

1 ELIZABETH ORTIZ (012838)  
2 ARIZONA PROSECUTING ATTORNEYS'  
3 ADVISORY COUNCIL  
4 1951 W. CAMELBACK RD. SUITE 202  
5 PHOENIX, ARIZONA 85015  
6 TELEPHONE: (602) 542-7222

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

10 In the Matter of:

11 Supreme Court No. R-15-0018

12 **PETITION TO AMEND**  
13 **RULES 31, 34, 38, 29 AND**  
14 **42, RULES OF THE**  
15 **SUPREME COURT**

16 **COMMENT OF THE ARIZONA**  
17 **PROSECUTING ATTORNEYS'**  
18 **ADVISORY COUNCIL IN OPPOSITION**  
19 **TO COMMENTS TO ER 4.2**

20  
21 **I. BACKGROUND OF PETITION**

22 The Hon. Ann A. Scott Timmer, Chair of the Committee on the Review of  
23 Supreme Court Rules Governing Professional Conduct and the Practice of Law, and  
24 Arizona Supreme Court Justice, has filed a rule change petition for adoption of  
25 amendments to Rules 31, 34, 38, 39, and 42, Rules of the Supreme Court. Pursuant to  
26 the Arizona Rules of the Supreme Court, Rule 28(C), the Arizona Prosecution  
27 Attorneys' Advisory Council ("APAAC") hereby submits its comments in opposition to  
28 R-15-0018 with regards to the Petition's requested modifications to the comments to ER  
4.2. Although the Petition briefly states that the goal of these changes is to add clarity  
to the duties of government lawyers under ER 4.2, the proposed change actually adds

1 confusion to prosecutorial obligations that are already clearly understood and  
2 established in the text of the Rule itself.

## 3 4 II. DISCUSSION/ANALYSIS

5 The Petition seeks to graft a new comment from the ABA Model Rules onto  
6 Arizona's ER 4.2. The first problem with doing so is that the ABA Model Rule 4.2 and  
7 the Arizona ER are not the same. The ABA Model Rule 4.2 refers to a represented  
8 "person" while Arizona's ER refers to a represented "party." MODEL RULES OF  
9 PROFESSIONAL CONDUCT, Rule 4.2; Rule 42, R. SUP. CRT. ARIZ., ER 4.2. This is not a  
10 minor or semantic difference. This distinction makes Arizona's Rule much narrower  
11 than the ABA Rule. That fact alone should caution against cutting comments from the  
12 ABA Rule and pasting them into Arizona's Rule.  
13  
14  
15

16 Even more concerning, however, is the fact that the Petition's requested comment  
17 adds a modification to the ABA's comment that puts the comment squarely at odds with  
18 the text of the Rule itself. The Arizona Rule very clearly states, "In representing a  
19 client, a lawyer shall not communicate *about the subject of the representation* with a  
20 party the lawyer know to be represented by another lawyer in the matter . . . ." Rule 42,  
21 R. SUP. CRT. Ariz., ER 4.2. (emphasis added). The plain scope of the Rule is reinforced  
22 by the first comment which instructs that "[t]his Rule does not prohibit communication  
23 with a party . . . concerning matters outside the representation." *Id.* cmt. 1. Thus, for  
24 prosecutors, the Rule's prohibition is clear: Prosecutors cannot talk to criminal  
25  
26  
27  
28

1 defendants about pending criminal matters for which the defendant has counsel. This is  
2 not a Rule in need of clarification.

3  
4 Nevertheless, with very little explanation, the Petition seeks to add a comment to  
5 provide additional guidance to government lawyers. The first two sentences of the  
6 proposed comment are fairly harmless statements regarding authorized communications  
7 that would seem to be clear from the Rule itself. Thus, while not particularly  
8 troublesome, these first two sentences are unnecessary and add nothing to the  
9 understanding of the Rule.  
10

11  
12 The third sentence, however, is far more problematic. That sentence states,  
13 “When communicating with the accused in a criminal *prosecution about a matter other*  
14 *than the criminal prosecution*, a government lawyer must comply with this Rule in  
15 addition to honoring the constitutional rights of the accused.” [Petition at 75] (emphasis  
16 added). Much like the first two sentences of the proposed comment, the last phrase of  
17 this sentence is completely unnecessary. No lawyer – much less a prosecutor – would  
18 think that compliance with ER 4.2 would trump the constitutional rights afforded to the  
19 accused or anyone else for that matter. With no explanation or discussion in the  
20 Petition’s text, it is difficult to know what confusion Petitioner was trying to resolve  
21 with this particular command.  
22

23  
24 It is the beginning of that third sentence, however, that appears to simply misstate  
25 the Rule. The italicized language above is NOT included in the ABA Model Rule.  
26  
27  
28

1 Again, there is no explanation in the Petition for adding this clause to the ABA  
2 comment or any attempt to discuss why this language is necessary in Arizona. On its  
3 face, however, the language of the comment forbids a lawyer from talking to an accused  
4 about any matter whatsoever without complying with the Rule. In so doing, the  
5 comment runs directly afoul of the Rule itself which is plainly limited to  
6 communications about the subject matter of the representation. As written, the  
7 proposed comment does not simply explain the Rule; it re-writes the Rule by adding  
8 new obligations which is not the role of a comment. *See*, Rule 42, ARIZ. R. SUP. CRT.,  
9 Preamble to the Arizona Rules of Professional Conduct, #14 (“Comments do not add  
10 obligations to the Rules but provide guidance for practicing in compliance with the  
11 Rules.”).

12 For a prosecutor or other lawyer advising law enforcement, the proposed  
13 comment creates an impossible dilemma – the Rule plainly permits the lawyer to do  
14 something the comment prohibits. For example, the Rule’s text does not prohibit a  
15 prosecutor from talking to a represented defendant if they are only talking about an  
16 unrelated case. These types of communications occur frequently where an accused in  
17 one case is also the victim in a separate, unrelated case. The proposed comment would  
18 require the prosecutor to get permission from the accused’s criminal defense attorney  
19 just to communicate with that person about the case where they were victimized because  
20 the prosecutor would clearly be “communicating with the accused . . . about a matter  
21  
22  
23  
24  
25  
26  
27  
28

1 other than the criminal prosecution . . .”

2 Another common scenario involves prosecutors or law enforcement officers  
3 wanting to talk to the accused about different, uncharged crimes. ER 4.2 does not  
4 prohibit a prosecutor from talking to (or advising law enforcement officers to talk to<sup>1</sup>) a  
5 represented defendant about crimes that are unrelated to the current prosecution. It is  
6 well settled that the Constitution allows law enforcement officers to talk to indicted  
7 suspects about *other* offenses as long as the suspect’s Fifth Amendment rights are  
8 protected though adherence with *Miranda*. See *Texas v. Cobb*, 532 US 162, 173 (2001).  
9 Thus, under ER 4.2, a government lawyer can advise law enforcement officers that they  
10 can talk to a represented defendant without counsel’s consent as long as they do not  
11 discuss the subject matter of the representation and they adhere to *Miranda*. The  
12 proposed comment, on the other hand, specifically states that when a lawyer is  
13 communicating with the accused about matters completely unrelated to the prosecution  
14 that they must comply with Rule 4.2. It is possible that the comment is a mere tautology  
15 – the lawyer must comply with the Rule but because the lawyer is not talking about the  
16 subject matter of the representation he or she *is* complying with the Rule – but if that is  
17 the case, the comment is wholly unnecessary. Either way, the comment completely fails  
18 to accomplish the stated goal of adding clarity and helping government lawyers  
19 understand their duties. In reality, the proposed comment does the exact opposite – it

---

26  
27 <sup>1</sup> ER 8.4 clearly prohibits any lawyer from knowingly assisting or inducing another to violate the  
28 Rules of Professional Conduct. Thus, when a lawyer advises a law enforcement officer to engage in  
any specific conduct, that conduct must not violate the lawyer’s duties under the ethical rules.

1 creates confusion where there currently is none.

2 **III. CONCLUSION**


3  
4 For all of these reasons, APAAC asks this Court to deny the Petition's request to  
5 modify ER 4.2. The requested changes are not adequately explained or justified in the  
6 text of the Petition, they are unnecessary, and they confuse the scope and application of  
7 the Rule.  
8

9 RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of April, 2015.

10 ELIZABETH ORTIZ  
11 Executive Director, Arizona Prosecuting  
12 Attorneys' Advisory Council

13  
14 By:   
15 ELIZABETH ORTIZ

16 Electronic copy filed with the  
17 Clerk of the Arizona Supreme Court  
18 this 27th day of April, 2015.

19  
20 By:   
21  
22  
23  
24  
25  
26  
27  
28