

Attorneys for Arizona Attorneys for Criminal Justice

Molly Brizgys (#029216)

Molly@mscclaw.com

Kathleen E. Brody (#026331)

kathy@mscclaw.com

MITCHELL | STEIN | CAREY | CHAPMAN, PC

2600 North Central Avenue, Suite 1000

Phoenix, AZ 85004

Telephone: (602) 358-0290

Facsimile: (602) 358-0291

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the matter of:)	No. R-24-0003
)	
Petition to Amend Rules 42 and 45,)	AACJ COMMENT TO THE PETITION
Rules of the Supreme Court of Arizona)	TO AMEND RULES 42 AND 45,
)	RULES OF THE SUPREME COURT
)	OF ARIZONA
)	
)	
)	

Pursuant to Rule 28 of the Arizona Supreme Court Rules, Arizona Attorneys for Criminal Justice (“AACJ”) respectfully submits this comment regarding the proposed amendment to Rules 42 and 45 of the Rules of the Arizona Supreme Court.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the

accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training, and mutual assistance, and fostering public awareness of citizens' rights, the criminal legal system, and the role of the defense lawyer. Thus, AACJ's comment to the petition focuses on how the proposed changes could affect the rights of criminal defendants and the public's perception of the criminal-legal system.

In the experience of AACJ's members, the proper functioning of the criminal-legal system requires that government lawyers who work in the system, particularly criminal prosecutors, give scrupulous attention to their ethical obligations when performing their duties and interacting with criminal defendants, crime victims, and other participants in the process. This Court recently reiterated that it shares AACJ's view that the public's confidence in the system is crucial for its proper functioning:

A prosecutor's conflict of interest erodes confidence in the judicial system and undermines the fairness of criminal trials. Courts must preserve the reality—and appearance—of fairness by disqualifying a prosecutor when such conflicts arise.

State ex rel. Mitchell v. Palmer, No. CR-21-0397-PR, 2024 WL 1561618, ¶ 1

(Ariz. Apr. 11, 2024). Consistent with these views, AACJ urges the Court to focus on these considerations in its review of the petition, with a close eye toward ensuring that changes do not result in any further erosion of the public's confidence in the fairness of the system.

As the petition recognizes, the proposed changes could affect the rights of criminal defendants in some situations. As stated in the rule-by-rule explanation to the petition (App. B at 8), “[n]ew paragraph 9 applies when a government law firm provides civil advice and representation to a government client, and the law firm also prosecutes criminal cases,” which is “common circumstance in Arizona at the state, county, and municipal levels of government.” The proposed new paragraph 9 concludes:

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.

In AACJ’s view, this provision does not reflect and embrace the full considerations set forth in the Court’s very recent opinion in *State ex rel. Mitchell v. Palmer* and the long line of Arizona caselaw on which that case finds its foundation. In particular, criminal prosecutors and the government law firms for which they work must take care to preserve both the reality of fairness and the appearance of fairness when evaluating their ethical obligations in particular cases and taking the required steps to both preserve the defendant’s rights and safeguard the public’s perception of the system.

With respect proposed new paragraph 10, AACJ appreciates and agrees with

the needed clarification that it provides concerning a government lawyer's duty of loyalty to their client. The proposed provision states that "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." Consistent with this proposed provision, a criminal defendant facing charges or a person under criminal investigation should never face a compromised duty of loyalty from their attorney, even when the lawyer works for the government. Given the possibility that conflicts could implicate a criminal defendant's due-process and other constitutional rights, government law firms should have in place robust screening mechanisms and other procedures to effectuate these requirements, for both criminal investigations and active criminal prosecutions, and they should not hesitate to refer matters to a different office or to outside counsel in the face of a potential conflict of interest or the appearance of impropriety. *See State ex rel. Mitchell v. Palmer*, 2024 WL 1561618, ¶¶ 19-22.

Ensuring a criminal defendant's right to fundamental fairness in the process is critically important because it "preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done.'" *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J.,

concurring)). In a time of public crisis in the confidence of the judicial system, the Court should take care that any amendments concerning a government lawyer's ethical obligations do not undermine the rights of criminal defendants or these important principles that this Court recently and repeatedly reaffirmed.

RESPECTFULLY SUBMITTED May 1, 2024.

MITCHELL | STEIN | CAREY | CHAPMAN, PC

By:  _____

Molly Brizgys

Kathleen E. Brody

*Attorneys for Arizona Attorneys for
Criminal Justice*