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

9 In the Matter of:

10 **PETITION TO AMEND**
11 **COMMENT [1], ER 4.2, RULE 42**
12 **OF THE ARIZONA RULES OF**
13 **SUPREME COURT**

Supreme Court No. R-25-

PETITION

14 Pursuant to Rule 28(a) of the Arizona Rules of Supreme Court, the State Bar
15 of Arizona (the “State Bar”) hereby petitions the Court to amend Comment [1] to
16 ER 4.2. The proposed amendment will expand upon the exceptions to the ethical
17 rules regarding communications with represented parties, to better follow the
18 American Bar Association (“ABA”) Model Rule 4.2 and to account for the realities
19 of the practice of employment law. Specifically, the amendment will clarify that “a
20 lawyer is not prohibited from advising a client concerning a communication that the
21 client is legally entitled to make.” A redlined version of the proposed amendment is
22 provided herewith at Exhibit A.
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Employment lawyers face a unique challenge relating to these rules, as it is not unusual for a lawyer to represent a corporate client in an administrative proceeding with a current employee who is also represented. Similarly, companies often receive demand letters from a lawyer representing a current employee and ask their own outside counsel to respond to the letter. In each of these situations, the employee and the employer have an ongoing relationship which can (and often does) become complicated in light of the dispute. It is natural for both parties to want legal assistance in managing the communications between them. The proposed

1 amendment would benefit clients by expressly permitting Arizona lawyers to
2 provide that assistance.

3 4 ARGUMENT

5 The RPC has long recognized exceptions to ER 4.2. For example, a lawyer
6 may have consent from the other lawyer to make the communication. ER 4.2.
7 Further, the rule “does not prohibit communication with a party...concerning matters
8 outside the representation.” *Id.*, cmt. [1]. “Also, parties to a matter may communicate
9 directly with each other and a lawyer having independent justification for
10 communicating with the other party is permitted to do so.” *Id.*

13 The ABA Model Rule 4.2, Comment [4] contains the same language as ER
14 4.2, Comment [1], except the ABA Model Rule goes further: “Parties to a matter
15 may communicate directly with each other, **and a lawyer is not prohibited from**
16 **advising a client concerning a communication that the client is legally entitled**
17 **to make.”** ABA Model Rule 4.2, cmt. [4] (emphasis added). Other states have
18 adopted the same or similar exceptions. For example:

- 21 • CA ST RPC 4.2, cmt. [3]: “The prohibition against
22 communicating ‘indirectly’ with a person represented by counsel in
23 paragraph (a) is intended to address situations where a lawyer seeks to
24 communicate with a represented person through an intermediary such as
25 an agent, investigator or the lawyer’s client. This rule, however, does not
prevent represented persons from communicating directly with one
another with respect to the subject of the representation, nor does it

1 prohibit a lawyer from advising a client concerning such a
2 communication. A lawyer may also advise a client not to accept or
engage in such communications.”

- 3 • NY ST RPC 4.2, cmt. [11]: “A lawyer may also counsel a client
4 with respect to communications with a represented person, including by
5 drafting papers for the client to present to the represented person.”

6 Indeed, 32 states recognize the exception in ABA Model Rule 4.2 Comment [4].¹

7
8 The Restatement similarly notes that the general anti-contact rule “does not
9 prohibit the lawyer from assisting the client in otherwise proper communication by
10 the lawyer’s client with a represented nonclient.” Restatement (Third) of the Law
11 Governing Lawyers § 99(2) (2000). The Restatement explains:

12
13 The lawyer for a client intending to make such a communication may
14 advise the client regarding legal aspects of the communication, such as
15 whether an intended communication is libelous or would otherwise
16 create risk for the client. Prohibiting such advice would unduly restrict
the client’s autonomy, the client’s interest in obtaining important legal
advice, and the client’s ability to communicate fully with the lawyer.

17 *Id.*, cmt. k.

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19 As discussed, it is not unusual for an employee to file an administrative charge
20 with the Equal Employment Opportunity Commission (“EEOC”), Department of
21 Labor (“DOL”), or similar state or federal agency against his or her current
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23
24 ¹ The following states have adopted this exception (names shortened for brevity): AK, KS,
25 NE, DE, ND, ID, WY, TN, NH, SD, AR, RI, SC, MA, ME, OK, KY, WI, VT, NM, WA,
IN, PA, WV, MO, CO, FL, MN, IL, UT, IA, OH.

1 employer. Employees are often represented by counsel through that process, and
2 employers almost always seek counsel to assist in responding to such allegations.
3 Meanwhile, the working relationship between the employer and the employee
4 continues. Although it may be strained, it is typically in both parties' interests for
5 that relationship to continue as professionally and respectfully as possible.
6 Employees may seek advice on how to communicate appropriately with the
7 employer, to avoid further adverse action; employers, likewise, may seek advice on
8 how to communicate with the employee, to avoid additional claims. In either
9 scenario, the client benefits greatly from the ability to communicate with the attorney
10 and to receive their attorney's advice regarding the employer-employee
11 communications.²

15 CONCLUSION

16 Employment lawyers receive frequent, near daily, requests from clients to
17 advise on communications between parties in active employment-related disputes.
18 The ABA, the Restatement, and a majority of other jurisdictions recognize that this
19 is a reality of the practice of law and allow for a lawyer to advise a client regarding
20 communications with a represented party. The proposed amendment would bring
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24 ² We can think of several other situations where clients would benefit from the proposed
25 amendment, including in business disputes, educational disputes, and marriage
dissolutions.

1 Arizona in line with the trend and weight of other authorities, while also
2 addressing the significant concern stated herein that the current RPC does not
3 expressly permit Arizona lawyers to do what is in fact a common and accepted
4 practice. The State Bar of Arizona respectfully requests that the Court amend ER
5 4.2 Comment [1], as set forth in Exhibit A.
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8 RESPECTFULLY SUBMITTED this 10th day of January, 2025.

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11 Lisa M. Panahi
12 General Counsel
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14 Electronic copy filed with the
15 Clerk of the Supreme Court of Arizona
16 this 10th day of January, 2025.

17 by: PSequin
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Exhibit A

(Please note: deletions are reflected by ~~striketthrough~~ and additions are reflected by underline.)

ER 4.2. Communication with Person Represented by Counsel

(a) In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

(b) A lawyer may communicate with a representative of a government entity on behalf of a client without obtaining the consent of the lawyer representing the government in the matter if the lawyer has a good faith and objectively reasonable belief that the communication is a legitimate exercise of the client's constitutional right to petition the government for the redress of grievances, including the settlement of a dispute or claim involving the client and the government entity. If such communication occurs other than in the course of an official public proceeding, the lawyer must notify the lawyer representing the government in the matter as follows:

(1) If the lawyer is seeking to initiate an oral exchange, in-person or by electronic means, the lawyer must notify the lawyer representing the government in the matter in writing regarding the intended communication and the matters to be discussed. This notice must be provided far enough in advance of the intended communication that the government's lawyer has a reasonable opportunity to contact the government representative to discuss the matter before the communication takes place.

(2) If the intended communication is a written communication, the lawyer must provide a copy of it to the lawyer representing the government in the matter at the same time it is provided to the government representative.

Comment [2003 amendment]

[1] This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other, and

lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, and a lawyer having independent justification for communicating with the other party is permitted to do so.

[2] In the case of an organization, including a government organization (subject to paragraph (b)), this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare ER 3.4(f).

[3] This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

Comment [2013 amendment]

[4] A person to whom limited-scope representation is being provided or has been provided in accordance with ER 1.2(c) is considered to be unrepresented for the purposes of this rule unless the opposing party or lawyer knows of the limited-scope representation and the identity of the lawyer providing limited representation. With the consent of the client, a lawyer providing limited-scope representation should consider informing the opposing party or lawyer of the limited-scope representation with instructions as to when opposing counsel may communicate directly with the client. Such instructions may include, for example, whom the opposing counsel should contact on specific matters, to whom and where opposing counsel should send pleadings, correspondence and other notices, and whether the lawyer performing limited-scope services is authorized to accept service on the client's behalf.

Comment [2025 amendment]

[5] Communications authorized by the law include, for example, the right of a party to a controversy with a government agency to speak with government officials, through the party's lawyer, about the matter. Paragraph (b) recognizes that special considerations come into play when a lawyer is seeking on behalf of a client to redress grievances involving the government, a right guaranteed by the First Amendment to the United States Constitution. Paragraph (b) permits communications with those in government having the ultimate authority to make policy decisions regarding the matter (but not with any other government personnel) without the prior consent of the lawyer representing the government in such cases. However, a lawyer planning to initiate such a communication without the prior

consent of the lawyer representing the government must notify that lawyer regarding the intended communication. This is intended to preserve a person's right to seek the redress of grievances while also allowing the government's lawyers to fulfil their duty to protect the interests of their government client.

[6] A government lawyer who is notified that another lawyer intends to meet with an official or employee of the government client may choose to discuss the underlying matter with the government official or employee in advance of the meeting, ask to be included in the meeting, or actively discourage the government actor from consenting to the meeting. Under ER 4.4(a), however, if there is a colorable claim that the communication is a legitimate exercise of the other lawyer's client's first amendment right to petition the government for redress, then the government lawyer should not, without a strong justification, seek to prevent the meeting altogether.

[7] Paragraph (b) does not permit a lawyer to bypass counsel representing the government on every issue that may arise in the course of disputes with the government. It is intended to provide lawyers access to high-level decision makers in government with respect to genuine policy issues, such as to present the view that the government's basic policy position with respect to a dispute is faulty, or that government personnel are conducting themselves improperly with respect to aspects of the dispute. It is not intended to provide direct access on routine disputes such as ordinary discovery disputes, extensions of time or other scheduling matters, or similar routine aspects of the resolution of disputes. In addition, a communication that is initiated for the purpose of obtaining, or is conducted in a manner likely to obtain, evidence, admissions, or information about litigation strategy or privileged communications, is clearly not for the purpose of seeking redress under the First Amendment. A lawyer may file a public records request on behalf of a client if the lawyer complies with ER 4.2(b)(2).