

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-016442

10/27/2011

HONORABLE DEAN M. FINK

CLERK OF THE COURT
S. Brown
Deputy

STATE OF ARIZONA, et al.

THOMAS C HORNE
MARY JO FOSTER

v.

COLLEEN MATHIS, et al.

KIERSTEN A MURPHY

JEAN JACQUES CABOU
ROOPALI HARDIN DESAI
TIMOTHY A NELSON
MARK D WILSON
PAUL K CHARLTON

**UNDER ADVISEMENT RULING
STATUS CONFERENCE SET**

Following oral argument on October 14, 2011, the Court took under advisement Defendant Commissioner McNulty's Motion for Disqualification of Counsel for the State, which was joined by several other parties. Upon further consideration of the respective briefing and argument related to the motion, the Court rules as follows.

Ethical Rule 1.9(a), as set forth in Supreme Court Rule 42, states, "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." There is no dispute that the Attorney General's Office (hereinafter "AGO") advised the commissioners on, among other things, their legal obligations under the Open Meeting Law. The state expressly concedes, at 2:23-25 of its response, that it "provided general training on open

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-016442

10/27/2011

meeting law to the AIRC ... and provided advice on open meeting law issues during the AGO's representation of the AIRC;" the affidavits of Ms. Mathis and Ms. McNulty, which the state apparently accepts, clarify that at least some of the advice was given in executive session. The Court believes this to have at least some significance. There can naturally be no expectation of confidentiality for information disclosed or advice given in public session. ER 1.9, comment 3 to 2003 amendment ("Information that has been disclosed to the public ordinarily will not be disqualifying"); *State v. Sucharew*, 205 Ariz. 16, 22 ¶ 11 (App. 2003). While the risk of disclosing privileged communications is not the only concern addressed by ER 1.9, *Matter of Evans*, 113 Ariz. 458, 462 (1976), the balance that the Court must find is plainly affected by the context of the communications. But there is no basis to suppose that communications in executive session are unprivileged. *State ex rel. Thomas v. Schneider*, 212 Ariz. 292, 298 ¶ 33 (App. 2006) ("executive session exists in part to provide a mechanism by which governmental bodies can receive confidential legal advice").

The AGO argues that, while it provided advice on the same *subject* as its current investigation, namely, the requirements of the Open Meeting Law, it did not advise the commissioners on the same *matter*, that is, the specific violation of the Open Meeting Law of which they are suspected. ER 1.9 makes such a distinction, but the AGO slices it much too fine. The Court quotes at length from comment 2 to the 2003 amendment:

The scope of a 'matter' for purposes of this Rule may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client.... The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Though the Court has no knowledge of what was discussed by the commissioners and the AGO, let alone what they might have intended as they discussed it, there is no reason to suppose that they had the act under investigation, or any specific act, in mind. This, however, does not remove the case from the scope of ER 1.9. Analysis in terms of "a wholly distinct problem of that type," as the AGO urges, is meaningless when there was no original "problem of that type," when the communication was general in nature rather than focused on a specific transaction. The rule

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-016442

10/27/2011

applies as well when the general subject matter of the communication “is substantially related to the issues which must necessarily be resolved” in the subsequent action. *Foulke v. Knuck*, 162 Ariz. 517, 521 (App. 1989). The general subject matter of the representation was, relevantly, the legal duty imposed on public officials by the Open Meeting Law. That legal duty is not just substantially, but fundamentally related to the investigation. To answer the underlying question posed by the comment, for the AGO to advise the commissioners, in privileged executive session, of their duties under the Open Meeting Law, then to conduct an official investigation of how well they complied with that advice, can be justly regarded as a changing of sides.

The Court also takes into account Ethical Rule 1.13, comment 9: “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.” But ER 1.13 does not override ER 1.9. Public officials are legitimately held to a high standard of probity and may be investigated if they fall short of that mark, but they are entitled no less than anyone else to the loyalty of their lawyers. The Court does not hold that any communication between the AGO and state former clients must result in disqualification. The provision of standardized advice in open session, without more, might balance in the opposite direction. But under the facts of this case, the Court believes that disqualification is appropriate under Ethical Rule 1.9.¹

Finally, the AGO argues that its statutory power to investigate and enforce violations of the Open Meeting Law overrides the Ethical Rules. Under the Arizona Constitution, “the practice of law is a matter exclusively within the authority of the Judiciary. The determination of who shall practice law in Arizona and under what condition is a function placed by the state constitution in [the Supreme] Court.” *Hunt v. Maricopa County Employees Merit Sys. Comm’n*, 127 Ariz. 259, 261-62 (1980). The Ethical Rules have been promulgated by the Supreme Court pursuant to this authority. *Scheehle v. Justices of the Supreme Court of the State of Arizona*, 211 Ariz. 282, 289 ¶ 23 (2005). Although the legislature may by statute regulate the practice of law, its regulation cannot be inconsistent with the mandates of the Supreme Court. *Id.*, ¶ 24. Thus, the general grant of investigatory authority to the AGO must in this case yield to the ethical bar imposed by ER 1.9.²

¹ The Court notes that the legislature granted investigatory authority to “the attorney general or the county attorney for the county in which the alleged violation occurred.” A.R.S. § 38-431.06. Thus, the Court’s ruling does not leave the state without a remedy.

² Here, however, the Court reiterates its comment from oral argument. The legislature appears to have anticipated that some form of undefined “conflict of interest” might exist with regard to an Open Meeting Law investigation. Indeed, one of the statute’s instructions to the Court indicates that the Court may order compliance with the investigation when it finds, *inter alia*, “that there is not a conflict of interest on the part of the attorney general or

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-016442

10/27/2011

Based on the foregoing analysis,

IT IS HEREBY ORDERED granting the Motion for Disqualification of Counsel, filed October 3, 2011.

The Court acknowledges that the state may require some time to locate alternate counsel willing to take this case, and that alternate counsel may need some time to get up to speed on this matter. Accordingly,

IT IS ORDERED alternate counsel for the State shall file a Notice of Appearance no later than **November 25, 2011**.

IT IS FURTHER ORDERED suspending the briefing schedule currently in place in this case until further notice.

IT IS FURTHER ORDERED vacating the oral argument set for November 7, 2011 at 2:30pm.

IT IS FURTHER ORDERED setting a status conference to discuss appropriate alterations to the briefing schedule and re-scheduling of the oral argument on **November 30, 2011 at 11:00 a.m.** Upon the filing of a Notice of Appearance by alternate counsel, any party may request an accelerated status conference.

ALERT: Effective September 1, 2011, the Arizona Supreme Court Administrative Order 2011-87 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.

county attorney.” A.R.S. § 38-431.06(D). The statute seems to have a built-in remedy, in that it allows investigations by either the AGO or a county attorney. *See* footnote 1, *supra*.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-016442

10/27/2011