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9 **(STATE BAR NUMBER 011474)**

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

11 **IN RE:**

R-16-0027

12 **PETITION TO AMEND ETHICAL**
13 **RULE 1.2, RULE 42, ARIZONA**
14 **RULES OF THE SUPREME**
15 **COURT**

MARICOPA COUNTY ATTORNEY'S
RESPONSE TO PETITION TO AMEND
ETHICAL RULE 1.2, RULE 42, ARIZONA
RULES OF THE SUPREME COURT

16 The Maricopa County Attorney's Office hereby responds to the Petition to
17 Amend ER 1.2 and asks this Court to deny the petition as the amendment is
18 inconsistent with the duty of lawyers to uphold the law.

19 In essence, the Petition seeks to create an exception to a longstanding ethical
20 principle of the legal profession - lawyers cannot help clients commit crimes. The
21 Petition creates an exception to this core ethical principle that effectively obliterates
22 the rule in some cases. Effectively the rule would be re-written to say, "A lawyer
23 may not help clients commit crimes unless they are helping them do something state
24 law appears to clearly permit, and the lawyer advises the client that their course of
25 action is in clear violation of Federal criminal law." Thus, the Petition seeks to
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1 modify the ethical rules to permit lawyers to help their clients commit Federal crimes
2 as long as the State of Arizona does not happen to agree with the particular Federal
3 law in question. Such a rule is a very odd view of our federal system of government
4 and directly contradicts one of the stated duties and obligations of every lawyer in
5 this state: "To support the constitution and the *laws of the United States* and of this
6 state." ARIZ. R. SUP. CT. 41 (emphasis added). Permitting lawyers to help clients
7 commit acts that are expressly prohibited by the laws of the United States makes a
8 mockery of this clearly stated obligation.
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12 When the people of a state decide to enact laws that are directly contrary to the
13 supreme law of the land, they must do so knowing and accepting that it will create
14 complications, including the inability to receive legal advice from lawyers on how to
15 break the conflicting Federal law. ER 1.2(d) currently allows a lawyer to discuss and
16 advise a client on the potential legal consequences of any particular action - including
17 opening a marijuana dispensary or possessing marijuana. Explaining the "scope,
18 meaning or application" of the law, as permitted by the current rule, is sufficient;
19 clients are then free to make their own decisions on how they wish to proceed, but the
20 lawyer cannot ignore his or her obligations to the legal system by helping them
21 violate the law. Creating a rule to the contrary does nothing but erode the rule of law
22 that all lawyers took an oath to uphold. What could be more antithetical to lawyer
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1 ethics than adopting a rule that specifically permits lawyers to be willing participants
2 in criminal conduct?
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4 The State Bar has filed a Comment to this Petition that supports the underlying
5 goal of the petition, but their Comment seeks to adjust the Petition to cover a situation
6 where a lawyer who is advising a client on conduct that is "expressly permitted" by
7 the Arizona Medical Marijuana Act (AMMA) is oblivious as to the Federal law on
8 the subject. The Bar seeks to provide for this scenario – not by requiring competence
9 – but by requiring that, if the lawyer is not competent in this area, that they tell the
10 client to seek independent advice on the topic. The Bar's requested change
11 essentially tells lawyers that they can hold themselves out as experts in the AMMA
12 even if they know little or nothing about Federal law in this area as long as they
13 encourage the client to talk to someone else.
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17 It is difficult to imagine how a lawyer could meet the basic competency
18 requirement of ER 1.1 if they are working with the AMMA but know nothing about
19 the potential severe criminal implications under Federal law for the exact acts that
20 they are advising and assisting their client to commit. Are there any other areas of
21 law where attorneys can skirt the competency requirement of ER 1.1 by advising the
22 client to talk to someone else about something as important as committing Federal
23 crimes? Certainly in the criminal arena lawyers are expected to know and advise
24 defendants about clear Federal immigration consequences of plea agreements. To fail
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1 to do so is deficient performance and it rises to the level of ineffective assistance of
2 counsel. *Padilla v. Kentucky*, 559 U.S. 356 (2010). Simply saying, "I don't know
3 how this plea might impact your immigration status, so you should seek the advice of
4 independent counsel knowledgeable in that area" is not enough. While there may be
5 complex federal regulatory schemes [e.g. EPA, IRS Rules and the tax code,
6 commerce based on interstate transportation of goods and people] that would require
7 an attorney to consult with or add specialists to an advisory team, or even refer a
8 client to a specialist in that practice area, that is not the case presented here. There is
9 a fundamental difference when the black letter federal law is clear and not complex.
10 Analogies are imperfect but it appears, by way of example, that the proposed
11 amendment would allow an attorney to facilitate a real estate transaction, knowing
12 that the client intended to use the property as a way station for smuggling illegal
13 immigrants to work sites around the country. The Federal Courts have ruled that
14 Congress has preempted this area of law; therefore there is no Arizona law or
15 regulation pertaining to the activity. The proposed change does violence to the
16 ethical standards necessary for a "self-regulating" profession by attempting to create
17 an unworkable bifurcation of our duty to uphold the law. With our oath and by our
18 craft we surrendered "ignorance of the law" as an excuse, whether representing
19 clients or in our adherence to the ethical rules. This cynical manipulation of the ER's
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1 to advance a policy agenda adopted by popular vote in Arizona has consequences far
2 beyond the stated intent and ought to be abandoned.
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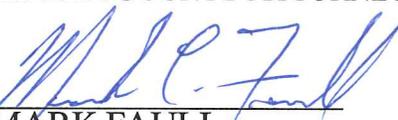
4 One of the main purposes of the State Bar of Arizona is to protect the public.
5 With that fact in mind, it is surprising that the Bar would propose a rule to encourage
6 lawyers to push clients off onto other practitioners instead of forcing lawyers to take
7 the time to become knowledgeable in the area of law where they choose to practice.
8 The Comment proposes changes that do just that. Why become knowledgeable in the
9 possible criminal consequences of a client's plan to distribute marijuana? After
10 giving a client specific instruction that would violate federal law, the lawyer can just
11 say, "You should talk to independent counsel knowledgeable in this area" and
12 seemingly avoid any adverse ethical consequences from assisting the client to commit
13 a Federal crime. Should the client later be arrested and charged with a crime for
14 doing what the lawyer advised, under the Bar's proposed rule, the lawyer can just
15 defend any bar complaint by saying, "I did exactly what ER 1.2 (or the comment) told
16 me to do. It is not my fault the client did not talk to someone who knew that
17 everything I counseled them to do was a Federal offense." It is difficult to imagine
18 how the draft comment helps protect the public.
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24 Petition R-16-0027 is poor public policy and demeaning to the ethical practice
25 of law. ER 1.2 as currently drafted adequately handles the situation by permitting a
26 lawyer to counsel a client on the law without assisting them to violate the law. As
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1 bad as the proposed rule change is, however, the proposed changes in the State Bar's
2 Comment makes it worse by encouraging lawyers to dabble in the AMMA without
3 taking the time to learn what type of Federal criminal exposure they are creating for
4 their clients (and potentially for themselves). For these reasons, the Maricopa County
5 Attorney's Office is opposed to this Petition and asks this Court to deny it in its
6 entirety. The ethical rules should promote the rule of law and the ethical, competent
7 practice of law. The Petition and the Bar's amendments do neither.
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11 Respectfully submitted this 20th day of May, 2016.

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13 WILLIAM G. MONTGOMERY
14 MARICOPA COUNTY ATTORNEY

15 By 
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17 CHIEF DEPUTY
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