

## CHAPTER 1

### THE ATTORNEY GENERAL AND THE DEPARTMENT OF LAW

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## CHAPTER 1

### THE ATTORNEY GENERAL AND DEPARTMENT OF LAW

**1.1 Scope of This Chapter.** This Chapter discusses the powers and duties of the Attorney General, particularly as they concern state agencies, officers, and employees. The Attorney General's Office, also referred to as the Department of Law, provides legal advice to state agencies, except those specifically exempted by statute. This Chapter is intended to help state agencies, officers, and employees identify when they should seek assistance from the Attorney General's Office. If questions arise that are not addressed in this Chapter, state agencies and other state entities should contact either their assigned Assistant Attorney General or the chief counsel for the appropriate division or section. For issues related to litigation against state agencies, officers, and employees, see Chapter 13.

**1.2 Establishment of the Office of the Attorney General.** Article V, section 1 of the Arizona Constitution created the Office of the Attorney General. The constitution does not prescribe the powers or duties of the Attorney General; rather, it mandates that the Legislature prescribe them. *Ariz. Const. art. V, § 9; see also State ex rel. Woods v. Block*, 189 Ariz. 269, 272 (1997). The Legislature is limited, however, in its power to remove the powers and duties of the Attorney General. *See Giss v. Jordan*, 82 Ariz. 152, 163-65 (1957); *Hudson v. Kelly*, 76 Ariz. 255, 263-65 (1953).

#### **1.3 Statutory Powers and Duties of the Attorney General.**

**1.3.1 General Powers and Duties.** The Legislature has prescribed the general powers and duties of the Attorney General in Arizona Revised Statutes ("A.R.S.") §§ 41-191 to -198. The Attorney General directs the Department of Law ("the Department") and serves as the chief legal officer of the State and the various departments and agencies of the State. A.R.S. § 41-192(A). The following subsections of this Chapter focus on the powers and duties of the Attorney General in advising and representing state agencies. These subsections are not exhaustive; they merely describe the general powers and duties of the Attorney General. Agencies should review this Chapter, the statutes creating the agency and defining the agency's authority to ascertain whether the Attorney General has specific powers and duties pertaining to that agency.

**1.3.2 Power to Organize Office and Organizational Structure of the Department of Law.** The Attorney General may organize the Department into bureaus, subdivisions, or units for the efficient and economical operation of the Department. A.R.S. § 41-192(B)(1). The Attorney General shall organize and administer a civil rights division within the Department and enforce the civil rights laws. A.R.S. §§ 41-1401 to 1442 and -1461 to 1492.12; -192(A)(7). (For a discussion of Arizona and federal civil rights laws, see Discrimination Law, Chapter 15.) The Attorney General may hire and assign assistant

attorneys general and other employees as “necessary to perform the functions of the department.” A.R.S. § 41-192(B)(3).

**1.3.3 Employment of Legal Counsel by the Attorney General and State Agencies.** Except as otherwise provided by law, state agencies other than the Attorney General are prohibited from employing legal counsel or incurring an expense or a debt for legal services. A.R.S. § 41-192(D). The following agencies are exempt from this prohibition: the Department of Water Resources, the Residential Utility Consumer Office, the Industrial Commission, the Arizona Board of Regents, the Auditor General, the Corporation Commissioners and the Corporation Commission other than its Securities Division, the Office of the Governor, the Office of the State Treasurer, the Arizona Commerce Authority, the Arizona Health Care Cost Containment System Administration, the Arizona Department of Agriculture in certain circumstances, and the Arizona Power Authority in federal agency proceedings, federal court, and in matters incidental to those proceedings. See A.R.S. §§ 15-1626(A)(12), 36-2903(N), 40-106, 41-192(D), (F), 41-192.01.

If the Attorney General determines that he or she is disqualified from providing legal representation or services to any state agency on any matter, the Attorney General must so notify the state agency in writing. A.R.S. § 41-192(E). Upon such notice, the agency “is authorized to make expenditures and incur indebtedness to employ attorneys to provide the representation or services” that the Attorney General is disqualified from providing. *Id.*

The Attorney General is required to provide legal services to certain agencies and departments. Compensation for such services is charged against the appropriations to that department or agency. A.R.S. § 41-191.09; see also A.R.S. § 28-333. Other agencies and departments are authorized to employ and pay for legal services with the consent of the Attorney General.

**1.3.4 General Representation Powers.** As a state agency’s advisor, the Attorney General represents the agency in both administrative and judicial proceedings concerning the enforcement of the agency’s statutes, rules, and orders. As the chief legal officer of the State, the Attorney General is required to prosecute and defend in the Arizona Supreme Court “all proceedings in which the state or an officer thereof in his official capacity is a party.” A.R.S. § 41-193(A)(1). In addition, the Attorney General, “[a]t the direction of the governor or when deemed necessary by the attorney general,” is required to prosecute and defend “any proceeding in a state court other than the [Arizona] supreme court in which the state or an officer thereof is a party or has an interest.” A.R.S. § 41-193(A)(2). The Attorney General also has the duty to “[r]epresent the state in any action in a federal court.” A.R.S. § 41-193(A)(3).

Under certain circumstances, the Attorney General represents political subdivisions of the State. The Attorney General represents school districts, governing boards of school districts, and fire districts in lawsuits in which a conflict of interest between county offices exists. See A.R.S. §§ 41-192(A)(4), -192.02(C). The Attorney General also represents

“political subdivisions, school districts and municipalities in suits to enforce state or federal statutes pertaining to antitrust, restraint of trade or price-fixing activities or conspiracies[.]” A.R.S. § 41-192(A)(5).

### **1.3.5 Representation of Individual Officers and Employees in Civil Actions.**

The Attorney General may, in his or her discretion, represent a current or former state officer or employee:

against whom a civil action is brought in . . . [the state officer’s or employee’s] individual capacity . . . until . . . it is established as a matter of law that the alleged activity or events which form the basis of the complaint were not performed, or not directed to be performed, within the scope or course of the officer’s or employee’s duty or employment.

A.R.S. § 41-192.02(A).

**1.3.6 Power to Settle Claims and Lawsuits Against the State and Boards, Commissions, and Agencies of the State.** Claims for liability damages (excluding claims for contractual breaches and those directly attributable to a felony) up to \$25,000, or such higher limit as the Joint Legislative Budget Committee may establish, may be settled with the approval of the Director of the Department of Administration (“DOA”). A.R.S. § 41-621(N). The Joint Legislative Budget Committee has authorized the DOA Director to approve settlements up to \$100,000. Claims between \$100,000 and \$250,000 may be settled with the approval of the Director of DOA and the Attorney General. See Chapter 13.5.3. Claims over \$250,000 may be settled with the approval of the DOA Director, the Attorney General, and the Joint Legislative Budget Committee. *Id.* Joint Legislative Budget Committee Rules and Regulations, Rule 14.1(A). State departments, agencies, boards, commissions, officers, agents, or employees may not voluntarily make any payment, assume any obligation, incur any expense, or maintain the individual right of consent for liability claims. A.R.S. § 41-621(N).

The Attorney General is authorized to settle other claims not involving liability self-insurance with the approval of the governor or the department, board, or agency involved. See A.R.S. § 41-192(B)(4).

**1.3.7 Powers and Duties Relating to County Attorneys.** The Attorney General is required to represent school districts, the governing boards of school districts, and fire districts if the county attorney has a conflict of interest that precludes or renders inappropriate continued representation by the county attorney. A.R.S. §§ 41-192(A)(4), -192.02(C). In addition, the Attorney General shall “exercise supervisory powers over county attorneys . . . in matters pertaining to that office” and shall, “[a]t the direction of the governor, or when deemed necessary, assist [a] county attorney . . . in the discharge of the county attorney’s duties.” A.R.S. § 41-193(A)(4), (5). Finally, the Attorney General must

concur in, revise, or decline to review education opinions issued by county attorneys or their designees. A.R.S. § 15-253(B). See Section 1.5.4.

**1.3.8 Opinion-Writing Authority.** The Attorney General is authorized to render a written opinion “[u]pon demand by the legislature, or either house or any member thereof, any public officer of the state, or a county attorney . . . upon any question of law relating to their offices.” A.R.S. § 41-193(A)(7). See Section 1.5 for a discussion of Attorney General opinions.

**1.3.9 Power to Approve Administrative Rules.** The Attorney General is required to review and authorized to approve emergency rules and rules proposed by a state agency that are exempt from review by the Governor’s Regulatory Review Council. A.R.S. §§ 41-1026, -1044. See Section 1.6 of this Chapter describing the Attorney General’s role in rule-making and Chapter 11 for detailed discussions on the procedures for rule adoption.

**1.3.10 Authority to Approve Bonds.** The Attorney General is required to review and authorized to approve various forms of government bonds. See, e.g., A.R.S. § 9-534 (municipal bonds); A.R.S. § 15-1489 (education bonds); A.R.S. § 28-7514 (transportation bonds); A.R.S. § 30-227(F) (Arizona Power Authority bonds); and A.R.S. § 36-1414(A) (housing bonds). Because the Attorney General often plays a role in certifying bonds, agencies authorized to issue bonds should consult with the Attorney General’s Office for assistance.

**1.3.11 Power to Enforce Criminal Laws.** The Attorney General or his designee shall present evidence of criminal conduct to the State Grand Jury and prosecute all indictments returned by the State Grand Jury. A.R.S. §§ 21-424, -427(B). The State Grand Jury and the Attorney General have jurisdiction over white collar crime, organized crime, public corruption, and certain crimes involving the use of computers. See A.R.S. § 21-422(B) (enumerating the types of offenses within the jurisdiction of the State Grand Jury). The State Grand Jury and the Attorney General also have jurisdiction over offenses involving possession, receipt, sale or transportation of narcotics, stolen property or other contraband that occur in more than one county or affect the residents of more than one county. Agencies should refer any matters that might involve criminal conduct within the jurisdiction of the State Grand Jury to the Attorney General’s Office. In addition, criminal wrongdoing “that is referred in writing by a county attorney and that is accepted in writing by the attorney general” is within the jurisdiction of the State Grand Jury. A.R.S. § 21-422(B)(7).

The Attorney General also is required to notify the respective county attorneys of State grand jury investigations and proposed indictments affecting such counties, and must inform the appropriate prosecutorial authority of any offenses discovered by the State Grand Jury for which it lacks jurisdiction to indict. A.R.S. §§ 21-422(C), -426. In addition to those offenses provided in A.R.S. § 21-422, the Attorney General may or must:

- A. Prosecute offenses arising out of the operation of the Arizona State Lottery. A.R.S. § 5-562.01(A).
- B. Prosecute offenses arising out of the operation of a discount buyer's organization or service. A.R.S. § 44-1797.20.
- C. Prosecute criminal violations of the state's employment security program. A.R.S. § 23-656(B).
- D. Prosecute violations of the state's workers' compensation program. A.R.S. § 23-929.
- E. Prosecute offenses involving securities. A.R.S. § 44-2032(5).
- F. Prosecute offenses arising out of any program administered by the Department of Economic Security. A.R.S. § 41-1963.
- G. Prosecute offenses related to the operation of pyramid schemes. A.R.S. § 44-1732.
- H. Prosecute environmental crimes. A.R.S. §§ 49-263(G), -263.01(I), -263.02(E), -304(C), -464(N), -925(C).
- I. Prosecute violations of state bidding and purchasing laws. A.R.S. §§ 34-258, 41-2616(D).
- J. Prosecute offenses under Title 16 involving any election for state office, members of the legislature, justices of the supreme court, judges of the court of appeals, or statewide initiative or referendum. A.R.S. § 16-1021.
- K. Recover fines levied for violations of the picketing and secondary boycott laws. A.R.S. § 23-1324(C). *But see United Food & Commercial Workers Local 99 v. Bennett*, 934 F. Supp. 2d 1167 (D. Ariz. 2013) (finding portions of the picketing and secondary boycott laws unconstitutional).
- L. Prosecute healthcare kickbacks and related frauds. A.R.S. § 13-3713(G).
- M. Enforce laws related to conflicts of interest, A.R.S. §§ 38-501 to -511, and financial disclosure by public officers, A.R.S. §§ 38-541 to -545. See A.R.S. § 21-422(B).
- M. Investigate campaign contribution limitation violation complaints for criminal or civil actions. A.R.S. § 16-905(K).
- N. Investigate and prosecute offenses related to lobbying and gifts to public officials. A.R.S. § 41-1237(B).

- O. Prosecute offenses relating to county, community college, and school district audits. A.R.S. § 41-1279.22(D).
- P. Prosecute violations of the welfare laws. A.R.S. § 46-133(D).
- Q. Prosecute violations of the insurance laws. A.R.S. § 20-152(C).
- R. Prosecute violations of state law regarding foreclosure consultants. A.R.S. § 44-1378.07(A).
- S. Prosecute violations of pure food provisions. A.R.S. § 36-912.
- T. Take action to abate nuisances. A.R.S. §§ 12-991(H), -998(B), 13-2917(C).
- U. Prosecute offenses relating to transportation. A.R.S. § 28-5240(B).
- V. Prosecute offenses relating to disposal of motor vehicle tires. A.R.S. § 44-1304.01(C).
- W. Prosecute (and defend against) actions to state tax laws. A.R.S. § 42-1004(E).
- X. Prosecute violations and bring civil penalty actions related to weights and measures. A.R.S. §§ 28-9523(D), -9525(B).
- Y. Bring actions related to certain deceptive internet representations. A.R.S. § 18-543(C).

The Attorney General also investigates and prosecutes violations of the State's Racketeering Act, A.R.S. §§ 13-2301 to -2323. See A.R.S. § 21-422(B)(5). The Racketeering Act defines racketeering as acts punishable by imprisonment for more than one year, and either constituting terrorism, animal terrorism or ecological terrorism or certain acts committed for financial gain, including homicide, robbery, kidnapping, forgery, theft, bribery, gambling, usury, extortion, obstructing justice, false claims or statements, securities or land fraud, money laundering, the sexual exploitation of children and other listed activities. A.R.S. § 13-2301(D)(4)(a)-(b). The Act provides criminal penalties and civil remedies for controlling any enterprise either with racketeering proceeds or through racketeering activity, and for conducting an enterprise through racketeering activity. A.R.S. §§ 13-2312, -2314. The Attorney General is authorized to obtain injunctive relief, disgorgement, divestiture, damages, and other civil remedies against persons engaged in racketeering. A.R.S. § 13-2314. Any agency that discovers conduct that falls within the Racketeering Act should report that conduct to the Attorney General's Office.

The Attorney General is also required to notify the respective county attorneys of State Grand Jury investigations and proposed indictments affecting such counties, must inform

the appropriate prosecutorial authority of any offenses discovered by the State Grand Jury for which it lacks jurisdiction to indict. A.R.S. §§ 21-422(C), -426.

**1.3.12 Power to Enforce the Consumer Fraud Act.** The Attorney General enforces the Consumer Fraud Act, A.R.S. §§ 44-1521 to -1534. This Act makes it unlawful to engage in deceptive or unfair acts or practices in the advertisement or sale of any merchandise. A.R.S. § 44-1522(A); *see also* A.R.S. § 44-1521(5) (defining merchandise as “any objects, wares, goods, commodities, intangibles, real estate or services”). The Attorney General may obtain injunctive relief, restitution, disgorgement and civil penalties against any person found to be in violation of the Act. A.R.S. §§ 44-1528, -1531.

As part of the Attorney General's investigative efforts under the Consumer Fraud Act, the Attorney General's Office receives and processes thousands of written complaints from consumers each year. In processing these complaints, the Attorney General's Office encourages cooperation from the relevant agencies and urges them to resolve complaints within their jurisdiction. If the Attorney General's Office receives a complaint that falls within the jurisdiction of a particular state regulatory agency and can best be resolved by that agency (for example, a complaint of poor workmanship against a contractor licensed by the Registrar of Contractors), the Consumer Protection and Advocacy Section of the Attorney General's Office will generally forward a copy of the complaint to that agency.

If an agency receives a complaint involving deceptive or unfair acts or practices that does not fall within the agency's jurisdiction or that the agency lacks the means to resolve, the agency should refer the complaint to the Consumer Protection and Advocacy Section of the Attorney General's Office. However, even when an agency is able to pursue a particular matter, it should send two copies of the complaint involving fraud or deception to the Consumer Protection and Advocacy Section.

If an agency receives a complaint within its jurisdiction that it possess the means to resolve, the agency should resolve that complaint. However, even if the agency intends to resolve the complaint, it should still send a copy of any complaint involving deceptive or unfair acts or practices to the Consumer Protection and Advocacy Section.

**1.3.13 Power to Enforce the State Antitrust Act.** The Attorney General has the authority to enforce the provisions of the Arizona Uniform State Antitrust Act, A.R.S. §§ 44-1401 to -1416. A.R.S. § 44-1407. Private parties may also enforce the Act through private litigation. A.R.S. § 44-1408(B). The Antitrust Act prohibits conspiracies and agreements in restraint of trade or commerce; conspiracies and agreements to monopolize; the establishment, maintenance, or use of a monopoly; and attempts to monopolize. A.R.S. §§ 44-1402, -1403.

Because the State and its agencies are subject to the Antitrust Act, government employees should be aware that their actions may be subject to its provisions. See A.R.S. § 44-1416. State officials routinely enter into agreements and take actions that affect trade and commerce. Only in certain circumstances are state officers immune from

antitrust prosecution. See Sections 5.9.9 and 5.9.6.1. Chapter 5 (Procurement) contains an overview of antitrust law and should be reviewed by agency personnel who buy and sell on behalf of the State.

Any person who serves a complaint, counterclaim, or answer in an action alleging an antitrust violation must also serve a copy of the pleading on the Attorney General along with any special action or appeal involving an antitrust issue. A.R.S. § 44-1415(A), (B). The Attorney General may appear in any civil action or proceeding before any Arizona court, agency, board, or commission in which antitrust matters appear to be at issue. A.R.S. § 44-1415(C).

If an agency believes that a matter may involve an antitrust issue and wishes to report it to the Attorney General, the agency should advise the Attorney General's Antitrust Unit in the Civil Litigation Division. Please note that the Antitrust Unit should not be considered counsel to any state agency, and that anything reported may result in enforcement action. If an agency is seeking legal advice, it should do so through its agency counsel.

**1.3.14 Power to Enforce the State Civil Rights Act.** The Attorney General is responsible for enforcing the Arizona Civil Rights Act, A.R.S. §§ 41-1401 to -1442, and -1461 to -1492.12. This includes violations of civil rights in voting, A.R.S. § 41-1421, public accommodations, A.R.S. §§ 41-1441 to -1442, employment, A.R.S. §§ 41-1461 to -1468, and housing, A.R.S. §§ 41-1491 to -1491.37. These laws prohibit discrimination against individuals based on race, color, national origin, religion, sex, age, and disability. See, e.g., A.R.S. §§ 41-1421, -1442(A), -1463(A). The Attorney General also enforces state laws (modeled after the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101 and -12213, 47 U.S.C. §§ 225 and -611) and the ADA Amendments Act of 2008 (P.L. 110-321; 122 Stat. 3553)) that prohibit discrimination against persons with disabilities in public accommodations, services, and public transportation. A.R.S. §§ 41-1492 to -1492.12.

These statutes generally provide that the Attorney General must investigate an individual's allegations of civil rights violations in these areas upon the receipt of a written complaint or charge. A.R.S. §§ 41-1471(A), -1481(A), -1491.22(A)-(C), -1492.09(A). If the Attorney General determines there is reasonable cause to believe that the charge is true, the Division of Civil Rights must attempt to correct the violation by means of conference, conciliation, or persuasion. A.R.S. §§ 41-1471(C), -1481(B), -1491.26. In certain situations, the Attorney General may initiate a lawsuit to correct the violation or authorize the charging party to file such a suit. A.R.S. §§ 41-1471(D), (E), -1481(D), (E), -1491.27. See Chapter 3 regarding personnel and Chapter 15 regarding discrimination law.

**1.3.15 Power to Collect Debts.** Pursuant to A.R.S. §§ 41-191(E), -192(B)(4) and -191.04, the Attorney General has the power to initiate legal action to collect, and to compromise or settle, debts owed to the State or to any agency, board, commission, or department of the State. The Attorney General's debt collection program is supported by a collection enforcement revolving fund. A.R.S. § 41-191.03. The collection program is

administered by the Bankruptcy and Collection Enforcement Section of the Civil Litigation Division.

**1.3.16 Power to Enforce the Arizona Open Meeting Law.** The Attorney General has the power to enforce the Open Meeting Law, A.R.S. §§ 38-431 to -431.09. A.R.S. § 38-431.07(A). The requirements of the Open Meeting Law are described in Chapter 7.

**1.3.17 Power to Enforce Arizona Immigration-Related Statutes.** The Attorney General is given powers and responsibilities related to immigration. For example, state statutes bar the employment of unauthorized aliens and provide penalties for the knowing, A.R.S. § 23-212, or intentional, A.R.S. § 23-212.01, employment of such persons. The Attorney General must provide a complaint form for complaints relating to the employment of an unauthorized alien. A.R.S. §§ 23-212(B); -212.01(B). When the Attorney General receives a complaint on the prescribed form, the Attorney General must investigate. A.R.S. §§ 23-212(B), -212.01(B). If the Attorney General receives a complaint that is not submitted on the prescribed form, the Attorney General has the discretion whether to investigate the complaint. *Id.* Information about how to file a complaint and the claim form are both available on the Attorney General's website: <https://www.azag.gov/sites/default/files/docs/complaints/2018/LegalAzWorkersComplaint.pdf>. During the initial investigation, the attorney general "shall verify the work authorization of the alleged unauthorized alien with the federal government pursuant to [federal law]." A.R.S. §§ 23-212(B), -212.01(B).

If the Attorney General determines that a complaint is not "false and frivolous," he or she must notify both the federal government and local law enforcement of the unauthorized alien. A.R.S. §§ 23-212(C)(1)-(2), -212.01(C)(1)-(2). The Attorney General must also notify the appropriate county attorney to bring an action under the statute. A.R.S. §§ 23-212(C)(3), -212.01(C)(3). The Attorney General is also required to maintain court orders received from actions under the statute and maintain a database of employers, along with their business locations, who have committed a first violation of § 23-212(A) or § 23-212.01(A). A.R.S. §§ 23-212(G), -212.01(G). As required by law, A.R.S. §§ 23-212(G), -212.01(G), court orders are available on the Attorney General's website. See <https://www.azag.gov/civil-rights/legal-az-workers-act/court-orders>.

The Attorney General is also responsible for enforcing the prohibition against the unauthorized practice of immigration and nationality law. A.R.S. §§ 12-2703, -2704.

**1.3.18 Miscellaneous Powers and Duties.** The Attorney General has additional powers and duties, including the authority to: release State liens on real estate, A.R.S. § 33-724(C); bring actions to enjoin the illegal payment of public monies or to recover state money illegally paid, A.R.S. § 35-212(A); approve interstate agricultural and horticultural agreements, A.R.S. § 3-221(B); seek dissolution of corporations, A.R.S. § 10-1430(A); seek quo warranto writs against persons improperly holding public office, A.R.S. § 12-2041; seek state court enforcement of State statutes and administrative

orders challenged in federal court, A.R.S. § 12-932(A); investigate extradition cases at the request of the governor, A.R.S. § 13-3844; handle quiet title actions, A.R.S. § 12-1101(B); register persons who conduct amusement gambling events, A.R.S. § 13-3311; and authorize emergency interceptions of wire, electronic, or oral communications, A.R.S. § 13-3015(A).

#### **1.4 Role of the Attorney General in Representing and Advising State Administrative Agencies, Public Officers, and Employees.**

**1.4.1 Administrative Agencies.** The Attorney General, as the State's chief legal officer, is charged with the duty of coordinating the legal affairs of a multitude of clients, each of which is responsible to the public. In addition, as a constitutional officer and elected official, the Attorney General is also entrusted with the duty to protect the public interest and defend the state constitution.

The statutory powers and duties of the Attorney General that form the basis for representing and advising state agencies are set forth in Section 1.3.

Although more than one Assistant Attorney General may provide legal services to an agency, one assistant is often assigned primary responsibility for furnishing the services. Any legal questions that an agency has should be first addressed to this attorney. If he or she is unavailable, the agency should consult the chief counsel of the division or section in which the primary attorney works. All requests for legal assistance should come through the head of the agency or an individual authorized by the agency head to request legal assistance. Requests from individuals other than these persons may be denied.

The Attorney General's role in most civil matters is to give legal advice. The Attorney General will also assist the agency by providing legal advice and representation in adjudicatory proceedings, licensing matters, rule-making proceedings, enforcement proceedings, and employee disciplinary matters. The Assistant Attorney General assigned to an agency will not perform administrative duties, maintain agency records, decide matters of policy, or make the decisions that the law requires the agency to make. A more detailed discussion of the Attorney General's role in representing and advising state agencies, public officers, and employees is set forth in Section 1.9. In setting priorities for the many requests for legal assistance that it receives from agencies, the Attorney General's Office considers the importance of the request, its bearing upon the Attorney General's obligation to the agency concerned, and its need for attention compared to other agencies' needs.

Because the Attorney General is elected by the people of this State, in addition to the obligation to provide legal representation to state agencies, he or she has an obligation to the people of the State to ensure that the laws governing state agencies are carried out in a manner that is consistent with the Legislature's intent. The Attorney General's resources are not available to help any agency avoid duties, obligations, or laws. If an agency disagrees with the laws that affect it, the agency should seek a legislative change

because the Legislature is the proper body to address changes, alterations, or modifications to laws.

**1.4.2 Public Officers and Employees.** The Attorney General can render legal advice only on matters relating to a public officer's or employee's public duty or employment. The Attorney General cannot give legal advice to public officers or employees pertaining to personal matters or conduct outside the scope of their employment or office.

The Attorney General is charged with investigating public corruption and other illegal activities that may involve public officers or employees. Consequently, the Attorney General will not represent officers or employees accused of these activities and will investigate and prosecute any public officer or employee engaged in illegal activity.

**1.4.3 Legal Assistance to Members of the Public.** The Attorney General and his assistants are generally not authorized to render legal advice or provide representation to members of the public. A.R.S. § 41-191(B). They cannot "directly or indirectly engage in the private practice of law or in an occupation conflicting with such duties." *Id.* Pro bono representation, however, is permitted if certain criteria are met. *Id.*

**1.4.4 Legislative Representation for Public Officers and Employees.** If an agency head determines that legislation is needed, he or she should seek assistance and guidance from the Legislative Council, either directly or through an interested member of the Legislature. The agency should also notify the Assistant Attorney General assigned to that agency of any proposed legislation. The Attorney General may provide guidance and advice to agencies regarding proposed legislation. If necessary and appropriate, a representative of the Attorney General's Office can appear with an agency representative before legislative committees regarding proposed legislation. However, the Attorney General will not act as a lobbyist for state agencies and assisting a client agency does not constitute Attorney General approval or support for any proposed legislation.

## **1.5 Role of the Attorney General in Issuing Legal Opinions.**

**1.5.1 Authority to Issue Opinions.** The Attorney General is authorized to provide a written opinion when requested to do so by the Legislature, an individual member of the house of representatives or state senate, a public officer of the State, or a county attorney. A.R.S. § 41-193(A)(7). Opinions must address a question of law relating to the office of the person requesting the opinion. *Id.* All official opinions of the Attorney General are rendered in writing. *Id.* The Attorney General is required to distribute a copy of each opinion to the governor, the president of the senate, the speaker of the house, the secretary of the senate, the chief clerk of the house, and any department or agency required to perform a function necessary to implement the opinion. A.R.S. § 41-194(A). Pursuant to A.R.S. § 38-507, requests for opinions concerning violations of Title 38, Chapter 3, Article 8 (conflicts of interest) are confidential, but once the opinion issues, it is a matter of public record and therefore must be made available to the public.

A.R.S. § 41-194(A). Other opinion requests not covered by a specific grant of confidentiality are considered public records and are made available to the public, if requested.

**1.5.2 Request Procedure.** Written opinions will be issued only upon the written request of a party entitled to receive an opinion. Requests for opinions should be directed to the Attorney General. Requests for opinions from a state agency must be signed by the agency director. After a proper request is received, a draft opinion will be prepared, and, upon the Attorney General's review and concurrence, the Attorney General will issue the opinion to the requesting party.

Upon receipt, every opinion request is assigned a number for reference (an "R" number, e.g., R99-001). This number is used for identification and for tracking the request. After an opinion has been issued, it is given an issue number (an "I" number, e.g., I99-001) by which it is permanently filed.

**1.5.3 Scope of Opinions.** Only formal written opinions signed by the Attorney General, or his/her designee, are official opinions of the Attorney General. This does not mean, however, that an agency cannot rely on advice from the attorney assigned to represent the agency; it merely means that such advice is not to be construed as the official opinion of the Attorney General.

Formal opinions address questions of law relating to the official duties of the requesting party. The Attorney General does not issue all opinions that are requested. Generally, the Attorney General will decline to issue opinions that: (1) address matters pending before a court, Ariz. Att'y Gen. Op. I81-137; *but see* Ariz. Att'y Gen. Op. I91-002; (2) respond to legal questions from constituents or third parties, Ariz. Att'y Gen. Ops. I78-81, -83; or (3) address the constitutionality of proposed legislation; *but see* Ariz. Att'y Gen. Op. I89-085. When called upon to address the constitutionality of a statute, the Attorney General presumes a statute is constitutional and will find otherwise only when the statute is clearly or patently unconstitutional. *See State v. Ramos*, 133 Ariz. 4, 6 (1982) ("An act of the legislature is presumed constitutional, and where there is a reasonable, even though debatable, basis for enactment of the statute, the act will be upheld unless it is clearly unconstitutional."); Ariz. Att'y Gen. Op. I83-069 ("Because the Attorney General has the duty to uphold and defend state laws, we will not opine that a statute is unconstitutional unless it is patently so.").

Opinions of the Attorney General are advisory and do not have the same effect as decisions of a court of law. *See, e.g., Ruiz v. Hull*, 191 Ariz. 441, 449 (1998); *Green v. Osborne*, 157 Ariz. 363, 365, 758 P.2d 138, 140 (1988); *Marston's Inc. v. Roman Catholic Church of Phoenix*, 132 Ariz. 90, 94 (1982). However, no public officer is personally liable for acts done in his or her official capacity in good faith reliance on a formal Attorney General Opinion. A.R.S. § 38-446. Arizona courts will not review the legal interpretation determined by the Attorney General, nor will the courts order withdrawal of an Attorney General Opinion. *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 465-66 (App. 2007). The

Attorney General is not obligated “to render any particular advice to any government official absent a request by that official.” *Id.* at 467, ¶ 23.

**1.5.4 Education Opinions.** The Attorney General, within sixty days of receipt, must concur in, revise, or decline to review opinions of county attorneys, or attorneys appointed with the consent of the county attorney, “relating to school matters” or issued to a community college district. A.R.S. §§ 15-253(B), -1448(H). The Attorney General has the authority only to review education opinions and does not accept opinion requests directly from school district governing boards. Ariz. Att’y Gen. Op. I80-059. Governing board members are not personally liable for acts done in reliance on a written opinion that the Attorney General concurs with, declines to review, or revises. A.R.S. § 15-381(B).

**1.5.5 Opinion Summaries.** Summaries of Attorney General opinions are published by the Secretary of State in the Administrative Register. A.R.S. § 41-1013(B)(4).

**1.6 Role of the Attorney General in the Adoption of Administrative Rules.** The Attorney General does not prepare rules for state agencies; that responsibility resides within each agency. *See Yes on Prop 200*, 215 Ariz. at 467. The Attorney General, however, may occasionally suggest the adoption of rules by an agency because of pending litigation, legislation affecting all state agencies or issues of statewide application.

The Attorney General will also advise the agency on the proper procedures to follow in promulgating rules and informally review draft rules to identify obvious legal defects or problems.

The Attorney General is required to formally review and approve rules in two situations: (1) when an agency wishes to adopt emergency rules under A.R.S. § 41-1026; and (2) when a rule is expressly exempted from the normal rule-making process by A.R.S. § 41-1057. *See* A.R.S. § 41-1044. Chapter 11 provides a detailed explanation of the procedure for adopting, amending, or repealing rules.

**1.7 Role of the Attorney General in Approving Contracts, Leases, and Intergovernmental Agreements.**

**1.7.1 Contracts and Leases.** Arizona Revised Statutes § 41-192(A)(1) establishes that the Attorney General shall “[b]e the legal advisor of the departments of this state and render such legal services as the departments require.” Therefore, the Attorney General may review contracts and leases at the request of any state agency.

Many state agencies use standard form contracts. The Attorney General will review these forms to ensure that they comply with changing legal requirements. Sometimes, it is necessary to draft an original agreement in order to address a new situation.

Arizona law may require that certain provisions appear in state contracts and leases. Section 35-214 requires language regarding retention and inspection of records relating to

the contract. State contracts are required to provide notice of A.R.S. § 38-511, which authorizes the State to cancel any contract if any person significantly involved in initiating, negotiating, securing, drafting, or creating the contract, on behalf of the State or any of its departments or agencies, becomes an employee or agent for any other party to the contract during the period of time the contract or any extension of the contract is in effect. Similarly, if a person becomes a consultant to another party “with respect to the subject matter of the contract” it may be cancelled. *Id.*; see also Ariz. Att’y Gen. Op. 108-10. Nondiscrimination language is mandatory in state contracts. See Exec. Order 2009-09, <http://azmemory.azlibrary.gov/cdm/ref/collection/execorders/id/680> at 1-2. It is also important that all contracts and leases contain a clause stating that every payment obligation of the State under the contract is conditioned upon the availability of funds appropriated or allocated for the payment of such obligation. State contracts should also include a provision that the contract or lease is governed by the laws of the State of Arizona, including the Arizona Procurement Code, A.R.S. §§ 41-2501 to 41-2673, and the administrative rules promulgated thereunder, Ariz. Admin. Code R2-7-101 to R2-7-1009. Contracts should contain warranties that the contractor is in compliance with all federal employment immigration laws and regulations, as well as A.R.S. § 23-214(A), which mandates participation in the federal e-verify program.

Contracts and leases should also be reviewed to determine if provisions regarding third-party antitrust violations and arbitration provisions are necessary. A.R.S. §§ 12-1518, 41-4401. Other provisions may be required by law from time to time.

The Assistant Attorney General assigned to represent an agency or the chief counsel of the Agency Counsel Section should be consulted regarding review or drafting of major contracts and leases. Agencies are strongly encouraged to seek the assistance of the Attorney General in the early phases of significant contract procurements to avoid potential problems.

Unless a contract or lease is exempt from review under A.R.S. § 41-790.01, the Department of Administration must review all architectural, engineering, and construction contracts before they are submitted to the Attorney General. A.R.S. § 41-791.01(A)(1). Consequently, the Attorney General will decline to review any contracts or leases that have not been reviewed by the Department of Administration unless they are exempt from such review. All lease purchase agreements relating to land acquisition, capital projects, energy systems, or energy management systems shall be submitted to the Attorney General for review. A.R.S. § 41-791.02 (D). Upon review, the Assistant Attorney General shall attach a certification to the agreement. *Id.*

Other statutes similarly require that certain agreements be reviewed by the Attorney General. See, e.g., A.R.S. §§ 15-2004(H)(4) (school facilities board lease purchase agreements); 41-1609(C) (contracts between Department of Corrections and private or public institutions for facilities or operations of facilities for the confinement of persons committed to the Department); 41-1958(B) (Department of Economic Security leases, lease-purchases and purchases of office space), 41-2813(C) (juvenile corrections contracts with other institutions for certain services).

**1.7.2 Intergovernmental Agreements.** Intergovernmental agreements are defined as contracts between two or more public agencies or public procurement units for services or for the joint exercise of any powers common to the agencies. A.R.S. § 11-952(A). The agencies may enter into agreements with one another for joint or cooperative action or may form a separate legal entity such as a nonprofit corporation. *Id.* Public agencies are defined to include “the federal government or any federal department or agency, Indian tribe, this state, any other state, all departments, agencies, boards, and commissions of this state or any other state, counties, school districts, fire districts, cities, towns, all municipal corporations, and any other political subdivisions of this state or any other state.” A.R.S. § 11-951. Public procurement units are defined as “a local public procurement unit, the department [of Administration], any other state or an agency of the United States.” A.R.S. § 41-2631(5). Local procurement units are political subdivisions, their agencies, boards and departments or other instrumentalities, and “nonprofit corporation[s] created solely for the purpose of administering a cooperative purchase under” the state procurement code. A.R.S. § 41-2631(3).

Intergovernmental agreements are controlled by A.R.S. §§ 11-951 to -954. It is important to note that, except for the right of joint exercise of powers granted in these statutes, no additional authority or power is conferred upon any public agency by way of the statutes controlling intergovernmental agreements. A.R.S. § 11-954. In other words, the statutes merely detail the method of entering into intergovernmental agreements and do not give any agency independent authority to act. Moreover, no intergovernmental agreement will relieve any public agency of any obligation or responsibility imposed upon it by law. A.R.S. § 11-952(C). In *Myers v. City of Tempe*, the Arizona Supreme Court assumed, without deciding, that one city’s fire department acting pursuant to an intergovernmental agreement could be considered an independent contractor of another city, but concluded that absent a duty imposed by the common law or a “statute, regulation, contract, franchise, or charter,” the contracting city could delegate its duty to the other city’s fire department. 212 Ariz. 128, 132-33 (2006).

Because intergovernmental agreements typically involve the joint exercise of powers common to the contracting public agencies, A.R.S. § 11-952(A), when two public agencies enter into an agreement for joint action, each agency must actually have the power to perform the action contemplated in the contract. See Ariz. Att’y Gen. Ops. 186-084, 183-057. Therefore, where there is no joint exercise of powers common to the public agencies involved, the statutory requirements of intergovernmental agreements do not apply. This will generally include the furnishing of services by one agency to another.

Prior to its execution, every intergovernmental agreement involving any state public agency, board, commission, or public procurement unit is required to be submitted to the attorney of each agency or unit for review. A.R.S. § 11-952(D). When such an agreement is submitted, the Attorney General will determine “whether the agreement is in proper form and is within the powers and authority granted under the laws of this state to such public agency or public procurement unit.” *Id.* Thus, the agency should submit the

intergovernmental agreement to the Attorney General for review *before* it is signed. The agency should also submit to the Attorney General copies of the agency's action, by resolution or otherwise, that authorizes the future execution (signing) of the agreement. The Attorney General should receive an adequate amount of time to examine the intergovernmental agreement and agency action in order to have an opportunity to review and propose necessary changes to the agreement.

The following is a checklist of the items the Attorney General requires for approval of intergovernmental agreements. Each agreement must:

- A. Identify each public agency that is a contracting party by correct statutory title and indicate whether it is a state, town, or other public or municipal agency or instrumentality.
- B. State in the recitals, or elsewhere in the agreement, the exact statutory references under which each contracting party is authorized to exercise the powers described in or required by the contract.
- C. State the duration of the contract, preferably by specifying the beginning date and the ending date of the obligations.
- D. State the purpose or purposes to be accomplished.
- E. State the manner of financing the undertaking and, where applicable, the manner of establishing and maintaining a budget.
- F. State the method or means of partial or complete termination.
- G. Where property is to be acquired solely to accomplish the purpose or purposes of the agreement, provide a means for disposing of such property upon termination or completion of the agreement.
- H. If a separate legal entity is formed, the agreement must include the precise organization, composition, title, and nature of the entity.

See A.R.S. § 11-952(B)(1)-(6).

The governing board of the contracting agency must authorize the future execution (signing) of the agreement *before* it is submitted to the Attorney General. An agency head or board may not delegate the authority to sign an intergovernmental agreement unless the agency or board is specifically authorized by statute to delegate its contract-related duties.

Ariz. Att'y Gen. Op. I80-092. Once the agreement is submitted to the Attorney General, the Attorney General will review it to ensure that "the agreement is "in proper form and is within the powers and authority granted under the laws of this state to such public agency or public procurement unit." A.R.S. § 11-952(D).

If the Attorney General determines that the agreement is “in proper form and is within the powers and authority granted” by law, A.R.S. § 11-952(D), this determination will be noted on the agreement. The Attorney General will then return the documents to the party who sent them. If the Attorney General determines that the agreement is not in the proper form or is not within the authority granted by law, all documents will be returned to the party who sent them with a letter noting the deficiencies. After the Attorney General has made a favorable determination, the parties may then execute (sign) the agreement.

**1.8 Investigative Services Within the Department of Law.** Requests for investigative assistance from the Attorney General’s Office concerning alleged criminal misconduct should be directed, in writing, to the chief agent of the Special Investigations Section or to the requesting agency’s assigned Assistant Attorney General. These requests should specify the nature and scope of the investigation needed. The chief special agent will evaluate the request to determine whether the Attorney General’s Office is capable of conducting the investigation and whether it would be appropriate for the Office to do so. The person requesting the investigation will be notified of this decision.

**1.9 Attorney General’s Guidelines for Representing State Agencies.**

**1.9.1 Scope of the Attorney General’s Duty to Represent State Agencies.** Article V, section 1, of the Arizona Constitution establishes the Office of the Attorney General, and Article V, section 9, provides that the duties of the Attorney General shall be as prescribed by law. Thus, the constitution itself does not undertake to describe the duties of the Office of the Attorney General, but instead assigns that task to the Legislature. See *Block*, 189 Ariz. at 272.

In carrying out that constitutional mandate, the Legislature has broadly prescribed the duties of the Attorney General as the “chief legal officer of the state.” A.R.S. § 41-192(A). The Attorney General’s duties are found primarily in A.R.S. §§ 41-192 to -193. These statutes provide that the Attorney General shall, for example, serve as legal advisor to all state departments, A.R.S. § 41-192(A)(1), organize and administer the civil rights division, A.R.S. § 41-192(A)(7), and prosecute and defend in the supreme court all proceedings to which the State or an officer thereof is a party. A.R.S. § 41-193(A)(1). The Legislature has also specifically authorized the Attorney General to represent the State, its agencies, and its employees. See, e.g., A.R.S. § 41-621(M)(requiring Attorney General to represent and defend the State, its agencies and employees for suits covered by the State’s self-insurance program); see also *Block*, 189 Ariz. at 273-75 (Attorney General authorized by A.R.S. § 35-212 to challenge any action involving the illegal expenditure of funds in state government and by A.R.S. § 12-2041 to challenge the legality of any individual’s exercise of authority as a public officer).

Additionally, if for any reason the Attorney General is unable to provide legal representation or services on behalf of a state agency in relation to any matter, the Attorney General shall give written notice to the agency affected. Receipt of such notice

authorizes the agency, through the Attorney General, to hire attorneys to provide the necessary legal services. A.R.S. § 41-192(E).

Even with these exceptions, the Attorney General has a statutory mandate to perform the vast majority of the legal affairs required by State government. The Attorney General's broad responsibility to represent State government includes providing legal advice to the agencies, departments, officers, and employees acting in their official capacity when performing their duties of defining, conducting, and carrying out the public's business in a manner consistent with the constitution and laws of the State. In this regard, the Attorney General is entrusted with protecting the public's interest while coordinating the legal affairs of a multitude of state agencies and agents.

Because the Attorney General is the chief legal officer of state government and the legal advisor to most state agencies and employees, it is inevitable that, from time to time, the Attorney General is called upon to advise two state agencies that disagree on what the law is or how to proceed. The Attorney General also may be asked to represent one or more agencies appearing before another agency acting as the decision maker, while at the same time being asked to represent or advise the decision maker. In situations like this, the Attorney General may be called upon to participate as an advocate in a proceeding and to act as an advisor to a hearing officer or decision-making officer or agency concerning evidentiary and procedural matters that may arise during the course of that proceeding. The Attorney General may also be required to initiate civil or criminal enforcement actions against public officers for whom the Attorney General may also serve generally as legal counsel. Finally, the Attorney General may serve on a board or commission before which the Attorney General's Office is required to appear as an advocate.

The Arizona Rules of Professional Conduct (Ethical Rules) recognize the unique and varying roles of government lawyers and provide some general guidance to government attorneys who must serve diverse interests. For example, the Preamble to the Ethical Rules provides, in pertinent part:

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. *Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer*

*could not represent multiple private clients.* They also may have authority to represent the “public interest” in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

Ariz. Sup. Ct. R. 42, Preamble, ¶ 18 (emphasis added).

The Ethical Rules also recognize that the government lawyer may represent a particular constituent agency or department, or the government as a whole. This principle is articulated in ER 1.13, comment 9, which discusses government lawyers’ ethical obligations when an organizational entity is the client:

The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of lawyers may be more difficult in the government context . . . *Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole.* For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. *Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances.* Thus, *when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.* In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes or regulation. *This Rule does not limit that authority . . .* Government lawyers also may have authority to represent the “public interest” in circumstances where a private lawyer would not be authorized to do so.

Ariz. Sup. Ct. R. 42, ER 1.13, cmt. 9 (emphasis added).

The above factors define the obligations of the Office of the Attorney General. Representation guidelines based upon these combined resources are presented below.

### **1.9.2 Attorney General’s Representational Role for the State, Its Agencies, and Its Employees.**

**1.9.2.1 Attorney General's Attorney-Client Relationship to the State, Its Agencies, and Its Employees.** As the attorney for the State, the Attorney General serves the people of Arizona and has the sworn obligation to uphold the state's constitution and laws. A.R.S. §§ 38-231 to -234. Although the State is a distinct legal entity, it cannot act except through its officers, employees, and other constituents. See Ariz. Sup. Ct. R. 42, ER 1.13 & cmt. 1.

Those state officials and employees or other constituents are not, however, the individual clients of the Attorney General. *Id.* & cmt. 2. An employee's position within the agency does not create an attorney-client relationship between the employee and the Attorney General. If a representative of the Attorney General's Office provides an employee with legal advice concerning the employee's official duties, the communication is protected by attorney-client confidentiality, but no individual attorney-client relationship arises between the individual employee and the attorney. *Id.*

From time to time, however, the Attorney General may represent individual officers, employees, or other constituents in specific matters, so long as consent to such representation is given by an appropriate official of the organization and if the individual's interests are not adverse to those of the organization with regard to the matter in controversy. *Id.* at ER 1.13(g). This is consistent with A.R.S. § 41-192.02, which gives the Attorney General discretion to represent an officer or employee of the State against whom a civil action is brought in his individual capacity for conduct performed within the scope of the officer's or employee's official duties or employment. When the clients (that is, the State and the public official, or employee) consent to dual representation, the Attorney General will undertake the representation as long as a good faith judgment can be made as early as practicable that no conflict exists between the State and the public official or employee. See Ariz. Sup. Ct. R. 42, ER 1.7. Public officials will be notified of the Attorney General's decision regarding representation and informed that such dual representation will result in the disclosure to the State of information communicated by the public official to the Attorney General.

If before undertaking dual representation a good faith judgment cannot be made that an actual or apparent conflict does not exist, the State will, when appropriate, provide independent legal counsel to the individual public official or employee. A.R.S. § 41-192.02.

**1.9.2.2 Attorney-Client Privilege and Waiver of the Privilege.** The principle of lawyer-client confidentiality is given effect by related bodies of law including the attorney-client privilege and the rule of confidentiality established in professional ethics. Ariz. Sup. Ct. R. 42, ER 1.6, cmt. 3. The attorney-client privilege is a common law privilege, and in Arizona is codified in both the civil and criminal contexts. A.R.S. § 12-2234 (civil) and § 13-4062(2) (criminal); *Samaritan Found. v. Goodfarb*, 176 Ariz. 497 (1993), superseded by statute on other grounds, 1994 Ariz. Sess. Laws, ch. 334, § 1 (2d Reg. Sess.). Information relating to the representation of a client, including communications between a lawyer and a client, is confidential pursuant to

ER 1.6. Agencies, officers, and employees acting lawfully can expect that the Attorney General will maintain confidential communications. Ariz. Sup. Ct. R. 42, ER 1.6 & cmt. 6.

Even where no attorney-client relationship is formed between an Assistant Attorney General and a state official, employee, or other organizational constituent, communications with state officials and employees are covered by the confidentiality provisions of ER 1.6 and also are protected by the attorney-client privilege. See ER 1.13, cmt. 2. Communications between an attorney for a governmental entity and any employee, agent, or member of the entity regarding acts or omissions of or information obtained from the employee, agent, or member is privileged if the communication is either: (1) for the purpose of providing legal advice to the entity or employer or to the employee, agent or member; or (2) is for the purpose of obtaining information in order to provide legal advice to the entity or employer or to the employee, agent or member. A.R.S. § 12-2234(B). The privilege belongs to the State, and not the individual. See *Samaritan Foundation*, 176 Ariz. at 504. (“In the corporate context, the privilege belongs to the corporation and not the person making the communication.”).

Generally, the State may assert a privilege over communications between representatives of the Attorney General’s Office and the State’s officials or employees. Because the official or employee who obtains legal advice from the State’s lawyers on behalf of the State or agency of the State is not the “client,” the privilege belongs to the State, and no individual attorney-client privilege may be asserted by the employee. Other situations, however, may arise. The Arizona Court of Appeals has held that where a city ordinance provided that the city attorney also represents individual city officers in “matters relating to their official . . . duties,” city council members could assert the privilege. See *State ex rel Thomas v. Schneider*, 212 Ariz. 292, 296, ¶ 17 (App. 2006). Section 13-4062(2) does not “exclude communications made to government attorneys that would otherwise fall within the privilege.” *Id.* at 297, ¶ 22.

Neither confidentiality nor conflict of interest per se will prevent the disclosure of communications with the Attorney General when disclosure is necessary on behalf of the State as, for example, where the Attorney General is investigating possible violations of law. Also, prior communications between a state officer or employee and a lawyer from the Attorney General’s Office do not prevent that lawyer or any other lawyer from the Attorney General’s Office from subsequently cross-examining that officer or employee.

The issues of (1) preserving communications between a public official or employee and the Attorney General as confidential and (2) asserting or waiving the attorney-client privilege are to be determined on the basis of the best interests of the State as the represented client. Legal communications between the Attorney General and its agencies and employees regarding official business of the State should not be disclosed to private parties without prior consultation with the Attorney General. Failure by an agency and employee to first seek approval of the Attorney General before disclosing confidential legal communications to third parties can jeopardize the interests of the State. Furthermore,

disclosure of confidential government information also may violate A.R.S. § 38-504(B), and could subject the employee to penalties. See A.R.S. § 38-510.

In all criminal and enforcement matters undertaken by the Attorney General, the decision to assert or waive the State's privilege will be made by the Attorney General. The decision in unrelated civil matters whether to assert or waive the privilege should be made jointly by the Attorney General and the authorized representative of the public agency, if any, that is directly involved in a particular matter. If no agreement can be reached or a dispute arises between the Attorney General and the public agency as to the best interests of the State as a whole, the Attorney General may present the matter to the Governor for review and resolution.

**1.9.2.3 Agency Requests for Actions or Defenses That Are Not Legally Supportable or That Are Interposed for Delay.** If an agency, officer, or employee proposes to pursue an action or maintain a defense that the Attorney General determines is not legally supportable or has no substantial purpose other than delay, the Attorney General's Office will so advise the agency and will not pursue the action or defense on the agency's behalf. Ariz. Sup. Ct. R. 42, ER 3.1; see also Ariz. Sup. Ct. R. 41(d). The applicable Ethical Rules, which provide that no lawyer may assert or controvert an issue where the issue or its defense is frivolous or otherwise legally unsupportable, preclude the Attorney General from pursuing such claims or defenses. *Id.* If an agency, officer, or employee wishes to pursue an action or maintain a defense that the Attorney General determines is not legally supportable or has no substantial purpose other than delay, the agency will not be entitled to public representation on that matter.

**1.9.2.4 Adverse Interests Other Than Enforcement Actions.** When the Attorney General has interests adverse to those of another state agency, officer, or employee in a matter not involving illegal conduct or other enforcement activity, the Attorney General will not represent the agency or employee on the matter in controversy but may instead appoint outside counsel to provide representation in the specific matter. The Attorney General will continue, however, to represent the agency or employee in all other matters, as required by law.

The Attorney General is not authorized to represent or appoint outside counsel for state entities or employees to defend a purely criminal proceeding. See generally A.R.S. §§ 41-192, -192.02 and -193. If a civil action is brought against a state employee in the employee's individual capacity, the Attorney General has discretion to represent the employee, but only until such time as it is established as a matter of law that the alleged activity or events involved were not performed, or directed to be performed, in the course and scope of the employee's duty or employment. A.R.S. § 41-192.02(A). Thus, if the Attorney General is contemplating or has instituted civil or criminal proceedings against a state agency, public official, or employee, then the agency, public official or employee that would be the subject of those proceedings may not be entitled to public representation, unless such representation is otherwise expressly allowed by law.

**1.9.2.5 Illegal Activity or Other Action Requiring Enforcement Actions Against State Officials.** Representatives of the Attorney General’s Office owe a fiduciary duty to the State of Arizona as the client and not to an individual official or employee. Ariz. Sup. Ct. R. 42, ER 1.13. There is, therefore, no inherent conflict of interest for the Attorney General to enforce civil or criminal laws against state officials. *See generally United States v. Troutman*, 814 F.2d 1428, 1438 (10th Cir. 1987) (“[A]n inherent conflict of interest does not arise merely because a state attorney general prosecutes a state officer whom he formerly represented.”); *State v. Klattenhoff*, 801 P.2d 548, 551 (Haw. 1990) (holding that Attorney General “may represent a state employee in civil matters while investigating and prosecuting him in criminal matters, so long as the staff of the AG can be assigned in such a manner as to afford independent legal counsel and representation in the civil matter, and so long as such representation does not result in prejudice in the criminal matter to the person represented”) *abrogated on other grounds by State v. Walton*, 324 P.3d 876 (Haw. 2014). Instead, the Attorney General has a duty on behalf of the State to investigate and take appropriate action if there is any claim of illegal acts by state officers or employees. *See, e.g., Block*, 189 Ariz. at 273-75 (Attorney General authorized to take action on behalf of State pursuant to A.R.S. § 35-212 to challenge any action involving the illegal expenditure of funds in state government and by A.R.S. § 12-2041 to challenge the legality of any individual’s exercise of authority as a public officer); *see also People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1230-31 (Colo. 2003) (explaining that the ethical rules do not bar Attorney General from filing suit against another executive branch officer because “the Attorney General must consider the broader institutional concerns of the state”).

The Attorney General may investigate and prosecute any state official or employee who has committed or intends to commit an improper or illegal act. This issue may arise in several contexts. For example, the Attorney General is responsible for ensuring that the correct individual is holding public office. A.R.S. § 12-2041 (quo warranto). The Attorney General is also responsible for preventing the illegal payment of state money (A.R.S. § 35-212(A)), and enforcing the Open Meeting Law (A.R.S. § 38-431.07(A)).

If, in the process of giving legal advice or representing an employee in his or her official capacity, a representative of the Attorney General’s Office discovers that the official or employee has committed or intends to commit an illegal act or fraud that is likely to result in substantial injury to the State, the lawyer must proceed as is reasonably necessary in the best interest of the State and, in most instances, disclose the matter to agency management. Ariz. Sup. Ct. R. 42, ER 1.13(b). These principles are embodied in Comment 2 to ER 1.13 which provides:

When one of the constituents of an organizational client [such as the state or an agency of the state] communicates with the organization’s lawyer in that person’s organizational capacity, the communication is protected by ER 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the

course of that investigation between the lawyer and the client's employees or other constituents are covered by ER 1.6. *This does not mean, however, that constituents of an organizational client are the clients of the lawyer.* The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by ER 1.6.

Ariz. Sup. Ct. R. 42, ER 1.13, cmt. 2 (emphasis added).

The Attorney General is not authorized to represent or appoint outside counsel for state entities or employees to defend a purely criminal proceeding. See *generally* A.R.S. §§ 41-192, -192.02 and -193. If a civil action is brought against a state employee in the employee's individual capacity, the Attorney General has discretion to represent the employee, but only until such time as it is established as a matter of law that the alleged activity or events involved were not performed, or directed to be performed, in the course and scope of the employee's duty or employment. A.R.S. § 41-192.02(A). Thus, if the Attorney General is contemplating instituting or has instituted civil or criminal proceedings against a state agency, public official, or employee, then the agency, public official or employee that would be the subject of those proceeding may not be entitled to public representation, unless such representation is otherwise expressly allowed by law.

### **1.9.3 Multiple Representation of State Agencies.**

**1.9.3.1 Scope of Section.** To the extent resources are available, the Attorney General is obligated to represent most state agencies in all matters. A.R.S § 41-192(A)(1). The only exceptions are those agencies expressly exempt from such representation by statute. A.R.S. § 41-192(D). See Section 1.9.1 (listing exempt agencies). In representing state agencies, the Attorney General serves several roles, including providing advice in non-judicial proceedings and representation in quasi-judicial and judicial proceedings. The following sections provide guidelines for situations where the Attorney General is faced with conflicting interests among different agencies.

**1.9.3.2 Non-Judicial Proceedings.** When two or more state agencies have adverse interests and the dispute between the agencies is not part of a pending judicial or quasi-judicial proceeding, the Assistant Attorneys General representing or advising the agencies shall consult with the Attorney General, and the Attorney General shall decide on the advice to be given to all agencies concerned. Normally this will resolve the conflict. If, however, an agency disagrees with the decision, it may pursue the matter further only when it has the statutory authority to do so. If the agency needs outside legal counsel, it may obtain outside counsel only through the Attorney General. The principles set forth in Sections 1.9.5 through 1.9.5.4 govern the appointment of outside counsel.

**1.9.3.3 Quasi-Judicial Proceedings.** When a state agency appears as a party before another state agency in a quasi-judicial proceeding, the agencies may consent to the continued representation of both by the Attorney General. In that case, the Attorney General shall continue to represent all consenting agencies. Continued representation of both agencies will be provided by different Assistant Attorneys General in accordance with the principles for adjudicatory proceedings identified in Section 1.9.3.4. If both agencies do not consent, the Attorney General will decide which agency to represent and the other agency may obtain outside legal counsel through the Attorney General.

**1.9.3.4 Judicial Proceedings.** The Arizona Supreme Court has determined that the Attorney General has both the power and the duty to initiate court action on behalf of the State when necessary to prevent the illegal expenditure of state funds, or to challenge the illegal exercise of a public office. *Block*, 189 Ariz. at 273-75. A different problem is posed, however, when the Attorney General is asked to represent two separate agencies that have a judicial dispute. The Arizona Supreme Court has stated that where the Legislature has expressly authorized one or both of the agencies to bring the dispute before the judicial branch for resolution, the contesting agencies are in control of the decision to do so. *State ex rel. Frohmiller v. Hendrix*, 59 Ariz. 184, 196-97. When this occurs, the Attorney General must decide how to provide the necessary legal representation.

In rare cases, two Assistant Attorneys General appeared in court on behalf of opposing agencies. See, e.g., *State ex rel. Conway v. Hunt*, 59 Ariz. 256 (1942), *vacated on rehearing on other grounds*, 59 Ariz. 312 (1942). In *Arizona State Land Dep't v. McFate*, 87 Ariz. 139 (1960), the Supreme Court seemed to approve of this practice, stating that the Attorney General may appear through his assistants to represent both agencies even “where two agencies of the State assert contrary positions on an issue presented to a court for decision.” 87 Ariz. at 145, 348 P.2d at 916 (citing *State ex rel. Conway*). *McFate* is consistent with the decision of the Connecticut Supreme Court in *Connecticut Comm'n on Special Revenue v. Connecticut Freedom of Info. Comm'n*, 387 A.2d 533 (Conn. 1978). In that case, two Assistant Attorneys General represented appellant and appellee state agencies, which took conflicting positions on the issue before the court. The Connecticut Supreme Court rejected the lower court's conclusion that such dual representation violated the Code of Professional Responsibility (the predecessor to the Rules of Professional Conduct). Noting the unique role of the attorney general as the State's attorney, the court noted:

Clearly, on the bare face of the record, the formal appearance of the attorney general for both commissions on the appeals to the Court of Common Pleas and to this court seems anomalous and contrary to the ethical considerations underlying Canon 5 [of the Code of Professional Responsibility] which is obviously based on the biblical maxim that “no man can serve two masters.” Matthew 6:24. We are, however, not limited to consideration of the superficial

seemliness of the dual appearances. An examination of the particular circumstances of the case, the unique position which is held by the attorney general and his relationship to the contesting commissions has convinced us that the trial court was in error and that the attorney general has not been guilty of any professional impropriety.

The attorney general of the state is in a unique position. He is indeed sui generis. A member of the bar, he is, of course, held to a high standard of professional ethical conduct. As a constitutional executive officer of the state he has also been entrusted with broad duties as its chief civil law officer and . . . he must, to the best of his ability, fulfill his “public duty, as Attorney General, and his duty as a lawyer to protect the interest of his client, the people of the State.” This special status of the attorney general where the people of the state are his clients cannot be disregarded in considering the application of the provisions of the code of professional responsibility to the conduct of his office.

[ . . . ]

Clearly, the relationship between the attorney general and [the state agencies] is quite different from that between private counsel and a client who retains him. The commissions have no corporate existence as such. They are merely agencies of the state and, by law, the attorney general is their legal advisor. The reasoning of the trial court would logically lead to the absurd conclusion that in the event of any dispute whatsoever between two state agencies, even though that dispute was not in litigation, the attorney general ethically could not act as legal adviser and lawyer for either agency because of the conflict indicated by their dispute.

[ . . . ]

As we have noted, the real client of the attorney general is the people of the state. Any suggestion of professional impropriety on the part of the attorney general would be considerably lessened in cases such as the present one involving civil litigation of a dispute between two state agencies if the appearance of the attorney general were entered for the state of Connecticut and appearances for the separate agencies entered by assistant attorneys general particularly assigned as counsel for the separate agencies.

387 A.2d at 537-39 (citations omitted). See also *Envtl. Prot. Agency v. Pollution Control Bd.*, 372 N.E.2d 50, 52 (Ill. 1977) (“The Attorney General’s responsibility is not limited to serving or representing the particular interests of State agencies, including opposing State agencies, but embraces serving or representing the broader interests of the State. This responsibility will occasionally, if not frequently, include instances where State agencies are the opposing parties.”); but see *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206, 1207 (Cal. 1981) (stating no “constitutional, statutory, or ethical authority” exists to permit attorney general to advise clients “with regard to pending litigation, withdraw, and then sue the same clients the next day on a . . . cause of action arising out of the identical controversy”).

In *Arizona State Land Dep’t v. State ex rel. Herman*, 113 Ariz. 125, 126 n.\* (1976), however, the Supreme Court appeared to disapprove of the practice of the Attorney General representing two State agencies on opposite sides of a controversy:

Since September 5, 1974, the practice of the staff of the Attorney General representing both sides of a controversy has ceased. On that date this Court denied jurisdiction of a petition filed by the Department of Economic Security for special action against the Department of Administration, both departments being represented by the Attorney General. Another party was substituted for the Department of Economic Security, and the action proceeded as *Navajo Tribe v. Arizona Department of Administration*, 111 Ariz. 279, 528 P.2d 623 (1974). The case at issue had been instituted prior to the above date. The fact that we allowed the matter to continue in its present posture does not reflect any change in our policy for actions instituted after September 5, 1974.

Thus, in only the rarest case will the Attorney General represent two state agencies in judicial proceedings when the agencies are on opposite sides of the litigation. Instead, in cases where two agencies are in opposition in a court proceeding, the Attorney General will determine which to represent and withdraw from representation of the other agency, if ethically appropriate. If the Attorney General determines that he or she ethically cannot withdraw representation from one agency and continue to represent the other agency, then he or she will withdraw from representation of both. Agencies that will not be represented by the Attorney General may obtain outside counsel in accordance with Sections 1.9.5 through 1.9.5.4.

#### **1.9.4 Agency Adjudicatory Proceedings.**

**1.9.4.1 Scope of Section.** Many agencies, boards, and department heads may also become decision makers in quasi-judicial administrative proceedings. This role is more fully discussed in Chapter 10. In such situations, the Assistant Attorney General who provides day-to-day legal advice to the agency, board, or department head often becomes

an advocate on behalf of the “Agency” and must present arguments asking the decision maker to take some action. In such a situation, the same Assistant Attorney General cannot also render impartial legal advice to the decision maker regarding the proceeding. Yet, the Attorney General’s Office must provide such advice if it is needed by the decision maker. This Section is designed to provide guidance on how that advice will be provided.

**1.9.4.2 Advocate.** An Assistant Attorney General participating as an advocate in a proceeding before an administrative tribunal cannot serve as an advisor to the tribunal respecting that proceeding. *Taylor v. Ariz. Law Enforcement Merit Sys. Council*, 152 Ariz. 200, 206 (App. 1986). The Assistant Attorney General may, however, act as an advisor to the agency on matters not related to the proceeding in which the attorney is appearing as an advocate. See Section 1.9.4.9.

**1.9.4.3 Selection of Advisor.** If an agency decision maker requests the assistance of the Attorney General to act as advisor during the pendency of the proceeding in which an Assistant Attorney General is appearing as an advocate, the Attorney General will designate a different Assistant Attorney General to act as an advisor.

**1.9.4.4 Participation in Preliminary Matters.** During the course of the Attorney General’s representation of an agency, an Assistant Attorney General may advise an agency concerning investigative matters, including whether the agency has grounds to commence a formal action. If an action is commenced, the same Assistant Attorney General who gave advice on such preliminary matters may, and usually will, act as the advocate, but shall thereafter refrain from discussing the specific matter with the decision maker in any role except that of advocate. See Section 1.9.4.6.

**1.9.4.5 Prohibition on Communication Between the Advocate and Advisor.** No ex parte communication shall occur between the AAG Advisor and the AAG Advocate regarding (a) the adjudication of any fact or issue in dispute, or (b) the discovery, preparation, or presentation of any fact or legal issue on behalf of any party participating in the proceeding.

**1.9.4.6 Limitations on Advocate.** The AAG Advocate shall not participate in the actual determination by the decision maker of any fact or legal issue in dispute, nor may the advocate have any ex parte communications with the decision maker regarding the merits of the case. The advocate may, however, submit written proposed findings of fact or a proposed decision to the decision maker provided that (1) the decision maker is free to accept, modify, or reject the proposed findings or decision and (2) copies are promptly provided to all adverse parties or their respective counsel to allow them to respond.

**1.9.4.7 Limitations on Advisor.** The advisor shall limit his or her participation to providing the decision-maker with advice on procedural matters, including questions concerning the admission or exclusion of evidence. If the decision-maker requests advice on other matters, such as the ultimate factual or legal issues presented in the case, the

decision maker should obtain that advice jointly from all advocates and participating parties through written memoranda or oral arguments during the course of the proceeding. The advisor should not advise the decision maker on how to resolve substantive legal or factual issues.

**1.9.4.8 Disregard of Advice.** The decision maker is free to take action contrary to the arguments presented by the parties or contrary to the legal advice of the advisor.

**1.9.4.9 Judicial Review.** If a party challenges an administrative decision in superior court, the Attorney General usually represents the decision maker and defends the administrative action taken. However, if the agency acted in a manner that causes the Attorney General to conclude that it cannot represent the decision maker, the Attorney General will decline to represent the agency. See Section 1.9.2.3.

**1.9.4.10 Comments.** State and federal courts have consistently ruled that combining investigatory, prosecutorial, and adjudicative functions within a single agency does not itself deny due process. See *Withrow v. Larkin*, 421 U.S. 35, 48-52 (1975); *Hamilton v. City of Mesa*, 185 Ariz. 420, 427 (App. 1995); *Rouse v. Scottsdale Unified Sch. Dist.*, 156 Ariz. 369, 371-72 (App. 1987). The Arizona Court of Appeals has also indicated that an Assistant Attorney General may act as an advocate and another Assistant Attorney General from a different section may serve as advisor in a case. *Taylor*, 152 Ariz. at 206.

## **1.9.5 Agency Representation by Outside Counsel.**

**1.9.5.1 Authority to Proceed.** Before a non-exempt agency or individual acts to obtain outside counsel, the Attorney General will first determine whether legal authority exists to require legal representation independent of the Attorney General. If it does, the following guidelines will apply.

**1.9.5.2 Available Funds.** If an agency will incur an obligation to pay for legal services, it must have both the authority to expend funds for this purpose and available funds.

**1.9.5.3 Appointment.** In accordance with the State's procurement laws, the Attorney General annually regularly solicits proposals from attorneys desiring to provide the State with outside counsel. If outside counsel is required by a state agency or employee that is not exempt from Attorney General representation, the choice of outside counsel must be made from the list of attorneys awarded contracts. The Attorney General may, in the exercise of discretion and in accordance with applicable procurement law, authorize other outside counsel in a particular case. In no case shall outside counsel be given a contract to perform services on behalf of the State or its non-exempt agencies without the Attorney General's approval. A.R.S. § 41-2513(B).

**1.9.5.4 Control of Appointed Counsel.** Once outside counsel is obtained for the cases described in this Chapter, outside counsel will exercise independent professional judgment in the handling of the case.

**1.9.6 Attorney General’s Membership on Quasi-Judicial Public Entities.**

**1.9.6.1 General Rule.** The Attorney General will generally recuse himself from participation as a member of a board, commission, or other public entity that functions as an administrative tribunal or in a quasi-judicial capacity in any proceeding in which an Assistant Attorney General participates as an advocate.

**1.9.6.2 Issues of Compelling Public Interest.** If the Attorney General determines that participation in a particular proceeding before a board, commission, or other public entity upon which he or she serves is of compelling public interest, he or she may elect not to recuse him or herself from participating in the matter. In such a case, the board, commission, or public entity may obtain outside counsel through the Attorney General to represent it in the matter. The principles in Sections 1.9.5 through 1.9.5.4 will apply in these circumstances.