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

9 In the Matter of a PETITION )  
10 TO AMEND SUPREME COURT ) Supreme Court No. R-\_\_\_\_\_  
11 RULES 42 AND 43 )  
12 ) Petition to Amend Supreme Court  
13 ) Rules 42 and 43  
14 )  
15 \_\_\_\_\_ )

16 Pursuant to Rule 28 of the Rules of the Supreme Court, the State Bar of  
17 Arizona (“State Bar”) petitions the Arizona Supreme Court to amend Rules 42  
18 and 43 of the Rules of the Supreme Court, as set forth in Appendix A, attached  
19 hereto.

20 A separate motion to amend the proposed rules on an emergency and  
experimental basis was filed with the Court this date.

I. Overview and Summary of Proposed Changes

The State Bar’s Committee on the Rules of Professional Conduct (“the  
Ethics Committee”) recently issued Ethics Op. 08-01 in which it concluded that  
lawyers and law firms may not ethically accept payment by credit card for

1 advance fees, costs or expenses. A copy of Ariz. Ethics Op. 08-01 is attached  
2 hereto as Appendix B.

3 The most significant impact of Ethics Op. 08-01 is the adverse effect it is  
4 having on the public's ability to obtain needed legal services. Many prospective  
5 clients do not have sufficient reserve funds—especially during these tough  
6 economic times—to retain legal counsel when unanticipated needs arise. A  
7 continuing prohibition against accepting credit card payments for advance fees  
8 and costs will deny many more prospective clients access to legal services.

9 The proposed rules would balance the lawyer's duty to safeguard client  
10 and third-party property while offering legal services to those individuals who  
11 are unable to obtain such services without the use of credit cards. While the  
12 current rules permit lawyers to accept credit card payments for earned fees and  
13 the reimbursement of costs or expenses, the proposed rules would also permit  
14 lawyers to accept credit card payments for advance fees, costs or expenses.  
15 Although the proposed rules would in some instances place client or third-party  
16 funds at risk, it is modeled on Supreme Court Rule 43(d)(3) (Rule 43(b)(3)  
17 effective January 1, 2009), which permits the disbursement of funds against  
18 limited-risk uncollected deposits that potentially place client or third-party funds  
19 at risk.

20 Under the proposed rules, three methods of accepting credit card payments

1 would be permitted. First, a lawyer or law firm could accept credit card  
2 payments for earned fees and the reimbursement of costs or expenses, in which  
3 case the funds would be deposited into the lawyer's or law firm's operating or  
4 business account (*see infra.* for only exception). This option is available under  
5 the current rules as Ethics Op. 08-01 dealt only with advance fees and costs.  
6 Second, a lawyer or law firm could accept credit card payments when the funds  
7 consist partially or wholly of advance fees or anticipated costs or expenses, in  
8 which case the funds would be deposited into the lawyer's or law firm's trust  
9 account. Third, a lawyer or law firm could use a credit card processing service  
10 that permits the lawyer or law firm to identify the account into which funds from  
11 each credit card transaction should be deposited (i.e., the lawyer or law firm  
12 would direct the deposit of funds for advance fees, costs or expenses into the  
13 trust account and the deposit of funds for earned fees and the reimbursement of  
14 costs or expenses into an operating or business account). Nothing in the  
15 proposed rules would prohibit lawyers from using one credit card account for the  
16 payment of earned fees and reimbursement of costs or expenses (with deposits  
17 made into an operating or business account) and another credit card account for  
18 the payment for advance fees, costs or expenses (with deposits made into the  
19 trust account).

20 In an effort to protect client and third-party funds, lawyers and law firms

1 will be encouraged to consider using a credit card processing service that has  
2 agreed to deposit advance fees, costs and expenses into a lawyer's or law firm's  
3 trust account but debit the lawyer's or law firm's operating or business account  
4 for all chargebacks<sup>1</sup> and fees or charges related to credit card transactions (e.g.,  
5 merchant and credit card transaction fees, chargeback fees, terminal rental fees,  
6 minimum monthly fees, address verification fees).<sup>2</sup>

7 In the event of a chargeback to a lawyer's or law firm's trust account, the  
8 proposed rules would give the lawyer or law firm three business days to deposit  
9 their own funds into their trust account to reimburse the account for funds  
10 debited therefrom.<sup>3</sup> The proposed provision is similar to the reimbursement  
11 provision of the current rule that allows the distribution of certain limited-risk  
12 funds without waiting for the correlating deposit to be finally settled and  
13 credited to the lawyer's trust account. *See* Rule 43(d)(3), Ariz. R. Sup.Ct. (Rule

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14 <sup>1</sup> A "chargeback" (or reversal of charges) occurs when a client or former client contacts the  
15 company that issued the credit card to dispute the amount that should be paid to the lawyer or  
16 law firm. When that occurs, the appropriate lawyer or law firm account is debited an amount  
equal to the disputed amount, plus a chargeback fee.

17 <sup>2</sup> Wells Fargo Bank, N.A., offers a multi-merchant account that permits the lawyer to select  
18 the account into which funds from each credit card transaction should be deposited. Although  
only one credit card terminal is required, certain fees or charges may be billed to both  
accounts.

19 <sup>3</sup> Lawyers and law firms that utilize credit card processing services that debit all chargebacks  
20 and fees and costs associated with credit card transactions from an operating or business  
account would not be required to have their own funds available to reimburse the trust  
account since no funds could ever be debited from the trust account (i.e., no client or third-  
party funds could ever be converted or misappropriated).

1 43(b)(3), Ariz. R. Sup.Ct., effective January 1, 2009). Under the current rule,  
2 lawyers assume the risk that the deposited limited-risk funds will not be finally  
3 settled and credited to their trust accounts, in which case they must personally  
4 pay the amount of any failed deposit within three business days of receipt of  
5 notice that the deposit has failed. Although a temporary conversion of client or  
6 third-party funds occurs between the time a lawyer disburses limited-risk funds  
7 and the date the funds are credited to the trust account or the lawyer reimburses  
8 the trust account with his or her own funds, this Court has determined that the  
9 risk that the deposit will fail is so limited that it warrants the disbursement of  
10 such funds prior to the time they are finally settled and credited to the lawyers  
11 trust account.

12 The risk of conversion of client or third-party funds under the proposed  
13 rules is also limited. The risk arises from the possibility that a client or former  
14 client might dispute the fee, costs or expenses, in which case a chargeback will  
15 occur (i.e., funds equaling the disputed amount, plus a chargeback fee, will be  
16 debited from the appropriate account). The risk and extent of temporarily  
17 converting client or third-party funds due to a chargeback is similar to that when  
18 limited-risk funds have been disbursed. In the case of a chargeback, unearned  
19 credit card funds may still be in the trust account at the time a chargeback is  
20 made. When disbursements of limited-risk funds have been made, the funds

1 may no longer be in the trust account when a lawyer learns the funds were not  
2 credited to his or her trust account.

3 The temporary conversion of client or third-party funds due to the  
4 acceptance of credit cards for advance fees and costs is a possibility only when  
5 chargebacks and credit card fees or charges are debited from a trust account. In  
6 the event a chargeback is made to a trust account, the proposed rules require the  
7 lawyer or law firm to reimburse the trust account with their own funds within  
8 three business days. In addition, the proposed comments inform lawyers and  
9 law firms that they must have sufficient funds of their own in their trust  
10 accounts to cover miscellaneous credit card fees and charges.

11 The risk of a chargeback appears very small. The State Bar has conducted  
12 approximately 400 trust account investigations over the past four years. A trust  
13 account has become overdrawn due to a credit card chargeback on only one  
14 occasion. Therefore, the risk of a chargeback resulting in an overdraft from a  
15 trust account has been approximately one quarter of 1%.<sup>4</sup> In the one case in  
16 which an overdraft resulted, the attorney remedied the overdraft within three  
17 business days. Admittedly, however, other chargebacks against trust accounts  
18 may have occurred without the State Bar's knowledge because they did not

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19 <sup>4</sup> It is unknown whether that figure accurately portrays the risk that client or third-party funds  
20 will be temporarily converted if the proposed rules are adopted. The State Bar has no  
information regarding the number or frequency of chargebacks requested by clients or former  
clients.

1 result in an overdraft from a trust account.

2 Ethics Op. 08-01 concluded that lawyers are ethically prohibited from  
3 accepting credit card payments for advance fees, costs and expenses because  
4 doing so would give credit card companies access to their trust accounts to  
5 impose chargebacks and any related fees or charges. The proposed rule  
6 amendments, however, recognize the need for lawyers to accept credit cards for  
7 advance fees and anticipated costs or expenses. Credit card companies' access  
8 to lawyers' and law firms' trust accounts would be limited to the amount of  
9 disputed charges, fees and charges related thereto, and other credit card fees or  
10 charges. To the extent that clients' credit card funds are no longer in the trust  
11 account when a chargeback is made to that account, the lawyer or law firm  
12 would be responsible for promptly depositing their own funds to safeguard  
13 client and third-party funds.

14 The State Bar believes it would be inappropriate to recommend any  
15 proposed rule that would permit funds for advance fees or anticipated costs or  
16 expenses to be deposited, even temporarily, into a lawyer's or law firm's  
17 operating or business account. The Supreme Court rules do not authorize the  
18 State Bar to monitor lawyers' or law firms' operating or business accounts or  
19 require financial institutions to notify the State Bar when overdrafts to such  
20 accounts occur. As a result, the State Bar would be unable to determine whether

1 lawyers and law firms properly transfer advance fees, costs or expenses into  
2 their trust accounts, or to take steps to address the possible conversion or  
3 misappropriation of client or third-party funds that could result when overdrafts  
4 occur on such accounts. Furthermore, the State Bar is concerned about the  
5 increased likelihood that funds in an operating or business account will be  
6 misappropriated. Over the past four years, the State Bar has discovered more  
7 instances in which a law firm's staff engaged in fraudulent activity regarding an  
8 operating or business account than instances in which a law firm's staff engaged  
9 in fraudulent activity regarding a trust account.

10 An additional benefit of permitting credit card deposits into lawyers' trust  
11 accounts for advance fees and costs is the increased revenue that will be realized  
12 by the Arizona Foundation for Legal Services and Education as a result of  
13 interest earned while the funds are on deposit in such accounts.

14 A. Supreme Court Rule 43 – Trust Accounts

15 The proposed amendments to Supreme Court Rule 43 would permit  
16 lawyers and law firms to accept credit card payments for advance fees, costs or  
17 expenses, but only if all chargebacks and credit card fees and charges are  
18 debited from an operating or business account or the lawyers or law firms have  
19 sources of funds, other than client or third-party funds, available at the time of  
20 the credit card transaction to replace any funds that may be debited from the

1 trust account due to a chargeback. Lawyers and law firms that choose to permit  
2 the deposit of funds from credit card transactions into their trust accounts for  
3 payment of advance fees, costs or expenses assume the risk of a chargeback. If  
4 a debit from a lawyer's or law firm's client trust account occurs due to a  
5 chargeback, the lawyer would be required to protect client and third-party funds  
6 by depositing the lawyer's own funds into his or her trust account within three  
7 business days of receipt of notice or actual knowledge of a chargeback.  
8 Lawyers who fail to do so will be subject to disciplinary proceedings.

9 The proposed rule would also permit lawyers and law firms to deposit their  
10 own funds into their trust accounts to pay fees or charges related to credit card  
11 transactions or to offset debits for chargebacks.

#### 12 B. Rule 42 (ER 1.15) – Safekeeping Property

13 The proposed rule would create another exception to the general  
14 prohibition against lawyers and law firms depositing their own funds into their  
15 trust accounts. In addition to permitting lawyers and law firms to deposit their  
16 own funds into their trust accounts to pay bank service charges related to  
17 operation of the trust account, the proposed amendment to ER 1.15 would  
18 permit lawyers and law firms to deposit their own funds into their trust accounts  
19 to pay fees or charges related to credit card transactions or to offset debits for  
20 chargebacks.

1 II. Text of Proposed Rule Changes

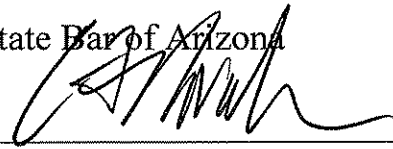
2 The text of the proposed rule changes is attached hereto as Appendix A.  
3 The changes are shown in legislative format, with additions underlined and  
4 deletions shown with strike-throughs.

5 III. Conclusion

6 For the reasons set forth above, the State Bar of Arizona respectfully  
7 petitions this Court to amend Rules 42 and 43 of the Rules of the Supreme  
8 Court, as set forth in Appendix A.

9 Respectfully submitted this 18 day of November, 2008.

10 State Bar of Arizona



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12 Edward F. Novak, President  
13 State Bar of Arizona

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15 Electronic copy filed with the  
16 Clerk of the Supreme Court of Arizona  
17 this 20<sup>th</sup> day of November, 2008.

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by: Cathleen Lundgren