Attorney Regulation Advisory
Committee
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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	
	Supreme Court No. R-15-0018
PETITION TO AMEND RULE 31, 34, 38, 29, AND 42, RULES OF THE SUPREME COURT	**COMMENT OF THE ATTORNEY REGULATION ADVISORY COMMITTEE**

The Supreme Court's Attorney Regulation Advisory Committee ("ARC") respectfully requests permission to file a late comment to Petition No. R-15-0018. ARC is a committee comprised of volunteer members supported by the Administrative Office of the Courts. A number of different staffing and scheduling factors contributed to ARC's untimely filing of this comment. ARC offers the following comment on two of the many proposals in Petition No. R-15-0018 resulting from the Court's Committee on the Review of Supreme Court Rules Governing Professional Conduct and the Practice of Law ("the Committee").

As Petition R-15-0018 explains, this Court established the Committee "in recognition that the changing practice of law in the last decade poses new ethical questions that necessitate review of certain court Rules governing the practice of law" and tasked it "with examining and updating the current Rules to ensure that the public is protected and the Rules do not impose unnecessary barriers to the delivery of legal services."

ARC does not believe that two of the Committee's proposals will protect the public. In fact, ARC believes that two of the proposals – those dealing with confidentiality and the unauthorized practice of law – pose significant potential dangers to the public in general and clients in particular.

I. The ER 1.6 proposal would weaken lawyers' obligation to safeguard client information.

The Committee's rule-change petition proposes to amend Ethical Rule ("ER") 1.6, which currently protects "information relating to the representation of a client," including information relating to the representation from public sources. ER 1.6 would be rewritten to protect against the revelation of confidential information or the use of confidential information to the disadvantage of a client or for the advantage of the lawyer or a third person (subject to certain exceptions).

It would define "confidential information" to consist "of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by applicable privileges and protections[,] (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested to be kept confidential. "Confidential information" does not ordinarily include (1) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field, or profession to which the information relates."

The Committee proposes its changes to the language of ER 1.6 for several reasons: some lawyers do not understand the current rule's breadth; lawyers could permissibly use purportedly non-harmful client information for marketing; and lawyers could use purportedly non-harmful client information to educate other clients. None of these proposed reasons justify weakening ER 1.6's current robust definition of confidentiality.

First, ER 1.6 says what it says, regardless whether, as the rule-change petition argues, it "appears to be honored more in the breach." Weakening client confidentiality because some lawyers do not abide by it is no justification. We believe the proper approach is to educate lawyers and make them more aware, not to lower the standard.

The justification that ER 1.6 "appears to be honored more in the breach" fails to give due consideration to the ongoing permission in ER 1.6 for a lawyer to reveal such confidential information as is "impliedly authorized to carry out the representation." This phrase invokes professional judgment, and recognizes that lawyers, in their unique position to measure and ascertain a client's "implied" authority, have traditionally made determinations regarding disclosure of confidential information, including the recipient of such information, the extent to which confidential information is "cleansed" to protect the client, and the scope of revealed information. ER 1.6, in short, has for decades worked effectively precisely because it relies, not on strict parameters, but rather on the "art" of lawyering.

Lawyers should be educated to use sound, conflict-free professional judgment to guide their decisions. For example, when confidential information is revealed carefully to a trusted mentor, discussion between the revealing lawyer and the mentor can assist the revealing lawyer to "carry out the representation" of the client through the guidance received from a colleague who perhaps is more knowledgeable, or simply more experienced, than the revealing lawyer. In a time when lawyers are increasingly isolated in their practice environments, no change in ER 1.6 should have the inadvertent effect of chilling the ability of lawyers to seek out and obtain a mentor's advice. While arguably the proposed amendment

might preserve such discretion, professional judgment about what is "impliedly authorized" has become ingrained in the practice of law. Amending ER 1.6, for any reason, could create confusion that risks overshadowing the exercise of sound professional judgment.

Second, moving away from the broad protection of client information to a far more subjective test endangers clients by injecting unnecessary additional subjectivity. ER 1.6's protection of "information relating to the representation of a client" has governed the Arizona legal profession since this Court adopted the Model Rules of Professional Conduct effective February 1, 1985. After three decades of a bright-line standard, lawyers under the Committee's proposal would have to decide whether information is privileged or otherwise protected by applicable law; whether the client requested the information to be kept secret; and whether the information would be embarrassing or detrimental to the client. They would be balancing client interests against their own interests in disclosing information for their own purposes.

Third, current ER 1.6 recognizes that the client, with relatively few exceptions, controls the distribution or release of information about the client's representation. Whether that information is publicly available is simply irrelevant to this control. The lawyer, as agent for the client, should abide by the client's decisions about disclosure, and not make decisions based on whether information

about the representation is available via the Internet or some other public source. Clients do not hire lawyers anticipating that they will become part of the lawyer's marketing plan. Lawyers should not be allowed to use client information for a lawyer's marketing purposes, without advance client consent, whether or not information related to the client is public record.

Finally, this proposal is not part of either the current American Bar Association Model Rules of Professional Conduct or any proposal to change the ABA Model Rules. It would, in fact, return Arizona's confidentiality rule to the same standard of the old Code of Professional Responsibility – a standard that this Court deemed inadequate 30 years ago. The fact that some jurisdictions have chosen not to follow the Model Rule 1.6 approach is not a reason to change.

In sum, our concern is that the proposed amendments to ER 1.6, while carefully crafted, nevertheless risk sending an unnecessary signal of change to a rule that is a fundamental thread in the fabric of the legal profession. The proposed changes to ER 1.6 appear less protective of client information than the current rule. ARC does not believe the case has been made for relaxing the standards governing one of the most essential elements of the attorney-client relationship – the duty to maintain the confidentiality of client information.

II. The ER 5.5 proposal dilutes the existing public protection of professional licensing.

The Committee's recommendation to amend ER 5.5, which deals with the unauthorized practice of law, likewise fails to protect the public. To require that only those lawyers who are practicing "Arizona law" be licensed in this jurisdiction effectively usurps this Court's regulation of the practice by allowing non-Arizona lawyers to set up shop and provide legal services to Arizona residents without any meaningful consumer protection other than the specter of a bar charge.

No matter the technological innovations, the practice of law is still largely based on geographic location. A lawyer who is physically and permanently present in this jurisdiction is an Arizona lawyer; accordingly, the public would expect the necessary professional licensing by the Arizona Supreme Court.

The few existing major exceptions to the admissions requirement have proven to be legitimate. ER 5.5(c) recognizes the multijurisdictional practice of law and allows non-Arizona lawyers to practice in this jurisdiction on a temporary basis. In compliance with federal case law, ER 5.5(d) allows non-Arizona lawyers to provide legal services in this jurisdiction as authorized by federal law.

While there is, thanks largely to the Internet, a legitimate basis to recognize that lawyers can now enjoy geographic flexibility, the proposed amendment would create the false impression that a lawyer who is physically present in Arizona, but not representing Arizona clients or practicing Arizona law, is not subject to the jurisdiction of the Arizona Supreme Court. In fact, the opposite is true. Any person practicing law in Arizona, with or without an Arizona license, is subject to the Court's jurisdiction. Rule 31(a)(1), Ariz. R. Sup. Ct. While not restricting the Court's jurisdiction, the proposed rule change, on the other hand, would restrict the prosecutorial options of the State Bar of Arizona, limiting any investigation or proceeding against such a lawyer to one involving the unauthorized practice of law, instead of a standard disciplinary proceeding that would be available if the lawyer were licensed in Arizona. Similarly, because a lawyer who falls into the category covered by the proposed rule would have no reporting or certification requirement, there would be no apparent mechanism for assuring compliance with the rule. Such a lawyer, therefore, could expand his/her practice, take on Arizona clients and/or practice Arizona law, and the State Bar would have no way to regulate the lawyer or discover that the lawyer is now required to become licensed, unless he or she were called to the Bar's attention through an allegation of misconduct.

Whatever the solution may be to more effectively address the virtual practice of law, we respectfully submit that allowing lawyers who practice other than "Arizona law" in this jurisdiction to escape licensure is not the answer. [1] At the very least, a lawyer who is physically present in Arizona but not representing Arizona clients or practicing Arizona law should be required to obtain a certificate, similar to in-house counsel registration, so that the State Bar of Arizona has a record of the lawyer's existence and the limited scope of the lawyer's permissible practice.

Conclusion

For the above reasons, ARC urges the Court to reject the Committee's proposals to amend ER 1.6 and ER 5.5.

RESPECTFULLY SUBMITTED this 16 day of July, 2015.

ATTORNEY REGULATION ADVISORY COMMITTEE

By Lawrence F. Winthrop

Its Chair

[1] Some practicing lawyers have applied for admission in Arizona and the Court has refused to credit those lawyers with time spent dispensing advice from Arizona for purposes of meeting the requirement of Rule 34 (f)(3)(B).