



OFFICE OF THE ARIZONA ATTORNEY GENERAL

Attorney General's Office Conflicts Manual

1.0 Preface and Introductory Material.

1.1 Scope and purpose of this manual: This manual is separate from the Attorney General's Office ("Office") Agency Handbook, which is promulgated under A.R.S. § 41-192(A)(8).¹ The purpose of this manual is to communicate to State Agencies and State Employees specific policies and procedures addressing, without limitation, situations in which a conflict of interest or potential conflict of interest may arise in respect to (1) the Office's representation of State Agencies or State Employees; (2) notice of such conflicts; and (3) the Office's screening procedures in the event of a conflict.

1.2 Important disclaimer: The existence of a client-lawyer relationship with the Office is governed by applicable state law and is determined by the facts and circumstances that exist at the time of a potential representation. Nothing in this manual is intended to, or does, create a client-lawyer relationship between the Office, or any personnel employed by the Office, and any state department, agency, board, commission, office, or political subdivision, or any officer or employee of any of the foregoing in their official or individual capacities. Moreover, the Office does not provide legal advice or representation to private persons or entities. With the exception of reservation of rights and/or determinations from coverage counsel in risk-management matters, the Office does not represent any state actor with respect to conduct outside the authorized scope of such actor's lawful duties and authority.

1.3 Relevant statutory authority for issuance of this manual: The Attorney General represents the State of Arizona. Accordingly, the Attorney General "shall have charge of and direct the department of law and shall serve as chief legal officer of the state." A.R.S. § 41-192(A). The Attorney General's representation of the State is paramount to, and must be consistent with, the Office's representation of any State actor. The Attorney General may organize the Office into bureaus, subdivisions, or units for the efficient and economical operation of the Office. See A.R.S. § 41-192(B)(1). The Attorney General may hire and assign assistant attorneys general and other employees as "necessary to perform the functions of" the Office. See A.R.S. § 41-192(B)(3). Except as otherwise provided by law, certain agencies are prohibited from employing legal counsel or incurring an expense or a debt for legal services. See

¹ Available at <https://www.azag.gov/outreach/publications/agency-handbook>

A.R.S. § 41-192(D). If for any reason the Attorney General, within his or her sole discretion, determines that the Office is disqualified from providing legal representation or services that would otherwise be required to be provided by the Office, the Office must so notify the affected agency in writing. A.R.S. § 41-192(E); *see also* Arizona Agency Handbook ch. 1, § 1.3.3.

1.4 Definitions: As used in this manual and except where context requires a different meaning, the following terms are defined as follows.

1.4.1 “Office” means both the Arizona Attorney General’s Office and Department of Law, which are established under A.R.S. §§ 41-191 to 41-199, among other statutes. Office includes the Attorney General, who is an elected, constitutional officer under Article 5, § 1 and § 9 of the Arizona Constitution. The Office employs attorneys (assistant attorneys general) and other employees to carry out the statutory and other duties assigned to the Attorney General and Department of Law. *See generally* Arizona Agency Handbook ch. 1 (discussing the Attorney General and Department of Law). The Office may also retain or authorize a State Agency to retain a private lawyer or law firm to perform legal services, and such private lawyers and law firms are not included within the definition of Office for purposes of this manual.

1.4.2 “State Agency” means any state department, agency, board, commission, or office of the State.

1.4.3. “State Employee” means any state officer or employee.

1.4.3.1 Official-capacity representation of a State Employee. Unless otherwise expressly agreed to in writing by the Office and a State Employee, the Office represents State Employees, if at all, *only* in respect to their official capacities as officers or employees of the state.

1.4.3.2 Individual-capacity representation of a State Employee. If expressly agreed to in writing by the Office and a State Employee and authorized by statute or other law, the Office may represent a State Employee in his or her individual capacity.

1.4.3.3. Representation of individual state employees. The Office may from time to time undertake the representation of a State Employee for matters where the State Employee is named in a lawsuit or other matter in their official capacity, and where the conduct at issue was within the course and scope of their employment, and there is no issue regarding the lawful authority of the State Employee. In such cases, the Office’s representation of the State Employee shall be undertaken consistent with the Office’s duty to represent the best interests of the State. If a conflict is foreseeable between the State Employee’s interests and those of the State, to the extent permissible by law, the State Employee shall be offered representation by separate counsel. That

the Office represents a State Employee in his or her official capacity, does not give rise to a client-lawyer relationship between the Office and a State Employee in his or her individual capacity or between the Office and any relative of a State Employee, including a spouse.

2.0 The Office’s determination when conflicts of interest or potential conflicts of interest arise in respect to the Office’s representation of State Agencies and State Employees.

2.1 The Office is not the same as a private law firm regarding conflicts of interest. State Agencies and State Employees must understand that the Office is not the same as a private law firm regarding conflicts of interest. Paragraph [18] of the Preamble to the Arizona Rules of Professional Conduct,² states:

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 governmental agencies in intragovernmental legal controversies where a private lawyer could not represent multiple clients. They also may have authority to represent the “public interest” in circumstances where a private lawyer may not be authorized to do so. The Rules do not abrogate any such authority.

Similarly, comment [9] to Ethical Rule (“ER”) 1.13 of the Arizona Rules of Professional Conduct, which relates to an organization as client, states:

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 difficult in the governmental context. See [Preamble] [18]. 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

² The Arizona Rules of Professional Conduct are set forth in Arizona Supreme Court Rule 42, available at <https://www.azbar.org/for-lawyers/ethics/rules-of-professional-conduct/>

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. *See* [Preamble]. Government lawyers also may have authority to represent the “public interest” in circumstances where a private lawyer would not be authorized to do so.

2.2 The Office’s policies and procedures are designed to preserve its independence to carry out its duties and act in the public interest consistent with Arizona law. The public policy of the State of Arizona is best served by the Office maintaining the maximum independence under law to protect the public fisc and other state resources from improper use by public officials, defend the constitutionality of state laws in court, seek available civil remedies, and prosecute criminal offenses. The Legislature has enacted specific statutes that create obligations for the Office that may be adverse to the interests of a State Agency or State Employee. *See, e.g., Ariz. State Land Dep’t v. McFate*, 87 Ariz. 139, 144-45 (1960) (identifying multiple statutes, including A.R.S. § 35-212, which involves illegal expenditure of public monies); *see also* A.R.S. § 16-1021 (enforcement of election laws by the Office); A.R.S. § 38-501 to -511 (conflict of interest laws). These are merely examples. *See generally* Arizona Agency Handbook.

2.3 The Office uses ethical screens. The Office establishes screens as a prophylactic tool when or within a reasonable time after a conflict of interest or potential conflict of interest is known to arise, so that part of the Office may be involved in a matter adverse to a State Agency or State Employee, even if another part of the Office represents the State Agency or State Employee in one or more matters. The purpose and intent of ethical screens is to shield confidential information of a State Agency or State Employee from Office personnel who are handling a matter that is adverse to the State Agency or State Employee.

2.3.1 How the Office’s screens generally work. The Office appoints an ethics counsel who is responsible for issuing screens in writing to the relevant supervisors and Office lawyers and non-lawyers after a determination is made that a conflict of interest exists with a State Agency or State Employee. A “screen” denotes the separation of lawyers and non-lawyers in one or more sections of the office from knowledge of and participation in a matter, including but not limited to, access to files (paper files and/or electronic files) and other information, by instructing such lawyers and non-lawyers not to communicate with lawyers and non-lawyers in other sections of the Office regarding such matter, and not to access or attempt to access any files in another part of the office regarding such matter.

2.3.2. The office has adopted mechanisms to deny access by the screened lawyer or non-lawyer to firm files or other information, including information in electronic form,

relating to the screened matter. The Office uses appropriate software to restrict access to lawyers and non-lawyers based on which section of the Office for which they work. Similar technological restrictions apply to the network drives. Paper files may be physically stored in different common areas of the office and, in the event of a screen, are labelled as subject to the screen.

2.3.3. Additional screening measures may also be used as the Office deems appropriate for a particular matter depending on the circumstances. Such additional measures may include, without limitation: screening attorneys' supervisors, up to and including the elected Attorney General, to ensure the chain-of-command does not become aware of the protected/confidential information and appointing acting supervisors to ensure attorneys are adequately supervised while also keeping the protected/confidential information screened from the chain-of-command.

2.4 State Agencies that are former clients of the Office. The same policies and procedures described in 2.3 apply for State Agencies and State Employees that are former clients of the Office with respect to matters that are substantially related to a matter in which the Office represented a State Agency or State Employee.

2.5 No imputation of conflicts of interest for State Agencies and State Employees represented by the Office in their official capacities. Imputation generally applies to an affected section of the Office; however, because of the Office's various statutory mandates, and given the Office's screening procedures, conflicts are not imputed to the entire Office in regard to the Office's representation of State Agencies and State Employees in their official capacities.

3.0 Notification of State Agencies in certain situations involving overturning a judicial decision. If the Office decides to seek to modify, reverse, or overturn a judicial decision previously obtained by the Office that the Office knows affects a State Agency, and where the State Agency is or was a client of the Office on the same or a similar matter, the Office will notify the State Agency in advance of any filing to that effect. The Office will generally notify the State Agency through the Assistant Attorney General who provides legal services to that State Agency through an Intergovernmental Service Agreement for general legal advice. If no such Intergovernmental Service Agreement exists, the Office will identify another appropriate contact person to notify the agency. Such notification does not create any new attorney-client relationship or broaden the scope of any existing attorney-client relationship.

4.0 Periodic notice of conflicts and screening procedures to State Agencies

4.1 Each State Agency and State Employee is charged with reviewing this Manual and being aware of its content. The Office shall cause the Manual to be available on its website. The Office shall also provide periodic reminder notices to State Agencies of this manual, and shall provide the manual to any newly-elected or appointed head of a State Agency. Failure to meet the reminder requirements of this section shall not change its application or interpretation.

5.0 Effective Date of This Manual, Amendments or Modifications to this Manual, and Notice Regarding the Same

5.1 The effective date of this Manual is March 24, 2022.

5.2 The Attorney General may amend or modify this manual from time to time in the Attorney General's sole discretion.

5.3 Questions or comments regarding this manual may be sent by email to acl@azag.gov.