



Filed

Supreme Court of Guam, Clerk of Court

NO. CRQ24-001

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**

**OPENING BRIEF
OF PETITIONER LOURDES A. LEON GUERRERO,
*I MAGA HÅGAN GUÅHAN***

LESLIE A. TRAVIS
JEFFREY A. MOOTS
OFFICE OF THE GOVERNOR OF GUAM
Ricardo J. Bordallo Governor's Complex
Adelup, Guam 96910
P.O. Box 2950, Hagåtña, Guam 96932
Office: (671) 473-1118 | Fax: (671) 477-4826

*Attorneys for the Honorable
Lourdes A. Leon Guerrero,
Governor of Guam*

E-Received

4/15/2024 7:36:10 PM

TABLE OF CONTENTS

I.	STATEMENT OF JURISDICTION.....	1
II.	ISSUES FOR DECLARATORY JUDGMENT.....	2
III.	STATEMENT OF THE CASE.....	3
IV.	SUMMARY OF THE ARGUMENT.....	14
V.	ARGUMENT.....	18
	A. The Organic Act designates the Attorney General as the Chief Legal Officer of the Government of Guam responsible for representing Executive Branch agencies and instrumentalities—a constitutional responsibility from which the Attorney General may not withdraw, and which he may not abandon.....	18
	1. The Attorney General of Guam’s Organic Act duty is to serve the <i>Government</i> of Guam, his principal client.	19
	2. The Attorney General’s role as public prosecutor is conferred by <i>statute</i> and cannot be used to justify his abandonment of his Organic Act duty.	29
	B. The Office of the Attorney General is required to implement conflict protocols consistent with the Guam Rules of Professional Conduct before or at the time a potential conflict arises between its representation of agencies and prosecution activities.	38
	C. Absent 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.	51
	D. If the Attorney General is unable to provide legal services to an agency, the agency may employ or procure services of an independent attorney to perform such services.	56
VI.	CONCLUSION.....	58

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>A.B. Won Pat Intern. Authority ex rel. Board of Directors vs. Moylan GIAA,</i> 2005 Guam 5	23, 24, 29, 35
<i>Barrett-Anderson v. Camacho,</i> 2018 Guam 20	40, 41
<i>City & Cnty. of San Francisco v. Cobra Sols., Inc.,</i> 38 Cal. 4th 839, 135 P.3d 20 (2006)	44, 55
<i>Guam Greyhound, Inc. v. Brizill,</i> 2008 Guam 13	43
<i>Guam Soc. Of Obstetricians & Gynecologists v. Ada,</i> 962 F.2d 1366 (9th Cir. 1992).....	32
<i>Hansen v. Utah State Ret. Bd.,</i> 652 P.2d 1332 (Utah 1982)	37
<i>Henriksen v. Great Am. Sav. & Loan,</i> 11 Cal. App. 4th 109 (1992)	54
<i>Hitachi, Ltd. v. Tatung Co.,</i> 419 F.Supp.2d 1158 (N.D.Cal.2006)	53
<i>In re A.B. Won Pat Int’l Airport Auth., Guam,</i> 2019 Guam 6	22
<i>In re Charlisse C.,</i> 45 Cal. 4th 145, 194 P.3d 330 (2008)	55
<i>In re Request of Calvo Relative to Interpretation & Application of Organic Act Section 1423b & What Constitutes Affirmative Vote of Members of I Liheslaturan,</i> 2017 Guam 14	35
<i>In re Request of Governor Carl T.C. Gutierrez, Relative to the Organicity & Constitutionality of Pub. L. 26-35,</i> 2002 Guam 1	2

<i>Kirk v. First Am. Title Ins. Co.</i> , 183 Cal. App. 4th 776, 108 Cal. Rptr. 3d 620 (2010).....	53
<i>Macris v. Richardson</i> , 2010 Guam 6	22
<i>McElroy v. Swart</i> , 57 Mich. 500, 24 N.W. 766 (1885).....	20
<i>Paff v. Div. of L.</i> , 412 N.J. Super. 140 (App. Div. 2010)	51
<i>People v. Lujan</i> , 1998 Guam 28	49
<i>People v. Santos</i> , 2018 Guam 12	16, 46, 54, 55
<i>People v. Tennessen</i> , 2008 Guam 21	49
<i>Poindexter v. Greenhow</i> , 114 U.S. 270 (1885).....	20
<i>Riley v. Cornerstone Cmty. Outreach, Inc.</i> , 57 So. 3d 704 (Ala. 2010)	58
<i>Sandra T.E. v. S. Berwyn Sch. Dist. 100</i> , 600 F.3d 612 (7th Cir. 2010).....	51
<i>Santos v. Camacho</i> , 2006 WL 581251 (D. Guam Mar. 10, 2006)	41
<i>Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co., Inc.</i> , 6 Cal. 5th 59, 425 P.3d 1, 237 Cal. Rptr. 3d 424 (2018)	43
<i>State ex rel. Morrissey v. W. Virginia Office of Disciplinary Counsel</i> , 234 W. Va. 238, 764 S.E.2d 769 (2014).....	29, 36
<i>State of Fla. ex rel. Shevin v. Exxon Corp.</i> , 526 F.2d 266 (5th Cir. 1976).....	37
<i>State v. Breeze</i> , 873 P.2d 627 (Alaska Ct. App. 1994).....	47
<i>Territorial Prosecutor for Territory of Guam v. Superior Court of Guam</i> , 1983 WL 30224 (D. Guam App. Div. May 26, 1983).....	32

<i>Texas v. White</i> ,	
74 U.S. 700 (1868).....	21
<i>Washington Mkt. Co. v. Hoffman</i> ,	
101 U.S. 112 (1879).....	22

Statutes

1 GCA § 713	24
5 GCA § 5121(b).....	10, 26, 27
5 GCA § 5150	10, 27
5 GCA § 5151 (a).....	10, 28, 43
5 GCA § 22601	27
5 GCA § 30102	4, 15, 24, 25
5 GCA § 30104	4, 15
5 GCA § 30109	Passim
5 GCA § 30109 (l)	48
5 GCA § 30109(c).....	4
5 GCA § 30202	27
5 GCA § 30201	4, 24, 28
7 GCA § 4104	1, 2
10 GCA § 80114	25, 26
10 GCA § 80114(a).....	26
12 GCA § 1108	24
12 GCA § 5103	25
12 GCA § 8112	25
12 GCA § 8112(d).....	26
12 GCA § 14109(c).....	26
48 U.S.C. 1421g(b)	22
48 U.S.C. §1421g.....	57
48 U.S.C. § 1421b(s).....	22
48 U.S.C. § 1421d.....	22
48 U.S.C. § 1422	57

48 U.S.C. § 1422c(b)	57
48 U.S.C. § 1428	23
48 U.S.C. § 1421a	22
48 U.S.C. § 1424-1(a)	1
48 U.S.C. § 1421f	22
48 U.S.C. §1421g(d)(1)	15, 20
48 U.S.C. § 1421g(c)	4, 33
48 U.S.C. § 1421g(d)	20, 28
48 U.S.C. §1425a	23
48 U.S.C. § 1711	23
Cal. Const. art. V, § 13	20
Fla. Const. art. IV, § 4(b)	19
Ill. Const. art. V, § 15	19
Tex. Const. art. IV, § 22	19

Other Authorities

A bill to amend the Organic Act of Guam, the Revised Organic Act of the Virgin Islands, and the Compact of Free Association Act, and for other purposes,

S. 210, 105th Cong. 240-244 (1997)	34
<i>Guam Commonwealth Act,</i>	
H.R. 100, 105th Cong. 240-244 (1997)	34
Guam Gov't Code §§ 199-200(1953)	24
Guam Gov't Code §§ 199 and 265 (1953)	30
Guam Gov't Code §§ 199-269 (1953)	29
Guam Gov't Code § 266 (1953)	31
Guam Gov't Code §§ 7000-7100 (1970)	30
Guam Gov't Code § 7101 (1970)	31
Guam Gov't Code § 7003.1 (1970)	30
<i>Guam Organic Act Amendments of 1998,</i>	
H.R. 2370, 105th Cong. 240-244 (1997)	34
Guam Pub. L. 13-117	31

Guam Pub. L. 16-72.....	31
Guam Publ. L. 16-72:1.....	31
Guam Publ. L. 16-72:20.....	32
Guam Pub. L. 20-134.....	32
Guam Pub. L. 24-288.....	33
Guam Publ. L. 24-288:3.....	33
Guam Pub. L. 25-003.....	24
Guam Pub. L. 25-44.....	33
Guam Pub. L 36-107.....	10, 26
Guam R. Prof'l Conduct 1.10(d)	41
Guam R. Prof'l Conduct 1.11	41
Guam R. Prof'l Conduct 1.7	42

I. STATEMENT OF JURISDICTION

This court has original jurisdiction over requests from the Governor of Guam to issue declaratory judgment interpreting any federal or local law “and upon any question affecting the powers and duties of [*I Maga’håga*] and the operation of the Executive Branch[.]” 7 GCA § 4104. *See also* 48 U.S.C. § 1424-1(a). Guam law authorizes the Governor of Guam to request that the Supreme Court of Guam directly interpret federal or local law affecting the powers and duties of the Governor of Guam and the operation of the Executive Branch:

I [Maga’hågan] Guåhan, in writing...may request declaratory judgments from the Supreme Court of Guam as to 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...The declaratory judgments may be issued only where it is a matter of great public interest and the normal process of law would cause undue delay. Such declaratory judgments *shall* not be available to private parties. The Supreme Court of Guam *shall*, pursuant to its rules and procedure, permit interested parties to be heard on the questions presented and *shall* render its written judgment thereon.

7 GCA § 4104 (emphasis in original). This Court has held:

[T]o pass jurisdictional muster, a party seeking a declaratory judgment must satisfy three requirements: (1) the issues raised must be a matter of great importance; (2)

the issue must be such that its resolution through the normal process of law is inappropriate as it would cause undue delay; (3) and the subject matter of the inquiry is appropriate for section 4104 review.

In re Request of Governor Carl T.C. Gutierrez, Relative to the Organicity & Constitutionality of Pub. L. 26-35, 2002 Guam 1 ¶ 9.

As this Court held in its April 2, 2024 Amended Order (“4/2/2024 Order”), the issues identified below and discussed herein are appropriate for review under 7 GCA § 4104, constitute matters of great public importance, and are such that their resolution through the normal process of law would cause undue delay. 4/2/2024 Order at 5-7.

II. ISSUES FOR DECLARATORY JUDGMENT

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 representations 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?

III. STATEMENT OF THE CASE

Petitioner seeks declaratory judgment interpreting the Organic Act of Guam and the laws of Guam related to the Attorney General of Guam's duty to provide legal services to Executive Branch agencies of the government of Guam. Specifically at issue in this matter is whether the Attorney General of Guam may withdraw from legal representation of agencies—or otherwise decline to provide legal services to agencies—based on his claim that such representation may conflict with his investigations or prosecution of agency officials. Petitioner further seeks a declaration of the Attorney General's responsibilities, and the rights of agencies, in the event of a conflict of interest arises.

The Organic Act of Guam provides that the Attorney General of Guam “*shall be the Chief Legal Officer of the Government of Guam.*” 48 U.S.C. § 1421g(d)(1) (emphasis added). Guam law further affirms the Attorney General’s responsibilities to the government of Guam through the enactment of numerous corollary statutes, which provide that the Attorney General *shall* have cognizance of all legal matters involving the Executive Branch of the government of Guam. 5 GCA § 30102. The Attorney General’s duties to the government of Guam include providing legal services to government agencies, advising on procurements, and reviewing and approving government contracts as provided in law. *See* 5 GCA §§ 30201, 5150, and 22601. The Attorney General is also required to conduct civil actions on behalf of the government of Guam. 5 GCA § 30109(c).

The Organic Act separately authorizes the Guam Legislature to establish an Office of Public Prosecutor. 48 U.S.C. § 1421g(c). Though the Organic Act does not designate the Attorney General to serve as the Public Prosecutor, Guam law provides that the Attorney General shall have cognizance of all matters pertaining to public prosecution, including the prosecution of public officials. 5 GCA § 30104.

On February 28, 2024, Respondent Douglas B. Moylan, Attorney General of Guam (“AG Moylan”) sent a letter to the directors of twenty-two (22) Executive Branch agencies and departments, including the Petitioner, with the subject line:

“Notice of Possible Conflict of Interest; *Temporary* Withdrawal Legal Representation to Protect Public Interest.” *See* Petition, Ex. 1 (February 28, 2024 Letter from Attorney General Douglas B. Moylan to Governor Lourdes A. Leon Guerrero re: Notice of Possible Conflict of Interest; *Temporary* Withdrawal Legal Representation to Protect Public Interest (“2/28/2024 Letter”). In his 2/28/2024 Letter, AG Moylan disclosed that the courts are presently considering motions to disqualify his office in two criminal cases he has brought against public officials, on the basis that his office previously provided legal advice to their agencies. *Id.* at 2. According to AG Moylan, “raising the conflict of interest issue necessitates judicial scrutiny,” which “created a *distracting and untenable operating situation.*” *Id.* (emphasis in original).

Expressing the concern that the “danger of violating an ethical rule” is too great, AG Moylan stated that he had “*therefore elected to temporarily withdraw from representing [Petitioner’s] dept. due to this potential legal conflict and until the Courts give us a clear direction.*” *Id.* (emphasis in original). Further in AG Moylan’s 2/28/2024 letter, he repeated that “[b]ecause of this legal scrutiny in the Courts upon the ethical conduct of the AG’s Office attorneys, we have reluctantly decided to *temporarily withdraw from representing Departments and*

Agencies in which we have active criminal and / or civil investigations.” *Id.* at 4 (emphasis in original).

AG Moylan further stated that he was “therefore providing notice that effective immediately, and until such time as the before-mentioned criminal cases authorize [his] Office to provide legal representation in both prosecuting government officials accused of corruption and also providing legal advice to that same department or instrumentality that the government official works for, the Office of the Attorney General will be temporarily withdrawing from providing certain government depts. and Instrumentalities any legal services to avoid any ethical violations until the Courts resolve the issue.” *Id.* at 5 (emphasis in original).

Finally, AG Moylan discussed the processing of documents, stating that “[f]or any document that requires the AG’s Office signature, we will simply insert on the signature line ‘potential conflict, cannot sign.’ We do not provide to you a legal opinion on whether Guam law allows for processing the document without the AG’s Office signature, and recommend that you seek the assistance of an independent counsel.” *Id.* (emphasis in original). AG Moylan concluded by stating that until further notice, “any communications with our Office is to be

considered by [Petitioner] as *non-privileged* and not protected by the Attorney-Client Privilege.” *Id.* (emphasis in original).

Attached to AG Moylan’s 2/28/2024 Letter was a list of reports issued by the Office of Public Accountability (“OPA”) and a list of twenty-one (21) agencies and instrumentalities under investigation by the Office of the Attorney General (“OAG”). *Id.* at Attachment 1. A notation further appears at the bottom right corner of the list, in parenthesis, stating “list subject to update.” *Id.* According to AG Moylan’s testimony before the 37th Guam Legislature on March 6, 2024, the list was later updated to include a twenty-second (22nd) agency from which AG Moylan was withdrawing representation, the Guam International Airport Authority.¹

On February 29, 2024, AG Moylan sent a second letter to his twenty-two (22) agency clients, with the subject “Processing of Documents for Approval by Attorney General.” Petition, Ex. 2 at 1 (February 29, 2024 Letter from Attorney General Douglas B. Moylan to Governor Lourdes A. Leon Guerrero re: Processing of Documents for Approval by Attorney General (“2/29/2024 Letter”). In his

¹ Guam Legislature Media, 37th Guam Legislature Emergency Session – March 6, 2024 at 2:13:45 – 2:14:40; <https://www.youtube.com/live/euHx4FKzL8M?feature=shared>

2/29/2024 Letter, AG Moylan outlined the process by which he intends to process agency documents, stating that he “[is] prepared to process documents transmitted to this Office on behalf of the ‘Government of Guam’ with the understanding that we serve as a ‘check’ upon your department to protect the Government of Guam/People of Guam’s legal interests, not yours or your department’s.” *Id.* (emphasis in original).

AG Moylan stated further that, to the extent the agencies intended to process any documents through the OAG during AG Moylan’s withdrawal, the agencies “will be required to acknowledge, consent to and agree to” a number of terms, including (1) that AG Moylan will not serve as the attorney for the agency in processing documents for AG Moylan’s signature; (2) that AG Moylan was reviewing documents to protect the public interest and the “Government of Guam/People of Guam’s legal interests,” not the agency’s interest; (3) that the agency acknowledges it may be under investigation and that AG Moylan is not the agency’s attorney in the document review and approval; (4) that AG Moylan reserves the right to investigate and prosecute government officials in their personal or official capacities regardless of his approval of the documents; and (5) that if agency officials believes they have civil or criminal exposure, they are

encouraged to seek the advice of independent legal counsel because AG Moylan is not their attorney. *Id.* at 1-2.

AG Moylan further recommended that agency heads seek the assistance of independent counsel to process the affected document if they declined to sign the waiver, because AG Moylan will write “**potential conflict, cannot sign**” on his signature line on the document. *Id.* at 2 (emphasis in original).

As with his 2/28/2024 Letter, though the notation “Confidential” appears above the addressee on the first page of the 2/29/2024 Letter, *Id.* at 1, an additional notation appears below AG Moylan’s signature on the second page, indicating that a copy of the letter was delivered to Therese Terlaje, Speaker of the 37th Guam Legislature and Chairperson of the Committee on Health, Land, Justice & Culture. *Id.* at 2.

Beginning on March 8, 2024, Executive Branch agencies from whom AG Moylan had withdrawn legal services and other concerned agencies submitted letters to Therese M. Terlaje, Speaker of the 37th Guam Legislature, and other senators, explaining their reliance on the OAG for a variety of legal services, including, but not limited, to providing routine legal advice as to interpretations of Guam and federal law and regulations; representing agencies in civil matters and negotiations; participating as legal advisor to all agencies, including

autonomous agencies, in procurements of Five Hundred Thousand dollars (\$500,000.00) or more; and reviewing agency plans, draft regulations, and contracts. *See* Petition, Ex. 7 (Compilation of Agency Letters).

The agencies expressed concern that AG Moylan's withdrawal would impact their operations and, ultimately, their services to the public. Many of these agencies are line agencies that Guam law does not authorize to employ agency attorneys, and which rely on the Attorney General for general legal advice.^{2 3} Others, including autonomous agencies, engage with the Attorney General pursuant to 5 GCA § 5150, which requires the Attorney General to serve as legal advisor in large procurements. Still others are not identified on AG Moylan's investigation list and did not receive a withdrawal letter from AG Moylan, but are associated with OPA reports he listed. Several other agencies have significant

² Uniquely, DPW, a line agency, has executed a Memorandum of Understanding ("DPW MOU") with the OAG to fund the salary of an Assistant Attorney General to specifically provide advice to the agency, and related instrumentalities pursuant to 5 GCA § 5151 (a). Following AG Moylan's withdrawal of representation from DPW, the status of the DPW MOU is unclear, as are the funds DPW agreed to pay the OAG pursuant to the DPW MOU.

³ Public Law 36-107, the current Budget Act, authorizes agencies that do not customarily obtain professional services, including legal services, through an employee in the classified service within the agency to contract to obtain services. *See* Public Law 36-107:XII:18(b). However, contracts for legal services may not be executed without the Attorney General's approval. 5 GCA § 5121(b), and, in any event, such authorization expires at the end of the fiscal year.

federally funded contracts in the upcoming months, such as the Guam Behavioral Health and Wellness Center (“GBHWC”) and the Department of Integrated Services for Individuals with Disabilities “(DISID”), and are concerned their legal services may be disrupted if the Attorney General decides to investigate them and suddenly withdraws his services from their agencies. *Id.*

On March 13, 2024, Petitioner sent a letter to AG Moylan requesting clarification of his 2/28/2024 Letter withdrawing services from agencies (“3/13/3034 Letter”). *See* Declaration of Counsel in Support of Reply Brief re: Jurisdiction (“Travis Decl.”), Ex. 3. In her letter, Petitioner summarized her discussions with AG Moylan, and his inconsistent statements and actions toward agencies since his withdrawal. Petitioner specifically asked AG Moylan for clarification of the following:

- (1) whether you intend to rescind your February 28th letter in which you withdraw from representation of the affected Executive Branch agencies;
- (2) whether you are in fact agreeing to provide legal services to Executive Branch agencies, including responding to legal inquiries, representing agencies in actions before the courts and the CSC, and reviewing and approving documents, including procurement documents, plans, and proposed regulations;
- (3) whether you *are* serving as legal counsel to agencies when you review their contracts, including DPHSS in its Adult Day Care contract;
- (4) given the apparent shift in your policy regarding contract review, whether you are rescinding your February 29th letter, and providing your agency clients with a new statement in writing outlining your apparent new policy; and
- (5) whether you will treat communications between attorneys in your office and the affected Executive Branch

agencies as confidential or privileged attorney-client communications, including with regard to any legal advice the agencies solicit or which your office provides as to procurements and contracts.

Id. at 4. AG Moylan did not respond to this letter.

On March 18, 2024, AG Moylan sent a letter to the agencies with the subject line “Legal Services to Government of Guam for Your Department/Agency by Attorney General.” Travis Decl., Ex. 1. In his 3/18/2024 Letter, AG Moylan acknowledges his 2/28/2024 and 2/29/2024 letters, “explaining to you that the Attorney General of Guam is temporarily withdrawing from representing your department/agency, and is not your attorney (no attorney-client relationship exists).” *Id.*

AG Moylan then states:

We are prepared to provide legal services to your Dept./Agency as an entity of the People of Guam / Government of Guam (hereinafter “Government of Guam”) pursuant to 5 GCA § 30109; *however*, you will need to review and agree to the attached disclosure acknowledgement that if we provide to your depart./agency, yourself and your personnel that it is only being done with your acknowledgement that we only represent the Government of Guam under Guam law, and *not* yourselves individually or in any form a personal capacity. That would include enforcing Guam law against you, your personnel and department in the event that we believe Guam law has been breached or will be breached.

Id. (emphasis in original). He further “reiterate[s]...that the Attorney General is ***not*** your attorney. We represent the Government of Guam, and in furthering our duty in

representing the Government of Guam would assist you in likewise serving in your capacity as an official, agent, representative and steward of the Government of Guam. In other words, you would not be able to rely upon any attorney-client relationship in the event that we prosecute you personally for any breach of Guam civil or criminal law...” *Id.* (emphasis in original). The second page of the letter provides signature lines for the agency heads and their legal counsel, above which appears the notation: “Acknowledge and Agree to Above[.]” *Id.* at 2.

On March 22, 2024, the OAG sent additional correspondence to DPW, from which AG Moylan has withdrawn services (“3/22/2024 Letter to DPW”), regarding the transmission of a DPW contract the OAG reviewed. Travis Decl., Ex. 2. The 3/22/2024 Letter to DPW states that “pursuant to the Attorney General of Guam’s February 28, 2024 and February 29, 2024 letters transmitted to your Dept./Agency...our review of the attached documents is being done solely pursuant to the AG’s duties to our client the Government of Guam. **Our review is not being done as your or your Dept’s./Agency’s attorneys.**” *Id.* (emphasis in original). Further, on the execution page of the attached contract, a stamp appears next to Chief Deputy Attorney General Joseph Guthrie’s signature, stating “Approved: Not Representing ANY Public Official.” *Id.*

As of the date of this writing, AG Moylan has not rescinded his withdrawal from agency representation, or explained how his “workarounds” resolve the numerous legal and ethical issues implicated by his withdrawal. He has not explained whether his communications with agencies are confidential. He has not disclosed whether and how the conflicts of interest that precipitated his withdrawal have otherwise been resolved. The Guam Legislature has not passed any legislation authorizing line agencies to procure legal services during AG Moylan’s withdrawal, or authorizing autonomous agencies to represent themselves in litigation or proceed with large procurements without AG Moylan’s involvement.

IV. SUMMARY OF THE ARGUMENT

The Office of the Attorney General of Guam has initiated criminal actions in the Superior Court of Guam against government officials based on various allegations of violations of Guam law. In response, defendants have sought disqualification of the OAG on the basis that the actions for which they are being prosecuted were consistent with advice they received from civil attorneys at the OAG. Faced with the possible disqualification that implicates obvious ethical obligations that OAG attorneys owe to agency clients, including the duty of loyalty and the duty of confidentiality, Attorney General Douglas B. Moylan, rather than

attempting to implement traditional ethics protocols including the implementation of ethical screens between civil attorneys and prosecutors or the designation of special prosecutors, has chosen to pursue a nuclear option: withdrawing wholesale from providing legal services to twenty-two (22) agencies whose officials are being investigated or prosecuted by the OAG.

AG Moylan's withdrawal of legal representation from Executive Branch agencies violates the Organic Act of Guam, which provides that the Attorney General of Guam "shall be the Chief Legal Officer of the *Government* of Guam." 48 U.S.C. § 1421g(d)(1). AG Moylan's withdrawal also violates Guam law, which reaffirms his designation as the chief *government* attorney in the enactment of numerous statutes, ultimately supporting the mandate that the Attorney General shall have cognizance of all legal matters involving the Executive Branch of the government of Guam, its agencies and instrumentalities. 5 GCA § 30102.

While Guam law separately designates the Attorney General to serve as the public prosecutor, *see* 5 GCA § 30104, the Attorney General may not elevate his *statutory* public prosecutor role above his *constitutional* role as the chief legal officer of the government of Guam, including the agencies of the Executive Branch. To the extent the two 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.

The Office of the Attorney General is subject to the Guam Rules of Professional Conduct. While the rules are not applied inflexibly, the OAG is not entitled to special or preferential flexibility. Relevant to the conflict AG Moylan has identified, GRCP 1.7 provides that, absent a waiver, an attorney may not represent concurrent adverse interests. Rule 1.11 further appears to suggest that such conflict is imputed to the other current attorneys within the OAG. Though the Court has suggested that the use of conflict screens may not be precluded to alleviate potential conflicts of interest within the OAG, the Court has noted that such screens may not be effective where the conflicted attorney sits in a supervisory role. *See People v. Santos*, 2018 Guam 12 ¶ 14. While it is unclear if ethical screens will be effective given the current structure and policies of the OAG, appointment of an independent special prosecutor to resolve complaints against agency officials may enable the OAG to provide legal services to its agency clients prospectively.

To the extent it is permissible for the OAG to utilize ethical screens to protect against split loyalties and breaches of confidentiality that may occur in instances of dual representation, such ethical screens must be timely and effectively implemented. Because the OAG has already initiated investigations or prosecutions

involving the twenty-two (22) agencies, it is too late to implement a timely ethical screen. Additionally, because AG Moylan has refused and continues to refuse to cede direct control and oversight over both agency representation and investigation and prosecution of agency officials, it is impossible to implement an effective ethical screen. Accordingly, the OAG should not be permitted to participate in investigations and prosecutions of agency officials or in agency representation relating to matters involved in such investigations and prosecutions.

Finally, access to competent legal services is critically important to support agency operations and performance of essential functions. The need for legal services caused by AG Moylan's abandonment of the agencies, if not addressed, will cripple agency action and cause substantial harm to the public, who relies on these vital services. Because the Organic Act charges the Governor of Guam with the executive power of Guam, supervision and control over Executive Branch agencies, and responsibility for the faithful execution of Guam law, if the Attorney General is unable or unwilling to provide legal services to agencies, the Governor is required by the Organic Act to take appropriate action directing agencies to employ or procure attorneys, or to otherwise ensure access to legal services to Executive Branch agencies.

V. ARGUMENT

A. The Organic Act designates the Attorney General as the Chief Legal Officer of the Government of Guam responsible for representing Executive Branch agencies and instrumentalities—a constitutional responsibility from which the Attorney General may not withdraw, and which he may not abandon.

On February 28, 2024, the Attorney General abandoned his primary job: to represent the government and its agencies. He has done so in a manner that has prejudiced his clients, purporting to terminate the attorney-client relationship with little notice, without ensuring his clients had adequate access to alternative services, and has violated client confidences in the process. Over the ensuing weeks, AG Moylan has offered inconsistent and plainly inadequate excuses for his behavior, and has compounded the damage to his agency clients by impermissibly demanding the execution of waivers in exchange for his provision of limited services.

Moylan has attempted to justify his erratic behavior by repeatedly asserting that the People of Guam or the public interest is his client. The Organic Act, however, clearly provides that the Government of Guam—a distinct legal entity composed to act in the public’s interest—is the Attorney General’s principal client. In an attempt to elevate *statutory* prerogatives over *constitutional* mandates, AG Moylan has abandoned his Organic Act responsibilities to his clients, the government of Guam and its agencies. Even if labeled a “temporary withdrawal,” an

abdication of this magnitude with respect to an elected official's Organic Act duties cannot be sustained.

1. The Attorney General of Guam's Organic Act duty is to serve the *Government of Guam*, his principal client.

The Attorney General is generally an elected or appointed constitutional office, whose primary scope of powers and duties is defined in state constitutions. Attorneys General in U.S. jurisdictions are conferred with diverse powers and responsibilities by state constitutions and statutes, as well as common law powers recognized by the courts.

In many jurisdictions, the Attorney General is the legal officer of the *state*. The Illinois constitution, for example, provides that the Attorney General is the legal officer of the state, with duties and powers that may be prescribed by law. Ill. Const. art. V, § 15. Texas's constitution provides that the Attorney General shall represent the state in certain suits, and provide legal advice to executive officers when requested. Tex. Const. art. IV, § 22. Florida's constitution provides that the Attorney General shall be the chief state legal officer, and that his office shall include a statewide prosecutor. Fla. Const. art. IV, § 4(b). California's constitution similarly states that the Attorney General shall be the chief law officer of the state, with direct

supervision over law enforcement officers and the duty to prosecute violations of law. Cal. Const. art. V, § 13.

Uniquely, the Organic Act of Guam defines the Attorney General's role not as the chief legal officer of the broader *territory* of Guam, but rather as the chief legal officer of the *Government* of Guam. 48 U.S.C. § 1421g(d)(1). While Guam law vests the Attorney General with power and responsibilities beyond those the Organic Act provides, and while many of these statutory responsibilities even pre-date Section 1421g(d)'s enactment, the Organic Act unequivocally establishes the Attorney General's *only* constitutional role: to serve as the *government's* chief legal officer.

The government of a state or territory is a distinct entity from the state or territory itself. *See Poindexter v. Greenhow*, 114 U.S. 270, 290 (1885) (“In common speech and common apprehension [the government of a state and the state itself] are usually regarded as identical; and as ordinarily the acts of the government are the acts of the state, because within the limits of its delegation of power, the government of the state is generally confounded with the state itself, and often the former is meant when the latter is mentioned. The state itself is an ideal person, intangible, invisible, immutable. The government is an agent...”); *see also McElroy v. Swart*, 57 Mich. 500, 505, 24 N.W. 766 n.1 (1885) (“The people themselves—the entire

mass of persons who compose the political society—are the true nation, —the final, permanent depositary of all power. Such a political society is a nation, and this nation possesses political sovereignty...The organized government, whatever be its form and character, is but the creature and servant of this political unit, which alone possesses dominion in itself.”); *Texas v. White*, 74 U.S. 700 (1868), *overruled on other grounds* by *Morgan v. United States*, 113 U.S. 476 (1885) (“In the Constitution the term state most frequently expresses the combined idea just noticed, of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States, and makes of the people and states which compose it one people and one country...And there are instances in which the principal sense of the word seems to be that primary one to which we have adverted, of a people or political community, as distinguished from a government.”).

The Organic Act contains several references to the Territory of Guam and numerous references to the Government of Guam, a distinction to which meaning

must be accorded.⁴ While the two terms, colloquially, may be used interchangeably, there is no mistaking that their meanings are distinct in the context of the Organic Act.

The Organic Act provides that “the *government of Guam* shall consist of three branches, executive, legislative and judicial.” 48 U.S.C. § 1421a (emphasis added). It assigns numerous duties to the Government of Guam. It requires that the Government provide adequate public education, 48 U.S.C. 1421g(b); transfers title over certain real property to the government of Guam for the benefit of the people of Guam, 48 U.S.C. § 1421f; requires the Government of Guam to pay salaries for government officers as employees, 48 U.S.C. § 1421d; and prohibits a religious test as a qualification for any office of the Government of Guam, 48 U.S.C. § 1421b(s).

⁴ The terms “government” and “Territory” should not be used interchangeably. *See In re A.B. Won Pat Int’l Airport Auth., Guam*, 2019 Guam 6 ¶ 51 (“We find it doubtful that the legislature would use two different words in such closely-related statutes to mean the same thing...”); *cf. Macris v. Richardson*, 2010 Guam 6 ¶ 15 (“A statute should be construed to give effect to all of its provisions so that no part would be superfluous or insignificant.”); *Washington Mkt. Co. v. Hoffman*, 101 U.S. 112, 115–16 (1879) (“We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word.”).

In contrast, Organic Act references to the “Territory of Guam” are more general, such as Section 1428’s authorization of appropriations to the Secretary of Interior to promote economic development in the Territory of Guam, or Section 1425a’s prohibition of actions by the housing authority to pledge the faith and credit of the Territory of Guam for a loan. 48 U.S.C. §§ 1428 and 1425a. Title 48 U.S.C. § 1711, which appears in Chapter 8A of Title 48, separate from the Organic Act, provides that the Territory of Guam shall be represented by a non-voting delegate to the U.S. House of Representatives. 48 U.S.C. § 1711. The distinction is clear—the Government of Guam is the agent of the broader Territory of Guam, charged with performing duties for the benefit of the community as provided by the Organic Act and the laws of Guam.

In *A.B. Won Pat Guam Int’l Airport Auth. (“GIAA”), ex rel. Bd. of Directors v. Moylan*, the Court held that though the Attorney General’s role as Chief Legal Officer to the Government of Guam vested him with common law powers, those powers may be expressly restricted or modified by statute. *GIAA*, 2005 Guam 5 ¶¶ 62. The Guam Legislature has exercised its discretion to modify the Attorney General’s powers and responsibilities by statute, limiting some of his duties to autonomous agencies and the legislative and judicial branches of the government of Guam.

Like the Organic Act, Guam law provides that “[g]overnment means the government of Guam and all of its branches.” 1 GCA § 713. Consistent with this definition of government, in the first government code, published in 1953, the Department of Law, administered by the Attorney General of Guam, was given “cognizance of all legal matters in which the *government of Guam* is in anywise interested.” Guam Gov’t Code §§ 199-200(1953). However, in 1999, the Guam Legislature, in Public Law No. 25-003, amended the section, now appearing in 5 GCA § 30102 to reflect its current language, which provides in relevant part:

Notwithstanding any other provision of law, the Attorney General shall have cognizance of all legal matters, excluding the Legislative and Judicial Branches of the government of Guam, involving the Executive Branch of the government of Guam, its agencies, instrumentalities, public corporations, autonomous agencies and the Mayors Council, all hereinafter referred to as ‘agency’. Where any other law permits any agency or autonomous public corporation to retain counsel other than the Attorney General, this shall not preclude said agency or public corporation from requesting the services of the offices of the Attorney General...

5 GCA § 30102.

Several statutes further circumscribe the Attorney General’s powers and duties relative to the Government of Guam by authorizing autonomous agencies of the Executive Branch to employ attorneys or procure contracts with private attorneys for legal services. *See, e.g.*, 12 GCA § 1108 (authorizing GIAA to appoint an attorney to advise the agency on legal matters and represent the agency in any

forum); 12 GCA § 8112 (authorizing the Consolidated Commission on Utilities to appoint an attorney to advise on legal matters to which the Guam Power Authority (“GPA”) is a party or is legally interested); 12 GCA § 5103 (authorizing the Guam Housing and Urban Renewal Authority to employ or retain legal counsel and staff); 10 GCA § 80114 (authorizing the Guam Memorial Hospital Authority (“GMHA”) to employ an attorney to assist and represent the hospital and to advise the GMHA board in civil matters).

Notwithstanding the Legislature’s qualification of the Attorney General’s duties to autonomous agencies, Guam law has repeatedly reaffirmed the Attorney General’s Organic Act duty to Executive Branch agencies, vesting in the Attorney General “cognizance of all legal matters ... involving the Executive Branch of the government of Guam.” 5 GCA § 30102. The Attorney General “is expected to provide legal services to those agencies that also are fiscally supported by the tax-base of the government of Guam” because “the operations of the Attorney General’s Office are fiscally supported by the revenues of the General Funds and various special funds of the government of Guam.” 5 GCA § 30201. Centralization of legal resources in the OAG is not only consistent with the Organic Act’s mandate, it also justifies the OAG’s funding under Guam law, further affirming that the Attorney

General's primary duty is to provide legal services to the agencies of the Executive Branch.

With few exceptions, the Attorney General represents the Government of Guam in litigation. *See* 5 GCA § 30109 (c) (“the Attorney General ... *shall* ... conduct on behalf of the government of Guam all civil actions in which the government is an interested party; provided that those ... agencies which are authorized to employ their own legal counsel may use them instead of the Attorney General.”) (emphasis in original); *see also* 12 GCA § 8112(d) (providing that the Attorney General shall represent GPA in litigation unless he delegates the duty to the GPA attorney); 12 GCA § 14109(c) (same regarding Guam Waterworks Authority (“GWA”)); 10 GCA § 80114(a) (same regarding GMHA).

Additionally, Guam Public Law 36-107, the current Budget Act, authorizes agencies that do not customarily obtain professional services, including legal services, through an employee in the classified service within the agency to contract to obtain services. *See* Guam Publ. Law 36-107: XII:18(b). This provision seemingly applies to all agencies of the Executive Branch, including line agencies. However, contracts for legal services may not be executed without the Attorney General's approval, *see* 5 GCA § 5121(b), and, in any event, such authorization expires at the end of the fiscal year.

In addition to providing routine legal services and litigation services to agencies, Guam law assigns several specific duties to the Attorney General pertaining to agencies in the area of procurement and contract review. Specifically, the Attorney General *shall* act as legal advisor during all phases of a solicitation or procurement process when it is estimated to result in an award of Five Hundred Thousand Dollars (\$500,000.00), or more, and review all resulting contracts for legality and form. 5 GCA § 5150. The Attorney General's duties under Section 5150 apply to all government agencies, autonomous and line agencies alike. The Attorney General is authorized to delegate his responsibilities under Section 5150 to Special Assistant Attorneys General, *see id.*, and has, in the past, delegated such authority to the attorneys for autonomous agencies. The Attorney General's approval is further required before all contracts are submitted to the Governor for execution. 5 GCA § 22601. The law also specifically requires the Attorney General's approval for execution of a contract for legal counsel services. 5 GCA § 5121(b).

While the Attorney General is expected to provide legal services to agencies supported by the General Fund, when agencies utilize the Attorney General's legal services for procurement and contract review that are not supported by the General Fund, the Attorney General may be authorized to recover legal fees from agencies for such activities. 5 GCA § 30202. The Attorney General is not generally expected

to dedicate an attorney to autonomous agencies or federally funded contract review. 5 GCA § 30201. However, he is expected to regularly employ attorneys to perform contract review services. *Id.* DPW, the Guam Board of Professional Engineers, Architects and Land Surveyors (“PEALS”), and the Guam Building Code Counsel (“GBCC”) may enter into a Memorandum of Understanding (MOU) to fund an Assistant Attorney General “to specifically provide legal services” to these bodies only. 5 GCA § 5151 (a).

As these numerous provisions of Guam law demonstrate, the Attorney General’s ultimate, primary, and non-delegable responsibility is to provide legal services to autonomous agencies as provided in law and to line agencies *in toto*. This central responsibility remains intact, even where the Legislature has qualified the Attorney General’s responsibilities to government entities, including the Legislature, the Judiciary, and, in some instances, autonomous agencies of the executive branch. Standing in contrast with many state constitutions, the plain language of Section 1421g(d) Organic Act and the numerous provisions of Guam law reinforcing that language, highlight that the Attorney General of Guam is, foremost, the *government’s* attorney.

//

//

2. The Attorney General’s role as public prosecutor is conferred by statute and cannot be used to justify his abandonment of his Organic Act duty.

This Court has recognized that the Attorney General “is charged with all the common-law powers and duties pertaining to the office, except insofar as they have been expressly restricted or modified by statute.” *GIAA*, 2005 Guam 5 ¶ 62. While many states courts have found that the public prosecutor role is a common law power of the Attorney General, *see State ex rel. Morrisey v. W. Virginia Office of Disciplinary Counsel*, 234 W. Va. 238, 253–54, 764 S.E.2d 769, 784–85 (2014) (collecting cases), it is clear that the role of public prosecutor is decidedly *not* among the common law powers conferred on the Attorney General of Guam. Rather, the Attorney General’s duties to the broader territory of Guam, including his role as public prosecutor, were conferred by Guam law.

In 1952, the Government Code of Guam separately established the offices of the Attorney General and the Island Attorney. Guam Gov’t Code §§ 199-269 (1953). Though the Attorney General administered the Department of Law, which had cognizance of all legal matters in which the Government of Guam was interested and all matters pertaining to public prosecution, the Attorney General’s enumerated duties were civil in nature, including providing opinions to public officers on matters related to their offices, instructing commissioners acting on behalf of the courts on

matters related to the service of writs, and defending judges when they were sued in their official capacity. Guam Gov't Code §§ 199-202 (1953). In 1970, the Attorney General's duties were expanded to authorize him to defend other government of Guam officials in actions for damages instituted against them for the performance of official acts, if the Attorney General found the officer acted in good faith. Guam Gov't Code § 7003.1 (1970).

The Island Attorney, by contrast, was primarily responsible for criminal prosecutions, and was subject only to the Attorney General's general supervision. In both the 1952 and 1970 versions of the Government Code, the Office of the Island Attorney formed the prosecution division of the Department of Law. While the Attorney General, as the administrator of the Department of Law, had jurisdiction over the Office of the Island Attorney, both the Attorney General and the Island Attorney were appointed by the Governor (appointment of the Attorney General was further subject to legislative approval), and both were subject to removal by the Governor. Guam Gov't Code §§ 199 and 265 (1953); Guam Gov't Code §§ 7000-7100 (1970).

The Island Attorney served as the public prosecutor, and performed duties collateral to prosecution, many of which are encapsulated today in 5 GCA §30109, including conducting all civil actions in which the Government was a party or

interested and protecting the rights and properties of the Government of Guam. Guam Gov't Code § 266 (1953); Guam Gov't Code § 7101 (1970). The role of the Island Attorney continued until 1975, when the Guam Legislature, in Public Law No. 13-117, eliminated the role and consolidated its powers in the Attorney General. Guam Pub. L. 13-117 (Dec. 27, 1975).

In Public Law No. 16-72, the Guam Legislature sought to transfer the prosecutorial functions of the Attorney General to the Office of the Territorial Prosecutor. Guam Pub. L. 16-72 (Mar. 11, 1982) (“Territorial Prosecutor Act”). The Territorial Prosecutor Act provided that the Territorial Prosecutor would be appointed in the first instance by the Governor with the advice and consent of the Legislature, but conditioned his removal on a conviction of a felony involving moral turpitude or willful misconduct, failure to perform duties, conduct prejudicial to the administration of justice, or conduct which brought his office into disrepute. P.L. 16-72:1. Though the Territorial Prosecutor Act contemplated that the Territorial Prosecutor and the Attorney General may share offices and nonprofessional personnel, the law specifically provided that the Territorial Prosecutor had discretion to investigate, bring, compromise or terminate criminal prosecutions “without being responsible to the Attorney General” unless such decisions constitute grounds for removal. *Id.*

In *Territorial Prosecutor for Territory of Guam v. Superior Court of Guam*, the District Court of Guam held that the Territorial Prosecutor Act was unconstitutional and void because attaching conditions to the Governor's possible removal of the Territorial Prosecutor impermissibly encroached on the Governor's removal powers. *Territorial Prosecutor*, CIV. 82-0215, 1983 WL 30224, at *6 (D. Guam App. Div. May 26, 1983).⁵ The court's invalidation of the Territorial

⁵ Notably, the *Territorial Prosecutor* court did not discuss the possibility of severing unconstitutional or inorganic sections of the Territorial Prosecutor Act. In *Guam Soc. of Obstetricians & Gynecologists v. Ada*, the Ninth Circuit Court of Appeals declined to declare Guam Public Law No. 20-134 invalid in its entirety on the basis that the defendants failed to appeal the district court's separate finding of unconstitutionality of specific sections, holding that "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Ada*, 962 F.2d 1366, 1369 (9th Cir. 1992). The Territorial Prosecutor Act further provided in relevant part "[i]f any provision of this Act or its application to any person or circumstance is held invalid and the invalidity substantially affects other provisions or applications of the Act, then the provisions of this Act shall not be severable and the entire Act shall expire by operation of law." P.L. 16-72:20. The *Territorial Prosecutor* court did not state a finding that the Legislature would not have enacted the remainder of the Territorial Prosecutor Act independent of the invalid part, or that the invalidity substantially affected the other provisions of the Act.

Prosecutor Act revived the prior law conferring the public prosecutor power on the Attorney General.

In 1986, Congress amended the Organic Act to authorize the Government of Guam to establish by law the Office of the Public Prosecutor and the Office of the Public Auditor, the removal of whom may also be provided by Guam law, resolving the prior constitutional defect noted by the *Territorial Prosecutor* court. 48 U.S.C. § 1421g(c). Two years later, in 1998, the Guam Legislature passed Public Law No. 24-288, again seeking to establish the Office of the Public Prosecutor, separate from the Attorney General. Guam Pub. L. 24-288 (Oct. 16, 1998). In relevant part, however, the P.L. 24-288, provided that “in the event that the position of an elective Attorney General is permitted by the Organic Act, no Public Prosecutor shall be elected.” P.L. 24-288:3. Thereafter, in Public Law No. 25-44, the Guam Legislature repealed P.L. 24-288, and established the elected office of the Attorney General. Guam Pub. L. 25-44 (Jun. 9, 1999).

At the time of Section 1421g(c)’s enactment, the Attorney General of Guam, then an appointed position, had already been designated to serve as the public prosecutor under Guam law. During the congressional hearings for the 1998 Amendment that established the Attorney General as a constitutional office,

Congress was presented with multiple recommendations to add the public prosecutor role to the Organic Act responsibilities of the newly designated Attorney General.

In his testimony, former Compiler of Laws Charles Troutman, serving as Acting Attorney General at the time of his testimony, recommended the repeal of the Section 1421g(c) reference to the Office of the Public Prosecutor, which he acknowledged was contrary to the provisions of most state constitutions, and which he believed would lead to ambiguities “if permitted to stand alongside” the proposed amendment establishing the constitutional role of the Attorney General.⁶ Mr. Troutman further acknowledged that the Guam Legislature was considering a bill to make the Attorney General the Public Prosecutor. *Id.* at 242.

Similarly, the 24th Guam Legislature submitted Resolution 186 to Congress, suggesting the following amendment to the language of H.R. 2370:

The Attorney General shall be the chief legal officer of the government of Guam, shall be vested with common law powers and such additional powers and duties as may be prescribed under the laws of Guam, not inconsistent with this chapter. The Attorney General shall prosecute all criminal violations of Guam law, provide legal advice to the government, and represent the government in all civil cases in which the government of Guam may be interested....

⁶ *Guam Judicial Empowerment Act of 1997, to Amend the Organic Act of Guam for the Purposes of Clarifying the Local Judicial Structure and the Office of Attorney General Hearing on H.R. 100, H.R. 2370 and S. 210 Before the House Comm. On Resources, 105th Cong. 240-244 (1997).*

Res. 186, 24th Guam Leg. First Reg. Sess. (1997). As the Court observed in *GIAA*, Congress did not adopt these recommendations. *GIAA*, 2005 Guam 5 ¶ 41.

As the various statutes and Organic Act amendments demonstrate, the public prosecutor role has been statutorily separated from the attorney general's common law powers since in the 1950s, and constitutionally separated since 1986. Nearly forty (40) years after enactment of Section 1421g(c), the Organic Act continues to authorize the Guam Legislature to establish an Office of the Public Prosecutor notwithstanding the establishment of the Attorney General as the Chief Legal Officer of the Government of Guam. Congress's refusal to repeal Section 1421g(c) is "weighty evidence" that it intended to reserve to the legislature the authority to determine whether to establish an independent public prosecutor or to continue to assign the role to the Attorney General. *See GIAA*, 2005 Guam 5 ¶ 26 ("because Congress apparently decided not to insert *any* language regarding the Legislature's authority in relation to the powers and duties of the Attorney General, it appears that Congress preferred not to tie the hands of the Legislature in this regard."); *cf. In re Request of Calvo Relative to Interpretation & Application of Organic Act Section 1423b & What Constitutes Affirmative Vote of Members of I Liheslaturan Guåhan*, 2017 Guam 14 ¶ 46 (finding that Congress's refusal to adopt proposed amendment to Organic Act that would authorize legislature to determine number of votes

required to pass law as evidence that Congress intended to reserve authority for itself.”). The Organic Act does *not* designate the Attorney General to serve as Public Prosecutor, or otherwise delegate prosecutorial duties to the Attorney General in addition to his Organic Act role as the government’s attorney. Rather, the Legislature conferred the prosecutorial functions to the Attorney General by statute.

To the extent the Attorney General of Guam had common law powers as public prosecutor owing to his title, the role of public prosecutor has been separated by statute from the common law powers of the Attorney General since 1952. *See Morrissey*, 234 W. Va. at 256 (observing that Virginia had “stripped the Attorney General of his common law powers to prosecute criminal offenses” over time, as a result of local judges initially appointing attorneys to prosecute criminal cases and the Virginia Legislature ultimately granting the authority to prosecute to elected county prosecutors). The public prosecutor role is further divorced from the Attorney General’s common law duties due to Organic Act provisions authorizing the Legislature to establish an Office of Public Prosecutor, and Congress’s resistance of recommendations to consolidate public prosecutor powers in the Attorney General. *See id.* (holding that the Attorney General of West Virginia’s common law prosecutorial authority were repealed as a result of the constitutional creation of the

office of the prosecutor, as well as statutes affirming the duties of prosecuting attorneys).

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. *See Hansen v. Utah State Ret. Bd.*, 652 P.2d 1332, 1337–38 (Utah 1982) (“In addition to constitutional and statutory authority, the Utah Attorney General, like attorneys general of numerous other states, has common law powers. However, those powers are not constitutionally rooted and therefore do not expand the power conferred by Article VII, § 16 [of the Utah Constitution] ...[W]here a conflict arises between the common law and a statute or constitutional law, the common law must yield.”) (citations omitted); *see also State of Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 270 (5th Cir. 1976) (“...[E]ven if the [Attorney General's] specific common law power asserted exists as a general matter, it might be that Florida's constitutional or statutory law conflicts with the common law on that point and thus overrules it.”).

The Attorney General's constitutional duty to provide legal services to the Government of Guam is further affirmed in Guam law, which has largely and repeatedly reaffirmed his Organic Act responsibility to serve as legal counsel to the

government. For this reason, the 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.

B. The Office of the Attorney General is required to implement conflict protocols consistent with the Guam Rules of Professional Conduct before or at the time a potential conflict arises between its representation of agencies and prosecution activities.

In his 2/28/2024 Letter, AG Moylan purports to “temporarily withdraw” from agency representation, which, as he describes, includes providing legal advice, defending lawsuits, reviewing contracts to note and correct errors, and issuing legal opinions. Petition, Ex. 1 at 2-3. AG Moylan states that the reason for his withdrawal is that the Superior Court of Guam is considering motions regarding potential conflicts of interest between his office’s representation of agencies and his prosecution of agency officials. *Id.* AG Moylan further claims that judicial legal scrutiny into his office’s potential conflicts of interest would require him to “create **mini-castles**” within his office, “with the People’s elected Attorney General of Guam stepping aside from Protecting the People of Guam’s legal interests for ½ of the elected AG’s duties as required by the U.S. Congress & the Guam Legislature.” *Id.* (emphasis added). AG Moylan rejects the apparent direction he has received to

“create 2 law firms, one for civil and one for criminal actions” because he “[does] not believe an ethical wall properly reflects Congress and the Guam Legislature’s enabling laws.” *Id.*

Addressing the application of the Guam Rules of Professional Conduct, AG Moylan further states:

The ongoing litigation to disqualify the AG attempts to treat the AG as any other private attorney where the AG represents government officials and that the AG is subject to “imputed disqualification.” In other words, the AG represents a government official when providing legal advice & legal services to that person as a managing agent of the “Government of Guam,” and cannot prosecute that same government official because of the Imputed Disqualification Rule as contained in the Guam Rules of Professional Conduct (i.e. AG has a “conflict of interest” that would force him to choose).

Id.

AG Moylan further addressed the application of ethical rules to the OAG in his March 6, 2024 testimony before the Guam Legislature during its emergency session called, in part, to discuss his withdrawal from agency representation:

In 2003, the Supreme Court of Guam passed the ethics rules for we attorneys ...nowhere is it referenced ... in the statute and (sic) the unique nature of an attorney general. An attorney general is a public attorney, it’s not equivalent to a private attorney, and that’s been recognized through cases in different jurisdictions...The Supreme Court of Guam recognized that there are certain areas that it’s adopting from the statutes that were in existence when the 2003 model rules were adopted...So I feel confident that the Supreme Court of Guam is going to make a positive decision for us on this. They have at least one 2018 case as well...with General Barrett-Anderson... and they came down in favor of the Attorney General having a unique position in our system

of government...When an attorney general is involved... sitting at a table with other government officials, they are a watchdog to protect the public interest because that government official and we represent the people of Guam, and we do not represent the government official, hence the reason why we can prosecute them...that scheme is not referenced in our model rules of professional conduct, and what they call as an imputed disqualification. A normal attorney, when they have one of their associates that has a conflict, it would normally transfer to the principal of the law firm, so the whole law firm would be disqualified...In the [*Barrett-Anderson* decision]...they didn't find the imputed disqualification, that just because then-Deputy Mason had a conflict, that conflict didn't transfer into the then-Attorney General Barrett-Anderson...I believe that the case authority exists, but quite frankly, I believe at some point the Supreme Court of Guam may be incorporating some of its decisions into an updated version of the Guam Rules of Professional Conduct.⁷

Despite AG Moylan's representations to the contrary, the Attorney General and the attorneys employed by the OAG are subject to the Guam Rules of Professional Conduct. *See 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...If the Attorney General seeks exceptions or changes to the rules, she should pursue those through the proper administrative channels for amending the rules, not through judicial interpretation.”); *see also*

⁷ Guam Legislature Media, 37th Guam Legislature Emergency Session – March 6, 2024 at 2:41:29 – 2:44:23; <https://www.youtube.com/live/euHx4FKzL8M?feature=shared>

Santos v. Camacho, CIV.04-00006, 2006 WL 581251, at *7 (D. Guam Mar. 10, 2006) (“The court is troubled that the Attorney General initially represented the Governor and the Directors, establishing an attorney-client relationship, only to later take an adverse position to them in the very same case. While the court agrees with the Attorney General that the rules of professional responsibility should not be applied “mechanically” when considering matters of conflict where the Attorney General is involved, that is not to suggest that they should not be applied at all.”).

Though the Guam Rules of Professional Conduct may not provide the degree of flexibility AG Moylan would prefer, they do provide specific rules that apply to government attorneys, including those employed by the OAG. *Barrett-Anderson*, 2018 Guam 20 ¶ 24. Relevant to this matter, GRCP 1.11 provides special conflicts of interest rules applicable to former and current government attorneys, *see* Guam R. Prof'l Conduct 1.11, and governs the disqualification of government lawyers due to imputation of conflicts of interest. *See* Guam R. Prof'l Conduct 1.10(d).

Rule 1.11 provides in relevant part that lawyers who formerly served as government employees are subject to Rule 1.9, and lawyers currently serving as public officers or employees are subject to Rule 1.7. *Id.* GRCP 1.7 in turn provides:

//

//

Rule 1.7: Conflict of Interest: Current Clients.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Guam R. Prof'l Conduct 1.7.

Rule 1.7 prohibits an attorney from representing a client if such representation involves a concurrent conflict of interest, which occurs where the representation of one client will be directly adverse to another, or there is a significant risk that the representation of one client will be materially limited by the lawyer's responsibilities to another client, a third person, or the personal interest of the lawyer. The lawyer may proceed notwithstanding the existence of a concurrent conflict upon fulfillment of certain conditions, notably including receiving informed, written consent by each affected client.

The Attorney General is designated by the Organic Act as the government’s chief legal officer. Because, as discussed, the Attorney General, by the Organic Act’s mandate, is agency counsel providing consistent, routine legal services to agencies, agencies are perpetually current clients of the OAG.⁸ Rule 1.7 is therefore implicated if a competing interest arises, whether in the context of investigations or prosecutions of agency officials on matters in which such officials received advice or legal services from the Attorney General’s office or due to a personal interest of the Attorney General.

GRPC 1.7 mirrors Rule 1.7 of the Model Rules of Professional Conduct, from which it was adopted. The comments to MRPC 1.7 may therefore serve as persuasive authority regarding the application of Rule 1.7. *Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶ 36 (“When the Legislature derives a statute from a model act, the

⁸ Because the scope of agency duties varies among Executive Branch agencies, their needs for legal services also varies. Some agencies, like DPW, require significant legal services, to a degree it is authorized an embedded assistant attorney general. 5 GCA § 5151 (a). While other agencies may require less consistent, more intermittent services, the consistency of legal work performed by the OAG on behalf of an agency does not undermine the current nature of the representation. *See Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co., Inc.*, 6 Cal. 5th 59, 81–82, 425 P.3d 1, 14, 237 Cal. Rptr. 3d 424, 439–40 (2018) (Finding that where the scope of legal services in an engagement agreement was “general employment matters,” and the firm provided work in November 2009 and again on March 2010, the agency work was ongoing and the client was a current client).

commentary to that act may be used to help determine the meaning of our version.”).

While concurrent conflicts of interest certainly implicate an attorney’s duty of confidentiality, Rule 1.7 also involves an attorney’s duty of loyalty to his clients:

Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client’s informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer’s ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client’s case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer’s interest in retaining the current client.

Model Rules of Prof’l Conduct R. 1.7 cmt. 6 (2023); *see also City & Cnty. of San Francisco v. Cobra Sols., Inc.*, 38 Cal. 4th 839, 846, 135 P.3d 20, 24–25 (2006) (“Two ethical duties are entwined in any attorney-client relationship. First is the attorney’s duty of confidentiality, which fosters full and open communication between client and counsel, based on the client’s understanding that the attorney is statutorily obligated to maintain the client’s confidences. The second is the attorney’s duty of undivided loyalty to the client.”).

The danger expressed in Comment 6 that concurrent representation of clients with adverse interests may damage the attorney-client relationship, including triggering a client’s reasonable fear that an attorney will pursue a client’s case less

zealously out of deference to the other interest, has come to fruition in AG Moylan’s current relationship with his agency clients. AG Moylan believes that when he renders legal advice to agency officials, he is acting as a “watchdog,” who can prosecute agency officials notwithstanding the provision of legal advice to those officials.⁹ Because AG Moylan is responsible for the assignment of assistant attorneys general to particular tasks, agency officials may reasonably fear that their assigned attorneys may be less zealous in defending agencies against improper subpoenas, for example, than their criminal division counterparts are in issuing those subpoenas, or that attorneys with less experience may be assigned to provide necessary legal services to their departments.

As the Department of Public Health and Social Services (“DPHSS”) noted in its March 8, 2024 letter to Speaker Terlaje, the agency has thirty (30) unanswered requests for legal advice pending with the OAG, including inquiries related to the issuance of sanitary permits, and, importantly, legal representation in investigative cases initiated by the OAG. Petition, Ex. 8. Agency officials may reasonably believe that its lawyers are withholding advice to help facilitate the investigation and prosecution of DPHSS officials.

⁹ 37th Guam Legislature Emergency Session – March 6, 2024, *supra* at 2:43:01-2:43:30.

Importantly, Rule 1.11 provides in relevant part that in the case of former government attorneys, disqualification is imputed to the attorney's new firm unless the disqualified attorney is timely screened from participation in the matter. GRPC 1.11(b)(1). However, this remedy is not expressly available under Rule 1.11 for attorneys *currently* employed with the government. If Rule 1.11 and 1.7 were strictly construed, implementing ethical screens may not be available as a prophylactic measure to enable the OAG to participate on both sides of an investigation, based on both the express authorization of screens in Rule 1.11 regarding former government attorneys and the silence regarding current government attorneys, and the significant duty of loyalty concerns implicated in the concurrent representation.

However, while not specifically addressing Rules 1.7 or 1.11 of the Guam Rules of Professional Conduct, in *People v. Santos*, the Court considered whether an ethical wall may be used to screen then Chief Prosecutor Joseph McDonald from criminal cases assigned to Judge Elyze Iriarte, his brother's daughter. *Santos*, 2018 Guam 12 ¶ 14. Though the Court specifically stated that it “[did] not preclude the use of an ethical wall to screen McDonald,” the Court expressed concerns regarding the effectiveness of a wall, particularly if it is erected after the assignment, and if McDonald, as the Chief Prosecutor, were required to evaluate attorneys in their performance before Judge Iriarte or had responsibility in allocating office resources.

Id. Here, where AG Moylan himself is at the top of the chain of command for both the civil and criminal divisions of the OAG, jealously guarding his authority to direct and control both, directly overseeing the allocation of office resources to both, and retaining ultimate authority to evaluate and discipline attorney within his office, it is clear that an ethical screen will not be effective.

Because, as discussed, the Attorney General has a continuing Organic Act duty to provide legal services to government agencies, to which statutory duties, including public prosecutor duties, must yield, if a conflict arises between the Attorney General's agency representation and a conflicting complaint, the investigation and any consequent prosecution of the complaint may be delegated to a special prosecutor.

The use of special prosecutors is appropriate in matters in which offices of the Attorney General has a conflict of interest, even in the absence of specific statutory language authorizing the use of a special prosecutor. In *State v. Breeze*, the Alaska Court of Appeals considered whether an attorney general's prosecution power may be delegated to a special prosecutor to investigate former clients of the attorney general, in the absence of specific statutory authority authorizing such delegation. *State v. Breeze*, 873 P.2d 627, 633 (Alaska Ct. App. 1994). The Court observed that Alaska law authorized the attorney general to assign functions to subordinate

officers and employees, and required the attorney general to ensure state law violations were investigated and prosecuted. *Id.* Relying on a provision in Alaska law setting forth the attorney general’s duty to “perform all other duties required by law,” the court held that because the attorney general had a continuing obligation to ensure violations of law were prosecuted notwithstanding his disqualification due to a perceived conflict, the appointment of a special prosecutor to conduct the prosecution “was also a duty required by law.” *Id.* at 632.

Similarly, Guam law does not expressly delineate the duty to delegate prosecutorial duties if a conflict of interest arises preventing the OAG from proceeding. However, like Alaska, Guam law authorizes the performance of the Attorney General’s public prosecutor function through deputies and assistants. 5 GCA § 30109. Like Alaska, Guam law also mandates that the Attorney General “perform such other duties as are required by law.” 5 GCA § 30109 (l). During his testimony before the Legislature, AG Moylan 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.¹⁰

However, special prosecutors have been appointed from time to time in Guam. In 2019, then-Attorney General Leevin Camacho (“AG Camacho”) requested that Governor Leon Guerrero appoint a special prosecutor in a possible criminal case against an attorney employed with his office, transferring funds to the Office of the Governor in furtherance of the requested appointment.^{11 12} Despite his protests, it appears AG Moylan himself recognizes that appointment of a special prosecutor is

¹⁰ 37th Guam Legislature Emergency Session – March 6, 2024, *supra* at 3:12:46-3:15:28.

¹¹ Recognizing the obvious conflict inherent in the OAG investigating or prosecuting one of its own attorneys, AG Camacho indicated an interest in “engag[ing] the services of an independent attorney to review [the report of the arrest] and determine whether to file criminal charges.” Jerick Sablan, *AG seeks special prosecutor in criminal case against assistant AG*, Pacific Daily News (Aug. 5, 2019). AG Camacho specifically asked the Governor to procure the services of the special prosecutor out of a commitment to a transparent and impartial review. *Id.*

¹² Guam courts have also deemed it appropriate for the Governor to appoint a Special Prosecutor if a conflict arises requiring the disqualification of the Attorney General. *See, e.g., People v. Lujan*, 1998 Guam 28 ¶ 4. Further, while the Court has previously held that judicial appointment of a special prosecutor violates the separation of powers, *see People v. Camacho*, 1 Guam R. 501, 504-05, 511 (1975), the Court has also suggested such appointment may be appropriate in limited circumstances. *People v. Tennessen*, 2008 Guam 21 ¶ 7 n.3, *amended and superseded on other grounds*, 2009 Guam 3.

appropriate in certain circumstances. In March 2024, AG Moylan himself designated a special prosecutor to bring a criminal action against an employee of the OAG.¹³ Though it is unclear whether the appointment authorizes the special prosecutor to act independent of interference or oversight from the Attorney General, of particular concern because the special prosecutor selected by the Attorney General has several contracts with the OAG, it is clear that AG Moylan's claim that he must absolutely oversee every criminal prosecution is not so inflexible as he claims.

Finally, it is possible that the OAG may proceed with both agency representation and investigations involving agencies if the Attorney General's office is given informed consent in writing by his agency clients. It appears this is in fact the only avenue the Attorney General has attempted to resolve his conflicts of interest.

If the Attorney General is unable to implement timely ethics protocols in response to his concurrent agency representation and investigations, Rule 1.7 is unmistakably clear. The Attorney General *shall* not engage in representation if it involves a concurrent conflict of interest.

¹³ See Shane Tenorio Healy, *Employee of AG's office charged with criminal sexual conduct*, The Guam Daily Post (Mar. 22, 2024).

C. Absent 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.

The Guam Rules of Professional Conduct require the OAG to implement ethics protocols if a conflict arises between its investigations and its agency representation. Such protocols are designed to ensure that agencies have access to loyal and zealous counsel, and to maintain the sanctity of privileged communications between agency officials and assigned attorneys general. This in turn will encourage dialogue between agency officials and their attorneys to ensure compliance with laws and regulations, and improve agency operations. *See Sandra T.E. v. S. Berwyn Sch. Dist. 100*, 600 F.3d 612, 621 (7th Cir. 2010) (“Confidential legal advising promotes the public interest by advising clients to conform their conduct to the law and by addressing legal concerns that may inhibit clients from engaging in otherwise lawful and socially beneficial activities... The public interest is best served when agencies of the government have access to the confidential advice of counsel regarding the legal consequences of their past and present activities and how to conform their future operations to the requirements of the law.”); *Paff v. Div. of L.*, 412 N.J. Super. 140, 153 (App. Div. 2010) (“[A] state agency has the same need for sound legal advice as a private client and...the confidentiality of communications between the government and its attorney is in the public interest.”).

However, based on current policy within the OAG, it appears that communications between attorneys and their agency clients are *never* confidential. During his testimony before the Legislature, AG Moylan was asked about civil attorneys and criminal attorneys within the OAG. According to AG Moylan, his office observes no such distinctions:

There is no designation under our statutes that says that a particular attorney is only a civil attorney or a particular attorney is only a prosecutor. Every assistant attorney general imbues (sic) the authority that you've given the attorney general as being a prosecutor and a civil attorney. If a civil attorney is sitting there as a government official breaks the Open Government Law, that attorney can turn into a prosecutor and handle that 'cause he's also a prosecutor. She's also a prosecutor, 'cause they are representative of the attorney general.¹⁴

AG Moylan's testimony highlights that there are no screens between assistant attorney generals 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.

Assuming the Court determines ethical screens are a tool available to current government attorneys pursuant to Rules 1.7 and 1.11, such protocols may be

¹⁴ 37th Guam Legislature Emergency Session – March 6, 2024, *supra* at 3:16:22-3:17:23.

effective prospectively when an issue arises that requires investigation of the agency clients of the Office of Attorney General. However, such screening protocols will not resolve the Attorney General’s existing ethical crisis.

Though the elements of an effective ethical screen vary based on the case, all screens require two universal features: timeliness and preventative measures. “A firm must impose screening measures when the conflict first arises. It is not sufficient to wait until the trial court imposes screening measures as part of its order on the disqualification motion.” *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 810–11, 108 Cal. Rptr. 3d 620, 645–46 (2010), as modified (May 6, 2010) (citing *Hitachi, Ltd. v. Tatung Co.*, 419 F.Supp.2d 1158, 1165 (N.D.Cal.2006) (“The time to have moved the matter [to another office] would have been when the ethical conflict was discovered, not after losing a motion to disqualify.”)). The time to erect an ethical wall between agency attorneys and attorneys involved in the investigation and prosecution of agency officials has passed. AG Moylan’s 2/28/2024 Letter confirms that he has already initiated investigations into the twenty-two (22) agencies identified in his letter.

The second element of an effective screen—implementation of prophylactic measures—would be likewise impracticable under present circumstances. “The typical elements of an ethical wall are: physical, geographic, and departmental

separation of attorneys; prohibitions against and sanctions for discussing confidential matters; established rules and procedures preventing access to confidential information and files; procedures preventing a disqualified attorney from sharing in the profits from the representation; and continuing education in professional responsibility.” *Henriksen v. Great Am. Sav. & Loan*, 11 Cal. App. 4th 109, 116 n.6 (1992).

As discussed, the current structure and policy of the OAG does not enable the implementation of screening protocols. Agency attorneys are simultaneously prosecutors, lying in wait for an official to violate the law so that they can investigate and prosecute them, a policy that almost assures agency officials, unable or unwilling to seek legal advice from attorneys they cannot trust, will inevitably misinterpret or misapply relevant laws and regulations.

As the Court noted in *Santos*, the challenges of implementing an effective ethical screen are compounded when the conflicted lawyer is a supervising attorney. 2018 Guam 12 ¶ 14. “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...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.” *Cobra Sols.*, 38 Cal. 4th at 853–54.

Reviewing the potential imputation of knowledge of a supervisory attorney requires a factual inquiry into the actual duties of the supervisor with respect to the attorneys to be screened, and the responsibility of the supervisor for setting policy affecting the subordinate attorneys. *In re Charlisse C.*, 45 Cal. 4th 145, 165, 194 P.3d 330, 342 (2008); *see also Santos*, 2018 Guam 12 ¶ 13-14 (observing that an ethical screen may not be effective where the conflicted attorney serves in a supervisory role and is required to evaluate the subordinate attorneys to be screened or has responsibility in allocating resources).

AG Moylan believes that, by virtue of his elected position, he is required to personally oversee both agency representation and investigations and prosecutions of agency officials. This belief is inconsistent with Guam law that allows the Attorney General to delegate work to deputies or assistant attorneys general, *see* 5 GCA § 30109, and the practice makes implementation of a late ethical screen impossible.

If the Court determines that ethical screens are a permissible tool for the OAG to use to avoid split loyalties and impermissible sharing of confidential information relating to agency representation and investigations and prosecution of agency

officials, such measures may suffice to avoid disqualification pursuant to Rules 1.7 and 1.11 of the Guam Rules of Professional Conduct prospectively. However, they will not cure the Attorney General's existing conflict, which is imputed to the other attorneys in his office due to belated implementation of screening protocols and the level of control he exercises over subordinate attorneys, office resources, and office policies. Accordingly, the OAG may not proceed with investigations and prosecutions of agency officials or agency representation related to the matters involved in the current investigations and prosecutions.

D. If the Attorney General is unable to provide legal services to an agency, the agency may employ or procure services of an independent attorney to perform such services.

As the Court observed in its 4/2/2024 Order:

Resolution of these questions will substantially affect government function since the OAG's withdrawal threatens to leave 22 Executive Branch agencies without legal services to perform essential functions. Provision of competent legal services to the Executive Branch is of great public concern and 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.

4/2/2024 Order at 5. The Court's observations aptly capture the crisis Executive Branch agencies currently face in the wake of the Attorney General's withdrawal. His withdrawal shakes the core of our government, leaving the Governor and

Executive Branch agencies without a critical component to their operations and ultimately interfering with their performance of essential functions.

The Organic Act provides that the executive power of Guam vests in the Governor of Guam, who “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.” 48 U.S.C. § 1422. The Governor is further required to establish, maintain, and operate public health services in Guam, including the hospital. 48 U.S.C. §1421g. The Organic Act further provides that the officers of Executive Branch agencies and instrumentalities “shall have such powers and duties as may be conferred or imposed upon them by law...” 48 U.S.C. § 1422c(b).

Guam law further assigns the Governor and Executive Branch agencies specific duties, many of which are critical to the daily lives of the members of our community, including public health, public safety, social services, public works, and education. The Attorney General performs a crucial function in agency effort to provide these services in compliance with the complex scheme of federal and local laws and regulations. To allow the Attorney General to stymie agency activity by

refusing to do his part would unreasonably hinder the performance of agency duties under the law and the Governor's duties under the Organic Act.

If the Attorney General is unwilling or unable to perform the necessary services for his agency clients, the Organic Act requires that the Governor, who has ultimate supervision authority over Executive Branch agencies, take steps to compensate for the Attorney General's inaction or inadequacy. *See Riley v. Cornerstone Cmty. Outreach, Inc.*, 57 So. 3d 704, 722 (Ala. 2010) (holding that constitution's grant of "supreme executive authority" duty to "take care that the laws be faithfully executed" to the governor means that "when the governor determines that, whether due to inaction or inadequate action by the other official, it is necessary for him to act lest the law go unenforced, he may act.").

Because the Attorney General has withdrawn from representation of the twenty-two (22) Executive Branch agencies, the Governor may instruct the agencies to employ or procure independent legal counsel to perform the legal services required by law, or may otherwise provide the agencies with access to legal services.

VI. CONCLUSION

The Attorney General may not simply abandon his obligations under the Organic Act. For this reason, Petitioner respectfully requests that this Court issue declaratory judgment finding that (1) the Attorney General of Guam may not

withdraw from legal representation of Executive Branch agencies based on his claim that such representation may conflict with investigations and prosecutions; (2) the Attorney General is required to implement ethics protocols if a conflict arises between legal representation of agencies and investigations and prosecutions; (3) because the Attorney General is unable to implement a timely and effective conflict screen, the Office of the Attorney General may not participate in investigations or prosecutions of agency officials or provide legal services to agencies; and (4) if the Attorney General is unable or unwilling to provide legal services to agencies, the Governor may direct agencies to employ or procure independent attorneys to provide such services, or may otherwise provide access to such services to affected agencies.

Respectfully submitted this 15th day of April, 2024.

OFFICE OF THE GOVERNOR OF GUAM
Lourdes A. Leon Guerrero, *Governor of Guam*

By: /s/ Leslie A. Travis

LESLIE A. TRAVIS

JEFFREY A. MOOTS

Attorneys for Petitioner

*The Honorable Lourdes A. Leon Guerrero,
Governor of Guam*

STATEMENT OF RELATED CASES

Pursuant to Appellate Rule 13(n), Petitioner hereby certifies that she is unaware of any cases related to the instant appeal.

Respectfully submitted this 15th day of April, 2024.

OFFICE OF THE GOVERNOR OF GUAM
Lourdes A. Leon Guerrero, *Governor of Guam*

By: /s/ Leslie A. Travis

LESLIE A. TRAVIS
JEFFREY A. MOOTS

Attorneys for Petitioner
The Honorable Lourdes A. Leon Guerrero,
Governor of Guam

CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitation of Rule 16(a)(7)(B) because this brief contains 13,614 number of words, excluding the parts of the brief otherwise exempted from Rule 16(a)(7)(B)(iii).

Respectfully submitted this 15th day of April, 2024.

OFFICE OF THE GOVERNOR OF GUAM
Lourdes A. Leon Guerrero, *Governor of Guam*

By: /s/ Leslie A. Travis

LESLIE A. TRAVIS
JEFFREY A. MOOTS

Attorneys for Petitioner
The Honorable Lourdes A. Leon Guerrero,
Governor of Guam

CERTIFICATE OF SERVICE

I, **LESLIE A. TRAVIS**, hereby certify that on the 15th day of April, 2024, I caused copies of the Brief of Petitioner Lourdes A. Leon Guerrero, I Maga'håga Guåhan to be served via the Supreme Court of Guam's electronic filing and service system on the following:

Douglas B. Moylan
Attorney General of Guam
Office of the Attorney General of Guam
590 South Marine Corps Drive, Suite 802
Tamuning, Guam 96913

Respectfully submitted this 15th day of April, 2024.

OFFICE OF THE GOVERNOR OF GUAM
Lourdes A. Leon Guerrero, *Governor of Guam*

By: /s/ Leslie A. Travis

LESLIE A. TRAVIS

JEFFREY A. MOOTS

Attorneys for Petitioner

*The Honorable Lourdes A. Leon Guerrero,
Governor of Guam*