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IN THE ARIZONA SUPREME COURT

In the Matter of:

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

Supreme Court No. R-25-0033
**Comment to Rule-Change Petition
R-25-0033**

I. Introduction

Amending the comment to Ethical Rule (ER) 4.2 as rule-change petition R-25-0033 proposes would formally and significantly dilute the foundational tenet of that rule: a lawyer may not communicate with another represented party in the matter except through that party's counsel. The proposed change would allow lawyers, via their own clients, to substantively communicate with an opposing represented party.

If this Court is inclined to formally give lawyers permission to do so, simply adding the obtuse American Bar Association (ABA) Model Rule language to the comment to ER 4.2 is not the solution. That proposed language has been interpreted to not only allow lawyers to "give substantial assistance to a client regarding a

substantive communication with a represented adversary,” but to prepare legally operative documents, such as settlement agreements, for their client to take to the opposing represented party, all without the opposing counsel’s knowledge, let alone consent.

Formally opening the door to giving lawyers the ability to help a client with talking points is one thing. Essentially throwing out the protections of ER 4.2 by allowing lawyers to prepare legally operative documents for their clients to give to the opposing represented party without telling opposing counsel is quite another.

Rule-change petition R-25-0033 provides an opportunity to the Court to clarify this issue. Arizona did not adopt the proposed language in 2003 when it adopted changes resulting from the ABA’s Ethics 2000 Commission. In addition, a nearly 20-year-old discipline case found violations of ER 4.2 and ER 8.4(a) – notwithstanding the existence of ER 8.4 comment [1], as explained below – when a lawyer wrote a letter to his client to “explain what has been going on in your case” and noted that “nothing prevents you from sharing this letter with [the opposing represented party].”

Partly in light of this history and partly because an exception should be explicit, simply adding language to the ER 4.2 comment is not the way to create a formal exception to ER 4.2’s broad prohibition on communicating with a represented party. Similar to the Court’s recent ER 4.2(b) amendment, ER 4.2 only should be

amended with an explicit exemption allowing certain conduct and restricting other conduct, along the lines as I suggest below.

II. Argument

The rule-change petition proposes to add to ER 4.2's comment [1] language adopted word-for-word from the ABA Model Rule comment [4]:

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 [a] 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.

[Proposed addition underlined.]

As recommended by the ABA's Ethics 2000 Commission, the ABA House of Delegates had adopted the operative language in 2002 as Model Rule 4.2 comment [4]:

This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, 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. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a).

Parties to a matter may communicate directly with each other, *and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.* Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[Emphasis added.]

At the same time, the ABA also adopted a new comment [1] to Model Rule 8.4: “Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. *Paragraph (a), however, does not prohibit a lawyer from advising a client of action the client is lawfully entitled to take.*” [Emphasis added.]

At the State Bar of Arizona’s recommendation in its rule-change petition R-02-0045, this Court did not adopt the Model Rule 4.2 comment [1] language “advising a client concerning a communication that the client is legally entitled to make.” It did, however, adopt the Model Rule 8.4 comment [1] “advising a client of action the client is lawfully entitled to take.”¹

The State Bar’s 2002 rule-change petition did not explain why it recommended adopting the Model Rule 8.4 comment [1] language about “action” but not the Model Rule 4.2 comment [4] language about “communication,” nor how

¹ Court order in State Bar of Arizona rule-change petition R-02-0045 (June 10, 2003) adopting changes prompted by the ABA’s Ethics 2000 Commission, effective December 1, 2003.

the resulting ER 8.4 comment would interact, if at all, with ER 4.2.

Based on the Model Rules 4.2 and 8.4 comments, ABA Formal Op. 11-461 (Aug. 4, 2011) concluded that a lawyer

may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who – the lawyer or the client – conceives of the idea of having the communication.

While that is rather anodyne, far more worrisome is that the ABA opinion also interpreted the bland language in Model Rules 4.2 and 8.4 comments to allow a lawyer to draft “the basic terms of a proposed settlement agreement” and even to draft “a formal agreement ready for execution” for their client to ferry to the opposing represented party – all without that opposing represented party’s lawyer being involved or even knowing about the conduct.

That is far beyond allowing employment lawyers to advise their employee and employer clients who may be involved in administrative actions about how to communicate with the other on a day-to-day basis to avoid further legal issues.

If the Court is inclined to open the door proposed by rule-change petition R-25-0033, I suggest adopting an explicit exception to ER 4.2(a), rather than merely adding the proposed ABA Model Rule 4.2 comment language that has been so expansively interpreted. A significant exception to ER 4.2 should not be based on one obtuse sentence in the comment.

An explicit exception could be similar to the new ER 4.2(b) the Court adopted to implement the “authorized by law” exception in what is now designated ER 4.2(a). The new ER 4.2(b) describes permitted conduct while also installing guardrails to ensure that opposing counsel is not cut out of the communication.

An explicit exception also is important because formally allowing lawyers to communicate with the opposing represented party via their own clients will constitute a major change of applying ER 4.2. At least one public discipline case – *In re Whiting*, SB-07-0189-D (2008) – firmly applied the concept in Arizona that a lawyer may not communicate with an opposing represented party through their client.²

Most importantly, a new explicit exception to ER 4.2(a) could be aimed at providing the leeway the Employment and Labor Law Section says its lawyers need but not open the door so wide as to allow a lawyer to prepare legally operative documents for their client to present to the opposing represented client.

As a result, instead of simply adding the ABA Model Rule comment language to ER 4.2 comment [1], I propose that the Court use the language as part of a new

² In that case, the lawyer represented the wife in a divorce proceeding in which the husband also was represented by counsel. The lawyer wrote to his client [the wife] a letter, at her request, “to explain what has been going on in your case.” The lawyer noted in that letter that while he could not contact the husband directly, “nothing prevents you from sharing this letter with him.” The letter made many references to what the husband may have understood and gave the lawyer’s view of the parties’ negotiations and the reason behind the judge’s rulings. The lawyer was found to have violated ER 4.2 and ER 8.4(a) by using his client as an intermediary to communicate with the opposing party while the opposing party was represented by counsel.

ER 4.2(c) and explanatory comment that makes the language's limits clear:

ER 4.2. Communication with Person Represented by Counsel

(a) – (b) [No change]

(c) A lawyer may advise a client concerning the substance of a communication that the client is legally entitled to make to another represented person. However, a lawyer may not draft a legally operative document for the client to provide to the other represented person if the lawyer is representing the client in a formal proceeding in which the other represented person also involved and the documents relate to the matters at issue in the formal proceeding.

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, p~~[P]arties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. While a lawyer may not make a communication prohibited by this Rule through the acts of another (see Rule 8.4(a)), paragraph (c) expressly allows a lawyer to advise a client concerning a communication that the client is legally entitled to make to another represented person. Paragraph (c) does not permit a lawyer to bypass counsel for another person in a formal proceeding by providing the client with legally operative documents that the client then intends to provide to the other represented person.

[2] – [7] [No change]

III. Conclusion

If we take the Employment and Labor Law Section lawyers' request at face value, they require the leeway supposedly provided by the ABA Model Rule

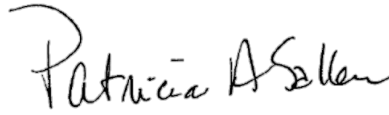
comment language to be able to advise their employee and employer clients who may need to interact with each other daily.

But it is an entirely different thing for a lawyer to be able, as the ABA opinion allowed, to draft a settlement agreement or other legally operative document for the client to take to the opposing *represented* client for that opposing *represented* client to possibly execute. That conduct borders on – if not actually constitutes – overreaching.

The broad ramifications of the specific proposed change cannot be overlooked. In addition to eroding the long-standing protections of ER 4.2, the proposed change would apply to *all* lawyers, not just employment lawyers who need to advise clients about navigating a continued relationship. Adopting the change as the State Bar recommends would allow, for example, family law lawyers, via their own clients, to substantively communicate with the opposing represented party, such as by drafting ready-to-sign settlement agreements, thus potentially taking advantage of emotionally fraught disputes in which the opposing party has intentionally hired counsel.

If the Court nonetheless agrees with the Employment and Labor Law Section's argument for needing this leeway, I propose that the Court adopt an explicit exception to ER 4.2 as well as restrictions, along the lines as I propose above.

Respectfully submitted April 29, 2025.

A handwritten signature in cursive script, reading "Patricia A. Sallen".

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Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this 29th day of April, 2025.

by: 