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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 RULES 42 and 45, RULES OF THE ARIZONA SUPREME COURT	Supreme Court No. R-24-0003 TASK FORCE REPLY TO THE COMMENTS

The Task Force met on May 10, 2024, to consider the four comments posted on the Court Rules Forum, and it now replies to each comment. The Task Force also submits two additional amendments for the Court's consideration, one concerning the Preamble and the other regarding Paragraph 9 of the comment to ER 1.7.

1. Department of Justice ("DOJ") Comment. A representative from the office of the United States Attorney for the District of Arizona (referred to here as the Department of Justice or "DOJ") attended the majority of Task Force meetings. As indicated by the DOJ's comment, its representatives provided beneficial input to the Task Force throughout this process. The DOJ's comment reiterates the unique relationship between the United States Attorney and its sole client, the United States. The comment then suggests 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.

The DOJ accordingly proposed a two-sentence addition to Paragraph 21 of the Preamble, as shown in the body of its comment. After discussion, the Task Force concluded that the DOJ's suggested addition might not be necessary. Task Force members also agreed, however, that if the Court believed the addition would add clarity and assist with future interpretation of the Ethics Rules, then the addition would be acceptable, albeit with the following modifications.

First, the subject matter of the DOJ's suggested addition is distinct from the subject matter of the Task Force's first two sentences of Paragraph 21. Paragraph 21 applies to all Arizona government lawyers, whereas the DOJ's new text applies solely to attorneys in the office of the United States Attorney General. The Task Force therefore proposes that if the Court adds text, it be added as a new Paragraph 22 rather than as an addition to Paragraph 21.

Second, if the Court adds Paragraph 22, then the Task Force proposes the following, non-substantive edits to the DOJ's suggested text:

> The 2024 amendments are intended to accommodate, and should be interpreted in recognition of, the differences in federal government practice. ~~For example, one~~ One important difference in federal practice is that~~,~~ as a matter of federal law, litigation authority in ~~the majority of~~ most cases is centralized in the Attorney General of the United States~~, who, also~~. The Attorney General and any of ~~with~~ the Attorney General's designees~~,~~ usually represent~~s~~ a single client, the United States.

The Task Force believes these changes are consistent with the DOJ's request as well as with general restyling principles.

2. Arizona Prosecuting Attorneys Advisory Council ("APAAC") Comment. APAAC's comment supports the proposed rule amendments. APAAC does not propose modifications to any of the amendments, but instead, it makes three observations. The first observation commended the work of the Task Force. The second observation noted that APAAC had no recommendation regarding the two continuing education options that were set out in the proposed alternative amendments to Supreme Court Rule 45. The third observation concerned APAAC's work on an updated ethics manual for government lawyers. This project regarding an ethics manual was summarized in the December 14, 2023, Task Force report to the Arizona Judicial Council, at pages 16-17. The Task Force appreciates APAAC's ongoing work on that endeavor.

3. Arizona Attorneys for Criminal Justice ("AACJ") Comment. The AACJ comment concerns ER 1.7 ("Conflict of Interest: Current Clients"), comment Paragraph 9. The Task Force proposed to add new paragraphs 9 and 10 under the subheading "material limitations for a government lawyer." In its comment, the AACJ quoted the last two sentences of Paragraph 9:

> 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.

The AACJ comment continues:

> 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 ¶ 1 of the *Mitchell v. Palmer* opinion, the Court characterized the underlying fact scenario as "a unique prosecutorial situation." The case did not involve potential conflicts between the county attorney's prosecutorial and civil functions, which Paragraph 9 addresses. Moreover, even in the unique circumstances of that case, the Court — in paragraphs 25, 28, and 31 of its opinion — noted the challenge of fashioning a bright-line rule, and it declined to do so. Similarly, the AACJ comment does not propose any amendments to Paragraph 9 or to other portions of the comment to ER 1.7, which is possibly an indication of the challenges of drafting such a provision.

The Task Force does not take issue with the general principles of law enumerated in the AACJ comment. The Task Force also notes, however, that it engaged in a long discussion of ER 1.7 before finalizing its proposed Paragraph 9. The Task Force accordingly submits that modifications to this proposed paragraph are unnecessary.

If the Court favors a revision, however, the Task Force suggests amending Paragraph 9 by adding the following underlined language in the last sentence of the new paragraph:

> 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, or will appear to a disinterested observer to be, influenced by a desire to affect the outcome of the other matter.

4. Arizona Attorney General ("AGO") comment. The AGO's comment has several sections. This Reply refers to each section of the AGO's comment by the same lower-case roman numerals used by the AGO.

(i) Amendments to the Preamble. The Task Force proposed in Appendix A of its petition to delete current Paragraph 18 of the Preamble in its entirely, and to replace it with an alternative Paragraph 18. The AGO's comment says,

> 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.

The Task Force disagrees that a clarifying comment is necessary. The removal of current Paragraph 18 does not limit, expand, or alter the powers of the Arizona Attorney General, which the AGO notes are established by the Arizona Revised Statutes. Regarding the Attorney General's power to act in the public interest, please see further the Task Force Reply concerning proposed ER 1.0, which follows.

(ii) Proposed ER 1.0. The AGO's comment requests an amendment to the definition of "government lawyer" in ER 1.0 ("Terminology") "to reflect that Government lawyers represent the public and prosecute criminal offenses."

The Task Force hesitates to add a provision to this definition about representing the public because such a provision might be incomplete or misleading. For example, in *State ex. rel. Brnovich v Arizona Board of Regents*, 250 Ariz. 127 (2020) ¶ 8, the Court said:

> In Arizona, unlike some other states, the Attorney General has no inherent or common law authority. Instead, our constitution provides that '[t]he powers and duties of . . . [the] attorney general. . . shall be as prescribed by law.' Ariz. Const. art. 5, § 9. Therefore, the authority of the Attorney General must be found in statute.

Although government lawyers admittedly serve the public interest, the AGO comment does not cite Arizona statutes that specifically empower the Attorney General, or any other government lawyer, to represent "the public." Furthermore, some government lawyers — for example, attorneys for a school board or an improvement district — may have no codified responsibilities as prosecutors. A sentence in proposed Preamble, Paragraph 18, expressly says, "Government lawyers have additional responsibilities when acting as prosecutors, as set forth in Ethics Rule 3.8." This should be adequate clarification of that point.

With the qualifications noted above, the Task Force generally agrees with the AGO's conclusion that by removing current Paragraph 18, "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 Task Force does not agree, however, that a further revision is needed to confirm that belief.

(iii) Proposed ER 1.2(b). The AGO suggests that Paragraph 1 of the comment to ER 1.2 ("Scope of Representation and Allocation of Authority between Client and Lawyer") requires further clarification. This paragraph concerns decision-making authority vested in a government lawyer. The AGO notes that there might be circumstances where decision-making authority is concurrently vested in a government lawyer and in another government official. After discussion, however, the Task Force concluded that the AGO's suggested provision could conflict with mechanisms proposed in other ER amendments for resolving disputes between client representatives. The Task Force believes that the course of action prescribed by those other proposed amendments should be followed regardless of whether one of the client representatives is a government lawyer. Because the AGO's proposed text is unnecessary and might create confusion, the Task Force opposes its inclusion.

Another portion of this AGO comment raised an issue concerning proposed ER 1.2(b). That provision provides in part that a government lawyer may 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." The AGO comment requested clarification on who — the

government lawyer or the client representative — makes the "clearly inconsistent" determination. The Task Force believes clarification is unnecessary. These ethical rules govern government lawyers, and that determination is inherently within the purview of a government lawyer.

(iv) Proposed comment 10 to ER 1.7. Proposed Paragraph 10 of the comment to ER 1.7 ("Conflict of Interest: Current Clients") includes this sentence: "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." The AGO requests adding the following text to dispel an interpretation that the provision would "preclude the use of screens, waivers, or referrals when appropriate:"

> 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.

The AGO's comment says that "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."

But the entire Task Force did not agree with the AGO's understanding. Several members believed that screening should be allowed if the logistics of a government law firm facilitated doing so. Other members believed that except as

allowed under the narrow exceptions in the current ERs, screening is contrary to the established principle against concurrent yet conflicting representation.

Current ERs 1.10 and 1.11, which concern conflicts of interest, allow screening to prevent one lawyer's conflict from infecting and disqualifying the entire office only under certain circumstances. For example, screening is permitted when the conflict is a personal conflict of one lawyer, a conflict that occasionally happens when that lawyer moves from one office to another. After considerable discussion, a majority of members agreed that issues involving conflicts are to be resolved under the current ERs as amended by these proposed rules. Accordingly, the Task Force does not agree that the Court should add the AGO's suggested text.

(v) Proposed ER 1.8. The only change the Task Force made to ER 1.8 ("Conflict of Interest: Current Clients: Specific Rules") was relocating a provision in Paragraph 11 of the current comment to section (g) of the rule. The provision was relocated verbatim, and the AGO comment acknowledges that the wording is unchanged. The AGO is concerned, however, with the phrase "potential for a conflict of interest." It contends that this phrase "introduces some ambiguities when added to the text of the Rule without clarifying amendments." The AGO accordingly proposes to substitute the phrase "a substantial likelihood of a conflict of interest." The AGO comment concludes that doing so "would resolve vagueness concerns and

ensure a government lawyer is not penalized for not identifying a potential conflict of interest."

In determining the existence of a conflict, "substantial likelihood" — that is, "probable" — is a higher standard than "potential," i.e., possible but discernable. The Task Force does not believe the current wording is problematic or that a higher standard is necessary. It disagrees with the need for this proposed change.

(vi) Proposed ER 1.16. Proposed Paragraph 6 of the comment to ER 1.16 ("Declining or Terminating Representation") provides:

> 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.

The AGO's comment, citing to A.R.S. § 41-192(E), says:

> 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.

A.R.S. § 41-192(E) provides:

> E. If the attorney general determines that he is disqualified from providing judicial or quasi-judicial legal representation or legal services on behalf of any state agency in relation to any matter, the attorney general shall give written notification to the state agency affected. If the agency has received written

> notification from the attorney general that the attorney general is disqualified from providing judicial or quasi-judicial legal representation or legal services in relation to any particular matter, the state agency is authorized to make expenditures and incur indebtedness to employ attorneys to provide the representation or services.

At the May 10, 2024, Task Force meeting, a representative from the AGO further explained that its comment intended to distinguish between withdrawal from representation of a global government organization, which is not permitted, and withdrawing from a component agency of the organization. The Task Force agreed that the latter may occasionally be necessary and the AGO is authorized to do so under A.R.S. § 41-192(E). Accordingly, the Task Force in this Reply clarifies that Paragraph 6 of the comment to ER 1.16 does not preclude a government lawyer's withdrawal from representing a constituent agency of the government organization when withdrawal is otherwise required by law.

5. Conclusion. The Task Force requests the Court to consider the proposed amendments at the August 2024 Rules Agenda, with the two modifications suggested by this Reply and as shown in Revised Appendix A. Those two amendments are briefly explained in Revised Appendix B. Finally, the Task Force is attaching Revised Appendix C. That appendix contains one change from the January 4, 2024, version: adding the inadvertently omitted word "elected" to the phrase "elected, appointed, or employed." The Task Force reiterates its request that the Court determine its preference, if any, for the alternative continuing education

requirements proposed in Appendix C that would specifically apply to government lawyers.

RESPECTFULLY SUBMITTED this 30th day of May 2024.

By /s/ _____
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Task Force Chair