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IN THE ARIZONA SUPREME COURT

In the Matter of:

**PETITION TO AMEND
RULE 42 (ER 1.2), ARIZ. R. SUP.
CT.**

Supreme Court No. R-21-0041

**Comment in Support of Petition to
Amend Rule 42 (ER 1.2), Ariz. R.
Sup. Ct.**

Pursuant to Rule 28, Ariz. R. Sup. Ct., I respectfully submit this comment in support of the Ethics Advisory Committee’s petition to amend ER 1.2.

I filed the rule-change petitions R-16-0027 and R-18-0009 that proposed amending ER 1.2(d) to address Arizona lawyers’ ethical ability to counsel and assist clients in legal matters expressly permissible under state law, even though the same conduct may violate applicable federal law. The only “authority” that allowed this conduct was the non-binding State Bar of Arizona Ethics Op. 11-01, which essentially created an exception to ER 1.2(d).

The Court denied each of my rule-change petitions, without comment. The Court's action essentially left ER 1.2(d) saying one thing while a non-binding ethics opinion said another.

I then asked the Ethics Advisory Committee (EAC) for an opinion reconciling the State Bar opinion with the express language of ER 1.2(d).¹ Apparently (and understandably) unable to do so, the EAC has filed a petition – the third – proposing that the Court amend ER 1.2(d). Barring that, the EAC suggests that the Court could refer the matter back to it but “with directions.”

In my two rule-change petitions, I had proposed that the Court follow how Connecticut had resolved the tension between its version of ER 1.2(d) and state authorization of medical marijuana:

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.

The EAC proposes following the Pennsylvania Supreme Court and adding a new ER 1.2(e), which achieves the same result:

(e) Notwithstanding subsection (d), a lawyer may counsel or assist a


¹ My opinion request, albeit with identifying information redacted, is attached to the EAC's rule-change petition.

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.

Either rule change would provide Arizona lawyers with certainty. Either also would resolve what I view as questions of system integrity, which I detailed on page 4 of my EAC opinion request.

My previous rule-change petitions plus my EAC opinion request more than adequately explain why I support the EAC's proposed amendments, and I incorporate those legal and policy arguments in this comment.

Respectfully submitted April 29, 2022.

By 

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