GOVERNMENT LAWYERS
Ethics Manual

1ST EDITION

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

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Arizona Prosecuting Attorneys' Advisory Council
3838 North Central Avenue | Suite 850
Phoenix, AZ 85012

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CHAPTER 1

Introduction

A lawyer, as a member of the profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. Our relationships with the bench and the bar are, for the most part, professionally harmonious. It is in the very nature of legal practice, however, that conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from a conflict among a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interests.

The Arizona Supreme Court recently deleted a paragraph in the Comment to the Preamble to the Arizona Rules of Professional Conduct (the "**Rules**"), one that contained vague statements that the rules "may" apply differently to government lawyers in certain situations. In its place, the Court added a new paragraph emphasizing that a "government lawyer who has responsibilities assigned by law must interpret and carry out those responsibilities in a manner consistent with these Rules, Oath, and Creed." **Preamble** Comment [18]. The clear message is that although a government lawyer may have duties that a private lawyer does not, those duties do not relieve the government lawyer of their obligation to comply fully with the Rules.

Government lawyers are nevertheless different from private lawyers. They are in a unique position of public trust. As a prosecutor, a government lawyer makes policy decisions that directly impact the public. In their role as a civil legal advisor, a government lawyer, like a private lawyer, must respect the lawful policy goals and choices of the individuals authorized to make decisions for their organizational client. A government lawyer—even an elected government lawyer—who respects and defends policy choices with which they do not agree is not abdicating the public trust. Rather, they are sharing that trust, as they must, with the individuals that the public has elected to make decisions outside of criminal prosecution. They are supporting democracy and the rule of law. A government lawyer who fails to respect those lawful policy choices, on the other hand, does not just violate the Ethics Rules; they are uniquely situated to injure and undermine the rule of law.

Though the Rules are comprehensive, they are by necessity general and there are many issues of professional discretion or best practices that are not addressed directly or in detail by the Rules. Those issues are resolved by the exercise of professional and moral judgment, guided by the principles underlying the Rules and the language of the Rules themselves, as well as the formal Comments to the Rules. Those principles include the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while also acting honorably and maintaining a courteous and civil attitude toward all persons involved in the legal system.

The purpose of this Manual is to provide guidance on ethical questions that commonly arise for government lawyers—those that act as the general counsel for the State, a county, a municipality, a state entity or agency, a school district, a community college district, another state or local special taxing district with an independent governing body, or an individual government official. (See **ER 1.0(s)**, defining "government lawyer" as "an elected, appointed, or employed lawyer who has a duty to prosecute criminal cases or 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.")

Sample forms for some of documents that government lawyers need to use to comply with the Rules are provided in the Appendices to this Manual. These samples are merely suggested starting places and they will need to be altered, in some cases significantly, where the circumstances make that appropriate.

CHAPTER 2

The Government Law Firm

2.1 Introduction

The government employs lawyers for the purpose of representation. Those lawyers are most often organized with an elected or appointed superior in command, and then with deputies and assistants to aid the appointed and elected officer. The Arizona Court of Appeals, in *Turbin v. Superior Court*, cites approvingly to this American Bar Association description of government law practice:

> *The relationships among lawyers within a government agency are different from those among partners and associates of a law firm. The salaried government employee does not have the financial interest in the success of department representation that is inherent in private practice…The channeling of advocacy toward a just result as opposed to vindication of a particular claim lessens the temptation to circumvent the disciplinary rules through the actions of associates….*

165 Ariz. 195, 198 (App. 1990) (citing **ABA Committee on Ethics and Professional Responsibility, Formal Opinion 342 (1975)**).

There is, however, no question that a government law office is a "law firm" within the meaning of the Rules.[1] And the leaders of government law offices, just like those of private law firms, must take reasonable steps to ensure that the individual government lawyers within the office clearly understand and comply with their professional responsibilities. The individual government lawyer, however, is ultimately responsible for meeting their ethical responsibilities. See **ER 5.2**(a); ***In re Alexander*, 232 Ariz. 1, 5, ¶ 15 (2013)**. Those responsibilities include competence, diligence, thoroughness of preparation, as well as having a willingness to avoid the existence of conflicts of interest *and* the appearance of impropriety.

With those broad guardrails in mind, let's look at specific questions regarding the makeup of government law firms.

2.2 I work in the Civil Division of my government law office. Is the Criminal Division also part of my government law office for purposes of the Rules of Professional Conduct?

ANSWER: Yes.

DISCUSSION: In Arizona, government law offices—at least for general government jurisdictions (municipalities, counties, and the state)—frequently perform both civil and criminal- prosecution functions. The Attorney General's Office constitutes the State's Department of Law, which advises State agencies and also prosecutes criminal and civil

1 **Model Rule 1.0**, Comment [3], notes that "With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct." That language was removed from the Arizona rule in 2021, when the definition was simplified to "lawyers in any affiliation," which is sufficiently broad to make the specific reference to an organizational legal department unnecessary.

offenses within its jurisdiction. County attorneys' offices represent both county government and special purpose districts and prosecute all felonies committed in their jurisdiction and all misdemeanor offenses that occur beyond the corporate limits of municipalities. A municipal attorney's office is composed of a hired or retained lawyer who renders civil advice to a city or town council and prosecutes misdemeanors that occur within the jurisdiction. The roles of each government law office are defined by statute or charter and ordinance.[2]

All but the smallest government law offices—in which the same lawyer may routinely perform both prosecutorial and civil functions—are divided into civil and criminal divisions. Those divisions are, however, part of the same "law firm" for purposes of the ethics rule. Each lawyer must remain aware of the ways in which cases handled by the division of which they are not a part can nevertheless create ethical issues and conflicts of interest for them. For more discussion regarding conflicts involving the two divisions, see **Section 8.5**, **Section 10.3**, and **Section 11.2** of this Manual.

2.3 I work in the Criminal Division of my government law office. Is the Civil Division part of my law firm?

ANSWER: Yes.

DISCUSSION: See **Section 2.2** of this Manual.

2.4 My individual office is embedded in a division of the larger government organization, and I work exclusively with that department. Am I still a part of the government law office?

ANSWER: Yes.

DISCUSSION: As the circumstances require, some government law offices will assign their deputies or assistants to occupy a location within a particular department or division of a government agency. Common assignments include embedding a lawyer with the government unit's law enforcement agency, or department of health, or transportation, or community development, and the like. Although the lawyer is assigned a division of the client, and even though the assignments all serve the same division objectives, the client is and remains the governmental unit acting as a whole and not as a division. The conscientious lawyer must remain alert and aware of instances where the individual division may be at odds with the whole of the governmental agency. So long as the relationship remains harmonious there is no significant risk of ethical pitfalls.

2.5 My assignments include advising elected and appointed officials. Am I required to respond to requests for guidance and advice when the scope of the client's inquiry exceeds the statutory powers and duties of the officer's authority?

For a discussion of the ethical issues that arise when a client representative appears to be exceeding their authority or otherwise behaving in what appears to be an improper or illegal manner, see **Chapter 8** of this Manual.

2 For the Arizona Attorney General, *see generally* **A.R.S. §§ 41-191 through 41-199**. For Arizona county attorneys, *see generally* **A.R.S. §§ 11-532 to 11-539**. Arizona municipalities may take different forms. Arizona statutes authorize town and city councils to appoint officers generally (*see* A.R.S. **§§ 9-237** and **9-274**) and recognize that, at least for cities, that will normally include a city attorney (*see* **A.R.S. § 9-271**). How a city or town attorney is appointed and the general scope of their authority and duties with respect to their city or town may also be addressed in the municipality's charter (if there is one) and code. In addition to those general authorities, there are numerous statutes throughout many titles of the Arizona Revised Statutes that govern the conduct or authority of government lawyers.

CHAPTER 3

The Government Client; General Representation

3.1 Introduction

A lawyer's representation of a client can be "general," meaning that they have agreed, as a matter of default, to be the client's lawyer in connection with any and all matters. Or representation can be limited, meaning that they have been retained to represent the client with respect to one or more discrete matters. An organization's general counsel is often an employee of the client organization, in which case they are referred to as "in-house" counsel, but some Arizona municipalities retain a private law firm to act as their general counsel. When an organization has in-house counsel and retains a private law firm to handle a specific matter, that law firm is typically referred to as "outside" counsel.

When the term "government lawyer" is used, it usually means a lawyer elected or appointed to serve as the in-house general counsel of a government organization[3] (and, occasionally, of an individual government official[4]), along with that lawyer's appointed deputies or assistants. The government entity may be the state, a county, a municipality, some type of special district, or an independent public body such as the Arizona Board of Regents or the Arizona Corporation Commission.[5] See **ER 1.0**(s) (definition of "government lawyer"). Although as noted above a lawyer in private practice may be appointed to act as the official city or town attorney for an Arizona municipality,[6] this manual is primarily directed to "in-house" government lawyers; the extent to which it is applicable to an outside lawyer appointed to be an official city or town attorney will depend in part on the terms and conditions of that engagement.

3.2 I'm an [assistant attorney general] [deputy county attorney] [assistant city attorney]; do I *always* represent the [state] [county] [city]?

ANSWER: Yes.

DISCUSSION: A lawyer who acts as general counsel for an entity, and each of that lawyer's assistant or deputy lawyers, represents that entity for all purposes and at all times, except to the extent that the representation is limited by law or by the agreement of the lawyer and client. In a multi-lawyer government law office, an individual lawyer may be assigned to advise only specific officials, agencies, or departments of the government entity client. An individual lawyer may even work exclusively with a single public official or agency. But the "client" – the entity to whom the lawyer's obligations of loyalty and confidentiality run – is still the larger government entity and not the individual government officials, employees, agencies and departments. See **ER 1.0(r)** (definition of "client representative"); **ER 1.13** Com-

3 See **A.R.S. §§ 41-192(A)** (attorney general serves "as chief legal officer of the state") and **11- 532(A)(7) and (9)** (county attorney advises county officers and acts "as the legal advisor to the board of supervisors").

4 Under **A.R.S. § 41-192(D)(7)**, for example, the "office of the governor" may employ their own legal counsel.

5 Both of those entities are authorized to employ their own legal counsel independent of the AG. **A.R.S. § 41-192(D)(4) and (6)**.

6 Municipal attorneys are generally appointed by city councils, as provided by statute, ordinance, or city charter. See **A.R.S. §§ 9-237** (town council appoints, in addition to the town clerk, town marshal, and town engineer, "other officers deemed necessary by the common council, who shall be appointed as provided by ordinance") and **9-271(B)(3)(b)** (city attorney is appointed by the mayor and city council).

ments [9] and [10]. (For further discussion of this concept, see **Section 2.4** and **Section 3.4** of this Manual.) And the representation is still general in nature.

For a discussion of situations in which a government lawyer might represent a government entity or individual government official or employee with respect to a discrete matter rather than as general counsel, see **Chapter 4** of this Manual.

3.3 Who does my office represent in criminal prosecutions?

ANSWER: The State—and only the State.

DISCUSSION: In their role as a criminal prosecutor, a government lawyer represents the State. It is particularly important to remember that although, under Arizona constitutional[7] and statutory[8] law, prosecutors owe certain duties to crime victims, *those victims are not the "clients" of the prosecutor*.[9] Victims, therefore, do not control the goals and objectives of the prosecution; they do not direct the prosecutor's actions; and their communications with and to the prosecutor are not, unless and to the extent otherwise provided by law, confidential.

Unlike when a government lawyer is acting as the civil legal advisor of a government entity— which, for the Arizona attorney general, is also "the state"—in their prosecutorial role, a government lawyer does not have a separate client representative whose policy goals, under **ER 1.2**, define the objectives of the lawyer's representation. In this way, a prosecutor is different from all other lawyers; in addition to decisions about legal strategy, a prosecutor makes all the substantive decisions with respect to their legal representation. And they exercise broad discretion when doing so. That creates unique ethical challenges. Prosecutors are so unique, in fact, that their conduct is subject to an additional ethics rule specific to their role: **ER 3.8**, *Special Responsibilities of a Prosecutor*.

The only interest of the prosecutor's true client – the state – and thus the only interest of the prosecutor, is to "do justice;" that fundamental principle must inform every decision that a prosecutor makes. As the Supreme Court of the United States has eloquently explained, a prosecutor:

> *is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.*

***Berger v. United States*, 295 U.S. 78, 88 (1935)**. **ER 3.8** makes it clear that this duty of impartiality and respect for the rights of the criminal accused is an ethical as well as a legal duty. Among other things, a prosecutor is ethically required to safeguard an accused's right to counsel; timely disclose all exculpatory or mitigating evidence; and carefully avoid prejudicing the rights of the accused by making inappropriate extrajudicial statements. They must also, when they become aware of new, credible, material evidence that an individual was wrongly convicted, disclose that evidence to the court and defense counsel and investigate the matter. If the evidence is clear and convincing, they must seek to get the conviction vacated.

It is essential that the prosecutor ensure that the victims with whom they interact understand that the prosecutor is not their lawyer. See **ER 4.3**. Because the prosecutor and the staff in their office will be communicating regularly with the victim, explaining their rights, what is happening in the criminal case, and how the criminal justice system works, victims can understandably become confused about their relationship to the prosecutor. The prosecutor must explain the nature of their role, their obligations to the criminal accused, and the fact that they do not represent the victim. Because of the victims' emotional state, those explanations will almost certainly need to be repeated from time to time.

7 **Ariz. Const. art. II, § 2.1.**

8 **A.R.S. §§ 13-4401 through 4443.**

9 See discussion in ***State ex rel. Romley v. Superior Ct. In & For Cnty. of Maricopa*, 181 Ariz. 378, 381-382 (App. 1995)**.

It is also important for the prosecutor to avoid becoming emotionally connected to a victim in a way that could compromise the prosecutor's impartiality or create an appearance of impropriety that could damage the justice system. Based on those same concerns, a prosecutor should not accept a gift from a victim that has any more than a nominal monetary value. See also **A.R.S. §38-505(A)** (prohibiting a public employee from accepting "any money, tangible thing of value, or financial benefit, directly or indirectly, for any service rendered").

3.4 Who do I take direction from on behalf of this big government organization?

ANSWER: The individual or multi-member body that has the legal authority to give you direction with respect to the particular matter, or any subordinate individual or body to whom authority has been delegated. That may vary depending on the circumstances, and you will occasionally need to navigate intra-organizational disagreements among client representatives.

DISCUSSION: A government entity is an incorporeal organization that, like a private corporation, can act only through natural persons. The persons through whom the government organization acts—which this handbook refers to as the government lawyer's "client representatives"—will typically include a multi-member executive body (which may also have legislative responsibilities) such as the mayor and council of a city or town, the board of supervisors of a county, or the Arizona Board of Regents, as well as individual elected and appointed officials and employees. The scope of the various client representatives' authority to act on behalf of the organization of course varies widely. That includes the scope of their authority to make statements and admissions that are binding on the organization, their authority to request the advice of the organization's lawyer, and their authority to direct the lawyer's representation of the government organization.

Because—generally speaking—the organization is your client, your duties as a lawyer run to that organization and not to any individual client representative, not even a high level client representative such as an elected official. (For a discussion of how to determine whether, in a particular circumstance, a client representative should be considered a separate client of your government law office, see **Section 5.4** and **Section 5.5** of this Manual.) You must, therefore, understand the scope of responsibility and authority of each client representative with whom you interact and must accept direction from – and only from – the client representative with the authority to give that direction. Because each organization is unique, you must consider any applicable law – whether state or local – as well as the organization's and your office's policies and practices, to determine the scope of that authority.

Under Arizona law, there is horizontal executive authority within the state and each county. Which executive official or body has the authority to make decisions on behalf of the client organization with respect to a matter will depend on the nature of that matter and the scope of each official's authority (and their relative authority when their decision-making spheres overlap). For example, the client representative with the broadest executive authority for a county is its board of supervisors, or its county administrator wielding authority delegated by the board of supervisors. However, in matters involving the jail, the county sheriff may have ultimate authority to make decisions as the county's client representative. The normal client representative having the highest executive authority for the state is the governor. However, in matters involving elections, the secretary of state may have ultimate authority as the state's representative, and in matters involving public education the superintendent of public instruction may have ultimate authority as the state's representative.

As noted above, you must determine which official or body has the authority to make policy decisions, and provide you direction, on behalf of the government organization with respect to which matters. At the state and county level, that may not always be clear. When handling a matter in which several departments, agencies, or officials have an interest, your office should, first and foremost, give the same legal advice to all those departments/agencies/officials and should encourage them to reach consensus. If an impasse is reached, your office may need to treat each *as though* they are separate clients who had been jointly represented by the office. This means that both representatives get outside counsel to litigate the scope of their authority and the in-house government law firm withdraws from any further involvement in the matter.

For a discussion regarding a lawyer's disagreement with a client representative's policy choices, and when you are ethically obligated to *refuse* to take direction from the client representative who is otherwise authorized to give it, and instead seek direction from a higher authority within the government organization, see **Section 8.1** of this Manual.

3.5 Who can give informed consent or waive confidentiality on behalf of the government organization when I need consent or waiver under the ethics rules?

The highest authority that can act on behalf of the government organization with respect to the matter from which the need for consent or waiver has arisen has authority to provide that consent or waiver. The extent to which lower-level employees, or the government lawyer themselves, possess the authority to do so depends on how the government client is structured and how authority has been divided or delegated. If that isn't clear, you may need to seek clarification through the promulgation of policies or regulations that address this. See **ER 1.13**(g) ("If the organization's consent to the dual representation is required by **ER 1.7**, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.).

3.6 What does it mean to be a client versus a "client representative?"

ANSWER: Lawyers have differing ethical duties to their clients, to unrepresented parties, to parties who are represented by other lawyers, and to the legal system. In order to analyze ethical issues, you must know into what category the individual whom you are advising falls.

DISCUSSION: An organization, including a government entity, can act only through human beings acting individually or as members of a multi-member board, commission, or council. Which means that you, as the lawyer for the organization, advise and receive direction from those individuals and multi-member bodies. But that does not mean that they are your clients; typically they are, instead, the representatives of your organizational client. See **ER 1.13**, Comments [9] through [12].

In your day-to-day practice, it may not be very important to classify, as either your "client" or a "client representative," any particular individual government employee or official, or multi- member body, with whom you interact and to whom you give advice. For example, you may appropriately take direction regarding a host of legal matters from a department director. For most practical purposes, that department director is treated as your "client." Their communications are confidential (and, depending on the nature of those communications, privileged) as to anyone *outside* the organization, and they set the policy goals with respect to the matter on which you are advising them.

But when ethics issues arise and you need to interpret and apply the Ethics Rules to your practice, the distinction between the client and a client representative is important because it is *your client* to whom most of your ethical duties run. For example, what if that department director gives you direction regarding a matter that involves policy considerations under the purview of another department? If you discuss the matter with the director of that other department, have you violated your confidentiality obligations under **ER 1.6**? If the individual department director whose communication you are sharing were your client, the answer would be yes. But that would interfere with your ability to represent the organization as a whole, which is your job. That is why you must make it clear to such client representatives that they are *not* your client, because owing a duty of confidentiality to them individually would be in conflict with your duty to your actual client, the organization. See discussion in **Section 3.9** of this Manual.

3.7 What are my obligations in communicating with my client representatives?

ANSWER: You must explain who you represent and what the scope of that representation means, before issues arise. See **ER 1.4**(d), **ER 1.4**(e), and Comment [2]; and **ER 1.13**(f).

DISCUSSION: As discussed elsewhere in this Chapter of the Manual, the government lawyer's client is the govern-

ment organization as a whole, for which the government lawyer is general counsel. That means that the organization is always your client. Under certain circumstances, an individual client representative may be a client of the government law office, jointly represented by the office along with the government organization; that is discussed further in **Section 5.4** and **Chapter 6** of this Manual. But most of the time, the individuals you are advising are client representatives rather than individual clients. You have an ethical obligation to ensure that they understand this. See **ER 4.3** ("When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.") and **ER 1.13**(f) ("In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.").

You must regularly provide written information about the office and its representation of the client organization to high-level client representatives. See **ER 1.4**(d) and **ER 1.4**(e). (For an example of such a communication, see **Appendix A**.) But you must also address any potential misunderstandings that arise in the course of your interaction with client representatives at all levels of the government organization. They should understand that the communications to you are not confidential as to others within the organization, that you will not provide them with personal legal advice, and that you may have an obligation to challenge their actions if those actions are wrongful. See ***State ex rel Thomas v. Schneider*, 212 Ariz. 292, 299, ¶ 31 (2006)** ("When a government attorney otherwise represents both an entity and its officials, and circumstances arise in which the attorney believes their interests may conflict, the attorney is ethically obliged to clearly inform both the entity and its officials concerning the scope of the attorney's representation so that those who might otherwise believe a confidential relationship exists do not compromise their legal interests.").

3.8 My individual office is located in the [transportation] [police] department, and I work exclusively with that department; isn't that department my client?

ANSWER: No. But the department, and its members, are representatives of your larger organizational client.

DISCUSSION: *See* discussion in **Section 2.4** of this Manual and sections throughout this **Chapter 3**. As explained elsewhere, although the department and the department's employees aren't themselves your clients, they are your client representatives. Their communications with you are client communications and although you can share those communications *within* the organization as necessary for the good of the organization, those communication are confidential and privileged as to anyone *outside* your organizational client. In addition, a department director may have authority to make significant legal decisions and give you direction on behalf of the larger organization with respect to matters within their purview. You should ensure that you understand the scope of that authority. See **Section 3.9** below.

3.9 I work regularly with a department headed by an elected official and that official says they're my "client;" how do I explain this to them?

ANSWER: Tactfully but firmly. And try to keep it as simple as possible under the circumstances.

DISCUSSION: That elected official, depending on the particular matter involved and the scope of their responsibilities, may actually be a client (see discussion in **Section 5.4** of this Manual). Most of the time, however, and for most purposes, they are simply an official through whom your organizational client acts. Even if the elected official is "only" a client representative, however, they may nevertheless have final decision-making authority for the client organization regarding particular matters, so the distinction may not always be particularly important. But you do not have the same ethical responsibilities to an individual who acts *on behalf of* your organizational client that you do to the organizational client itself. It is important for your client representatives to understand that and what it means in terms of practical things like whether and when you will share their communications with others within the government organization.

3.10 The lawyer for the opposing party in a matter I am handling is demanding to communicate with some elected and appointed officials for my government organization client. Can I demand they communicate only through me?[10]

ANSWER: It depends on the nature of the communication. The Rules recognize an exception to **ER 4.2** for communications by a lawyer that amount to an exercise of their client's right to petition the government for the redress of grievances.

DISCUSSION: **ER 4.2** prohibits a lawyer from "communicat[ing] about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." As explained in one recent ethics opinion,

> *the no-contact rule contributes to the proper functioning of the legal system by (1) preserving the integrity of the attorney-client relationship; (2) protecting the client from the uncounseled disclosure of privileged or other damaging information relating to the representation; (3) facilitating the settlement of disputes by channeling them through dispassionate experts; (4) maintaining a lawyer's ability to monitor the case and effectively represent the client; and (5) providing parties with the rule that most would choose to follow anyway.*

VA Legal Eth. Op. 1890, at *2 (2021).

The Comment to **ER 4.2** explains that, for an organization, the rule applies to communications "with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."[11] The Comment also notes that the "authorized by law" exception to the consent requirement includes "the right of a party to a controversy with a government agency to speak with government officials about the matter."[12] The inclusion of that language is clearly intended to accommodate the First Amendment's prohibition on laws abridging "the right of the people ... to petition the Government for a redress of grievances."

As a result, if opposing counsel is seeking to communicate directly with representatives of your client who have authority to act on behalf of the client regarding the matter in order to discuss a policy issue – including settling the matter that is in dispute – you should not try to prevent them from doing so. You can and should, however, encourage your client representatives to contact you to discuss such requests before acquiescing to them so that you have an opportunity to advise them regarding the matter and, if they want to allow the communication, you can offer to be present during the communication. This allows you an opportunity to safeguard the interests of your client that might otherwise be compromised as a result of the communication.

3.11 When do I have to withdraw from representation? CAN I withdraw from representation?

ANSWER: You must withdraw from a matter whenever the Ethics Rules require you to do so, and you may withdraw

10 A petition to amend this rule has been filed. To determine the current status of the rule, please check the Arizona Supreme Court's Rules Forum. **https://www.azcourts.gov/Rules- Forum/aft/1524**

11 This is similar to the category of employee communications that fall within the scope of an organization's attorney-client privilege as articulated by the Arizona Supreme Court in ***Samaritan Foundation v. Superior Court In and For County of Maricopa*, 176 Ariz. 497, 499-500 (1992)** (holding that "factual communications from corporate employees to corporate counsel are within the corporation's privilege ... if they concern the employee's own conduct within the scope of his or her employment and are made to assist counsel in assessing or responding to the legal consequences of that conduct for the corporate client").

12 Though the comment refers to communications by a party, most authorities assume that this includes communication through that party's lawyer. See, *e.g.*, **ABA Formal Eth. Op. 97-408**, n.10 (interpreting language identical to that in Arizona's **ER 4.2** comment); **AK Eth. Op. 2017-2 (Alaska Bar Assn. Eth. Comm.)**. Several years after the ABA Opinion was issued, the language in the model rule comment was altered to explicitly refer to communications by a lawyer on behalf of their client: "Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government."

as permitted by the Rules (though this could have employment consequences).

DISCUSSION: The fact that, as a government lawyer, you have a duty to represent the government organization does not excuse you from compliance with the Ethics Rules, which require you to withdraw from representation under certain circumstances. Under **ER 1.16(a)**, you must withdraw from representation of a client if,

> *(1) the representation will result in violation of the Rules of Professional Conduct or other law;*
> *(2) [your] physical or mental condition materially impairs [your] ability to represent the client; or*
> *(3) [you are] discharged.*

You also cannot both advise a client representative and prosecute an action, civil or criminal, against them. If you have a duty to initiate such an action, you must refer it to another government law firm or to outside counsel unless you can competently continue to advise the client by working through another client representative. **ER 1.16(e)**.

Likewise, the fact that you are a government lawyer does not prevent you from withdrawing from representation when it is permitted by the rules. Withdrawal is permitted under **ER 1.16** (with permission of the tribunal when required) if "(1) withdrawal can be accomplished without material adverse effect on the interests of the client; (2) the client persists in a course of action involving [your] services that [you] reasonably believe[] is criminal or fraudulent; (3) the client has [your] services to perpetrate a crime or fraud; (4) the client insists upon taking action that [you] consider[] repugnant or with which [you have] a fundamental disagreement; (5) the client fails substantially to fulfill an obligation to [you] regarding [your] services and has been given reasonable warning that [you] will withdraw unless the obligation is fulfilled; (6) the representation will result in an unreasonable financial burden on [you] or has been rendered unreasonably difficult by the client; or (7) other good cause for withdrawal exists." You must, of course, take reasonable steps to protect the client's interests. **ER 1.16(d)**. Typically, that can be accomplished by assigning another lawyer in the office to handle the matter (depending on the reason for the withdrawal) or by sending the matter to outside counsel.

Of course, government lawyers have a *duty* to provide advice and representation to their government client(s), which must be taken into account when considering a withdrawal that is permissive rather than mandatory. If withdrawal, particularly withdrawal from multiple matters, is inconsistent, or perceived to be inconsistent, with that duty, you could face employment consequences.13

If the withdrawal is related to misconduct of a client representative, you may also be required to take certain actions either before or after withdrawal, as set forth in **ER 1.13**; this is discussed more in **Chapter 8** of this Manual.

13 For example, a city attorney's refusal to provide representation in a particular matter could lead to the city council ending the lawyer's appointment. An assistant attorney general's refusal to work on a particular class of cases could lead to a reassignment or termination if those cases are a significant part of the AAG's assignment. And a wholesale refusal to represent the organizational client as required by law would, of course, make continued occupation of an appointed or even an elected office improper.

CHAPTER 4

Disagreements/ Secrets Among Client Representatives

4.1 Introduction

Most government organizations will have one governing body that is the ultimate executive authority for the entity; for example, a school board for a school district, and the city council for a municipality. For those entities, a disagreement among lower-level officials does not create a conflict for the government lawyer[14] because it can be resolved by appeal to this ultimate decision maker.

But some government organizations, including state and county governments in Arizona, are a little different. Their executive authority is split among different elected officials and bodies, each of which has authority to make certain decisions on behalf of the government entity. And, as events of the last few years have illustrated, those elected officials may disagree about the proper course of action. The lawyer may also be elected and may have their own scope of authority within which they can make a final decision regarding whether and how to act.

The government lawyer's job is to take direction from whichever elected official or body has authority to give that direction in each instance, regardless of what other elected officials or the individual lawyer thinks about the wisdom of the chosen course of action. See **ER 1.2**(b). When that authority is clear, a disagreement between that decision maker and other elected officials does not create a conflict for the government lawyer, because the government lawyer will take ultimate direction from the decision maker. When the scope of authority is unclear or is shared by multiple decision makers, however, the lawyer may need to treat the competing decision makers as separate clients and apply the Rules to determine how the lawyer may act in the face of a disagreement among whose decision makers.

4.2 My office's organizational client has several different elected officials or bodies with some scope of independent authority, and they disagree about how to handle an issue that has come up; what do I do?

This type of conflict is only going to arise for government entities whose executive authority is split among different elected officials and bodies. If one official has clear authority to control the decision, it is your duty to follow the direction of that official even if other officials, or you yourself, disagree with the direction given. See **ER 1.2**.

If, however, it isn't clear which elected official has authority to control the decision, or multiple officials each have

14 It is nevertheless possible for the careless government lawyer to be drawn into interdepartmental drama. To avoid this, it is important to discuss issues with one's colleagues in the law office, take care to consider all matters from the perspective of the organization as a whole rather than individual client representatives, and learn to recognize a client representative who is "opinion shopping," seeking to use you as an advocate against another department.

overlapping authority, you should share your legal analysis with both officials and encourage them to work together to reach a consensus. If an impasse is reached, you should treat both officials as though they were separate clients who had been jointly represented by the office. This means that each official gets outside counsel[15] to litigate the scope of their authority and you withdraw from any further involvement in the matter—unless both consent to your continued representation of just one of the officials.

4.3 Several government officials are named in a lawsuit in their official capacity. Our office filed a notice of appearance for all of them in addition to the government organization and now the officials disagree about whether to settle the lawsuit; what should we do?

See the discussion in **Section 6.5** and **Section 6.6** of this Manual.

4.4 The [department head] [city/county manager] [elected official] who I regularly assist and advise has told me something "in confidence" and cautioned me not to share it with other government officials in the organization; do I really have a duty to keep this information secret?

ANSWER: No, not as long as you have made it clear that this individual official/employee is not your client.

DISCUSSION: Although you may from time to time represent an individual official or employee as a client, your client is normally the government organization as a whole, and not the officials and employees through whom it acts. See **Section 3.6** of this Manual and **ER 1.13**. This means that your duty of confidentiality runs to the organization, not the individuals who communicate with you on behalf of the organization, and you in fact have an obligation to share information with others in the organization when that is in the organization's interests. Presumably, you have made this clear to the client representatives with whom you work—as you are ethically obligated to do (see **ER 1.4**(d), **ER 1.4**(e), and **ER 4.3**, and **Section 3.7** and **Section 3.9** of this Manual).

If you have not explained this to the client representative, and they share the information with you assuming that you will not share it with anyone else, you will be in an ethical quandary for which there is no perfect solution. *See* ***State ex rel. Thomas v. Schneider*, 212 Ariz. 292, 299, ¶ 31 (App. 2006)** ("In the absence of such a clarification, a communication made by a government official to a government attorney may be subject to the privilege even if the attorney cannot appropriately represent the communicant because the attorney-client privilege belongs to the communicant.").

As a best practice, when someone asks to tell you something "in confidence," you should interject and take that opportunity to remind them of what confidences you can (and cannot) keep and from whom you can keep them confidential. While you ideally will also have specified your role when they first joined the organization or first interacted with your office, this in-the-moment reminder (preferably before they tell you the information they want to share) can be essential to avoiding problems. They may share the information with you regardless, but with a better understanding of how it will be used and your role. Alternatively, the conversation may transition into whether they have an obligation to share certain kinds of information and, if so, with whom. For example, they may be required by the policies of the entity to report certain kinds of alleged misconduct to an internal ethics office, civil rights investigator, or auditor, and you can counsel them regarding their obligation and how to fulfill it.

15 See ***State ex rel. Frohmiller v. Hendrix*, 59 Ariz. 184, 196–97 (1942)** (noting that if two public officers disagree on what the law is they can commence litigation to determine the law's meaning, and that both are entitled to be represented by counsel in that litigation).

CHAPTER 5

Limited or Episodic Representation of Other Government Organizations and Individuals

5.1 Introduction

The fact and scope of representation of the regular government organizational client and other organizational clients is generally established for the government lawyer not by the client representatives who are constituents of the government organization but instead by applicable law. See, *e.g.*, attorney general (**A.R.S. §§ 41-191 through 41-198**); county attorney (**A.R.S. § 11-532**); city attorney (Tucson City Charter, Chapter V, § 2). It is important for every government lawyer to be cognizant of all their constitutional, statutory, and other legal duties and authorities. (Best practice is for the government law office to maintain a memorandum setting forth all its legal duties and authorities that is reviewed on at least an annual basis and updated as appropriate. See **Appendix A** of this Manual for an example.)

As discussed in **Chapter 3** of this Manual, government lawyers typically act as general counsel for a specific government organization. They may also, however, be tasked with advising and representing other organizations and individuals, including:

1. General representation of a distinct special-purpose district that is under the control of the same governing board as the primary client organization. This includes many improvement districts, stadium districts, and flood control districts that share governing boards with the related county or municipality.
2. General representation of a distinct government organization that is under the control of a governing board that is independent of the primary client's governing board, such as fire districts and school districts.
3. Limited or episodic representation of other government organizations—sometimes jointly with your primary client organization if the matter involves your primary client.
4. Limited or episodic joint representation of individual government officials and employees in their personal, and sometimes their official, capacity, along with the larger government organization of which they are a part, such as when they are named along with, or in place of, a government organization in a civil lawsuit.

Government lawyers are still subject to all the Ethics Rules regarding conflicts of interest. Whenever a conflict of interest is possible, it must be thoroughly analyzed before engaging in the representation of clients in addition to the lawyer's primary client.

When conducting your analysis of the potential conflicts associated with representing an entity other than, or in addition to, your primary client, consider the following:

1. Identify as soon as possible what entity or entities (or individual(s)) are clients or potential clients in the matter, as distinct from client representatives.
2. Determine what legal authority exists for your office to represent each of those clients or potential clients.
3. If you determine that you will be representing more than one client with respect to the matter[16]:
   A. Assess what confidential information, potentially relevant to the matter, has already been obtained from one or more of the clients.
   B. Determine what their initial positions are with respect to the matter and whether they are consistent or harmonious.
   C. Evaluate whether conflicts or potential conflicts (along with the possession of confidential information) necessitate or warrant engagement of outside counsel for one or more (possibly all) of the clients or potential clients. If so, facilitate (through appropriate procedures) the engagement of outside counsel (either private counsel, or another government law office as authorized by law).
   D. If you conclude that you can represent multiple clients, obtain informed consent from each, confirmed in writing.
4. For limited representation of individuals and entities other than your primary client, provide an engagement letter--a written confirmation of the scope and pertinent details of the limited representation, which client representatives will work with you on the matter, and when the representation will be deemed concluded (see **Appendix B** for a sample engagement letter). If you are also representing another client in the matter, this can be combined with the informed consent document.
5. After your office is done providing representation regarding a matter to an individual or entity other than your primarily organizational client, provide a disengagement letter to formally conclude the representation (see **Appendix C** for a sample).

5.2 What if there are statutes that require my law office to represent other entities like school districts and special taxing districts; are they my office's clients?

ANSWER: Yes, but you may or may not be their general counsel, and you must still conduct a conflicts analysis.

DISCUSSION: Every government lawyer has one primary client for which they are general counsel. But they may also be tasked with representing other government entities on a general or limited basis. Some such government entities are special-purpose entities governed by the same governing body as the lawyer's primary client. That includes, for example, a municipal improvement district that is governed by the city council, or a county stadium or flood control district the governing board of which is comprised of the individuals who constitute the county board of supervisors. As a practical matter, representation of these entities does not create a conflict of interest for the government lawyer. The governing body for jointly governed entities has fiduciary obligations to each of the entities that may occasionally compete with one another. But having different lawyers advise the body with respect to each of the entities does nothing to resolve that, and it is impossible for any information to be confidential as between the jointly governed entities.[17]

A government lawyer may, however, sometimes be tasked with representing truly distinct government entities that are independent of one another. For example, under Arizona law, a school district is statutorily assigned to be repre-

16 As general counsel for your primary client organization, you of course always represent that entity. But if that entity has no interest in the matter, you can represent another entity without this amounting to a joint representation. An example would be a county attorney who reviews, on behalf of a school district, a proposed intergovernmental agreement with a municipality. If, on the other hand, the IGA is between the school district and the county, then this is a potential joint representation.

17 Some government law offices may nevertheless choose to go through an informed consent process, particularly if this is useful in reminding the members of the governing body that the lawyers' advice will take into account the governing body's legal obligations to both entities as well as any limitations imposed by law.

sented by the county attorney, unless that representation conflicts with the county attorney's representation of the county. **A.R.S. § 11-532(A)(10)**. When there is a conflict of interest, the district can be represented by the Attorney General. **A.R.S. § 41- 192(A)(4)**.[18] The school district may also employ its own counsel on a general or limited basis. **A.R.S. § 15-343**. Even when the school district has engaged separate general counsel, however, it may nevertheless request representation by the county attorney on occasion for a particular matter. Government law offices may also utilize one another as outside counsel for representation of one another's government entity clients on a limited basis. **A.R.S. § 11-532(E)**.

With respect to these distinct government entity clients, you must assess whether there are any conflicts of interest or potential conflicts under **ER 1.7**. Even for entities for which you provide general representation, a conflict assessment must be done each time a new matter is undertaken.

After making this assessment, if you find that there are conflicts, you must determine whether you may provide the representation with informed consent from the governing boards of the two entities pursuant to **ER 1.7**(b), or whether you must instead decline the representation. Any informed consent that is obtained must be confirmed in writing. See **ER 1.7**(b); **ER 1.0**(b) and (e) and Comments [4] and [5]. If your office has multiple attorneys, this likely will involve consultation with your colleagues and office head.

If you find you have a conflict and must refuse to undertake a particular matter for a client entity that you are otherwise legally obligated to represent, your office must facilitate its engagement of alternative counsel.

5.3 What if my office's primary organizational client is entering into an agreement with one of those other entities? Can we represent them both?

ANSWER: Only if you obtain informed consent for joint representation.

DISCUSSION: If two entities' interests are fundamentally antagonistic to each other, then you may not represent both. Likewise, if either entity is unwilling to waive confidentiality as to the other entity or accept the other limitations inherent in joint representation, then you may not represent both. However, if the two entities' interests are generally aligned, even if there is some difference of interest, then you may represent them both—so long as each client gives informed consent, confirmed in writing, and you reasonably believe you will be able to provide competent and diligent representation to each. See **ER 1.7**, Comment [26] and [29] through [33]. Joint representation is further discussed in **Chapter 6** of this Manual.

5.4 What if an employee of my government-entity client is sued in their personal capacity and they are entitled to an employer-provided defense; can my office represent them?

This happens with some frequency. For example, a city police officer may be sued in their personal capacity along with the city for money damages alleging excessive use of force, and the city attorney may be called upon to defend both the city and the officer in a lawsuit in federal court in which the plaintiff claims civil rights violations under **42 U.S.C. § 1983**. In this type of situation, the employee is indeed a separate client for purposes of the lawsuit because they face personal liability. This is true even if the government organization is indemnifying them for fees, costs, and damages.

The government law office for the government organization can represent both clients in this situation provided there is no conflict between the two clients' substantive positions regarding the merits of the matter and they both give their informed consent. **ER 1.7**(b); see also **ER 1.13**(g) (a lawyer representing an organization may also represent any

18 See also, *e.g.*, **A.R.S. §§ 48-853(C)** and **48-805(G)** (authorizing the county attorney to advise a fire district so long as it doesn't conflict with representation of the county); **A.R.S. § 41-192.02(C)** ("The attorney general may advise and represent a fire district when the county attorney is unable to represent the district due to a conflict of interest.").

of its officers, employees or other constituents, subject to the provisions of **ER 1.7**). Where the organizational client and the employee's interests are generally aligned, even if there is some difference of interest, you may represent them both—so long as each client gives informed consent, confirmed in writing, and you reasonably believe that you will be able to provide competent and diligent representation to each. See **ER 1.7**, Comment [19] to [33] and **ER 1.13**(g) ("If the organization's consent to the dual representation is required by **ER 1.7**, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented.").

The government lawyer "must make reasonable efforts to ensure that the client … possesses information reasonably adequate to make an informed decision" about the joint representation, *see* **ER 1.0**(s), Comment [4], including the advantages and disadvantages of the representation, in light of the government lawyer's ongoing duties to its regular government organization client. The advantages typically include having the representation provided at no cost. The disadvantages include a limitation on confidentiality of information that must be shared with the regular government client entity's client representatives, and the potential for a disqualifying conflict of interest to arise during the representation, which would require new counsel to be obtained. *See* **ER 1.6** and **ER 1.7**. The government lawyer, after explaining these issues to the clients must then memorialize each client's informed consent in writing. See **ER 1.0**(s), Comment [5]. The employee client's informed consent must also acknowledge and consent to the ways in which the representation might be impacted by the fact that you are being paid by the government organization (see **ER 1.8(f)**), and the fact that the organization, as the employee client's indemnitor, will control certain aspects of the litigation, including monetary settlements. Joint representation is further discussed in **Chapter 6** of this Manual.

If there is a conflict between the substantive position being taken in the lawsuit by the government organization client and the individual employee, then outside counsel must be retained for the employee in the manner specified by the policies and procedures of the government organization for engaging outside counsel.

Note: in some circumstances, the government organization may determine that the employee is suspected of having acted in a criminal manner outside the course and scope of employment, which not only manifests a conflict of interest but may also negate the obligation to provide the employee with representation in the lawsuit. The best practice in that situation may be to provide outside representation to the employee subject to the employee agreeing in writing that if the employee is later found guilty of criminal activity outside the course and scope of their employment, then the employee must reimburse the government organization for the cost of representation.

5.5 What if a government official is named in a lawsuit in their official capacity; can my office represent them? If my office files an appearance on their behalf does that mean they are a separate client?

ANSWER: Often, when an official is named in their official capacity, you can file an appearance on their behalf without treating them as a separate client for purposes of the ethics rules. But it depends on a number of factors that must be carefully analyzed in consultation with the named official. If the official is a separate client, then you must analyze whether they can be represented jointly with the government entity. See **Section 5.4** and **Chapter 6** of this Manual.

DISCUSSION: An example of this situation is a lawsuit brought against a government official in their official capacity seeking injunctive relief via a special action in Superior Court seeking enforcement of the Public Records Law. Another example is a suit in federal court under **42 U.S.C. § 1983** seeking an injunction to force the discontinuation of certain police practices claimed to violate constitutional rights or an injunction mandating enhanced medical care for prison or jail inmates, claiming the current type of care is inadequate thus subjecting the inmates to cruel and unusual punishment.

An official need not, for purposes of the ethics rules, be treated as a separate client simply because they are individually named in a lawsuit, if they are named in their official capacity, but it can depend. People who sue government entities will often—whether properly or not—name as defendants both the government entity and the individual members of its governing body, such as county supervisors, municipal councilmembers, or members of a body such as the board

of regents. Those individuals will almost never be separate clients of the government law office because they do not normally face any personal liability and, because they exercise their authority as a body, they cannot be individually subject to mandamus or other injunctive relief. They are named simply as part of the government entity or because caselaw requires the lawsuit to be brought against responsible employees rather than a government entity with Eleventh Amendment immunity.

But there are individual elected officials in county and state government that have some scope of authority to act for the government entity independent of any other elected official or body. When one or more of those officials is named in their official capacity along with the government entity, it is possible for them to have interests that are different from one another depending on the scope of their authority and the relief being sought by the plaintiff. Consider the example of a plaintiff who is seeking monetary damages for violation of their civil rights under **42 U.S.C. § 1983** based on conditions at the jail, as well as an injunction against the county sheriff (who is statutorily tasked with running the jail) to change those conditions. The county, acting through its board of supervisors and those employees who ultimately report to the board (such as the county risk manager) is interested primarily in minimizing financial losses. The board of supervisors has no authority or control over how the jail is run, however; any injunction regarding the running of the jail will therefore be against the sheriff. Because of their differing interests, the sheriff must be treated as a client separate and apart from the county. Whether or not the two clients can nevertheless be jointly represented by the government law office, and how that is managed, is addressed in **Chapter 6** of this Manual.

CHAPTER 6

Joint Representation of Multiple Clients

6.1 Introduction

The concept of "joint representation" simply means that a lawyer or office represents more than one client in the same dispute or matter. Generally, the representation of multiple clients in the same matter is permissible so long as the lawyer believes that they will be able to provide competent and diligent representation to each client, the representation does not involve the assertion of a claim by one client against another client, and each client gives informed consent, confirmed in writing. **ER 1.7**(b).

The first task for the government lawyer is to identify the potential clients involved in a particular matter, determine whether there really are multiple clients, and determine who is the decision maker for each organizational client if there is more than one. An elected official who is individually named in a lawsuit in their official capacity may or may not be a separate client. *See* discussion in **Section 5.5** of this Manual.

The lawyer must then consider whether joint representation is a possibility. In making this initial determination, the lawyer should consider the following:

1. Client confidentiality - under most circumstances a lawyer who represents a client is obligated to keep all communications with the client confidential. In a joint representation situation, the lawyer must be able to tell one client what the other said. Will both clients be comfortable with this approach? Likewise, will each client be willing to reveal confidential information to the lawyer?
2. Duty of Loyalty- A lawyer owes a duty of loyalty to their client. In the case of joint representation this duty is owed to each client jointly. Will the joint representation cause the lawyer to limit their advocacy for or against one of the clients?
3. How will fees, costs or liability be allocated between the clients?
4. Can the advantages and disadvantages of joint representation be explained in sufficient detail for each client to understand and provide an informed written consent?

The above list is by no means exhaustive and will turn on the facts of the matter being handled, and the clients involved. Still, the potential benefits of joint representation for the government client(s) include "reduced legal fees, the avoidance of unnecessary future conflicts, and, in litigation, the opportunity to present a united front." ***Sellers v. Superior Court*, 154 Ariz. 281, 286 (App. 1987)**. Once an initial determination is made that the lawyer can competently and diligently represent multiple clients in a matter, it is incumbent upon the lawyer to show that there was an adequate disclosure to the clients and that each gave their informed consent.

It should be noted that a government law office cannot avoid the necessity of obtaining informed consent to joint representation by simply assigning different lawyers in the office to different clients and then screening them from one another. Conflicts created by representation of clients with conflicting or potentially conflicting interests are imputed

to all lawyers within the law firm and must be resolved, if they can be, through obtaining informed consent. Screening does not resolve the conflict. See discussion in **Section 10.5** of this Manual.

6.2 What sort of informed consent do I need?

ANSWER: Informed consent denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. **ER 1.0(e)**.

DISCUSSION: The information or disclosures required to obtain a client's "informed consent" will turn on the facts and circumstance of the particular matter. Generally, in the joint representation context, the lawyer must explain the possible effects of the common representation in relation to the lawyer's obligations of loyalty, confidentiality and attorney-client privilege. The lawyer must explain the advantages and disadvantages of the common representation in sufficient detail so each client can understand why separate counsel may be desirable. Arizona Ethics Opinion 07-04, *Joint Representation; Conflicts; Communication; Informed Consent*. The informed consent should point out any potential risks, provide the client the opportunity to ask questions and, depending on the complexity of the matter, it may also be appropriate to allow the client to seek independent counsel to assist in evaluating the representation.

The lawyer should also consider the sophistication level of the client. Is the client experienced in litigation and multi-party representation? **ER 1.0**, Comment [6] ("in determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally").

Although there is no standard template for obtaining informed consent, the following are general topic areas that should be discussed and included on the client acknowledgement form:

1. The possibility that the clients will take conflicting positions regarding settlement and who has authority for settlement. When the potential co-client is an individual government employee facing personal liability, you must explain that the government entity, typically through your office or the entity's risk manager, CEO, or governing board, depending on the size of the settlement, has the authority to make monetary settlement decisions.
2. The impact on confidentiality and the attorney-client privilege. You must explain that there is no confidentiality as between jointly represented clients and that sharing of information and communications will be essential.
3. What happens if a conflict does arise during the representation - need to withdraw.
4. The need to continually re-evaluate the joint representation
5. The fact that you are paid by the client organization rather than the individual client. *See* **ER 1.8**(f).

A sample informed-consent letter is included in this Manual as **Appendix D**.

6.3 Who can give informed consent for the organizational client?

See discussion in **Section 3.5** of this Manual.

6.4 Can my office get informed consent to future conflicts of interest in particular types of matters?

ANSWER: You can probably get informed consent from your primary client's governing board for very common types of conflicts. But it needs to be done carefully.

DISCUSSION: Informed consent must be just that—informed. Which means that the client giving the informed con-

sent must thoroughly understand[19] what they're agreeing to, and the risks and pitfalls that they need to first consider carefully. Consent to joint representation must include all the factors discussed in **Section 5.4**, **Section 5.5**, and **Section 6.2** above. When the consent is given in advance, it is important that the consent be limited to a specific type of situation and that it be a situation with which the client is very familiar. *See* discussion in **ER 1.7**, Comment [22].

Two of the most common circumstances in which joint representation occurs in the government context are: (1) an individual government employee is being sued and faces potential personal liability for actions taken in the course and scope of their employment; and (2) your primary government entity client is entering into an intergovernmental agreement with another entity you also represent (for example, a county is providing funding to a school district for shared recreational facilities).[20] Because those situations are so common, it can be appropriate to obtain advance informed consent to joint representation from the governing bodies of the organizational entities involved (not from potential individual clients). And advance consent can be particularly helpful because these are matters that might arise and need to be addressed quickly. It may be appropriate to document that consent in an official policy or code of the government entity, but the consent should be discussed periodically with the governing body, particularly as its members change, so that the consent remains truly informed.

6.5 What if one client wants to settle and the other doesn't?

ANSWER: You cannot settle a claim against a party without that party's consent. See **ER 1.2**. Both clients must consent to an aggregate settlement of all the claims against them both. That consent must be in a writing *signed* by each client[21] and must follow a full disclosure by the lawyer of "the existence and nature of all the claims … involved and of the participation of each person in the settlement." **ER 1.8**(g); *see* **ABA Formal Op. 06-438**. How that works as a practical matter will depend on the circumstances.

DISCUSSION: The rule is fairly easy to state: you cannot settle a case on behalf of a client without that client's consent, period, regardless of the position or desires of the other client, and an aggregate settlement of the claims against both clients can be made only after enhanced disclosures to both clients under **ER 1.8**(g). It is useful, however, to work through how that plays out in a hypothetical.

Suppose plaintiff sues an individual sheriff's deputy, the elected county sheriff in their official capacity, and the government entity under § 1983 seeking damages for injuries sustained when arrested by the deputy. (See **Section 5.4** for another discussion of this scenario.) The county is obligated, under its code, to indemnify the deputy, who faces personal liability. After confirming that the deputy, the sheriff, and the county's risk manager all agree that the deputy's actions are defensible, you obtain informed consent to represent all the named defendants.[22] Plaintiff offers to settle for a stated sum of money.

The risk manager and the sheriff approve the settlement, but the sheriff's deputy wants to go to trial to vindicate the righteousness of their actions. You sit down and explain to the deputy that you cannot settle the case on their behalf without their consent. But you also explain that the county and the sheriff *are* going to pay the plaintiff the money and settle. The plaintiff is perfectly happy to dismiss the lawsuit altogether, but if the deputy refuses to settle, the plaintiff has the option of dismissing the county and sheriff and continuing to litigate their lawsuit against the deputy (if the plaintiff thinks it is worth it). And you explain that, at this point, under the terms of the county's code the county is no longer obligated to defend and indemnify the deputy so the deputy will need to hire their own lawyer. At that point the

19 This means, of course, that the client representatives giving the consent must have the degree of sophistication necessary to form an accurate understanding based on the lawyer's explanation.

20 See **Section 4.2** of this Manual for a discussion regarding IGAs between entities that share a governing board, and whether that creates a conflict of interest for the government lawyer.

21 Note that this is a more rigorous requirement than "confirmed in writing" applicable to other forms of informed consent.

22 You might have 2 clients or 3. Because the sheriff is named in their official capacity, they can probably be viewed as part of "the county" client. Depending on the specific allegations, however, you might conclude that it's appropriate to treat the sheriff as a separate client. If the relief sought included a request for a court order directing the sheriff to take or refrain from taking certain actions, the Sheriff would need to be treated as a separate client.

deputy is likely to change their mind.

Now let's suppose that the plaintiff, in addition to seeking damages, is asking the court to declare that certain sheriff's department policies are unconstitutional and enjoin the sheriff from following those policies. Plaintiff offers to settle for a stated sum of money plus an agreement to change the policies. The county risk manager and the deputy just want the case to go away; the risk manager is willing to provide the money for the settlement. But the sheriff refuses to change their policies unless forced to do so by the court. And because they are an elected official, the sheriff is not answerable to the board of supervisors.[23] At this point, the sheriff's interests have departed so fundamentally from the interest of the county and the deputy that you can no longer continue with the joint representation. For what happens next, see the following section of this manual.

6.6 What sorts of things might make continued joint representation impossible and what do we do if it breaks down?

ANSWER: If jointly represented clients have a fundamental disagreement regarding an important decision to be made in the case, or if one client orders you to keep material information confidential from the other client, you will *usually* be required to withdraw from representation of both clients and help them obtain separate counsel.

DISCUSSION: Fundamental disagreements that arise among jointly represented clients during the course of the representation make continued joint representation impossible. For example, if one client wants to concede liability and just contest damages, but the other client refuses to concede liability, you cannot continue to represent them both. Likewise, if one wants to agree to an aggregate settlement offer from the other side, and the other does not, the joint representation breaks down. Unless all parties give informed consent allowing you to continue representing one of them, you must withdraw from representation of all of them and assist them in getting outside counsel, with the associated expense and delay. This is one of the risks of joint representation, and something you should have discussed with the clients at the outset.

It is sometimes possible to obtain informed consent from both clients, at the outset of the joint representation, for your continued representation of one of the clients—typically it would be the primary organizational client—if the joint representation breaks down. Whether advance consent is possible, or advisable, whether and to what extent you can rely on that prior consent, and whether you can continue to provide competent and diligent representation to the remaining client, will depend on all the facts and circumstances. That should include a consideration of how it might impact your ability to work with the clients in the future.

23 Of course, if this were an appointed chief of police, the city/town council can require them to go along with the settlement.

CHAPTER 7

Advising a Board or Hearing Officer Acting in a Quasi-Judicial Capacity

7.1 A decision of a subordinate board or hearing officer is being "appealed" to the board of my organizational client, which is acting in a quasi-judicial capacity; can my office both advise the board and appear before it?

ANSWER: Maybe. But not without some substantial separation and independence between the appearing lawyer and the advising lawyer.

DISCUSSION: Appearing before the board in an adversarial role and then advising the board as it acts in a quasi-judicial capacity is a conflict of interest and bears an appearance of impropriety. Imagine a criminal prosecutor also having an attorney-client relationship with the judge presiding over the criminal trial!

The potential for these situations to arise occurs frequently for government lawyers who work with regulatory boards or commissions. For example, an assistant attorney general ("AAG") who regularly advises a licensing board can become a prosecutor of a licensee for alleged violations of the professional conduct statutes/rules. At that point the board exercises a quasi-judicial authority and must maintain impartiality to the best of its ability. In some instances, board members who were closely involved in the investigation will recuse themselves from the case so that they have no say in the ultimate decision. By the same token, someone independent and separate from the prosecuting lawyer needs to advise the board in its quasi-judicial role with respect to that matter.

Another example occurs in municipalities and counties. Civil government lawyers may regularly advise a city's council or county's board of supervisors regarding planning and zoning issues or community development issues, and then be called upon to assist in prosecuting zoning or building code/ordinance violations before a hearing officer. If the resulting decision of the hearing officer is appealed to the council or the board, the same lawyer may not both prosecute the appeal and advise the council or board.

Government lawyers must maintain meaningful and effective separation between their duties as advocates in a quasi-judicial proceeding and counselors to councils or boards, to maintain the independence of the body acting in quasi-judicial manner. In a large office, this might be done by screening (i.e., "walling off") the lawyers from one another (such as having the Solicitor General's Office advise the board on the case that the AAG is prosecuting). Such screening is only effective if the separation is meaningful. This separation may significantly narrow the service that government lawyers can provide to the tribunal. For example, if a civil deputy county attorney provides substantive legal advice to a county building department concerning prosecution of a code violation before a department hearing officer, a different, screened deputy would need to advise the board of supervisors in any appeal. Further, even when employing screened counsel, some offices require that any advice to the board in such circumstances also be limited

exclusively to procedural issues, refraining from advising on substantive legal matters, including not advising on how to apply facts to law regarding the case. Others require agencies or departments to proceed without the assistance of counsel in adversarial enforcement proceedings or to use outside counsel for that purpose.

In smaller offices, effective screening may not be an option. If an office lacks sufficient resources to meaningfully screen, that office will need to engage outside counsel to avoid conflicts of interest. Such outside counsel may include private lawyers or possibly engaging another government law office as permitted under **A.R.S. § 11-532(E)**.

Even where sufficient resources to screen are available, there are exceptions where screening itself is insufficient to avoid a conflict of interest. For example, if a county attorney becomes the actual party who must appear before a hearing officer or body acting in a quasi-judicial capacity (such as in an employment dispute by a member of the county attorney's office before the board of supervisors or before a county merit commission), the county attorney's conflict will be imputed to all other lawyers in the office. In such circumstances, outside counsel should be retained to represent the hearing officer, board, or commission. Further, it is best if the county attorney and all members of the office do not select that outside counsel, leaving such selection to the board of supervisors or relevant authorized administrator.

Arizona has adopted a comment to **ER 3.5** that specifically addresses this situation:

> Comment [6] *At times, a government entity is required to act in a 'quasi-judicial' capacity as part of an administrative process. In that capacity, it may act as the decision-maker in contested proceedings or hear appeals from the determinations of another officer, body or agency of the same government. A government lawyer may be called upon to advise the tribunal after another lawyer in the same office has advised the other government constituent about the matter, or while another attorney from the same office appears before the tribunal. Advice given by the lawyer to the tribunal does not constitute impermissible ex parte contact,* ***provided that reasonable measures are taken to ensure the fairness of the administrative process****, such as using different attorneys to advise and represent the two constituents and screening those lawyers from one another or strictly limiting the lawyer's advice to the tribunal to procedural matters.* ***In no event can the same lawyer both provide advice to the tribunal and appear before it in the same matter, even if the advice is limited to procedural advice.***

(Emphasis added.)

CHAPTER 8

Questioning a Client's or Client Representative's Decisions or Conduct

8.1 Introduction

Under **ER 1.2**(a), it is a lawyer's job to "abide by a client's decisions concerning the objectives of representation," regardless of whether the lawyer personally agrees with those objectives, and to consult with the client about the means by which the client's objectives are to be pursued. *See also* **ER 1.13**, Comment [3] ("When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province.") *That includes government lawyers*. In fact, this is particularly important in the government sector where the government lawyer's client representatives are typically individual elected officials, multi-member bodies made up of elected officials, or officials who are appointed by an elected official or body. Because the electorate has chosen those individuals, directly or indirectly, to make certain policy decisions, a government lawyer's failure to respect those decision is not merely an ethical problem for the individual lawyer; it is a threat to our democratic system of government.[24]

There are times when, under applicable law, a government lawyer has clearly been delegated authority to make the policy decision on behalf of the government entity. For example, when exercising a prosecutorial function, the government lawyer is the decision maker for the client, which is the state. But a legal obligation to review and pass on the legality of something that has been done by the appropriate government client representative—for example, reviewing and signing a contract "as to form"—does not imply the authority to second guess the wisdom of that client representative's choices. At the same time, the lawyer's defense of the client's policy choices does not constitute an endorsement of the client's political, economic, social or moral views or activities. **ER 1.2**(b).

Most often, the lawyer-client relationship falls within the confines of **ER 1.2**(a). However, there may be times when the government lawyer must question the decisions or conduct of the client or client representative. At the most benign level this involves redirecting the client representative's proposed course of conduct to activities or positions autho-

24 The Arizona Supreme Court has long held that government lawyers—even elected government lawyers—have no common law authority to question the actions of other government officials "in the public interest." See, *e.g.*, ***State ex rel. Brnovich v. Arizona Bd. of Regents*, 250 Ariz. 127, 132, ¶ 16 (2020)**. An elected lawyer is still a lawyer and has no inherent authority to question the decisions of other government officials when those decisions concern matters within the scope of those officials' authority:

> *I do not believe Section 4-607 (A.R.S. § 41-193) was designed or intended to authorize the Attorney General to exercise the power of discretion placed by the Constitution and applicable statutes in other executive and administrative officers. Nor that it should be so construed that the ultimate power to decide matters pertaining to their offices is shifted to the Attorney General thereby giving him the right to supersede their judgments.*

***Santa Rita Mining Co. v. Dep't of Prop. Valuation*, 111 Ariz. 368, 370 (1975)** (approvingly quoting language from a dissenting opinion in an earlier case).

rized by law that will allow them to reach the client's ultimate goal. At worst, it involves filing a civil or criminal action against the client representative.

As discussed further below, the government lawyer may have a duty to bring such an action. But it should be done carefully to avoid ethical pitfalls. It is ethically incompatible to both advise the client representative, on the one hand, and sufficiently investigate the client representative and the validity of criminal allegations, on the other. Unless the government law office can continue to advise the client organization by working with a client representative other than the one that is the subject of the investigation or action, the investigation or action should be send to another government law office or outside counsel. See **ER 1.16(e)**.

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The events described in ***In re Alexander*, 232 Ariz. 1 (2013)**, and ***In re Aubuchon*, 233 Ariz. 62 (2013)**, provide a cautionary tale. Starting in 2006 the Maricopa County Attorney's Office and the Maricopa County Sheriff's Office opened criminal investigations into the conduct of the Maricopa County Board of Supervisors and certain judges of the Maricopa County Superior Court. The issue concerned the funding and construction of a court tower in Maricopa County. The MCAO Civil Division represents the County Board of Supervisors, members of which were the subject of the County Attorney and County Sheriff's investigation. The County Attorney and a deputy county attorney were eventually disbarred and, and several other deputy county attorneys were disciplined for ethical violations. The cases of *Alexander* and *Aubuchon* are excellent reading if only to understand the ethical roles of public lawyers and the standards of practice in the field of lawyer discipline and professional misconduct.

8.2 What do I do if I think a client representative is doing something improper or beyond their lawful authority?

ANSWER: In brief, you should first explain the problem to the client representative, discourage the conduct, and advise them regarding the consequences of proceeding with it. If that is not sufficient, you must inform a higher authority within the organization that has authority to prevent the conduct. If that is not sufficient, and the consequences of the conduct are sufficiently severe, you may share information in a manner that would otherwise violate **ER 1.6** to the extent necessary to prevent the harm. If the conduct has already occurred, and you believe that you have an affirmative duty to initiate an action against that client representative, you must refer the prosecution of the action to another government law firm or outside counsel if you cannot continue to fulfill your advice duty by working with a different official or employee as the client representative for that purpose. **ER 1.16(e)** and Comment [4].

DISCUSSION: First, do no harm. You cannot, of course, assist the client representative in taking an action that is contrary to law or is against the interests of the client organization. *See, e.g.*, **ER 1.2**, Comment [15] ("If the lawyer comes to know or reasonably should know that the client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct.") And you should seek to divert the client representative from the improper course of action.

If that is not successful, you may be required by **ER 1.13** to seek direction from a higher authority within the government organization. This obligation applies when you learn that a client representative (a) "is engaged in action, intends to act or refuses to act in a matter related to the representation" (b) "that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization," (c) "and that is likely to result in substantial injury to the organization." When that occurs, you must report it up the chain of command – if necessary to the highest authority that can act for the organization (for example, the city council) – until appropriate corrective action is taken.

If even the highest authority refuses to take corrective action, and the wrongfulness of the act and its consequences are sufficiently grievous—the client representative's intended conduct must be "clearly a violation of law" and you must reasonably conclude "that the violation is reasonably certain to result in substantial injury" to your client—then you "may reveal information relating to the representation … to the extent necessary to prevent" the injury, even if **ER 1.6** would normally prohibit that disclosure.

This rule may apply to you differently than it would to a private lawyer representing a private organizational client, for two reasons. First, because the scope of your client's and your client representatives' authority is likely determined by law (whether local or statutory), improper conduct by a government official may amount to a "clear violation of law" even though similar conduct by an officer of a private corporation would not. Second, because your client is a government organization with a duty to act in the public interest, you may appropriately conclude that the gravity of the possible consequences of any improper action are more significant than similar conduct would be in a private setting. You may also have a specific duty under applicable law to take corrective action. But care must be taken to ensure that the client is truly violating a legal obligation to the organization and that you are not motivated by a disagreement over policy. See **ER 1.6**, Comment [6] ("The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.).

8.3 My office has a duty under [statute] [city charter] to bring a civil legal action against a particular official who is part of my organizational client; isn't that a conflict?

ANSWER: No, it is generally not a conflict, provided the role of the government lawyer has been properly defined and communicated to the official. But you cannot continue advising that official while simultaneously pursuing an action against them. Therefore, if you cannot provide that through a different official or employee, you must refer the matter to another government law office or outside counsel. **ER 1.16(e)**.

DISCUSSION: With some exceptions, the organizational client, rather than the individual officer, is the client. The government lawyer must clearly identify the client and disclose to the individual constituents the lawyer's other legal obligations, such as duties to enforce open meeting, public records, and election laws. See **ER 1.4**(d), **ER 1.4**(e), and **ER 1.13**, Comment [10].

The difficult decision to bring a civil action against an official who is part of your organizational client will be easier if the government lawyer has previously provided a letter of representation to the official explaining at a minimum the role and the duties of the government lawyer; who is the lawyer's client; and who controls the attorney-client privileged communications, which is ethically required. **ER 1.4**(d) and **ER 1.4**(e). When a government lawyer becomes aware of potential adversity between the official and the organization client, it is prudent to remind the official of the government lawyer's role as counsel for the organizational client and that the government lawyer cannot provide legal representation for the official with respect to an illegal or improper act. See **ER 1.2**(d) ("A lawyer shall not council a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.). The official may also need to be reminded that discussions between the government lawyer and the official may not be privileged, and the lawyer may have a legal obligation to take corrective action for wrongful conduct. See **ER 1.13** (f) and Comment [11] and [12].

Privileged communications.

Officers of an organizational client acting lawfully can expect that the government lawyer will maintain confidential communications. However, officers should be aware that such confidences are maintained on behalf of the organizational client and may be disclosed by the organizational client when it is in the interests of the organizational client to do so. Such disclosure could be authorized by the organizational client in the event a civil action needs to be brought against the officer.

Certain circumstances that may create a conflict.

Notwithstanding the above discussion, a government lawyer should be aware of the following scenarios, which may create a conflict.

Inadvertently creating an attorney-client relationship with the official.

Failure to clearly articulate roles may inadvertently create an attorney-client relationship between the government lawyer and the official who is part of the client organization. To determine whether an attorney-client relationship has been created, the Arizona Supreme Court has stated:

> *[T]he relationship is proved by showing that the party sought and received advice and assistance from the attorney in matters pertinent to the legal profession…The appropriate test is a subjective one, where "the court looks to the nature of the work performed and to the circumstances under which the confidences were divulged. An important factor in evaluating the relationship is whether the client thought an attorney-client relationship existed.*

***In re Petrie*, 154 Ariz. 295 at 299-300 (1987).**

In a situation where the Government lawyer has failed to adequately inform the client representative that the organizational client is the only client, leaving the client representative to believe there is an attorney-client relationship with the government lawyer, the government lawyer will most likely be prohibited from bringing a civil action against the official. *See* ***In re Alexander*, 232 Ariz. 1 (Ariz. 2013)** (when a deputy county attorney brought a civil RICO lawsuit against the county board of supervisors while the county attorney's office represented the board on other existing matters, the deputy violated **ER 1.7**(a)(1) which prohibits a lawyer from representing one client directly adverse to another client); ***State ex rel. Thomas v. Schneider*, 212 Ariz. 292, 299, ¶ 31 (App. 2006)** ("In the absence of such a clarification, a communication made by a government official to a government attorney may be subject to the privilege even if the attorney cannot appropriately represent the communicant because the attorney-client privilege belongs to the communicant.").

Representation in an individual capacity.

Certain situations where the government lawyer has represented the official in their individual capacity will result in a personal attorney-client relationship. *See*, for example, **A.R.S. § 41-192.02** and **Section 5.4** of this Manual.

8.4 An employee/official of my office's organizational client has taken an action in the course of their official duties that may constitute a crime; how do we handle that?

Proactively communicating the government lawyer's role in your organization, as required by the Rules, will help clear potential hurdles to addressing criminal activity within your organization's ranks. You should make clear to your client representatives that criminal conduct can and will be reported to the proper authorities for investigation and potential prosecution.

This does not create a conflict of interest for your office because the client representative is not the client and criminal conduct is always outside the scope of their authority to act for the government client. If your office has a criminal prosecution function, it may be appropriate to send the prosecution to another office if someone in your office may be a witness (see **ER 3.7**) or if prosecution would unduly interfere with your office's ability to continue providing advice and representation to the organizational client. Additional considerations are discussed in **Section 8.5** below.

8.5 An employee/official of my office's organizational client has taken an action in the course of their personal life (unrelated to work) that has been referred to our office for criminal prosecution; how do we handle that?

The Attorney General's Office and County Attorneys' Offices have the dual responsibility of providing legal advice to their respective government organizational clients through the organization's employees and officials as well as the responsibility of prosecuting criminal acts. A municipal legal office may also have such dual roles. In criminal prosecution cases prosecutors represent the State of Arizona even though they may work for a county or city attorney's office (see discussion in **Section 3.3** of this Manual).

During the course of representing the government client, the government lawyer's office routinely gives advice to the government client through its employees or officials or uses such employees or officials as technical advisors or witnesses. Such advice and interaction does not make these employees or officials clients of the lawyer or government law office. There may also be employees of the government client with which the government law office has no meaningful interaction related to the provision of civil legal advice. Moreover, it is not the job of the government lawyer to provide legal advice to government employees and officials as to their personal affairs. As such, when a government lawyer's firm is called upon to prosecute an employee or official of a government organization for action taken in the course of their personal life such action is generally appropriate. Before proceeding, however, there are some additional considerations for the government lawyer/prosecutor.

Under **ER 1.7**, the government lawyer must analyze whether the government law firm's representation of the State in the prosecution is materially limited by the firm's civil representation of the government client through the client representative being prosecuted and vice versa. It may be that the constituent government employee or official has such close relationship with the government law office in a civil capacity that such interaction may interfere with the constituent's rights to a fair trial in the criminal prosecution or the State's interest in a fair prosecution. If the government client, through the constituent, needs civil legal advice from the government law firm while the prosecution by the government law firm is ongoing, the pending prosecution may materially limit the ability of the government law firm to appropriately communicate that advice through the constituent. In the matter of ***In re Alexander*, 232 Ariz. 1 (2013)**, a deputy county attorney was found to have violated **ER 1.7**(a)(1) by bringing a civil RICO lawsuit against the County Board of Supervisors while the county attorney's office represented the board in other civil matters. **ER 1.7**(a)(2) recognizes a conflict if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client…" Thus, a government law office's representation of the State of Arizona in a criminal prosecution against a client representative may hinder the ability of the government law office to effectively communicate legal advice though that representative because of the strain of the prosecution. The availability of an alternative representative to receive legal advice may mitigate this concern.

Likewise, if the constituent has certain influence over the government law office, such as the ability to approve the office's budget, it may have a chilling effect on the office's decisions regarding prosecution or raise the appearance of impropriety or public suspicion especially if the constituent is given some sort of preferential treatment in the prosecution.

CHAPTER 9

Ethics Analysis and Responsibility

9.1 Introduction

As a lawyer working for the government, you have a unique set of ethical duties and responsibilities in regard to protecting the public interest, upholding the law and complying with the Rules of Professional Conduct. Accordingly, it is important to have a framework in place regarding how to identify and approach ethical questions that will inevitably arise in the course of your work.

This Chapter will explore the role of professional judgment in ethical decision-making and the importance of seeking guidance from colleagues and supervisors when necessary. It will also address the limitations of that guidance. It will explore the practices, procedures and strategies that government offices should have in place for timely identifying potential ethical problems before they arise, thereby ensuring that you are adequately prepared for reasonably foreseeable ethics concerns and not suddenly caught off-guard or unaware by these issues. It will also discuss the importance of ethical decision-making and how a government office should approach ethical questions in a structured, thoughtful and responsible manner to achieve an appropriate resolution of such questions. An additional topic of discussion will be the format or structure for how such an ethics resolution system may be implemented. Finally, this Chapter will address reporting duties, the importance of reporting misconduct by other lawyers and the legal limitations on such reporting.

By having clear planning and processes in place before ethical problems arise, you can be assured that when they arise, you will have the tools at your disposal to properly and ethically resolve them. Formal policies and structures for identifying, avoiding and resolving ethical concerns is a necessary part of every office policy and procedures manual and integral to upholding your duties to the public, to the legal system and to the profession.

9.2 Can I rely on what my supervising lawyer decides?

ANSWER: "I was only doing what I was told to do" is not a defense to a bar charge. Every lawyer is responsible for their own conduct. But "a subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." **ER 5.2**(b)

DISCUSSION: Every government lawyer works within an organizational structure that includes supervisory and subordinate lawyers. As a government employee, you have duties and responsibilities to your organization and to your superiors. As a lawyer, you also have duties to your clients, the legal system and the public at large. Understandably, subordinate lawyers frequently seek out direction and advice from more experienced supervisory lawyers when they are unsure as to what action to take regarding an ethics question. In fact, because each government law office may take a slightly different approach to how they resolve certain ethics issues (for example, under what circumstances the office will treat a particular government official as an individual client), and because consistency is critical, such consultation should be encouraged. This gives rise to the question of to what extent the subordinate lawyer can, for

purposes of ethical compliance, rely upon the decisions of the supervisory lawyer.

All lawyers, governmental or not, have an independent duty to comply with the Rules of Professional Conduct. As a predicate matter, it is important for government lawyers to understand their ethical obligations when following the instructions of a supervising lawyer. Only by being aware of your ethical obligations can you identify when potential conflicts between your directions and your ethical obligations may arise. Once such a conflict does arise, the subordinate lawyer has the duty to avoid acting unethically. In some cases, a subordinate lawyer may be tempted to follow the instructions of a supervising lawyer, even if they suspect that the instructions may be unethical. However, the subordinate lawyer must recognize that they have a duty to comply with the Rules of Professional Conduct, even if it means disobeying the instructions of a superior. See **ER 5.2**(a) and ***In re Alexander*, 232 Ariz. 1, 6-7, ¶ 19 (2013)**.

If a subordinate lawyer knows a directed action is unethical, the subordinate lawyer is not immunized from ethical liability simply because they were following the directions of their superior. *Id.* Because of this, a subordinate lawyer cannot be willfully blind to the ethical ramifications of proposed courses of conduct. However, when the proper course of action is unclear, or there are reasonably arguable interpretations of what is proper under the Ethics Rules, a subordinate lawyer may rely upon the decisions of the supervisor. **ER 5.2**(b) and Comment [2], and ***Alexander* at 6-7, ¶ 19**.

In summary, subordinate lawyers are personally responsible for knowing the relevant ethical code applicable to their conduct and are not absolved from ethical responsibility for their actions or decisions merely because they were directed by a supervising lawyer. **Restatement (Third) of the Law Governing Lawyers § 12 (2020)**. If the ethical obligations are clear or there is no reasonable doubt as to the proper course of conduct, a subordinate lawyer must refuse to engage in the directed behavior that would violate the ethical rules. If the proper course of conduct is unclear because a reasonable view of the facts or the ethical rules is subject to conflicting interpretations or the matter involves a proper exercise of professional discretion, then the subordinate lawyer may rely upon the reasonable determination of the supervising lawyer. In such circumstances, the subordinate and supervising lawyers would be wise to seek clarification and guidance from an ethics expert or consult with their agency's ethics committee prior to proceeding.

9.3 Is it good practice to have an ethics committee or advisor?

ANSWER: Yes.

DISCUSSION: Government lawyers often encounter complex legal and ethical challenges in their day-to-day work. An ethics committee plays a vital role in providing guidance, promoting awareness, and ensuring compliance with the Rules of Professional Conduct. It also serves as a valuable resource for lawyers within the agency, offering a platform for discussion, education, and resolution of ethical concerns. Having a centralized ethics committee or advisor is one of the key manners in which governmental agencies can comply with the ethical duties imposed by the Rules.

ER 5.1 of the Rules of Professional Conduct outlines the responsibilities of supervisory lawyers in establishing organizational frameworks and procedures that give reasonable assurance that subordinates will comply with the Rules. See **ER 5.1**(a). In order to promote adherence to the rules, provide guidance in difficult situations and foster a culture of ethical conduct, it is beneficial for government law offices to establish an individual, office, or committee that provides advice and guidance on lawyers' ethical duties (an "ethics advisor").

Not only should an ethics advisor be designated, but the powers and duties of that advisor should be clearly defined. If the advisor is a committee, that committee should meet regularly. The ethics advisor should also report directly to senior management. Agency lawyers and staff should be trained to take any ethics concerns, including conflicts concerns, to the ethics advisor for guidance and decision making regarding ethical questions. The elected or appointed head of the government law office should be kept in the loop and involved in decision making based on recommendations of the ethics advisor.

An effective ethics advisor should fulfil several roles and responsibilities within the organizational structure of a government law office:

Advisory Role: The ethics advisor should provide guidance to lawyers and other law office staff on ethical matters. This includes interpreting and applying the Rules of Professional Conduct to specific situations, offering recommendations, and clarifying potential conflicts of interest.

Education and Training: The advisor should develop and implement ongoing ethics education and training programs for lawyers within the agency. These programs should address the specific ethics challenges faced by government lawyers, highlight best practices, and ensure a comprehensive understanding of the Rules of Professional Conduct.

Ethical Policy Development: The advisor should actively participate in the development and review of ethics policies and guidelines for the office. This may include drafting codes of conduct, conflict of interest policies, and procedures for handling ethics complaints or conflicts.

Periodic Review and Recommendations: The advisor should periodically review the office's ethics practices and policies, identifying areas for improvement and making recommendations to enhance the ethical culture within the organization. This may involve conducting surveys, collecting feedback, and proposing updates to policies and procedures.

Ethical Inquiry and Investigations: In cases where a lawyer's conduct (either within or outside of the government law office) is called into question, the ethics advisor may be responsible for conducting internal inquiries or investigations. This includes gathering relevant information, interviewing involved parties, and making recommendations for appropriate action to office leadership. Many offices have a policy whereby the ethics advisor is responsible for referring any lawyers violating rules to the State Bar or appropriate regulatory agency or making recommendation to the elected or appointed head of the government law office about making such referrals.

Confidentiality and Whistleblower Protection: The advisor should ensure that lawyers feel comfortable raising ethics concerns without fear of retaliation. It should establish mechanisms to protect the confidentiality of those who report ethics issues and provide assurances that such concerns will be addressed appropriately.

In conclusion, the establishment of an ethics advisor with clearly defined powers and responsibilities is a good practice that supports the ethical duties of governmental lawyers. By providing guidance, education, and a platform for addressing ethical questions, an ethics advisor can help ensure compliance with the Rules of Professional Conduct and will foster a culture of ethical conduct within the agency.

9.4 Can/Must I report ethical violations by others?

ANSWER: A failure to report a lawyer to the Bar can itself rise to the level of an ethics violation, but only if (1) you have actual knowledge that the lawyer violated the Ethics Rules and (2) the violation is one that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." **ER 8.3**(a).

DISCUSSION: As part of a self-governing profession, lawyers have ethical duties to report certain types of misconduct committed by other lawyers. See **ER 8.3**. The Rules of Professional Conduct put an affirmative obligation upon individual lawyers to do so. That being said, there are limitations to what type of conduct must be reported and when it may be reported. Additional obligations, such as the duty of confidentiality, may actually prohibit reporting in some circumstances.

While lawyers generally *can* make reports of unethical conduct they observe, the Rules of Professional Conduct do not *require* every instance of misconduct to be reported. Rather, the Rules require reporting in two specific circumstances. First, when the misconduct raises a substantial question as to the offending lawyer's honesty or trustworthiness. **ER 8.3**(a). This means that if the violation observed relates to the lawyer's honesty, then reporting is required. Second, if the violation raises a substantial question as to the offending lawyer's fitness to be a lawyer, reporting is required. *Id.*

This second reporting category is less of a bright line and open to some interpretation. What constitutes a substantial question as to fitness to practice has traditionally been viewed as requiring more than a single or isolated instance of minor or explainable misconduct, such as conflict of interest or negligently missing a filing date. **State Bar of Ariz. Ethics Opinion 90-13** at 9. Likewise, a successful post-conviction relief claim based upon ineffective assistance of counsel does not by itself establish an ethics violation (and therefore, would not raise a substantial question as to the lawyer's fitness to practice). See ***In re Wolfram*, 174 Ariz. 49 (1993)**; ***Florida State Bar v. Sandstrom*, 609 F. So.2d 583, 584 n.1 (Fla. 1992)**; ***In re Riccio*, 131 A.D. 2d 973 (N.Y. 1987)**; ***Office of Disc. Counsel v. McKinney*, 668 S.W. 2d 293, 296-97 (Tenn. 1984)**; ***In re Lewis*, 445 N.E. 2d 987, 989 (Ind. 1983)**. However, if observed misconduct is indicative of a pattern of misconduct, "the balance should weigh in favor of reporting." **State Bar of Ariz. Ethics Opinion 98-02**, *Citing* Opinion 90-13. Serious or repeated misconduct is far more likely to raise a substantial question as to fitness to practice.

Similarly, lawyers have these obligations when it comes to reporting observed violations of the Judicial Canons by judges. The Rule requires reporting of judges for observed violations of the rules of judicial conduct "that raise substantial question as to the judge's fitness for office." **ER 8.3**(b). These violations should be reported to the appropriate judicial regulation authority.

An important caveat to note however is that all of these reporting duties are subject to the **ER 1.6** duty of confidentiality. Accordingly, in order to report, client consent must first be obtained. **ER 8.3**(d). If the client will not consent, the lawyer cannot report. However, the lawyer should encourage the client to consent where disclosure would not substantially prejudice the client's interests. **ER 8.3**, Comment [2]. Some government law offices may also require ethics reporting to go through a specific process, such as through the organization's ethics advisor (which may be an individual, office, or committee). See **Section 9.3**, above. Accordingly, you should be familiar with your office's internal processes and procedures when it comes to reporting of ethical misconduct.

CHAPTER 10

Conflicts of Interest; Identifying and Addressing

10.1 Introduction

Conflicts of interest are some of the most complex and difficult ethics issues for any lawyer to navigate. This is particularly true for government lawyers, who may owe competing duties to multiple individuals, entities and the public, all at the same time. However, by preemptively having systems in place for identifying conflicts of interest and processes for resolving them, government agencies and lawyers can ensure they remain committed to their ethical responsibilities and clear of the pitfalls that conflicts can present.

Once a conflict is identified, there are three possibilities depending upon the situation: some conflicts can be cured with the informed consent of the impacted client(s); some conflicts can be cured by screening if the conflict is due to the competing interests or duties, or former legal employment, of a particular lawyer; and some conflicts will require that a matter be referred to another government law office or outside counsel. Even if the office determines that a conflict is curable through informed consent or screening, the office should still consider whether there is an appearance of impropriety that would make declining or withdrawing a better option.[25] At the same time, because government lawyers have a *duty* to provide advice and representation to their government client(s), an "appearance of impropriety" should not be used as an excuse to avoid unpleasant work or "get rid of" politically unpopular matters.

10.2 How should the office make sure that conflicts of interest are identified when they occur?

Conflicts of interest cannot be effectively avoided or resolved if they are not first identified. Expecting individual lawyers in an agency to simply "avoid" conflicts without providing them with the necessary tools to do so is a recipe for disaster. **ER 5.1** and **ER 5.3** require managing and supervising lawyers to have processes and procedures in place giving reasonable assurance that the firm (agency), lawyers and staff will operate in compliance with the Rules of Professional Conduct. Accordingly, having resources, structures and processes in place for the identification of conflicts is essential.

To identify conflicts, the agency must first *define* conflicts. This process begins with defining who the client is. Government agencies should have clearly defined policies in place requiring involved lawyers to identify and document (both internally and to the client) *who* the client is in each representation. Careful consideration should be given regarding to whom the legal and ethical duties of the agency will be owed in each instance. This could be a government agency

25 The Arizona Supreme Court, in ***State v. Marner in & for Cnty. of Pima*, 251 Ariz. 198, 200, ¶ 11 (2021)**, confirmed that a trial court has discretion to disqualify an entire prosecuting agency based on an appearance of impropriety, if that appearance is "sufficiently weighty." *Id.*, ¶ 12. In that case, "the appearance of impropriety was grounded not in a mere perception of wrongdoing but an actual finding of misconduct with no ability to determine the scope of its impact." *Id.*, ¶ 13. In ***State v. Chambers*, 255 Ariz. 464, 468, ¶ 16 (2023)**, the Court explained that "*Marner* does not stand for the proposition that an allegation of an appearance of impropriety may, on its own, call for the disqualification of an *entire* prosecutor's office."

or other type of sub-entity, a particular government employee, or the government organization as a whole. If the client is an organization rather than an individual, which officials or employees the office will communicate with and receive direction/decisions from should also be defined and documented. This will prevent confusion and unexpected conflicts further down the line.

Government law offices often represent the same entities or persons repeatedly and/or handle the same types of matters repeatedly. This makes it possible to anticipate and preemptively identify some conflicts of interest that may be likely to arise. Recognizing these potential conflicts in advance and having policies prepared for dealing with them is one big step a government agency can take towards avoiding conflicts. For less apparent or common conflicts, the agency should also have broader definitions of what would constitute a conflict drafted into agency policies. Lawyers and staff should then be trained on these policies so that they are aware of them and prepared for when a conflict arises.

Having adequate resources in place for conflicts checking and analysis is critical to tackling the problem. At a minimum, these resources should include a routine conflict-checking system that is used at the inception of each new representation and an ethics counsel or committee that more complicated conflicts issues or questions can be referred to for analysis and resolution. Agency policy should require all new representations to go through a basic conflicts check, conducted by either the lawyer, relevant support staff or the office's ethics advisor. This check should run the names of involved persons and entities through the agency's database or case management system. All related names, including opposing parties and major witnesses, should also be added to the system for future conflicts checking purposes. If a conflict is discovered, the matter should then be elevated to the agency's ethics advisor or senior management for resolution.

In addition to the opening check process, every government law office should have a designated ethics advisor to keep ethics guidelines up to date, provide guidance on difficult ethics questions and make decisions regarding reporting misconduct, by both internal and external actors. *See* **Section 9.3**, above.

10.3 Should the office regularly screen the civil and criminal divisions from one another?

ANSWER: No.

DISCUSSION: The government law offices for the state and the various county and municipal governments contain both a civil division and a criminal division. While the prospect of implementing a screen between the civil and criminal divisions to cure conflicts may appear attractive, it is inadequate under the Ethics Rules. A government law office or agency, the lawyers of whom report ultimately to one lead lawyer (whether a town/city attorney, county attorney, or the state attorney general), is considered to be one law firm and conflicts and other ethics issue that arise must be analyzed on that basis. Implementing a screening mechanism that prevents the right hand from knowing what the left hand is doing makes that impossible and is therefore an *impediment* to compliance with the Rules. What conflicts can and cannot be "cured" through screening mechanisms is discussed more in **Section 10.5** below.

10.4 What conflicts can – and cannot – be "cured" by obtaining a conflict waiver?

ANSWER: Not all conflicts are waivable; only those that meet the criteria in **ER 1.7**(b).

DISCUSSION: The first step in obtaining waiver of a conflict of interest is to determine if the conflict is waivable at all. Standard conflicts of interest are governed by **ER 1.7**. Waiver of conflicts is specifically governed by **ER 1.7**(b). There is a three-part test for determining if a conflict is waivable, and all three parts must be met for the conflict to be waivable.

First, the lawyer must reasonably[26] believe that they will still be able to provide competent and diligent representation to each affected client. This means that if the government lawyer or office would be somehow materially limited in its representation of either of the conflicting clients, then the conflict would be unwaivable. See **ER 1.7**, Comment [14].

Second, the representation cannot be prohibited by law. What laws are applicable will differ from jurisdiction to jurisdiction but may involve scenarios such as representing co-defendants in criminal matters or limitations on a government entity's ability to waive conflicts. See **ER 1.7**, Comment [15].

Finally, the representation cannot involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal. In other words, the government lawyer cannot represent multiple partes that are directly adverse to each other or have interests that do not align regarding an issue being litigated. See **ER 1.7**, Comment [16]; ***Arizona State Land Dept. v. State ex rel. Herman*, 113 Ariz. 125, n.* (1976)** (court indicates that it had previously denied jurisdiction of a petition for special action filed by one state agency against another because the attorney general's office had appeared for both parties in the case, and that this practice, disapproved by the Court, had ceased as of that date).

Once the government lawyer has determined a conflict can be waived and that the government entity wishes to provide a waiver, they must exercise caution in obtaining informed consent from the proper persons and in the proper manner. **ER 1.7**(b) requires informed consent to be obtained, in writing, from each affected client. First, determine who the appropriate authority is within the client entity or organization that can legally give that consent. Then, ensure you are obtaining informed consent. Informed consent requires that each affected client be made aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interest of that client. **ER 1.7**, Comment [17]. Any informed consent discussion or notification involving multiple clients should include a discussion of how client loyalty, decision making, and confidentiality will be handled. Then, the consent should be obtained in a signed writing, confirming all of the notifications given above.

Consent, once given, can subsequently be withdrawn by one or both affected clients. Note also that changes in circumstances may render ongoing representation and waiver impossible, thus necessitating the withdrawal from representation of one or both of the clients.

10.5 What conflicts can – and cannot – be "cured" by implementing a screen?

ANSWER: Personal conflicts, and some conflicts caused by changing employment, can be "cured" by implementing a screen, but the devil is in the details; see **ER 1.10**, **ER 1.11**, and **ER 1.12**. Your law office *cannot* engage in conflicting representation without client consent simply by screening the lawyers involved.

DISCUSSION: It should be known that the vast majority of conflicts of interest, including most of the direct and traditional conflicts governed by **ER 1.7**, cannot be remedied by screening. The concept of avoiding conflicts of interest by dividing a government law office up and screening different divisions or departments or lawyers from one another has been analyzed multiple times by the relevant ethics authorities, and each time the concept was found to be lacking or impermissible. In **Ariz. EO 93-06**, the Ethics Committee of the State Bar found that a public defender office's establishing of a separate division would not comply with the rules prohibiting conflicting representations. **Ariz. EO 93-06**. Similarly, in **Ariz. EO 04-04** the Ethics Committee found establishing a separate "Conflicts Unit" would not comply with the Rules. **EO 04-04**. *See also* ***In re City of Detroit, Michigan*, 654 B.R. 266, 275 (Bankr. E.D. Mich. 2023)** (The Michigan Department of Attorney General "does not become more than one organization when the Attorney General decides to create teams or walls within the Department to try to deal with potential conflicts of interest. The attorneys in the Flint Criminal Team and the attorneys in the Flint Civil Team were all agents of the Department.") See discussion in **Section 10.3 above**.

26 Note that a "reasonably believe" is an objective standard; subjective belief is not enough in and of itself. When making these determinations it is highly advisable to seek the advice of your office's ethics advisor or, if your office does not have a designated ethics advisor, other lawyers in the office who are not involved in the matter.

Screening, in fact, doesn't actually "cure" a conflict at all; it merely keeps certain types of conflicts from *spreading*. Screening is the process by which the affected lawyers or staff members who are the source of a conflict of interest are blocked off from access to and participation in a matter, thereby ensuring that the conflict is not imputed to and therefore disqualifies the entire office. And screening is only effective at doing that for select types of conflicts of interest: conflicts that are created by a personal interest of an individual lawyer, and—under certain circumstances—conflicts that are created when lawyers move from one law firm to another, or transition from being a judicial officer to a lawyer or vice versa.[27]

Conflicts of interest caused by a lawyer changing law firms, and the imputation of those conflicts to the remainder of the firm, are governed by two different rules, **ER 1.10** and **ER 1.11**. **ER 1.10** governs conflicts caused by a lawyer moving between private firms. **ER 1.11** governs conflicts caused by a lawyer moving from public to private practice or vice versa or moving from one government law firm to another. **ER 1.10** is not discussed here, so it should be separately consulted if the conduct of a private firm with no government lawyer connection is being analyzed. **ER 1.11** and the screening of current or former government lawyers is discussed in this section.

ER 1.11 addresses four specific conflicts of interest particular to government lawyers. First, if a lawyer participated personally and substantially in a matter as a public officer or employee (including as a government lawyer), then it is a conflict of interest for that lawyer, or that lawyer's firm, to participate in or represent a client in regard to that same matter. **ER 1.11**(a). Imputation of this type of conflict can be avoided by screening if three criteria are met. First, the disqualified lawyer must be screened from any participation in the matter and must receive no part of the fee therefrom. Second, written notice must be promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of the Rule. That notice must include a description of the screening procedures adopted, when they were adopted, a statement by the personally disqualified lawyer and by the new firm that the government's material confidential information has not been disclosed or used in violation of the Rules and an agreement by the new firm to respond promptly to any written inquiries or objections by the government about the screening procedure. Third, and finally, the personally disqualified lawyer and the new firm must reasonably believe that the steps taken to accomplish the screening of material confidential information will be effective in preventing such information from being disclosed to the new firm and client.

The second type of government lawyer conflict involves confidentiality. If a lawyer has information that they know is confidential government information about a person acquired when the lawyer was a public officer or employee (including a government lawyer), they may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. **ER 1.11**(b). Confidential government information is information that has been obtained under governmental authority, which the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public. **ER 1.11**(e). In such a situation, imputation of the conflict can be avoided by screening. In this scenario, the affected lawyer must be screened off from the matter and may not receive any part of the fee therefrom, but there is no affirmative notification requirement.

The third conflict rule for government lawyers, **ER 1.11**(c)(1), states that current government lawyers may not "participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead." Though the rule doesn't address imputation in this situation, the comment states that paragraph "(c)(1) contemplate[s] a screening arrangement." **ER 1.11**, Comment [5].[28]

Finally, a current government lawyer may not "negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially." **ER 1.11**(c)(2).

27 See ***State ex rel. Mitchell v. Hon. Palmer/Durand*, 257 Ariz. 160, ¶ 22 (2024)** (finding screening inadequate and disqualifying entire prosecutor's office when a lawyer in the office was a victim of the crime being prosecuted).

28 Though the rules themselves, rather than the comments, control, a lawyer is unlikely to face disciplinary charges for following guidance in the comments that adds to, but does not directly contradict, the rule.

10.6 How do we implement an effective screen?

ANSWER: Carefully, thoroughly and *quickly*. Lawyers and staff must be notified of the conflict, physical files need to be secured, and the conflicted individual must be denied the ability to access information stored electronically in the office's legal case and document management systems.

DISCUSSION: Once a conflict has been identified and the determination made that it can be resolved through screening, the process of implementing that screen must begin immediately. As a preliminary matter, the office's process for implementing a conflicts screen should be detailed and memorialized in formal office policy, so that all employees are aware of the process and can be held accountable for following that process.

Any effective ethical screen will necessarily isolate the affected lawyer or nonlawyer from any participation in a matter and will protect information about the matter from being communicated from or to that affected lawyer or nonlawyer. See **ER 1.0**(j). Similarly, any affected lawyer being screened off must not receive any part of the fee from the matter. **ER 1.10**(d)(2). While the ethical rules do not define the specific steps that must be undertaken to screen off an affected individual, any effective screen will involve aspects of communication, access control and monitoring.

When a lawyer or nonlawyer is being screened off of a matter, that decision should be communicated to all firm personnel, including the person being screened and the people working on the affected matter. There should be a standardized template for language informing all personnel that a specific person is screened off a specific matter. The language should then go on to reiterate that nobody is to share any information with the screened individual and that the screened individual is to have no access to the affected matter. It is also helpful, if possible, to have a notation or pop-up in firm systems when the affected matter is opened reminding users of the screening measures in place for that matter.

The central pillar of any screening plan is going to be access control. Any affected person who is being screened off of a matter must be physically prevented from accessing it. Simply having them agree not to look at or access the matter is insufficient. Their access must be physically terminated. For physical files, this could involve locking the files in a room, safe or cabinet with physical locks that the affected person does not have keys to. For digital files, this means cutting of the screened person's computer access to the affected matter so that they cannot access electronically stored information. Strong consideration should be given to physically separating the personnel working on the affected matter from the screened individual, so that they are working in separate physical areas, floors or buildings. Through this methodology, the chances of accidental cross- contamination of information or the overhearing of protected information can be reduced.

Finally, any effective screen will involve ongoing monitoring. Firms should, on a regular basis, reach out to the screened individual and the persons working on the affected matter to confirm they are still engaging in screening. Firms should also regularly use IT resources to check that sensitive files and matter documents have not been accessed by screened individuals. By using effective communication, physical access control and ongoing monitoring, an effective screen can be set up for the limited matters in which screening is appropriate.

CHAPTER 11

Specific Conflicts

11.1 Introduction

While the specific circumstances of a situation matter, certain kinds of conflicts arise more frequently. Examples of these conflicts, and principles for handling them, follow.

11.2 The victim in a criminal matter being handled by my office just sent a notice of claim to my civil government client; can my office work on the civil matter?

ANSWER: If the two matters are completely unrelated, it's probably okay. If they are related, you must analyze whether your office's duties to the victim are in conflict with your duties to your civil client.

DISCUSSION: **Rule 39 of the Arizona Rules of Criminal Procedure** authorizes - and in some instances requires - a prosecutor to assert certain rights on behalf of a crime victim. That said, the victim is not the prosecutor's client. The prosecutor's only client is the State of Arizona, and the prosecutor's primary obligation is to do justice. So, if the victim in a criminal case files a notice of claim against the civil client of the same government law office that is the prosecutor, there is no direct conflict of interest between clients.

However, it is necessary to conduct a conflict inquiry that focuses upon whether there is a significant risk that the representation of the civil government client in defending against the civil claim will be materially limited by the office's responsibilities to the victim. See **ER 1.7**(a)(2). If the two matters are wholly unrelated, there is not much chance there will be a material limitation. By contrast, if the matters are related, there is a greater chance that there will be a material limitation. If confidential information obtained from the victim that is required by law to be kept confidential would be helpful to disclose to defend the civil client, then there is a material limitation that will necessitate conflicting out the civil matter in which the notice of claim has been filed. This is likely to arise in government law offices that provide victim services and advocacy, because consultation between the crime victim and advocate is privileged. *See* **A.R.S. 13-4430**. So, information shared by the victim with a victim advocate employed by or volunteering for the government law office cannot be used by that law office against the victim in a civil matter. If there is this type of material limitation, then the civil matter must be sent to outside counsel.

11.3 My office faces the prospect of prosecuting a defendant and simultaneously engaging in civil litigation with that same defendant. Is that a problem?

ANSWER: The question is whether, under **ER 1.7**(a)(2), there is a "significant risk" that your office's prosecutorial duty to do justice in the criminal case will "materially limit" your office's ability to represent its civil client in the civil case, or vice versa. If the facts underlying the two cases are related, such that what happens in one case can materially impact the other, that is a problem.

DISCUSSION: Many government law offices in Arizona that provide civil advice and representation to a government organization also prosecute criminal cases. Occasionally a government lawyer will be asked to advise or represent the

government organization in a civil matter involving an individual who is the subject of a pending or potential prosecution action being handled by that lawyer's office. For example, the defendant in a criminal prosecution might have a claim against the government organization based on the conditions of incarceration or the actions of its law enforcement officers. Material limitation conflicts can also arise when the government lawyer is called upon to provide civil legal advice to government actors involved in criminal prosecution handled by the lawyer or the lawyer's law office. 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 materially limit or be materially limited by the law firm's duty as a prosecutor to act in the interests of justice.

In that circumstance, the 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. If the civil and criminal matters are (a) not substantially related, i.e., the matters do not share common legal or factual issues, and (b) the prosecution and civil-representation functions of the government law office are not usually intermingled[29], then the handling of either matter is unlikely to be materially influenced by concerns about the other matter. If the civil lawsuit is filed by a person after the person has been charged or indicted and it appears that the purpose of the suit is obtain leverage over the prosecution or is a pretext to disqualify the prosecutor's office, there is also likely no disqualifying conflict. But if the civil lawsuit is not pretextual and there are common issues or the office's prosecution and civil representation functions are not clearly separate, then a disqualifying conflict of interest likely exists.

A government lawyer cannot avoid the issue by seeking informed consent under **ER 1.7**(b) because, unlike a lawyer with a potential conflict between two civil clients, a prosecutor does not have an independent client representative who can choose to give or withhold informed consent; the prosecutor is the client representative for the state.

In should be noted that in at least two opinions the complications of intermingling a criminal and civil case have been examined. In **ABA Formal Opinion 92-363** the ABA concluded that in certain circumstances a lawyer does not act unethically by using the possibility of presenting criminal charges against an opposing party in a private civil matter to gain relief for a client. But the lawyer making the threat cannot imply that the lawyer has the ability to improperly influence the criminal prosecution. The decision only addressed situations involving negotiations between nongovernmental parties and does not purport to deal with issues presented where one of the parties is in an official position to act or refrain from acting in connection with bringing criminal charges. It would be clearly improper for a prosecutor to seek a criminal indictment for the purpose of gaining an advantage for the office's civil government client; even the appearance of doing so would be problematic and should be avoided.

In another analogous matter the U.S. Supreme Court in ***Town of Newton v. Rumery*, 480 U.S. 386 (1987)**, addressed the propriety of a release-dismissal agreement wherein a county prosecutor agreed to dismiss criminal charges against a defendant in exchange for the defendant releasing his rights to bring a § 1983 civil rights action against a town and the arresting officer the town employed as well as a victim in a different criminal case. Sometime after the agreement was made and the criminal charges were released, the former defendant nevertheless filed a § 1983 action and argued that the release-dismissal agreement was not binding because it was against public policy. In a 5-4 decision, the Supreme Court declined to create a *per se* rule that such agreements are unenforceable and instead allowed the agreement finding that the agreement was voluntarily made…there was no evidence of prosecutorial misconduct, and that the agreement would not adversely affect the relevant public interests. ***Id.* at 398**. The majority also found that the prosecutor "had an independent, legitimate reason to make [the release-dismissal] agreement directly related to his prosecutorial responsibilities." ***Id.***

Rumery, of course, was not an ethics decision. But even if it is read as such, it must be noted that the prosecutor was in the *county* attorney's office, which was also the civil law office for the county—*but not the town*, which was the entity protected by the release-dismissal agreement. The prosecutor therefore had no *duty* with respect to the potential

29 Note that divisions should never be "screened" or walled off from one another in an attempt to avoid conflicts; this is ineffective for avoiding conflicts and can interfere with needed sharing of information. See discussion in **Section 10.5**. The point here is a very practical one; a prosecutor who has no day-to-day involvement in civil cases is less likely to be improperly influenced by concerns about a civil case and civil lawyers who have no day-to-day involvement in criminal cases are less likely to be improperly influenced by concerns about a prosecution.

civil case that was clearly in conflict with their prosecutorial duties. Just as it would be improper for a prosecutor to file criminal charges to obtain an advantage for their civil client, it would be improper for a prosecutor to condition dismissal of criminal charges on an agreement not to pursue a § 1983 action against their civil client.

When simultaneous involvement in related civil and criminal matters creates a material-limitation conflict, the government law office must decide which case to outsource to resolve the problem. If the material limitation arises from a risk that the law office's loyalty to the government organization will cause prosecutorial decisions to be made in a manner that provides the government organization an advantage in the civil case, sending the civil case to outside counsel will not eradicate that risk; instead, the criminal case will need to be sent to another prosecuting agency.

Material-limitation conflicts can also arise when the government lawyer is called upon to provide civil legal advice to government actors involved in the criminal justice process. For example, the head of a law-enforcement agency may want to publicly comment on a pending criminal case as extensively as legally permissible. The government lawyer's ability to help the law-enforcement agency achieve its policy goal and understand its legal authority to do so will be materially limited by their obligation, as prosecutor, under **ER 3.8**(f) to urge the law-enforcement agency to limit such extrajudicial statements. That makes it necessary to obtain outside counsel to provide independent legal advice to the law-enforcement agency on this issue.

11.4 The victim in a criminal matter being handled by my office is also the defendant in another criminal matter being handled by my office. Is this a conflict?

ANSWER: Maybe.

DISCUSSION: If the victim in a criminal case is the defendant in another criminal case, there is not a direct conflict of interest between two clients because the victim is not a client of the prosecutor's office. However, the prosecutor has certain duties towards the victim under Ariz. R. Crim. P. 39, and there is likely[30] to be a significant risk that the representation of the state in the second case will be materially limited by the prosecutor's responsibilities to the victim in the first case. When that occurs, the case in which the victim is a defendant should be referred to another government law office for prosecution, because screening would not remedy the significant risk of material limitation. See **ER 1.7**(a)(2).

In many criminal cases, the prosecutor and their staff, as well as victim advocates, have significant contact and communication with the victim regarding the facts of the case and regarding their rights as a victim. The prosecutor's positive relationship with the victim may be important to encourage the victim to testify if they are a necessary witness. If the prosecutor's office charges and prosecutes the victim in another case, that relationship will be damaged, thus negatively impacting the first case. Accordingly, even if the cases are wholly unrelated—such as where the victim in the first case was subjected to domestic violence, and in the second case is accused of driving while intoxicated—it is best to refer out the second case to protect the integrity of the first case and to avoid incentivizing the victim to refuse to testify against the perpetrator.

11.5 My law office wants to make an employment offer to a [judicial law clerk] [associate in a private firm] [member of another public law office]; what are the ethics issues we need to consider?

ANSWER: When a lawyer is moving from one law firm to another—whether public or private— or is joining a law firm after service as a judicial officer, conflicts must be carefully analyzed and resolved *before the move*. The default rule is that conflicts are imputed to the entire law firm into which the lawyer is moving, but that may be avoidable

30 In rare cases, it may be possible to prosecute both cases because of the specific circumstances involved; for example, if the individual has opted out of victim notifications in the case in which they are a victim, and the two cases are wholly unrelated. The question is whether the prosecutor's office can adequately fulfill all its duties.

with screening. Certain proactive notifications may need to take place as well; a careful reading of **ER 1.10** (moving between private firms), **ER 1.11** (moving into or out of public practice or between public law offices), and **ER 1.12** (employing a former judge or other type of arbitrator or tribunal) is necessary.

DISCUSSION: When a move is contemplated, careful conflict checks need to be completed before the lawyer shows up to work at the new firm and any screening processes need to be in place and any required notices provided. Note that if there are any conflicts that cannot be resolved other than by sending a case to another law firm, the rule on withdrawal must be consulted to ensure that it can be done properly. See **ER 1.16**. If withdrawal is not permitted under the rules, the lawyer may simply not be able to join the law firm. That's not something you want to learn your first day at the new job. For more discussion regarding "screenable" conflicts, see **Section 10.5** above. For a discussion about implementing an effective screen, see **Section 10.6**.

11.6 Someone in my office has a personal/family relationship with [opposing counsel] [adverse party][criminal defendant][victim]; does the office have a disqualifying conflict?

ANSWER: It may be possible to screen the individual who has the personal relationship in order to avoid disqualifying the entire office, but it will depend on the circumstances and how quickly and effectively a screen is put in place.

DISCUSSION: **ER 1.8**(l) specifically addresses the situation in which a lawyer is related to another lawyer involved in a matter; it prohibits the representation if the interests of the clients of the related lawyers are "directly adverse," without the informed consent of the clients. (See **Section 10.4** regarding conflict waivers.) Timely screening of the lawyers can, however, prevent imputation of the conflict to the entire law office, if the requirements of **ER 1.10**(a) are satisfied. See **ER 1.8**, Comment [19]; see **Section 10.5** and **Section 10.6** of this Manual regarding screening mechanisms.

Screening is effective to avoid imputation based on personal interests of other types as well—so long as the personal interest does not "present a significant risk of material limiting the representation of [the impacted client(s)] by the remaining lawyers and nonlawyers in the firm." **ER 1.10**(a). Whether that is the case requires a candid assessment of all the relationships involved and how they might impact the handling of the matter. For example, a large office may be able to easily screen a staff member in the office's civil division from a criminal prosecution for a property crime in which the staff member is a victim, and confidently conclude that the relationship will not impact the prosecution. In contrast, if the staff member has been a beloved member of a small- to-medium-sized office for 20 years, it would be virtually impossible to conclude that this circumstance won't impact the office's prosecution of someone accused of murdering the staff member's child.

CHAPTER 12

Confidentiality and Publicity

12.1 Introduction

The Ethics Rules relating to confidentiality and publicity are applied in a unique manner for government lawyers who are subject to the Public Records Law, **A.R.S. §§ 39-121 through 39-129**. It is incumbent upon government lawyers to familiarize themselves with the Public Records Law. Fortunately, there are handbooks published by the Arizona Attorney General and the Arizona State Library Archives and Public Records agency that provide a good starting point. Confidentiality is covered by **ER 1.6**. **ER 3.6** addresses extrajudicial statements regarding pending litigation and is supplemented by **ER 3.8**(f) which specifically addresses extrajudicial statements by prosecutors.

12.2 What information am I allowed to reveal regarding my civil legal work and what information am I required to keep confidential?

ANSWER: Even though the matters on which a government lawyer is working may be matters of great interest to the public and already a subject of public discussion, that does not lessen the lawyer's duties of confidentiality. Even if the appropriate client representatives waive confidentiality in particular matters, the government lawyer must remain mindful of their obligation to limit comments about pending adjudicative proceedings under ERs 3.6 and 3.8(f).

DISCUSSION: A lawyer's confidentiality obligation under **ER 1.6**, especially with respect to attorney-client communications and work product, is one of the hallmarks of our justice system. That said, things are somewhat different for government lawyers, who are subject to the Arizona Public Records Law, **A.R.S. §§ 39-121 through 39-129**.

Because government lawyers are involved in advising and assisting government officials in implementing those officials' policies, and because the officials' actions are very public, it can be tempting to comment negatively on policies with which the government lawyer disagrees. That is particularly the case for an elected lawyer who is seeking reelection and therefore wishes to make their contrary policy positions available to the public. But this is not a justification for breaching confidentiality. See **ER 1.6**, Comment [6] ("The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.).

For example, if a county board of supervisors adopts a zoning policy that increases disability accessibility requirements for housing in residential subdivisions, requiring that every house have a ramp for front entry, garage entry, and rear entry, the county attorney and their deputies are prohibited from publicly expressing their policy disagreement and opinion that such requirements are unduly expensive and that developers will pass along the costs to housing buyers, resulting in a reduction in the supply of affordable housing, which will have the unintended consequence of negatively impacting people who are disabled because they tend to have lower incomes. Of course,

the county attorney or one of their deputies can and should confidentially advise the board of supervisors of their policy assessment acting in their role as advisor. *See* **ER 2.1**.

For another example, if an elected county recorder takes the policy position that they plan to reduce the number of polling places as much as is legally authorized, they may ask the county attorney to advise them about what is legally authorized. The county recorder may then announce publicly that they are reducing the number of polling places to the extent the county attorney advised them is permissible. The attorney-client privilege is the county recorder's to waive in this circumstance. The county attorney, and their deputies, may be dismayed but are prohibited from publicly expressing concern that the reduction in the number of polling places is bad public policy that may deter or impede voters from exercising their franchise. The county attorney and their deputies should express their opinion privately to the county recorder as advisor, but must remain publicly silent, even if the county attorney receives unwarranted negative publicity and might, as a result, lose political support for their own future re-election bid.

This can be challenging for appointed government lawyers, as well. For example, if a city police chief decides to offer deflection to treatment in lieu of arrest for people found in possession of illegal drugs, the city attorney is prohibited from expressing their opinion publicly and in the news media that this is bad public policy because the city attorney is the civil legal advisor to the city and its police chief, despite the fact that the city attorney is also the city prosecutor. See **ER 1.6** and **ER 1.7**. However, the city attorney, in their role as prosecutor, can and should express their policy position privately to the police chief.[31] *See* **ER 2.1**.

Because the legal matters handled by government lawyers by their nature involve matters of public concern, they often pique the interest of news reporters. Government lawyers thus must be particularly mindful to comply with the limitations regarding trial publicity.

Generally, with the authorized client representative's permission, a government lawyer may state the following types of information about a litigation matter they are handling: the claim, offense or defense involved; information contained in a public record; that an investigation of a matter is in progress; the scheduling or result of any step in litigation; a request for assistance in obtaining evidence and information necessary thereto; a warning of danger concerning the behavior of a person involved if there is a likelihood of substantial harm to an individual or the public interest. *See* **ER 3.6**(b). Note that there are special rules of confidentiality for mental health proceedings and juvenile proceedings, with which **ER 3.6** mandates compliance. *See* **ER 3.6**, Comment [2].

Frequently, government lawyers handling civil matters provide legal advice and representation to the head of their own office, including regarding public records and public statements that may be released in criminal cases. Accordingly, it is important for government lawyers to familiarize themselves with the laws and ethical rules pertaining to those matters. Reference to the **Arizona Attorney General's Agency Handbook**, and the **Arizona Public Records Law Handbook** published by The Arizona Ombudsman-Citizens' Aide can provide a good place to begin legal research. And **ER 3.8**(f) sets forth the special responsibilities of a prosecutor relating to the need to limit extrajudicial comments.

12.3 Can I discuss legal issues with government lawyers in other offices, such as the State Civil Deputies group (for county attorneys) or the Arizona City Attorneys Association (for municipal lawyers)?

ANSWER: Only in very general terms unless you have your client's informed consent.

DISCUSSION: **ER 1.6**(a) provides that a lawyer may disclose otherwise confidential information if "the disclosure is impliedly authorized in order to carry out the representation." This might arguably include revealing limited informa-

31 Whether the city attorney can also give the police chief legal advice regarding the matter in their role as civil lawyer for the city will depend on whether there is, because of the policy disagreement, "a significant risk" that their advice will be "material limited" by the lawyer's own interests. **ER 1.7**(a)(2).

tion in order to consult with a colleague outside your government law office about a legal issue. This must, however, be done with great care. **ER 1.6**, Comment [4] provides specifically that a "lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved." The problem for in- house lawyers, of course, is that everyone knows the identity of your client.

ABA Formal Opinion 24-511, which was issued May 8, 2024, addresses the question of "whether, to obtain assistance in a representation from other lawyers on a listserv discussion group, or post a comment, a lawyer is impliedly authorized to disclose information relating to the representation of a client or information that could lead to the discovery of such information." Though specifically addressing listservs, the opinion also applies to discussions at in-person gatherings. Regarding in- house counsel, including government lawyers, the ABA opinion advises:

> *Additionally, when lawyers represent only one client (as in the case of in-house counsel or government lawyers) or their client's identity can be readily inferred (as in the case of a litigator seeking assistance with a pending or contemplated action), "a description of specific facts or hypotheticals that are easily attributable to the client likely violates Rule 1.6 in most contexts. Also, if a matter is receiving media coverage or the group of listserv participants is comprised of a small, closely connected legal community, the risk of a Rule 1.6 violation is likely to be too great to permit the lawyer to post a hypothetical relating to the matter without the informed consent of the client. For example, where the listserv participants are familiar with each other's practice because they practice in a limited geographic area or a specialized practice setting, posting a hypothetical based on information relating to the representation of the client will be more likely to lead to disclosure of the client's identity to some other participant on the listserv. The lawyer should err on the side of caution and avoid specific hypotheticals, refrain from posting, or obtain the client's informed consent if there is any reasonable concern.*

Because the ability to discuss the unique issues that arise in government practice is such an important tool for government lawyers—particularly those in small offices who must advise the client on the same scope of issues that a larger office does with multiple lawyers—the best practice is to obtain informed consent from your client for these types of discussions. That consent should be periodically renewed when new officials take office. In-person and online discussions should also be accompanied with reminders to keep confidential any information that is shared.

12.4 Am I allowed to conduct a press conference regarding a pending civil matter? Is the head of my government law office allowed to do so?

ANSWER: A government lawyer generally should not conduct a press conference regarding a civil matter. The authority to conduct a press conference rests with the highest authorized client representative.

DISCUSSION: In situations where the head of a government law office is the authorized client representative (such as if the matter involves a criminal case, or if they are the sole defendant in a civil lawsuit), then the head of the government law office may conduct a press conference or direct one of their subordinates to do so. What can be said at a press conference by a government lawyer about a matter pending before a court or other tribunal is limited by the specific restrictions set forth in **ER 3.6**, and listed in Comment [5], as well as in **ER 3.8**(f) (for criminal prosecutions), especially the general prohibition against making any extrajudicial statement the lawyer knows or should know will be publicly disseminated and might have a "substantial likelihood of materially prejudicing" an adjudicative proceeding in the matter.

12.5 The opposing side in a matter I am handling has made statements to the press. Am I or my agency allowed to respond to their comments/claims?

ANSWER: Maybe.

DISCUSSION: The government lawyer or their government law office may respond to comments made to the press regarding a pending case, but only if and to the extent responding is necessary to protect the client from undue prejudice caused by recent publicity not initiated by the government lawyer or their government client. **ER 3.6**(c), and Comment [7]. Additionally, the government lawyer should first discuss this with their client. See **ER 1.4**(a)(2).

12.6 Our agency / our client received a public records request. Are we required to disclose materials in response to such a request if we believe they are confidential?

ANSWER: Probably. You may withhold legally privileged materials—attorney-client privileged communications and work product—and you may be able to withhold other records if they fall within another recognized exception to the public records laws. But where the public records law requires disclosure, it trumps your confidentiality obligations.

DISCUSSION: Arizona has one of the most expansive public records laws in the nation. It is presumed that all government records, including the records of government law offices, are open to the public. *See* **A.R.S. § 39-121, *et seq.*** *See also* ***Carlson v. Pima Cty.*, 141 Ariz. 487 (1984)**. There must be an express statutory exception, or another legally recognized exception to justify overcoming the presumption of access to keep government law office records confidential.

If a record must be produced under the Public Records Law, disclosure does not violate **ER 1.6**. **ER 1.6** (d)(5) (permitting disclosure "to comply with other law or a final order of a court").

The presumption in favor of disclosure of public records may be overcome, however, where privacy, confidentiality, or the best interests of the state outweigh the policy in favor of disclosure. ***McKee v. Peoria Unified School Dist*., 236 Ariz. 254 (App. 2014)**; see also ***Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.*, 191 Ariz. 297 (1998)**. A government lawyer should assert attorney-client privilege and the work product doctrine where applicable and withhold or redact those records from disclosure unless and until a court orders otherwise. *See* **ER 1.6**, Comment [15]. It may also be appropriate to assert an argument based on the best interests of the government entity for withholding other records. Ultimately, however, the Public Records Law trumps confidentiality.

CHAPTER 13

Special Duties of Criminal Prosecutors

13.1 Introduction

Special ethical responsibilities of prosecutors are set forth in **ER 3.8**.

13.2 Can I subpoena a lawyer to testify about a past or present client?

ANSWER: Maybe.

DISCUSSION: A lawyer may only be subpoenaed by a prosecutor to testify in a grand jury or other criminal proceeding if three criteria are satisfied: first, the prosecutor must reasonably believe there is no applicable privilege protecting the information sought (such as attorney-client privilege where the crime-fraud exception to that privilege does not apply); second, the evidence sought must be essential to the successful completion of an ongoing investigation or prosecution; and third, there must be no other feasible alternative to obtain that information. See **ER 3.8**(e).

13.3 I discovered evidence that was not timely disclosed to the defense in a case. What are my obligations?

ANSWER: Make disclosure immediately.

DISCUSSION: In addition to the constitutional due process requirement recognized in ***Brady v. Maryland*, 373 U.S. 83 (1970)** and its progeny, which *legally* requires prosecutors to disclose to the defense of all exculpatory evidence possessed by the state (including that possessed by law enforcement agencies but not possessed by the prosecutor's office), there also is an *ethical* obligation to disclose such evidence. **ER 3.8**(d).

When in doubt about whether evidence is exculpatory and thus required to be disclosed, the best ethical practice and best strategy is for the prosecutor to make disclosure to the defense and to point out the previous failure to disclose. If the case is still pending, notification should be provided to the court by the prosecutor, as well. It never harms a prosecutor's case to make disclosure of any potentially exculpatory evidence, because the prosecutor's primary case objective is not to obtain a conviction but to do justice.

13.4 I have become aware of evidence in an old, closed case that causes me to question whether the convicted defendant was actually guilty. What are my obligations?

ANSWER: Investigate and take further steps based on the outcome of that investigation.

DISCUSSION: You must promptly conduct an investigation of this evidence calling into question the guilt of the convicted defendant. If there is a conflict of interest or a lack of competence or lack of resources to conduct the investigation (such as a lack of qualified investigators), then you must engage another prosecutor's office to conduct the investigation. See **ER 1.1** and **ER 1.7**.

If the evidence is "new, credible, and material" and creates a "reasonable likelihood" that the convicted defendant did not commit the offense of which they were convicted, then **ER 3.8**(g) requires that disclosure shall be made to the court as well as to the defense, as well as to any other prosecutor's office that was involved in obtaining the conviction.

Moreover, if the evidence is clear and convincing that the convicted defendant did not commit the crime, then **ER 3.8**(h) requires the prosecutor to notify the victim and take appropriate steps to set aside the conviction.

13.5 What public statements can I or my office make about a pending matter?

ANSWER: In addition to the information that **ER 3.6**(b)(1) through (6) allows a lawyer to reveal in extrajudicial statements, a prosecutor may reveal the information listed in **ER 3.6**(b)(7) regarding a criminal case. But their remarks must also comply with the standard in **ER 3.8**(f).

DISCUSSION: A prosecutor is limited in what they can say about a pending criminal investigation or case.

A prosecutor may make a statement that informs the public about the nature and extent of the prosecutor's action and that serves a legitimate law enforcement purpose, such as identifying a suspect who has been indicted and for whom an arrest warrant has been issued but who is at large and cannot be found. The legitimate law enforcement purpose there is to apprehend the suspect. See **ER 3.6**(b)(5) and (b)(7)(ii) and **ER 3.8**(f). A prosecutor also may report to the public: the fact that an investigation of a matter is in progress; the scheduling or result of any step in litigation (such as a preliminary hearing date); the identity, residence, occupation, and family status of the accused; the fact, time, and place of arrest; the identity of investigating and arresting officers or agencies; and the length of the investigation. See **ER 3.6**(b)(7). Additionally, a prosecutor may report to the public a warning of danger concerning the behavior of a person involved when there is a reasonable likelihood of substantial harm to an individual or to the public interest (such as if a suspect who is at large is known to be armed and dangerous). See **ER 3.6**(b)(6).

However, a prosecutor otherwise must refrain from making statements outside the courtroom and the pleadings that have a substantial likelihood of heightening public condemnation of the accused. See **ER 3.8**(f). Note: Notwithstanding the foregoing, a prosecutor may release public records relating to a case. *See* **ER 3.6**(b)(2). But the prosecutor may not do so if the prosecutor knows the records will be disseminated by means of public communication (via the media or social media) and will have a substantial likelihood of materially prejudicing a proceeding in the case. See **ER 3.6**(a).

13.6 The [sheriff's department/police department], which my office advises, is interested in making public comments regarding a pending criminal case in which that law enforcement agency was the arresting/investigating agency. What should I advise them?

ANSWER: A prosecutor has an ethical obligation to exercise reasonable care to prevent investigators, law enforcement personnel, and employees or others assisting or associated with the prosecutor in a criminal case from making statements outside the courtroom that the prosecutor would be prohibited from making themself. *See* **ER 3.8**(f) and **ER 3.6**.

DISCUSSION: For this reason, it is important for the entire leadership team of the government law office - and especially anyone involved in communications with the news media and on social media - as well as all civil legal advisors within the government law office who provide legal advice and representation to law enforcement agencies--including detectives and investigators employed by the government law office itself--to be fully trained on these Ethics Rules.

Where the prosecutor's government law office is also the civil legal advisor to a law enforcement agency that wants to comment about a criminal case, the prosecutor has a potential conflict of interest. On the one hand, the prosecutor is ethically obligated to discourage the law enforcement agency from making comments beyond what the prosecutor could make. On the other hand, the prosecutor is legally obligated to provide civil legal advice to the law enforcement agency about its legal right to comment. See **ER 1.7**. The law enforcement agency has a legal right to resist the prosecutor's urging to refrain from making certain public comments about a criminal case. But the prosecutor's office, which is also the civil legal advisor to the law enforcement agency, is ethically prohibited from so advising the law enforcement agency. So, to address this conflict of interest and the material limitation upon the government law office's ability to provide complete and accurate legal advice, the government law office must engage outside counsel to advise the law enforcement agency of the scope of its legal right to comment. ***Note:*** Outside counsel for this matter cannot be another government law firm that is also a prosecutor's office.

APPENDIX A

Sample Client Representation Memos

A.1 Representation Memo Sample/Template for Counties

This memorandum addresses the role of the Civil Division of the ABC County Attorney's Office ("CAO") within ABC County government. We wish to be very clear about our unique role in ABC County Government so we can avoid any confusion or misunderstandings.

Some of this memo's main points can be summarized as follows:

- **CAO's unique role.** Our role as the chief criminal-prosecution agency, and our other statutory duties, impact our role as the County's in-house law firm in important ways.
- **The identity of the client.** Usually, ABC County itself is our client, and not individual elected officials or employees (though there are exceptions).
- **The respective roles of County officials/employees and CAO.** The County, acting through its elected and appointed officials, is generally responsible for setting policy and goals, while we are responsible for making decisions about legal strategy.
- **What we don't do.** There are certain things about which we will not advise County elected officials or employees, such as personal legal matters and the individual's own employment issues.
- **Who makes decisions for the County.** We take direction from the individual official or body that we believe has the statutory authority to provide that direction, or from their designee. *An intra-County disagreement does not usually create a disqualifying "conflict of interest" for our office, as the identity of the client, ABC County, remains the same, and CAO will not advocate for one County department or official against another in a policy dispute.*
- **The attorney-client privilege.** Some (though not all) communications between County representatives and our office are privileged as to the outside world but we will still share those communications with others inside the County organization when that is in the best interests of the organization.
- **Conflicts of interest.** If we determine that we have a "conflict of interest" we will take steps to resolve it, which may in some—but not all—instances require hiring outside counsel.

1. The unique role of the government lawyer.

CAO is essentially the County's in-house law firm. Its mission is to serve the public with integrity by providing the highest quality legal services to the public's elected and appointed leaders within the County. But the County Attorney is also the chief criminal prosecutor representing the State of Arizona within the geographic area of ABC County (A.R.S. § 11-532) and has various other duties such as enforcing the State's open meeting law (A.R.S. § 38-431.06) and elections laws (A.R.S. § 16-1021). Satisfying these various, and sometimes competing, duties can create unique challenges for our office. There are even statutes that require a county attorney to bring an action against the county's

board of supervisors to recover payments made from the county treasury, pursuant to an order of the board, without legal authority (A.R.S. § 11- 641); sue the county assessor to recover taxes on property that the assessor negligently fails to assess (A.R.S. § 11-543); investigate the county assessor or treasurer at the request of the board of supervisors (A.R.S. § 11-664); and bring an action against the county sheriff to obtain funds in their possession that should be paid to the county (A.R.S. § 11-451).

2. Who is the client?

CAO at all times represents ABC County, which is our primary client in civil legal matters. We also advise and represent certain taxing districts, such as the ABC County Free Library District, Stadium District, and the Flood Control District, the governing boards of which are the ABC County Board of Supervisors. And we may from time to time represent school districts or fire districts within the County when they ask us to do so, provided it does not create a conflict with our representation of the County.

Because the County is an organization that can act only through individuals, CAO provides legal advice to, and receives direction on legal matters from, the County's elected and appointed officials. That does not mean, however, that these individuals are themselves "clients" of our office, and it is extremely important to remember this. *Generally, when we are rendering advice to these individuals, we are doing so as the County's lawyer, not the individual's lawyer.* This is the case even when the advice concerns the individual's own duties (for example, regarding whether the individual has a conflict of interest that must be declared), and even when the individual is an elected official.

Sometimes one or more County employees or elected officials are named as parties (either plaintiff or defendant) in a lawsuit. For example, statutes require that the Treasurer be named as a defendant in tax-lien-foreclosure cases; another statute permits the Assessor to be named as a plaintiff in certain tax appeals. And people who sue the County often—whether properly or not— name as defendants both "ABC County" and individual members of the Board of Supervisors or other elected officials. So long as the employee or official is named in an official capacity, and faces no personal liability in the case, we still consider the actual client in these cases to be *the County* and we do not consider the individual employee or elected official to be a separate client. (The fact that the client in these cases is the County does not answer the question of who has authority to act on behalf of the County in a particular case. If a dispute develops among the named officials regarding who has authority to speak for the County and give our office policy direction with respect to the lawsuit, we deal with that as discussed in Section 5, below.)

In some lawsuits, however—including certain tort lawsuits—the named employee or official *does* face personal liability. For example, an inmate of the Adult Detention Center might file a claim or bring a lawsuit against a corrections officer individually, as well as the Sheriff and ABC County, alleging that the officer used excessive force and injured the inmate. In those cases—assuming the County is obligated to defend and indemnify the individual, and we determine that we are ethically able to provide that defense—that individual is a separate client of our office, along with ABC County and any other named County employees and officials. How this joint representation works is described in Section 8 below.

Because the identity of the client has such a profound impact on how our duties of confidentiality and loyalty are applied, and on whether in any particular instance we have a conflict between different clients, it is important that our office and the individuals we advise have a mutual understanding of who the client is in each instance. When we believe it is reasonably necessary to clarify the identity of the client, we will do so. If you ever find yourself confused about this, however, please seek clarification from the deputy county attorney who normally advises your office or from the Chief Civil Deputy.

3. What are our respective roles?

The County, as client, sets policies and goals through its elected and appointed officials; CAO determines legal strategy and gives advice regarding legal considerations and consequences.

When a contract or other legal instrument is being drafted and negotiated, it is up to the County to decide what the substantive terms of the agreement should be – for example, what duties each party has; how much money, if any, is

changing hands; and when the various duties must be performed and to what standard. It is CAO's role to assist with drafting the document (normally by reviewing a draft created by a County representative) to ensure that it accurately reflects the County's intent, as articulated by the appropriate County representative. CAO will advise County representatives with respect to the legal risks and possible consequences of a particular decision and course of action and will work with them to develop a legally permissible way of achieving the County's policy goals.

It is the County's responsibility to determine, as a policy matter, what course of action to take after considering CAO's legal advice as well as other non-legal risks and benefits associated with available alternatives. CAO will not, however, approve a contract that contains a provision that is clearly illegal or clearly exceeds the County's authority. CAO is legally and ethically prohibited from doing so.

In the context of litigation, the County sets the goals and determines the County's position on the dispute. For example, the County will decide, after receiving CAO's advice, whether to advance, accept, or reject a settlement offer or whether to appeal an unfavorable decision by a lower court. The *process* of litigation, however, is generally CAO's province. In consultation with appropriate County representatives, CAO will determine what legal arguments to make, what motions to file and when to file them, as well as whether to grant professional courtesies such as time extensions to opposing counsel. (Please note that, under the ethical rules that apply to lawyers, we are required, in most instances, to extend professional courtesies to opposing counsel, unless doing so would prejudice the County.)

Which individuals or bodies are authorized to make the above decisions on behalf of "the County" can vary depending on the circumstances, as discussed in Section 5 below. And there are circumstances in which we represent individual clients in addition to the County; how this works is discussed in Section 8.

4. What advice will CAO *not* give?

The deputy county attorney or attorneys assigned to assist you will normally advise you only in your capacity as a representative of CAO's primary client, which is the County. CAO does not represent you personally and cannot advise you about personal legal matters. One area of particular concern is the area of employment and personnel matters. If you, personally, are the subject of an employment action such as a disciplinary action, *this is not a matter about which any deputy county attorney can give you advice*. You can contact the County's Human Resources Department for assistance regarding ABC County personnel policies and procedures; if you feel you need legal advice, however, you must retain private counsel.

Remember also that the County Attorney represents the State as its criminal prosecutor and is authorized to enforce certain civil statutes (such as the open meeting law) that apply specifically to public officers and employees. Accordingly, a deputy county attorney assigned to assist you cannot advise or defend you in a criminal case, or in certain types of civil enforcement actions, even if you believe that you took the acts that are the subject of the enforcement action in your capacity as a County employee or official. Communications with anyone in CAO regarding a matter over which the County Attorney has enforcement authority also may not be confidential or privileged. You should not discuss with any deputy county attorney anything relating to a criminal matter under investigation or pending against you, a member of your family, or a friend. Information you communicate to a deputy county attorney relating to a criminal matter will not be confidential and may be used against the suspect or defendant in that matter.

5. Who is authorized to evaluate this office's legal advice and make a final policy decision on behalf of the County?

Vertical Authority; Chain of Command.

As noted, the County, as an organization, can act only through individuals. It is important that we have a mutual understanding of who has the authority to make a decision on behalf of the County with respect to a particular legal matter.

CAO normally provides day-to-day advice on an informal basis, often simply in the form of a verbal discussion or email exchange. Many times, that informal discussion occurs between the County employee or official most familiar with the

issues and related facts and the deputy county attorney assigned to assist their department. That particular County official or employee, however, may not have the authority to make certain policy decisions on behalf of the County, and may need to refer a decision up the chain of command to ahigher authority, who might be the Board of Supervisors or an individual elected official. If it is the Board of Supervisors, a public vote by a quorum may be required before legal action can be taken. It might also be necessary to involve representatives of other departments whose input is necessary or appropriate. Please note that CAO will not advocate for one County official or department against another.

It is helpful if you inform the members of your staff what decisions are within the scope of their authority, so they know when to refer a matter up their chain of command. The deputy county attorney assigned to advise you will normally assume that the staff person designated to work with that lawyer on a matter is the one who is authorized to make most of the decisions about it; if this is not the case, you may be called upon to clarify the staff member's scope of authority.

Horizontal Authority; Different Elected Officials.

But what about a matter that is of interest to more than one elected official at the County? Unlike a private corporation, where the ultimate executive authority lies solely with its board of directors, the County's executive authority is split. The Board of Supervisors is the primary executive body, with the broadest scope of authority to act for the County. It has the authority to "supervise the official conduct of all county officers … charged with assessing, collecting, safekeeping, managing or disbursing the public revenues," and to "direct and control the prosecution and defense of all actions to which the county is a party, and compromise them." And the board may delegate some matters over which it has exclusive authority to the County Manager. But each of the other elected officials has some independent authority to control how they fulfill the obligations of their office—including the County Attorney. And we are sometimes called upon to render advice, or provide representation, with respect to matters that impact more than one elected official's office.

For example, suppose the County's finance director (who reports, through the County Manager, to the Board of Supervisors) requests advice about what a particular statute requires. We might conclude that there are two possible interpretations and that, although one appears to be more *likely* to be favored by a court if the matter were ever litigated, both are legally defensible. If the statute's interpretation has the potential to impact not only the finance department but the Treasurer's office, who decides which interpretation to adopt?

As we have already stressed, our client is normally "ABC County" as a whole, and not the individuals or groups who act for the County. And, as we have also explained, our role is to provide advice about available legal options and associated risks and abide by the policy decision made by the client. In a situation like that described above, in which we are called upon to give advice that we realize will impact more than one elected official's office, the deputy county attorneys who regularly advise each office will consult with one another, and with the Chief Civil Deputy as necessary, to formulate our advice. We will then give that same advice to both offices. In the hypothetical example, we would advise both offices that both interpretations of the statute are legally defensible, though the arguments in favor of one are stronger than the other. It is then up to the two offices to work together cooperatively and determine which approach to take. *We will not advocate on behalf of one county office against another.*

If the two offices cannot reach consensus, the question then becomes which elected official or body has the ultimate authority to make that particular decision for the County. We can offer advice regarding which we think that is. And if the authority is clear, we will accept direction from that official or body. Unfortunately, however, the scope of an individual elected official's authority to act for the County is sometimes unclear, so we may not be able to come up with a definitive answer. If we cannot, we may—depending on all the facts and circumstances—be forced to treat the situation as a conflict between two clients, even though in fact we have onlyone client—ABC County—and the issue is who is authorized to *act* for the County. That may in turn require retention of outside counsel. We try very hard to work effectively with County officials to avoid such situations, which can be costly for the public.

6. The Attorney-Client Privilege.

What communications are protected?

A communication will not necessarily be protected by the attorney-client privilege just because a lawyer is involved in the discussion or, in the case of a memorandum or e-mail, just because a lawyer is "cc'ed" on the communication. Nor will it be protected by the privilege just because it is labeled "privileged" or "attorney-client privileged"; likewise, a communication may be protected by the privilege even if it is not labeled as such. Determining whether a communication is privileged requires analyzing *all* the parties to—*and* the content of—the particular communication.

To fall within the privilege, a communication must, first, be between a lawyer and the lawyer's "client." In the case of the County, that means a communication between a County representative and the County Attorney, a deputy county attorney, or a private lawyer serving as outside counsel under contract. The client representative may be the Board, an elected official, the County Manager, a department head, or another County employee, depending on the circumstances of the communication. If the person speaking with the lawyer is acting within that person's scope of authority in communicating with counsel, then that person qualifies as a County representative whose communications *might* be privileged.

But the fact that the communication is between the County's lawyer and a County representative is not enough to make it privileged. The communication must *also* be made *confidentially* and for the purpose of obtaining *legal* advice. If outside parties (such as County consultants) are privy to the communication, it is probably not privileged. If a communication was privileged and then it is shared with an outside party, the privileged status is likely lost. Even a privileged communication that is shared with too many people within the County organization may lose its privileged status.

The point is this: if you communicate with a lawyer in our office and intend that communication to be privileged, do not share that communication (written or oral) with any non-County person; also limit the County personnel with whom you share the communication to those who have a need to know. It is also a good practice to keep any documents requesting legal advice, or containing legal advice from the County's lawyers, separate from your other documents in your files and clearly label them "Confidential; Attorney-Client Privilege." The same goes for emails; if you are seeking legal advice, it is good practice to label the email – either in the subject line, or by using Outlook's "permission" option – "Confidential; Attorney-Client Privilege." CAO lawyers endeavor to do this in their communications with client representatives, as well. But given the volume and ease of email communication, please do not assume that an email from a CAO lawyer that lacks such a label is not privileged. If in doubt, please ask your assigned deputy county attorney or the Chief Civil Deputy.

Who controls the privilege?

It is important to understand that, although our communications may be and often are privileged, it is normally the *County* and not the communicating individual who is our "client" and thus holds or "owns" the privilege. The privilege can be asserted, or waived, only by the board or official who has authority to act for the County with respect to the matter that gave rise to the communication. That is most often (though not always) the Board of Supervisors or their designee, the County Manager. So please keep in mind that we will share your "confidential" communications with other County staff members or officials when we conclude that such disclosure is in the best interests of the County.

As noted, however, CAO does sometimes provide representation to a County official or employee in their individual capacity, in which case we would owe a duty of confidentiality to that individual, *as well as* to the County as a whole; the effect of such joint representation on issues of confidentiality is discussed further in Section 8 below. If you ever have a concern about how the duty of confidentiality will apply to a particular communication or are confused about whether you are an individual "client" of CAO, please seek clarification from your assigned deputy county attorney or the Chief Civil Deputy.

7. Communication; expectations.

Obviously, to make this relationship work, there must be full and candid communication between County representatives and CAO lawyers. We cannot advise you fully and accurately without a thorough understanding of the facts and circumstances surrounding the matter with respect to which you are seeking our legal advice.

In the litigation context, it is imperative that the individual clients (if any) and all representatives of the organizational client (the County) be absolutely candid with the assigned lawyer and cooperate with all requests for information or documents and with any requests that certain electronic documentation be preserved. If you have a question concerning whether certain information should be disclosed, or documents preserved for possible disclosure later, you must not make the decision to withhold information yourself but must consult with the assigned lawyer who will inform you of the legal requirements you must follow.

It is also important that we be consulted in a timely manner so that we have time to do the work, including any necessary legal research and analysis. We are unable to provide "on-the-spot" analysis of complicated issues or provide an overnight turnaround for the review of a contract, resolution, or ordinance. CAO's general commitment is to review routine proposed ordinances, such as traffic ordinances, within three business days and to review proposed contracts and more complex ordinances within five business days. In a litigation context, we will try to keep key County personnel informed about the status of the case and important developments. Note that there will be "quiet times" when nothing may be happening with a litigation matter, but that does not carry either a negative or a positive connotation about the case. If you have questions about the status of a pending case, please contact the assigned deputy county attorney, who will be happy to give you an update.

8. What happens when CAO has a conflict of interest?

What is a "conflict of interest"?

A lawyer has a conflict of interest when there is a significant risk that the lawyer's independent professional judgment in advising and recommending options to one client will be materially limited by the lawyer's duties to another client or to another person, or by the lawyer's own interests. As noted above, a mere disagreement between County officials usually does not create a conflict of interest for our office because, even when several officials are involved, there is normally still just one client: ABC County.

But we do sometimes have an individual client in addition to the County. For example, someone who is injured while incarcerated at the jail might sue an individual corrections officer as well as the Sheriff (usually in their official capacity) and the County. Under the County Code, the County will normally indemnify and defend the corrections officer in that situation, and it is most economical to use CAO to defend all the defendants so long as their interests are aligned—which they often are. If, however, the injury was, or may have been, caused by the corrections officer's failure to follow detention-facility procedures, the County's interests may not be the same as the officer's, especially if the Sheriff wants to discipline the employee for those actions. In that event, the corrections officer on the one hand, and the Sheriff and the County on the other hand, would have conflicting interests.

Conflict Checking; Joint Representation.

If a claim is brought against you in your individual capacity based on actions taken in the course of your County duties, the County Risk Manager will determine whether you are entitled to be defended and indemnified by the County. If you are, then our office must complete a conflicts analysis to determine whether that defense can be provided by CAO. When there is an actual conflict, as in the above example, CAO will not represent you individually. If you are entitled to a County-provided legal defense, and we cannot provide it, we will arrange for another lawyer (outside counsel) to represent you.

If, however, there is no actual conflict, then CAO can jointly represent the County and you. If that is the case, we will explain to you, at that time, certain conditions and limitations on the scope of that representation, which are a result of our simultaneous representation of the County and the fact that the County is funding your defense. If you are not

comfortable with those limitations, you can *refuse* to be represented by our Office—that is your right. But if you do so, you might have to hire your own lawyer, at your own expense.

If CAO represents both you and the County with respect to a particular matter and a conflict develops *after* we undertake that representation, we may be forced to withdraw and not represent either party in connection with that matter.

9. Outside Counsel

CAO endeavors to conserve County resources and taxpayer funds by handling in-house as many of the County's civil legal matters as possible. Nevertheless, on occasion, CAO must hire outside counsel, either to comport with its ethical obligations when a conflict of interest exists, or because of workload or specialized-expertise issues. When hiring outside counsel, CAO considers a variety of factors, including the outside lawyer's knowledge and experience in the particular area for which counsel is sought, standing with the State Bar, fee structure, and local presence.

Generally, CAO will consult with the County staff or officials involved in the matter regarding its recommendations for outside counsel. Only CAO and the County Manager, however, are authorized to select outside counsel.

Conclusion

We hope this information has given you a better understanding of the role our office plays in your day-to-day County business. Because our office works with many individuals within County government, it is crucial that we are all aware of exactly who is and is not a client, the scope of the legal representation being provided, and the ethical requirements CAO lawyers must follow in fulfilling our duties. For further clarification of any of the matters discussed in this memorandum, feel free to approach your assigned deputy county attorney or contact the Chief Civil Deputy.

Representation Memo Sample/Template for Municipalities and Special Districts

To: City Council Members, Mayor, City Manager, and Department Heads

This memorandum addresses the role of the Civil Division of the [Town of_____] [City of _____] Attorney's Office ("CAO" [or "TAO"]) within the [City's or Town's] government organization. We wish to be very clear about our unique role in City Government so we can avoid any confusion or misunderstandings.

10. The unique role of the government lawyer.

The CAO is essentially the City's in-house law firm. But the CAO also prosecutes misdemeanor offenses committed within the City and has various other duties under state statutes and the City's Code [and Charter]. Satisfying these various, and sometimes competing, duties can create unique challenges for our office.

11. Who is the client?

CAO at all times represents the City, which is our primary client in civil legal matters. Because the City is an organization that can act only through individuals, CAO provides legal advice to, and receives direction on legal matters from, the City's elected and appointed officials. That does not mean, however, that these individuals are themselves "clients" of our office, and it is extremely important to remember this. *Generally, when we are rendering advice to these individuals, we are doing so as the City's lawyer, not the individual's lawyer.* This is the case even when the advice concerns the individual's own duties (for example, regarding whether the individual has a conflict of interest that must be declared), and even when the individual is an elected official.

Sometimes one or more City employees or elected officials are named as parties (either plaintiff or defendant) in a lawsuit. And people who sue the City often—whether properly or not—name as defendants the City and the Mayor and even individual members of the Council. So long as the employee or elected official is named in their official capacity, and faces no personal liability in the case, we still consider the actual client in these cases to be *the City* and we do not consider the individual employee or official to be a separate client.

In some lawsuits, however—including certain tort lawsuits—the named employee or official *does* face personal liability. For example, an individual might file a claim or bring a lawsuit against a City police officer, as well as the Chief of Police and the City, alleging that the officer violated their constitutional rights by using excessive force and injuring them. In those cases—assuming the City is obligated to defend and indemnify the individual, and we determine that we are ethically able to provide that defense—that individual is a separate client of our office, along with the City. How this joint representation works is described in Section 12 below.

Because the identity of the client has such a profound impact on how our duties of confidentiality and loyalty are applied, and on whether in any particular instance we have a conflict among different clients, it is important that our office and the individuals we advise have a mutual understanding of who the client is in each instance. When we believe it is reasonably necessary to clarify the identity of the client, we will do so. If you ever find yourself confused about this, however, please seek clarification from the City Attorney or the assistant city attorney who normally advises your office.

12. What are our respective roles?

The City, as client, sets policies and goals through its elected and appointed officials; CAO determines legal strategy and gives advice regarding legal considerations and consequences. When a contract or other legal instrument is being drafted and negotiated, it is up to the City to decide what the substantive terms of the agreement should be – for example, what duties each party has; how much money, if any, is changing hands; and when the various duties must be performed and to what standard. It is CAO's role to assist with drafting the document (or, typically, reviewing a draft created by a City representative) to ensure that it accurately reflects the City's intent, as articulated by the appropriate City representative(s). CAO will advise City representatives with respect to the legal risks and possible consequences of a particular decision and course of action and will work with them to develop a legally permissible way of achieving the City's policy goals.

It is the City's responsibility to determine, as a policy matter, what course of action to take after considering CAO's legal advice as well as other non-legal risks and benefits associated with available alternatives. CAO will not, however, approve a contract that contains a provision that is clearly illegal or clearly exceeds the City's authority. CAO is legally and ethically prohibited from doing so.

In the context of litigation, the City sets the goals and determines the City's position on the dispute. For example, the City will decide, after receiving CAO's advice, whether to advance, accept, or reject a settlement offer or to appeal an unfavorable decision by a lower court. The *process* of litigation, however, is generally CAO's province. In consultation with appropriate City representatives, CAO will determine what legal arguments to make, what motions to file and when to file them, as well as whether to grant professional courtesies such as time extensions to opposing counsel. (Please note that, under the ethical rules that apply to lawyers, we are required, in most instances, to extend professional courtesies to opposing counsel, unless doing so would prejudice the City.)

Which individuals or bodies are authorized to make the above decisions on behalf of "the City" can vary depending on the circumstances, as discussed in Section 14 below. And there are circumstances in which we represent individual clients in addition to the City; how this works is discussed in Section 17.

13. What advice will CAO *not* give?

The assistant city attorney or attorneys assigned to assist you will normally advise you only in your capacity as a representative of CAO's primary client, which is the City. CAO does not represent you personally and cannot advise you about personal legal matters. One area of particular concern is the area of employment and personnel matters. If you, personally, are the subject of an employment action such as a disciplinary action, *this is not a matter about which the City Attorney or any assistant city attorney can give you advice*. You can contact the City's Human Resources Department for assistance regarding City personnel policies and procedures; if you feel you need legal advice, however, you must retain private counsel.

Remember also that the City Attorney represents the State as its criminal prosecutor in certain misdemeanor crim-

inal cases and is authorized to enforce certain civil statutes (such as for the abatement of nuisances). Accordingly, an assistant city attorney assigned to assist you cannot advise or defend you in a criminal case, even if you believe that you took the acts that are the subject of the enforcement action in your capacity as a City employee or official. Communications with anyone in CAO regarding a matter over which the City Attorney has enforcement authority also may not be confidential or privileged. You should not discuss with the City Attorney or any assistant city attorney anything relating to a criminal matter under investigation or pending against you, a member of your family, or a friend. Information you communicate to an assistant city attorney relating to a criminal matter will not be confidential and may be used against the suspect or defendant in that matter.

14. Who is authorized to evaluate this office's legal advice and make a final policy decision on behalf of the City?

As noted, the City, as an organization, can act only through individuals. It is important that we have a mutual understanding of who has the authority to make a decision on behalf of the City with respect to a particular legal matter.

CAO normally provides day-to-day advice on an informal basis, often simply in the form of a verbal discussion or email exchange. Many times, that informal discussion occurs between the City employee or appointed official most familiar with the issues and related facts and the assistant city attorney assigned to assist their department. That particular city employee, however, may not have the authority to make certain policy decisions on behalf of the City, and may need to refer a decision up the chain of command to a higher authority, who might be the city manager or the city council. If it is the city council, a public vote by a quorum will be required before legal action can be taken.

It is helpful if you inform the members of your staff what decisions are within the scope of their authority, so they know when to refer a matter up their chain of command. The assistant city attorney assigned to advise you will normally assume that the staff person designated to work with that lawyer on a matter is the one who is authorized to make most of the decisions about it; if this is not the case, you may be called upon to clarify the staff member's scope of authority.

Note also that, when a department seeks advice from CAO regarding a matter, it might be necessary to involve representatives of other departments whose input is necessary or appropriate, along with the assistant city attorneys who advise those departments. Again, the City as a whole is the client, not the individual department; CAO will not advocate for one City department against another. If there is a disagreement among departments, the matter may need to be escalated to the City Manager or even to the City Council

15. The Attorney-Client Privilege.

What communications are protected?

A communication will not necessarily be protected by the attorney-client privilege just because a lawyer is involved in the discussion or, in the case of a memorandum or e-mail, just because a lawyer is "cc'ed" on the communication. Nor will it be protected by the privilege just because it is *labeled* "privileged" or "attorney-client privileged"; conversely, a communication may be protected by the privilege even if it is *not* labeled as such. Determining whether a communication is privileged requires analyzing *all* the parties to—*and* the content of—the particular communication.

To fall within the privilege, a communication must, first, be between a lawyer and the lawyer's "client." In the case of the City, that means a communication between a City representative and the City Attorney, an assistant attorney, or a private lawyer serving as outside counsel under contract. The client representative may be the City Council, the City Manager, a department head, or another city employee, depending on the circumstances of the communication. If the person speaking with the lawyer is acting within that person's scope of authority in communicating with counsel, then that person qualifies as a City representative whose communications *might* be privileged.

But the fact that the communication is between the City's lawyer and a City representative is not enough to make it privileged. The communication must *also* be made *confidentially* and for the purpose of obtaining *legal* advice. If outside parties (such as City consultants) are privy to the communication, it is probably not privileged. If a communication was

privileged and then it is shared with an outside party, the privileged status is likely lost. Even a privileged communication that is shared with too many people within the City organization may lose its privileged status.

The point is this: if you communicate with a lawyer in our office and intend that communication to be privileged, do not share that communication (written or oral) with any non-City person; also limit the City personnel with whom you share the communication to those who have a need to know. It is also a good practice to keep any documents requesting legal advice, or containing legal advice from the City's lawyers, separate from your other documents in your files and clearly label them "Confidential; Attorney-Client Privilege." The same goes for emails; if you are seeking legal advice, it is good practice to label the email – either in the subject line, or by using Outlook's "permission" option – "Confidential; Attorney-Client Privilege." CAO lawyers endeavor to do this in their communications with client representatives, as well. But given the volume and ease of email communication, please do not assume that an email from a CAO lawyer that lacks such a label is not privileged. If in doubt, please ask your assigned assistant attorney or the City Attorney.

Who controls the privilege?

It is important to understand that, although our communications may be and often are privileged, it is normally *the City* and not the communicating individual who is our "client" and thus holds or "owns" the privilege. The privilege can be asserted, or waived, only by the body or official who has authority to act for the City with respect to the matter that gave rise to the communication.

That is most often (though not always) the City Council or their designee, the City Manager. So please keep in mind that we will share your "confidential" communications with other City staff members or officials when we conclude that such disclosure is in the best interests of the City.

As noted, however, CAO does sometimes provide representation to a City official or employee in their individual capacity, in which case we would owe a duty of confidentiality to that individual, *as well as* to the City as a whole; the effect of such joint representation on issues of confidentiality is discussed further in Section 17 below. If you ever have a concern about how the duty of confidentiality will apply to a particular communication or are confused about whether you are an individual "client" of CAO, please seek clarification from your assigned assistant city attorney or the City Attorney.

16. Communication; expectations.

Obviously, to make this relationship work, there must be full and candid communication between City representatives and CAO lawyers. We cannot advise you fully and accurately without a thorough understanding of the facts and circumstances surrounding the matter with respect to which you are seeking our legal advice.

In the litigation context, it is imperative that the individual clients (if any) and all representatives of the organizational client (the City) be absolutely candid with the assigned lawyer and cooperate with all requests for information or documents and with any requests that certain electronic documentation be preserved. If you have a question concerning whether certain information should be disclosed, or documents preserved for possible disclosure later, you must not make the decision to withhold information yourself but must consult with the assigned lawyer who will inform you of the legal requirements you must follow.

It is also important that we be consulted in a timely manner so that we have time to do the work, including any necessary legal research and analysis. We are unable to provide "on-the-spot" analysis of complicated issues or provide an overnight turnaround for the review of a contract, resolution, or ordinance. CAO's general commitment is to review routine proposed ordinances, such as traffic ordinances, within three business days and to review proposed contracts and more complex ordinances within five business days. In a litigation context, we will try to keep key City personnel informed about the status of the case and important developments. Note that there will be "quiet times" when nothing may be happening with a litigation matter, but that does not carry either a negative or a positive connotation about the case. If you have questions about the status of a pending case, please contact the assigned lawyer, who will be happy to give you an update.

17. What happens when CAO has a conflict of interest?

What is a "conflict of interest"?

A lawyer has a conflict of interest when there is a significant risk that the lawyer's independent professional judgment in advising and recommending options to one client will be materially limited by the lawyer's duties to another client or to another person, or by the lawyer's own interests. As noted above, a mere disagreement among city departments does not create a conflict of interest for our office because there is still just one client: the City.

But we do sometimes have an individual client in addition to the City. For example, someone who is injured during an arrest might sue an individual City police officer, and perhaps other city employees or officials, for a claimed injury to their constitutional rights. The individual officer faces personal responsibility in such cases but, under the City Code, will normally be entitled to be indemnified and defended at the City's expense. It is usually most economical to use CAO to defend all the defendants so long as their interests are aligned—which they often are. If, however, the injury was, or may have been, caused by the officer's failure to follow police department procedures, the City's interests may not be the same as the officer's, especially if the police chief wants to discipline the officer for those actions. In that event, the officer and the City would have conflicting interests.

Conflict Checking; Joint Representation.

If a claim is brought against you in your individual capacity based on actions taken in the course of your City duties, the City Risk Manager will determine whether you are entitled to be defended and indemnified by the City. If you are, then our office must complete a conflicts analysis to determine whether that defense can be provided by CAO. When there is an actual conflict, as in the above example, CAO will not represent you individually. If you are entitled to a City-provided legal defense, and we cannot provide it, we will arrange for another lawyer (outside counsel) to represent you.

If, however, there is no actual conflict, then CAO can jointly represent the City and you. If that is the case, we will explain to you, at that time, certain conditions and limitations on the scope of that representation, which are a result of our simultaneous representation of the City and the fact that the City is funding your defense. If you are not comfortable with those limitations, you can *refuse* to be represented by our Office—that is your right. But if you do so, you might have to hire your own lawyer, at your own expense.

If CAO represents both you and the City with respect to a particular matter and a conflict develops *after* we undertake that representation, we may be forced to withdraw and not represent either party in connection with that matter.

18. Outside Counsel

CAO endeavors to conserve City resources and taxpayer funds by handling in-house as many of the City's civil legal matters as possible. Nevertheless, on occasion, CAO must hire outside counsel, either to comport with its ethical obligations when a conflict of interest exists, or because of workload issues or the need for specialized expertise (such as bond counsel). When hiring outside counsel, CAO considers a variety of factors, including the outside lawyer's knowledge and experience in the particular area for which counsel is sought, standing with the State Bar, fee structure, and local presence. Generally, CAO will consult with the City staff or officials involved in the matter regarding its recommendations for outside counsel.

Conclusion

We hope this information has given you a better understanding of the role our office plays in your day-to-day City business. Because our office works with many individuals within City government, it is crucial that we are all aware of exactly who is and is not a client, the scope of the legal representation being provided, and the ethical requirements CAO lawyers must follow in fulfilling our duties. For further clarification of any of the matters discussed in this memorandum, feel free to approach the City Attorney or the assistant city attorney who typically advises you.

APPENDIX B

Engagement Letter for Episodic Organizational Client

[LAW OFFICE LETTERHEAD]

[NAME AND ADDRESS OF CLIENT/CLIENT REPRESENTATIVE]

Re: Engagement for Legal Services

To: [CLIENT/CLIENT REPRESENTATIVE]

You have asked this office to represent the [NAME] (the "**District**" [or other appropriate term]) as its legal counsel in connection with [description of matter] (the "**Matter**"). The purpose of this engagement letter ("**Agreement**") is to outline the nature of the engagement and our respective responsibilities and expectations with respect to it.

Scope of the Engagement: Our client with respect to this engagement is the District organization itself. Our office does not represent any officials or employees of the District. Because the District is an organization, we will take direction on behalf of the District from the District's governing body and [describe any officials/employees you will be working with or taking direction from on a day-to-day basis and the scope of their authority to make decisions and give direction on behalf of the District with respect to the Matter]. In connection with this engagement, [NAME OF REPRESENTATIVE] should be available to discuss issues as they arise, comment on and approve draft documents we prepare, and attend and participate in meetings, preparation sessions, court proceedings, and other activities.

The scope of this engagement is limited to the Matter. It does not include any other actual or potential litigation, appeal, arrangement, or transaction that may arise out of or be related to the Matter. Our representation may be expanded only if we agree in writing to an expanded scope. After this engagement concludes [description of when the matter concludes], our office will have no further obligation to District. We will, therefore, not be responsible for advising the District if there are any later legal developments that may impact the District's future rights and liabilities connected to the Matter, including changes in the applicable laws or regulations, unless we are separately engaged to provide that advice.

We will do our best to serve you efficiently. [As such, we may use [artificial intelligence (AI)/[TECHNOLOGY]] in this matter [for [DESCRIPTION OF WHEN COUNSEL MAY USE TECHNOLOGY]].]

The outcome of any matter is subject to inherent risks and other factors beyond our control. Therefore, we have not made, and cannot make, any guarantees or promises concerning the outcome of the Matter.

Staffing: Work on this matter will be performed primarily by [name of assigned lawyer and if appropriate staff]. It may, however, be necessary to assign other lawyers in our office. We will keep you apprised of any staffing changes and

ensure that you have the appropriate contact information for the lead lawyer on the Matter.

Fees and Expenses: [If the District will be paying for your office's representation, describe that arrangement here, including what expenses will be billed separately. If no fees or expenses are being charged, indicate that. If there is a not-to-exceed amount, describe that and what happens if that threshold is reached.]

Waiver: You acknowledge, on behalf of the District, that our office is a department of, and serves as general counsel of, the [name] (the "term for Main Client"). The Matter does not involve the Main Client. We may, however, currently be representing, or may in the future during the course of our engagement by District, represent the Main Client in matters unrelated to the Matter in which District is involved, including matters in which the Main Client and District are technically adverse to one another. We do not believe that our current or future representation of District with respect to these unrelated matters—none of which involve or will involve the assertion of a claim by the Main Client against District during the course of our engagement for the District—will interfere with our ability to competently and diligently represent the District in the Matter. By signing this Agreement, you are consenting on behalf of the District to our representation of the Main Client in those matters. [The consent to future conflicts may or may not be permissible; consult the ethics rules, comments, and opinions for further guidance. If you can more specifically define the current matters involving the District, or specific types of future matters that might come up involving the District, list those. Also consider whether committing to a screening mechanism would be appropriate as part of this waiver and how that could be effectively implemented. Finally, address what happens if a conflict does develop that isn't within the scope of this waiver.]

[If your office *will* be representing both the District and your Main Client in connection with the Matter—for example, if you are working on an IGA between the two entities—modify the above paragraph as appropriate and incorporate disclosures from the joint representation template, including how confidentiality functions and what happens if there is a break down in the joint representation.]

Termination of the Representation: District has the right to terminate this engagement of our office at any time. [If this is a litigation matter and the consent of the court might be required, explain that limitation.]

We have the right to terminate this engagement for good cause, subject to an obligation to give the District reasonable notice to permit it to obtain alternative representation and subject to applicable ethical rules to which we as lawyers are subject. Good cause means (a) the District's failure to honor the material terms of the engagement or failure of its representatives to assist in and cooperate with the representation, and (b) circumstances where our continued representation would be unlawful or unethical.

Regardless of who terminates the representation, we will provide reasonable assistance in effecting a transfer of responsibilities to new counsel.

Client Documents: During the engagement, we will maintain all documents relevant to this representation. At the conclusion of this engagement, we will retain the District's original documents for the applicable retention period unless District requests that they be returned to District.

Communication: It is important for us to maintain open communication with each other throughout the engagement. We will regularly keep the District informed of the status of the matter, will promptly notify the identified District representatives of any major case developments, and consult with them whenever appropriate.

District agrees that its representatives will communicate with us and provide us with complete and accurate information as needed in connection with the Matter.

We may use mobile phones and email in the course of this engagement. Our email transmissions may not be encrypted so the use of such forms of communication under current technologies may place confidential or privileged information at risk. Similarly, the use of mobile phones may place confidential or privileged information at risk. By signing below, you are consenting to this on behalf of the District.

Please review this letter carefully and let the undersigned lawyer know if you have any questions or concerns. If the terms of the engagement are agreeable, please sign below and return this letter to the undersigned lawyer. By signing below, you are certifying that the District has approved this engagement and that you are authorized to sign on its behalf.

We appreciate the chance to be of service and look forward to working with you.

[SIGNATURE BLOCKS]

APPENDIX C

Disengagement Letter

[LAW OFFICE LETTERHEAD]

[DATE]
[METHOD OF DELIVERY]
[NAME AND ADDRESS OF CLIENT/CLIENT REPRESENTATIVE]

Re: Termination of Engagement

Dear [NAME OF CLIENT/CLIENT REPRESENTATIVE]:

Pursuant to your instructions, this letter confirms that you, on behalf of the District, have decided to terminate our office's engagement effective [immediately/as of [DATE]] concerning [describe matter] (the "Matter"). Accordingly, the [NAME OF OFFICE] will not render further legal services to the District and we will have no further attorney-client relationship unless we mutually agree to enter into a subsequent engagement letter.

OR

As the matter for which you engaged the [NAME OF OFFICE] has concluded, this letter confirms that the District's engagement of our office is terminated effective immediately. Accordingly, our office will not render further legal services to the District and we will have no further attorney-client relationship unless we and the District mutually agree to enter into a subsequent engagement letter.

OR

Pursuant to the terms of our office's engagement/retainer letter dated [DATE], we regret to inform you that we have decided to terminate our representation of the District effective [immediately/as of [DATE]] because of [explain basis for termination]. Accordingly, we will not render further legal services to the District with respect to the Matter and we will have no further attorney-client relationship unless we mutually agree to enter into a subsequent engagement letter. [IF COURT PERMISSION IS REQUIRED, ADDRESS THAT.]

We encourage you to retain new counsel if you believe the District needs additional legal services relating to the Matter. We will cooperate with your new counsel during the transition process in this matter and will provide them with any original documents, correspondence, and other records in the file. [or we will return to you any original documents, correspondence and other records in the file]

Please note the following important [dates/deadlines] in connection with the Matter: [MATTER DEADLINES].]

[Address any unpaid fees or expenses if any.]

If you have any questions about this letter please let us know.

[SIGNATURE BLOCKS]

APPENDIX D

Joint Representation Informed Consent Letter for Individual Client

[LAW OFFICE LETTERHEAD]

[DATE]
[METHOD OF DELIVERY]
[NAME AND ADDRESS OF CLIENT/CLIENT REPRESENTATIVE]

Re: [LAWSUIT]

Dear [NAME OF POTENTIAL CLIENT]:

You have been named as a defendant in a lawsuit alleging that you caused damage to a person, property, or both on [date], while acting within the scope of your employment as an employee of _____ (the "Agency" [or the "State" or the "City" or the "County. Etc." Add any additional agency defendants.]), which is also a named defendant. A copy of the complaint is attached. This notice is to inform you of your right to Agency-provided legal representation and explain how that works.

It is the policy of the Agency to defend employees of the Agency in civil litigation and to hold them harmless and indemnify them against any claims of civil liability that rise from allegedly negligent or wrongful acts, errors or omissions by the employee taken in the employee's authorized capacity and in the course and scope of the employee's employment. That defense is normally provided by our office, which also, of course, represents the Agency. In this case, based on the information that we currently have, it appears that your defense and the Agency's defense are consistent with one another, so we believe we can effectively and efficiently represent both of you in the litigation. In order to do so, however, we must obtain your informed consent to this joint representation.

Joint representation comes with some risks as well as benefits. A unified defense can help the lawsuit run more efficiently and increase the chance of a successful defense of both clients, and it is more cost effective. If a conflict between your position and the Agency's position later develops, however, it may require our office to withdraw and find new counsel for both clients.

At this point, we don't think that's likely, but if were to occur, that could slow the litigation down. In addition, you need to understand that anything you tell us, though it is privileged and confidential as to the "outside world," will not be confidential or privileged as to the Agency. In other words, we can—and when we deem it appropriate, we will—share information that you provide with Agency officials.

Because the Agency is funding your defense, you also need to understand that you are required by Agency policies

and rules [reference specific rules] to cooperate fully in that defense. That means things like responding quickly when we have questions or need to discuss the litigation with you or are trying to schedule meetings or hearings that we need you to attend. It also means preserving and producing for us any and all documentation or other evidence of any type in your possession that relates to the subject of this lawsuit. Finally, it means that the Agency will make certain decisions during the course of the litigation that involve expenses, and it has the right to elect to make a monetary payment to settle the lawsuit as to the Agency—and as to you, as long as you consent.[32]

You do have the right to choose not to be represented by our office and to obtain counsel of your own choosing. But, under the Agency's [Code? Policies?], the Agency will not pay for separate counsel unless there is an actual conflict between your position regarding the events that are the subject of the lawsuit, and the position of the Agency. To understand the scope of your employee rights with respect to the lawsuit, please consult [reference Agency policy or rules or risk management rules, or the risk management or HR department, whatever is appropriate]. And if you believe there is an actual disconnect between your defense to the lawsuit and the Agency's defense, please discuss that with [HR Department, Risk, etc.], but do so without revealing information that you wish to keep confidential. [NOTE: The lawyer can't insist that the employee give their informed consent and accept representation by the government law office.

But their employer can do so, as a condition of paying for the defense, so long as there is no other disqualifying conflict between the two defenses.]

If you wish to have our office represent and defend you in the lawsuit, please sign the consent for representation below and return it to this office by [date]. If you have any questions about the pending litigation or the potential representation of you by this office and how that works, please call [name/contact info for assigned lawyer or head of law office or ethics advisor]. You are also free to consult an outside lawyer at your own expense regarding what it means to be jointly representation by this office.

[SIGNATURE BLOCKS]

32 We cannot settle the lawsuit on your behalf unless you give your consent. However, refusing to settle the lawsuit when the Agency is prepared to obtain a complete dismissal of the lawsuit in exchange for a monetary settlement may make it impossible for this office to continue representing you; may impact your right to indemnification and an Agency-provided defense; and may leave you as the only remaining defendant in the lawsuit.


ARIZONA PROSECUTING ATTORNEYS'
ADVISORY COUNCIL