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On behalf of the Arizona Steering Committee on
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**IN THE SUPREME COURT OF THE STATE OF ARIZONA**

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|---|---|---|
| In the matter of: | ) | |
| | ) | |
| PETITION TO AMEND RULE 42 (ER's 1.16 AND 3.3), RULES OF THE SUPREME COURT | ) | Supreme Court No. 25-0029 |
| | ) | REPLY |
| ______________________________ | ) | |

Robert M. Brutinel, Petitioner in this matter on behalf of the Arizona Steering Committee on Artificial Intelligence and the Courts, hereby replies pursuant to Rule 28(e)(5), Rules of the Supreme Court of Arizona and this Court's Order dated January 21, 2025.

**I. Background**

The Arizona Steering Committee on Artificial Intelligence and the Courts ("Committee") was established on January 24, 2024 by Administrative Order 2024-33 and among other tasks, was charged with making recommendations, including rule changes, related to AI technologies and their impact on judicial proceedings.

In carrying out this charge, the Committee reviewed and recommended amendments to Rules 1.16 and 3.3, Comment 8, of the Arizona Rules of Professional

Conduct. Accordingly, Petitioner filed Petition R-25-0029 on January 10, 2025. This Court opened the Petition for public comment until May 1, 2025, with any Reply due by June 2, 2025. Petitioner files this Reply to address the comments received during the comment period.

## II. Discussion of Comments

This petition received three comments, summarized as follows:

1. Arizona Commission on Access to Justice – **Supporting** petition
2. The State Bar of Arizona – **Supporting** petition and incorporating its comment on R-25-0030 that discusses how to address "deep fakes" in litigation
3. Maricopa Indigent Defense Offices – **Opposing** petition

### A. Ethical Rule (ER) 1.16

The proposed amendment to ER 1.16 tracks the recent amendments to Rule 1.16 of the ABA Model Rules of Professional Conduct, on which ER 1.16 is based. Indeed, the ABA and Arizona rule have used essentially identical language since 1985, when Arizona adopted the Model Rules. The joint comment submitted by the Maricopa Indigent Defense Offices asserts that the proposed amendment to ER 1.16 would have the effect of delaying the commencement of representation and unnecessarily disrupting attorney-client relationships by imposing an affirmative duty to investigate and assess the facts of a case prior to accepting the representation.

The proposed amendments to ER 1.16 are not intended to cause any such delay or disruption, nor does ER 1.16 limit the power of the court to appoint lawyers. To the extent the proposed language could benefit from this clarification, Petitioner has added a sentence to the proposed comment to clarify that the requirements of ER 1.16 are not intended to impact public defender appointments to the extent that a delay in accepting the representation or disruption in the attorney-client relationship would result. The additional proposed verbiage, highlighted in red, is reflected in the entirety of the proposed rule amendments as set forth in the Appendix attached hereto.

As to Commentor's assertion that expanding mandatory withdrawal obligations would increase the number of attorney withdrawals in criminal cases, Petitioner respectfully disagrees, and any withdrawal request, including withdrawals under proposed ER 1.16(a)(4), must be submitted to the court for decision before withdrawal is permitted.

**B. ER 3.3. Comment 8**

The joint comment submitted by the Maricopa Indigent Defense Offices suggests that the proposed amendment to ER 3.3 will "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," and that such an amendment would result in lawyers not presenting unverified evidence for fear of discipline for insufficient investigation if the evidence is later determined to be fake.

Petitioner respectfully disagrees and maintains that a lawyer who *reasonably believes* evidence has been materially altered or generated *with the intent to deceive* should have an affirmative duty to reasonably inquire into the authenticity of the evidence before submitting it to the court, so that the court is not intentionally misled or deceived. Moreover, the language of the proposed comment to ER 3.3 explicitly notes that lawyers retain discretion to submit this evidence to the court after conducting a reasonable inquiry.[1] Therefore, unless a lawyer reasonably believes the evidence has been altered or generated with intent to deceive and fails to conduct an inquiry before submission, the lawyer will have no reason to fear discipline. As the defense comment appears to acknowledge, a competent lawyer would not fail to inquire into such evidence before submission.

The State Bar's Comment incorporates its comment on Petition R-25-0030 that discusses how to address "deep fakes" in litigation, asserting that the standard or submission of evidence should not be so onerous as to require parties or counsel

[1] As noted in the proposed comment: "If after inquiry the lawyer still does not know that the evidence has been materially altered or generated with intent to deceive, the lawyer retains discretion to submit the evidence to the court." *See also* ER cmt. 9 ("Because of the special protections historically provided criminal defendants, . . . this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false.").

to scrutinize each document, photograph, or other item for authenticity, but the standard should also not be so lax as to permit overlooking reasonable indicia of fabrication. Petitioner agrees and believes that the proposed amendment to ER 3.3, Comment 8, strikes this balance.

Accordingly, Petitioner respectfully requests that this Court adopt the amendments to ER 3.3, Comment 8, as proposed in the Petition and as set forth in the Appendix attached hereto.

**III. Request**

Petitioner appreciates the comments stakeholders submitted during the comment period and deems it important to file this Reply to address the concerns reflected in the comments. Based on the foregoing responses, Petitioner respectfully requests that the Court adopt at its August 2025 Rules Agenda the proposed rule amendments as set forth in the Appendix attached hereto.

Respectfully submitted this 27th day of May, 2025.

/s/ Robert M. Brutinel
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**APPENDIX**
(new language is underlined)

**Rules of the Supreme Court of Arizona**

**Rule 42. Arizona Rules of Professional Conduct**

**ER 1.16. Declining or Terminating Representation**

**(a)** A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation. Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) [No change]

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; ~~or~~

(3) the lawyer is discharged; or

(4) the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud, despite the lawyer's discussion pursuant to Rules 1.2(e) and 1.4(a)(5) regarding the limitations on the lawyer assisting with the proposed conduct.

**(b) through (e) [No change]**

**2003 Comment [amended ~~2025~~ effective Jan. 1, 2026]**

[1] Paragraph (a) imposes an obligation on a lawyer to inquire into and assess the facts and circumstances of the representation before accepting it. Nothing in this requirement is intended to impact public defender appointments to the extent that it would unnecessarily disrupt the attorney-client relationship or unreasonably cause delay in an otherwise timely acceptance of the representation. The obligation imposed by Paragraph (a) continues throughout the representation. A change in the facts and circumstances relating to the representation may trigger a lawyer's need to make further inquiry and assessment. For example, a client traditionally uses a lawyer to acquire local real estate through the use of domestic limited liability companies, with financing from a local bank. The same client then asks the lawyer to create a multi-tier corporate structure, formed in another state to acquire property in a third jurisdiction, and requests to route the transaction's funding through the lawyer's trust account. Another example is when, during the course of a

representation, a new party is named or a new entity becomes involved. A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See ERs 1.2(~~c~~d) and 6.5. See also ER 1.3, Comment [4].

**Mandatory Withdrawal**

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation. Under paragraph (a)(4), the lawyer's inquiry into and assessment of the facts and circumstances will be informed by the risk that the client or prospective client seeks to use or persists in using the lawyer's services to commit or further a crime or fraud. This analysis means that the required level of a lawyer's inquiry and assessment will vary for each client or prospective client, depending on the nature of the risk posed by each situation. Factors to be considered in determining the level of risk may include: (i) the identity of the client, such as whether the client is a natural person or an entity and, if an entity, the beneficial owners of that entity, (ii) the lawyer's experience and familiarity with the client, (iii) the nature of the requested legal services, (iv) the relevant jurisdictions involved in the representation (for example, whether a jurisdiction is considered at high risk for money laundering or terrorist financing), and (v) the identities of those depositing into or receiving funds from the lawyer's client trust account, or any other accounts in which client funds are held. For further guidance assessing risk, see, e.g., as amended or updated, Financial Action Task Force Guidance for a Risk-Based Approach for Legal Professionals, the ABA Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing, A Lawyer's Guide to Detecting and Preventing Money Laundering (a collaborative publication of the International Bar Association, the American Bar Association and the Council of Bars and Law Societies of Europe), the Organization for Economic Cooperation and Development (OECD) Due Diligence Guidance for Responsible Business Conduct, and the U.S. Department of Treasury Specially Designated Nationals and Blocked Persons List.

[3] and [4] [No change]

**Discharge**

[5] through [7] [No change]

**Optional Withdrawal**

[8] and [9] [No change]

**Assisting the Client Upon Withdrawal**

[10] through [12] [No change]

**ER 3.3. Candor Toward the Tribunal**

**(a) through (d) [No change]**

**Comment [2003 amendment] <u>[amended 2026]</u>**

[1] through [7] [No change]

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See ER 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood. <u>If a lawyer reasonably believes that evidence has been materially altered or generated with the intent to deceive the court, the lawyer has an obligation to conduct a reasonable inquiry before submitting the evidence to the court. The scope of the inquiry will vary according to the circumstances of each case, but factors to consider may include the probative value of the evidence, the value or importance of the case or issue, the source of the evidence, and what, if any, accessible, reliable, and affordable tools or methods are available to assess the evidence’s authenticity or integrity. If after inquiry the lawyer still does not know that the evidence has been materially altered or generated with intent to deceive, the lawyer retains discretion to submit the evidence to the court.</u>

[9] through [15] [No change]