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IN THE ARIZONA SUPREME COURT

In the Matter of: **PETITION TO AMEND ETHICAL RULE 1.2, RULE 42, ARIZ. R. SUP. CT.**	Supreme Court No. R-18-_____ **Petition to Amend ER 1.2, Rule 42, Ariz. R. Sup. Ct.**

Pursuant to Rule 28, Ariz. R. Sup. Ct., the undersigned respectfully petitions this Court to amend Ethical Rule (ER) 1.2, Rule 42, Ariz. R. Sup. Ct., to address Arizona lawyers' ethical ability to counsel and assist clients in legal matters expressly permissible under state law, despite the fact that the same conduct may violate applicable federal law. The proposed amendment is intended to resolve the "ethical conundrum" for lawyers that arises due to Arizona's legalization of medical marijuana.

This petition is a revised version of Petitioner's 2016 proposal, R-16-0027, which this Court denied on its August 29, 3016, rules agenda. Petitioner respectfully requests that the Court revisit this issue for two reasons.

First, as discussed in more detail below, the federal government recently rescinded what was essentially a safe-harbor position on marijuana enforcement, thereby raising the specter of federal prosecution for acting in compliance with a state law.

Second, by revisiting this issue, the Court has an opportunity, in its role as administrative authority over lawyers and the practice of law in this state, to resolve a conflict between reality and an ethical rule's prohibition. Does the clear language of ER 1.2(d) — that a lawyer "shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent" — include the federal prohibition on marijuana? If not, then is providing legal services under the state medical-marijuana law allowed as an unwritten exception to the rule? Or has a non-judicial committee's non-binding advisory opinion that essentially adopted an exception to the rule become the law?

I. Background

The federal Controlled Substances Act, 21 U.S.C. §801 *et seq*., generally prohibits the cultivation, distribution and possession of marijuana.

Faced with states adopting medical-marijuana laws, the Obama Administration's U.S. Department of Justice (DOJ), in a series of memoranda beginning in late 2009, advised federal prosecutors to "not focus federal resources in your States on individuals whose actions are in clear and unambiguous

compliance with existing state law providing for the medical use of marijuana"[1] and if the state has a "robust" system of regulation, "enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity."[2]

In the 2010 general election, Arizona voters approved the Arizona Medical Marijuana Act (AMMA, codified at A.R.S. §§ 36-2801 through -2819), which legalized medical marijuana for use by people with certain chronic or debilitating conditions. Arizona law thus permitted what federal law prohibited.

This conflict between federal and state law implicated lawyers' professional obligations. Arizona's ER 1.2(d), which is identical to the American Bar Association's Model Rule 1.2(d), specifically bars lawyers from "counsel[ing] a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent." Comment [10] to ER 1.2 makes clear "that a lawyer is not for hire as an accomplice or enabler of criminal conduct." Ariz. Ethics Op. 11-01 at p. 4 (February 2011) (attached as Appendix 1). Strictly applied, this means that by advising and helping clients conduct business under Arizona's medical-marijuana law, lawyers

[1] October 19, 2009, memorandum from David W. Ogden, Deputy Attorney General, to selected United States Attorneys, available at https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states

[2] August 29, 2013, memorandum from James M. Cole, Deputy Attorney General, to all United States Attorneys, available at https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf

would be engaging in criminal conduct under federal law and thus violating ER 1.2(d).

Faced with the conflict between the federal and state laws and the clear language of ER 1.2(d), the State Bar of Arizona's Committee on the Rules of Professional Conduct issued a non-binding ethics opinion that declined to interpret and apply ER 1.2(d) "in a manner that would prevent a lawyer who concludes that the client's proposed conduct is in 'clear and unambiguous compliance' with state law from assisting the client in connection with activities expressly authorized under state law." State Bar Ethics Op. 11-01 at 6. Because clients need legal advice and assistance "to implement and bring to fruition that conduct expressly permitted under state law," *id*., the opinion essentially interpreted ER 1.2(d) as containing an exception that does not exist: compliance with state law. The opinion calls this a "reasonable construction." *Id*. at 7.

The Trump Administration now has changed course. Attorney General Jefferson Sessions, in a January 4, 2018, memorandum (attached as Appendix 2), directed federal prosecutors to return to "well-established principles that govern all federal prosecutions," such as "weigh[ing] all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community." He expressly rescinded the DOJ memoranda

that had provided the prosecution safe harbors.

II. Other states' ethical-rule responses to the marijuana state-federal conflict

With the wave of state medical- and recreational-marijuana laws, many affected jurisdictions with Model Rule 1.2(d) language — the same as our ER 1.2(d) — have taken formal action, not just relied on non-binding ethics opinions. Some have added explanatory comments to their ethical rules; some have amended their rules; some have done both. No matter which avenue they have chosen, their formal action has removed uncertainty and added transparency to their black-letter rules of professional conduct.

Some states have chosen to add comments to their rules. **Colorado** added new comment [14] to its Colorado Rules of Professional Conduct Rule 1.2, effective March 24, 2014:

> A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, secs. 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. ln these circumstances. the lawyer shall also advise the client regarding related federal law and policy.

Nevada adopted almost identical language — customized with citation to its state laws — as new comment [1] to its Rule 1.2, Nevada Rules of Professional Conduct, effective May 7, 2014. **Washington** added slightly different language in its comment [18] effective December 9, 2014, to its Rule 1.2, Washington Rules of

Professional Conduct:

> At least until there is a change in federal enforcement policy, a lawyer may counsel a client regarding the validity, scope and meaning of Washington Initiative 502 (Laws of 2013, ch. 3) and may assist a client in conduct that the lawyer reasonably believes is permitted by this statute and the other statutes, regulations, orders, and other state and local provisions implementing them.

Other states have added marijuana-related-law specific exemptions to their rules. **Oregon**, **Alaska** and **Ohio** have added very similar subsections that provide exceptions to the Model Rule 1.2(d) language. Effective February 19, 2015, Oregon, which has Model Rule 1.2(d) language as its Rule 1.2(c),[3] added this exemption:

> (d) Notwithstanding paragraph (c), a lawyer may counsel and assist a client regarding Oregon's marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy.

Effective June 23, 2015, Alaska added a new subsection (f) to its Rule 1.2, Rules of Professional Conduct:

> A lawyer may counsel a client regarding Alaska's marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. If Alaska law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy.

In **Ohio**, the Ohio Supreme Court changed its rule after its Board of Professional Conduct issued an informal, non-binding ethics opinion concluding that

[3] Oregon's Rule 1.2(c) substitutes the word "illegal" for "criminal."

its Rule 1.2(d) — virtually identical to Arizona's ER 1.2(d)[4] — prohibited lawyers from counseling or assisting clients under the state's medical-marijuana law, such as "provid[ing] the types of legal services necessary for a client to establish and operate a medical marijuana enterprise or to transact with medical marijuana businesses." It concluded its analysis of Rule 1.2(d) by saying that the Ohio Supreme Court could amend the rules "to address this conflict." Less than two months later, that court did, adding this provision to its version of Rule 1.2(d), effective September 20, 2016:

> (2) A lawyer may counsel or assist a client regarding conduct expressly permitted under Sub. H.B. 523 of the 131st General Assembly authorizing the use of marijuana for medical purposes and any state statutes, rules, orders, or other provisions implementing the act. In these circumstances, the lawyer shall advise the client regarding related federal law.

Other states have chosen to add comments or rule exemptions that are not medical-marijuana specific. **Connecticut** revised its Rule 1.2(d) to permit conduct allowed under state law:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may (1) discuss the legal consequences of any proposed course of conduct with a client; (2) ~~and~~ ~~may~~ counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law~~.~~; or (3) counsel or assist a client regarding conduct expressly permitted by Connecticut law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct.

[4] Like Oregon, Ohio's Rule 1.2(d) uses the word "illegal" instead of "criminal."

At least one other state has both amended its rule and added a comment. In **Illinois**, the Illinois State Bar Association (ISBA) issued Advisory Opinion No. 14-07 (October 2014) citing Connecticut's efforts and recommending that the Illinois Supreme Court Rules Committee promulgate a similar amendment. That supreme court subsequently not only adopted Connecticut's approach but also added a lengthy comment. Effective January 1, 2016, Illinois amended its Rule 1.2(d) similar to Connecticut's amendment:

> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct the lawyer knows is criminal or fraudulent, but a lawyer may
> (1) discuss the legal consequences of any proposed course of conduct with a client,
> (2) ~~and may~~ counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law, and
> (3) counsel or assist a client in conduct expressly permitted by Illinois law that may violate or conflict with federal or other law, as long as the lawyer advises the client about that federal or other law and its potential consequences.

The lengthy new comment [10] explains the rule change:

> Paragraph (d)(3) was adopted to address the dilemma facing a lawyer in Illinois after the passage of the Illinois Compassion Use of Medical Cannabis Pilot Program Act effective January 1, 2014. The Act expressly permits the cultivation, distribution, and use of marijuana for medical purposes under the conditions stated in the Act. Conduct permitted by the Act may be prohibited by the federal Controlled Substances Act, 21 U.S.C. §§801-904 and other law. The conflict between state and federal law makes it particularly important to allow a lawyer to provide legal advice and assistance to a client seeking to engage in conduct permitted by Illinois law. In providing such advice and assistance, a lawyer shall also advise the

> client about related federal law and policy. Paragraph (d)(3) is not restricted in its application to the marijuana law conflict. A lawyer should be especially careful about counseling or assisting a client in other contexts that may violate or conflict with federal, state, or local law.

III. ER 1.2(d) should be amended to add an explicit exception for lawyers who comply with state law

Arizona should follow Connecticut and Illinois and amend ER 1.2(d) to recognize that there may be times when — as Illinois explained in its comment — "the conflict between state and federal law makes it particularly important to allow a lawyer to provide legal advice and assistance to a client seeking to engage in conduct permitted by [state] law."

The language adopted by Connecticut and Illinois also importantly incorporates a concept already posited in Ethics Op. 11-01: that lawyers may provide necessary legal help to a client taking permissible acts under Arizona's medical-marijuana law if they advise the client of the "potential federal law implications and consequences thereof, or, if the lawyer is not qualified to do so, advises the client to seek other legal counsel regarding those issues… ." If a lawyer is not competent to provide the counsel required under proposed ER 1.2(d)(3), then ER 1.1 (competence) requires that the lawyer associate a lawyer who has the established competence, and ER 1.2(c) allows the lawyer to limit the scope of representation, with informed client consent.

The proposed language also implicitly recognizes that other state-federal

conflicts similar to medical marijuana may arise.[5] By adopting this change, Arizona would not be an outlier; it would be joining Connecticut and Illinois by simply allowing lawyers to ethically provide legal services in compliance with state law.

Adopting such a provision means Arizona's ER 1.2 is not the same as the ABA Model Rules of Professional Conduct. While it may be preferable to adhere as closely as possible to the ABA Model Rules, medical-marijuana laws have been controversial, state-by-state phenomena unlikely to result in timely changes to a national model rule.

Amending the rule itself also is preferable to simply adding a comment. Comments "explain[] and illustrate[] the meaning and purpose of the Rule" and "are intended as guides to interpretation, *but the text of each Rule is authoritative*." Preamble, Arizona Rules of Professional Conduct, paragraph [21] (emphasis added). A rule should not specifically prohibit conduct while an explanatory comment provides an exception.

Amending the rule is also preferable to leaving the issue up to a non-binding ethics opinion or, perhaps, disciplinary prosecutorial discretion. Ethics Op. 11-01 has provided guidance to lawyers but such an opinion is advisory only and not binding on the discipline system. The Illinois ethics opinion cogently noted that

[5] This would not be the first time Arizona adopted ethical-rule language from Connecticut. *See* rule-change petition R-11-004, in which the State Bar proposed (and this Court agreed) to adopt clarifying language for ER 1.5(b).

ethics opinions "do not immunize any lawyer from disciplinary action."

In addition, allowing the disciplinary agency, rather than the highest court, to adopt a policy does not provide adequate certainty for lawyers. At least two jurisdictions – Florida and Massachusetts, both of which have Model Rule 1.2(d) language – have adopted formal written policies in which they state that bar members will not be prosecuted for misconduct if they advise clients under those states' medical-marijuana laws.[6] But a policy adopted by an entity other than the rule-making court is an inadequate way to resolve this issue and provide transparency for lawyers. And, of course, the actual rule would still have clear, contradictory language.

IV. Proposed rule amendment

Arizona should adopt Connecticut's simple and elegant language. ER 1.2(d) thus would be revised as follows:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may (1) discuss the legal consequences of any proposed course of conduct with a client; (2) ~~and~~ ~~may~~ counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law~~.~~; or (3) counsel or assist a client regarding conduct expressly permitted by Arizona law, provided that the lawyer counsels the client about the legal consequences, under other applicable

[6] *See* Massachusetts "Board of Bar Overseers/Office of Bar Counsel Policy on Medical Marijuana" (available at http://www.mass.gov/obcbbo/marijuana.pdf) and, for The Florida Bar, "Board adopts medical marijuana advice policy" (available at http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/575b2ba3c91f53dd85257cf200481980!OpenDocument).

law, of the client's proposed course of conduct.

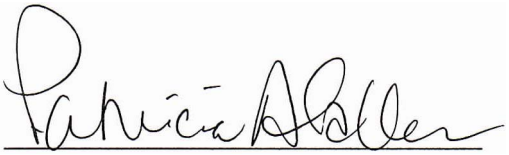
With the rule amended this way, a lengthy explanatory or medical-marijuana-specific comment is unnecessary.

Conclusion

This rule-change proposal is not intended to weigh into or reignite the debate over whether medical marijuana should be allowed or continued, or whether marijuana otherwise should be decriminalized. Amending ER 1.2(d) as proposed also of course would not affect the federal government's ability to prosecute drug-law violations, even against lawyers. This proposed rule change simply recognizes existing reality — medical marijuana is currently permitted under state law — and is offered to provide certainty and transparency to lawyers about their ethical role in advising and assisting clients about activities falling within permissible state law.

Our ethical rules should clearly state the Court's expectations of lawyers. If ER 1.2(d) does not apply to the medical-marijuana situation, then the rule should be amended to say so. At a minimum, if the Court chooses not to amend ER 1.2(d) — either as proposed in this petition or, perhaps, limited to the medical-marijuana scenario — it would be helpful for the Court to explain why ER 1.2(d) does not apply.

Respectfully submitted January 10, 2018.

By 

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APPENDIX 1

[PDF of Ariz. Ethics Op. 11-01]

OPINION NO. 11-01
(February 2011)

SUMMARY

A lawyer may ethically counsel or assist a client in legal matters expressly permissible under the Arizona Medical Marijuana Act ("Act"), despite the fact that such conduct potentially may violate applicable federal law. Lawyers may do so only if: (1) at the time the advice or assistance is provided, no court decisions have held that the provisions of the Act relating to the client's proposed course of conduct are preempted, void or otherwise invalid; (2) the lawyer reasonably concludes that the client's activities or proposed activities comply fully with state law requirements; and (3) the lawyer advises the client regarding possible federal law implications of the proposed conduct if the lawyer is qualified to do so, or recommends that the client seek other legal counsel regarding those issues and appropriately limits the scope of the representation.

NOTE: This opinion is limited to the specific facts discussed herein. Because the opinion is based on the Act as currently in effect, subsequent legislative or court action regarding the Act could affect the conclusions expressed herein.

FACTS

In the 2010 general election, Arizona voters approved Proposition 203, titled "Arizona Medical Marijuana Act" ("Act"), which legalized medical marijuana for use by people with certain "chronic or debilitating" diseases. The proposition amended Title 36 of the Arizona Revised Statutes by adding §§ 36-2801 through -2819 and also amended A.R.S. § 43-1201. Arizona became the 16th jurisdiction (15 states and the District of Columbia) to adopt a medical-marijuana law.

Despite the adoption of Arizona's Act, 21 U.S.C. § 841(a)(1) of the federal Controlled Substances Act ("CSA") continues to make the manufacture, distribution or possession with intent to distribute marijuana illegal.

In an October 19, 2009, memorandum ("DOJ Memorandum"), the U.S. Department of Justice advised that it would be a better use of federal resources to not prosecute under federal law patients and their caregivers who are in "clear and unambiguous compliance" with state medical-marijuana laws. The DOJ Memorandum indicates that federal prosecutors still will look at cases involving patients and caregivers, however, if they involve factors such as unlawful possession or use of a firearm, sales to minors, evidence of money-laundering activity, ties to other criminal enterprises, violence, or amounts of marijuana inconsistent with purported compliance with state or local law.

Although characterizing patients and their caregivers as low priorities, the DOJ Memorandum does not characterize commercial enterprises the same way. In fact, the DOJ Memorandum says that the "prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority" of the DOJ.[1]

The DOJ Memorandum explains that the DOJ's position is based on "resource allocation and federal priorities" and

> does not "legalize" marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter. Nor does clear and unambiguous compliance with state law or the absence of one or all of the above factors create a legal defense to a violation of the Controlled Substances Act. Rather, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion.

QUESTION PRESENTED

May a lawyer ethically advise and assist a client with respect to activities that comply with the Act, including such matters as advising clients about the requirements of the Act, assisting clients in establishing and licensing non-profit business entities that meet the requirements of the Act, and representing clients in proceedings before state agencies regarding licensing and certification issues?

[1] The DOJ recently further refined this position, in a February 1, 2011, letter regarding the City of Oakland's Medical Cannabis Cultivation Ordinance: "The prosecution of individuals and organizations involved in the trade of any illegal drugs and the disruption of drug trafficking organizations is a core priority of the [DOJ]. This core priority includes prosecution of business enterprises that unlawfully market and sell marijuana. Accordingly, while the [DOJ] does not focus its limited resources on seriously ill individuals who use marijuana as part of a medically recommended treatment regimen in compliance with state law as stated in the [DOJ Memorandum], we will enforce the CSA vigorously against individuals and organizations that participate in unlawful manufacturing and distribution activity involving marijuana, even if such activities are permitted under state law."

APPLICABLE ARIZONA RULES OF PROFESSIONAL CONDUCT ("ER __")

ER 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer

. . .

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

RELEVANT ARIZONA ETHICS OPINIONS

Ariz. Ethics Ops. 86-05 (March 1986), 87-05 (February 1987), 00-04 (November 2000)

OPINION

I. Introduction

The Act's passage gives rise to complex issues related to the proper ethical role of lawyers in advising and assisting clients about activities falling within the scope of the Act but which potentially may violate applicable federal law. Novel issues are presented regarding the relationship between Arizona's Act and federal law prohibitions on the manufacture, distribution or possession of marijuana.[2]

In addition to such unresolved legal issues, the DOJ Memorandum leaves unclear the extent to which federal prosecutors will pursue violations of federal law for conduct that complies fully with Arizona's Act and whether Arizona's medical-marijuana law ultimately may be held to be preempted or invalid in whole or in part.

While these issues are being decided by prosecutors and courts, it is important that lawyers have the ability to counsel and assist their clients about activities that are in compliance with the Act — and traditionally at the heart of the lawyer's role — by assisting clients in complying with the Act's requirements through the performance of such legal services as: establishing medical-marijuana dispensaries; obtaining the necessary licensing and registrations; representing clients in proceedings before Arizona agencies responsible for implementing the Act; and representing

[2] For example, the United States Supreme Court has held that the CSA does not establish an implied medical-necessity exception to prohibitions on manufacture and distribution of marijuana. *See United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001). California has held that the state's medical-marijuana law is not preempted by the CSA because there is "no positive conflict" in that the state law does not require activities in violation of federal law. In so holding, the California court noted that "governmental entities do not incur aider and abettor or direct liability by complying with their obligations under the state medical marijuana laws." *See Qualified Patients Ass'n v. City of Anaheim*, 187 Cal. App. 4th 734, 759-60, 115 Cal. Rptr. 3d 89, 107-08 (2010), *review denied* Dec. 1, 2010.

governmental entities to draft rules and regulations or otherwise counsel the governmental entity with respect to its rights and obligations under and concerning the Act.

II. Ethical Rule (ER) 1.2(d) and Prior Ethics Opinions and Court Decisions

Although Arizona's medical-marijuana law is new, it raises a timeless issue for lawyers: whether the client is seeking the lawyer's help to engage in conduct that the lawyer knows is criminal or fraudulent. As one treatise explains, Model Rule (MR) 1.2(d), which mirrors Arizona's ER 1.2(d), states the dividing line as follows:

> [W]hile a lawyer may discuss, explain, and predict the consequences of proposed conduct that would constitute crime or fraud, a lawyer may not counsel or assist in such conduct. Rule 1.2(d) is thus the close relative – in the disciplinary context – of the criminal law of aiding and abetting, and the civil law of joint tort feasance. As is the case in those other forms of accessorial liability, however, the principle of Rule 1.2(d) is much easier to state than to apply.

Geoffrey C. Hazard Jr. and W. William Hodes, *The Law of Lawyering* § 5.12 at 5-37, 5-38 (3d ed. 2005).

Comment 10 to ER 1.2 emphasizes that a lawyer is not for hire as an accomplice or enabler of criminal conduct:

> Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

These principles have been applied in three prior Arizona ethics opinions and in Arizona disciplinary cases, which have addressed the issue of whether the lawyer could affirmatively counsel or recommend conduct by the client that the lawyer knew was criminal or fraudulent.

The first two ethics opinions addressed whether a lawyer may advise a client to refuse to submit to blood, breath or urine tests upon being arrested for driving while intoxicated. Ariz. Ethics Ops. 86-05 (March 1986), 87-05 (February 1987). Opinion 86-05 concluded that, based on the then-state of the law, a lawyer could not advise a client to refuse to submit to a test upon being arrested for DUI, but could discuss the consequences of refusal without actually counseling refusal. When a new appellate opinion on the subject changed the law several months later, the Committee reconsidered Op. 86-05 and issued Op. 87-05, which concluded that a lawyer could ethically advise a client to refuse to undergo blood, breath or urine tests.[3]

[3] The Committee does not express any opinion here as to whether the conclusions reached in Op. 86-05 or Op. 87-05 are still valid in light of *Carrillo v. Houser*, 224 Ariz. 463, 232 P.3d 1245 (2010), which held that the DUI implied-

In discussing ER 1.2(d) under the then-state of the law, Op. 86-05 concluded:

> It is one thing to tell a client that proposed conduct may violate the antitrust laws, for example. It is quite another to advise the client affirmatively to undertake such conduct. ER 1.2(d), recognizing the distinction, explicitly forbids a lawyer to "counsel a client to engage… in conduct that the lawyer knows is criminal or fraudulent." Neither "criminal" nor "fraudulent" is explicitly defined in either the Rule or the accompanying Comment.

Similarly, the third opinion addressed whether a lawyer may ethically advise a client that the client may record telephone conversations between the client's children and the client's former spouse without the former spouse's knowledge and consent. Ariz. Ethics Op. 00-04 (November 2000). In Op. 00-04, the answer to whether a lawyer could ethically advise a client to record a telephone call hinged on the answer to the basic question of whether the client's proposed conduct would be "illegal under federal or state law." If so, "then the inquiring attorney may not, under ER 1.2(d), advise the client to tape record telephone conversations between the client's children and the client's former spouse."

Arizona lawyer-discipline cases demonstrate that ER 1.2(d) (or its predecessor, DR 7-102(A)(7), which contained generally the same language[4]) has been applied to sanction lawyers who affirmatively counseled their clients to engage in conduct that was knowingly fraudulent or otherwise in violation of state law, but not in a conflict-of-laws circumstance. *E.g.*, *In re Burns*, 139 Ariz. 487, 679 P.2d 510 (1984) (by urging his client to take settlement funds and not pay an Air Force lien for medical services, lawyer "encouraged his client to commit fraud on the United States government"); *In re Nulle*, 127 Ariz. 299, 620 P.2d 214 (1980) (lawyer violated DR 7-102(A)(7) by effectively advising corporate client's president to falsely represent himself as the sole owner on a liquor-license application thus violating state law).

III. Medical Marijuana Laws in Other Jurisdictions

Of the other jurisdictions that have legalized medical marijuana[5], it appears that only Maine has addressed the intersection of state-authorized medical marijuana and legal ethics.[6] In Maine Op.

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consent statute does not generally authorize law enforcement to administer a test to determine alcohol concentration without a warrant, unless the arrestee expressly agrees to the test.

[4] DR 7-102(A)(7) provided that in representing a client, a lawyer "shall not…[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

[5] Alaska, California, Colorado, the District of Columbia, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont and Washington. *Medical Marijuana, 15 Legal Medical Marijuana States and DC, Laws, Fees, and Possession Limits*, http://medicalmarijuana.procon.org (last visited Feb. 15, 2011).

[6] The Oregon Supreme Court dealt with a discipline case involving a lawyer who advised a client about a medical-marijuana dispensary but the opinion does not address whether the lawyer's conduct violated Oregon's version of ER 1.2(d). The opinion also does not disclose whether the Oregon State Bar, in prosecuting the lawyer, raised the issue. In *In re Smith*, 348 Or. 535, 236 P.3d 137 (2010), the Oregon court suspended for 90 days a lawyer for misconduct in representing a former employee of a medical-marijuana clinic who attempted to physically take over the clinic. The court concluded that the lawyer gave the client frivolous advice; lied about having authority for the client's acts from a governmental entity; and engaged in a criminal act by accompanying the client when she attempted to occupy the clinic. The lawyer met the client when he was a patient at the same clinic. Oregon's Rule

199 (July 7, 2010), the Professional Ethics Commission of the Maine Bar Board of Overseers also warned lawyers about this issue. Maine's version of ER 1.2(d) is the same as Arizona's, except for one word immaterial to this analysis.[7]

Maine concluded:

> Maine and its sister states may well be in the vanguard regarding the medicinal use and effectiveness of marijuana. However, the Rule which governs attorney conduct does not make a distinction between crimes which are enforced and those which are not. So long as both the federal law and the language of the Rule each remain the same, an attorney needs to perform the analysis required by the Rule and determine whether the particular legal service being requested rises to the level of assistance in violating federal law.

IV. Analysis

As noted above, no prior Arizona ethics opinions or cases have addressed the novel issue presented by the adoption of the Act — whether a lawyer may ethically "counsel" or "assist" a client under the following conditions: (1) the client's conduct complies with a state statute expressly authorizing the conduct at issue; (2) the conduct may nonetheless violate federal law; (3) the federal government has issued a formal "memorandum" that essentially carves out a safe harbor for conduct that is in "clear and unambiguous compliance" with state law, at least so long as other factors are not present (such as unlawful firearm use, or "for profit" commercial sales); and (4) no court opinion has held that the state law is invalid or unenforceable on federal preemption grounds.

In these circumstances, we decline to interpret and apply ER 1.2(d) in a manner that would prevent a lawyer who concludes that the client's proposed conduct is in "clear and unambiguous compliance" with state law from assisting the client in connection with activities expressly authorized under state law, thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits. The maintenance of an independent legal profession, and of its right to advocate for the interests of clients, is a bulwark of our system of government. History is replete with examples of lawyers who, through vigorous advocacy and at great personal and professional cost to themselves, obtained the vindication of constitutional or other rights long denied or withheld and which otherwise could not have been secured.

A state law now expressly permits certain conduct. Legal services are necessary or desirable to implement and bring to fruition that conduct expressly permitted under state law. In any potential conflict between state and federal authority, such as may be presented by the interplay

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1.2(c), Oregon Rules of Professional Conduct, is identical to ER 1.2(d) except that Oregon prohibits a lawyer counseling a client to engage or assist to engage in conduct the lawyer knows is "*illegal* or fraudulent," rather than "*criminal* or fraudulent."

[7] Arizona's rule allows a lawyer to discuss with a client the legal consequences of "*any* proposed course of conduct." Maine's rule allows a lawyer to discuss with a client the legal consequences of "*the* proposed course of conduct."

between the Act and federal law, lawyers have a critical role to perform in the activities that will lead to the proper resolution of the controversy. Although the Act may be found to be preempted by federal law or otherwise invalid, as of this time there has been no such judicial determination.

Accordingly, we believe the following is a reasonable construction of ER 1.2(d)'s prohibitions in the unique circumstances presented by Arizona's adoption of the Act:

- If a client or potential client requests an Arizona lawyer's assistance to undertake the specific actions that the Act expressly permits; and
- The lawyer advises the client with respect to the potential federal law implications and consequences thereof or, if the lawyer is not qualified to do so, advises the client to seek other legal counsel regarding those issues and limits the scope of his or her representation; and
- The client, having received full disclosure of the risks of proceeding under the state law, wishes to proceed with a course of action specifically authorized by the Act; then
- The lawyer ethically may perform such legal acts as are necessary or desirable to assist the client to engage in the conduct that is expressly permissible under the Act.

This opinion and its construction of ER 1.2(d) are strictly limited to the unusual circumstances occasioned by the adoption of the Act. Any judicial determination regarding the law, a change in the Act or in the federal government's enforcement policies could affect this conclusion. The Committee cannot render opinions based on pure questions of law or on questions involving solely the lawyer's exercise of judgment or discretion. Committee on the Rules of Professional Conduct Statement of Jurisdiction § 9(a), (c). This opinion does not address whether specific conduct is preempted by federal law; whether the Act is or is not available to the client as a defense for a violation of federal law; or whether the lawyer's assistance to the client may expose the lawyer to criminal prosecution under federal law.

CONCLUSION

Lawyers may ethically advise clients about complying with the Arizona Medical Marijuana Act, including advising them about compliance with Arizona law, assisting them to establish business entities, and formally representing clients before a governmental agency regarding licensing and certification issues, but only in the narrow circumstances set forth in this opinion and only if lawyers strictly adhere to those requirements.

APPENDIX 2

[PDF of U.S. Attorney General statement]

Office of the Attorney General
Washington, D. C. 20530

January 4, 2018

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: Jefferson B. Sessions, III
Attorney General

SUBJECT: Marijuana Enforcement

In the Controlled Substances Act, Congress has generally prohibited the cultivation, distribution, and possession of marijuana. 21 U.S.C. § 801 *et seq*. It has established significant penalties for these crimes. 21 U.S.C. § 841 *et seq*. These activities also may serve as the basis for the prosecution of other crimes, such as those prohibited by the money laundering statutes, the unlicensed money transmitter statute, and the Bank Secrecy Act. 18 U.S.C. §§ 1956-57, 1960; 31 U.S.C. § 5318. These statutes reflect Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime.

In deciding which marijuana activities to prosecute under these laws with the Department's finite resources, prosecutors should follow the well-established principles that govern all federal prosecutions. Attorney General Benjamin Civiletti originally set forth these principles in 1980, and they have been refined over time, as reflected in chapter 9-27.000 of the U.S. Attorneys' Manual. These principles require federal prosecutors deciding which cases to prosecute to weigh all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community.

Given the Department's well-established general principles, previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately.[1] This memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion in accordance with all applicable laws, regulations, and appropriations. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

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[1] Previous guidance includes: David W. Ogden, Deputy Att'y Gen., Memorandum for Selected United States Attorneys: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009); James M. Cole, Deputy Att'y Gen., Memorandum for United States Attorneys: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011); James M. Cole, Deputy Att'y Gen., Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013); James M. Cole, Deputy Att'y Gen., Memorandum for All United States Attorneys: Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014); and Monty Wilkinson, Director of the Executive Office for U.S. Att'ys, Policy Statement Regarding Marijuana Issues in Indian Country (Oct. 28, 2014).