ARIZONA JUDICIAL COUNCIL

Request for Council Action

Date Action Requested:	**Type of Action Requested:**	**Subject:**
December 14, 2023	XX Formal Action/Request __ Information Only __ Other	REPORT FROM AN ETHICS TASK FORCE

FROM:

Hon. William G. Montgomery
Justice, Arizona Supreme Court
and Task Force Chair

DISCUSSION:

In February 2022, the Arizona Supreme Court entered an Administrative Order that noted the "unique roles and statutory responsibilities in the justice system" of the state attorney general, county attorneys, and other public lawyers. The Order further observed that the current attorney ethics rules "might not adequately contemplate or address those unique roles and the potential conflicts of these public attorneys." The Court therefore established a Task Force on Ethics Rules Governing the State Attorney General, County Attorneys, and Other Public Lawyers. The Order directed the Task Force "to determine if pertinent ethical rules for Arizona public lawyers should be modified," and if the Task Force so determined, that it recommend amendments.

The Task Force is accordingly submitting this report to the Arizona Judicial Council, as required by the Court's Order. This report recommends amendments to certain ethics rules ("ERs") in Supreme Court Rule 42, as detailed in Attachment 2 to the report.

RECOMMENDED COUNCIL ACTION:

A motion that authorizes the Task Force to file a rule petition in the 2024 rules cycle requesting adoption of the proposed amendments to the ethics rules.

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Report to the Arizona Judicial Council from the Task Force on Ethics Rules Governing the State Attorney General, County Attorneys, and Other Public Lawyers

December 14, 2023

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Executive Summary.

All members of the State Bar of Arizona -- private lawyers as well as lawyers denominated as government lawyers -- have professional duties established by Arizona Supreme Court Rule 41 ("Duties and Obligations of Members.") Supreme Court Rule 41 expressly refers to and includes the ethical responsibilities prescribed by Supreme Court Rule 42 ("Arizona Rules of Professional Conduct.")[1]

Unlike the nature of client representation for most lawyers in private practice, the representation of a government client —and the scope of the government lawyer's representation—is provided by constitutional provisions, statutes, or ordinances. These laws also establish the offices in which government lawyers serve in addition to setting forth their duties and responsibilities. The mandates of these codified provisions may occasionally conflict with this Court's ethical requirements regarding the general attorney-client relationship. At other times, Rule 42 fails to adequately address particular ethical issues a government lawyer might encounter in carrying out the representation of a government client. These situations can pose ethical conundrums for the lawyers who work for the Arizona Attorney General or a County Attorney, for other state agencies, or for Arizona municipalities or districts.[2]

With this in mind, the Supreme Court entered Administrative Order No. 2022-22 (see Attachment 1 to this report) and established the Task Force on Ethics Rules Governing the State Attorney General, County Attorneys, and Other Public Lawyers ("Task Force.") The Court's Order noted the "unique roles and statutory responsibilities in the justice system" of the state attorney general, county attorneys, and other public lawyers, and observed that the current ethics rules "might not adequately contemplate or address those unique roles and the potential conflicts of these public attorneys." The Order established this Task Force "to determine if pertinent ethical rules for Arizona public lawyers should be modified," and if the Task Force so determined, that it recommend amendments. The

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[1] Rule 41(b) says, "The duties and obligations of members, including affiliate members, shall be (1) Those prescribed by the Arizona Rules of Professional Conduct adopted as Rule 42 of these Rules." The first sentence of Rule 42 then provides, "The professional conduct of members shall be governed by the Model Rules of Professional Conduct of the American Bar Association, adopted August 2, 1983, as amended by this court and adopted as the Arizona Rules of Professional Conduct."

[2] The State Bar of Arizona advised in 2022 that there were 15,181 active status attorneys in Arizona, and that 1,686 of those (11%) are public lawyers.

Task Force is submitting this report to the Arizona Judicial Council ("AJC"), along with its proposed rule amendments, as directed by that Order.

Task Force members included current and former government lawyers at diverse levels of government, as well as a representative government client and a legal ethics expert.[3] The Task Force also had the benefit of participation by similarly qualified proxies and guests from all levels of government, including the federal government, with first-hand experience in either representing government clients or being represented by government lawyers.[4] The Task Force considered hundreds of pages of reference materials, some of which are identified in this report.

Members met 20 times. The number of meetings was due in part to the complexity of the subject matter, which was characterized as "narrow but deep." The number of meetings was also reflective of the Task Force drafting amendments in three different formats as discussed in Part II of this report.[5]

The members' discussions resulted in a unanimous recommendation that the AJC approve the filing of a rule petition in the 2024 rules cycle requesting the adoption of amendments to the ethics rules ("ERs"), as shown in Attachment 2 to this report.

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[3] Task Force members are identified in A.O. No. 2022-22; please see Attachment 1. Mr. Scott Rhodes, who is identified in that Order, regrettably had to withdraw before the first Task Force meeting to avoid any potential conflict with his pending rule petition, No. R-22-0024. Ms. Polk resigned from the Task Force upon her retirement from office in February 2023. Mr. Kros, who was formerly with the Arizona State Senate, is now with the State Treasurer's Office. A.O. No. 2023-32, which added four members to the Task Force, is also included in Attachment 1.

[4] Proxies included Ms. Regina Nassen, former chief ethics counsel for the Pima County Attorney's Office and now a principal assistant city attorney for the City of Tucson; Mr. James Lee, senior State Bar counsel; deputy Maricopa County Attorneys Joseph Vigil and Charles Trullinger, Mr. Thomas Stoxen, chief civil deputy for the Yavapai County Attorney, and Daniel Barr, Chief Deputy Attorney General. Several of the individuals who presented at the second Task Force meeting (see footnote 7), including Ms. Nassen, Mr. Cardenas, and Ms. Demarchi, attended, and provided input at, subsequent Task Force meetings. Mr. William Ring, the Coconino County Attorney, provided both written and oral comments to the Task Force. Mr. Emory Hurley, an assistant United States Attorney for the District of Arizona, attended almost every meeting.

[5] The various formats consisted of a single new Rule 1.19, a standalone set of new Rules 9.1 through 9.4, and finally, a set of rule amendments integrated into the current rules (Appendix 2).

The Task Force has two subsidiary recommendations, one concerning continuing legal education for government lawyers regarding these amendments, and the other pertaining to a handbook for government lawyers, which is a work-in-progress of the Arizona Prosecuting Attorneys Advisory Council ("APAAC").

I. First recommendation: Authorize the Task Force to file a petition requesting the Court to adopt integrated amendments to Supreme Court Rule 42 pertaining to government lawyers.

A. Materials

Before their first meeting, members considered more than 500 pages of reference materials. Those materials included excerpts from the Arizona Constitution, from Titles 11 and 41 of the Arizona Revised Statutes, and from Arizona Supreme Court Rules. The materials for the first and subsequent meetings also included several Arizona cases,[6] documents prepared or used by former Deputy County Attorneys of the Pima County Attorney's Office,[7] law review articles,[8] written memos submitted by Task Force members,

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[6] Arizona cases considered by the Task Force included *Hudson v. Kelly*, 76 Ariz. 255 (1953); *Arizona State Land Department v. McFate*, 87 Ariz. 139 (1960); *Maricopa Board of Supervisors v. Woodall*, 120 Ariz. 379 (1978); *Romley v. Arpaio*, 202 Ariz. 47 (2002); *Romley v. Daughton*, 225 Ariz. 521 (COA-1, 2010); *State ex rel. Brnovich v. Arizona Board of Regents*, 250 Ariz. 127 (2020); and *State v. Superior Court (Henderson)* CR-21-0388-PR (August 7, 2023).

[7] The Pima County materials included a Function Statement: Powers and Duties of the Pima County Attorney, identifying action by the civil division mandated by state statutes, the county code, and county policies; Pima County Attorney Policy 2.2, regarding a duty of its employees to notify and disclose certain events and relationships; Pima County conflict of interest memo to county employees; and Pima County Attorney's Office (Civil Division) memorandum to elected officials, administrators, and managers regarding the county's legal representation. The foregoing materials are available in a supplemental March 31, 2022 meeting packet on the Task Force webpage.

[8] The law review articles are the following: Justin G. Davids, "State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers," analyzing the Colorado Supreme Court opinion in *People ex rel. Salazar v. Davidson*; Aviva Meridan Kaiser, "Ethical Issues in Representing Government Clients;" Paula K. Maguire, "The Attorney General: Political Loyalty v. Professional Responsibility – The Ethical Challenge in Serving Three Masters," 23 J. Marshall L. Rev. 229 (1990). The foregoing materials are available in the March 31, 2022, meeting packet on the Task Force webpage.

and Mr. Rhodes' rule petition, No. R-22-0024. The Task Force also considered the 1990 Attorney General Ethics Manual (see further Part IV of this report) and "Practicing Ethics: A Handbook for Municipal Lawyers" prepared by the League of California Cities.[9] The materials that the Task Force considered are available on the Task Force webpage.

B. Presentations and Preliminary Discussions

Members held their first meeting on March 31, 2022. The meeting included a presentation by Ms. Lisa Hauser, deputy counsel for the Administrative Office of the Courts, on the origin of the Governor's Office of Legal Counsel, which was established in 1995 by the enactment of A.R.S. § 41-192(E). The pertinent history involved a strained relationship between the then-Governor and Attorney General, the latter who served as the Governor's legal counsel under the existing law, and the Governor's desire to receive independent legal advice.

During an ensuing discussion, members observed that the current ethics rules were written primarily for attorneys in private practice. There are occasional references in the current rules and comments to government attorneys, but those references are somewhat general and provide only marginal guidance for government lawyers. One member noted that few legislators are members of the Bar, and they might not be aware of potential ethical issues and conflicts of interest that are inadvertently embedded in legislation. Several members stressed the need for government attorneys to be mindful of the identity of their clients and that government attorneys should promptly communicate with newly elected and appointed officials to reinforce who they represent.

At their next meeting, members considered presentations from nine distinguished individuals.[10] Mr. Ernest Calderon addressed issues of loyalty and confidentiality, and the

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[9] These materials are also available on the Task Force webpage. Here are links for the Attorney General Ethics Manual and the League of California Cities Handbook.

[10] Mr. Calderon is a former president of the State Bar of Arizona and previously served as president of the Arizona Board of Regents and the Arizona Board of Dental Examiners. Mr. Twist, who is now general counsel for a corporation, served 12 years as a chief assistant Arizona Attorney General. Mr. Cardenas has practiced law for more than forty years; he most recently served as general counsel for Arizona State University ("ASU") from 2009 to 2023. Ms. Demarchi, who serves as senior associate ASU general counsel, also is a member of the Arizona Supreme Court's Attorney Ethics Advisory Committee. Mr. Rhodes has spent his long career in the area of lawyer ethics and has represented private and public organizations as well as individuals in this area. Ms. Shely was formerly the director of ethics for the State Bar of Arizona. She is currently an attorney in private practice focusing on ethics matters and also serves as chair of the American Bar

need for ethics rules to be comprehensible by government officials. Mr. Steve Twist offered observations and historical background concerning the Supreme Court's decision order in *Mecham v. Superior Court (Corbin)*, CV 87-0410-SA (1997). Mr. Jose Cardenas and Ms. Kim Demarchi addressed the need for professionalism and the belief that ethics rules should apply to public lawyers with the same weight and force that they apply to private attorneys. Mr. Scott Rhodes explained the concepts of screening in R-22-0024, a petition he had filed on behalf of the Arizona Attorney General. Ms. Lynda Shely spoke about conflicts of interest. Ms. Betsey Bayless and Ms. Sharon Bronson, both of whom have served as non-lawyer public officials, shared their experiences with government lawyers from the client's perspective. Ms. Regina Nassen offered a conceptual framework for distinguishing government clients and client representatives reflecting the approach taken by the Pima County Attorney's Office during her service as a deputy county attorney.

During a subsequent meeting that focused on the practice of municipal lawyers, members heard presentations from Nancy Davidson, General Counsel for the Arizona League of Cities and Towns, and from Joseph Estes, a lawyer in private practice who currently serves as the town attorney for Bisbee, Litchfield Park, Miami, and Quartzite. Finally, Ms. Stacy Ludwig, Director of the Department of Justice ("DOJ") Professional Responsibility Advisory Office, addressed the potential application of the proposed ER amendments to federal government lawyers. Ms. Ludwig underscored the organizational and legal differences in federal practice representing federal government clients. (Ms. Ludwig's DOJ colleague, Emory Hurley, who is mentioned in footnote 4, routinely noted these differences during Task Force meetings.)

C. Further Discussion of the Issues.

During the first several meetings, members discussed and formulated the issues that their proposed amendments should address. The discussion was informed by a 12-page, March 31, 2022, memo prepared by Task Force member Pat Sallen to David Byers, Director of the Administrative Office of the Courts. The introduction to Ms. Sallen's memo said,

> The rules governing lawyers' professional conduct generally have been written with private lawyers in mind and without taking into comprehensive account the special circumstances of public lawyers who have statutory obligations that make them distinctly different from private practitioners....While the rules have moved

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Association Committee on Ethics and Professional Responsibility. Ms. Bayless served as Secretary of State and as the chief executive officer of the Maricopa Integrated Health System, charged with administering the public hospital and healthcare system for Maricopa County. Ms. Bronson currently serves on the Pima County Board of Supervisors.

incrementally to more of a one-size-fits-*most* system – and the current iteration of rules includes specific references to government lawyers – they still do not adequately address the differences of government lawyers, notably public agencies that handle civil matters. At its most basic, the problem is how the rules intersect with and specifically acknowledge those lawyers' statutory obligations while at the same time working in harmony with the entire network of rules.

One of the core concepts the Task Force discussed was that of the "client representative." With rare exceptions, the client of a government lawyer is a government organization, e.g., the State of Arizona, or a county, municipality, or special district. Current ER 1.13 ("Organization as Client") is therefore quite pertinent, and the current ER even contains two comments, numbers 9 and 10, under the heading "government agency." But the current ER does not fit well with the reality of government practice. For example, ER 1.13(a) provides, "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." The phrase "duly authorized constituents" might be suitable for lawyers in corporate practice, but in government practice, the phrase suggests the voters, and it is therefore inapt in this context.

In addition to discussing amendments that used appropriate terminology, members determined that the amended ERs should address the following fundamental questions:

- Who is the government lawyer's client?
- Who is the client representative?
- Who is a government lawyer?
- What duties does a government lawyer owe to the client and the client representative?
- What should a government lawyer do if there are disagreements among client representatives?
- Can a government lawyer bring an administrative, civil, or even a criminal action against a client representative?

D. The first two drafting efforts: ER 1.19 and the standalone rules (ERs 9.1 to 9.4.)

The Task Force efforts to draft amendments to Rule 42 had three phrases. Throughout the drafting process, the Task Force strived to be concise and to eliminate surplusage. More text can bring less clarity rather than greater clarity and can inject issues that create unintended consequences. At the same time, the members recognized that the substance of the proposed amendments needed to provide sufficient guidance. The Task Force also intended that its proposed provisions be flexible and general in nature rather than specific and prescriptive. It wanted to facilitate adherence to the new provisions and

not create traps for the unwary. It also recognized the futility of attempting to address every potential ethics scenario in these proposed amendments. Additionally, members strove to provide guidance concerning the existing practices of government lawyers and to not create new authority or duties. Those proposed amendments accordingly addressed the most common scenarios. Proposed provisions that were in the nature of best practices were deleted from the drafts or relocated as comments.

The first effort was a draft of a single rule that attempted to synthesize the members' discussions during the first several meetings. The draft rule was tentatively numbered as ER 1.19 (the last rule in Part 1 of the current ethics rules is number 1.18) and it was titled "special duties of a government lawyer." A staff memo explained that the definitions in draft ER 1.19 ("government client," "government entity," "client representative," "government law firm," "government lawyer," and "individual government client") were the foundation of the rule. The remaining sections of the draft addressed "the role of a government law firm," "identifying the government law firm's client and client representatives," "required initial communication," "qualifications regarding the initial communication requirement," "authority to act," "disagreements between client representatives regarding authority to act," "formal action against a client representative," "confidentiality," and "substitute representation."

ER 1.19 therefore provided a central location for provisions pertaining to government lawyers. The drawback was that this rule was formatted differently than the other ERs. Consistent with the Court's rule restyling conventions, draft ER 1.19 included section and subpart titles, and it was organized into distinct segments rather than long block paragraphs. The current ERs for the most part do not have these features. Although members recognized that ER 1.19 could serve as a standard for modifying the other ERs, they agreed it was unlikely that conforming modifications to the entire body of ethics rules would be made in the foreseeable future. In the meantime, in the words of one commentator, draft ER 1.19, which adhered to modern restyling conventions, would "stick out like a sore thumb" among the other traditionally styled ERs.

Members then undertook a second effort, a new alternative that would allow retention of the titles and organization of the proposed draft while also mitigating its different appearance. The current ERs, numbered 1.0 through 8.5, are organized into eight unnumbered parts. The new alternative involved adding a ninth part under the title "special duties of a government lawyer." This approach would have permitted retention of the section and subpart titles, yet without the new rules being obviously different because they would be located at the back of the current ERs, unlike ER 1.19, which would have been located in the middle. These new provisions, provisionally numbered ERs 9.1 to 9.4, would have been grouped together, in their own, special section at the end of Supreme Court Rule 42, separate and apart from the other ERs. In March 2023, the Task Force

submitted this freestanding set of rules to a dozen organizations for comments.[11]

Although there were not many comments, the comments that were received were critical of the work product, particularly the proposed definitions, which the comments found were either over- or under-inclusive. Members acknowledged the challenge of fashioning definitions that appropriately identified the government client, a government lawyer, and client representatives. After further discussion, the members scrapped the standalone rules. They instead opted to embark on a third effort: to prepare another version, an "integrated" version, that amends the existing Preamble and 8 of the 18 rules in Part 1 ("Client-Lawyer Relationship") of the current ERs.

E. The proposed integrated amendments.

The integrated amendments address the fundamental questions identified in Section C above.

1. Who is the government lawyer's client?

The question on its face appears to be an easy one, but in practice, it is not. The Office of the Arizona Attorney General, for example, provides advice to, or represents, a wide variety of professional licensing boards, other state agencies, and elected and appointed officials. Thus, the client of the Arizona Attorney General and each assistant attorney general in that office is the State of Arizona and, in some circumstances, other state agencies, officers, and employees. In the case of a county, the county attorney's client is the county, and for each municipal attorney, the respective municipality is the client. Whether other entities or individuals are also clients of these government lawyers requires a specific analysis. The proposed amendments provide guidance on these issues.

2. Who is the client representative?

The State of Arizona, counties, municipalities, and other political subdivisions require real people to make decisions on their behalf and to operate and execute the day-to-day functions of government. Accordingly, in the case of the State, the various officials and employees of boards and commissions created and delegated authority by law to carry out the specific duties and responsibilities on behalf of the State are the State's client representatives. The proposed amendments note that the client and the client representative can be the same. To illustrate the concept of client representatives, consider the fact that

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[11] The draft was submitted to the Arizona Association of Counties, the County Supervisors Association, the Arizona League of Cities and Towns, the Arizona Prosecuting Attorneys Advisory Council, the State Bar's Public Law Section, the Maricopa County Bar's Public Lawyers Division, the Arizona Attorney General, ethics professors at the Rogers and O'Connor Law Schools, the Arizona Association of Defense Council, and to everyone who had previously made presentations to the Task Force.

the executive authority of the State is arranged horizontally; that is, the authority is assigned among several co-equal office holders in the Executive Department: the governor, lieutenant governor, secretary of state, attorney general, state treasurer, and superintendent of public instruction. Arizona Constitution, art. 5, sec. 1. They each exercise executive authority on behalf of the State.

A similar arrangement exists among counties. At the county level, executive authority is delegated to the Recorder, the Treasurer, the Assessor, the Sheriff, the County Attorney, the School Superintendent, and a Board of Supervisors. The county attorney represents each of these elected officers, as well as a myriad of county departments. But although the county attorney is required by statute to advise and represent them all, usually these elected officials or departments are not the county attorney's "clients" as that term is understood in the private practice of law. With the County as the client, the client representatives may consist of the various elected officials in their respective roles as provided by law, and any county boards, or commissions. Deputies and assistants of elected officials would also be client representatives to the extent they exercise the authority delegated to the elected official. So also, the heads of various county departments – transportation or highway, elections, libraries, and a long list of others – would be client representatives, as would individuals within the departments who have authority to act, expressly or by delegation, in specific instances.

The same principle applies to municipalities and other political subdivisions, which typically have vertical executive authority or authority vested in one office or body. Unlike the State and counties, where elected officials are often co-equals or on the same level of an organization chart, these cities, towns, and other political subdivisions customarily have an elected mayor, council, or governing board at the top, and everyone else in the organization is appointed or hired by or through the executive authority. These other individuals would appear further down on the organization chart with delegated authority from the executive official or body, or authority established by ordinance. Still, the client is the city, the town, or the political subdivision, rather than the mayor, council, or governing board, or any of the organization's departments or subparts. See the integrated amendments in Appendix 2, ER 1.0(r), for the proposed definition of a client representative.

A notable exception exists in federal government practice. The United States Attorney General, as a matter of law, is the sole client representative in federal matters. And the Attorney General's only client — and the only client of the attorneys in the Department of Justice — is the United States of America. This feature was the subject of considerable discussion, particularly because federal attorneys practicing in Arizona are bound by Arizona's Rules of Professional Conduct. The Task Force intended that its proposed rules accommodate the differences in representing federal government clients.

3. Who is a government lawyer?

Once again, a seemingly simple question does not have a simple answer. For the State and counties, the highest government lawyer is an official elected by the voters, i.e., the Arizona Attorney General or the County Attorney in each of Arizona's 15 counties. The duties of these lawyers are specified by statute, as discussed below. A government lawyer would also encompass the assistant and deputy attorneys appointed or hired by the elected attorneys.

But it gets more complex. Although the Arizona Attorney General, for example, is authorized to represent the State and its various agencies and officials, some agencies or officials have their own, in-house attorneys, as provided by law. The Governor, for example, has statutory authority to hire his or her own counsel. The Arizona Board of Regents has an in-house counsel, but it might also be represented by the Arizona Attorney General, as provided by statute for specific services, and under a contract with the Attorney General for other services.

There's a further level of complexity. Although counties often have intergovernmental agreements that allow one county attorney to refer a matter to another county attorney in the event of a conflict of interest, referral is not always possible. This is particularly the situation with matters involving highly specialized practice areas, and in those situations, certain government matters might be referred to attorneys in private practice. Moreover, a small town or a special district might not need a full-time attorney on its payroll, and it might contract with a private attorney to serve as the town attorney on a part-time basis. All these situations required consideration in drafting a definition of government lawyer. See the integrated amendments in Appendix 2, ER 1.0(s), for the proposed definition.

4. What duties does a government lawyer owe to the client and the client representative?

Typically, the duties of a government lawyer are specified by statutes, ordinances, or the Rules of Professional Responsibility. A document that former deputy county attorneys of the Pima County Attorney's Office shared with the Task Force (see the "Function Statement" in footnote 7 to this report) identified 141 individual duties of the County Attorney under the Arizona Revised Statutes. The document identified 16 additional duties under the Pima County Code, 8 duties under Board of Supervisors' policies, and 18 more duties under codified Pima County Administrative Procedures. The Function Statement continued with a list of dozens of additional duties under the Arizona Revised Statutes pertaining to criminal and juvenile proceedings. These duties arise under applicable law. The duties of the Arizona Attorney General, other county attorneys, and the lawyers for municipalities and special districts, are similarly specified by applicable law.

The Task Force made an important distinction, however. Where a public lawyer's representation of a government client is required by applicable law, then all of the ERs—including the proposed ER amendments—would be fully applicable. However, where representation is not required by applicable law but is otherwise permitted by written agreement between the lawyer and a government client, then the terms of the representation would be governed by that agreement. In that latter circumstance, the lawyer's representation would be subject to those ERs that are generally applicable to any attorney-client relationship, but the relationship would not be subject to the ERs specifically pertaining to representation of a government client.

Finally, the Task Force addressed the need to communicate the scope of representation and particular duties of a government lawyer to ensure that the client representative understands the nature of the representation.

5. What should a government lawyer do if there are disagreements among client representatives?

This happens occasionally. Note that the operative term here is "disagreements." These disagreements are sometimes referred to as conflicts of interest, but that is an inaccurate characterization. As a matter of law, there should always be an individual or group of individuals within the government entity with ultimate authority on a litigated case or other matter. The proposed rule amendments clarify that identifying that individual or group is not determined under the ethics rules, but rather it is determined as a legal matter. If the law does not clearly provide guidance for the disagreement, i.e., which client representative has the ultimate authority in the matter, and the government lawyer is unable to resolve the disagreement, the government lawyer might need to arrange for both client representatives to have independent counsel and let them seek a declaratory judgment.

6. Can a government lawyer bring an administrative, civil, or even a criminal action against a client representative?

Arizona statutes specifically provide for such a possibility. At the county level, for example, a statute requires the county attorney to file suit against the county assessor if the assessor declines to assess a parcel of real estate, but the county attorney is also responsible for providing day-to-day legal advice and representation to the assessor on other matters. This could require that the county attorney refer one or the other of these duties to outside counsel. As another example, an elected county official could be charged with a crime; the county attorney in this situation might need to refer the prosecution to outside counsel or refer other duties owed to that official to outside counsel. The proposed ER amendments provide guidance for these scenarios.

II. Second recommendation: Require continuing legal education for government attorneys regarding the amended ethics rules.

Supreme Court Rule 45 ("mandatory continuing legal education") requires a minimum of three hours of continuing legal education each educational year in the area of professional responsibility, including legal ethics and professionalism. This report proposes that a portion of that ethics training for government lawyers, perhaps one hour annually, include a session on the amended ethics rules. (The proposed rule could be modified to require one hour of training at the outset, but not as an annual requirement.) The State Bar could develop that training module, either as a freestanding program or in conjunction with other CLE topics. Alternatively, large offices such as the Arizona Attorney General or the Maricopa County Attorney, or APAAC, could offer such programs to its professional staff and to other government lawyers.

A proposed amendment to Rule 45 would accordingly provide:

(a) Continuing Legal Education Requirements.

1. Every active member of the bar, not exempted, shall complete a minimum of fifteen hours of continuing legal education activity in each educational year. An educational year shall begin on July 1 and end on the following June 30.

2. A minimum of three hours of continuing legal education activity each educational year shall be in the area of professional responsibility. Professional responsibility includes instruction in legal and judicial ethics, professionalism, and malpractice prevention, and may include such topics as substance abuse, including causes, prevention, detection and treatment alternatives, attorneys' fees, client development, law office economics and practice, alternatives to litigation for managing conflict and resolving disputes, stress management, and the particular responsibilities of public lawyers, judges, and in-house counsel, to the extent that professional responsibility is directly addressed in connection with these topics. Lawyers appointed, or employed, as government lawyers must have at least one hour on rules that are specifically applicable to government lawyers.

[No change to the remainder of the rule.]

III. Third recommendation: Support APAAC's update to the Attorney General Ethics Manual.

One of the items available to members at the first Task Force meeting was the "Attorney General Ethics Manual" (hereafter "Manual"); see footnote 9 of this report. The Manual was provided by Arizona Attorney General Robert Corbin to his assistant Attorneys General in May 1990. (See Attachment 3, Mr. Corbin's introductory letter dated May 16, 1990, which recognized that balancing the ethical obligations of those lawyers while also providing quality legal services "can be extremely difficult at times." The Manual was intended to "aid in the resolution of difficult issues.") The Manual is more

than 150 pages and includes, after individual ethical rules or comments, a comparison with the previous ethics code and, more pertinent to this recommendation, an "Attorney General Discussion" that analyzed and provided guidance on the relevant ethics issues from the perspective of experienced government attorneys. Although the Manual is now 33-years old, several members of the Task Force were familiar with it and continue to keep a copy for reference.

Members agreed that although lawyers might continue to refer to the Manual, it is somewhat outdated. Members did not believe it would be appropriate for this report to recommend to the Arizona Attorney General that the Office update its Manual. At the urging of the Task Force, however, a member inquired whether APAAC would voluntarily agree to undertake that endeavor. APAAC in fact agreed to do so, and Mr. William Ring, the Coconino County Attorney, is leading APAAC's effort. He has enlisted the assistance of civil attorneys from various government law firms in Arizona as well as a few members of this Task Force. The Task Force anticipates that the updated Manual will include best practices and that it will address nuances and provide details and form templates that are beyond the scope of the proposed rule amendments.

Members considered referring to the updated Manual in one of their proposed rules, or in a comment, but decided against doing so because preparing the update will take considerable time and it almost certainly will not be finalized before the effective date of the proposed amendments, should the Court adopt them. However, upon completion of the updated Manual, the Task Force recommends that the Court consider specific reference to the Manual, either expressly by an appropriate amendment to the ERs, or by entry of an Administrative Order that formally acknowledges the Manual and its use as an authoritative resource for government lawyers.

IV. Conclusion.

The Task Force requests the AJC's authorization to file a rule petition in the 2024 rules cycle that proposes the adoption of integrated amendments to Supreme Court Rule 42, as shown in Appendix 2 to this report.

Administrative Order No. 2022-22 does not include an ending date for the terms of the Task Force and its members. If the Arizona Judicial Council authorizes the filing of a rule petition, members will reconvene in 2024 to discuss a reply to public comments concerning the proposed amendments.

Members appreciate the opportunity to serve on this Task Force and to recommend improvements to these ethical rules for the benefit of government lawyers, client representatives, and the people of the State of Arizona.

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Table of Attachments

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ATTACHMENT 1

Supreme Court Administrative Orders

No. 2022-22 and No. 2023-32

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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	
	)	
ESTABLISHMENT OF THE TASK FORCE ON ETHICS RULES GOVERNING THE STATE ATTORNEY GENERAL, COUNTY ATTORNEYS, AND OTHER PUBLIC LAWYERS	)	Administrative Order No. 2022 - 22

The state attorney general, county attorneys, and other public lawyers have unique roles and statutory responsibilities in the justice system. The current Arizona rules of ethics for attorneys might not adequately contemplate or address those unique roles and the potential conflicts of these public attorneys.

Therefore, pursuant to Article VI, section 3 of the Arizona Constitution,

IT IS ORDERED that:

1. ESTABLISHMENT: The Task Force on Ethical Rules Governing the State Attorney General, County Attorneys, and Other Public Lawyers is established to determine if pertinent ethical rules for Arizona public lawyers should be modified.

2. PURPOSE: The Task Force shall:
   a. Review the unique roles and responsibilities that the attorney general, county attorneys, and other public lawyers have in Arizona's justice system;
   b. Describe what, if any, conflicts an attorney general, county attorney, or other public lawyer may have under the current ethics rules with regard to representation of their respective clients and their statutory duties;
   c. Review examples of rules that other states have adopted to govern the conduct of similarly situated government officials;
   d. If the Task Force determines that changes to the ethics rules are necessary, recommend amendments; and,
   e. Submit a written report to the Arizona Judicial Council with the Task Force's findings and recommendations by December 2022.

3. MEMBERSHIP: The individuals listed in Appendix A are appointed as members of the Task Force for a term beginning on February 16, 2022. The Chief Justice may appoint additional members as may be necessary.

4. MEETINGS: Task Force meetings shall be scheduled at the discretion of the Chair. All meetings shall comply with the Arizona Code of Judicial Administration § 1-202: Public Meetings.

5. STAFF: The Administrative Office of the Courts shall provide staff for the Task Force and shall assist the Task Force in developing recommendations and preparing any necessary reports and filings.

Dated this 16th day of February, 2022.

ROBERT BRUTINEL
Chief Justice

Appendix A

Membership List

Task Force on Ethical Rules Governing the State Attorney General, County Attorneys, and Other Public Lawyers

Chair:

Justice William Montgomery
Arizona Supreme Court

Members:

Pat Sallen
Ethics at Law

Jeff Kros
Arizona State Senate

Maret Vessella
Chief Bar Counsel, State Bar of Arizona

Shelia Polk
Yavapai County Attorney

Scott Rhodes
Jennings, Strouss, and Salmon

Amelia Cramer
Chief Deputy Pima County Attorney (*ret.*)

Mary O'Grady
Osborn Maledon

Karen Emerson
Maricopa County Public Defender's Office

Terry Goddard
Goddard Law, PLC
AG (*ret.*)

Michael Bailey
Arizona Chamber of Commerce and Industry

Hon. Christopher Staring
Chair, Supreme Court Attorney Ethics

Steve Peru
Coconino County Manager

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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	
APPOINTMENT OF MEMBERS TO THE TASK FORCE ON ETHICS RULES GOVERNING THE STATE ATTORNEY GENERAL, COUNTY ATTORNEYS, AND OTHER PUBLIC LAWYERS	Administrative Order No. 2023 - 32 (Modifying Administrative Order No. 2022-22)

On February 16, 2022, this Court entered Administrative Order No. 2022-22, which established the Task Force on Ethics Rules Governing the State Attorney General, County Attorneys, and Other Public Lawyers ("Task Force") and appointed its members. The Order provided that the Chief Justice could appoint additional members as may be necessary. Because of recent changes in the official status of certain members and to broaden Task Force membership, it now would be appropriate to appoint additional members.

Therefore, after due consideration,

IT IS ORDERED that the following individuals are appointed to the Task Force for terms beginning upon signature of this Order and ending concurrently with the terms of current members.

Kris Mayes
Arizona Attorney General

Rachel Mitchell
Maricopa County Attorney

Dennis McGrane
Yavapai County Attorney

Michael Braun
Arizona Legislative Council

Dated this 21st day of February, 2023.

ROBERT BRUTINEL
Chief Justice

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ATTACHMENT 2

Proposed Amendments to the Current Ethics Rules

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Ethics Task Force

Proposed Integrated Rule Amendments

This proposal includes Preamble ¶¶ 18 and 21 and Part 1 rules as follows.

- **Part 1 ERs amended:**

1.0 Terminology
1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer
1.4 Communication
1.7 Conflict of Interest: Current Clients
1.8 Conflict of Interest: Current Clients: Specific Rules
1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees
1.13 Organization as Client
1.16 Declining or Terminating Representation

- **Part 1 ERs not amended:**

1.1 Competence
1.3 Diligence
1.5 Fees
1.6 Confidentiality
1.9 Duties to Former Clients
1.10 Imputation of Conflicts of Interest: General Rule
1.12 Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral
1.14 Client with Diminished Capacity
1.15 Safekeeping Property
1.17 Sale of Law Practice or Firm
1.18 Duties to Prospective Clients

AJC version

Unless otherwise indicated, these amendments do not propose deleting topic headings in the current comments to these rules.

Additions are shown by underline; deletions are shown with strikethrough.

==========

Preamble

[**Note:** The Preamble does not appear in the Supreme Court Rules that are provided to the public on the Arizona Judicial Branch website. The publisher should be requested to include the Preamble in those posted rules.]

[1] to [17]. No change.

~~**[18]** Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules do no abrogate any such authority.~~

[18] Government lawyers, like other lawyers, are subject to the Rules of Professional Conduct and the obligations stated in Supreme Court Rule 41, the Oath of Admission to the State Bar of Arizona, and the Lawyer's Creed of Professionalism. A government lawyer who has responsibilities assigned by law must interpret and carry out those responsibilities in a manner consistent with these Rules, Oath, and Creed. Government lawyers have additional responsibilities when acting as prosecutors, as set forth in Ethical Rule 3.8.

[19] to [20] No change.

[21] In 2024, the Supreme Court adopted amendments to the Rules of Professional Conduct and Comments to clarify the obligations of government lawyers where previous guidance was incomplete. None of these amendments exempts government lawyers from the general application of these Rules, nor do they limit the application of the Rules to government lawyers.

~~21~~ 22] No change.

ER 1.0. Terminology

(a) through (q). No change.

(r) "Client representative" is a duly authorized constituent of a government organization, whether an individual or a group – elected, appointed, or employed – to act with authority on behalf of the government organization. In some circumstances, the client and the client representative may be the same.

(s) "Government lawyer" is an elected, appointed, or employed lawyer who has a duty to provide civil and administrative advice and representation to a government organization on an ongoing basis pursuant to relevant provisions of the United States and Arizona Constitutions, statutes, and regulations, and if applicable, charters and ordinances of local governments. Government lawyers include but are not limited to the Arizona Attorney General, county attorneys, and municipal attorneys, and their deputies and assistants.

[**Staff Note:** The two definitions above would be added at the end of the existing definitions because the existing definitions are not in strict alphabetical order.]

ER 1.1. Competence. [No change]

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

(a) Subject to paragraphs (b), (c), ~~and~~ (d), and (e), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by ER 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter pursuant to applicable law. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A government lawyer has a duty to abide by the decisions that are made by the appropriate client representative regarding the goals of representation in a particular matter, unless the client representative's decisions concerning the objectives of representation are clearly inconsistent with the client representative's legal authority under applicable law or properly delegated authority.

(~~b~~ c) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(~~c~~ d) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(~~d~~ e) 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.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. There may be circumstances where authority has been delegated to a government lawyer pursuant to applicable law, and in that instance, the client representative with decision-making authority is the government lawyer. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client ~~unless applicable law provides otherwise.~~ See ER 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by ER 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation or as provided by applicable law.

[2] through [4] No change.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities, including where such representation is generally required by applicable law as in the circumstance of a government lawyer.

Agreements Limiting Scope of Representation

[6] through [9]. No change.

Criminal, Fraudulent and Prohibited Transactions

[10] and [11]. No change.

[12] The duties of a government lawyer as specified by applicable law may include the duties to investigate the conduct of a client representative, and to criminally prosecute or bring a civil or administrative action against that client representative, either directly or through referral to a different government law firm or outside counsel. See ER 1.7 and ER 1.16 with regard to addressing conflicts of interest associated with these duties. This rule does not limit investigations or actions against a government law firm's employees.

[~~12~~ 13] No change to the content.

[~~13~~ 14] No change to the content.

[~~14~~ 15] No change to the content.

ER 1.3. Diligence. [no change]

ER 1.4. Communication

(a) through (c). No change.

(d) Unless these requirements are otherwise satisfied by applicable law, a government lawyer must proactively identify and provide the appropriate client representative with written confirmation of the scope and pertinent details of the government lawyer's representation. The writing must also confirm that the client representative is usually not an individual client of the government law firm. Where the government lawyer also functions as the client representative, such notice is not required.

(e) A government lawyer must advise government officials, as well as any other client representative when appropriate, of the identity of the lawyer's client, the nature of the relationship between the government lawyer and the client representative, the potential impact of the lawyer's other legal duties on the representation, and the circumstances under which a client representative may be treated as a separate client of the government lawyer. See ER 1.13 and ER 4.3 for further guidance.

Comment

[1] No change.

Identifying the client representatives for government lawyers

[2] Paragraph (d) requires a government lawyer to timely identify the client representative(s) who is authorized to make decisions on behalf of the client in each

type of matter and in each case. The "appropriate client representative" typically includes the client's elected and appointed officials who are regularly advised by the government lawyer and have constitutional or statutory authority for decision-making on behalf of the client.

In addition to providing the written confirmation to identified client representatives, a government lawyer should determine whether it is also appropriate to provide it to other officials and employees of the client.

The frequency with which the advisement referenced in section (d) is required is at least as often as client representatives are elected or appointed.

The requirement in Rule 1.4(d) may be satisfied by making the information publicly available, such as on the organization's public website or through published regulations or policies.

[2] through [7] will need to be renumbered as [3] through [8]. No changes to the content of these comments.

ER 1.5. Fees [No change]

ER 1.6. Confidentiality of Information [No change]

ER 1.7 Conflict of Interest: Current Clients

(a) through (c). No change.

Comment [2021 amendment]

[1] through [8]. No change.

Material Limitations for a Government Lawyer

[9] Many Arizona government law firms that provide civil advice and representation to a government organization also prosecute criminal cases. Occasionally, a government lawyer will be asked to advise or represent the government organization in a civil matter involving an individual who is the subject of a pending or potential prosecution by the same government law firm. For example, a defendant in a criminal prosecution might have a claim against a client representative based on the conditions of incarceration or the actions of its law enforcement officers. Material limitation conflicts can also arise when the government lawyer is called upon to provide civil legal advice to client representatives involved in the criminal justice process. Whether this creates a

disqualifying conflict of interest under ER 1.7(a)(2) depends on whether the government law firm's duties to the government organization in the civil matter will be materially limited by the law firm's duty as a prosecutor to act in the interest of justice. When determining whether a material limitation exists, a government lawyer must consider the likelihood that the lawyer's decision-making in one matter will be influenced by a desire to affect the outcome of the other matter.

[10] A government lawyer owes a duty of loyalty to a government organization and fulfills that duty by providing advice to the organization's client representatives. Therefore, a government lawyer cannot provide advice to, or represent, the client representative in one matter, and act as an advocate against the client representative in another matter, even when the matters are unrelated. See ER 1.16(e), and comment 4.

[9] to [14] No change to the content but these comments will need to be renumbered as [11] to [16].

[~~15~~ 17] ~~Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest. Model ER 1.7,~~ Former comment 15, set forth in Model Code 1.7, comment 16, is inapplicable in Arizona.

[**Note:** The remaining comments will need to be renumbered accordingly.]

ER 1.8. Conflict of Interest: Current Clients: Specific Rules

(a) through (f). No change.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement. This rule does not apply to lawyers representing governmental agencies or officials unless, in the particular action, there is a potential for a conflict of interest between the jointly represented government agencies or officials on the issue of settlement.

(h) through (m). No change

Comment [2021 amendment]

[1] through [11]. No change.

[11] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under ER 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, ER 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also ER 1.0(e) (definition of informed consent). ~~This rule does not apply to lawyers representing governmental agencies or officials unless, in the particular action, there is a potential for a conflict of interest between the jointly represented government agencies or officials on the issue of settlement.~~ Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

[**Note:** The remaining comments will need to be renumbered accordingly.]

ER 1.9. Duties to Former Clients [no change]

ER 1.10. Imputation of Conflicts of Interest: General Rule [no change]

ER 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees

(a) through (e). No change.

Comment

[1] through [3]. No change.

AJC version

[4] When the client is an agency of one government, that agency should be treated as a private client for purposes of this Rule if the lawyer thereafter represents an agency of another government, as when a lawyer represents a city and subsequently is employed by a federal agency. ~~The question whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See ER 1.13, Comment [6].~~

[5] through [8]. No change.

ER 1.12. Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral. No change.

ER 1.13. Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. In the government context, "constituents" are "client representatives."

(b) through (g). No change.

Comment

[1] through [8]. No change.

Government Agency

~~[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of lawyers may be more difficult in the government context. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes or regulation. This Rule does not limit that authority. See Scope. Government lawyers~~

~~also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so.~~

~~[10] A government lawyer may have an obligation to render advice to a government entity and constituents of a government entity. Normally, the government entity, rather than an individual constituent, is the client. Some government lawyers may also be elected officials or the employees of elected officials who have statutory obligations to take formal action against individual constituents under certain circumstances. The government lawyer, therefore, must clearly identify the client and disclose to the individual constituents any limitations that are imposed on the lawyer's other legal obligations. See ER 1.2(c) and related comments. Further, where a conflict arises between a constituent and the government entity the lawyer represents or between constituents of the same government entity, the lawyer must make the identity of the client clear to the constituents and determine which constituent has authority to act for the government entity in each instance.~~

[9] The duty defined in this Rule applies to governmental organizations. The term "constituents" in the government context is somewhat ambiguous because it might be misconstrued to reference the constituents of an elected official or elected multi-person body. For this reason, the term "client representatives" is used in the government context and is synonymous with "constituents."

[10] A government lawyer's duties may include an obligation to render advice to elected and appointed representatives of a government organization. Usually, the government organization, rather than an individual government client representative to whom the advice is given, is the client.

Some government lawyers may also be elected officials or the employees of elected officials who have statutory obligations to take formal action against individual government client representatives under certain circumstances. The government lawyer, therefore, must clearly identify the client and disclose to the individual government client representatives the existence of those other duties, as provided in ER 1.4.

[11] Further, where a disagreement arises between two or more client representatives of a government organization regarding what actions should be taken on the government organization's behalf, the lawyer must make the identity of the client clear to the client representatives and determine which has authority to act for the government organization in each instance. If a government lawyer cannot determine which client representative has the authority to act for the government client on the matter in question and the representatives cannot reach a consensus on how to proceed, it may be necessary to request declaratory relief.

[12] When a client representative is personally named in a legal proceeding, the government lawyer may jointly represent that individual and the organizational client if permitted by these rules. The government lawyer must obtain informed consent for joint representation and inform the client representative of the scope and consequences of the government lawyer's representation. Whether a client representative is entitled to separate representation is a legal question based on the scope of authority, the claims at issue, the remedies sought in the litigation, and other factors.

[~~11~~ 13] No change to the content.

[~~12~~ 14] No change to the content.

Dual Representation

[~~13~~ 15] Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder. The question whether two government agencies should be regarded as the same or different clients for conflicts of interest purposes is a legal question.

Derivative Actions

[14] and [15] will need to be renumbered as [16] and [17].

ER 1.14. Client with Diminished Capacity. No change

ER 1.15. Safekeeping Property. No change.

ER 1.16. Declining or Terminating Representation

(a) through (d). No change.

(e) When a government lawyer has a good faith belief that applicable law imposes an affirmative duty to initiate an action against a client representative, the government lawyer must refer the commencement and pursuit of that action to another government law firm or outside counsel, unless it is feasible for the government lawyer to cease advising the government organization through that client representative and to advise the government organization only through other client representatives. This rule does not limit investigations or actions against a government law firm's employees.

Comment

[1] through [3]. No change.

AJC version

[4] Because a government lawyer cannot terminate representation of the government organization, if the government lawyer cannot feasibly cease advising and representing the government organization through the client representative against whom an action must be initiated, then referral of that action to another government law firm or outside counsel is required to address conflict of interest issues.

[4] through [11] will need to be renumbered as [5] through [12].

ER 1.17. Sale of Law Practice or Firm. No change

ER 1.18. Duties to Prospective Clients. No change

ATTACHMENT 3

Letter from Attorney General Robert Corbin

Dated May 16, 1990

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Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert K. Corbin

May 16, 1990

All Assistant Attorneys General
State of Arizona

Ladies and Gentlemen:

I take great pleasure in presenting to you the first edition of the Attorney General Ethics Manual. This manual represents the work of the lawyers on the Attorney General's Ethics Committee who recognized the need to publicize internally for your assistance significant ethical considerations pertinent to your public practice in this office.

The Attorney General's Office is dedicated to providing quality legal services to state government and its citizens. We recognize that balancing our ethical obligations as lawyers and providing quality legal services to the public can be extremely difficult at times. This manual is provided to you to aid in the resolution of difficult issues arising under the Ethical Rules.

I welcome any comments or suggestions you may have on the manual and future revisions.

Very truly yours,

BOB CORBIN
Attorney General