

SUPREME COURT OF ARIZONA

In the Matter of ) Arizona Supreme Court  
 ) No. R-15-0018  
RULES 31, 34, 38, 39 & 42, )  
RULES OF THE SUPREME COURT )  
 ) **FILED 08/27/2015**  
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**ORDER  
AMENDING RULES 31, 34, 38, 39, AND 42, AND PROMULGATING RULE 40,  
RULES OF THE ARIZONA SUPREME COURT**

A petition having been filed proposing to amend Rules 31, 34, 38, 39, and 42, Rules of the Arizona Supreme Court, and comments having been received, upon consideration,

IT IS ORDERED that Rules 31, 34, 38, 39, and 42, Rules of the Arizona Supreme Court, be amended, and Rule 40, Rules of the Arizona Supreme Court, be promulgated, in accordance with the attachment hereto, effective January 1, 2016.

IT IS FURTHER ORDERED that consideration of the proposed amendments to ER 1.6 is continued.

With respect to the proposed amendments to ER 1.10(d) and related Comments, refer to the order in R-13-0046.

DATED this 27th day of August, 2015.

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SCOTT BALES  
Chief Justice

**RULE 42. ARIZONA RULES OF PROFESSIONAL CONDUCT**

.....

**ER 1.0 Terminology**

.....

**Comment**

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under ERs 1.10, 1.11, 1.12 or 1.18.

**ER 1.5. Fees**

(a)-(d) [No change in text.]

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or each lawyer receiving any portion of the fee assumes joint responsibility for the representation;

(2) the client agrees, in a writing signed by the client, to the participation of all the lawyers involved and the division of the fees and responsibilities between the lawyers; and

(3) the total fee is reasonable.

....

**Comment [2003 amendment]**

....

**Division of Fee**

[8] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee by agreement between the participating lawyers if the division is in proportion to the services performed by each lawyer or all lawyers assume joint responsibility for the representation and the client agrees, in a writing signed by the client, to the arrangement. A lawyer should only refer a matter to a lawyer who the referring lawyer reasonably believes is competent to handle the matter and any division of responsibility among lawyers working jointly on a matter should be reasonable in light of the client's need that the entire representation be competently and diligently completed. See ERs 1.1, 1.3. If the referring lawyer knows that the lawyer to whom the matter was referred has engaged in a violation of these Rules, the referring lawyer should take appropriate steps to protect the interests of the client. Except as permitted by this Rule, referral fees are prohibited by ER 7.2(b).

**ER 1.10. Imputation of Conflicts of Interest: General Rule**

(a) [No change in text.]

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) [No change in text.]

(2) any lawyer remaining in the firm has information protected by ERs 1.6 and 1.9(c) that is material to the matter. If the only such information is contained in documents or electronically stored information maintained by the firm, and the firm adopts screening procedures that are reasonably adequate to prevent access to such documents or electronically stored information by the remaining lawyers, those remaining lawyers will not be considered to have protected information within the meaning of this Rule.

(c) [No change in text.]

(d) [See Order in R-13-0046.]

(e) [No change in text.]

....

**Comment [2003 and 2016 amendment]**

....

**Principles of Imputed Disqualification**

....

[5] ER 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate ER 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by ERs 1.6 and 1.9(c). For purposes of determining whether any current lawyer in the firm has such material information, information maintained by a firm in the form of documents, including electronically stored information, will not be imputed to the remaining lawyers if the firm adopts screening procedures that are reasonably adequate under the circumstances to prevent the remaining lawyers from accessing such information. In determining whether screening procedures are reasonably adequate, factors

to be considered include whether technology is available and has been implemented to restrict lawyer access to electronically stored information maintained by the firm and whether adequate notice is provided to lawyers in the firm regarding the screening procedures. Further guidance is provided in ER 1.0, comments [8] – [10]. In addition, the firm should consider whether its lawyers have access to internal electronic databases that utilize research memoranda or other work product from past client representations, to ensure that any protected information is removed from such databases or that access is appropriately restricted.

[6] – [8] [No change in text.]

[Proposed Comments [9]-[12], see Order in R-13-0046.]

### **ER 1.13. Organization as Client**

(a)-(g) [No change in text.]

#### **Comment [2004 amendment]**

....

#### **Government Agency**

[9] [No change in text.]

[10] A government lawyer may have an obligation to render advice to a government entity and constituents of a government entity. Normally, the government entity, rather than an individual constituent, is the client. Some government lawyers may also be elected officials or the employees of elected officials who have statutory obligations to take formal action against individual constituents under certain circumstances. The government lawyer, therefore, must clearly identify the client and disclose to the individual constituents any limitations that are imposed on the lawyer's other legal obligations. See ER 1.2(c) and related comments. Further, where a conflict arises between a constituent and the government entity the lawyer represents or between constituents of the same government entity, the lawyer must make the identity of the client clear to the constituents and determine which constituent has authority to act for the government entity in each instance.

[Re-number subsequent comments.]

### **ER 3.4 Fairness to Opposing Party and Counsel**

A lawyer shall not:

(a)-(f) [No change in text.]

**Comment [2003 amendment]**

....

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including electronically stored information~~computerized information~~. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

**ER 3.5. Impartiality and Decorum of the Tribunal**

A lawyer shall not:

(a)-(d) [No change in text.]

**Comment [2003 rule]**

....

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

**ER 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law**

(a) [No change in text.]

(b) Except as authorized by these Rules or other law, ~~A~~a lawyer who is not admitted to practice in ~~this jurisdiction~~ Arizona shall not:

(1) ~~except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction~~engage in the regular practice of Arizona law for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice Arizona law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in ~~this jurisdiction~~ Arizona that involve Arizona law and which:

(1) are undertaken in association with a lawyer who is admitted to practice in ~~this jurisdiction~~ Arizona and who actively participates in the matter.

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in ~~this Arizona~~ Arizona or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in ~~this Arizona~~ Arizona or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, or a lawyer admitted in a jurisdiction outside the United States, not disbarred or suspended from practice in any jurisdiction, may provide legal services in ~~this jurisdiction~~ Arizona that exclusively involve as authorized by federal law, the law of another or other law of this jurisdiction, or tribal law.

(e) A lawyer admitted in another United States jurisdiction, or a lawyer admitted in a jurisdiction outside the United States, not disbarred or suspended from practice in any jurisdiction, and registered pursuant to Rule 38(h)(a) of these rules, may provide legal services in ~~this jurisdiction~~Arizona that are provided to the lawyer's employer or its organizational affiliates and are not services for which ~~the forum requires~~ pro hac vice admission is required.

(fe) Any attorney who engages in the authorized multijurisdictional practice of law in ~~the State of~~ Arizona under this rule must advise the lawyer's client that the lawyer is not admitted to practice in Arizona, and must obtain the client's informed consent to such representation.

(gf) Attorneys not admitted to practice in ~~the State of~~ Arizona, who are admitted to practice law in any other jurisdiction in the United States and who appear in any court of record or before any administrative hearing officer in ~~the State of~~ Arizona, must also comply with Rules of the Supreme Court of Arizona governing *pro hac vice* admission. See Rule 39.

(hg) Any attorney who engages in the multijurisdictional practice of law in ~~the State of~~ Arizona, whether authorized in accordance with these Rules or not, shall be subject to the Rules of Professional Conduct and the Rules of the Supreme Court regarding attorney discipline in ~~the State of~~ Arizona.

### Comment

[1] Paragraph (a) applies to the unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. The definition of the practice of law is established by law and varies from one jurisdiction to another. For Arizona's definition, see Rule 31(a)(2)(A). Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. Paragraph (ba) does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See ER 5.3. Likewise, it does not prohibit lawyers from providing professional advice and instruction to nonlawyers whose employment requires knowledge of law, for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[2] Other than as authorized by these Rules or other law or this Rule, a lawyer who is not admitted to practice in Arizona violates paragraph (b)(1) if the lawyer engages in the regular practice of Arizona law in Arizona. A lawyer who is not admitted to practice in Arizona members of the State Bar of Arizona violates paragraph (b)(2) if the lawyer fails to state may comply with paragraph (b)(2) by stating in any advertisement or communication that targets or specifically offers legal services to Arizona residents that: (1) the non-member lawyer is not licensed to practice Arizona law the Supreme Court of Arizona; or and (2) the non-member's lawyer's practice is limited to federal legal matters, such as immigration law, or tribal legal matters, or the law of another jurisdiction. (for example, a non member may state his or her practice is limited to immigration matters). See ERs 7.1(a) and 7.5(b).

[3] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in Arizona that involve Arizona law under circumstances that do not create an unreasonable risk to the interests of their clients, the public



or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized.

[4] There is no single test to determine whether a lawyer's provision of legal services involving Arizona law are provided on a "temporary basis" in Arizona, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides legal services in Arizona that involve Arizona law on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[Note: First sentence of comment [1] added effective 1/1/15.]