Revised Appendix B: Version submitted with the Reply.

Appendix B contains a detailed discussion of the proposed rule amendments in Appendix A.

Note: Appendix B refers to "sections" of the rules and "paragraphs" of the comments, but not the converse. The current ERs occasionally conflate this distinction. For example, ER 1.2, comment paragraph 1, refers to "paragraph (a)" of the rule; the Task Force believes that reference should be to "section (a)" of the rule.

Because some of the comments to the ERs are lengthy, it's natural to perceive them as multiple comments. The Task Force, however, believes that each of these rules has a single comment with multiple "paragraphs." Appendix B consistently refers to "sections" of rules and "paragraphs" of comments.

Preamble

The current Preamble contains 20 paragraphs. The petition proposes to replace current paragraph 18 with entirely new text, ~~and~~ to add a new paragraph 21, and possibly to add a new paragraph 22.

Current paragraph 18 is outmoded in several respects. The current paragraph, which attempts to distinguish government lawyers from private practitioners, contains sentences that might not apply to all government lawyers, and it might be conceptually incomplete. By comparison, and rather than distinguishing private and public lawyers, the proposed substitute text for paragraph 18 notes that "government lawyers, like other lawyers," are subject to the same ethics rules, the same oath, and the same creed. The proposed text goes on to state that "a government lawyer who has responsibilities assigned by law [i.e., by statute, ordinance, or code] must interpret and carry out those responsibilities in a manner consistent with these Rules, Oath, and Creed." In other words, a government lawyer should be mindful of both statutory and ethical duties and should harmonize these duties to the fullest extent possible. The proposed paragraph concludes by noting the special responsibilities of government prosecutors under ER 3.8.

New paragraph 21 of the Preamble notes that the Arizona Supreme Court adopted amendments to the ethics rules in 2024 "to clarify the obligations of government lawyers where previous guidance was incomplete." The new paragraph explicitly provides that the amendments do not exempt government lawyers from the

general application of these rules. Paragraph 22 is optional. The paragraph describes the unique nature of the relationship between the United States Attorney and its sole client (the United States), and advises that these amendments are intended to accommodate, and should be interpreted in recognition of, the difference in federal government practice.

ER 1.0. Terminology

The Task Force proposes to add two definitions to ER 1.0. New ER 1.0(r) would add a definition of "client representative," while new ER 1.0(s) would add a definition of "government lawyer." Note that the current definitions in ER 1.0(a) through (q) are not in alphabetical order, and the Task Force declined to alphabetize those sections in the course of adding these two new definitions.

Both of these new definitions are fundamental to understanding the nature of a government attorney's practice.

A government lawyer typically has an inchoate government organization as a client, i.e., the State of Arizona, a county, or a municipality. But as noted in the Task Force Report, "The State of Arizona, counties, municipalities, and other political subdivisions require real people to make decisions on their behalf and to operate and execute the day-to-day functions of government." These "real people," whether individuals or a group, and whether elected, appointed, or employed, have authority – by statute or ordinance, or by delegation – to act on behalf of the government organization. These people and groups are "client representatives."

Note that the Task Force has not proposed a definition of "government client." Task Force members spent considerable time discussing a possible definition, and the definition of "government client" in the proposed standalone rules was roundly criticized. The Task Force concluded that defining a "government client" was not a necessary predicate for the other proposed amendments. Furthermore, the drafters of the current ethics rules probably faced a similar dilemma, because current ER 1.0 does not include a definition of "client."

The definition of "government lawyer" provides that the individual may be "elected, appointed, or employed" as such. The definition further provides that a government lawyer "has a duty to provide civil and administrative advice and representation to a government organization on an ongoing basis" as provided by the Constitution and by codified state and local law. For additional clarification,

the definition also instructs that "government lawyers include but are not limited to the Arizona Attorney General, county attorneys, and municipal attorneys, and their deputies and assistants."

Lawyers in private practice often provide legal services to government entities, either on a discrete matter or as outside general counsel. They do not face all the challenges that lawyers employed by government entities face. Without legally established duties, for example, private lawyers can move to withdraw from the representation when ethical challenges arise. The new definitions in ER 1.0 are intended to acknowledge this.

ER 1.2. Scope of Representation and Allocation of Authority between Client and Lawyer

Regarding ER 1.2, the Task Force proposes to amend current section (a), to add a new section (b), and to renumber current sections (b), (c), and (d) as sections (c), (d), and (e).

Note: Because the addition of new section (b) required the relettering 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)

The amendment to the third sentence of section (a) is shown with underline as follows: "A lawyer shall abide by a client's decision whether to settle a matter pursuant to applicable law." "Applicable law" would include statutes, ordinances, and other local codes. In some instances, applicable law may empower a government lawyer with settlement authority.

New section (b) specifies that 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…." This is parallel to section (a), which generally requires a lawyer to "abide by a client's decisions concerning the objectives of representation," but it is explicitly stated for government lawyers to avoid any misperception that a government lawyer inherently has that decision-making authority. This distinction seeks to underscore the general nature of an attorney-client relationship, albeit one that in the government context may also carry a political dimension, given the fact that the client representative and the lawyer may be popularly elected to their respective positions. The foregoing provision in new section (b) includes a significant exception to the duty to abide, specifically, when the client representative's decisions are "clearly inconsistent" with the client representative's authority under applicable law or properly delegated authority.

Comment to ER 1.2:

There are currently 14 paragraphs of comments concerning ER 1.2. The Task Force proposes to add one new paragraph, number 12, and to amend a few of the existing paragraphs as noted below.

The comments to ER 1.2 have subtitles, and paragraph 1 is under the subtitle "Allocation of Authority between Client and Lawyer." Paragraph 1 vests the client with "ultimate authority" in the relationship with counsel, subject to limits set by law and the attorney's professional responsibilities. A new sentence in paragraph 1 continues with the concept expressed in new section (b) and provides, "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." This concept is reiterated in subsequent ERs. Paragraph 1 also includes as an addition to the last sentence the phrase "or as provided by applicable law" to identify that a government lawyer's authority derives not only from the client, but also from "applicable law."

Paragraph 5 is under the subtitle "Independence from Client's Views or Activities." Usually, a government lawyer has no choice about which client or client representatives the government lawyer will represent or advise. That "choice" is typically made for a government lawyer by applicable law. Accordingly, the Task Force amendment to paragraph 5 provides, "…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." In practical terms, representation is required even when, as is often the case, the government lawyer and the public official are members of different political parties or have divergent policy goals.

New paragraph 12 is under the subtitle "Criminal, Fraudulent and Prohibited Transactions." One of the unique features of a government lawyer's relationship with a client representative is that the lawyer might have duties specified by applicable law to bring a civil action against, or even to criminally prosecute, a client representative under certain circumstances. This can involve a lower-level client representative, but it can also involve client representatives at higher levels and even an elected official, and consequently such an action can generate a great deal of publicity. Regardless, this comment validates that it is ethically permissible for a government lawyer to take action against a client representative, even an elected one. This concept is also reiterated in subsequent rules, but it is first introduced in new paragraph 12. The new paragraph provides:

> 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.

Please see in this Appendix the discussion of proposed ER 1.16(e) regarding the last sentence of paragraph 12.

ER 1.4. Communication

Current sections (a), (b), and (c) contain general principles regarding attorney-client communication. (Current sections (a) and (b) apply to lawyers generally; current section (c) specifically applies to criminal defense counsel.)

Government lawyers, however, are in a somewhat different circumstance. For example, as a result of a client representative's election, retirement, or resignation, a government lawyer might continue to represent a public office but will be advising a newly elected or appointed client representative. Conversely, a government lawyer might be newly elected or appointed, and must in that instance act to establish relations with appropriate client representatives.

To address these circumstances, the Task Force proposes adding new sections (d) and (e), which have multiple requirements that a government lawyer must fulfill:

- Section (d) requires a government lawyer to "proactively identify and provide the appropriate client representatives with written confirmation of the scope of representation and pertinent details" of the representation. The Task Force discussed the timing of discharging that responsibility, such as whether it was upon the client representative's election, appointment, or hiring, or upon the government lawyer's election or appointment, or perhaps whether it should be done annually or at some other specified interval. The Task Force concluded that "proactively" would best accommodate all of these circumstances.

- Section (d) also requires the government lawyer to provide written confirmation to a client representative that the client representative is not the individual client of the government law firm. This codifies that the government lawyer provides advice only on official matters and is precluded from giving personal legal advice to a client representative. It further underscores the fact that the relationship between the client representative and the government lawyer reflects the mutual duty to serve the public as provided by Arizona law. The attorney-client relationship in the government context is not defined by the pursuit of personal interests.

- Section (e), in conjunction with the foregoing, requires the government lawyer to advise government officials and client representatives of the identity of the government lawyer's client (for example, to advise county supervisors or the sheriff that the government lawyer's client is the county and not the board of supervisors or the sheriff), the nature of the relationship between the government lawyer and the client representative, the potential impact of the government lawyer's other duties on the relationship (i.e., circumstances under which the government lawyer may take enforcement action against the client representative), and the circumstances under which a client representative might be treated as a separate client of a government

lawyer (most commonly if the client representative is named as a defendant in civil litigation).

Section (d) includes a couple of caveats. One is that the requirements in this section might be "otherwise satisfied" (see the comment discussion below of new paragraph 2.) The other is that the requirements are not applicable where the government lawyer functions as a client representative. This latter circumstance is particularly the situation for Department of Justice lawyers, where the United States Attorney as a matter of law is the client representative.

Comment to ER 1.4:

The Task Force proposes a new paragraph 2. The addition of this paragraph would require renumbering current paragraphs 2 through 7 as paragraphs 3 through 8.

The first portion of paragraph 2 discusses the phrase "appropriate client representatives" used in new section (d). It explains that the phrase encompasses elected and appointed officials who are regularly advised by the government lawyer and who have decision-making authority on behalf of the client. But it could also include other officials and employees of the client, if appropriate.

The new paragraph next explains the minimum frequency of the section (d) advisement. At a minimum, an advisement is required "at least as often as client representatives are elected or appointed."

Finally, the new paragraph clarifies that in lieu of an advisement addressed to a specific client representative, the requirement in section (d) can be fulfilled by "making the information publicly available, such as on the organization's public website or through published regulations or policies." Most government organizations maintain a website presence, and this is an easy and efficient way of providing this information. The paragraph also anticipates that the Arizona Administrative Code might include this information in the future, which would also fulfill the requirement.

ER 1.7. Conflict of Interest: Current Clients

As noted in the rule petition, ER 1.7 is a relatively concise, three-section rule, but it is currently followed by 34 paragraphs of comments spread over more than four pages of the current volume of the Arizona Rules of Court. In sum, section (a) provides that a lawyer may not represent a client if there is a concurrent conflict

of interest, except if the affected clients waive the conflict as provided in section (b). Section (c) specifies certain conflicts that may not be waived. The Task Force is not proposing amendments to these sections.

Comment to ER 1.7:

The paragraphs of the comment to ER 1.7 are interspersed with subtitles. Preceding paragraph 8, for example, is the subtitle "Identifying Conflicts of Interest: Material Limitation." The Task Force proposes to add a new subtitle after paragraph 8: "Material Limitations for a Government Lawyer." Under that subtitle, the Task Force proposes two new paragraphs, numbered 9 and 10. Current paragraphs 9 through 14 would accordingly be renumbered as paragraphs 11 through 16. Current paragraph 15 would be renumbered as paragraph 17, and the text of the paragraph would be modified as explained below.

New paragraph 9 applies when a government law firm provides civil advice and representation to a government client, and the firm also prosecutes criminal cases. This is a common circumstance in Arizona at the state, county, and municipal levels of government. In one possible scenario noted in the comment, a criminal defendant might have a civil claim against the government organization regarding the conditions of incarceration or the actions of its law enforcement officers, and the organization is represented by the same government law firm that acts as the prosecutor. In another scenario, the firm might be called on to advise client representatives who might be witnesses in the criminal case. 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, or will appear to a disinterested observed to be, influenced by a desire to affect the outcome of the other matter.

The Court should consider whether adding the phrase "or will appear to a disinterested observed to be" would be helpful to users. Adding the phrase

indicates that the issue of influence could be determined under a more objective standard.

New paragraph 10 continues the concept first noted in ER 1.2 whereby a government lawyer takes civil, criminal, or administrative enforcement action against a client representative. This new paragraph notes that providing advice to the client representative triggers a duty of loyalty, and 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."

The Task Force did not believe that current paragraph 15 applies in Arizona. In lieu of deleting the paragraph outright, however, the Task Force substituted this sentence: "Former comment 15, set forth in Model Code 1.7, comment 16, is inapplicable in Arizona."

ER 1.8. Conflict of Interest: Current Clients: Specific Rules

Current ER 1.8 consists of 13 sections, (a) through (m). These sections are followed by 19 paragraphs of comments.

Current paragraph 11, which concerns acceptance of offers of settlement, consists of seven sentences. The Task Force believed that the sixth sentence of this paragraph, which addresses "lawyers representing governmental agencies or officials," belonged in the body of the rule. It therefore deleted the sentence from the comment and relocated it, verbatim, as the last sentence of section (g) of the rule. The sentence says,

> 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.

ER 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees

Notwithstanding the title of this rule, the Task Force is not proposing any changes to its five sections. It is, however, proposing a change to one of the 8 paragraphs of the comment. The last sentence of current paragraph 4 provides:

> 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].

Two Arizona government agencies within the same organization client are very rarely different clients, and the sentence therefore contains an unusual premise. Moreover, saying that "the question…is beyond the scope of these Rules" provides no useful guidance. The Task Force therefore proposes to delete this sentence from the paragraph.

ER 1.13. Organization as Client

Current ER 1.13 consists of seven sections. In some respects, it has application to a government organization as a client, but this is not always the case. See, for example, page 10 of the Report, which noted:

> … ER 1.13(a) provides, 'A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.' The phrase 'duly authorized constituents' might be suitable for lawyers in corporate practice, but in government practice, the phrase suggests the voters, and it is therefore inapt in this context.

To address this issue, the Task Force is proposing to add a sentence to section (a), which is shown with underline as follows:

> (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."

Comment to ER 1.13:

Current ER 1.13 contains 15 paragraphs, and several subtitles. Paragraphs 9 and 10 are under the subtitle "Government Agency." The Task Force proposes to delete the content of these two paragraphs and to add four new paragraphs numbered 9, 10, 11, and 12. It further proposes an amendment to current paragraph 13, which would be renumbered paragraph 15. Current paragraphs 11 through 15 would be renumbered in accordance with the foregoing changes.

ER 1.13 imposes duties on an attorney when the client is an organization. New paragraph 9 would explicitly provide that the attorney's duties under this rule also apply when the organization is a government organization. The paragraph goes on to clarify that:

> [t]he 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.

New paragraph 10 has two portions. The first portion notes that a government lawyer's duties may include an obligation to render advice to the organization's elected and appointed representatives, but in that common circumstance, "the government organization, rather than an individual government client representative to whom the advice is given, is the client." This is consistent with the concepts of "client" and "client representatives" expressed elsewhere in the proposed amendments. The second portion of paragraph 10 reiterates that government lawyers might have statutory obligations to take formal action against client representatives. The paragraph therefore reminds those government lawyers of the duties under amended ER 1.4 to "clearly identify the client and disclose to the individual government client representatives the existence of those other duties…."

Occasionally, client representatives of a government organization who are represented by the same government lawyer might disagree on a course of action. (For example, a county treasurer might want X, the county assessor might want Y, which is inconsistent with X, and both are represented by the county attorney. What does the county attorney do in that situation?) Preliminarily, this is not a conflict of interest, as that term is used elsewhere in these ERs, because the County Treasurer and the County Assessor are not different clients. Rather, they are client representatives of the same client. In this circumstance, however, new paragraph 11 would require the government lawyer to "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." Often, one of the client representatives has the ultimate authority as a matter of applicable law. If that informal approach is unavailable or unsuccessful, new paragraph 11 would provide the following guidance:

> 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.

New paragraph 12 is instructive when a client representative of a government organization is personally named in a legal proceeding. The paragraph permits the government lawyer to jointly represent the government organization and the individual client representative "if permitted by these rules" and after obtaining the requisite informed consent and informing the individual of the scope and consequences of joint representation. The question of whether joint representation is allowed is separate from the question of whether the government law firm is required to represent the client representative. On the latter question, new paragraph 12 concludes, "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."

A somewhat related subject is discussed in paragraph 13 (now paragraph 15), which appears under the subtitle "Dual Representation." Current paragraph 13 is a single sentence that says, "Paragraph (e) [i.e., ER 1.13, section (e)] recognizes that a lawyer for an organization may also represent a principal officer or major shareholder." The Task Force would add a second sentence to this paragraph that says, "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." This is a different analysis than the one arising under paragraph 11, which involves a disagreement (not a conflict of interest) between client representatives. This new sentence, by comparison, requires a true legal analysis of whether joint representation of two agencies during litigation would present a conflict. For example, in the event a declaratory action is brought, as contemplated under new paragraph 11, both client representatives/agencies would probably require new and independent counsel.

ER 1.16. Declining or Terminating Representation

Current ER 1.16 has four sections, (a) through (d). The Task Force would add a fifth section, section (e). Section (e) is the concluding provision regarding the concept of a government lawyer bringing an enforcement action against a representative of the government lawyer's client.

The relationship between a government lawyer and client representatives is typically an ongoing one. It commonly involves continuing, or at least recurring, advice. Under those circumstances, when the government lawyer has become adverse to the client representative because of a pending or filed enforcement action, how does the government lawyer continue to provide the same individual

with routine advice? The Task Force concluded that the government lawyer cannot do both.

Accordingly, the first sentence of new section (e) provides, "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." The "unless it is feasible" exception will naturally depend on the circumstances. For example, if the duties of the client representative who is the subject of the enforcement action can be reassigned to someone else in the organization, thereby avoiding the need for the government lawyer to communicate with that client representative, then the "unless feasible" exception might be practical. On the other hand, if the client representative is an elected official, this might not be feasible, and the enforcement action would need to be referred to another government law firm or outside counsel.

The last sentence of new section (e) says, "This rule does not limit investigations or actions against a government law firm's employees." Note that this sentence is also contained in paragraph 12 of the comment to ER 1.2. This sentence confirms that government law firm is not constrained in an investigation of one of its own elected, appointed, or employed attorneys or staff members, or an enforcement action against the individual. Under certain circumstances, however, it might be prudent to refer the investigation or enforcement action to another government law firm or outside counsel.

Comment to ER 1.16:

The current comment to ER 1.16 contains 11 paragraphs. The Task Force proposes to add a new paragraph 4, which would require renumbering current paragraphs 4 through 11 as paragraphs 5 through 12.

New paragraph 4 begins by noting that "a government lawyer cannot terminate representation of the government organization." This is true because representation is required by applicable law. The paragraph continues by advising that if the "unless feasible" exception in new section (e) is not possible, "then referral of that action to another government law firm or outside counsel is

required to address conflict of interest issues." The line on when referral is required is therefore a bright one, and the guidance of the ER is clear.