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

9 In the Matter of:

Supreme Court No. R-18-0009

10 **PETITION TO AMEND ER 1.2,**
11 **RULE 42, ARIZONA RULES OF**
12 **SUPREME COURT**

COMMENT OF THE
13 **STATE BAR OF ARIZONA**

14 Pursuant to Rule 28(D) of the Arizona Rules of Supreme Court, the State Bar
15 of Arizona (the “State Bar”) hereby submits the following as its Comment to the
16 above-captioned Petition. The State Bar generally supports Petitioner’s proposed
17 amendment to Ethical Rule (ER) 1.2, Rule 42, Ariz. R. Sup. Ct., yet respectfully
18 requests that the additional language, as set forth herein, be included in the amended
19 rule to further clarify lawyers’ obligations under the circumstances presented in the
20 Petition.

21 **DISCUSSION**


22 The above-captioned Petition is a revised version of Petition No. R-16-0027,
23 in which Petitioner sought similarly to amend ER 1.2 to address the ethical concerns
24 faced by lawyers who counsel clients engaging in conduct permitted by state law,
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1 yet prohibited under federal law. At that time, the State Bar filed a Comment to
2 Petition No. R-16-0027, which is reproduced in its entirety herein as an Appendix
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4 A. Having now reviewed the above-captioned petition before the Court, the State
5 Bar reiterates the position expressed in its Comment to Petition No. R-16-0027. The
6 Bar respectfully requests that the Court adopt the proposed rule change, but also add
7 a caveat, either in the Rule itself or in a comment to the Rule, making it clear that a
8 lawyer's obligation is to *either* counsel a client on the effect of other law on the
9 client's proposed conduct *or* refer the client to counsel who is competent to do so.
10 Appendix A provides the reasoning behind the Bar's recommendation; Appendix B
11 provides the Bar's recommended language.
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15 **CONCLUSION**

16 For the above reasons, the State Bar requests that the Court adopt the
17 proposed amendment to ER 1.2, incorporating the additional recommended
18 language set forth in Appendix B.
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20 RESPECTFULLY SUBMITTED this 21st day of May, 2018.
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23 Lisa M. Panahi
24 General Counsel
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1 Electronic copy filed with the
2 Clerk of the Arizona Supreme Court
3 this 2~~1~~ day of May, 2018.

4 by: 

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APPENDIX A

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11 **IN THE SUPREME COURT**
12 **STATE OF ARIZONA**

13 In the Matter of:

14 **PETITION TO AMEND ER 1.2,**
15 **RULE 42, ARIZONA RULES OF**
16 **SUPREME COURT**

Supreme Court No. R-16-0027

17 **COMMENT OF**
18 **THE STATE BAR OF ARIZONA**

19 Pursuant to Rule 28(D) of the Arizona Rules of Supreme Court, the State Bar
20 of Arizona (the "State Bar") hereby submits the following as its Comment to the
21 above-captioned Petition. The State Bar generally supports Petitioner's proposed
22 amendment to Ethical Rule (ER) 1.2, Rule 42, Ariz. R. Sup. Ct., yet respectfully
23 requests that the additional language, as set forth herein, be included in the amended
24 rule to further clarify lawyers' obligations under the circumstances presented in the
25 Petition.

1 The Petition requests this Court to amend ER 1.2 in an effort to alleviate the
2 ethical ambiguity that exists when a lawyer is asked to assist a client with a matter
3 permissible under state law, yet a violation of federal law. This ethical dilemma was
4 addressed in 2011 by the State Bar’s Rules of Professional Conduct Committee
5 (Ethics Committee), which resulted in the issuance of Arizona Ethics Opinion 11-
6 01 (appended to the Petition). While Ethics Op. 11-01 provides some guidance to
7 lawyers on the ethical propriety of advising clients on conduct in which state law
8 and federal law conflict, the opinion is non-binding and advisory only. The State Bar
9 supports amending ER 1.2 to incorporate language that provides certainty to lawyers
10 on the ethical propriety of advising clients on conduct permissible under state law.
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14 The State Bar respectfully requests this Court adopt Petitioner’s proposed rule
15 amendment with one caveat: clarifying what constitutes “counsels” in Petitioner’s
16 proposed ER 1.2(d)(3). Petitioner’s proposed amendment provides that a lawyer may
17 counsel a client on conduct permissible under state law (even if the conduct is
18 prohibited by federal law), provided that the lawyer “*counsels* the client about the legal
19 consequences, under other applicable law, of the client’s proposed course of conduct.”
20 (See page 9 of Petition) (emphasis added). The concern with the currently proposed
21 ER 1.2(d)(3) language is that it appears to mandate that the lawyer advise the client on
22 “other applicable law” (presumably the conflicting federal law) even if the lawyer is
23 not competent to provide advice on this other body of law. Aligned with the guidance
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1 set forth in Ethics Op. 11-01, if the lawyer is not able to competently advise the client
2 on this other body of law, the lawyer should be able to encourage the client to seek the
3 guidance of another attorney well-versed in this other area of law. ER 1.2(d) should be
4 amended to reflect that the lawyer has two options: (1) advise the client on the potential
5 implications of this other law, if the lawyer is competent to do so; or (2) recommend
6 that client seek the advice of independent counsel knowledgeable on this other body
7 of law.
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10 The State Bar respectfully leaves to the discretion of the Court whether the
11 incorporation of this proposed language is best situated in the body of the proposed ER
12 1.2(d)(3) or as an explanatory comment to ER 1.2. Below are both options for the
13 Court's consideration.
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15 **Option 1: Additional language incorporated into ER 1.2(d)(3):**
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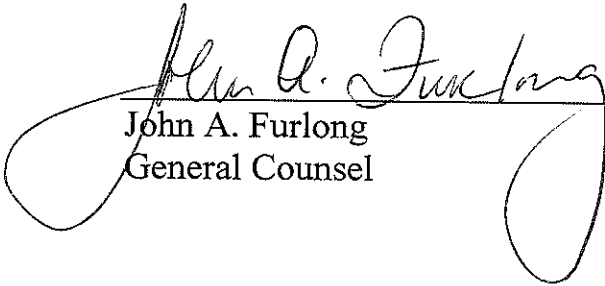
17 A lawyer shall not counsel a client to engage, or assist a client, in
18 conduct that the lawyer knows is criminal or fraudulent, but a lawyer
19 may (1) discuss the legal consequences of any proposed course of
20 conduct with a client; (2) ~~and may~~ counsel or assist a client to make a
21 good faith effort to determine the validity, scope, meaning or
22 application of the law; or (3) counsel or assist a client regarding
23 conduct expressly permitted by Arizona law, provided that the lawyer
24 counsels the client about the legal consequences, under other applicable
25 law, of the client's proposed course of conduct, if the lawyer is qualified
to do so, or recommends that the client seek the advice of independent
counsel knowledgeable in the other applicable law and appropriately
limits the scope of the representation.

1 client's instructions, the lawyer must consult with the client regarding
2 the limitations on the lawyer's conduct. See ER 1.4(a)(5).

3 **CONCLUSION**

4 For the above reasons, the State Bar requests that if the Court is inclined to
5 adopt the proposed amended ER 1.2(d), that the Court incorporate the
6 recommendation set forth in this Comment to the amended rule.
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9 RESPECTFULLY SUBMITTED this 10th day of May, 2016.
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13 John A. Furlong
14 General Counsel
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17 Electronic copy filed with the
18 Clerk of the Arizona Supreme Court
19 this 12th day of May, 2016.

20 by: 
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APPENDIX B

APPENDIX B

Option 1: Additional language incorporated into ER 1.2(d)(3):

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 law, of the client's proposed course of conduct, if the lawyer is qualified to do so, or recommends that the client seek the advice of independent counsel knowledgeable in the other applicable law and appropriately limits the scope of the representation.

Option 2: Additional language as an explanatory comment to ER 1.2:

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

Comment [2003 amendment]

...

[13] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a sham transaction; for example, a transaction to effectuate criminal or fraudulent escape of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d)

recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[14] Pursuant to Paragraph(d)(3), the lawyer should only counsel the client about the legal consequences of other applicable law if the lawyer is qualified to do so. If the lawyer is not qualified or competent in this other applicable body of law, the lawyer may fulfill his or her obligation to the client by recommending that the client seek independent advice from another lawyer knowledgeable in that area of law and appropriately limit the scope of the representation.

~~[14]~~ [15] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See ER 1.4(a)(5).