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Task Force on Ethics Rules Governing the State Attorney General, County
Attorneys, and Other Public Lawyers, Petitioner
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SUPREME COURT OF ARIZONA

PETITION TO AMEND) Supreme Court No. R-24-
RULES 42 and 45, RULES OF THE)
ARIZONA SUPREME COURT) PETITION
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Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the Task Force on Ethics Rules Governing the State Attorney General, County Attorneys, and Other Public Lawyers (“Task Force”) petitions this Court to amend Rules 42 and 45 of the Rules of the Arizona Supreme Court. The proposed amendments to Rule 42 are shown with strikethrough and underline in Appendix A. Appendix B contains a detailed explanation of the proposed amendments to Rule 42. Appendix C shows with underline the proposed amendment to Rule 45.

The Task Force recently submitted a report to the Arizona Judicial Council (“Report”). This rule petition refers to that Report, and the Report is filed concurrently with, and in support of, this rule petition. Following a presentation of

the Report to the Arizona Judicial Council at its December 14, 2023, meeting, the Council authorized the filing of this rule petition.

1. Background. As noted at page 5 of the Report,

...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.

This rule petition requests adoption of the recommended amendments.

Task Force members, shown in footnote 3 of the Report, and their proxies include current and former elected and appointed public attorneys at the state, county, and municipal levels of Arizona government, as well as a Court of Appeals judge, a private attorney whose practice focuses on ethics, and a county administrator. The Task Force was also informed by more than a dozen stakeholders who were invited to present at Task Force meetings or who otherwise attended one or more meetings and publicly addressed the Task Force. (The Report at pages 8 and 9, and in footnotes 4 and 10, acknowledges those stakeholders.) The Task Force

also considered hundreds of pages of written materials. (The Report at pages 7 and 8, and in footnotes 6, 7, 8, and 9, describes those materials.)

As of the date of the Report, the Task Force had met 20 times over the course of 21 months. The Task Force met one additional time after presentation of the Report to the Arizona Judicial Council and before filing this rule petition. Attachment 2 to the Report included a proposed set of amendments to Supreme Court Rule 42; those amendments, with only minor, non-substantive revisions, are contained in Appendix A to this petition. As noted at page 6 of the Report, these amendments reflect a unanimous recommendation of Task Force members.

2. The Issues Addressed by the Proposed Amendments. Handbooks and law review articles have discussed the ethical issues that specifically confront government lawyers (see, for examples, the Report, footnotes 8 and 9), and Arizona appellate courts have been called upon over the course of several decades to resolve variations of those issues (see the Report, footnote 6). Task Force members and individuals who presented to the Task Force also shared a wealth of personal experiences and insightful anecdotes. The issue before the Task Force was succinctly identified by Task Force member Patricia Sallen in a March 31, 2022, memo to David Byers:

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 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.

(Ms. Sallen’s memo begins at page 29 of the March 31, 2022, [supplemental meeting packet](#).)

After extensive discussion, the Task Force identified the following issues as most in need of further guidance for government lawyers:

- 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?

The Report elaborates on each of these six issues. To avoid repetition, please see the discussion at pages 12 to 15 of the Report.

3. Context of the Ethics Rules; Standalone Rules versus Integrated Amendments. Supreme Court Rule 41(b) states, “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.”

There are currently 57 ethics rules, or “ERs,” in Rule 42, organized into eight parts. Many of the current ERs include extensive comments. The ethics rules also include a 21-paragraph Preamble. Paragraph 21 of the Preamble provides:

The Comments accompanying each Rule explains [sic] and illustrates [sic] the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

The Task Force determined that the Rule 42 ethics rules warranting amendments for government lawyers were contained in Part I (“Client-Lawyer Relationship”). These specific rules are not particularly lengthy, but some of the comments are. ER 1.7, for example, consists of three sections and is relatively concise, yet it has 34 paragraphs of comments. This runs counter to a restyling convention utilized in previous rule restyling projects. Essentially, the convention is: (1) if a comment is necessary to understand the rule, then the rule might not be clearly written; and (2) if there is substantive content in the comment, it should instead be in the rule.

Moreover, the current ethics rules are not formatted in the manner of other recently restyled rules. For the most part, the current ethics rules have no section titles, which assist readers in navigating other sets of restyled Arizona rules. Additionally, the current provisions sometimes contain lengthy text that is not organized into subparts with subpart titles, as Arizona's restyled rules are organized. The organizational format of the ERs occasionally vary from rule to rule. (Compare, for example, ER 1.2 with ER 6.3.)

To address these concerns, the Task Force considered two alternatives. One alternative was to aggregate all the proposed new provisions concerning government lawyers in a single rule. The result of this effort was a draft Rule 1.19, an entirely new Part I rule that would have followed current Rule 1.18, the last rule in current Part I. Rule 1.19 was formatted pursuant to the recent restyling conventions. But the draft rule had one significant drawback attributable to its distinctive formatting; as one commentator noted, Rule 1.19 "would stick out like a sore thumb."

An alternative proposal would have relocated all the provisions regarding government lawyers in a new Part IX (the last current part is Part VIII), as standalone Rules 9.1 through 9.4. These rules, which also would have been organized pursuant to the restyling conventions, would have been at the end of the ethics rules, and the styling and organizational differences would not have been as noticeable.

Both of these options had benefits and drawbacks. The primary benefit, in addition to using modern restyling, is that the rules applicable to government lawyers would be consolidated in a single location, which could be especially helpful for educating newly admitted Arizona government lawyers. The most significant drawback, however, was that although government lawyers are bound by all the ethics rules, the standalone rules might have created an impression that government lawyers were governed only by these new provisions.

Accordingly, the Task Force concluded that the preferred approach was to integrate the new provisions into the current rules. The disadvantages of this approach are the inability to reorganize the rules in a more contemporary fashion and the de facto inclusion of extensive comments to the rules. The primary advantage of the integrated rules approach, as Ms. Sallen noted, is that the proposed rules are designed to work “in harmony with the entire network of rules.”

Throughout the process of drafting the integrated rule amendments, the Task Force attempted to be concise. More text can result in less clarity and inject issues that create unintended consequences. At the same time, the Task Force 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. The Task Force strove to

provide guidance concerning the existing practices of government lawyers and not to create new authority or duties. It also wanted to facilitate adherence to the new provisions and not create traps for the unwary. Draft rule provisions that were in the nature of best practices were deleted from draft rules or relocated as comments. In addition, the Task Force recognized the futility of attempting to address every potential ethics scenario in these proposed amendments. These proposed amendments to Rule 42 accordingly address the most common scenarios.

Lawyers in private practice often provide legal services to government entities, either on a discrete matter or as outside general counsel. They do not face all the challenges that lawyers employed by government entities face. Without legally established duties, for example, private lawyers can move to withdraw from the representation when ethical challenges arise. The new definitions in ER 1.0 are intended to acknowledge this.

4. Appendix A. Appendix A shows the proposed integrated amendments to Rule 42. These amendments concern two paragraphs of the Preamble and 8 of the 18 rules in Part I, as well as comments to those rules. These proposed amendments address the issues identified in section 2 of this rule petition.

5. Appendix B. Appendix B is the complement of Appendix A. Appendix B explains, in a rule-by-rule fashion, the considerations associated with each proposed amendment, such as the amendment's purpose and intended effect.

Petitioner encourages readers to carefully review Appendix B in conjunction with their review of Appendix A.

6. Appendix C. Appendix C contains a proposed amendment to Rule 45. The current rule details continuing education requirements for all active lawyers. One of the requirements is that every lawyer have three hours annually of ethics training. The proposed amendment to Rule 45 would require that for government lawyers, one of those three ethics hours be on the specific subject of ethics rules applicable to government lawyers. The objective is to make government lawyers aware of the content of these new amendments and to educate those lawyers on how the amendments apply in their actual practices.

Petitioner proposes the Rule 45 amendment in two alternative versions. One version would require government lawyers to have one hour every year on the subject of ethics rules applicable to government lawyers. The requirement in the other version would be satisfied by one hour of CLE after the effective date of the proposed amendments to Rule 42; there would be no requirement for further CLE on this subject after completion of the single hour. The subject of the amendments, however, could be included in the general three hours of ethics otherwise required for all active attorneys in subsequent years.

7. Prefiling Comments. As noted at pages 11-12 of the Report, the Task Force circulated a draft of standalone Rules 9.1 through 9.4 to more than a dozen

stakeholders identified in footnote 11 of the Report. As the Report observed, there were few comments, but the comments that the Task Force did receive were influential in the members' decision to abandon the standalone rules and proceed with the integrated version now presented in Appendix A. The version in Appendix A has not been similarly circulated to stakeholders for pre-filing comments.

8. Conclusion. The Task Force requests that this petition be opened for public comments and that the Task Force be permitted to file a reply to those comments, as provided by Supreme Court Rule 28. The Task Force further requests that the Court consider the proposed amendments at its August/September 2024 Rules Agenda.

RESPECTFULLY SUBMITTED this 4th day of January 2024.

By /s/ _____
Hon. William G. Montgomery
Task Force Chair