **OF THE ARIZONA RULES OF**
12 **THE SUPREME COURT**

COMMENT OF THE
13 **STATE BAR OF ARIZONA**

14 Pursuant to Rule 28(D) of the Arizona Rules of Supreme Court, the State Bar
15 of Arizona (the "State Bar") hereby submits the following as its Comment to the
16 above-captioned Petition.

17 The Petition requests several changes to Rule 43 that would:

- 18 • Encourage lawyers to obtain overdraft protection for all trust accounts
19 (Rule 43(a));
- 20 • Eliminate the requirement for a monthly three-way reconciliation of the
21 client ledgers, trust account general ledger or register, and the trust
22 account bank statement (Rule 43(b)(2));
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- 1 • Add a section providing a five-business-day grace period during which
2 a lawyer would be able to remedy an overdraft of the client’s trust
3 account, and permit a Bar investigation only in the event that the lawyer
4 exceeded that time period;
- 5 • Permit a disciplinary investigation or further proceedings only if the
6 lawyer does not provide a “satisfactory explanation” of the overdraft;
- 7 • Require the automatic suspension of a lawyer’s license if the overdraft
8 is not remedied for over 10 business days, to be lifted only when the
9 overdraft is remedied;
- 10 • Require a 10-business-day waiting period before disbursements could
11 be made from deposits over \$5,000; and
- 12 • Eliminate language from Rule 43(d) that contemplates trust account
13 examinations when information comes to the Bar relating to trust
14 account management.
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19 examinations when information comes to the Bar relating to trust
20 account management.

19 Because the proposal is antithetical to the basic tenets relating to client trust
20 accounts, including that the funds contained therein belong to the client and not the
21 lawyer; that the lawyer has a fiduciary duty to preserve and appropriately manage
22 those entrusted funds; and that the protection of the client is the paramount concern,
23 not the protection of the lawyer or insulation of the lawyer from inquiry, the State
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1 Bar requests that the Petition be denied.

2 **DISCUSSION**

3 Rule 43 creates reasonable and strong measures of accountability to which
4 lawyers holding the funds of clients and third parties or persons must adhere. The
5 underlying construct is that because the lawyer is entrusted with funds belonging to
6 others the lawyer must be scrupulous in the management of those funds. Although
7 these requirements exceed those governing the management of a lawyer's own
8 operating or personal checking accounts, the underlying need to protect the client
9 and third parties with interests in the funds more than justifies these additional
10 requirements. There requirements may be met with simple procedures to which the
11 lawyer routinely adheres. Petitioner's stated grounds for his proposal, largely based
12 on his personal experience, do not justify changes to this Rule.

16 1. Proposal for overdraft protection

17 Petitioner's first suggested change, not only to permit but to encourage
18 lawyers to obtain overdraft protection on their client trust accounts, may
19 superficially appear to protect client funds. In actuality, however, implementation
20 of this proposal would create an environment where accountability would be
21 removed. Lawyers, confident that overdraft protection would cover up inaccurate
22 accounting at best and conversion at worst, would have no incentive to maintain their
23 trust accounts in compliance with the rule.
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1 Lawyers hold a position of trust, not only with their clients but also with the
2 Court, with third parties with whom they interact, and with the public in general.
3 With that trust comes responsibility and accountability. The public at large, and the
4 Legislature, are increasingly demanding transparency as well as accountability. It is
5 antithetical to the necessary level of accountability and responsibility to adopt a rule
6 change that would permit an overdraft that lasts for “only a matter of days” because
7 the lawyer has improperly disbursed uncollected funds in violation of Rule 43(b)(3).
8 The Court’s prohibition on securing overdraft protection is reasonable; it creates
9 accountability by prohibiting a safety net under which a lawyer’s error or misdeed
10 in managing the trust account could be easily hidden from scrutiny.
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14 2. Elimination of the monthly three-way reconciliation

15 The three-way reconciliation required by Rule 43(b)(2)(C) of the trust
16 account general ledger, individual client ledgers, and trust account bank statement
17 serves as a timely and important check on the lawyer’s appropriate management of
18 client trust accounts. Although more complicated than reconciling a personal
19 checking account, the three-way reconciliation is a logical process that may be
20 managed by a manual process and is currently enabled in a number of practice
21 management software solutions.
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24 Because lawyers may hold funds for more than one client in the trust
25 account, the three-way reconciliation is necessary to ensure that one client’s funds

1 have not been converted to the use of another client, or to the lawyer. In fact, this
2 process may identify inadvertent errors even in the absence of an overdraft by
3 requiring the lawyer to regularly examine their records and process. The relatively
4 minimal burden imposed by this double-check is more than justified considering the
5 lawyer's fiduciary role.
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7 3. Delaying overdraft reporting to the Bar

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9 Petitioner proposes a course of events that would give a lawyer five
10 business days (potentially as much as seven or eight calendar days) to remedy an
11 overdraft before the Bar is notified. The Bar is charged by the Court with the
12 regulation of lawyers for the protection of the public. It goes without saying that if
13 the lawyer is appropriately maintaining the client trust account, an overdraft should
14 not occur. If despite accurately maintaining trust account records an overdraft does
15 occur, that serves as a red flag that there is some problem with the internal controls
16 used by the lawyer. In fact, an inadvertent error that creates an overdraft does not
17 typically lead to the imposition of a disciplinary sanction. It more commonly leads
18 to the issuance of an instructional comment accompanying a dismissal of the bar
19 charge, or to diversion if some additional hands-on or educational assistance is
20 required.
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24 It is expected that lawyers do not relish notification by the Lawyer
25 Regulation Office of the State Bar that they have received an overdraft notice. This

1 is not a sufficient reason, however, to create a system whereby notice to the Bar is
2 delayed, during which time the problems with the trust account may increase,
3 through ignorance or due to more nefarious conduct.
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5 Rule 43 already provides for summary suspension for non-compliance
6 with the trust accounting rules (Rule 43 (h)), so Petitioner's suggestion of an
7 automatic suspension pending the remedy of the overdraft is unnecessary. In fact,
8 Petitioner's proposal provides less notice to the lawyer than currently exists under
9 the rule, which gives the lawyer 30-day notice of a pending suspension.
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11 4. Waiting period for disbursement based on deposits over \$5,000

12 Rule 43(b)(4) already restricts disbursement of funds of any amount based
13 on uncollected funds, with exceptions for limited risk deposits. Petitioner's proposal
14 to eliminate that restriction for amounts under \$5,000 is logically inconsistent with
15 the purposes of the rule—to ensure that funds are appropriately accounted for and
16 that other funds in the trust account are not converted in the event the funds are not,
17 or cannot be, collected. As noted in Rule 43(b)(4)(A), even disbursements based on
18 limited risk deposits before funds are collected are at the risk of the lawyer. The
19 proposed change puts even greater risk on the lawyer by permitting disbursements
20 on uncollected funds under \$5,000.
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24 5. Eliminating the provision relating to trust account audits.

25 Rule 43(d)(1) grants the Bar the authority to conduct random trust account

1 audits, even though the Bar does not currently engage in this practice. The
2 philosophy underlying random trust account audits is not disciplinary, it is
3 precautionary and remedial. Through the random examination of client trust
4 accounts, regulatory bodies are able to identify problem areas and offer assistance
5 and education so that lawyers can better comply with their ethical duties. This result
6 is consistent with a new movement in lawyer regulation, practice management based
7 regulation (“PMBR”), focusing on the practical application of the ethical rules in
8 lawyers’ practices.
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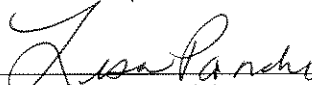
11 **CONCLUSION**

12 Lawyers may not, at the outset of their practices, automatically know or
13 understand the additional requirements set forth in Rule 43, such as maintaining
14 client ledgers or conducting three-way reconciliations, but they are expected to learn
15 them. Many lawyers received their legal education at a time when practical skills
16 were not stressed. Lawyers, however, have a variety of resources available to them
17 through the State Bar including continuing education programs (some of which
18 include hands-on demonstrations), a comprehensive trust account manual, and
19 practical advice through a trust account hotline answered by knowledgeable Bar
20 staff. In addition to those resources provided by the Bar, lawyers may seek and
21 obtain the assistance of professional accountants and bookkeepers, all of whom may
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1 also access Bar resources for information and guidance.¹ Any burden imposed on
2 lawyers by Rule 43 is amply justified by the need for transparency, accountability,
3 and protection of the public.
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5 The State Bar of Arizona respectfully requests that the petition be denied.

6 RESPECTFULLY SUBMITTED this 21st day of May, 2018.
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10 _____
11 Lisa M. Panahi
12 General Counsel
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14 Electronic copy filed with the
15 Clerk of the Supreme Court of Arizona
16 this 21st day of May, 2018.

17 by: 
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25 ¹ Of course, the requirement that the lawyer supervise any non-lawyer staff applies (ER 5.3, Rule 42, Ariz. R. Sup. Ct.) to those situations.