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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:) Supreme Court No. R-24-003
)
PETITION TO AMEND RULES 42) COMMENT RE PETITION TO
and 45, RULES OF THE ARIZONA) AMEND RULES 42 AND
SUPREME COURT) 45, RULES OF THE ARIZONA
) **SUPREME COURT**
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Pursuant to Arizona Rule of the Supreme Court 28, the Arizona Attorney General’s Office (“AGO”) respectfully submits the following comment regarding Petition R-24-003 (“Petition”). The Task Force’s petition is the result of extensive discussions with experts from Arizona and the nation. The AGO appreciates the Task Force’s efforts to clarify the Ethics Rules (ERs) as they pertain to government lawyers. The AGO respectfully requests this Court consider the below

suggestions to clarify some of the Task Force recommendations.

i. Amendments to the Preamble.

To clarify the scope of the ERs, the Task Force removed Paragraph 18 to the Preamble. That paragraph recognized government lawyers' unique responsibilities that have no similar equivalent in private practice. Those responsibilities have been summarized as follows:

First, the goals of a governmental client necessarily include pursuit of the public interest, as identified by law and as determined by decisions of government officials in the course of their duties. Second, both government lawyers and governmental officials directing the activities of government lawyers are often subject to greater legal constraint (for example, under state and federal constitutions) than is true of lawyers representing nongovernmental persons or entities. Third, and conversely, a government lawyer may possess powers beyond those possessed by a lawyer representing a nongovernmental client, such as the power to select those persons who will be charged with serious crimes. Some government lawyers, such as an elected state attorney general or similar officer, have discretionary powers under law that have no parallel in representation of nongovernmental clients.

Restatement (Third) of the Law Governing Lawyers § 97 (2000) (internal citations omitted).

This Court has also recognized that government lawyers such as the Attorney General serve the public interest, concluding that the Attorney General is “invested with full authority to use all the means afforded by the law to meet the requirements of any situation and fully protect the interests of the state.” *See*

Westover v. State, 66 Ariz. 145, 151 (1947); *In re Maricopa Juv. Act. No. J-81405-S*, 122 Ariz. 252, 255 (1979) (“The county attorney shall: Cause Petitions alleging delinquent behavior to be drafted and filed with the juvenile court as he deems necessary in the public interest”). Or as the California Supreme Court has put it, the Attorney General has a “paramount duty to represent the public interest.” *D’Amico v. Bd. of Med. Exam’rs*, 520 P.2d 10, 15 (Cal. 1974). In other words, elected officials like the Attorney General and county attorneys run for office to serve the public’s best interests by representing the state and their counties, respectively, according to their statutorily defined responsibilities.

By removing Paragraph 18 to the Preamble, the AGO does not believe the Task Force intended to limit government lawyers’ ability to pursue their statutory responsibilities or alter their duty to the public interest. The AGO requests this Court consider including a comment clarifying this point and affirming that the ERs do not limit government lawyers’ statutory powers and duties, as those are defined by the Arizona Legislature and outside the scope of the ERs.

ii. Proposed ER 1.0.

The proposal defines “Government lawyer” as:

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.

Although this definition includes the Attorney General and county attorneys, it fails to recognize that these attorneys prosecute criminal cases. Elsewhere the Task Force’s proposal recognizes that government lawyers will have responsibilities as prosecutors. *See* Proposed Preamble cmt. 18 (“Government lawyers have additional responsibilities when acting as prosecutors, as set forth in Ethics Rule 3.8.”); Proposed ER 1.2 cmt. 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.”); Proposed E.R. 1.7 cmt. 9 (recognizing that government lawyers “also prosecute criminal cases”).

This definition could be amended to reflect that Government lawyers represent the public and prosecute criminal offenses.

iii. Proposed ER 1.2(b).

The AGO requests two clarifying amendments to Proposed ER 1.2(b) and its accompanying comment.

Proposed ER 1.2(b) reads as follows:

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.

For government lawyers with independent decision-making authority, the Task Force recommends adding the following sentence to Comment 1: "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."

As the AGO understands the Task Force's recommendation, the Proposed Comment would allow, for example, the Attorney General to use her independent decision-making authority to file a nuisance claim under A.R.S. § 13-2917, against a business regulated by a client representative, even if a client representative declines to pursue regulatory action against the same business (assuming there is no conflict under ER 1.7 or another applicable rule). This is so because the two proceedings are different matters, and both the attorney general and client representative have separate decision-making authority.

Because "matter" is not defined in the ERs, *see* ER 1.9 cmt. 2 ("The scope of a 'matter' for purposes of this Rule may depend on the facts of a particular situation or transaction."), the AGO requests that the Task Force consider adding the following sentence to its Proposed comment to ensure there is no confusion

over the scope of Proposed Rule 1.2(b): “When a government lawyer and a client representative both have decision-making authority in a matter, this Rule does not prohibit a government lawyer from exercising independent decision-making authority consistent with the prohibition against concurrent conflicts of interest in ER 1.7 or other applicable rules.”

Second, Proposed ER 1.2(b) includes a significant and important exception that allows government lawyers to depart from a client representative’s objectives when those objectives “are clearly inconsistent with the client representative’s legal authority under applicable law or properly delegated authority.” Although the proposal does not specify the party who decides when the exception applies, the AGO believes the Task Force’s intent was that a government lawyer could depart from a client representative’s objectives based on the government lawyer’s reasonable determination that the exception applies, even if that determination is later found to be incorrect.

To clarify Rule 1.2(b), the AGO requests that this Court specify that the government lawyer is allowed to depart from the client representative’s objectives if the government lawyer reasonably determines that the exception applies. The Court could do so either by amending Proposed ER 1.2(b) or adding a sentence to Comment 2.

iv. Proposed Comment 10 to ER 1.7.

The AGO requests that this Court clarify that Proposed Comment 10 to ER 1.7 does not preclude using a screen, obtaining a conflict waiver, or referring the matter to another government lawyer or outside counsel to resolve conflicts when appropriate. The Proposed Comment provides:

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.

To ensure this comment is not interpreted to preclude the use of screens, waivers, or referrals when appropriate, the AGO requests this Court consider amending the comment as follows indicated by underlined text:

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. This does not prevent the government lawyer or a government law firm from participating in both matters pursuant to a screen or conflict waiver, consistent with ER 1.7(b) or other applicable rules. It also does not prevent the government lawyer or government law firm from participating in one matter and referring the other matter to another government law firm or other outside counsel, consistent with other applicable rules. See ER 1.16(e), and comment 4.

These options may be appropriate for large government law offices, and the

AGO does not understand the Task Force’s recommendations as prohibiting these options when allowed by the ERs.

v. Proposed ER 1.8.

Proposed ER 1.8 provides:

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.

While this sentiment is currently in comment 11, this standard—“potential for a conflict of interest”—introduces some ambiguities when added to the text of the Rule without clarifying amendments. *See* ER 1.8, comment 11. To ensure government lawyers are not mistakenly penalized for failing to recognize a potential conflict of interest, the AGO requests this Court consider amending this sentence in Proposed ER 1.8 to require a “substantial likelihood” of a conflict rather than a “potential” conflict. This would resolve vagueness concerns and ensure a government lawyer is not penalized for not identifying a potential conflict of interest.

vi. Proposed ER 1.16.

The Task Force’s proposed Comment 4 to ER 1.16(e) states that “a government lawyer cannot terminate representation of the government organization.” The Attorney General understands this to mean that a government

lawyer cannot withdraw from representing an entire “government organization,” such as the State of Arizona or a specific county. However, this statement could perhaps be read to mean that a government lawyer cannot withdraw from representing a particular governmental agency. That reading would be problematic, both because A.R.S. § 41–192(E) provides for such withdrawals and because other ethical rules could require or permit such a withdrawal if, for example, that agency sued the government lawyer. The Court should ensure that this comment does not suggest that a government lawyer is precluded from withdrawing from the representation of a particular

CONCLUSION

As discussed above, the Attorney General’s Office supports the goals of the Task Force Petition and its recommendations. The Attorney General’s Office requests that this Court consider the above suggestions to clarify some of the Task Force’s recommendations.

RESPECTFULLY SUBMITTED this 1st day of May, 2024.

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By /s/ _____
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