IN THE SUPREME COURT OF GUAM

IN RE: REQUEST OF LOURDES A. LEON GUERRERO, *I MAGA'HÅGAN GUÅHAN*, RELATIVE TO THE DUTIES OF THE ATTORNEY GENERAL OF GUAM TO EXECUTIVE BRANCH AGENCIES.

Supreme Court Case No. CRQ24-001

OPINION

Cite as: 2024 Guam 18

Request for Declaratory Judgment Pursuant to
Section 4104 of Title 7 of the Guam Code Annotated
Argued and submitted on May 20, 2024
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; and KATHERINE A. MARAMAN, Associate Justice.

TORRES, C.J.:

[1] Petitioner Lourdes A. Leon Guerrero, *I Maga'hågan Guåhan* ("the Governor"), filed a Request for Declaratory Judgment under 7 GCA § 4104 about the responsibilities of the Attorney General of Guam to executive branch agencies under the Organic Act of Guam and the laws of Guam. We accepted this case on an expedited basis due to the pressing nature of the certified questions. We entered declaratory judgment on May 31, 2024, answering the questions certified to this court and retaining jurisdiction to issue a written opinion consistent with our declaratory judgment. Our opinion now follows.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] On February 28, 2024, Attorney General Douglas B. Moylan ("AG Moylan") sent notices to 22 executive branch agencies ("the agencies") of the Government of Guam, notifying them that he was "temporarily withdrawing" from representing them because of a potential conflict of interest between his representation of the agencies and his statutory role as Public Prosecutor. Req. Declaratory J. at 3 (Mar. 14, 2024). This potential conflict had arisen in criminal cases when, as alleged by the defendants, the Office of the Attorney General provided legal advice to some of these agencies and then prosecuted officials of those same agencies for the matters about which they consulted the Office of the Attorney General.

[3] In each of his 22 letters to the agencies, AG Moylan stated that the Guam Rules of Professional Conduct may not apply to the Office of the Attorney General the way they apply to private attorneys. So, AG Moylan stated he would not implement ethical screens to protect against

potential conflicts, nor would he appoint a special prosecutor. AG Moylan urged the agencies to secure independent legal counsel to provide for their needs.

[4] The next day, AG Moylan sent another letter to the 22 agencies, reaffirming that the Attorney General of Guam is not the attorney for the agencies and no attorney-client relationship exists. AG Moylan offered to process documents if the agencies agreed to certain terms in this letter, but if the agencies did not agree, he recommended they obtain independent counsel.

[5] Following these letters, the Speaker of the 37th Guam Legislature called an emergency session, and the Governor called for two special sessions, to address the issues that arose from AG Moylan's "withdrawals." Req. Declaratory J. at 4. According to the parties, no legislation addressing the issue was passed at these sessions. On March 14, 2024, the Governor petitioned this court under 7 GCA § 4104, seeking declaratory judgment on several questions related to AG Moylan's conduct.

[6] The Governor argues that the Attorney General of Guam "may not simply 'temporarily' refuse to perform the only function the Organic Act has assigned to him and leave agencies to fend for themselves." *Id.* at 5-6. She requested this court issue a judgment declaring:

> (1) The Attorney General of Guam may not withdraw from legal representation of Executive Branch agencies, or otherwise decline to provide legal services to these agencies, on the basis that the representation conflicts with his duties as Public Prosecutor.
>
> (2) In the event the [Office of the Attorney General] receives a claim or complaint against an agency official for actions performed in the course of the official's employment or related to the official's employment with the agency, the Attorney General shall implement conflict of interest protocols consistent with the Guam Rules of Professional Conduct.
>
> (3) If the Attorney General failed to implement conflict of interest protocols prior to initiating civil and criminal investigations into agency actions, the Attorney General is disqualified from representing government agencies in any matter

> related to the investigations, and from participating in or supervising investigations or prosecutions related to such matters.
>
> (4) Agencies the Attorney General is investigating without having implemented conflict of interest protocols are permitted to employ or contract with an attorney for the provision of legal services to their agencies, and the Attorney General is required to pay for such services.

Id. at 38-39. AG Moylan filed a response to the Governor's Request for Declaratory Judgment, arguing this court lacks jurisdiction to consider the Governor's questions, and the Governor's Request should be dismissed.

[7] On April 2, 2024, this court decided it had jurisdiction over the declaratory judgment action and accepted the case on an expedited basis due to the pressing nature of the certified questions. *See* Am. Order at 7 (Apr. 2, 2024) ("As it is unlikely for these questions to be resolved through the normal process of law outside a declaratory action, expedited resolution of these questions under § 4104 is appropriate."). We invited briefing on the following four questions certified by the Governor:

1. May the Attorney General of Guam withdraw from legal representation of an Executive Branch agency, or otherwise decline to provide legal services to such agency, when the Attorney General claims such representation conflicts with ongoing investigations or prosecutions?

2. May the Attorney General provide legal services to the agency, notwithstanding his access to confidential information from both the agency and the investigations and prosecutions?

3. Is the Attorney General required to implement conflict protocols consistent with the Guam Rules of Professional Conduct including, but not limited to, an ethical screen or assignment of investigations or prosecutions of agency officials to an independent Special Prosecutor?

4. If the Attorney General withdraws from representing an agency—or is otherwise unable to provide legal services to the agency—may the agency employ or procure the services of an attorney independent from the Attorney General to perform legal services for the agency, including review and approval of agency contracts as to legality and form?

Id. at 7-8. The parties each timely filed their briefs. Additionally, the Consolidated Commission on Utilities ("CCU"), Guam Power Authority ("GPA"), Guam Waterworks Authority ("GWA"), Guam Memorial Hospital Authority ("GMHA"), and Port Authority of Guam ("Port Authority") filed a joint *amici curiae* brief supporting the Governor.[1] Oral argument was held on May 20, 2024.

[8] On May 31, 2024, we issued a declaratory judgment answering the certified questions and entered judgment without an opinion under Rule 27(b)(2)(A)(ii) of the Guam Rules of Appellate Procedure ("GRAP"). We retained jurisdiction to issue a written opinion consistent with the declaratory judgment. AG Moylan petitioned for rehearing on June 14, 2024; we denied the petition on July 31, 2024.

II. JURISDICTION

[9] Besides having original jurisdiction over proceedings necessary to protect our appellate jurisdiction, the Organic Act grants the Supreme Court of Guam original jurisdiction "as the laws of Guam may provide." 48 U.S.C.A. § 1424-1(a)(1) (Westlaw through Pub. L. 118-157 (2024)); *In re Request of Leon Guerrero* ("*In re Leon Guerrero II*"), 2023 Guam 11 ¶ 21. We have original jurisdiction over declaratory judgment actions regarding "the interpretation of any law, federal *or* local, lying within the jurisdiction of the courts of Guam to decide, and upon any question affecting the powers and duties of [*I Maga'håga*] and the operation of the Executive Branch . . . ." 7 GCA § 4104 (2005); *In re Request of Leon Guerrero* ("*In re Leon Guerrero I*"), 2021 Guam 6 ¶ 8 (per

[1] We note that the *amici* filed their brief and participated in oral argument at this court's invitation and in compliance with the Guam Rules of Appellate Procedure. *See* Order at 2 (Apr. 9, 2024) ("The court is satisfied that the four questions certified by this court in its April 2, 2024, Amended Order impact the movant agencies, that they have a significant interest in the outcome of this matter, and that the court would benefit from granting them permission to file a joint amicus brief."); Guam R. App. P. 14(a) ("The Government of Guam or any of its branches, agencies, or instrumentalities may file an amicus curiae brief without the consent of the parties or leave of court."); Guam R. App. P. 14(g) ("[A]micus curiae may participate in oral argument with the court's permission.").

curiam); *In re Request of Calvo*, 2017 Guam 14 ¶ 5. Additionally, the Organic Act grants us the authority to "govern attorney . . . ethics and the practice of law in Guam, including . . . the conduct and discipline of persons admitted to practice law." 48 U.S.C.A. § 1424-1(a)(7).

[10] Under 7 GCA § 4104, this court has the power to issue declaratory judgments at the request of the Governor if certain conditions are met:

> [T]o pass jurisdictional muster, a party seeking a declaratory judgment must satisfy three requirements: (1) the issue raised must be a matter of great public importance; (2) the issue must be such that its resolution through the normal process of law is inappropriate as it would cause undue delay; and (3) the subject matter of the inquiry is appropriate for section 4104 review.

In re Request of Gutierrez ("*In re Gutierrez II*"), 2002 Guam 1 ¶ 9. We issued an order finding these requirements were met for the four questions the Governor posed. Am. Order (Apr. 2, 2024). We stand by the analysis in that order and shall only summarize here.

[11] "[P]ublic interest . . . signifies an importance of the issue to the body politic, the community, in the sense that the operations of the government may be substantially affected one way or the other by the issue's resolution." *In re Leon Guerrero I*, 2021 Guam 6 ¶ 15 (alterations in original) (quoting *In re Gutierrez II*, 2002 Guam 1 ¶ 26). Further, a "great public interest" requires that "the issue presented must be significant in substance and relate to a presently existing governmental duty borne by the branch of government that requests the opinion." *In re Gutierrez II*, 2002 Guam 1 ¶ 26 (quoting *In re Request of Gutierrez* ("*In re Gutierrez I*"), 1996 Guam 4 ¶ 4). We have found that issues "of consequence in terms of governmental function and resources" indicate public interest. *See In re Gutierrez I*, 1996 Guam 4 ¶¶ 5-6 (finding "great public interest" in a case involving the Department of Education because it is "one of the largest departments in Guam's Government and has a mission that directly impacts . . . nearly every family on the island," and "extensive governmental resources" were involved).

[12] Resolution of these questions will substantially affect government function since the Office of the Attorney General's withdrawal threatens to leave 22 executive branch agencies without legal services to perform essential functions. The provision of competent legal services to the executive branch is of great public concern. It is necessary for the 22 agencies to have legal representation to advise and defend public officials, review and approve public contracts, and maintain the uninterrupted operation of the agencies. These questions relate to a "presently existing governmental duty borne by the branch of Government requesting the opinion" because the Governor alleges AG Moylan's actions impinge on her general management of the executive branch. *See In re Gutierrez II*, 2002 Guam 1 ¶ 28; *see also* Pet'r's Reply Br. re: Jurisdiction at 24 (Mar. 26, 2024). The ability of the Attorney General of Guam to represent the public's interest is also of great importance to the community. The public must know that the Office of the Attorney General operates fairly and ethically without compromising the Attorney General's dual role as legal officer and chief prosecutor. Thus, the public has a great interest in both positions: (1) the ability of executive branch agencies to function and operate, and (2) the ability of the Attorney General to represent the interests of the public. This requirement is satisfied for all four questions.

[13] Under section 4104, a declaratory judgment may be issued only if "the normal process of law would cause undue delay." *In re Request of I Mina'trentai Dos Na Liheslaturan Guåhan*, 2014 Guam 15 ¶ 25. Section 4104 "was intended to provide a fast track for the initiation of cases before the Supreme Court of Guam so that rulings could be obtained on important issues of law without time consuming litigation in the inferior court." *In re Gutierrez I*, 1996 Guam 4 ¶ 8. Because there is no "bright line demarcation," undue delay is analyzed using a two-element test, requiring this court to "(1) measure the delay relative to the time that would be consumed by litigating the issue through the 'normal process of law' and (2) determine whether this delay is

'excessive or inappropriate.'" *In re Calvo*, 2017 Guam 14 ¶ 11 (quoting *In re Gutierrez I*, 1996 Guam 4 ¶ 7).

[14] We find the undue-delay prong is met for each of the four questions. For question 1, forcing each agency to file a collateral action to determine whether the Attorney General can withdraw from representing them would result in time-consuming piecemeal litigation—and potentially inconsistent decisions. Contrary to AG Moylan's arguments, there is significant uncertainty on when the propriety of his withdrawal will be discussed in the "related" cases he references.[2] *See* Mem. re Lack of Jurisdiction at 6-7 (Mar. 21, 2024); *see also In re Leon Guerrero II*, 2023 Guam 11 ¶ 28. Questions 2, 3, and 4 are unlikely to be answered in the normal process of law, except by filing a declaratory action. Forcing the Governor or some autonomous agency to bring a separate declaratory action later would mandate an arbitrary delay in resolution of these questions, which is "excessive or inappropriate." *See In re Leon Guerrero I*, 2021 Guam 6 ¶ 17. As it is unlikely for these questions to be resolved through the normal process of law outside of a declaratory action, expedited resolution of these questions under section 4104 is appropriate.

[15] We have held that the subject-matter requirement should be read disjunctively, permitting "the Governor to ask the Supreme Court for: (1) an interpretation of an existing law that is within its jurisdiction to decide; *or* (2) an answer to any question affecting [her] powers and duties as governor and the operation of the executive branch." *In re Calvo*, 2017 Guam 14 ¶ 14 (quoting *In re Gutierrez II*, 2002 Guam 1 ¶ 11). When faced with declaratory actions seeking to determine the duties of their attorneys general, other jurisdictions have held that "declaratory relief is

[2] We struck AG Moylan's "Statement of Related Cases" as inaccurately filed in violation of the GRAP, in part because "several cases listed are not 'related' to this case as contemplated in GRAP 13(l)." Declaratory J. at 4-6 (May 31, 2024). AG Moylan had argued that the legal issues in this case arose directly from ongoing criminal prosecutions. Mem. re Lack of Jurisdiction at 6-7 (Mar. 21, 2024).

particularly appropriate to determine the statutory duties of a public officer." *Brown v. Or. State Bar*, 648 P.2d 1289, 1293 (Or. 1982); *see also Martin v. Thornburg*, 359 S.E.2d 472, 473 (N.C. 1987); *Woodahl v. State Hwy. Comm'n*, 465 P.2d 818, 818 (Mont. 1970).

[16] We find the appropriate-subject-matter prong is met for each of the four questions. Question 1 raises an issue that impacts the operation of the executive branch and asks this court to interpret existing law that is within our jurisdiction to decide. Questions 2, 3, and 4 also ask this court to interpret local law, which satisfies this prong.

III. STANDARD OF REVIEW

[17] "For cases brought before this court pursuant to our original jurisdiction, all issues are determined in the first instance." *In re Leon Guerrero II*, 2023 Guam 11 ¶ 34 (quoting *In re Leon Guerrero I*, 2021 Guam 6 ¶ 20).

IV. ANALYSIS

[18] We answer the certified questions as follows.

A. May the Attorney General of Guam Withdraw from Legal Representation of an Executive Branch Agency, or Otherwise Decline to Provide Legal Services to such Agency, When the Attorney General Claims such Representation Conflicts with Ongoing Investigations or Prosecutions?

[19] The parties agree the answer to this question is no. Pet'r's Br. at 18-38 (Apr. 15, 2024); Resp't's Br. at 6 (Apr. 29, 2024). We also agree and answer this question in the negative. But a complete answer requires more guidance.

[20] In Guam, the Attorney General is charged with a dual role: to serve both as the Chief Legal Officer of the Government of Guam, 48 U.S.C.A. § 1421g(d)(1), and the Public Prosecutor, 5 GCA § 30104 (2005). Although the Organic Act outlines some duties of the Attorney General, Guam law vests the Attorney General with additional powers and responsibilities beyond those

laid out in the Organic Act. *See A.B. Won Pat Guam Int'l Airport Auth. ex rel. Bd. of Dirs. v. Moylan*, 2005 Guam 5 ¶ 2 (per curiam) (finding Attorney General has common law powers and duties that "may be subject to increase, alteration or abridgement by the Guam Legislature"). The Governor argues that the Attorney General's "ultimate, primary, and non-delegable responsibility is to provide legal services to autonomous agencies" as the Chief Legal Officer. Pet'r's Br. at 28. From this premise, she argues, "[T]he Attorney General may *not* withdraw from his Organic Act duty to serve as the attorney for and legal advisor to Executive Branch agencies on the basis that such representation conflicts with his duty to investigate or prosecute as the statutory public prosecutor." *Id.* at 38. AG Moylan seems to agree, stating "Guam law requires the AG perform both functions." Resp't's Br. at 6. He argues the Office of the Attorney General did not "formally withdraw" from representing the agencies but merely "paused representation." *Id.* at 56. The Governor refutes this claim, pointing out that AG Moylan specifically used the word "withdrawal" in his letters to the 22 agencies. Pet'r's Reply Br. at 7 (May 6, 2024). She states:

> While AG Moylan seeks to minimize the severity of his actions by belatedly attempting to frame his withdrawal as a 'pause' in his provision of services to the agencies, he essentially admits that he has declined to provide legal services to Executive Branch agencies for over two (2) months as of the date of this filing, while conceding he is not legally permitted to do so.

Id. at 8.[3]

[21] Before determining whether one role trumps the other, the duties and responsibilities of each role must first be understood. We outline the duties and responsibilities of the Attorney General as both the Chief Legal Officer of the Government of Guam and the Public Prosecutor.

[3] As this dispute highlights, the parties' use of the term "withdraw" is somewhat imprecise. As used in the Guam Rules of Professional Conduct, "withdrawal" is a term of art that means to terminate the attorney-client relationship. But as applied to the Attorney General, this definition becomes imprecise because, unlike in private practice, there are certain clients that he is required by law to represent.

Most of these duties are mandatory, and the Attorney General cannot "withdraw" from them. However, there may be select scenarios where the Attorney General may "withdraw" from certain aspects of his representation of executive branch agencies, although this can be done only where such withdrawal would not adversely affect the agency.

1. Chief Legal Officer: What duties does the Attorney General owe to the Government of Guam?

[22] The Organic Act does little more than state that "[t]he Attorney General of Guam shall be the Chief Legal Officer of the Government of Guam" and outline options for appointing, electing, and removing an Attorney General. 48 U.S.C.A. § 1421g(d)(1)-(2). The Organic Act does not define "Chief Legal Officer," so we look to other sources to determine the Attorney General's duties in that role. As Chief Legal Officer, the Attorney General "is charged with all the powers and duties pertaining to the office at common law, except insofar as they have been expressly restricted or modified by statute." *Moylan*, 2005 Guam 5 ¶ 67. The Attorney General also has "cognizance of all legal matters . . . involving the Executive Branch of the government of Guam," 5 GCA § 30102 (2005), and "is expected to provide legal services to those agencies that also are fiscally supported by the tax-base of the government of Guam," 5 GCA § 30201(a) (added by Guam Pub. L. 30-188:1 (Aug. 28, 2010)). These legal services can be divided into two primary categories: (1) procurement and contract review and (2) routine legal services and litigation. Under both categories, Guam law mandates the Attorney General's responsibilities while providing agencies some freedom in choosing outside counsel. Yet the Attorney General does not act alone, and as the administrator of the Office of the Attorney General, he may delegate his duties to deputies and assistants. 5 GCA § 30101(a) (as amended by P.L. 29-019:VI:52 (Sept. 29, 2007)) ("The Office of the Attorney General of the government of Guam shall *be administered* by the

Attorney General of Guam . . . ." (emphasis added)). As the *amici* note, the Attorney General "is not required to *personally* handle every matter." Amici Br. at 11 (May 6, 2024).

a. The Attorney General has mandatory duties regarding procurement and contract review

[23] The Attorney General's duties to agencies regarding procurement and contract review depend on whether the agency is subject to the Central Accounting Act. Under 5 GCA § 22601, agencies subject to the Central Accounting Act must have *all* their contracts approved by the Attorney General as to form and legality. 5 GCA § 22601 (2005) ("All contracts shall, after approval of the Attorney General, be submitted to the Governor for [her] signature. All contracts of whatever nature shall be executed upon the approval of the Governor."). Generally, the agencies subject to this statute are what we refer to as "line agencies"—i.e., those agencies not statutorily empowered to hire counsel separate from the Office of the Attorney General.[4] *See* 5 GCA § 22205 (2005); *see also* Amici Br. at 24. For these line agencies, it appears *all* agency contracts must be approved by the Attorney General; the law does not give these agencies an alternative avenue. Thus, the Attorney General owes a responsibility to these agencies to review all contracts so the agencies can function.

[24] For agencies not subject to the Central Accounting Act, including the *amici*, the Attorney General's responsibilities are different, as these agencies do not require the Attorney General's approval for all contracts. But the Attorney General must still "act as legal advisor during all phases of the solicitation or procurement process" when it "is estimated to result in an award of Five Hundred Thousand Dollars ($500,000) or more." 5 GCA § 5150 (as amended by P.L. 30-

[4] In this opinion, we use "line agencies" as a general term that encompasses executive branch agencies and departments that traditionally have not been statutorily empowered to employ private outside counsel. As discussed below, this term may be imprecise given that the Legislature may pass new statutes that expressly authorize line agencies to hire outside counsel.

157:1 (July 12, 2010)). Additionally, "[n]o contract for the services of legal counsel in the Executive Branch shall be executed without the approval of the Attorney General." 5 GCA § 5121(b) (as amended by P.L. 32-146:3 (Apr. 28, 2014)). Thus, even these agencies require the Attorney General's approval and review for procurement contracts exceeding $500,000 and to secure outside legal counsel. There is no other avenue for these agencies to pursue these necessities without the Office of the Attorney General.

[25] Thus, for line agencies, the Attorney General's review of all agency contracts is a mandatory duty. Similarly, reviewing solicitation and procurement contracts of $500,000 or more for all executive branch agencies is a mandatory duty of the Attorney General because under Guam law, only the Attorney General or his designee can perform these services. *See* 5 GCA § 5150. Although some executive branch agencies may hire outside counsel to prepare contracts of $500,000 or more, only the Attorney General can approve such contracts after reviewing them for form and legality. *See id.* Therefore, the Attorney General cannot "withdraw" from his duties to line agencies in contract review or any executive branch agencies for contracts and procurements of $500,000 or more.

[26] In the event of a conflict of interest or disagreement over the public interest, the procurement code empowers the Attorney General to appoint special assistant attorneys general. *See id.* We do not see this as "withdrawing" since the Attorney General would still have the duty to appoint a special assistant attorney general, who would act on behalf of the Office of the Attorney General. Thus, the Attorney General cannot "withdraw" from representing executive branch agencies entirely, as he cannot abdicate his mandatory duties related to procurement and contract approvals. However, as will be seen in the next section, he may still be able to "withdraw" from certain duties in specific circumstances.

b. The Attorney General has mandatory legal service and litigation responsibilities

[27] Generally, the Attorney General is expected to represent the Government of Guam in litigation. *See* 5 GCA § 30109(c) (as amended by P.L. 31-153:2 (Nov. 21, 2011)) ("[T]he Attorney General . . . *shall* . . . conduct on behalf of the government of Guam all civil actions in which the government is an interested party . . . ." (emphasis added)).[5] However, the Legislature provided a caveat that "agencies which are authorized to employ their own legal counsel may use them instead of the Attorney General." *Id.*; *see also* 12 GCA § 8112(d) (2005) (providing that Attorney General shall represent GPA in litigation unless he delegates duty to GPA attorney); 12 GCA § 14109(c) (2005) (same regarding GWA); 10 GCA § 80114(a) (added by P.L. 30-190:1 (Aug. 28, 2010)) (same regarding GMHA). Thus, the law permits certain executive branch agencies to relieve the Office of the Attorney General of its duty to represent them, while denying other agencies this ability (i.e., "line agencies"). What the Attorney General owes to these two categories of executive branch agencies differs.

i. The Attorney General cannot withdraw from providing routine legal services to "line agencies" or representing them in litigation

[28] Line agencies are not statutorily empowered to hire outside counsel for legal matters, suggesting that the Office of the Attorney General alone is empowered to represent these agencies. Much like the analysis above, if the law dictates a duty of the Attorney General and provides no other avenue for agencies to otherwise obtain such services, then that duty is mandatory, and the

[5] The Attorney General is further authorized to provide legal services to agencies not supported by the General Fund if such services are requested. 5 GCA § 30102; *see also, e.g.*, 5 GCA § 5151(a) (added by P.L. 32-068:XII:16 (Sept. 11, 2013)) ("The Department of Public Works (DPW), the Guam Board of Professional Engineers, Architects and Land Surveyors (PEALS), and the Guam Building Code Council (GBCC) may enter into a Memorandum of Understanding (MOU) to jointly fund an Assistant Attorney General to specifically provide legal services to DPW, GBCC, and the PEALS Board only.").

Attorney General may not "withdraw" from performing it. Rule 1.16 of the Guam Rules of Professional Conduct ("GRPC") further supports this notion. Rule 1.16 governs the withdrawal of attorneys, and when an attorney "withdraws" under this rule, it results in the termination of the attorney-client relationship. *See* Guam R. Prof'l Conduct 1.16; *see also, e.g.*, *In re Suspension of: Joseph*, 56 V.I. 490, 502 (2012) (per curiam) ("As Model Rule 1.16 itself recognizes, a lawyer may only unilaterally terminate the attorney-client relationship in a very narrow set of circumstances . . . ."). Rule 1.16 states that a lawyer may withdraw if "withdrawal can be accomplished without material adverse effect on the interests of the client." Guam R. Prof'l Conduct 1.16(b)(1). If the Attorney General "withdraws" from providing a line agency with routine legal services and litigation representation, the agency would have no other avenue to obtain legal counsel. This would undoubtedly cause a material adverse effect on the line agency. Thus, the Attorney General cannot withdraw from the representation of a line agency.

[29] So, in the event of a conflict of interest or disagreement over the public interest with a line agency, the Attorney General is required to appoint a special assistant attorney general to represent the agency through his common law powers. *See State ex rel. Discover Fin. Servs., Inc. v. Nibert*, 744 S.E.2d 625, 649 (W. Va. 2013) ("[T]he Attorney General has common law authority to appoint special assistant attorneys general." (quoting *Kinder v. Nixon*, No. WD 56802, 2000 WL 684860, at *11 (Mo. Ct. App. May 30, 2000), *transferred sub nom. State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122 (Mo. 2000) (en banc))); *Sears v. State*, 24 Ill. Ct. Cl. 452, 458 (1964) ("Because of this common law and constitutional authority as the chief legal officer of the State, the Attorney General has the inherent power to appoint Special Assistant Attorneys General."); *Landrum v. Commonwealth ex rel. Beshear*, 599 S.W.3d 781, 786 n.8 (Ky. 2019) (collecting cases); *see also*

Moylan, 2005 Guam 5 ¶ 62 (holding that Attorney General retains all common law powers not abrogated by statute).

[30] The Legislature temporarily gave line agencies the ability to hire independent counsel through Public Law No. 36-107: "Government of Guam departments and agencies that do not customarily obtain professional services, such as . . . legal services . . . through an employee in the classified service in that department or agency may contract to obtain such services." Guam Pub. L. 36-107:XII:18 (Sept. 12, 2022). This temporary ability was extended by subsequent appropriations bills. P.L. 37-42:XII:18 (Sept. 11, 2023); P.L. 37-125:XII:20 (Sept. 11, 2024). The Legislature has empowered line agencies with this ability only through Fiscal Year 2025.[6] Because this is a temporary ability and not a permanent one, we use the term "line agencies" to refer to those that agencies that were not authorized by statute to hire outside counsel before Public Law No. 36-107. These enactments mean that for Fiscal Years 2024 and 2025, line agencies fall under the same rules as analyzed in subpart (*ii*) below, as they have been temporarily granted the ability to hire independent counsel. The key inquiry is not whether the entity is an "independent" or "line" agency, but whether there is express statutory authority to hire outside counsel.

ii. The Attorney General may be able to withdraw from providing routine legal services and litigation representation to independent agencies

[31] Unlike "line agencies," several agencies and autonomous public corporations are statutorily empowered to hire counsel other than the Attorney General. *See, e.g.*, 12 GCA § 8112(a) (GPA); 12 GCA § 14109(a) (GWA); 10 GCA § 80114(a) (GMHA); 12 GCA § 10105(f) (2005) (Port Authority). This does "not preclude said agency or public corporation from

[6] Public Law No. 37-42 was in effect at the time we issued our declaratory judgment, and Public Law No. 37-125 is in effect at the time of this opinion.

requesting the services of the offices of the Attorney General." 5 GCA § 30102 (emphasis added); *see also Moylan*, 2005 Guam 5 ¶ 19 ("[A]lthough the Attorney General is authorized to institute civil actions on behalf of the Government of Guam, an individual agency such as [the Airport Authority] may instead utilize its outside counsel for such purposes."). Whether the Attorney General must accept an agency's "request" for the services of the Office of the Attorney General is an issue of first impression.

[32] The reasoning of the Supreme Judicial Court of Maine in *Superintendent of Insurance v. Attorney General*, 558 A.2d 1197, 1200 (Me. 1989), is instructive. There, the court was asked to determine whether a Maine statute imposed a mandatory duty on the Attorney General to represent agencies and officers of the State of Maine in all civil actions involving their official acts. *Id.* at 1199. The court found that even as modified by statute, the common law duties of the Attorney General involved more discretion than was allowed by the lower court's ruling. *Id.* The court observed that "at common law the Attorney General did not represent every state official nor was he required to do so." *Id.* at 1200. The court reasoned that passage of a statute which stated that the Attorney General "shall" represent state agencies did not "remove[] all discretion and require[] that the Attorney General represent all state agencies regardless of his view of the public interest." *Id.* The court held that "[b]oth the history of the enactment of section 191 and its plain language support our conclusion that the Legislature directed the Attorney General to control state litigation and consolidated control in his office without mandating representation in all cases." *Id.* The court emphasized that "[a] contrary conclusion would ignore the provisions of the statute authorizing the employment of private counsel with 'written approval of the Attorney General.'" *Id.* However, it declined to address "whether approval could be withheld for the employment of private counsel because of a disagreement over the public interest." *Id.*

[33] Like the statutory scheme considered in *Superintendent of Insurance*, Guam law provides that the Attorney General "shall" represent the government in civil actions. *See* 5 GCA § 30109(c). We find persuasive the reasoning of the Supreme Judicial Court of Maine and find that the Attorney General may withdraw from representation in some instances based on his view of the public interest. However, 5 GCA § 5121(b) and GRPC 1.16 call for restrictions on this power.

[34] Title 5 GCA § 5121(b) mandates that even where an agency can hire private counsel, the Attorney General must first approve the employment of said counsel. This duty implies that the Attorney General is responsible for ensuring these executive branch agencies are adequately represented before delegating his duty to the private attorney and cannot simply "withdraw" from representing the agency before first ensuring the agency has secured other counsel. While the Attorney General may be permitted to "withdraw" legal services and litigation representation from certain executive branch agencies, he is not permitted to do so until he has first approved a contract for the agency to hire private counsel. This also helps ensure that the Office of the Attorney General would not withhold approval of the employment of private counsel due to disagreements over public interest, as the Attorney General would still "represent" the agency up until the time the contract is approved.

[35] Additionally, GRPC 1.16 requires that an agency not be prejudiced by the Attorney General's withdrawal. Guam R. Prof'l Conduct 1.16; *see also Law. Disciplinary Bd. v. McGraw*, 461 S.E.2d 850, 863 (W. Va. 1995) (finding Rule 1.16 of West Virginia Rules of Professional Conduct permitted Attorney General to withdraw so long as withdrawal would not prejudice interests of agency client). Even where the Attorney General can withdraw from providing legal services and litigation representation to certain executive branch agencies, GRPC 1.16 would not allow him to do so if it would prejudice the agency. If an agency cannot secure private counsel—

for example, because of a lack of qualified private attorneys or conflicts of interest—the Attorney General would not be permitted to withdraw from representation since doing so would "prejudice" the agency. Additionally, the Attorney General could not stop providing legal services to the agency until the agency obtained private counsel and had the contract approved by the Attorney General.

[36] Thus, the Attorney General may withdraw from providing legal services and litigation representation to independent executive branch agencies if he approves a contract for private counsel, and if doing so would not prejudice the agency.[7]

[37] In the event of a conflict of interest or disagreement over the public interest, the Attorney General cannot withdraw from procurement and contract review because doing so would prejudice the agencies. The Attorney General also cannot withdraw from providing routine legal services to agencies that cannot hire outside counsel, nor can he withdraw from representing them in litigation. Allowing withdrawal in such cases would also cause prejudice to those agencies. The narrow exception is that the Attorney General may withdraw from providing routine legal services to an independent agency or representing them in litigation if he can do so without prejudicing their interests, and he first approves the employment of private counsel. Thus, most duties the Attorney General owes to the Government of Guam are mandatory and cannot be withdrawn from. But when a conflict of interest or disagreement over the public interest arises, the Attorney General does not violate his duties as Chief Legal Officer with regard to procurement, contract review,

[7] This ability to withdraw from legal services representation in certain circumstances would not remove the Attorney General's duty to review contracts for procurement as described above. Thus, even if the Attorney General "withdraws" from representing an executive branch agency in litigation, he would still not be permitted to "withdraw" from reviewing their contracts for form and legality.

provision of routine legal services, or litigation when he appoints a special assistant attorney general.

2. Public Prosecutor: What does the Attorney General owe to the public?

[38] The Attorney General serves as the Public Prosecutor and has "cognizance of all matters pertaining to public prosecution, including the prosecution of any public officials." 5 GCA § 30104. In this role, the Attorney General has "broad authority to investigate and prosecute claims and perform other duties required by law." *Att'y Gen. of Guam v. Gutierrez*, 2011 Guam 10 ¶ 37. These duties include that he, or "a deputy or assistant, *shall*: . . . be diligent in protecting the rights and properties of the government of Guam; [and] . . . perform such other duties as are required by law." 5 GCA § 30109(f), (l) (emphasis added).

[39] Unlike the role of Chief Legal Officer, the Attorney General's role as Public Prosecutor was created not by the Organic Act but by statute.[8] The Governor argues this makes the Chief Legal Officer role inherently more important than the role of Public Prosecutor. Pet'r's Br. at 37 ("Because the Attorney General's public prosecutor role is statutory, it is secondary and subservient to his Organic Act role as the government's chief legal officer, and the corresponding responsibilities of providing legal services to government agencies."). AG Moylan has publicly countered that he should not be forced to "step[] aside from [p]rotecting the People of Guam's legal interests for [half] of the elected AG's duties." Pet'r's Br. at 38 (quoting Req. Declaratory J., Ex. 1 at 2 (Letter, Feb. 28, 2024)). But he has done just that by withdrawing from representing the agencies. *See* Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. Fla. J.L. & Pub. Pol'y 1, at *12 (1993) (indicating that whether the Attorney General

[8] The Organic Act has a provision that permits that "[t]he Government of Guam may by law establish an Office of Public Prosecutor." 48 U.S.C.A. § 1421g(c). But the separate office has not been established.

is representing the state government or enforcing some law against the state government, she represents the public interest). Instead, his actions seem to reflect his belief that his role as Public Prosecutor trumps any duties as Chief Legal Officer.

[40] AG Moylan is correct that, because he is elected by the people of Guam, acting in the people's and the public's interest is considered a core function of the Office of the Attorney General. *See* Justin G. Davids, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers*, 38 Colum. J.L. & Soc. Probs. 365, 373-74 (2005). While the Organic Act may not define his duties as the Public Prosecutor, they are nonetheless mandatory. Even so, the implication that the Attorney General's duty to the public is so paramount that it would permit him to sit at both the prosecution and the defense table at the trial of a public official must be rejected. *See* Resp't's Br. at 27-29 (arguing if the Attorney General were the only attorney in the Office of the Attorney General, he could perform all functions without issue and that assistant attorneys general can simultaneously represent an agency and prosecute its officials); *id.* at 47-48 ("No conflict walls can exist that prevent the AG from *himself* having direct control and cognizance over prosecuting a corrupt government official and providing legal services to the [agency] which that government official serves." (emphasis added)). As the South Carolina Supreme Court once observed: "The Attorney General is not required to sit at both the prosecution and the defense table in the prosecution of a public official . . . . Of course, the Attorney General cannot participate both in the prosecution and defense of a public official." *State ex rel. McLeod v. Snipes*, 223 S.E.2d 853, 855-56 (S.C. 1976).

3. The Attorney General's dual roles can be performed simultaneously

[41] AG Moylan and the Governor are correct that the Attorney General's powers and responsibilities as both the Chief Legal Counsel of the Government of Guam and the Public

Prosecutor can create conflicting interests. However, both parties are misguided in their conclusions that one role must categorically give way to the other. Instead, we reject both arguments, as the Attorney General may not abrogate his responsibility to one or the other. In addressing a similar issue, the Mississippi Supreme Court held:

> Under our scheme of laws, the attorney general has the duty as a constitutional officer possessed with common law as well as statutory powers and duties to represent or furnish legal counsel to many interests—the State, its agencies, the public interest and others designated by statute.
>
> Paramount to all of his duties, of course, is his duty to protect the interest of the general public.
>
> The question presented under these circumstances is whether the attorney general must abrogate his responsibility to one or the other. We think not . . . .

State ex rel. Allain v. Miss. Pub. Serv. Comm'n, 418 So. 2d 779, 782 (Miss. 1982) (en banc). In rejecting the premise that the Attorney General must choose between his responsibilities to the government and the public as a false dichotomy, the court observed:

> The attorney general has a large staff which can be assigned in such manner as to afford independent legal counsel and representation to the various agencies. The unique position of the attorney general requires that when his views differ from or he finds himself at odds with an agency, then he must allow the assigned counsel or specially appointed counsel to represent the agency unfettered and uninfluenced by the attorney general's personal opinion.

Id. at 784. Thus, when the responsibilities of the Attorney General to represent the government and the public come into conflict, he must assign his staff in a way that both (1) affords independent legal counsel and representation to the agencies and (2) seeks justice in prosecutions brought in the People's name. Because the public's interest in prosecutions—even of government corruption—is not elevated above the Attorney General's duty to represent executive branch agencies, nothing prevents the Attorney General from withdrawing from a *prosecution* in an

appropriate case. But if he does not, then he must allow assigned or specially appointed counsel to represent the agency unfettered and uninfluenced by the Attorney General.

4. We answer Question 1 in the negative

[42] The Attorney General may not completely withdraw from legal representation of any executive branch agency. Additionally, the Attorney General has mandatory duties from which he cannot withdraw or decline to perform in any circumstance. These duties include: reviewing *all* contracts for "line agencies"; reviewing contracts or procurements worth $500,000 or more for all executive branch agencies; and reviewing contracts for legal counsel for all autonomous agencies. *See* 5 GCA § 22601; 5 GCA § 5150; 5 GCA § 5121(b). The Attorney General also may not withdraw from providing legal services and litigation representation to line agencies as doing so would prejudice them in violation of GRPC 1.16. The Attorney General is, however, allowed to partially withdraw from providing an autonomous agency with non-mandatory legal services and litigation representation where (1) the Attorney General has approved a contract for the agency to hire private counsel, (2) the withdrawal can be done without material adverse effect to the agency, and (3) the Attorney General can take steps to the extent reasonably practicable to protect the agency's interests after withdrawal. *See* Guam R. Prof'l Conduct 1.16(b)(1); 5 GCA § 5121(b); *see also Moylan*, 2005 Guam 5 ¶ 19.

B. May the Attorney General Provide Legal Services to the Agency, Notwithstanding His Access to Confidential Information from Both the Agency and the Investigations and Prosecutions?

[43] The Governor contends that "[a]bsent informed consent, the Attorney General may not provide legal services to agencies and participate in investigations and prosecutions if he has access to confidential information from both." Pet'r's Br. at 51. The threshold issue that the parties disagree about is whether an attorney-client relationship exists between the Attorney

General and executive branch agencies. The Governor argues that agencies are clients of the Attorney General, and the risk for split loyalties and breaches of confidentiality is too high. Pet'r's Reply. Br. at 12, 22-23. The Governor claims AG Moylan's current policy allows agency attorneys to "l[ie] in wait for an official to violate the law so that they can investigate and prosecute them." Pet'r's Br. at 54. AG Moylan does not seem to dispute the Governor's characterizations of his policies regarding agency attorneys. *See, e.g.*, Resp't's Br. at at 28 (arguing that assistant attorneys general can simultaneously represent an agency and prosecute its officials). Instead, he focuses most of his arguments on whether agency *officials* are clients of the Office of the Attorney General. *See id.* at 41-46. At the same time, he does not seem to dispute that agencies are in some sense his clients,[9] but argues that "[t]he attorney-client relationship is tempered by the AG's legal duty of loyalty to the People & protecting their 'Public Interest.'" *Id.* at 42.

1. The agencies are the Attorney General's clients

[44] The Governor argues that "the Government of Guam—a distinct legal entity composed to act in the public's interest—is the Attorney General's principal client." Pet'r's Br. at 18. AG Moylan, however, does not directly address this claim. Instead, he argues that *officials* are not his clients, and if an official breaks the law, then his professional obligations to the agency essentially evaporate. *See* Resp't's Br. at 16-17, 30, 33, 36-46. As the Governor points out, AG Moylan's arguments on his responsibilities to "officials" are not a part of this Petition. "Rather, the Petition is based on AG Moylan's withdrawal from legal representation of *agencies*, his organizational clients." Pet'r's Reply Br. at 13.

[9] But AG Moylan qualifies the duties he owes such "clients" to such an extent that it bears no resemblance to any reasonable understanding of an attorney-client relationship. He argues that once a public official breaks the law, apparently as determined by the Attorney General himself, all the confidences and documents of the agency are fair game for disclosure to prosecutors without consulting the client. *See* Resp't's Br. at 60.

[45] A survey of jurisdictions reveals the majority rule is that "a relationship akin to the traditional attorney-client relationship [exists] between the Attorney General and the state officials and agencies the Attorney General represents." *State ex rel. Comm'r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 773 (Tenn. Ct. App. 2001); *Attorney General v. Mich. Pub. Serv. Comm'n*, 625 N.W.2d 16, 28 (Mich. Ct. App. 2000) ("[W]hen the Attorney General advises or represents another official, agency, or department, an attorney-client relationship is thereby formed, and the rules regarding professional conduct apply." (citation omitted)); *Manchin v. Browning*, 296 S.E.2d 909, 920 (W. Va. 1982) ("The Legislature has thus created a traditional attorney-client relationship between the Attorney General and the state officers he is required to represent."), *overruled on other grounds by Nibert*, 744 S.E.2d 625; *Holloway v. Ark. State Bd. of Architects*, 86 S.W.3d 391, 400 (Ark. Ct. App. 2002), *aff'd in part, rev'd in part*, 101 S.W.3d 805 (Ark. 2003); *Chun v. Bd. of Trs. of Emps.' Ret. Sys. of State of Haw.*, 952 P.2d 1215, 1238 (Haw. 1998) ("The Attorney General stands in a traditional attorney-client relationship to a state officer [or instrumentality] [s]he is required by statute to defend." (alterations in original) (quoting *Manchin*, 296 S.E.2d at 920-21)); *Blue Lake Forest Prods., Inc. v. United States*, 75 Fed. Cl. 779, 792 (2007) ("[W]henever the United States, its agencies, or officers are involved in litigation, an attorney-client relationship exists between DOJ attorneys and an affected federal agency and its officers."); *Morgan v. N.Y. State Dep't of Envt'l Conservation*, 779 N.Y.S.2d 643, 645 (App. Div. 2004) ("[S]tate agencies have an attorney-client relationship with the Attorney General's office, as that office is obligated to prosecute, defend and control all legal business of state agencies."). We agree that the Attorney General has an attorney-client relationship with executive branch agencies in Guam.

[46] It is also well settled that the Attorney General must conform his conduct to that prescribed by the rules of professional ethics. *Barrett-Anderson v. Camacho*, 2018 Guam 20 ¶ 24 ("We begin by rejecting the Attorney General's request for flexibility under the Guam Rules of Professional Conduct based on her unique position as the Chief Legal Officer of the Government of Guam."); *Manchin*, 296 S.E.2d at 920 ("As a lawyer and an officer of the courts of this State, the Attorney General is subject to the rules of this Court governing the practice of law and the conduct of lawyers, which have the force and effect of law."). Thus, the GRPC apply to the Attorney General's relationship with executive branch agencies—he "owes a duty of undivided loyalty" to executive agencies and "must exercise the utmost good faith to protect their interests." *Medicine Bird Black Bear White Eagle*, 63 S.W.3d at 773; *Holloway*, 86 S.W.3d at 400; *In re Pioneer Mill Co.*, 33 Haw. 305, 307 (1935) (holding that Attorney General's "relation to the Territory thus became the sacred and confidential one which an attorney bears to his client—a relation which demands the highest degree of loyalty and fidelity known to the law").

[47] The Attorney General is required to "(1) preserve client confidences to the extent public clients are permitted confidences, (2) exercise independent judgment on his or her client's behalf, and (3) represent his or her clients zealously within the bounds of the law." *Medicine Bird Black Bear White Eagle*, 63 S.W.3d at 773; *see also McGraw*, 461 S.E.2d at 862 ("We see no conflict between [the Attorney General's] duty as a servant of the public and his ethical duty of confidentiality under Rule 1.6(a) of the *Rules of Professional Conduct*."). But as an inanimate entity, an agency must act through its agents since it cannot speak directly to its lawyers. *Cf. Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985) ("A corporation cannot speak directly to its lawyers."). Although the client is the agency, when one of the constituents of an agency communicates with the agency's lawyer in that person's official

capacity, the communication is confidential. *See Jesse by Reinecke v. Danforth*, 485 N.W.2d 63, 67 (Wis. 1992).

[48] The parties disagree over how GRPC 1.13 affects these obligations. Rule 1.13(d) provides: "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." Guam R. Prof'l Conduct 1.13(d). Thus, while AG Moylan is correct that the attorney-client relationship with individual officials is limited because his "client" is the agency and not its individual employees, when officials are dealing with the Office of the Attorney General in their official capacity, the Office of the Attorney General must explain when the organization's interests are adverse to those of the official. Additionally, because agencies conduct business through various officials and employees, many of the agency client's privileges extend to officials interacting with the Office of the Attorney General in their official capacity.[10] *See Mead Data Cent., Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 253 n.24 (D.C. Cir. 1977) ("Where the client is an organization, the privilege extends to those communications between attorneys and all agents or employees of the organization who are authorized to act or speak for the organization in relation to the subject matter of the communication.").

[10] Although related concepts, there is an important distinction between the attorney-client privilege and the duty of confidentiality. *In re Est. of Rabin*, 474 P.3d 1211, 1219 (Colo. 2020) ("The duty of confidentiality is broader than the attorney-client privilege and prohibits disclosure of any 'information relating to the representation of a client' unless the client consents or an exception applies." (citation omitted)). In his petition for rehearing, AG Moylan argued that the attorney-client privilege could not be invoked by public officials to hide official misconduct. Pet. Reh'g at 10-13 (June 14, 2024). However dubious this proposition may be, it does not follow that this would negate the duty of confidentiality (or of loyalty for that matter). We have already rejected the argument that government lawyers have no duty of confidentiality to government clients. *See Amici* Answer to Pet. Reh'g at 5 (July 3, 2024) ("Guthrie, as a Deputy Attorney General, has the same duty of confidentiality as any other lawyer." (quoting *In re Guthrie*, ADC04-002 (Guam Sup. Ct. Oct. 14, 2005))).

2. Although there is no inherent conflict of interest mandated by the Attorney General's dual Organic Act and statutory roles, actual conflicts may arise

[49] The Governor argues that "[t]o the extent the [public prosecutor and chief legal officer] duties conflict, AG Moylan is required to continue services to his constitutional agency clients, and implement appropriate ethics protocols to mitigate against the breaches of the duty of loyalty and duty of confidentiality he owes to his agency clients." Pet'r's Br. at 15-16. The Governor does not contend that the dual roles of the Attorney General are inextricably in conflict, but that as applied to the Office of the Attorney General's current structure and policies, an actual conflict exists. *See id.* at 16-17. AG Moylan maintains that he can perform both roles, but that his duties to the agencies are "tempered" by his duty to the public interest. Resp't's Br. at 42.

[50] Despite the attorney-client relationship being near sacred in American law, *e.g.*, *United States v. Schell*, 775 F.2d 559, 565 (4th Cir. 1985), a surprising number of courts have found no issue with a state attorney general prosecuting a state officer he formerly represented, *see United States v. Troutman*, 814 F.2d 1428, 1438 (10th Cir. 1987) (collecting cases). These cases discuss the possibility of the Attorney General having a *per se* conflict of interest and an actual conflict. We discuss each possibility below.

a. There is no inherent or per se conflict of interest between the Attorney General's dual roles

[51] The Tenth Circuit's decision in *United States v. Troutman* stands for the proposition that "a state attorney general has a primary responsibility to protect the interests of the people of the state and must be free to prosecute violations of those interests by a state officer regardless of his representation of the state officer in past or pending litigation." 814 F.2d at 1438. The Tenth Circuit held that "no inherent conflict of interest existed merely because the Attorney General had advised Troutman, in Troutman's official capacity as the State Investment Officer, on matters

unrelated to the offenses charged." *Id.* at 1437 (emphasis added); *see also State v. Armijo*, 887 P.2d 1269, 1284 (N.M. Ct. App. 1994) (finding no conflict of interest where attorney general's office approved legal sufficiency of contract which was subject of indictment of defendant because "attorneys involved in the review were in a different division of the attorney general's office from those prosecuting the case, and there was no evidence of any confidential communications between Defendant and the attorney general's office"). The Hawai'i Supreme Court posited in *State v. Klattenhoff* that the majority rule is that the Attorney General is allowed "to concurrently represent conflicting interests when the AG can ensure independent representation for the competing parties." *State v. Klattenhoff*, 801 P.2d 548, 551 (Haw. 1990) (collecting cases), *abrogated on other grounds by State v. Walton*, 324 P.3d 876 (Haw. 2014). The court in *Klattenhoff* was also pragmatic:

> The practical reality is that every employee, appointee or elected official in state government who may be advised by the AG, or receive some legal service from the AG is a potential client of the AG. Thus, there is a potential conflict whenever the AG exercises his statutory duty to investigate and prosecute violations of state law committed by people in state service. Carried to its logical end, appellant's argument would mean that every time a state employee, appointee or elected official became the subject of a criminal investigation, that party could disqualify the AG from prosecuting based upon an alleged conflict-of-interest. Thus, the AG would constantly be prevented from performing his legal duties as the State's chief law enforcement officer.

Id. The court ultimately held that "the AG 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." *Id.* at 552.

[52] We conclude there is no inherent conflict of interest in the Attorney General serving as Chief Legal Officer and Public Prosecutor. *See, e.g.*, Lacy H. Thornburg, *Changes in the State's Law Firm: The Powers, Duties and Operations of the Office of the Attorney General*, 12 Campbell L. Rev. 343, 359 (1990) ("[I]t is imperative that the Attorney General simultaneously represent both the state agency and the public interest."). The Attorney General has a responsibility to protect the people of Guam's interests and must be free to investigate and prosecute violations of those interests by a government officer despite his representation of the officer in past or pending litigation. *See Troutman*, 814 F.2d at 1438. There is no inherent conflict of interest where the Attorney General has merely advised a government officer in their official capacity on matters *unrelated* to the offenses charged. *See id.* at 1437. The Office of the Attorney General may concurrently represent conflicting interests if the Attorney General can ensure independent representation for the competing parties. Contrary to AG Moylan's arguments, the fact that there is no *per se* conflict of interest whenever the Attorney General exercises his statutory duty to investigate and prosecute violations of Guam law committed by people in government service does not mean the Attorney General can never have a conflict.

b. Actual conflicts of interest may still arise when the Attorney General prosecutes an official

[53] The Governor contends that "based on current policy within the [Office of the Attorney General], it appears that communications between attorneys and their agency clients are *never* confidential." Pet'r's Br. at 52. The Governor further argues:

> AG Moylan's testimony [before the Legislature] highlights that there are no screens between assistant attorney[s] general[] who advise agencies and those investigating them. In fact, AG Moylan expects that if agency attorneys observe conduct that may violate the law, they are not expected to advise agency officials to correct such violations, they simply turn into prosecutors and "handle" the matters.

Id. We can answer the legal question of whether the Attorney General can be conflicted without making the factual determination that AG Moylan is conflicted in any specific case. *See In re I Mina'trentai Dos Na Liheslaturan Guåhan*, 2014 Guam 15 ¶ 54. We express no view on specific factual situations that are pending or may come before us.

[54] The appropriate disqualification standard is whether the Attorney General, "by reason of his professional relation with the accused, . . . has acquired knowledge of facts upon which the prosecution is predicated, or which are closely interwoven therewith." *State v. Coulter*, 67 S.W.3d 3, 29-30 (Tenn. Crim. App. 2001) (quoting *State v. Phillips*, 672 S.W.2d 427, 430-31 (Tenn. Crim. App. 1984)), *abrogated on other grounds by State v. Jackson*, 173 S.W.3d 401 (Tenn. 2005); *State v. McKibben*, 722 P.2d 518, 525 (Kan. 1986). Stated a different way, an actual conflict of interest exists when the Attorney General has advised a government officer in their official capacity on matters *related* to the offenses charged. The principles articulated by the Supreme Court of California in a civil context are just as persuasive when applied to prosecutions:

> The issue then becomes whether the Attorney General may represent clients one day, give them legal advice with regard to pending litigation, withdraw, and then sue the same clients the next day on a purported cause of action arising out of the identical controversy. We can find no constitutional, statutory, or ethical authority for such conduct by the Attorney General.

People ex rel. Deukmejian v. Brown, 624 P.2d 1206, 1207 (Cal. 1981) (in bank). Thus, the duty of loyalty is violated and an actual conflict of interest exists when an attorney prosecutes officials for matters on which they have advised the agency. The Attorney General may not represent an agency one day, give agency officials legal advice regarding certain issues, withdraw, and then prosecute the same officials the next day for following his legal advice.

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3. Whether a particular government attorney's conflict of interest should be imputed to the entire Office of the Attorney General is a question of fact that should be decided case by case

[55] If a court finds that an actual conflict exists, it should determine whether that conflict should be imputed to the entire Office of the Attorney General.

a. Where the Attorney General is conflicted, the Office of the Attorney General is not automatically disqualified, but more often than not, disqualification of the Attorney General will operate to disqualify his assistants

[56] That the elected Attorney General has a conflict of interest is not, by itself, enough to support the disqualification of the entire office. *People v. Pomar*, 313 Cal. Rptr. 3d 457, 467 (Ct. App. 2023); *People v. Tennessen*, 2009 Guam 3 ¶ 37 ("While one can argue that an Attorney General's disqualification coupled with his supervisory power weighs in favor of disqualification of the entire office, we are confident that a non-disqualified prosecutor can effectively dispense justice if protected by an effective conflict wall surrounding his or her supervisor."), *overruled on other grounds by Barrett-Anderson*, 2018 Guam 20 ¶ 37. "'[N]o one factor will compel disqualification in all cases.' Instead, 'the entire complex of facts surrounding the conflict' must be considered." *Pomar*, 313 Cal. Rptr. 3d at 467 (first quoting *Hambarian v. Superior Court*, 44 P.3d 102, 109 (Cal. 2002); and then quoting *People v. Eubanks*, 927 P.2d 310, 322 (Cal. 1996)). Often, courts find disqualification of a chief prosecuting attorney disqualifies his assistants. In considering the "entire complex of facts," a court would be well served in following the guidance of the California Supreme Court:

> Individuals who head a government law office occupy a unique position because they are ultimately responsible for making policy decisions that determine how the agency's resources and efforts will be used. Moreover, the attorneys who serve directly under them cannot be entirely insulated from those policy decisions, nor can they be freed from real or perceived concerns as to what their boss wants. The power to review, hire, and fire is a potent one. Thus, a former client may

> legitimately question whether a government law office, now headed by the client's former counsel, has the unfair advantage of knowing the former client's confidential information when it litigates against the client in a matter substantially related to the attorney's prior representation of that client.

City and Cnty. of San Francisco v. Cobra Sols., Inc., 135 P.3d 20, 29-30 (Cal. 2006). When the Attorney General knows an agency's confidential information and then directs and controls a prosecution against an officer of the agency in a matter substantially related to the attorney's prior representation of the agency, there is an actual conflict of interest that in most cases should be imputed to the entire Office of the Attorney General.

b. Where an assistant attorney general is conflicted, the Office of the Attorney General is usually not disqualified

[57] But the conflict of one assistant attorney general is less likely to be imputed to the entire Office of the Attorney General. "[T]he fact that an assistant prosecuting attorney is disqualified does not necessarily require disqualification of the entire office in which he or she works." *State ex rel. Keenan v. Hatcher*, 557 S.E.2d 361, 366 n.4 (W. Va. 2001). "When one deputy prosecutor has a conflict but is *not* involved in the case in any way, we do not require the disqualification of the deputy prosecutor who *is* involved in the case, unless the defendant can show that actual prejudice will result from the prosecution." *Page v. State*, 689 N.E.2d 707, 709 (Ind. 1997). As the Supreme Court of Washington held:

> There is a difference between the relationship of a lawyer in a private law firm and a lawyer in a public law office such as prosecuting attorney, public defender, or attorney general; accordingly, where a deputy prosecuting attorney is for any reason disqualified from a case, and is thereafter effectively screened and separated from any participation or discussion of matters concerning which the deputy prosecuting attorney is disqualified, then the disqualification of the entire prosecuting attorney's office is neither necessary nor wise.

State v. Stenger, 760 P.2d 357, 361 (Wash. 1988) (en banc).

[58] Thus, only in extraordinary circumstances—such as where a conflicted assistant attorney general remains unscreened and continues to participate in or discuss the matters where they have a conflict—is disqualification of the entire office necessary.

4. We answer Question 2 in the affirmative

[59] The Attorney General has an attorney-client relationship with executive branch agencies, and the GRPC apply. *See Morgan*, 779 N.Y.S.2d at 645; *Mich. Pub. Serv. Comm'n*, 625 N.W.2d at 28. But as an inanimate entity, an agency must act through its agents since it cannot speak directly to its lawyers. *Cf. Weintraub*, 471 U.S. at 348. Thus, although the client is the agency, when one of the constituents of an agency communicates with the agency's lawyer in that person's official capacity, the communication is confidential. *See Jesse by Reinecke*, 485 N.W.2d at 67. If the agency's attorney believes that the official's interests are adverse to the agency's, the attorney has a duty to explain to the official that he represents the agency's interests, not the individual's. *See* Guam R. Prof'l Conduct 1.13(d).

[60] The Attorney General owes a duty of confidentiality and loyalty to the agencies because they are his clients. *Barrett-Anderson*, 2018 Guam 20 ¶ 24 ("We begin by rejecting the Attorney General's request for flexibility under the Guam Rules of Professional Conduct based on her unique position as the Chief Legal Officer of the Government of Guam."); *Medicine Bird Black Bear White Eagle*, 63 S.W.3d at 773; *Holloway*, 86 S.W.3d at 400; *In re Pioneer Mill Co.*, 33 Haw. at 307; *McGraw*, 461 S.E.2d at 862. Despite these duties, the Office of the Attorney General may represent an executive branch agency in civil matters while investigating and prosecuting an agency official in criminal matters without violating ethical duties if the Attorney General's staff can be assigned in a way that affords independent legal counsel and representation in the civil matter, and so long as such representation does not result in prejudice to the official in the criminal

matter. *See Klattenhoff*, 801 P.2d at 552. There is no inherent conflict of interest between the Attorney General's dual roles as Chief Legal Officer and Public Prosecutor. *See Troutman*, 814 F.2d at 1437; *see also, e.g.*, Matheson, Jr., *supra*, at *12.

[61] Actual conflicts of interest may arise when the Office of the Attorney General prosecutes a government official. The appropriate conflict-of-interest standard is whether an attorney, "by reason of his professional relation with the accused, . . . has acquired knowledge of facts upon which the prosecution is predicated, or which are closely interwoven therewith." *Coulter*, 67 S.W.3d at 29-30; *McKibben*, 722 P.2d at 525. An attorney in the Office of the Attorney General, including the Attorney General himself, has an actual conflict of interest when the attorney has advised a government officer in his or her official capacity on matters related to an offense with which the officer is charged. *See Troutman*, 814 F.2d at 1437; *Deukmejian*, 624 P.2d at 1207. Whether that conflict should be imputed to the entire Office of the Attorney General should be decided case by case after considering the entire complex of facts surrounding the conflict. *See Pomar*, 313 Cal. Rptr. 3d at 467.

C. Is the Attorney General Required to Implement Conflict Protocols Consistent with the Guam Rules of Professional Conduct Including, but Not Limited to, an Ethical Screen or Assignment of Investigations or Prosecutions of Agency Officials to an Independent Special Prosecutor?

[62] The Governor contends that AG Moylan "[does] not believe an ethical wall properly reflects Congress and the Guam Legislature's enabling laws." Pet'r's Br. at 38-39 (alterations in original) (citing Req. Declaratory J., Ex. 1 at 3 (Letter)). The Governor further claims AG Moylan has "lambasted suggestions that he should be required to delegate any of his responsibilities to attorneys and implement screens to protect against conflicts, based on his insistence that his election as Attorney General requires that he maintain full control over both roles despite the

existence of potential conflicts." *Id.* at 48-49. AG Moylan does little to dispel these characterizations. *See* Resp't's Br. at 47-48 ("No conflict walls can exist that prevent the AG from *himself* having direct control and cognizance over prosecuting a corrupt government official and providing legal services to the [agency] which that government official serves." (emphasis added)).

1. The Guam Rules of Professional Conduct apply to the Attorney General

[63] The GRPC apply to the Attorney General, despite his "unique position as the Chief Legal Officer of the Government of Guam." *Barrett-Anderson*, 2018 Guam 20 ¶ 24. Rules 1.13, 1.7, 1.9, and 5.1 explain the Attorney General's obligations relative to this question. The Governor is correct in her assessment that "[w]hile AG Moylan has superficially addressed the application of Rule 1.13 to the Office of the Attorney General, he completely neglects to acknowledge the other rules of ethics that apply to his practice generally and to this action specifically." Pet'r's Reply Br. at 16.

[64] Rule 1.7(a) states that, generally, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Guam R. Prof'l Conduct 1.7(a). A concurrent conflict can exist where either "the representation of one client will be directly adverse to another client," or "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." Guam R. Prof'l Conduct 1.7(a)(1)-(2). Rule 1.9 further provides that unless they obtain written informed consent from the former client, "[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 . . . ." Guam R. Prof'l Conduct 1.9(a). Additionally, "[a] lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented

a client in a matter shall not thereafter: . . . use information relating to the representation to the disadvantage of the former client . . . ." Guam R. Prof'l Conduct 1.9(c)(1). As the Attorney General is the head of the Office of the Attorney General, he is subject to the responsibilities imposed on supervisory lawyers by Rule 5.1. These responsibilities include making reasonable efforts to ensure that the "firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct," and that lawyers he directly supervises conform to the GRPC. Guam R. Prof'l Conduct 5.1(a)-(b).

[65] The GRPC deliberately provide flexibility for government attorneys and should not be mechanically applied in any case. *Barrett-Anderson*, 2018 Guam 20 ¶ 24. The Rules generally provide that when a disqualified government lawyer is timely screened from any participation in the matter, the conflict is not imputed to their firm. *See* Guam R. Prof'l Conduct 1.11(b)(1), 1.18(d)(2)(A). Screening is not mandatory, but it is necessary to avoid vicarious disqualification. *See Kirk v. First Am. Title Ins. Co.*, 108 Cal. Rptr. 3d 620, 647 (Ct. App. 2010) (quoting ABA Model R. Prof'l Conduct 1.10(a)(2)(A)); *Smart Indus. Corp. v. Superior Court*, 876 P.2d 1176, 1184 (Ariz. Ct. App. 1994) (holding that despite rules of professional conduct not expressly authorizing screens for current government attorneys, "screening the individual government lawyer 'from any direct or indirect participation in the matter' would avoid vicarious disqualification"); *Tennessen*, 2009 Guam 3 ¶ 36; *see also People v. Santos*, 2018 Guam 12 ¶ 14 (per curiam) (stating "we do not preclude the use of an ethical wall to screen" the chief prosecutor, but expressing "concerns about the effectiveness of such a wall").

[66] This court's decision in *People v. Tennessen* is salient on screening the Attorney General, as we found that AG Moylan violated a conflict wall during his previous term as Attorney General. 2009 Guam 3 ¶ 50 ("Moylan's apparent inability to isolate himself from Tennessen's prosecution

reflected poorly on the AG's Office as a whole, which may have led to a public perception that 'continued prosecution by the [AG's Office], under the particular circumstances here, [was] improper and unjust, so as to undermine the credibility of the criminal process in our courts.'" (alterations in original) (quoting *People v. Palomo*, 31 P.3d 879, 882 (Colo. 2001) (en banc))). The court noted that disqualification of prosecutors generally falls under two categories: (1) "disqualification arising from a conflict of interest based on a professional, attorney-client relationship" or (2) "disqualification arising from a conflict based on a personal interest in the litigation or on a personal relationship with the accused." *Id.* ¶ 33. *Tennessen* dealt with a personal conflict, but its reasoning on conflict walls is still instructive. This court found that an effective conflict wall may alleviate the need to disqualify the entire Office of the Attorney General. *Id.* ¶ 36. But this court held "that a court abuses its discretion in not [disqualifying] the entire AG's Office once the conflict wall surrounding the Attorney General has been shown to be ineffective." *Id.* ¶ 43.

[67] As a licensed attorney, the Attorney General must conform his conduct to the law, including those requirements set forth in the GRPC. *Manchin*, 296 S.E.2d at 920 ("As a lawyer and an officer of the courts of this State, the Attorney General is subject to the rules of this Court governing the practice of law and the conduct of lawyers, which have the force and effect of law."). But it is not the judiciary's place to invade the internal decision-making process of how an elected official runs his office. *See Santos v. Calvo*, D.C. Civ. No. 80-0223A, 1982 WL 30790, at *4 (D. Guam App. Div. Aug. 11, 1982); *see also Barrett-Anderson*, 2018 Guam 20 ¶¶ 29-30 (discussing Attorney General's argument that "trial court's order violates the separation of powers by invading 'an internal decision-making process of the executive branch'"). We can answer what the law permits the Attorney General to do to conform his conduct to the GRPC, without dictating *how* he

must run the Office of the Attorney General. Yet when faced with a conflict, the Attorney General cannot simply choose to do nothing. *See, e.g.*, *Lacey v. Maricopa County*, 693 F.3d 896, 933 (9th Cir. 2012) (holding prosecutors have a legal duty to avoid conflicts of interest).

[68] Precedent establishes that the Attorney General may erect conflict walls to avoid violating conflict-of-interest rules, *Tennessen*, 2009 Guam 3 ¶ 36, and the Governor presents persuasive case law outlining effective screening practices, *see* Pet'r's Br. at 53-54 (citing *Kirk*, 108 Cal. Rptr. 3d at 645-46; *Henriksen v. Great Am. Sav. & Loan*, 14 Cal. Rptr. 2d 184, 188 n.6 (Ct. App. 1992)). And the Attorney General retains the statutory and common law ability to appoint special assistant attorneys general to provide services to executive branch agencies and departments. *See* 5 GCA § 5150; 17 GCA § 3110 (2005) ("[T]he Attorney General shall designate the attorney for the Board or the DOE as a Special Assistant Attorney General . . . ."); 12 GCA § 9109(c) (2005) ("[T]he Attorney General may deputize or designate the attorney for the Bureau as a Special Assistant Attorney General . . . ."); 17 GCA § 16114 (2005) ("[T]he Attorney General shall designate the attorney for the University as a Special Assistant Attorney General . . . ."); *see also* 7A C.J.S. *Attorney General* § 7 (observing an attorney general generally has power to appoint or employ private attorneys as special assistant attorneys general absent statutory prohibition); *Guam Waterworks Auth. v. Badger Meter, Inc.*, Civil Case No. 20-00032, 2023 WL 4053899, at *17 (D. Guam June 16, 2023) (finding GWA's counsel were de facto Special Assistant Attorneys General); *Davis v. Guam*, Civil Case No. 11-00035, 2017 WL 930825, at *1 (D. Guam Mar. 8, 2017) (noting Julian Aguon was appointed as Special Assistant Attorney General to litigate the *Davis* case).

[69] In a previous order, this court stated that it would "decline to address the merits" of the assertion that the Attorney General can appoint a special prosecutor. Am. Order at 2 n.2 (Apr. 2, 2024). Despite this, each party has addressed the Attorney General's ability to appoint a special

prosecutor. We do not feel it essential to the resolution of the case at hand to address this issue now.

2. We answer Question 3 in the affirmative

[70] Whatever the Attorney General's unique status, where a conflict occurs between the prosecution of a public official and the representation of an agency, he must act to guard his clients' interests. The Attorney General must not participate in a prosecution where there is a significant risk his representation of the People will be materially limited by his responsibilities to an agency. *See* Guam R. Prof'l Conduct 1.7(a)(2). Even if an agency can be considered a former client, the Attorney General must not represent the People in a prosecution substantially related to the matters on which the Attorney General represented the agency. *See* Guam R. Prof'l Conduct 1.9(a). The Attorney General must not use information relating to the Attorney General's representation of an agency to the disadvantage of the agency—including prosecutions of government officials. *See* Guam R. Prof'l Conduct 1.9(c)(1). If this information is confidential or privileged, the agency—and not the Attorney General—must decide whether to disclose it. *See* Guam R. Prof'l Conduct 1.6(a). As the head of the Office of the Attorney General, the Attorney General must make reasonable efforts to ensure that the Office of the Attorney General has measures in effect that give reasonable assurance that all lawyers in the Office of the Attorney General conform to the GRPC. *See* Guam R. Prof'l Conduct 5.1(a). The Attorney General must also make reasonable efforts to ensure that the lawyers under his direct supervisory authority conform to the GRPC. *See* Guam R. Prof'l Conduct 5.1(b). Whether this should be accomplished by recusing from a prosecution, erecting conflict walls, or appointing a Special Assistant Attorney General is within the Attorney General's discretion. When faced with this conflict, the Attorney General cannot simply choose to do nothing. *See, e.g.*, *Lacey*, 693 F.3d at 933.

D. If the Attorney General Withdraws from Representing an Agency—or Is Otherwise Unable to Provide Legal Services to the Agency—May the Agency Employ or Procure the Services of an Attorney Independent from the Attorney General to Perform Legal Services for the Agency, Including Review and Approval of Agency Contracts as to Legality and Form?

[71] Generally, where a statute places the duty of conducting the legal business of a government agency on the Attorney General, the agency has no power to employ outside counsel, unless allowed by statute or implied from the powers granted to it. *See Salt Lake Cnty. Comm'n v. Salt Lake Cnty. Att'y*, 1999 UT 73, ¶¶ 21-23, 985 P.2d 899; 73 C.J.S. *Public Administrative Law and Procedure* § 78. "Where the public elects an officer who is to perform all duties of an attorney for a governmental entity, they expect that that person will perform all duties within the scope of that office unless disabled from doing so by some ethical or legal rule." *Salt Lake Cnty. Comm'n*, 1999 UT 73, ¶ 21, 985 P.2d 899. When such a public officer—in this case the Attorney General—refuses to act, is incapable of acting, or is unavailable for some reason, the agencies cannot be left without representation.

1. Under specific circumstances, the Governor may appoint outside counsel to agencies where the Attorney General refuses to act, is incapable of acting, or is unavailable for some other reason

[72] The Attorney General's statutory duties to autonomous agencies include reviewing the form and legality of contracts for outside legal counsel or for procurements over $500,000. Additionally, for line agencies, the Attorney General must review and approve all contracts, including those for legal services. These are mandatory duties of the Attorney General, from which he cannot withdraw. No statutory authority provides agencies with an avenue for redress when the Attorney General refuses or is otherwise unable to perform his duties and responsibilities. But the Government of Guam cannot be left without representation. *Id.* (resolving dispute between county commission and county attorney). Leaving executive branch agencies without an avenue

to secure the abovementioned services could jeopardize the Government of Guam, halting the agencies' ability to execute critical contracts and opening them up to prosecution for actions that had to be taken without the advice of a lawyer. Thus, we recognize the authority of the Governor to appoint counsel for an agency where the Attorney General has explicitly "refuse[d] to act, is incapable of acting, or is unavailable for some other reason." *Id.* ¶ 24; *cf. Coventry Sch. Comm. v. Richtarik*, 411 A.2d 912, 916 (R.I. 1980) (applying this standard to municipal attorney).

[73] "[T]he right to hire outside counsel for any purpose, whether for advice or litigation, arises only when the [Attorney General] 'refuses to act or is incapable of acting or is unavailable for some other reason.'" *Salt Lake Cnty. Comm'n*, 1999 UT 73, ¶ 22, 985 P.2d 899 (citation omitted).[11] This narrow exception to the general rule does not arise where the agency merely disagrees with the advice of the Attorney General or dislikes the way the Attorney General performs the duties of the office. *Id.* ¶ 23. The determination of whether the elected Attorney General "refuses to act, is incapable of acting, or is unavailable for some other reason" is a critical and fact-intensive issue, and leaving this determination to either party could lead to untoward results. *Id.* ¶ 24. The Attorney General is the legal representative for the Government of Guam and cannot be displaced without the Attorney General's agreement or a formal declaration by a

[11] This includes situations where a conflict of interest is imputed to the entire Office of the Attorney General, rendering the entire Office "unavailable" or "disqualified." *See Salt Lake Cnty. Comm'n v. Salt Lake Cnty. Att'y*, 1999 UT 73, ¶ 22, 985 P.2d 899; *see also People v. Tennessen*, 2009 Guam 3 ¶ 37 ("[D]isqualification of the AG's Office would only be necessary if the particular conflicted attorney were not properly screened from the case."). Generally, where a conflict of interest exists that is so pervasive that it disqualifies the entire Office of the Attorney General, *see Tennessen*, 2009 Guam 3 ¶ 50, the Attorney General himself should take measures to approve outside counsel or otherwise appoint a Special Assistant Attorney General, *see* Guam R. Prof'l Conduct 1.16(d) ("Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests . . . ."). But when the Attorney General refuses to do so, a proper authority may declare him "unavailable" or "disqualified" and empower an agency to hire outside counsel. *Cf. Romley v. Daughton*, 241 P.3d 518, 521 (Ariz. Ct. App. 2010) (applying this standard to county attorney).

proper authority[12] that the Attorney General is "unavailable" to act in that capacity. *See id.* ¶¶ 26, 29 (finding the courts to be an appropriate authority and stating that "the trial court is free to take evidence and make any factual findings necessary to frame the controversy and to resolve the dispute"). The determination that the Attorney General refuses to act—including through attempts to withdraw and terminate the attorney-client relationship—"is generally a question of fact * * * [however,] where the evidence is clear and unambiguous, so that reasonable minds can come to but one conclusion from it, the matter may be decided as a matter of law." *Cf. Kaltenbach v. Wasserman*, 2023-Ohio-1778, ¶ 41 (citation omitted) (applying standard to legal malpractice claim).

[74] Parties should first try to settle the matter among themselves. Usually, the Office of the Attorney General should be able to effectively determine whether it is unwilling, incapable, or unavailable to act and, if so, should appoint a Special Assistant Attorney General or let the agency hire outside counsel. As relevant in this case, this situation may arise where the Attorney General communicates his intent to withdraw from all representation, declares the attorney-client relationship ended, or advises agencies to find outside counsel. In the letters to the 22 agencies, AG Moylan has unambiguously stated he is not the attorney for the agencies and told agencies to seek outside counsel. The evidence in this case is clear and unambiguous, permitting us to decide the issue as a matter of law. Reasonable minds can come to but one conclusion—that AG Moylan has refused to act. Therefore, the Governor may take appropriate steps. These include the

[12] We do not define the exact contours of who may fall into this category beyond saying it excludes the Governor and includes the courts of Guam.

Governor appointing a Special Assistant Attorney General for an agency to fill any void left by AG Moylan.[13]

[75] Other situations in which the Attorney General has not communicated his intent to withdraw from all representation, declared the attorney-client relationship ended, or advised agencies to find outside counsel require critical and fact-intensive review. If the parties fail to settle the matter, the agency cannot simply hire independent counsel to handle all its legal matters. The agency must first obtain a formal declaration from a proper authority that the Attorney General is "unavailable"[14] to act in his capacity as the legal representative for the Government of Guam. *See Salt Lake Cnty. Comm'n*, 1999 UT 73, ¶ 26, 985 P.2d 899. We recognize the paradox this may cause for an agency, particularly those "line agencies" that are not statutorily empowered to hire outside counsel. *See id.* ¶ 29 n.10 ("We recognize that to appear before a court to obtain a determination of whether the County Attorney is unable or unwilling to perform his or her duties, the Commission will almost certainly have to retain an attorney for that limited purpose."). We therefore hold that—even without the Attorney General's own declaration and before a formal declaration by a proper authority that the Attorney General is "unavailable"—the Governor may appoint outside counsel for an agency for the limited purposes of advice and representation regarding (1) whether the Attorney General has explicitly refused to act, is incapable of acting, or is unavailable for some other reason (including conflicts of interest); (2) alternatives available to

[13] Because the AG Moylan is the legal representative for the Government of Guam, he cannot be displaced indefinitely. When new matters arise, those agencies that are not expressly authorized by statute to hire outside counsel should seek advice regarding whether AG Moylan continues to "refuse[] to act or is incapable of acting or is unavailable for some other reason." *See Salt Lake Cnty. Comm'n*, 1999 UT 73, ¶ 22, 985 P.2d 899. The resolution procedures set out in this opinion should then be followed: the parties should first try to settle the matter among themselves; if they cannot, as a last resort, they should turn to the courts.

[14] We use this as a shorthand for the entire standard—whether a public attorney has refused to, is incapable of, or is otherwise unavailable to act as legal counsel.

resolve issues short of litigation; (3) filing an action for declaratory judgment to determine whether the Attorney General is unavailable to carry out his ordinary representation; or (4) filing a mandamus action to compel the Attorney General's mandatory duties. *Cf. Romley v. Daughton*, 241 P.3d 518, 521 (Ariz. Ct. App. 2010) (applying this standard to county attorney). After a proper authority formally declares that the Attorney General is "unavailable," outside counsel appointed by the Governor may then fill the void left by the Attorney General—whether for advice or litigation.

2. In extraordinary circumstances, the Governor may appoint Special Assistant Attorneys General where the Attorney General refuses to do so

[76] Even with the agreement of the Attorney General or a formal declaration by a court that outside counsel can represent an agency, this outside counsel cannot perform contract review for form and legality.[15] *See, e.g.*, 5 GCA § 22601; 5 GCA § 5150. Some agencies, specifically those subject to the Central Accounting Act, require the Attorney General's approval on all contracts. *See* 5 GCA § 22601 ("All contracts shall, after approval of the Attorney General, be submitted to the Governor for [her] signature. All contracts of whatever nature shall be executed upon the approval of the Governor."). Those not subject to the Central Accounting Act require the Attorney General's signature for all contracts worth $500,000 or more. *See* 5 GCA § 5150. Unlike general legal services and litigation representation, these are duties the Legislature specifically assigned to the Attorney General and withheld from the abilities of any outside legal counsel.

[77] Normally, if the Attorney General neglects or otherwise refuses to perform a mandatory duty of his office—such as reviewing contracts over $500,000 for form and legality—a writ of

[15] Nothing in this opinion is intended to limit the authority of counsel for autonomous agencies in contract review as provided for by statute. *See, e.g.*, 12 GCA § 8104(e); 12 GCA § 14104(e); 10 GCA §§ 80109-116; 12 GCA §§ 10105, 10109.

mandate is the proper vehicle to compel performance of his nondiscretionary duties. *See, e.g.*, *Moylan*, 2005 Guam 5 ¶ 67 (granting mandamus relief to the Airport Authority against the Attorney General). A writ is not always an efficient and proper mode of redress, especially where, as here, the Attorney General is refusing these services to 22 agencies. In extraordinary circumstances such as these, the Governor's "ultimate responsibility" for the "supervision and control" of the executive branch can be properly invoked. *Cf. Bordallo v. Baldwin*, 624 F.2d 932, 934 (9th Cir. 1980) (stating that under Organic Act, the Governor has "ultimate responsibility" for public health services (quoting 48 U.S.C.A. § 1422)).

[78] The Organic Act states that "[t]he executive power of Guam shall be vested in an executive officer whose official title shall be the 'Governor of Guam.'" 48 U.S.C.A. § 1422. The Act further states that "[t]he Governor shall have general supervision and control of all the departments, bureaus, agencies, and other instrumentalities of the executive branch of the government of Guam" and "shall be responsible for the faithful execution of the laws of Guam and the laws of the United States applicable in Guam." *Id.* When the Governor determines she must act lest the law go unenforced—whether based on the actions or the inactions of the Attorney General—she may act. *See Riley v. Cornerstone Cmty. Outreach, Inc.*, 57 So. 3d 704, 722 (Ala. 2010). The Organic Act authority of the Governor to ensure the faithful execution of the laws includes the authority to appoint a Special Assistant Attorney General. *See People v. Behan*, 235 N.Y.S.2d 225, 232 (Onondaga Cnty. Ct. 1962). At least under circumstances like those presented here, the Governor acts consistently with her Organic Act authority when she appoints Special Assistant Attorneys General where the Attorney General refuses to do so. *See Riley*, 57 So. 3d at 734 (holding governor acted consistently with his constitutional authority in creating task force and appointing special prosecutor as its commander). This includes, but is not limited to, the authority to appoint Special

Assistant Attorneys General with the power to approve contracts for form and legality. *See* 5 GCA § 5150 (stating that when properly designated, a Special Assistant Attorney General may approve contracts for form and legality).[16]

[79] Even so, like how agencies cannot freely hire outside counsel for any reason, the Governor is empowered to appoint Special Assistant Attorneys General only in narrow and extraordinary circumstances. *See Sec'y of Admin. & Fin. v. Att'y Gen.*, 326 N.E.2d 334, 335-36 (Mass. 1975) (finding representation of Secretary by Governor's legal counsel proper where Attorney General refused to do so but emphasizing "this narrow exception applies only where the powers of the Attorney General's office themselves are in question, and not in the ordinary case of disagreement between an agency and the Attorney General"). These extraordinary circumstances include where the Attorney General is unable or unwilling to perform the duties of his office, resulting in the law going unenforced or the inability of the executive branch to function, such as where the Attorney General "act[s] in a capricious, arbitrary or illegal manner in refusing to represent a governmental body." *Id.* at 337 n.4. Thus, the Governor has the power to supersede the Attorney General's authority, discretion, or representation only in extraordinary circumstances that threaten her duty to ensure the proper function of the executive branch. *See Riley*, 57 So. 3d at 733 ("If the governor's 'supreme executive power' means anything, it means that when the governor makes a

[16] To be clear, the Governor can appoint Special Assistant Attorneys General for multiple purposes. But a Special Assistant Attorney General cannot both advise an agency and approve its contracts for form and legality. The Governor must only appoint Special Assistant Attorneys General to review contracts for form and legality who are wholly independent from the agency. Contracts for legal services remain subject to approval by the Attorney General for form and legality. 5 GCA § 5121(b). However, "the Attorney General has no discretion to reject a contract that is lawful and correct in form." *Moylan*, 2005 Guam 5 ¶ 65 (citing *Citizens Energy Coal. of Ind. v. Sendak*, 594 F.2d 1158, 1162 (7th Cir. 1979)). Given the extraordinary circumstances presented by this case, it would be within the Governor's authority to appoint an independent Special Assistant Attorney General to review any agency contracts for outside legal counsel that this opinion contemplates.

determination that the laws are not being faithfully executed, he can act using the legal means that are at his disposal.").

[80] As the question is not properly before us, we offer no opinion on who pays for legal services of agencies that normally lack permission to hire counsel.

3. We answer Question 4 as follows

[81] Generally, where a statute places the duty of conducting the legal business of a government agency on the Attorney General, the agency has no power to use outside counsel, unless allowed by statute or implied from the powers granted to it. But when the Attorney General refuses to act, is incapable of acting, or is unavailable, the agencies cannot be left without representation. The Governor has the authority to appoint counsel for an agency in narrow circumstances where the Attorney General has explicitly refused to act, is incapable of acting, or is unavailable for some other reason. This situation may arise where the Attorney General communicates his intent to withdraw from all representation, declares the attorney-client relationship ended, or advises agencies to find outside counsel. Because the Attorney General is the legal representative for the Government of Guam, he cannot be displaced without the Attorney General's agreement[17] or a formal declaration by a proper authority that the Attorney General is "unavailable" to act in that capacity. This narrow exception to the general rule does not arise where the agency merely disagrees with the advice of the Attorney General or dislikes the way the Attorney General performs the duties of the office.

[17] Such "agreement" need not always be cordial. It includes a refusal to act where the Attorney General communicates his intent to withdraw from all representation, declares the attorney-client relationship ended, or advises agencies to find outside counsel. But it also includes cases where the Office of the Attorney General independently determines it is incapable or unavailable to act and consents to the agency hiring outside counsel.

[82] In the letters to the 22 agencies, AG Moylan unambiguously stated he was not the attorney for the agencies and told agencies to seek outside counsel. The evidence is clear and unambiguous: AG Moylan has refused to act. Therefore, the Governor may take appropriate steps, including appointing outside counsel as Special Assistant Attorneys General to fill the void left by AG Moylan with regard to advising the agencies and representing them in litigation.

[83] Additionally, the Governor's ultimate responsibility for the supervision and control of the executive branch can be properly invoked to appoint Special Assistant Attorneys General to approve contracts for form and legality where the Attorney General refuses to do so. When the Governor determines that she must act lest the law go unenforced—whether based on the actions or inactions of the Attorney General—she may act using the legal means that are at her disposal. However, this authority can be exercised only in narrow and extraordinary circumstances, such as those presented in this case. Such circumstances include where the Attorney General acts in a capricious, arbitrary, or illegal manner in refusing to perform the duties of his office. The Governor has the power to supersede the Attorney General's authority, discretion, or representation only in extraordinary circumstances that threaten her duty to ensure the proper function of the executive branch. Under the circumstances presented here, the Governor acts consistently with her Organic Act authority when she appoints Special Assistant Attorneys General with the power to approve contracts for form and legality because AG Moylan has refused to do so.

V. CONCLUSION

[84] Generally, the Attorney General of Guam may not withdraw from legal representation of an executive branch agency, or otherwise decline to provide legal services to such agency, when the Attorney General claims such representation conflicts with ongoing investigations or

prosecutions. The Attorney General may provide legal services to the agency, notwithstanding his access to confidential information from both the agency and the investigations and prosecutions. The Attorney General must implement conflict protocols consistent with the Guam Rules of Professional Conduct. Generally, an agency has no power to use outside counsel unless allowed by statute or implied from the powers granted to it. However, where the Attorney General refuses to act, is incapable of acting, or is unavailable, the agencies cannot be left without representation. When the Governor determines that she must act lest the law go unenforced, she may act using the legal means that are at her disposal.

[85] We issue this opinion in support of our Declaratory Judgment of May 31, 2024.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice