

Appendix A

Proposed integrated amendments to Rule 42

Appendix A includes proposed amendments to Supreme Court Rule 42, including Preamble ¶¶ 18 and 21 and Part I rules as follows.

- Part I 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 I 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

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.

The proposed amendments begin on the next page.

Preamble

[**Note:** The Preamble does not appear in the Supreme Court Rules that are provided to the public on the Arizona Judicial Branch website. Consideration might be given to including 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 [sic] 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 Ethics 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.

[24 ~~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 and whether elected, appointed, or employed, who acts 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 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.

(~~e~~ 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.**

Note: Because the addition of new section (b) required the re-lettering of current sections (b), (c), and (d) as sections (c), (d), and (e), references in other rules to current ER 1.2(b), ER 1.2(c), and ER 1.2(d) will need to be corrected as follows:

Reference in current ER	To ER 1.2 section	Should be changed to
1.1, comment [5]	1.2(c)	1.2(d)
1.6, comment [8]	1.2(d)	1.2(e)
1.7, comment [30]	1.2(c)	1.2(d)
1.13, comment [10]	1.2(c)	1.2(d)
1.14, comment [4]	1.2(d)	1.2(e)
3.3, comment [3]	1.2(d) [two references]	1.2(e) [both references]
3.3, comment 11	1.2(d)	1.2(e)
4.1, comment [3]	1.2(d) [two references]	1.2(e) [both references]
6.4, comment [1]	1.2(b)	1.2(c)
6.5, comment [2]	1.2(c)	1.2(d)
8.4, in the third paragraph of comment amended effective December 1, 2002	1.2(d)	1.2(e)

8.4, comment [4] of the comment effective December 1, 2003	1.2(d)	1.2(e)
--	--------	--------

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 government 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] Section (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.

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] These paragraphs will need to be renumbered as [11] to [16]. **No change to the content.**

~~[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 paragraphs 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 [10]. **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 paragraphs 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.

[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. The terms “constituents” and “client representatives” are synonyms.~~

~~[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 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 of 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]. **No changes to the content.**

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.**

[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]. **No changes to the content.**

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

ER 1.18. Duties to Prospective Clients. No change.