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ARIZONA SUPREME COURT

In the Matter of:

Petition to Amend ERs 1.16 and 3.3 of
the Arizona Rules of Professional
Conduct

Supreme Court No. R-25-0029

Joint Comment by the Directors of the
Maricopa County Indigent Defense Agencies

The Maricopa County indigent representation offices (IR) collectively handle most cases filed in Maricopa County in which there has been a finding of indigency. The Office of Public Defense Services (OPDS) provides administrative and financial oversight to the staffed offices and the Office of Contract Counsel (OCC). The staffed offices are comprised of the Office of the Public Defender (OPD), the Office of the Legal Advocate (OLA), the Office of the Legal Defender (OLD), and the Office of the Public Advocate (OPA). We jointly oppose the amendments proposed in the petition.

The legal profession understandably feels a sense of urgency in responding to the rapidly evolving capabilities of artificial intelligence (AI). However, the proposed amendments to Ethical Rules (ER) 3.3 (Candor Toward the Tribunal) and 1.16 (Declining or Terminating Representation) are an impractical and ineffective overcorrection to speculative fears about digitally forged evidence. These changes risk undermining foundational principles of the legal system—particularly the adversarial process—without offering meaningful protection against the threats AI poses.

The entirety of the petition is premised on the assumption that lawyers will flush out false AI-created evidence if ethical obligations require lawyers to engage in more extensive inquiry and investigation at the outset of representation and when they have reason to believe evidence is faked. This premise is flawed. Forgeries, lies, and deception are not new to lawyers or the courts. The current ethical,

procedural and evidentiary rules have allowed, and will continue to allow, lawyers and courts to successfully navigate most AI-generated evidence just as lawyers and the courts have successfully navigated forgeries created by quills, typewriters, Xeroxes and Photoshop. The proposed rule changes are not necessary for that purpose.

What the proposed rule changes seek to do; they cannot accomplish. This is because the real threat of AI does not come from evidence a lawyer has reason to believe is false but, rather, arises from digitally forged evidence so well executed that lawyers and judges would have no reason to question it.

I. Proposed Amendment to ER 1.16 would delay the commencement of representation and unnecessarily disrupt attorney-client relationships.

The proposed revisions to ER 1.16(a) mirror the 2023 amendments to the ABA Model Rules of Professional Conduct, which were driven by pressure from legislation like the ENABLERS Act—a federal proposal aimed at combating money laundering and terrorism financing. The ABA amendments were adopted after contentious debate, not as a response to AI risks, but as a strategic move to forestall federal regulation that would have defined law firms as "financial institutions" for purposes of certain reporting requirements. *See* ABA, [HOD strengthens rule on duty of lawyers to review clients, other new policies](#) , (Aug. 8, 2023). Adopting this language in Arizona, under the guise of responding to AI-generated fake evidence, is disingenuous. The rule change petition does not demonstrate how these

amendments would reduce the risk of AI-generated deepfakes or other false evidence being used in legal proceedings.

Particularly problematic in the amendments is the proposed requirement for lawyers to conduct an ambiguous inquiry and assessment prior to accepting representation. For public defenders, commencement of representation begins immediately upon appointment and assignment of an attorney to the case. The proposed language, however, imposes an affirmative duty to investigate and “assess” the facts of a case prior to accepting the representation. While we doubt the proposed amendment is intended to delay the services provided to clients by appointed counsel in criminal cases, the plain language of the rule would dictate otherwise.

The proposed subsection (a)(4) compounds this problem. By expanding mandatory withdrawal obligations to cases where a client merely seeks to use a lawyer’s services to commit fraud or a crime—rather than persists in doing so—the amendment would increase the number of attorney withdrawals in criminal cases. Under current practice, appointed lawyers refuse to pursue unlawful courses of action without moving to withdraw, even when a client requests their lawyer engage in the misconduct. The proposed rule change, however, may require withdrawal when no actual misuse of legal services has occurred or will occur. The result would be delays, disrupted representation, and potential prejudice to clients’ constitutional rights.

II. Proposed Amendment to ER 3.3, Comment 8, alters the adversarial structure of our legal system and would chill the presentation of valid evidence.

The current Rules of Professional Conduct and a Lawyer's Oath already prohibit lawyers from (a) presenting evidence they know to be false, including a prohibition on willful blindness to the falsity of evidence (the lawyer "cannot ignore an obvious falsehood") and (b) counseling or maintaining an action, proceeding, or defense that lacks a reasonable basis in fact or law. AZ ST S CT Rule 41, AZ ST S CT RULE 42 RPC ER 3.3.

At first glance, it may appear sensible to impose an additional duty of candor that includes a duty for lawyers to investigate the veracity of evidence they suspect is false. However, the proposed changes to Comment 8 of ER 3.3 would shift the burden of determining the truth or falsity of evidence they seek to present from the tribunal to lawyers, fundamentally altering the adversarial structure of our legal system.

In an adversarial system, particularly in litigation subject to the broad disclosure obligations provided for in Arizona's Rules of Criminal Procedure, lawyers, in accordance with their duty of *competence*, not their duty of *candor*, are compelled to investigate what appears to be falsified evidence. This is necessary so that the lawyers can either demonstrate to the court that their opponent's evidence is fake, or so that the lawyers do not rely upon, in advocating for their client, evidence that is impeachable or will ultimately harm their client's position. The

proposed comment reverses this long-established adversarial approach to truth seeking such that a lawyer now becomes an investigator adverse to their client rather than an investigator in advocacy of their client.

Additionally, by introducing an affirmative duty of “reasonable inquiry,” the proposed amendment would create a chilling effect on lawyers’ presentation of valid evidence. Under the current rules, lawyers are permitted to make the difficult call of presenting evidence they reasonably believe, but do not know, is false without fear of discipline and based on a multitude of case and client specific factors. If the proposed rule change is adopted, lawyers may consistently err on the side of not presenting unverified evidence, even evidence that would ultimately prove to be valid, because they fear discipline for conducting insufficient investigation if any evidence they present is later determined to be faked. This chilling effect would be most pronounced in under-resourced practice areas in which lawyers do not have sufficient time or money to employ digital forensic tools.

While not perfect, the adversarial system already provides tools for the tribunal to determine the reliability of evidence. Evidentiary rules and pretrial hearings regarding foundation and authenticity can be employed when a party questions the validity of their opponent’s evidence such that judges, not the lawyers, serve as gatekeeper. And ultimately it is the trier of fact, not the lawyers, who should determine the credibility of testimony and other evidence.

III. Conclusion

The true danger of AI-generated evidence in litigation does not arise from evidence that appears suspicious, but rather from high-quality forgeries that no lawyer, acting reasonably, would even recognize as fake. The proposed rules do nothing to address that challenge. Instead, the proposed rule changes are focused on situations in which lawyers already have tools to identify the suspicious evidence, and obligations to further investigate it, through their currently existing duties of competence, candor, and disclosure requirements.

Instead of imposing new and ambiguous burdens on attorneys, a better approach would be to empower courts and parties to make use of existing procedural tools and evidentiary rules to ensure legal proceedings are fair. The adversarial system, coupled with judicial gatekeeping as set forth in Arizona's Rules of Court, remain the most effective defense against AI-created evidence.

While the threat of AI is real, the proposed amendments are not the appropriate solution. They would disrupt long-standing norms of advocacy, introduce ambiguity for court-appointed counsel, and impose unreasonable investigative duties on lawyers—without addressing the actual risk that AI-generated evidence poses. Arizona should resist adopting these overreaching changes and instead pursue strategies that reinforce the strength of the current adversarial system while enhancing the tools available to detect and challenge deceptive digital evidence.

Respectfully submitted this day of April 30, 2025.

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