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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

Petition to Amend Rule 43, Ariz. R. Sup.
Ct.

Supreme Court
No.

Petition to Amend Rule 43, Ariz. R.
Sup. Ct.

Pursuant to Rule 28, Ariz. R. Sup. Ct., the undersigned individual, Tracy Ward, respectfully petitions this Court to amend Rule 43, Ariz. R. Sup. Ct., to update account ledger requirements, clarify and define terms, increase documentation options for deposits and disbursements, and expand the use of technology. A redlined draft of the proposed changes is attached as Appendix A. A clean draft of Rule 43, as proposed to be amended, is attached as Appendix B.

I. Background and Purpose of the Proposed Rule Amendments

The proposal seeks to update the trust account rules to assist lawyers in understanding the recordkeeping requirements and to allow the use of advancing technology.

A. Proposed amendments to recordkeeping requirements

These proposed amendments clarify, for example, the types of documents and data lawyers must keep showing disbursements. To bring trust-accounting into the 21st century, Rule 43 should detail the evidence lawyers must keep when making electronic transactions.

In addition, Rule 43(b)(2)(D) should recognize that the required three-way reconciliation may be a combination of report types, not just a single report.

B. Proposed amendment to define “electronic transfer”

Rule 43(b)(5) allows disbursements by pre-numbered check or “electronic transfer.” In 2002, when the State Bar of Arizona proposed adding “electronic transfer” as the second of two acceptable methods of disbursement, it explained the change was necessary to

recognize the realities of contemporary business by recommending that disbursements from a trust account may occur by either electronic (i.e., "wire") transfer or by pre-numbered checks.

In the Matter of Petition for Amendments of Arizona Supreme Court Rules 42 and 43, R-02-0045 (filed December 6, 2002) at 26. This court adopted that proposed change effective December 1, 2003.

In 2019, the realities of contemporary financial transactions clearly have transcended “wiring” funds. The phrase “electronic transfer” should be clarified

and clearly defined to encompass the myriad of ways in which a lawyer may safely and appropriately disburse funds from the lawyer's client-trust account other than by pre-numbered paper check.

II. Contents of the Proposed Amendment

The subsections to which amendments are proposed are attached as Appendix A in redline form.

III. Conclusion

Petitioner requests that this Court amend Rule 43, Ariz. R. Sup. Ct., as proposed.

Respectfully submitted January 10, 2019 by:

/s/ Tracy Ward
Tracy Ward

APPENDIX A

Rule 43. Trust Accounts

(a) Duty to Deposit Client Funds and Funds Belonging to Third Persons; Deposit of Funds Belonging to the Lawyer. Funds belonging in whole or in part to a client or third person in connection with a representation shall be kept separate and apart from the lawyer's personal and business accounts. All such funds shall be deposited into one or more trust accounts that are labeled as such. The location of the trust account shall be controlled by the provisions of ER 1.15(a). No trust account required by this rule may have overdraft protection. No funds belonging to the lawyer or law firm shall be deposited into a trust account established pursuant to this rule except as follows:

1. Funds to pay service or other charges or fees imposed by the financial institution that are related to operation of the trust account, but only in an amount reasonably estimated to be necessary for that purpose may be deposited therein.
2. Funds to pay merchant fees or credit card transaction charges or to offset debits for credit card chargebacks, but only in an amount reasonably estimated to be necessary for those purposes may be deposited therein.
3. Earned fees and funds for reimbursement of costs or expenses may be deposited into a trust account if they are part of a single credit card transaction that also includes the payment of advance fees, costs or expenses and the lawyer does not use a credit card processing service that permits the lawyer to direct such funds to the lawyer's separate business account. Any such earned fees and funds for reimbursement of costs or expenses must be withdrawn from the trust account within a reasonable time after deposit.
4. Funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm must be withdrawn when due and legally available from the financial institution, or within a reasonable time thereafter, unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the lawyer shall comply with ER 1.15(e).

(b) Trust Account Requirements.

1. Standards of Performance.

A. Due professional care must be exercised in the performance of the lawyer's duties under this rule.

B. Employees and others assisting the attorneys in the performance of such duties must be competent and properly trained and supervised.

C. Internal controls within the lawyer's office must be adequate under the circumstances to safeguard funds or other property held in trust.

2. Trust Account Records.

A. Every active member of the state bar shall maintain, on a current basis, complete records of the handling, maintenance and disposition of all funds, securities and other property belonging in whole or in part to a client or third person in connection with a representation. These records shall include the records required by ER 1.15 and cover the entire time from receipt to the time of final disposition by the lawyer of all such funds, securities and other property. The lawyer shall preserve these records for a period of five years after termination of the representation.

B. A lawyer shall maintain or cause to be maintained an account ledger or the equivalent for each client, person or entity for which funds are held ~~have been received in trust, showing:~~ A lawyer shall maintain or cause to be maintained an account ledger or the equivalent for any administrative funds the lawyer has deposited into the lawyer's trust account. The account ledgers or equivalent must show:

(i) T~~h~~e date, amount and payor of each receipt of funds. "Payor" is defined as the source of the funds.

(ii) T~~h~~e date, amount and payee of each disbursement. "Payee" is defined as the person or entity who received the funds.

(iii) A~~n~~y unexpended balance. "Unexpended balance" is defined as either the total remaining balance on the ledger or a running balance after each transaction.

C. A lawyer shall make or cause to be made a monthly three-way reconciliation of

the client ledgers, trust account general ledger or register, and the trust account bank statement.

D. A lawyer shall retain, in accordance with this rule, all trust account bank statements, cancelled pre-numbered checks (unless recorded on microfilm, check images are provided on the bank statement or stored electronically by a ~~bank or other~~ financial institution that maintains such records for the length of time required by this rule, other evidence of disbursements (which may include confirmation/transaction codes of electronic transfers provided the codes can be identified on both the ledgers and bank statement), evidence of deposit (which may include deposits slips, receipts, logs, text or online communications, confirmation/transaction codes of electronic deposits provided the codes can be identified on both the ledgers and bank statement or any equivalent documentation), ~~duplicate deposit slips or the equivalent (which shall be sufficiently detailed to identify each item)~~ client ledgers, administrative ledger, trust account general ledger or register, and three-way reconciliation (which can be a combination of different ledger reports types and not a single report) report to clients.

E. A record shall be maintained showing all property, other than cash, held for clients or third persons in connection with a representation, including the date received, where located and when returned or otherwise distributed.

3. *Deposits from Credit Card Transactions.* A lawyer or law firm may permit funds from a credit card transaction to be deposited into a client trust account for payment of advance fees, costs or expenses, and merchant or credit card transaction fees, but only if:

A. the lawyer has sources of funds, other than client or third-party funds, available at the time of the credit card transaction to replace any funds that may be debited from the account due to a credit card chargeback and any associated fees or charges;

B. within three business days of receipt of notice or actual knowledge that a chargeback has been made, the lawyer deposits into the trust account his or her own funds in an amount equal to the amount of the chargeback, if the lawyer has disbursed any of those funds, including any fees or charges associated with the chargeback that exceeds the client's credit card funds remaining in the trust account, and any fees or charges associated with the chargeback; and

C. the trust account contains sufficient administrative funds of the lawyer or law firm at the time of the transaction to pay all merchant and credit card transaction fees, except to the extent such fees are paid by the client as part of the transaction.

4. *Disbursement Against Uncollected Funds.* A lawyer generally may not use, endanger, or encumber money held in trust for a client or third person without the permission of the owner given after full disclosure of the circumstances. Except for disbursements based upon any of the four categories of limited-risk uncollected deposits enumerated in paragraph A below, a lawyer may not disburse funds held in trust unless the funds are collected funds. For purposes of this provision, “collected funds” means funds deposited, finally settled by the issuer's bank, and credited without recourse to the lawyer's trust account.

A. Certain categories of trust account deposits are considered to carry a limited and acceptable risk of failure so that disbursements of trust account funds may be made in reliance on such deposits without disclosure to and permission of clients and third persons owning trust account funds that may be affected by such disbursements. Notwithstanding that a deposit made to the lawyer's trust account has not been finally settled and credited to the account, the lawyer may disburse funds from the trust account in reliance on such deposit under any of the following circumstances, if the lawyer has other sources of funds, other than client or third party funds, available at the time of disbursement to replace any uncollected funds:

(i) when the deposit is made by certified check or cashier's check;

(ii) when the deposit is made by a bank check, official check, treasurer's check, money order, or other such instrument where the payor is a bank, savings and loan association, or credit union;

(iii) when the deposit is made by a check issued by the United States, the State of Arizona, or any agency or political subdivision of the State of Arizona; or

(iv) when the deposit is made by a check or draft issued by an insurance company, title insurance company, or a licensed title insurance agency authorized to do business in the state of Arizona.

In any of the above circumstances, a lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds is at the risk of the

lawyer making the disbursement. If any of the deposits fail, for any reason, the lawyer, upon receipt of notice or actual knowledge of the failure, must immediately act to protect the property of the lawyer's clients and third persons. If the lawyer accepting any such check personally pays the amount of any failed deposit within three business days of receipt of notice that the deposit has failed, the lawyer will not be considered to have committed professional misconduct based upon the disbursement of uncollected funds.

B. A lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds in any circumstances other than those four categories set forth above, when it results in funds of clients or third persons being used, endangered, or encumbered, will be grounds for a finding of professional misconduct.

5. Methods of Disbursement. All trust account disbursements shall be made by pre-numbered check or by electronic transfer, provided the lawyer maintains a record of such disbursements in accordance with the requirements of this rule. Electronic transfers are defined as any transfer of funds that is initiated through an electronic terminal, telephone, computer, magnetic tape, mobile device for the purpose of ordering, instructing or authorizing a financial institution to debit the account. Types of electronic transfers include but are not limited to: ACH, debit/credit cards, point-of-sale transfers, ATM transfers, and disbursement applications provided by financial institutions. ~~All instruments of disbursement shall be identified as a disbursement from a trust account.~~

[no changes proposed to (c) through (j) or comment]

APPENDIX B

Rule 43. Trust Accounts

(a) Duty to Deposit Client Funds and Funds Belonging to Third Persons; Deposit of Funds Belonging to the Lawyer. Funds belonging in whole or in part to a client or third person in connection with a representation shall be kept separate and apart from the lawyer's personal and business accounts. All such funds shall be deposited into one or more trust accounts that are labeled as such. The location of the trust account shall be controlled by the provisions of ER 1.15(a). No trust account required by this rule may have overdraft protection. No funds belonging to the lawyer or law firm shall be deposited into a trust account established pursuant to this rule except as follows:

1. Funds to pay service or other charges or fees imposed by the financial institution that are related to operation of the trust account, but only in an amount reasonably estimated to be necessary for that purpose may be deposited therein.
2. Funds to pay merchant fees or credit card transaction charges or to offset debits for credit card chargebacks, but only in an amount reasonably estimated to be necessary for those purposes may be deposited therein.
3. Earned fees and funds for reimbursement of costs or expenses may be deposited into a trust account if they are part of a single credit card transaction that also includes the payment of advance fees, costs or expenses and the lawyer does not use a credit card processing service that permits the lawyer to direct such funds to the lawyer's separate business account. Any such earned fees and funds for reimbursement of costs or expenses must be withdrawn from the trust account within a reasonable time after deposit.
4. Funds belonging in part to a client or third person and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm must be withdrawn when due and legally available from the financial institution, or within a reasonable time thereafter, unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the lawyer shall comply with ER 1.15(e).

(b) Trust Account Requirements.

1. Standards of Performance.

A. Due professional care must be exercised in the performance of the lawyer's duties under this rule.

B. Employees and others assisting the attorneys in the performance of such duties must be competent and properly trained and supervised.

C. Internal controls within the lawyer's office must be adequate under the circumstances to safeguard funds or other property held in trust.

2. Trust Account Records.

A. Every active member of the state bar shall maintain, on a current basis, complete records of the handling, maintenance and disposition of all funds, securities and other property belonging in whole or in part to a client or third person in connection with a representation. These records shall include the records required by ER 1.15 and cover the entire time from receipt to the time of final disposition by the lawyer of all such funds, securities and other property. The lawyer shall preserve these records for a period of five years after termination of the representation.

B. A lawyer shall maintain or cause to be maintained an account ledger or the equivalent for each client, person or entity for which funds are held in trust. A lawyer shall maintain or cause to be maintained an account ledger or the equivalent for any administrative funds the lawyer has deposited into the lawyer's trust account. The account ledgers or equivalent must show:

(i) The date, amount and payor of each receipt of funds. "Payor" is defined as the source of the funds.

(ii) The date, amount and payee of each disbursement. "Payee" is defined as the person or entity who received the funds.

(iii) Any unexpended balance. "Unexpended balance" is defined as either the total remaining balance on the ledger or a running balance after each transaction.

C. A lawyer shall make or cause to be made a monthly three-way reconciliation of the client ledgers, trust account general ledger or register, and the trust account

bank statement.

D. A. lawyer shall retain, in accordance with this rule, all trust account bank statements, cancelled pre- numbered checks (unless recorded on microfilm, check images are provided on the bank statement or stored electronically by a financial institution that maintains such records for the length of time required by this rule, other evidence of disbursements (which may include confirmation/transaction codes of electronic transfers provided the codes can be identified on both the ledgers and bank statement), evidence of deposit (which may include deposits slips, receipts, logs, text or online communications, confirmation/transaction codes of electronic deposits provided the codes can be identified on both the ledgers and bank statement or the equivalent documentation), client ledgers, administrative ledger, general ledger or register, and three-way reconciliation (which can be a combination of different ledger reports types and not a single report).

E. A record shall be maintained showing all property, other than cash, held for clients or third persons in connection with a representation, including the date received, where located and when returned or otherwise distributed.

3. *Deposits from Credit Card Transactions.* A lawyer or law firm may permit funds from a credit card transaction to be deposited into a client trust account for payment of advance fees, costs or expenses, and merchant or credit card transaction fees, but only if:

A. the lawyer has sources of funds, other than client or third-party funds, available at the time of the credit card transaction to replace any funds that may be debited from the account due to a credit card chargeback and any associated fees or charges;

B. within three business days of receipt of notice or actual knowledge that a chargeback has been made, the lawyer deposits into the trust account his or her own funds in an amount equal to the amount of the chargeback, if the lawyer has disbursed any of those funds, including any fees or charges associated with the chargeback; and

C. the trust account contains sufficient administrative funds of the lawyer or law firm at the time of the transaction to pay all merchant and credit card transaction fees, except to the extent such fees are paid by the client as part of the transaction.

4. *Disbursement Against Uncollected Funds.* A lawyer generally may not use, endanger, or encumber money held in trust for a client or third person without the permission of the owner given after full disclosure of the circumstances. Except for disbursements based upon any of the four categories of limited-risk uncollected deposits enumerated in paragraph A below, a lawyer may not disburse funds held in trust unless the funds are collected funds. For purposes of this provision, “collected funds” means funds deposited, finally settled by the issuer's bank, and credited without recourse to the lawyer's trust account.

A. Certain categories of trust account deposits are considered to carry a limited and acceptable risk of failure so that disbursements of trust account funds may be made in reliance on such deposits without disclosure to and permission of clients and third persons owning trust account funds that may be affected by such disbursements. Notwithstanding that a deposit made to the lawyer's trust account has not been finally settled and credited to the account, the lawyer may disburse funds from the trust account in reliance on such deposit under any of the following circumstances, if the lawyer has other sources of funds, other than client or third party funds, available at the time of disbursement to replace any uncollected funds:

(i) when the deposit is made by certified check or cashier's check;

(ii) when the deposit is made by a bank check, official check, treasurer's check, money order, or other such instrument where the payor is a bank, savings and loan association, or credit union;

(iii) when the deposit is made by a check issued by the United States, the State of Arizona, or any agency or political subdivision of the State of Arizona; or

(iv) when the deposit is made by a check or draft issued by an insurance company, title insurance company, or a licensed title insurance agency authorized to do business in the state of Arizona.

In any of the above circumstances, a lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds is at the risk of the lawyer making the disbursement. If any of the deposits fail, for any reason, the lawyer, upon receipt of notice or actual knowledge of the failure, must immediately act to protect the property of the lawyer's clients and third persons. If the lawyer accepting any such check personally pays the amount of any failed deposit within three business days of receipt of notice that the deposit has failed,

the lawyer will not be considered to have committed professional misconduct based upon the disbursement of uncollected funds.

B. A lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds in any circumstances other than those four categories set forth above, when it results in funds of clients or third persons being used, endangered, or encumbered, will be grounds for a finding of professional misconduct.

5. Methods of Disbursement. All trust account disbursements shall be made by pre-numbered check or electronic transfer, provided the lawyer maintains a record of such disbursements in accordance with the requirements of this rule. Electronic transfers are defined as any transfer of funds that is initiated through an electronic terminal, telephone, computer, magnetic tape, mobile device for the purpose of ordering, instructing or authorizing a financial institution to debit the account. Types of electronic transfers include but are not limited to: ACH, debit/credit cards, point-of-sale transfers, ATM transfers, and disbursement applications provided by financial institutions.