REVIEWING EO 11-01: SCOPE OF REPRESENTATION FOR ATTORNEYS ADVISING ON MATTERS PERMITTED UNDER THE AMMA.

The Attorney Ethics Advisory Committee ("Committee") has received a request to revisit Arizona Ethics Opinion 11-01 (2/2011) (the "Opinion"), which addresses whether a lawyer may ethically advise and assist clients with matters relating to the Arizona Medical Marijuana Act ("AMMA"), A.R.S. § 36-2801, *et seq.*, when the actions with which the lawyer would assist may violate the federal Controlled Substances Act ("CSA"), 21 U.S.C. § 801, *et seq. See* 21 U.S.C. § 841(a)(1) ("[I]t shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, [marijuana] . . . ."); *see also United States v. McIntosh*, 833 F.3d 1163, 1179 (9th Cir. 2016) (no state can legalize what federal law prohibits). For the reasons discussed in this memo, the Committee should decline the request.

BACKGROUND

Shortly after Arizona voters passed the AMMA in November 2010, the State Bar of Arizona Rules of Professional Conduct Committee ("Former Committee") issued the Opinion to provide guidance to Arizona lawyers. Specifically, the Opinion addresses whether—

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

Ariz. Op. 11-01 at 1. The applicable ethical rule, ER 1.2(d), provides:

> 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.

Although Arizona was the sixteenth jurisdiction to adopt a medical marijuana law, at the time of the Opinion, Maine was the only one to have addressed the issue. Ariz. Op. 11-01 at 1, 5; *see also* Me. Op. 119 (July 7, 2010). The Maine opinion decided that Rule 1.2(d) "does not make a distinction between crimes which are enforced and those which are not." Me. Op. 119. And with respect to the state's marijuana laws, the rule allows a lawyer to "counsel or assist a client in making good faith efforts to determine the validity, scope, meaning or application of the law," but it "forbids attorneys from counseling a client to engage in the business or to assist a client in doing so." *Id.* Accordingly, the opinion concluded, "[s]o long as both the federal law and the language of the Rule each remain the same," the lawyer's role is limited, and the lawyer "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." *Id.*

The Former Committee considered Maine's opinion, but ultimately "decline[d] 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." Ariz. Op. at 5. Since the Opinion, several states' opinions have concluded, as Maine did, that it would be unethical for a lawyer to assist a client in violating the CSA. Most of these states resolved the conflict by amending their rule or adding explanatory comments to allow lawyers to ethically assist clients with their states' marijuana laws.

However, Maine did not. In 2016, after reviewing the subsequent opinions and rule amendments of other jurisdictions, Maine issued a second opinion "re-evaluating" Me. Op. 119 and "recommend[ing] that [the rule] be amended consistent with that change enacted by other states." Me. Op. 214 (May 1, 2016). "After significant consideration," Maine's rules committee "felt it unwise to craft a rule of general applicability for this specific issue," and instead, suggested a new opinion clarifying "that counseling or assisting a client to engage in conduct that conforms to Maine laws regarding marijuana does not violate Rule 1.2." Me. Op. 215 (March 1, 2017) (vacating Me. Op. 214). The following year Maine issued a superseding opinion recognizing the inconsistency between the rule and the guidance but concluding that the ethical rules are rules of reason, and "[d]efining Rule 1.2 too strictly on matters involving marijuana would inhibit lawyers from assisting clients in testing the boundaries and validity of existing law, which is recognized to be an integral part of the development of the law." *Id.* As did the Arizona Opinion, the new Maine opinion concluded that "[t]he public's need for legal assistance and right to receive it are substantial, and concerns about upholding respect for the law and legal institutions are not significant enough to outweigh those considerations in this circumstance." *Id.*

Around the time Maine sought to revisit its opinion, the author of this request petitioned the Arizona Supreme Court to adopt Connecticut's Rule 1.2(d), thereby permitting a lawyer to "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." But the Court did not amend the rule. A second petition was submitted in 2018, which the Court also denied, leaving Arizona and Maine in the same position. In both states, a lawyer assisting a client in complying with the states' marijuana laws is likely violating the plain text of Rule 1.2(d) but could fairly expect not to be disciplined for the conduct. An inconsistent result the request aims to correct.

DISCUSSION

The request does not present new circumstances or identify why the Opinion is no longer workable. The complaint is twofold: (1) the Opinion is wrong; and (2) "system integrity" requires it to be fixed.[1] The request states that "[f]or nearly a decade [Arizona has] had an "an intellectually untenable situation: rules that say one thing and a nonbinding advisory opinion that says another." (Footnote omitted.) The author notes that "[i]t certainly would be more comfortable and non-controversial to maintain the status quo and perpetuate Op. 11-01's conclusion. But we should make sure any direction given to lawyers can be

[1] A third reason provided was that the Opinion somewhat relied on a DOJ policy that provided a safe harbor for some marijuana-related conduct and the safe harbor has since been rescinded. However, the Opinion notes that, although it was not pursuing "seriously ill individuals" and caregivers, the DOJ position was that it would "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." Because the Opinion was not concerned with seriously ill individuals or caregivers, there has been no relevant change to the DOJ's policy.

reconciled with our professional rules. If that direction cannot be reconciled with our professional rules, then either the direction or the rules need to be changed."

It is unlikely that the Committee could reach the same conclusion today based on the plain language of the rule and given the numerous jurisdictions that have interpreted the same or substantially similar language to require a rule change to allow for a lawyer to engage in the conduct. Nevertheless, the Committee should deny the request because: (1) the Court has repeatedly expressed its unwillingness to address the matter; (2) the Committee would be unable to provide a complete analysis without considering "pure questions of law"; and (3) because the existence of the Opinion and the lawyers' reliance thereon is not currently creating a problem that warrants re-visiting the almost-decade-old decision.

First, revisiting the Opinion is unlikely to result in a satisfactory result at this time. Any opinion from the Committee must be submitted to the Arizona Supreme Court. To date, the Court—not unaware of the issue—has opted not to take any action by amending the rule to permit or prohibit the conduct or adding comment to clarify. Furthermore, the Court has twice declined an express request for it to act by denying the rule change petitions, which were supported by the State Bar and the Attorney Regulation Advisory Committee. There is no reason to believe that the Court would do different now. It is not unreasonable to believe that the Court is both, choosing not to publicly declare that it is ethical for lawyers to assist clients in violating federal law, and providing implicit permission to do just that by refusing to curtail the conduct.

Second, an decision from the Committee that concludes the Opinion does not comport with the rules would be incomplete without addressing A.R.S. § 36-2811(F), which provides, "[a] registered nonprofit medical marijuana dispensary agent . . . may not be denied any right or privilege, including . . . disciplinary action by a court or occupational or professional licensing board or entity, for working or volunteering for a registered nonprofit medical marijuana dispensary." *See also* A.R.S. § 36-2801(13) (defining a nonprofit medical marijuana dispensary agent). The statute purports to protect some lawyers, including in-house counsel, from discipline but not others. At the least, opining on this issue requires the Committee to consider whether certain lawyers are exempt from discipline based solely on their employment status, which, in turn, raises the question of whether a statute can do that. *See In re Shannon*, 179 Ariz. 52, 76 (1994) ("[T]he combination of article 3, which creates three separate government departments, and article 6, § 1, which vests judicial power with the judicial department, confers upon this court the power to discipline members of the bar."); Ariz. Const. art. 22, § 14 ("Any law which may be enacted by the Legislature under this Constitution may be enacted by the people under the Initiative. Any law which may not be enacted by the Legislature under this Constitution shall not be enacted by the people."). Both questions are outside the Committee's scope. *See* Ariz. R. Sup. Ct. 42.1(c)(3) ("The Committee may not . . . issue opinions . . . on pure questions of law . . . ."). Although the Committee could resolve whether the conduct is consistent with a lawyer's ethical requirements without discussing the potential consequences for engaging in such conduct, it would only serve to settle the academic debate without providing any meaningful guidance to lawyers or the State Bar.

Third, revisiting the discussion does little to provide a lawyer practicing in the area additional clarity or comfort. Even if the Opinion received the Court's blessing, relieving a lawyer from the possibility of discipline does not protect the lawyer from the risk of criminal penalties. *See McIntosh*, 833 F.3d at 1177, 1179, n.5 (although the DOJ is currently prohibited from expending funds to prosecute an individual who engaged in conduct permitted by the state's medical marijuana laws, "Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals

who committed offenses while the government lacked funding"). Furthermore, it does not appear that the absence of a binding opinion has deterred lawyers from the practice. For the past decade, lawyers have been providing these services while, at best, relying on an opinion which is "advisory in nature only and [is] not binding in any disciplinary or other legal proceeding[]." Yet, Arizona has a "Cannabis Bar Association," lawyers that openly advertise cannabis-related services, and nearly half of the March 2020 Arizona Attorney magazine was dedicated to "Cannabis Law." It is quite possible, and more likely, that a lawyer who is not involved in cannabis law simply does not want to be.

Finally, a lawyer is no more or less at risk today than he or she was nine years ago. In 2010, the State Bar notified lawyers that guidance on the AMMA would be provided prior to the act's effective date and it would not pursue discipline against lawyers who advised on compliance with the AMMA "in the interim." *See* https://www.azbar.org/newsevents/newsreleases/2010/12/statebarofarizonaissuesstatementclarifies roleinthemedicalmarijuanalawandtherulesofprofessionalconduct/ (December 3, 2010). The referred-to guidance was provided shortly after in the form of the Opinion. Nine years later, the State Bar has not retracted its position—nor has it pursued discipline predicated on the conduct, the Court has not taken steps to prohibit the conduct, and the inconsistent rule and Opinion have co-existed. Although reconciliation of the rule and the Opinion is ideal, it is unlikely that lawyers and the clients who rely on their guidance would be willing to risk disrupting their businesses to achieve system integrity and clarity.[2]

CONCLUSION

Without a reason to warrant reexamining the Opinion, its propriety is not relevant. Since 2011 many lawyers and their clients have made career decisions based on the Opinion and neither the State Bar nor the Arizona Supreme Court has given them reason not to. This is a rapidly-changing area of law and it would be a disservice to the lawyers and their clients to pull the rug out from underneath them now. Accordingly, the Committee should decline to reopen the issue unless review becomes necessary.

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[2] The request's example of another "unpopular but accurate conclusion" that did not cause the legal profession to "implode," is not comparable to the situation at hand. In that instance, the Court issued an emergency order amending a rule in anticipation of an opinion that would have concluded that the Maricopa County Bar Association's referral service fee structure did not comply with the rules. The request implies the same result is possible here. But if the Court were so inclined, it would have. A rule petition to achieve the same result has been denied twice. The issue presented in the Opinion is likely more controversial than the MCBA's not-for-profit lawyer referral service and there are many reasons to doubt the same outcome.