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9 **(STATE BAR NUMBER 011474)**

10 **IN THE SUPREME COURT OF THE STATE OF ARIZONA**

11 **IN THE MATTER OF:**

12 **PETITION TO AMEND RULES 31,**
13 **34, 38, 39, AND 42, RULES OF THE**
14 **SUPREME COURT**

R-15-0018

MARICOPA COUNTY ATTORNEY'S
RESPONSE TO PETITION TO AMEND RULES
31, 34, 38, 39 AND 42 OF THE RULES OF
THE SUPREME COURT

15 The Maricopa County Attorney hereby responds to the Petition to Amend
16 Rules 31, 34, 38, 39, and 42 of the Rules of the Supreme Court and asks this Court to
17 deny the Petition as it pertains to the change to ER 4.2 because the changes are
18 unnecessary and confusing. For simplicity and clarity, the Maricopa County
19 Attorney's Office has filed a separate response relating to the Petition's proposed
20 changes to ER 1.13.
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22 The 22 page Petition outlines the justifications for the numerous requested
23 changes but the changes to ER 4.2 are barely mentioned. At the end of the Petition,
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Petitioner states,

“The Committee recommends amending Comments to ER 1.13, ER 3.5,
and ER 4.2 to augment existing Comments and to provide additional

1 guidance to government lawyers on three frequently arising issues: (1)
2 identifying the client in the governmental context, (2) advising
3 government entities acting in a quasi-judicial capacity and restricting ex
4 parte contact, and (3) *providing additional guidance on the scope of an*
5 *authorized exception to ER 4.2*. None of these Comments is intended to
6 change what behavior is permissible under the Rules. Instead, they are
intended to provide useful guidance to government lawyers on
application of existing Rules to their practice.”

7 [Petition at 21-22] (emphasis added). Thus, with no examples of how the changes
8 will provide guidance or help clarify the existing Rule, the Petitioner asks this Court
9 to delete a sentence from Comment 1 and add the following Comment which is taken
10 to delete a sentence from Comment 1 and add the following Comment which is taken
11 (mostly) from the ABA Model Rule 4.2:

12 [2] Communications authorized by law may include communications by
13 a lawyer on behalf of a client who is exercising a constitutional or other
14 legal right to communicate with the government. Communications
15 authorized by law may also include investigative activities of lawyers
16 representing governmental entities, directly or through investigative
17 agents, prior to the commencement of criminal or civil enforcement
18 proceedings. When communicating with the accused in a criminal
19 prosecution about a matter other than the criminal prosecution, a
20 government lawyer must comply with this Rule in addition to honoring
the constitutional rights of the accused. The fact that a communication
does not violate a state or federal constitutional right is insufficient to
establish that the communication is permissible under this Rule.

21 [Petition at 75]. The ABA Comment to Model Rule 4.2 states,

22 [5] Communications authorized by law may include communications by
23 a lawyer on behalf of a client who is exercising a constitutional or other
24 legal right to communicate with the government. Communications
25 authorized by law may also include investigative activities of lawyers
26 representing governmental entities, directly or through investigative
27 agents, prior to the commencement of criminal or civil enforcement
28 proceedings. When communicating with the accused in a criminal
matter, a government lawyer must comply with this Rule in addition to

1 honoring the constitutional rights of the accused. The fact that a
2 communication does not violate a state or federal constitutional right is
3 insufficient to establish that the communication is permissible under this
4 Rule.

5 MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2, cmt. 5.

6 A close reading of these two Comments shows that they are identical except
7 Petitioner's Comment adds the italicized language in the following sentence, "When
8 communicating with the accused in a criminal *prosecution about a matter other than*
9 *the criminal prosecution*, a government lawyer must comply with this Rule in
10 addition to honoring the constitutional rights of the accused."

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12 The first problem with adding this Comment is that is it based on a Comment
13 from a Model Rule that Arizona does not have. The ABA's Model Rule 4.2 states,

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15 In representing a client, a lawyer shall not communicate about the
16 subject of the representation with a person the lawyer knows to be
17 represented by another lawyer in the matter, unless the lawyer has the
18 consent of the other lawyer or is authorized to do so by law or a court
19 order.

20 MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2. Arizona's ER 4.2, on the other
21 hand, reads as follows (differences bolded for emphasis):

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

26 Rule 42, R. SUP. CRT. ARIZ., ER 4.2. These are not minor differences. The question
27 of whether the Rule applies to a represented "party" or to a represented "person" is
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1 significant. This precise issue was agued when the Rules of Professional Conduct
2 were overhauled in 2003. The fact that the ABA's Rule is broader on its face than
3 Arizona's should immediately counsel against adopting the ABA's Comment.
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5 More concerning, however, is the additional phrase in the proposed Comment,
6 "about a matter other than the criminal prosecution." As discussed above there is
7 nothing in the Petition that explains how adding this clause to the Comment will help
8 clarify a prosecutor's responsibilities nor is there any attempt to explain why this
9 language is necessary or what problem it would solve. Instead of clarifying, the
10 proposed Comment adds confusion to the scope of the Rule. The language of
11 Arizona's Rule is clear on its face – a lawyer may not communicate with a
12 represented party *about the subject matter of the representation* without counsel's
13 permission. The proposed Comment, however, appears to expand the scope of the
14 Rule by claiming that, in the context of a criminal prosecution, the Rule applies when
15 a lawyer is communicating with an accused about any matter whatsoever. In that
16 case, the Comment clearly goes beyond the limitation of the Rule because the Rule is
17 limited to the subject matter of the representation which, if the text of the Rule itself
18 is not clear enough, is clear from the first sentence of Comment 1, "This Rule does
19 not prohibit communication with a party . . . concerning matters outside the
20 representation." Even the ABA's Comment to a different, broader rule is narrower
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1 than Petitioner's Comment. All of which leaves the very real question of exactly
2 what is this comment trying to accomplish?
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4 Despite Petitioner's statement that the Comment is not meant to change the
5 current understanding of the Rule, the Comment is actually a major change to the
6 current Rule. For example, consider the situation where a defendant in a charged
7 criminal matter, "Mr. Jones," is also a victim in a separate, unrelated criminal matter.
8 Under the current Rule, it is clear that the prosecutor handling the case where Mr.
9 Jones is the victim can talk to Mr. Jones about his case as long as the prosecutor does
10 not discuss the criminal matter where Mr. Jones is the defendant. In this situation, the
11 prosecutor is not communicating with a represented party about the subject matter of
12 the representation.
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16 The proposed Comment appears to turn this situation on its head. Under the
17 Comment, it appears that the prosecutor cannot talk to Mr. Jones about the case
18 where he was victimized without the permission of his criminal defense attorney
19 because the prosecutor would be talking to the accused in a criminal matter "about a
20 matter other than the criminal prosecution." Of course the Comment does not clearly
21 prohibit such contact because it commands that, in this situation, the prosecutor "must
22 comply with this Rule . . ." But, as discussed above, the Rule allows the prosecutor
23 to talk to the represented accused about anything other than the subject of the
24 representation, so the prosecutor who talks to Mr. Jones about his victimization
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1 without getting consent from the defense lawyer *is* complying with the Rule. But if
2 that interpretation of the Comment is correct, then the Comment adds nothing to the
3 Rule and there is no reason to add it. If, on the other hand, the Comment is saying
4 that to “comply with this Rule” the prosecutor must get permission from Mr. Jones’
5 criminal defense attorney, then the Comment is expanding the Rule far beyond its
6 actual text and current application. Under either reading, the Comment is not adding
7 any clarity at all – it is adding nothing but confusion. Similar issues would arise
8 when talking to defendants about completely unrelated offenses while they are
9 represented by counsel on *other* criminal matters – conversations that are not barred
10 by the Rule but appear to be prohibited by the Comment.
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14 Equally confusing is the situation presented in *Texas v. Cobb*, 532 US 162
15 (2001) where the United States Supreme Court held that there was no constitutional
16 impediment to law enforcement talking to a represented defendant as long as they
17 were talking about a separate (even if closely related) crime. If this proposed
18 Comment were adopted, government lawyers advising police officers would be
19 placed in an impossible position because the lawyer could not advise the officers to
20 do something prohibited by the ethical rules and the Comment would require
21 compliance with ER 4.2 when talking to an accused even when talking about a matter
22 other than that prosecution. The Comment makes it impossible for lawyers to
23 provide constitutionally sound advice to their law enforcement partners or clients. In
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1 fact, this Comment appears to be an attempt to alter the clear holding of the Supreme
2 Court in *Cobb* by preventing a lawyer from engaging in the exact type of conduct the
3 Constitution (and the Rule) permits. Regardless of the unstated goals of the
4 Comment, the fact remains that it is not adding any clarity and it is, in fact, adding
5 confusion to situations that are already clear under the plain text of the Rule.
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8 The proposed Comment appears to be an effort to greatly expand the scope of
9 ER 4.2 only when it applies to prosecutors. A Comment to a Rule cannot expand the
10 rule itself and for good reason – a policy change of this significance should not be
11 done by adding a Comment to an Ethical Rule with no discussion, analysis, or
12 justification. Therefore, the Maricopa County Attorney’s Office asks this Court to
13 deny the Petition to modify Comment 1 and add Comment 2 to ER 4.2.
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16 Respectfully submitted this 20th day of May, 2015.

17 WILLIAM G. MONTGOMERY
18 MARICOPA COUNTY ATTORNEY

19 By 
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