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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

**PETITION TO AMEND RULES 42
and 45, RULES OF THE ARIZONA
SUPREME COURT**

Supreme Court No. R-24-0003

**COMMENT
ON
PROPOSED
AMENDMENT**

The United States Department of Justice (the “Department”), through the United States Attorney for the District of Arizona, respectfully submits this comment on the above-referenced Petition submitted by the Task Force on Ethics Rules Governing the State Attorney General, County Attorneys, and Other Public Lawyers (the “Task Force”). The Petition principally recommends amendments to Rule 42 (the “Arizona Rules of Professional Conduct” or “Arizona Rules”), which are intended to address fundamental issues arising in the context of a government lawyer representing and providing advice to a wide variety of agencies, officers, and

employees. See Report to the Arizona Judicial Council from the Task Force on Ethics Rules Governing the State Attorney General, County Attorneys, and Other Public Lawyers 12-15 (the “Task Force Report”).

The Department appreciates the opportunity to have contributed its views on how these fundamental issues play out differently in the context of federal government practice through its participation in Task Force meetings and in its January 2, 2023, letter to the Task Force (the “January 2023 Letter”). We appreciate the Task Force’s efforts to accommodate the Department’s concerns, as well as its acknowledgement in its Report that its proposed integrated rules are intended to “accommodate the differences in representing federal government clients,” Task Force Report 13. To promote the clarity of the proposed rules, the Department requests that the amendments acknowledge this intent in paragraph [21] of the amended preamble, which concerns the purpose of the 2024 amendments.

Specifically, the Department requests that proposed paragraph [21] of the preamble be amended by the language underlined below so that the full paragraph would read as follows:

[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. The amendments are intended to accommodate the differences in federal government practice. For example, one important difference is that, as a matter of federal law, litigation authority in the majority of cases is centralized in the Attorney General of the United States, who, also with the Attorney General’s designees, represents a single client, the United States.

I. BACKGROUND

In its Administrative Order No. 2022-22 creating the Task Force, this Court directed the Task Force to undertake, *inter alia*, the following tasks:

- 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; [and]
- c. Review examples of rules that other states have adopted to govern the conduct of similarly situated government officials[.]

Administrative Order No. 2022-22 at ¶ 2.

As noted, the Department participated in many of the Task Force’s meetings (i.e., from October 17, 2022, going forward) and, to facilitate the Task Force’s consideration of the issues in the context of federal government practice, provided

its views in writing in the January 2023 Letter (i.e., when the Task Force was considering stand-alone rules).

Although the Task Force ultimately determined to propose amendments in the form of integrated rules, the January 2023 Letter’s explanation of how existing authority addressed the Court’s concerns about conflicts and other issues arising for government lawyers outside of federal practice remains relevant for purposes of the integrated amendments proposed in the Petition. In this regard, the January 2023 Letter summarized the Department’s views as follows:

In sum, federal law and practices already robustly protect Department attorneys from being burdened with “conflicts . . . under the current ethics rules with regard to representation of their respective clients and their statutory duties.” Arizona Supreme Court Administrative Order No. 2022-22 . . . at ¶ 2(b). In the majority of the litigation matters handled by Department attorneys, this objective is achieved by centralizing litigation authority in the Attorney General, who, also with his designees, represents a single client, the United States. The only exception to this arrangement occurs in cases where a federal government attorney represents one or more individual federal employees who are sued in their individual capacity while also representing the United States, which remains the attorney’s primary client; a Department attorney’s representation of an individual client in such cases is subject to reasonable limitations designed to avoid conflicts that are a condition of the Department’s representation. Federal practice thus does not give rise to conflicts among clients that would require modification of the Arizona Rules as they currently exist.

January 2023 Letter 5.¹

In its Report, the Task Force acknowledges the differing legal framework that exists for federal government lawyers compared with their state and local counterparts. Specifically, in its discussion of the identity of the government lawyer's client representative, the Task Force Report observes that executive authority may be divided at the state and local levels in Arizona, but then proceeds to note that federal government lawyers are differently situated:

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.

Task Force Report 13.

¹ The Department also explained in its January 2023 Letter that the absence of similar rules in other jurisdictions supported its view that existing authority was sufficient to address concerns about conflicts arising outside the context of federal government practice:

We are unaware of any other jurisdiction that has adopted or considered modifications to the rules of professional conduct similar to the Proposed New Rules to regulate the conduct of federal government attorneys, *cf.* Order No. 2022-22 at ¶ 2(c), and respectfully submit that the absence of any similar efforts in other jurisdictions confirms the general understanding that existing federal law and practice provide adequate protection against the possibility of conflicts between multiple clients.

Id.

II. THE DEPARTMENT RECOMMENDS THAT THE PROPOSED AMENDMENTS ACKNOWLEDGE THAT THEY ARE INTENDED TO ACCOMMODATE THE DIFFERENCES IN REPRESENTING FEDERAL GOVERNMENT CLIENTS

The Department appreciates the Task Force’s engagement with Department attorneys on the issue of how the proposed new rules would apply in the context of federal government practice, as well as the Task Force’s acknowledgement of the Department’s concerns in the Report. See Task Force Report 13. The Department respectfully submits that an acknowledgment that the new rules are intended to be interpreted in light of the differing circumstances in federal governmental practice would be helpful to interpreting the proposed new rules and avoiding any confusion about the scope of their application. As current paragraph [21] of the Scope section of the Arizona Rules explains, “[t]he Preamble and this note on Scope provide general orientation.” Ariz. R. Prof’l Conduct Scope [21].

The Department notes that the proposed rules include a new paragraph [21] in the Scope section of the Arizona Rules, which would provide the following general orientation regarding the 2024 amendments:

[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.

Task Force Report app’x A at 2.

The Department proposes that proposed paragraph [21] also include the language underlined below so that the entire paragraph would read as follows:

[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. The amendments are intended to accommodate the differences in federal government practice. For example, one important difference is that, as a matter of federal law, litigation authority in the majority of cases is centralized in the Attorney General of the United States, who, also with the Attorney General's designees, represents a single client, the United States.

Including the underlined language in the Scope section of the Arizona Rules would ensure greater access to important background information relevant to the interpretation of the amended rules for federal government attorneys that otherwise would not be available except through a review of the legislative history of the 2024 amendments.

III. CONCLUSION

The Department respectfully requests that the Court include the Department's proposed language in proposed new paragraph [21] of the Scope section of the Arizona Rules.

RESPECTFULLY SUBMITTED this 28th day of April 2024.

A handwritten signature in blue ink, appearing to read "Gary M. Restaino".

Gary M. Restaino
United States Attorney
District of Arizona