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8 IN THE SUPREME COURT OF THE STATE OF ARIZONA  
9

10 IN THE MATTER OF:

R-15-0018

11 PETITION TO AMEND RULES 31,  
12 34, 38, 39, AND 42, RULES OF THE  
13 SUPREME COURT

MARICOPA COUNTY ATTORNEY'S  
RESPONSE TO PETITION TO AMEND RULES  
31, 34, 38, 39 AND 42, RULES OF THE  
SUPREME COURT

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15 The Maricopa County Attorney hereby responds to the Petition to Amend  
16 Rules 31, 34, 38, 39 and 42, Rules of the Supreme Court, and asks this Court to adopt  
17 a modified version of the requested comment to ER 1.13 to address several concerns  
18 with the version in the Petition. The Maricopa County Attorney is also filing a  
19 separate comment regarding this Petition to address concerns with the requests to  
20 modify the comments to ER 4.2.  
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23 A. AS DRAFTED, THE PROPOSED COMMENT DOES NOT  
24 ADEQUATELY CLARIFY THE OBLIGATIONS OF  
25 GOVERNMENT LAWYERS.

26 According to the Petition, the goal of adding a new comment to ER 1.13 is to  
27 clarify the ethical rules for government lawyers. The requested change appears  
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1 calculated to address three interrelated situations regarding the conflicts attendant to a  
2 government lawyer's duties. By addressing all three situations in one comment,  
3 however, the requested comment confuses the issues and does not provide clear  
4 guidance to a government lawyer. As a result, although the substance of the  
5 proposed change may not be problematic, the way it is drafted creates unfortunate  
6 ambiguities.  
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9 First, the comment seeks to clarify the ethical considerations for a government  
10 lawyer who provides legal advice and representation for "constituents" of a  
11 "governmental organization" with one hand and prosecutes criminal charges and civil  
12 actions with the other hand. [Petition at 71, Proposed Comment 10 to ER 1.13] ("A  
13 government lawyer may have an obligation . . . to render legal advice to various  
14 constituents of a government organization . . . or to other governmental organizations.  
15 Some government lawyers may themselves be elected officials who have statutory  
16 obligations to take formal action against government constituents under certain  
17 circumstances.").

18 This situation arises, for example, when a constituent of a government  
19 organization approaches a county attorney for legal advice regarding past conduct. If  
20 the county attorney concludes the constituent is criminally or civilly liable for his past  
21 conduct, and the county attorney has a duty to prosecute that conduct, she would have  
22 the ethical obligation to "make the identity of th[e] client [i.e., the government  
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1 organization] clear to the constituents” and “disclose to the constituents any  
2 limitations that are imposed on the lawyer’s representation or advice as a result of the  
3 lawyer’s other statutory obligations.”<sup>1</sup> *Id.* This ethical consideration may put the  
4 county attorney in a difficult position because she does not know *ex ante* the conduct  
5 the constituent will describe, but this part of the proposed comment is not  
6 objectionable because it does not depart from current ethical considerations or  
7 practice.  
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10           Second, the comment seeks to clarify the ethical considerations when a  
11 government lawyer encounters conflicts (a) between a “constituent” and the  
12 government organization she represents, (b) between “constituents” of the same  
13 government organization, and (c) conflicts among different government  
14 organizations. *Id.* (“A government lawyer may have an obligation . . . to render legal  
15 advice [and representation] to various constituents of a governmental organization,  
16 including elected officials, multi-member boards, or agencies, or to other  
17 governmental organizations.”)<sup>2</sup> Where a potential conflict arises (a) between a  
18 “constituent” and the government organization she represents or (b) between  
19 “constituents” of the same government organization, the government lawyer would  
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24 <sup>1</sup> Although this section of the proposed comment mentions “statutory obligations,” elsewhere the  
25 comment more accurately addresses “an obligation defined by statute, regulation, or case law to  
26 render legal advice.” It is unclear why the comment changes these terms.

27 <sup>2</sup> Curiously, the text of the proposed comment leaves out the most common constituent to whom a  
28 government lawyer may interact and/or provide legal advice and with whom the government  
organization may have a conflict: a rank-and-file employee.

1 have the ethical obligation to “make the identity of th[e] client [i.e., the government  
2 organization] clear to the constituent[] and determine which constituent has authority  
3 to act for the government entity in each instance.” *Id.* The proposed comment  
4 therefore offers sensible guidance that comports with current ethical considerations  
5 and practice.  
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8 The comment is silent, however, in the case of a conflict between government  
9 organizations to which the government lawyer provides legal advice and  
10 representation. Therefore, unless the comment is revised to address this situation, the  
11 phrase “or to other governmental organizations” in the first sentence should be  
12 deleted for the sake of clarity.  
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15 Finally, the Proposed Rule appears to address but does not sufficiently clarify  
16 the ethical considerations when a government attorney potentially advises a  
17 constituent of a government organization in the constituent’s personal, rather than  
18 representative, capacity. The comment states: “Normally, the government lawyer  
19 advises each constituent of a government organization not in his individual capacity  
20 but as a representative of the organizational client. In that event, there is only one  
21 client, and thus no joint representation or conflict of interest.” *Id.* The use of  
22 “[n]ormally” suggests without addressing the opposite circumstance in which the  
23 legal representation becomes individual rather than representative. *See State ex rel.*  
24 *Thomas v. Schneider*, 212 Ariz. 292, 296, ¶ 17, 298-99, ¶ 30-31, 130 P.3d 991, 995,  
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1 997-98 (Ariz. Ct. App. 2006) (holding city councilmembers had “reason to believe”  
2 individual attorney-client relationship with city attorney existed based on city  
3 ordinance and individual discussions).  
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5       Rather than provide guidance for this situation, the requested comment  
6 recommends a course of action that, taken together, serves as a non sequitur by  
7 confusing all three of the scenarios described in this memo: The lawyer must make  
8 the identity of that client clear to the constituents and determine which constituent has  
9 authority to act for the government entity in each instance. The lawyer must also  
10 disclose to the constituents any limitations that are imposed on the lawyer’s  
11 representation or advice as a result of the lawyer’s other statutory obligations.  
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14       Only the first part of the first sentence of the proposed comment which  
15 recommends that the government lawyer clarify the relationship to the constituent  
16 provides sensible guidance for this issue. The second part of the first sentence  
17 addresses the action to take when the interests of the organizational client and the  
18 client’s representative potentially conflict. And the second sentence is inapposite  
19 because it primarily addresses the dual role of the government lawyer as advice-giver  
20 and prosecutor. Further, the proposed comment which is directed at government  
21 lawyers need not address this issue at all; unlike the other situations addressed by the  
22 requested comment, the potential for incidental personal representation of a  
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1 constituent is not restricted to government lawyers but applicable to any attorney that  
2 represents a corporate entity rather than a corporeal person.  
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4 **B. THIS COURT SHOULD ADOPT A MODIFIED VERSION OF THE**  
5 **PROPOSED COMMENT TO ACHIEVE THE PETITIONER'S**  
6 **GOALS.**

7 Petitioner correctly notes that additional clarity is needed in this area for  
8 government lawyers, but the proposed comment needs modifications to achieve that  
9 goal. The alternative proposal address two of the three situations from the original  
10 proposed comment: (1) conflicts between a government lawyer's representation of  
11 individual constituents of government entities and the lawyer's statutory duty to  
12 prosecute or bring civil cases against those constituents and (2) (a) conflicts between  
13 a constituent and the government entity she represents and (b) conflicts between  
14 constituents of the same entity. The third situation that is addressed in the Petition's  
15 comment – the circumstances in which a government lawyer's representation of a  
16 constituent of a government entity may become representation of the constituent in  
17 their individual, rather than representative, capacities – is excluded because it is not  
18 unique to government lawyers. Corporate attorneys, for example, may encounter the  
19 same situation. Further, guidance offered through reference to Rule 1.2(c) is not  
20 helpful because that Rule and the related comments discuss a lawyer's ability to limit  
21 the scope of the representation through the client's informed consent. For the  
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1 governmental lawyer, where statute or other legal authority sets the scope of the  
2 representation, that Rule provides no meaningful guidance.

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4 **Suggested Changes to the Proposed Comment to ER 1.13**

5 [10] A government lawyer may have an obligation TO RENDER ADVICE TO  
6 A GOVERNMENTAL ENTITY AND CONSTITUENTS OF A GOVERNMENT  
7 ENTITY. NORMALLY, THE GOVERNMENT ENTITY, RATHER THAN AN  
8 INDIVIDUAL CONSTITUENT, IS THE CLIENT. ~~defined by statute, regulation, or~~  
9 ~~ease law to render legal advice to various constituents of a government organization,~~  
10 ~~including elected officials, multi-member boards, or agencies, or to other~~  
11 ~~governmental organizations. Some government lawyers may ALSO themselves be~~  
12 ~~elected officials OR THE EMPLOYEES OF ELECTED OFFICIALS~~ who have  
13 statutory obligations to take formal action against INDIVIDUAL government  
14 constituents under certain circumstances. Normally, the government lawyer advises  
15 each constituent of a government organization not in his individual capacity but as a  
16 representative of the organizational client. THE GOVERNMENT LAWYER  
17 THEREFORE MUST CLEARLY IDENTIFY THE CLIENT AND DISCLOSE TO  
18 THE INDIVIDUAL CONSTITUENTS ANY LIMITATIONS THAT ARE  
19 IMPOSED ON THE LAWYER'S REPRESENTATION OR ADVICE AS A  
20 RESULT OF THE LAWYER'S OTHER LEGAL OBLIGATIONS. SEE ER 1.2(C)  
21 AND RELATED COMMENTS. FURTHER, WHERE A CONFLICT ARISES  
22 BETWEEN A CONSTITUENT AND THE GOVERNMENT ENTITY THE  
23 LAWYER REPRESENTS OR BETWEEN CONSTITUENTS OF THE SAME  
24 GOVERNMENTAL ENTITY, ~~In that event, there is only one client, and thus no~~  
25 ~~joint representation or conflict of interest. See ER 1.7 cmts. [28] to [30]. T[t]he~~  
26 ~~lawyer must make the identity of that THE client clear to the constituents and~~  
27 ~~determine which constituent has authority to act for the government entity in each~~  
28 ~~instance. The lawyer must also disclose to the constituents any limitations that are~~  
imposed on the lawyer's representation or advice as a result of the lawyer's other  
statutory obligations. See ER 1.2(e) and related comments.

23 Respectfully submitted this 20<sup>th</sup> day of May, 2015.

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27 By   
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