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IN THE ARIZONA SUPREME COURT

In the Matter of: **PETITION TO AMEND ETHICAL RULE 1.2, RULE 42, ARIZ. R. SUP. CT.**	Supreme Court No. R-16-_____ **Petition to Amend ER 1.2, Rule 42, Ariz. R. Sup. Ct.**

Pursuant to Rule 28, Ariz. R. Sup. Ct., the undersigned respectfully petitions this Court to amend Ethical Rule (ER) 1.2, Rule 42, Ariz. R. Sup. Ct., to address Arizona lawyers' ability to counsel and assist clients in legal matters expressly permissible under state law, despite the fact that the same conduct may violate applicable federal criminal law. The proposed amendment is intended to resolve the "ethical conundrum" for lawyers that arises due to the legalization of medical marijuana.

I. Background and Purpose of Proposed Rule Amendment

In the 2010 general election, Arizona voters approved the Arizona Medical Marijuana Act, which legalized medical marijuana for use by people with certain

chronic or debilitating conditions. The federal Controlled Substances Act, 21 U.S.C. §841(a)(1), however, continues to make the manufacture, distribution or possession with intent to distribute marijuana illegal.

This conflict has put Arizona lawyers in a tenuous position because existing ER 1.2(d), which is identical to the American Bar Association's Model Rule 1.2(d), specifically bars them from "counsel[ing] a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent" and they only "may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." Comment [10] to ER 1.2 (identical to Model Rule comment [9]) makes clear "that a lawyer is not for hire as an accomplice or enabler of criminal conduct." Ariz. Ethics Op. 11-01 at p. 4 (February 2011) (appended). Strictly applied, this means that by advising and helping clients conduct business under Arizona's medical-marijuana law, lawyers would be engaging in criminal conduct under federal law and thus violating ER 1.2(d).

After Arizona voters approved the medical-marijuana law, the State Bar of Arizona's Committee on the Rules of Professional Conduct attempted to reconcile ER 1.2(d) with the fact that Arizona now allowed Arizonans to engage in conduct that remained illegal under federal law, and issued Ethics Op. 11-01. Noting that clients need legal advice and assistance "to engage in the conduct that the state law

expressly permits," the opinion declined to interpret and apply ER 1.2(d) "in a manner that would prevent a lawyer who concludes that the client's proposed conduct is in 'clear and unambiguous compliance' with state law from assisting the client in connection with activities expressly authorized under state law."

Faced with the same "ethical conundrum" as well under the same Model Rule 1.2(d) language, the Illinois State Bar Association (ISBA) issued Advisory Opinion No. 14-07 (October 2014) agreeing with Arizona's Op. 11-01. The ISBA opinion, however, also cogently noted that ethics opinions "do not immunize any lawyer from disciplinary action" and advocated that the Illinois Supreme Court amend its version of Rule 1.2(d), saying:

> Given the text of Rule 1.2(d), there is some degree of uncertainty surrounding the duties of an Illinois lawyer when representing a client involved in the medical marijuana business. That uncertainty would be removed if Rule 1.2(d) were to be amended...to account for the unique situation in which the laws of another jurisdiction run counter to those of Illinois.

Since the wave of adoption of state medical-marijuana laws, many affected jurisdictions with Model Rule 1.2(d) language have recognized this "ethical conundrum" in light of their new permissible state laws and have formally changed their professional-conduct codes, thereby removing any uncertainty.

Some states have chosen to add comments to their professional-conduct rules. **Colorado** added new comment [14] to its Colorado Rules of Professional Conduct Rule 1.2, effective March 24, 2014:

> A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances. the lawyer shall also advise the client regarding related federal law and policy.

Nevada adopted almost identical language – customized with its state laws – as new comment [1] to its Rule 1.2, Nevada Rules of Professional Conduct, effective May 7, 2014. **Washington** added slightly different language in its comment [18] effective December 9, 2014, to its Rule 1.2, Washington Rules of Professional Conduct:

> At least until there is a change in federal enforcement policy, a lawyer may counsel a client regarding the validity, scope and meaning of Washington Initiative 502 (Laws of 2013, ch. 3) and may assist a client in conduct that the lawyer reasonably believes is permitted by this statute and the other statutes, regulations, orders, and other state and local provisions implementing them.

Other states have added marijuana-related-law specific exemptions to their rules. **Oregon** and **Alaska** have added very similar subsections that provide exceptions to the Model Rule 1.2(d) language. Effective February 19, 2015, Oregon, which has Model Rule 1.2(d) language as its Rule 1.2(c)[1], added this exemption:

> (d) Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon's marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy.

Effective June 23, 2015, Alaska added a new subsection (f) to its Rule 1.2, Rules of

[1] Oregon's Rule 1.2(c) substitutes the word "illegal" for "criminal."

Professional Conduct:

> A lawyer may counsel a client regarding Alaska's marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. If Alaska law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.

Other states have chosen to add comments or rule exemptions that are not medical-marijuana specific. **Connecticut** revised its Rule 1.2(d) to permit conduct allowed under state law:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may (1) discuss the legal consequences of any proposed course of conduct with a client; (2) ~~and may~~ counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.; or (3) counsel or assist a client regarding conduct expressly permitted by Connecticut law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

At least one other state has both amended its rule and added a comment. In **Illinois**, the ISBA advisory opinion cited Connecticut's efforts and recommended that the Illinois Supreme Court Rules Committee promulgate a similar amendment. Illinois not only adopted Connecticut's approach but also added a lengthy comment. Effective January 1, 2016, the Illinois Supreme Court amended its Rule 1.2(d) similar to Connecticut's amendment:

> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct the lawyer knows is criminal or fraudulent, but a lawyer may
>
> (1) discuss the legal consequences of any proposed course of conduct with a client,

> (2) ~~and may~~ counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law, and
> (3) counsel or assist a client in conduct expressly permitted by Illinois law that may violate or conflict with federal or other law, as long as the lawyer advises the client about that federal or other law and its potential consequences.

It also added a lengthy new comment [10] explaining the rule change:

> Paragraph (d)(3) was adopted to address the dilemma facing a lawyer in Illinois after the passage of the Illinois Compassion Use of Medical Cannabis Pilot Program Act effective January 1, 2014. The Act expressly permits the cultivation, distribution, and use of marijuana for medical purposes under the conditions stated in the Act. Conduct permitted by the Act may be prohibited by the federal Controlled Substances Act, 21 U.S.C. §§801-904 and other law. The conflict between state and federal law makes it particularly important to allow a lawyer to provide legal advice and assistance to a client seeking to engage in conduct permitted by Illinois law. In providing such advice and assistance, a lawyer shall also advise the client about related federal law and policy. Paragraph (d)(3) is not restricted in its application to the marijuana law conflict. A lawyer should be especially careful about counseling or assisting a client in other contexts that may violate or conflict with federal, state, or local law.

In Arizona, Ethics Op. 11-01 has provided much needed guidance to lawyers. But in Arizona, as in many other jurisdictions, ethics opinions issued by a State Bar committee – the Committee on the Rules of Professional Conduct, in this state -- are advisory only and not binding on the discipline system. This is true even though the State Bar of Arizona is a mandatory bar to which all licensed members in this jurisdiction must belong, and even though the ethics advisory function coexists in the same organization as the discipline prosecution function. As the ISBA opinion

put it, an ethics opinion does not "immunize any lawyer from disciplinary action."

Allowing the disciplinary agency, rather than the highest court, to adopt a policy also does not provide adequate certainty for lawyers. The governing boards for at least two jurisdictions – Florida and Massachusetts, both of which have Model Rule 1.2(d) language -- have adopted formal written policies in which they state that bar members will not be prosecuted for misconduct if they advise clients under those states' medical-marijuana laws.[2] A policy adopted by an entity other than the rule-making court, however, is an inadequate way to resolve the "ethical conundrum" posed by the ER 1.2(d)/Model Rule 1.2(d) dilemma.

To remove the uncertainty, Arizona should follow Connecticut and Illinois and amend its ER 1.2(d) to recognize that there may be times when – as Illinois explained in its comment – "the conflict between state and federal law makes it particularly important to allow a lawyer to provide legal advice and assistance to a client seeking to engage in conduct permitted by [state] law."

The language adopted by Connecticut and Illinois also importantly incorporates a concept already posited in Ethics Op. 11-01: that lawyers may provide necessary legal help to a client taking permissible acts under Arizona's medical-

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[2] *See* Massachusetts "Board of Bar Overseers/Office of Bar Counsel Policy on Medical Marijuana" (http://www.mass.gov/obcbbo/marijuana.pdf) and, for The Florida Bar, "Board adopts medical marijuana advice policy" (http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/575b2ba3c91f53dd85257cf200481980!OpenDocument).

marijuana law if they advise the client of the "potential federal law implications and consequences thereof, or, if the lawyer is not qualified to do so, advises the client to seek other legal counsel regarding those issues...." If a lawyer is not competent to provide the counsel required under proposed ER 1.2(d)(3), then ER 1.1 (competence) requires that the lawyer associate a lawyer who has the established competence, and ER 1.2(c) allows the lawyer to limit the scope of representation, with informed client consent.

It also implicitly recognizes that other state-federal conflicts similar to medical marijuana may arise.[3] By adopting this change, Arizona would not be an outlier; it would be joining Connecticut and Illinois by resolving a state/federal conflict. While it may be preferable to adhere as closely as possible to the ABA Model Rules of Professional Conduct, medical-marijuana laws have been controversial, state-by-state phenomena unlikely to result in timely changes to a national model rule.

Amending the rule itself also is preferable to simply adding a comment. Comments "explain[] and illustrate[] the meaning and purpose of the Rule" and "are intended as guides to interpretation, but the text of each Rule is authoritative." Preamble, Arizona Rules of Professional Conduct, paragraph [21]. A rule should not

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[3] This would not be the first time Arizona adopted ethical-rule language from Connecticut. *See* rule-change petition R-11-004, in which the State Bar proposed (and this Court agreed) to adopt clarifying language for ER 1.5(b).

specifically prohibit conduct while an explanatory comment provides an exception.

II. Proposed Rule Amendment

Arizona should adopt Connecticut's simple and elegant language. ER 1.2(d) thus should be revised as follows:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may (1) discuss the legal consequences of any proposed course of conduct with a client; (2) ~~and may~~ counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law~~.~~; or (3) counsel or assist a client regarding conduct expressly permitted by Arizona law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

With the rule amended this way, a lengthy explanatory or medical-marijuana-specific comment is unnecessary.

Conclusion

This rule-change proposal is not intended to weigh into or reignite the debate over whether medical marijuana should be allowed or continued, or whether marijuana otherwise should be decriminalized. Medical marijuana is currently permitted under state law. This proposed rule change recognizes existing reality and is offered only to provide certainty to lawyers about their proper ethical role in advising and assisting clients about activities falling within permissible state law.

RESPECTFULLY SUBMITTED January 10, 2016.

By _____

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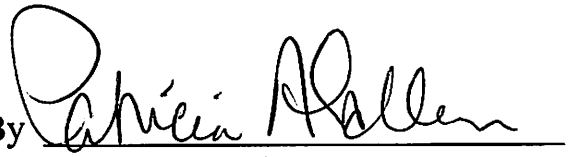
RESPECTFULLY SUBMITTED January 10, 2016.

By 

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APPENDIX

[PDF of Ariz. Ethics Op. 11-01]