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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of PETITION TO AMEND RULE 42 (ER 1.2), ARIZ. R. SUP. CT.	)	Supreme Court No. R-__ - ___

According to Rules 28 and 42.1(b)(2), Ariz. R. Sup. Ct., the Petitioner, the Ethics Advisory Committee (the "Committee"), petitions the Court to adopt an amendment to Arizona Rule Supreme Court 42 (ER 1.2), which prohibits a lawyer from counseling or assisting a client in illegal conduct.

I. Background

The Committee received a request to revisit Arizona Ethics Opinion 11-01 (2/2011) (the "Opinion"), issued by the State Bar of Arizona Rules of Professional Conduct Committee ("Former Committee"). (See request, EO 20-0004, attached.) The Opinion was issued after Arizona voters passed the Arizona Medical Marijuana Act ("AMMA"), A.R.S. § 36-2801, *et seq.*, which provides limited immunity from

prosecution under state law for various marijuana-related offenses. To enjoy immunity, medical marijuana dispensaries must comply with numerous statutes and regulations. Since the inception of the AMMA, Arizona lawyers have assisted clients with compliance.

ER 1.2(d) states:

> 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 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.

The Opinion addressed whether a lawyer may ethically advise and assist clients with matters relating to the AMMA when such actions violate the federal Controlled Substances Act ("CSA"), 21 U.S.C. § 801, *et seq. See* 21 U.S.C. § 841(a)(1) ("[I]t shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, [marijuana] . . . .").

Although Arizona was the sixteenth jurisdiction to adopt a medical marijuana law, it was only the second to address the issue. Ariz. Op. 11-01; *see also* Me. Op. 119 (July 7, 2010). Maine Op. 119 found that Rule 1.2(d) "does not make a distinction between crimes which are enforced and those which are not," and, concerning the state's marijuana laws, the rule allows a lawyer to "counsel or assist

a client in making good faith efforts to determine the validity, scope, meaning or application of the law," but it "forbids attorneys from counseling a client to engage in the business or to assist a client in doing so." Accordingly, the opinion concluded, "[s]o long as both the federal law and the language of the Rule each remain the same," the lawyer's role is limited, and the lawyer "needs to perform the analysis required by the Rule and determine whether the particular legal service being requested rises to the level of assistance in violating federal law." *Id.*

The Former Committee considered Maine's opinion, but ultimately "decline[d] 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, thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits." Ariz. Op. 11-01. The Former Committee concluded that a lawyer might ethically advise and assist a client concerning activities that comply with the AMMA, including:

> such matters as advising clients about the requirements of the [AMMA], assisting clients in establishing and licensing non-profit business entities that meet the requirements of the [AMMA], and representing clients in proceedings before state agencies regarding licensing and certification issues.

Ariz. Op. 11-01.

Since the Opinion, several states' opinions have concluded, as Maine did, that it would be unethical for a lawyer to assist a client in conduct that would violate the CSA. Most of these states resolved the conflict by amending their rule or adding an explanatory comment to allow lawyers to assist clients with their states' marijuana laws ethically.

II. Purpose of the Proposed Rule Amendment

Considering the numerous jurisdictions that have subsequently interpreted the same or substantially similar language to require a rule change to allow a lawyer to engage in the conduct, the requestor asked that the Committee reevaluate the Opinion's propriety. The requestor also pointed to New Mexico's criticism of the Opinion, which states, "in the [State Bar of New Mexico's Ethics Advisory Committee's] opinion, [Arizona's] opinion is based on a value judgment of the current state of federal laws and prosecutions and not on a true reading of the Rules of Professional Conduct." N.M. Op. 2016-01. Because the Former Committee's ethics opinions are not binding, the requestor invited this Committee to reconcile the perceived inconsistency; or provide a binding opinion on which Arizona lawyers could rely.

After the Committee received the request and reviewed the Opinion, Arizona voters passed Proposition 207 (Safe and Smart Arizona Act, "SSAA") in November 2020, which expands the AMMA's limited immunity protection to cover various

conduct, including the purchase, possession, and consumption of small amounts of marijuana for non-medicinal purposes. Like the AMMA, the SSAA directs the Arizona Department of Health Services to adopt rules and regulations under the SSAA. Like the AMMA, clients are likely to seek legal assistance to comply with the rules and regulations of the SSAA. Because of the unique circumstances presented by the AMMA and SSAA (collectively the "marijuana laws"), *see United States v. McIntosh*, 833 F.3d 1163, 1179 (9th Cir. 2016) (no state can legalize what federal law prohibits), which was not contemplated when the Court adopted Model Rule 1.2, the Committee petitions the Court to amend ER 1.2 to clarify that a lawyer may assist with matters expressly permitted under state law. *See also* Dennis A. Rendleman, *Ethical Issues in Representing Clients in the Cannabis Business: "One Toke over the Line?"*, Prof. Law., 2019, at 20, 23 (2019) ("Model Rule 1.2(d) contemplates legality as a binary concept, not an ambiguous situation with conflicting federalism issues.").

A. Counseling or Assisting Clients with Matters Expressly Permitted by State Law is Not a Violation of 1.2(d).

The Committee concludes that a lawyer should not be held to have violated 1.2(d) by counseling or assisting a client with matters expressly permitted under the marijuana laws because there is no federal law that explicitly prohibits lawyers from counseling or assisting clients in complying with state law. No provision of the

marijuana laws has been held to conflict with federal law or otherwise invalid.[1] *See, e.g., Reed-Kaliher v. Hoggatt*, 237 Ariz. 119, 123, ¶¶ 18–24 (2015); *White Mountain Health Ctr., Inc. v. Maricopa County*, 241 Ariz. 230, 240, ¶¶ 35-36 (App. 2016). Given that "federal policy on medical marijuana authorized by states [is] in a state of flux," *Green Cross Med., Inc. v. Gally*, 242 Ariz. 293, 298, ¶ 18 (App. 2017), it is the Committee's opinion that a lawyer who assists a client within the parameters of the Opinion is making "a good faith effort to determine the validity, scope, meaning or application of the law." *See* ER 1.2 cmt. 13 (the last clause of ER 1.2(d) "recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities").

However, the conclusion presumes that the lawyer's conduct of counseling and assisting the client with state law would not itself be a violation of federal law. *See* 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."). Although issues of impossibility preemption and aiding and abetting have been raised concerning the AMMA, they have routinely been rejected.[2] *See White Mountain*, 241 Ariz. at 240, ¶ 33 (impossibility preemption

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[1] The courts have not considered a challenge to the SSAA yet.

[2] Presumably the same analysis would apply to the SSAA.

occurs when "a conflict between the state and federal law . . . makes it physically impossible to comply with both state and federal law"). If compliance with the procedure prescribed by the marijuana laws does not make it impossible to comply with the CSA, the same would be true of a lawyer assisting a client with compliance under the marijuana laws.

Because the Committee's conclusion turns on whether the conduct of "lawyering" itself would be illegal in this context, *see White Mountain*, 241 Ariz. at 246, ¶ 52 ("[T]o prove aiding and abetting under federal law, 'it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949))); Michael H. Rubin, *Smokin' Hot: Ethical Issues for Lawyers Advising Business Clients in States with Legalized Medical or Recreational Marijuana*, 79 La. L. Rev. 629, 661–62 (2019) ("Courts have indicated that if there is evidence an attorney knew of the client's wrongful conduct and rendered substantial assistance in committing it, the possibility exists that the attorney might be held liable as an aider and abettor." (footnote omitted)), and because the answer is a question of law and beyond the Committee's scope, *see* Ariz. R. Sup. Ct. 42.1(c)(3), the committee respectfully requests the Court clarify Arizona lawyers' ethical responsibility when

advising clients who currently conduct, or wish to conduct, business under the protections of the marijuana laws.

B. Other Jurisdictions Have Approached this Issue in Various Ways.

Although most jurisdictions have concluded that the conduct discussed above would violate ER 1.2(d), *but see* Me. Op. 215 (March 1, 2017) ("[N]otwithstanding current federal marijuana laws, Maine Rule of Professional Conduct 1.2 permits an attorney to counsel or assist clients who are engaged in conduct related to the sale or use of marijuana consistent with Maine's laws and regulations governing medical and recreational marijuana."),[3] the method by which these jurisdictions go about resolving the issue varies.

On one end of the spectrum—while concluding that a "lawyer may represent non-profit producers, courier and manufacturers of medical cannabis and approved laboratories, to the extent that representation is not in the form of impermissible

[3] In 2016, after reviewing the subsequent opinions and rule amendments of other jurisdictions, Maine issued a second opinion "re-evaluating" Me. Op. 119 and "recommend[ing] that [the rule] be amended consistent with that change enacted by other states." Me. Op. 214 (May 1, 2016). "After significant consideration," Maine's rules committee "felt it unwise to craft a rule of general applicability for this specific issue," and instead, suggested a new opinion clarifying "that counseling or assisting a client to engage in conduct that conforms to Maine laws regarding marijuana does not violate Rule 1.2." Me. Op. 215 (March 1, 2017) (vacating Me. Op. 214). The following year Maine issued a superseding opinion recognizing the inconsistency between the rule and the guidance but concluding that the ethical rules are rules of reason, and "[d]efining Rule 1.2 too strictly on matters involving marijuana would inhibit lawyers from assisting clients in testing the boundaries and validity of existing law, which is recognized to be an integral part of the development of the law." *Id.* The new Maine opinion concluded that "[t]he public's need for legal assistance and right to receive it are substantial, and concerns about upholding respect for the law and legal institutions are not significant enough to outweigh those considerations in this circumstance." *Id*

counseling to engage in or providing 'assistance' in the commission of crimes," New Mexico's Ethics Advisory Committee "[wa]s unable to agree as to the exact parameters of 'assistance.'" N.M. Op. 2016-01. The committee "fe[lt] that attorneys must analyze the issue of "assistance" for themselves, based upon the specific facts of the situation bearing in mind that that line may be tested through a disciplinary complaint." *Id.* The New Mexico Supreme Court has not offered any additional guidance, leaving lawyers to discover the rules' limitations through discipline.

Although Florida and Massachusetts have not provided an opinion on the propriety of the conduct under the rule, their respective state bars adopted a formal policy not to prosecute lawyers for advising clients about marijuana law. *See* Gary Blankenship, *Board adopts a medical marijuana advice policy*, The Florida Bar (June 15, 2014), https://www.floridabar.org/the-florida-bar-news/board-adopts-medical-marijuana-advice-policy/ (the Florida Bar Board of Governors "adopted a policy not to prosecute Bar members for misconduct if they advise clients about the new state law — as long as they also remind clients about federal law"); Massachusetts Board of Bar Overseers, *BBO/OBC Policy on Legal Advice on Marijuana* (Mar. 29, 2017), https://www.massbbo.org/Announcements?id=a0P360 00009Yzb3EAC ("The Massachusetts Board of Bar Overseers and Office of the Bar Counsel will not prosecute a member of the Massachusetts bar solely for advising a client regarding the validity, scope, and meaning of Massachusetts statutes and laws

regarding medical or other legal forms of marijuana or for assisting a client in conduct that the lawyer reasonably believes is permitted by Massachusetts statutes, regulations, orders, and other state or local provisions implementing them, as long as the lawyer also advises the client regarding related federal law and policy.").

Others, like Maine, permit the conduct through ethics opinions. *See* Me. Op. 215 (although the rules committee "felt it unwise to craft a rule of general applicability for this specific issue," it instead suggested a new opinion clarifying "that counseling or assisting a client to engage in conduct that conforms to Maine laws regarding marijuana does not violate Rule 1.2"). Some states' supreme courts, including Nevada and Vermont, added a comment to clarify lawyers' obligations concerning advising clients on matters where state law and federal law may conflict or narrow the comment to address marijuana specifically. *See* Nev. ER 1.2, cmt. 1; Vt. ER 1.2, cmt. 14. Several other states, some of which are discussed below, opted to amend the rule.

C. Arizona Should Amend the Rule.

Despite the AMMA taking effect in 2011, as of 2019, Arizona was one of eleven states without a rule change, comment, or binding ethics opinion permitting lawyers to assist clients in complying with state laws that conflict with federal criminal statutes. *See* Rubin, *supra* at 647–48, n.58. After considering the various

actions (and inaction) taken by other jurisdictions, the Committee requests that the Court amend the Rule for the following reasons.

First, unlike New Mexico, where lawyers have always been aware of the risk of discipline, Arizona lawyers must rely on the non-binding Opinion. *See* Gary Michael Smith, *Letters from Marijuana Land-the First Decade*, Ariz. Att'y, March 2020, at 26 (2020) ("Absent issuance of Ethics Opinion 11-01, Arizona lawyers would have been in ethical limbo. To an extent, given that State Bar Ethics Opinions are non-binding, Arizona's marijuana lawyers arguably may still be in that ethical limbo--but maybe more like limbo's lobby rather than limbo's main floor."). Since 2011 many lawyers and their clients have made career decisions based on the Opinion. This is a rapidly changing area of law. It would be a disservice to the lawyers and their clients to abruptly announce that reliance on the Opinion was misplaced and that lawyers who provide legal services concerning the marijuana laws are now subject to discipline for such conduct.

And although in 2010 the Arizona State Bar notified lawyers that guidance on the AMMA would be provided before the act's effective date and it would not pursue discipline against lawyers who advised on compliance with the AMMA "in the interim," the interim has passed without a further statement from the State Bar. (The news release was removed sometime after April 2020 and is no longer available.)

Resolving the issue with a comment is also an inferior route. "The Comments are intended as guides to interpretation, but the text of each Rule is authoritative." Ariz. R. Sup. Ct. 42, Preamble, 21. The text of Arizona's ER 1.2 has been interpreted by nearly every jurisdiction that has addressed the issue to preclude a lawyer from assisting in such matters. A comment to a rule should not conflict with the rule's text.

The language of the proposed amendment is consistent with the language adopted by several other jurisdictions. Faced with the same dilemma, the Pennsylvania Supreme Court amended the rule in 2017, after the Pennsylvania Bar Association Legal Ethics and Professional Responsibility Committee and the Philadelphia Bar Association Professional Guidance Committee issued a joint opinion in response to both organizations receiving "numerous inquiries" concerning the ethical propriety of a Pennsylvania lawyer providing legal services to clients who were subject to another jurisdiction's marijuana law, and in anticipation of Pennsylvania's own proposed medical marijuana law. *See* The Disciplinary Board of the Supreme Court of Pennsylvania, PA Supreme Court clarifies rule that pertains to the issue of lawyers advertising clients engaged in the medical marijuana industry (Oct. 26, 2017), https://www.padisciplinaryboard.org/news-media/news-article/7/amendment-to-rules-of-professional-conduct. After concluding that the proposed conduct would

violate the rule without such amendment, the committees recommended an amendment to ER 1.2 "[i] n order to provide clearer guidance and comfort to lawyers who are interested in practicing in this burgeoning area of law." *See* Penn. Op. 2015-100 http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/JointFormalOpinion2015-100.pdf.

The Pennsylvania Supreme Court adopted ER 1.2(e), which provides:

> A lawyer may counsel or assist a client regarding conduct expressly permitted by Pennsylvania law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

Penn. ER 1.2(e); *see also* N.J. ER 1.2(d) (adding to Model Rule 1.2(d)) ("A lawyer may counsel a client regarding New Jersey's medical marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. The lawyer shall also advise the client regarding related federal law and policy."); Or. ER 1.2(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.").

The Committee recommends this Court amend ER 1.2(e). A similar petition was submitted in 2016 and 2018 with the State Bar and the Attorney Regulation Advisory Committee's support but denied without comment. *See* R-16-0027; R-18-

0009. The proposed amendment would reconcile any perceived conflicts between ER 1.2 and the Opinion and clarify a lawyer's ethical ability to assist a client with matters expressly permitted under state law, even when the law may conflict with federal law, until or unless the state law is declared invalid.

III. Contents of the Proposed Rule Amendment

ER 1.2:

> (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by ER 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
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> (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
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> (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
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> (d) 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 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.

> (e) Notwithstanding subsection (d), a lawyer may 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.

IV. Conclusion

The Petitioner respectfully requests that the Court adopt the proposed rule. In the alternative, Petitioner requests that the Court refer the matter back to the Committee with directions.

Attached is Ariz. Op. 11-01 and EO 20-0004.

DATED this 25 day of March , 2021.

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