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**ARIZONA SUPREME COURT**

In the Matter of

PETITION TO AMEND RULES 31,  
34, 38, 39, AND 42, Rules of the  
Supreme Court

No. R-15-0018

COMMENT OF THE  
ARIZONA ATTORNEY GENERAL

Pursuant to Supreme Court Rule 28, the Arizona Attorney General hereby provides comments to the request in Petition No. R-15-0018.

**I. Introduction: The Attorney General's Interest**

The Attorney General serves as the chief legal officer for the State of Arizona and the Attorney General's Office (AGO) is the largest law office in the State. The AGO represents and provides legal advice to almost all State agencies and departments; enforces consumer protection and civil rights laws; and prosecutes certain criminal cases, including handling all felony conviction appeals in the state. AGO attorneys thus handle matters that run the gamut of the legal

spectrum from civil to criminal to family law, and their work often encompasses investigations outside the context of, or before the commencement of, litigation, as well as administrative law and alternative dispute resolutions.

In short, the AGO has a paramount interest in the promulgation and application of procedural rules impacting the practice of law in the State of Arizona. In that capacity, the Arizona Attorney General submits the following comments regarding the Petition filed by Justice Timmer on behalf of the Committee on the Review of Supreme Court Rules Governing Professional Conduct and the Practice of Law (Petition) to change various aspects of the Rules of the Supreme Court.

## **II. Proposals Regarding Government Law Practice**

The Petition recommends changes to the comments following three specific rules relating to the practice of law by government lawyers. It is largely silent as to why the Committee recommends these amendments; it merely indicates that the proposals do not seek to make substantive changes but rather seek “to provide useful guidance to government lawyers on application of existing Rules to their practice.”

### **a. Proposed Comment Changes to Ethical Rules 1.13 and 3.5**

Rule 1.13 relates to organizational clients. The proposed addition to the comments clarifies some procedures related to the concerns arising where a

government lawyer with an organizational client is advising constituents of that organization. The AGO supports this proposed comment and respectfully urges the Court to adopt the amendment. The additional language is particularly helpful to the AGO, the largest law firm of government lawyers representing organizational clients in the State of Arizona.

Rule 3.5 relates to impartiality and decorum of the tribunal, and includes provisions relating to improper *ex parte* communications. The proposed addition to the comments clarifies appropriate procedural mechanisms for government lawyers representing entities that may act in a quasi-judicial role. The language of the proposed comment is consistent with procedures the AGO has already adopted in handling the circumstances described and, as such, is helpful in clarifying the propriety of these procedures. The AGO thus supports this proposed comment and respectfully urges the Court to adopt the amendment.

**b. Objection to ER 4.2 Proposed Changes**

The proposed amendments to the comments for Rule 4.2 are, as stated above, not explained in the petition beyond the indication that they are intended to “provide useful guidance to government lawyers.” While that intention is laudable, the proposed language does not, unfortunately, provide such guidance.

Rule 4.2 relates to communications with represented parties. Although the title of the rule includes the language “person represented by counsel,” Arizona is

one of the states that affirmatively declined to change the text of its Rule 4.2 from referencing a “party” to referencing a “person.” The American Bar Association Model Rules of Professional Responsibility adopted this change in 1995, and this Court was presented with an opportunity to make the change itself in 2002. The Court agreed with the State Bar and this office at that time, opting not to make that change. The AGO respectfully urges the Court now to avoid any attempt to proceed in a manner that will further divorce the comments to Rule 4.2 from its actual text and from case law interpreting that text.

A significant concern with the proposed comment is that it suggests government lawyers engaged in criminal investigations may no longer be secure when they follow the direction of the courts regarding pre-indictment investigative activities. Rather, the final sentence of proposed comment two now suggests that government lawyers engaged in investigations may essentially never be secure that their conduct is ethical—the comment suggests that even fully legally and constitutionally permissible communications may be unethical, although it fails to provide any explanation or guidance as to what types of communications fall into that category and why.

Indeed, one statement in the current comments that provides clear guidance (the final sentence of current comment one) is actually removed in the proposal and its apparent replacement (the first sentence of proposed comment two) is not at

all the same. The new language refers only to a communication by a lawyer as opposed to a communication by any individual, and thus fails to account for communications by informants or whistleblowers.

The proposed new comment did contain one sentence that could have been of particular use and guidance generally to government attorney investigations. The second proposed sentence states: “Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings.” Unfortunately, the inclusion of “may” in the sentence (in contrast to the current final sentence of comment one) leaves the guidance of little value as it is vague and inconclusive. Well-intentioned government attorneys engaged in investigations on behalf of the public’s interest receive little guidance from such an equivocal statement.

To the extent the Court is interested in adding clarity to Rule 4.2 for government attorneys, adding the following slightly altered sentence from the proposal to current comment one would do so: “Communications authorized by law include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings.” This sentence would comport with Arizona’s rule

text that maintains application of the rule to a “party,” a status that can’t arise before the commencement of such proceedings.

The third sentence of the proposed new comment is not merely equivocal, it is outright confusing because it appears to substantively alter the text of the rule itself. Rule 4.2 explicitly applies to communications “about the subject of the representation.” Yet the proposed comment purports to expand the rule’s application so that its restrictions apply even to conversations outside the subject of representation previously understood to be outside its reach.

The proposed amendments to the Rule 4.2 comments are not helpful in clarifying the rule, but rather appear likely to increase confusion among government lawyers. As such, the AGO respectfully requests that the Court reject the proposed amendments to this rule.

### **III. Objection to Rule 31 Changes Regarding Mediators**

The proposed changes to Rule 31 of the Rules of the Supreme Court require mediators be either active members of the Arizona State Bar or certified legal document preparers. The Arizona Attorney General’s Office’s Mediation Program, in partnership with local courts, offers free mediation in civil rights claims and trains volunteer mediators who serve the public statewide by resolving disputes outside court. Most of the volunteer mediators would be barred from this service if burdened with the requirements of the proposed change. The Attorney General’s

Office opposes changes to Rule 31 that add burdens reducing or ending these volunteer mediation services.

- a. The Attorney General's Office has traditionally offered free mediation in civil rights cases and worked with the courts to train volunteer mediators to serve the public.**

Pursuant to Rule 31(d)(25)(A) and (B), volunteer mediators discussed in this statement are currently exempt from the burdens of the changed rule.

#### *Civil Rights Mediation*

In nearly every civil rights claim brought by the community to the Attorney General, the parties are given the opportunity to participate in free, no-fault mediation before an investigation takes place. These volunteer mediators help to make victims of discrimination whole. The mediators require written agreements including language provided by the Attorney General that guards against future discrimination by the responding employer, housing provider or public accommodation. In short, the volunteer mediators serve to swiftly correct past discrimination and to protect against future discrimination. In fiscal year 2014 (FY14), the Attorney General, through volunteer mediators, resolved 68 claims of discrimination before an investigation took place.

#### *Volunteer Mediators Training*

The Attorney General offers free 40-hour mediation trainings throughout Arizona for volunteer mediators for Arizona courts. The Arizona Supreme Court,

Administrative Office of the Courts and the Attorney General annually enter into an Interagency Service Agreement (attached as Exhibit A) as follows:

The Attorney General agrees to provide up to eight (8) five-day educational training seminars on mediation techniques for Court staff, advocates and volunteers. Each five-day training seminar, (forty (40) hours of instruction) shall include, but not be limited to, the following: A. The basic principles of conflict resolution and mediation; B. Role-playing and other appropriate training techniques; and C. Communication, listening problem-solving skills. Subject to the approval of the Court, the Attorney General may schedule additional separate half-day seminars for court staff, advocates and volunteers to a maximum of twenty-four (24) half-day seminars in fiscal year 2015. Each half-day training seminar of approximately four (4) hours of instruction shall include one of the following topics: A. Victim-offender mediation; B. Cross-cultural mediation; C. Advanced mediation techniques; and D. Ethical and confidentiality issues. . . . The training seminars shall be held in various geographic locations around the State of Arizona during the term of the Agreement at times, locations, and dates determined by the Arizona General and approved by the Court.

The agreement requires “[A] minimum of ten (10) participants must be enrolled for any seminar to be held.” If the rule change is adopted, it is the Attorney General’s belief that courts in outlying counties would not be able to recruit enough qualified participants for the mediation trainings to be held. As an example, in the past year we received a “Granting Exception” to train fewer than ten participants in a Mohave County. (see attached Exhibit C). Therefore, under the rule as changed, those communities would be deprived of volunteer mediators.

The Attorney General has trained volunteer mediators for Arizona courts since 1984. These courses are open to the public. The Attorney General’s training

provides basic knowledge and skills necessary to begin mediating with the court mediation programs in Arizona courts. Participants who complete the training can apply to various Arizona courts to become volunteer mediators. Disputes mediated include small claims, commercial, and truancy. Participants complete five days of training and complete the individual court's application process, including background and fingerprint checks, to be accepted as a volunteer mediator. There is currently no state level mediator certification in Arizona and the training does not grant any certification. Certificates of completion of the training course are distributed upon completion of the 40-hour basic mediation training.

Pursuant to the above-referenced agreement, the Attorney General trains court staff, advocates, and volunteers regardless of being licensed Arizona attorneys or certified legal document preparers. During FY14 the Attorney General trained 134 mediation class participants in Pima County, Yavapai County, Pinal County, and Maricopa County (see attached Exhibit B, the Attorney General's FY14 Annual Report to the Court).

**b. The proposed changes to Rule 31 will reduce or end the Attorney General's free mediation in civil rights cases and the volunteer mediators training program.**

Many of the Attorney General's Conflict Resolution Program staff, Arizona's court staff, and the participants of volunteer mediators training do not meet the requirements of the rule as changed. We expect that the investment of

finances and time required to become a member of the Bar or a certified document preparer would reduce our pool of volunteer mediators and therefore reduce our services offered to the public.

The Attorney General respectfully requests that the Court not adopt the proposed changes to Rule 31 because it would not serve the public in that it would end or reduce free mediation services offered in civil rights cases and other court programs statewide.

#### **IV. Conclusion**

The Attorney General supports the Petition's recommended changes with regard to Ethical Rules 1.13 and 3.5, but objects to the recommended changes as to Ethical Rule 4.2, and Supreme Court Rule 31. As such, the Attorney General respectfully requests that the court reject the proposed changes to Ethical Rule 4.2 and Supreme Court Rule 31.

DATED this 20th day of May, 2015.

MARK BRNOVICH  
Arizona Attorney General

/s/ John R. Lopez IV  
John R. Lopez IV  
Solicitor General