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Supreme Court of Guam, Clerk of Court

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IN RE:

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

**REPLY BRIEF OF RESPONDENT TO
AMICI CURIAE BRIEF**

PEOPLE OF GUAM / GOVERNMENT OF GUAM

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Argument

I.

***Amici* brief per se violates Guam's laws**

The AG is vested with the Chief Legal Officer of Guam's ("CLO's") cognizance, 5 GCA § 30102, with duty to conduct all civil actions, 5 GCA § 30109(c), unless otherwise provided by the Legislature. *GIAA v. Moylan*, 2005 Guam 5. The Consolidated Commission on Utilities¹ ("CCU") appoints the utilities' attorneys, but these positions have no express authority to represent the agencies or the CCU in litigation, or setting legal policy. 12 GCA §§ 14109(a), (c), and 8112(a), (d). Guam Memorial Hospital Authority ("GMHA") also appoints lawyers without authority to represent it in litigation or setting legal policy. 10 GCA § 80114(a). There is no enabling provision for the Port Authority of Guam ("PAG") to employ attorneys,² making its participation in this action particularly dubious.³ Plainly, only the AG represents these agencies in litigation. 5 GCA §§ 30102, 30109; 2011 Guam 10; *GIAA v. Moylan*, 2005 Guam 5.

As acknowledged by *Amici*, the Attorney General rescinded the delegation of SAAG to their attorneys. Counsel for *Amici* are explicitly prohibited from appearing before the Judiciary on behalf of their authority *unless* such duty has been delegated to them by the Attorney General of Guam. 10 GCA § 80114, 12

¹ Which itself is suspect and possibly inorganic. See AG CCU Opinion (SER at 18).

² See 12 GCA §§ 10101 et. seq.

³ Likewise, the Office of the Governor has no express authority to hire attorneys. See 5 GCA § 1101 et. seq.

GCA § 8112, 12 GCA § 14109(c). Such delegated counsel serves at the AG’s direction as a special assistant attorney general and would exercise the powers of that office subject to oversight by the AG⁴. No authority was sought from nor granted by the AG, who herein objects. The Guam Legislature intended that uniform legal policy be set by the democratically elected Attorney General.

Each *Amici* is organized as a public corporation. 10 GCA § 80102; 12 GCA §§ 10102, 14103 and 8103. Each must comply with Guam’s administrative laws, but none of their governing bodies appear to have passed on the content of their counsel’s brief, nor directed its filing, as required by their enabling laws.⁵ A corporate lawyer represents the corporate organization acting through its duly authorized constituents. GRPC 1.13(a). Without lawful authorization to represent their agencies and or failing to obtain organizational directive regarding the content of their brief; *Amici* Counsel’s acts are *ultra vires*.⁶ *Amici* counsel violated, or caused organizational violations of Guam’s laws, and falsely represent to the Court that their conduct is lawful when it expressly is *not*. Theirs is a rogue operation.

⁴ This delegation of a SAAG is distinct from an attorney appointed to function as conflict counsel when the Attorney General is conflicted, as such counsel is not subject to oversight by the Attorney General.

⁵ See notices published at <https://notices.guam.gov/> (last visited 5/11/24) and entity websites at <https://guamccu.org/ccu-documents/>, <https://www.gmha.org/transparency-center/>, <https://www.portofguam.com/about-us/board-directors/board-resolutions>; see also 10 GCA § 81015.2 (*GMHA business conducted in public meetings*); 12 GCA §§ 10103(a) (*PAG board directs the agency*), § 79100 (*CCU exercises the powers of the utilities*), § 14105 (*powers of Guam Waterworks authority (“GWA”) vested in CCU*), § 8107 (*powers of Guam Power Authority (“GPA”) vested in CCU*).

⁶ See 2011 Guam 3 ¶ 39 citing *Tacoma Way, LLC v. State*, 233 P.3d 871 (Wash. 2010) (citations omitted) (*acts are ultra vires when they exceed scope of authority*).

A. *Amici* attorneys brazenly violated the rules and appear to have committed separate instances of misconduct.

Amici counsels apparently commit misconduct through conduct involving dishonesty, deceit and misrepresentation, including false statements of material fact (that they are authorized by their organizations to put forward legal positions in their brief), or law (that they are legally authorized to represent their agencies). GRPC 4.1, 8.4. *Amici* counsels apparently commit misconduct in inducing their agencies to participate in this action by giving material, false statements. *E.g. The Fla. Bar v. Letwin*, 70 So.3d 578 (Fla. 2011) (*misconduct to make a materially false statement intended to induce potential client to act*). *Amici* Counsels' conduct is prejudicial to the administration of justice (i.e. misconduct), because they caused this Court to entertain their brief when they have no lawful organizational authority to file a brief or assert a legal position. GRPC 8.4(d); *see also Ligon v. Stilley*, 371 S.W.3d 615 (Ark. 2010).

A lawyer may not make material misstatements of fact or law in dealing with others. GRPC 4.1. A lawyer shall not bring or defend a proceeding unless there is basis in law for doing so. GRPC 3.1. A lawyer shall not knowingly make a false statement of fact or law to a court or fail to correct falsity. GRPC 3.3(a)(1). It is professional misconduct to engage in dishonesty, deceit or misrepresentation. GPRC 8.4(c). It is professional misconduct to engage in conduct that is prejudicial to the administration of justice. GPRC 8.4(d). The brief should be disregarded.

II.

The Position Set Forth by *Amici* is Inorganic, Undemocratic, and Authoritarian

A. *Amici*'s interpretation of attorney-client privilege is unpersuasive and self-serving.

The *Amici* claim that the AG violated the GRPC by releasing privileged attorney-client communications, release of which only *Amici* could authorize. *Amici* cite to a string of cases involving general statements of attorney-client privilege as it relates to individual clients and private attorneys. These cases are *not* persuasive in this context, as those cases do not, and cannot, consider legal authorities and public policy that give an AG more authority over their government wards than that vested in a regular private attorney representing a private client⁷.

Amici, without any support, disclaim the AG's common law duty to represent the public interest. *Jacobson v. Parks & Recreation Commn. of Boston*, 189 N.E.2d 199 (Mass. 1963) (“[The AG] *also has a common law duty to represent the public interest.*”). Rather, they claim he serves only the machinery of government and is bound by the determinations of the Authorities. *Sec'y of Admin.*

⁷ “The Secretary contends that the traditional attorney-client relationship exists between himself and the Attorney General, and thus it is up to him, as client, and not for the Attorney General, as attorney, to decide whether to prosecute an appeal... We cannot accept this contention. Although we agree that the canons permit the client to make such decisions where the traditional attorney-client relationship exists, a careful reading of G.L. c.12, s3, its legislative history and the history of the office of Attorney General compel us to conclude that something other than that traditional attorney-client relationship exists where the Attorney General ‘appears for’ an officer, department head or secretary pursuant to c.12. We hold that the Attorney General, as ‘chief law officer of the commonwealth,’ has control over the conduct of litigation involving the Commonwealth, and this includes the power to make a policy determination not to prosecute the Secretary's appeal in this case.” *Sec'y of Admin. & Fin. v. Att'y Gen.*, 326 N.E.2d 334, 336–37 (Mass. 1975) (Citations omitted).

& Fin. v. Att'y Gen., 326 N.E.2d 334, 338 (Mass. 1975) (“...when an agency head recommends a course of action, the Attorney General must consider the ramifications of that action on the interests of the Commonwealth and the public generally, as well as on the official himself and his agency. To fail to do so would be an abdication of official responsibility.”)

Amici further fail to discuss the impact of the Sunshine Reform Act of 1999 on disclosure of legal opinions from the AG or the mandate of Guam law that “[A]ll legal memoranda or opinions [by the AG], except those prepared with regard to actual or pending litigation, or which give opinions on matters which, in themselves are not public, shall be public documents.” 5 GCA § 30107.

One unsupported example of harm alleged by *Amici* is that the AG’s release to the public of information related to the review of GPA’s temporary power contract was a breach of privilege between GPA, its private counsel, and the AG. What this example fails to confront is that the information released by the AG involved a contract subject to procurement law. Save for proprietary information and trade secrets, all documents in procurement record are public, the public is entitled to access the record at the earliest possible time, and there is no requirement that the record be complete or an award be made before they are considered public. 5 GCA §§ 5251, 5252; *see also* 2 GARR Div. 4 § 3019 (l).

Further, the AG serves as a check & balance for the People' Govt. in procurement and is not bound to confidentiality to that public official when wrongdoing occurs.

“Procurement statutes exist to support a strong public policy of fostering honest competition, to assure prudent and economical use of public monies, and to facilitate the acquisition of high-quality goods and services at the lowest possible cost. The purpose of these laws, in addition to the protection of taxpayers and the public treasury by obtaining the best work at the lowest possible price, is to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of public contracts. These laws are intended for the benefit of the taxpayers and are to be construed and administered as to accomplish such purpose fairly and reasonably *with sole reference to the public interest.*” Conway, Danielle M., State and Local Government Procurement, 3 (2012).

The *Amici* have no standing to challenge the release of information by the AG concerning his rejection of one of their contracts for failing to comply with Guam's procurement law. There is nothing in 5 GCA § 5150 that creates privilege when the AG reviews a contract for form and legality. Release of information is entirely within the discretion and authority of the AG. *Amici's* statement to the contrary reflects a deeply flawed understanding of public policy in favor of transparency and promoting a procurement system rooted in integrity. *See* 5 GCA §§ 5001 (b) (7) and 10103.

B. *Amici* fail to describe the limited applicability of the term “screened” in the GRPC.

Amici state that the term “*screened*” is defined by the GRPC, but do not discuss the extent of the usage of that term. The term is used in three (3) distinct Rules: 1.11, 1.12 and 1.18. Those rules govern a narrow range of scenarios where a law firm may associate with an attorney that has access to disqualifying information that cannot be used for material representation of one of the firm’s clients. The methods of obtaining disqualifying information are: (1) former government attorney (GRPC 1.11); (2) judge, law clerk, mediator, arbitrator or third-party neutral (GRPC 1.12); (3) discussions with prospective client (GRPC 1.18). In each of these cases, the GRPC provides that the law firm may pursue representation in those circumstances if the disqualified attorney is timely screened and is apportioned no part of the fee therefrom. None of these scenarios are applicable to the operations of the AG.

III.

The Attorney General Serves as an Important “*Check and Balance*” on Operations of the Government of Guam

A. *Amici*’s interpretation of procurement is self-serving and attempts to rewrite the Guam Procurement Law.

Amici argue that while they are not textually exempted from 5 GCA § 5150, they owe no affirmative duties to the AG in the processing of high-value contracts. Guam law does not support their legal position.

Guam law clearly states when an official, “*conducts any solicitation or procurement which is estimated to result in an award of Five Hundred Thousand Dollars (\$500,000) or more, the Attorney General, [or their designee], ... shall act as legal advisor during all phases of the solicitation or procurement process... [and shall when approving] contracts, determine not only the correctness of their form, but their legality.*” 5 GCA § 5150. Furthermore, the AG “*may require any or all agencies involved in the contract to supply him with evidence that the required procedures precedent to executing the contract were carried out.*” *Id.* Amici have an affirmative duty to comply with the requirements set forth by the AG to protect the integrity of Guam’s Procurement Law⁸ and the Legislature’s clear mandate.

Furthermore, the entirety of the Procurement Law is applicable to contracts entered into by governmental bodies. 5 GCA § 5004(b). Title 5 GCA § 5125 further provides “[E]very governmental body which is in the purview of the Executive Branch... including the... Guam Memorial Hospital... shall be governed by Articles 1, 3, 6, 7, 10, 11 and 12 of this Chapter... It is the intent of [the Legislature] to require all Executive Branch governmental bodies, including autonomous agencies... to be governed to the maximum extant practicable by [this Chapter]...”

⁸ Amici attorneys failed to assert privilege or create a privilege log.

B. Executive Branch actions demonstrate the need for oversight from an independent Attorney General.

Amici are not well positioned to opine on public discussion and oversight of their contracting activities. *Amici* are funded with taxpayer monies to provide services for the taxpayers. It is disingenuous for *Amici* to claim they have been prejudiced by the release of information concerning failure to properly follow Guam procurement law on a high-value contract for services that are of great import to the taxpayers.⁹ This is not an isolated failure. Several audits from the elected Public Auditor involve failures by Executive Agencies to comply with Guam's procurement law.¹⁰ Per those reports, *Amici* failed to follow Guam procurement law and are potentially subject to investigation by the AG.¹¹ It is for this reason that the AG has still been reviewing contracts as required by Guam law. (SER at 22).

Furthermore, autonomous instrumentalities like GWA refused to permit the AG to have cognizance over litigation that they are involved. (SER at 11, 14). Such

⁹ John O'Connor, *Temporary power contract sent back, OAG says it needs correction*, Guam Daily Post (Mar.17,2024), https://www.postguam.com/news/local/temporary-power-contract-sent-back-oag-says-it-needs-correction/article_2dc7ad7a-e2b0-11ee-8240-9b9a4556d559.html.

¹⁰ OPA Report No. 20-07 (SER, Vol. IV, 1); OPA Report No. 21-06 (SER, Vol. V, 1); OPA Report No. 22-02 (SER, Vol. V, 141); OPA Report No. 23-06 (SER, Vol. VI, 202); OPA Report No. 23-10 (SER, Vol. VII, 1); OPA Report No. 23-11 (SER, Vol. VII, 37); OPA Report No. 24-01 (SER, Vol. VII, 68); OPA Report No. 24-02 (SER, Vol. VII, 118);

¹¹ PAG: OPA Report No. 21-03 (SER Vol. IV, 181); OPA Report No. 21-09 (SER Vol. V, 65);
OPA Report No. 22-05 (SER Vol. V, 174)
GWA: OPA Report No. 23-10 (SER Vol. VII, 1)
GPA: OPA Report No. 23-10 (SER Vol. VII, 1)
GMHA: OPA Report No. 24-01 (SER Vol. VII, 68)

refusal is in direct violation of 12 GCA § 14109(c) and presents great peril to both the public interest, GWA, and GWA's private counsel.

Finally, it is noteworthy that when Congress made the office of the AG an elected position, they did so because "*controversies have arisen in the past because of the appointment nature of the position of Attorney General. Public concerns revolve[d] around political interference with investigations, inefficiency of case work and dismissal of the Attorney General without cause.*" (SER at 2-3).

Conclusion

The Attorney General of Guam performs the duties to him by the Guam Legislature. *Amici* incorrectly treats this public position as a private attorney ignoring who the AG's client is under Guam law, namely the People of Guam / Government of Guam, serving as *their* chief legal officer rather than their public officials per se.

Respectfully submitted this 13th day of May, 2024.

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Certificate of Compliance

This brief complies with the type-volume limitation of GRAP 16(a)(7)(B) because this brief contains 2,560 words, excluding the parts of the brief otherwise exempted from Rule 16(a)(7)(B)(iii). This brief complies with the Court's April 22, 2024 Order providing for no more than ten (10) pages of argument and conformance with GRAP 16(a)(5).

Respectfully submitted this 13th day of May, 2024.

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Certificate of Service

I hereby certify that on May 13, 2024, I electronically filed the foregoing document with the Supreme Court of Guam by using the electronic filing system and that the following parties or their counsel of record will be served electronically:

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I declare under penalty of perjury that the foregoing is true and correct.

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