

KATIE HOBBS
SECRETARY OF STATE
State of Arizona

October 1, 2020

Via email and hand-delivery

Maret Vessella
Chief Bar Counsel
State Bar of Arizona
Lawyer Regulation Department
4201 North 24th Street, Suite 100
Phoenix, AZ 85016-6266
maret.vessella@staff.azbar.org

Re: Request for disciplinary action

Dear Ms. Vessella:

We write to ask that the State Bar of Arizona investigate and take appropriate disciplinary action against certain lawyers affiliated with the office of the Arizona Attorney General who have violated the Rules of Professional Conduct while representing the office of the Arizona Secretary of State (the "SOS"). This letter and the accompanying exhibits identify the roles and specific misconduct of these lawyers, but they are sometimes referred to collectively as "the AG's Office."

The SOS does not make this request lightly. But the frequency and magnitude of these violations of the Rules of Professional Conduct leave the SOS with no choice. The recurring violations reflect an intentional effort by the AG's Office to substitute its own judgment for that of its client in election-related matters and to smear its own client in the public eye whenever possible.

Below are a few examples, described in more detail in the body of this letter:

- After obtaining confidential information and representing the SOS in a matter involving [REDACTED] the AG's Office withdrew from the representation without explanation. [REDACTED]
[REDACTED] Despite the SOS's objections to this obvious conflict, the AG's office has refused to acknowledge the conflict or recuse itself.
- In several election lawsuits, the AG's Office has represented the SOS, received confidential attorney-client communications, provided advice, filed papers on behalf of

the SOS, and then withdrawn from representation and appeared in the same litigation on behalf of a different party asserting a position materially adverse to the SOS.

- The AG’s withdrawal often occurs because the AG’s Office seeks to substitute its own views for the SOS’s despite ER 1.2(a)’s requirement that “a lawyer shall abide by a client’s decisions concerning the objectives of the representation.” Making matters worse, the AG’s Office has withdrawn at the eleventh hour on several occasions with a material adverse effect on the interests of the SOS, notwithstanding ER 1.16’s prohibition on doing so.
- The Attorney General himself publicly criticizes the SOS’s position on legal matters on multiple occasions, *including on matters in which the AG’s Office provided advice to and represented the SOS*. This disparagement not only breaches of the duty of loyalty and the duty of confidentiality owed to his client, but also damages the integrity of the profession in violation of ER 8.4(d).

The “hallmark of the client-lawyer relationship” is trust. ER 1.6 cmt. 2. Here, that trust has been irretrievably shattered. The SOS cannot share information with its counsel at the AG’s Office without fear that whatever it says may be used against the SOS [REDACTED] in the press, or when the AG’s Office changes sides in litigation.

“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.” ER 1.7 cmt. 1. But the line lawyers at the AG’s Office representing the SOS on election matters cannot exercise independent judgment, display loyalty and recommend an appropriate course of action when their every decision is subject to review and reversal by senior lawyers in that office, and the senior official in that office is publicly criticizing the SOS’s conduct in litigation matters.

I. The Lawyer-Client Relationship of the SOS and the AG’s Office

A. The statutory allocation of authority

The Secretary of State is the elected constitutional executive officer overseeing the Arizona Department of State and the State’s chief election officer. Ariz. Const. art. V, § 1(A); A.R.S. §§ 41-121, -121.02. Among other duties, the SOS prescribes rules governing election procedures, oversees the state library, archives, and public records, registers trade names and trademarks and issues certificates of registration for Arizona businesses. Although the AG’s Office provides legal services in connection with various of the SOS’s duties, only in the area of elections have counsel for the AG’s Office violated their ethical obligations.

The SOS may not expend funds to hire outside counsel unless the AG provides written notification that it is disqualified on a particular matter. A.R.S. § 41-192(E). In that situation, the SOS is “authorized to make expenditures . . . to employ attorneys” other than the AG’s Office. *Id.*

A.R.S. § 41-192(A)(1) provides that the Attorney General shall “be the legal advisor of the departments of this state and render such legal services *as the departments require.*” (emphasis added). When litigation involves the SOS or other agencies, the AG does not have authority to resolve it; instead, any “compromise or settlement shall be first approved by the department.” *Id.* § 41-192(B)(4). Notably, unlike federal law and the law in some states, Arizona does not have a statute empowering the Attorney General to act as the decisionmaker in litigation. *See, e.g.*, 28 U.S.C. § 516 (“Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or an officer thereof is a party, or is interested . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General.”) In sum, when the AG’s Office represents the SOS, it is obligated by statute and the Rules of Professional Conduct to act as the lawyer, not as the decisionmaker.

The lawyers in the AG’s Office are unquestionably bound by the Rules of Professional Conduct. *See, e.g.*, ER 1.11 cmt. 2 (“A lawyer representing a government agency . . . is subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in ER 1.7[.]”); *see also, e.g., People ex rel. Deukmejian v. Brown*, 624 P.2d 1206, 1209 (Cal. 1981) (rejecting state attorney general’s argument that he is exempt from rules of professional conduct because he acts “in the public interest,” and holding that he “may not take a position adverse to [his] clients”); *Attorney Gen. v. Michigan Pub. Serv. Comm’n*, 625 N.W.2d 16, 28 (Ct. App. Mich. 2000) (“[W]hen the Attorney General advises or represents another official, agency, or department, an attorney-client relationship is thereby formed, and the rules regarding professional conduct apply.”) (citation omitted).

Indeed, “[t]he need to dispel even the appearance of impropriety becomes ‘even more compelling when the attorney is a government attorney, i.e., an attorney invested with the public trust.’” Ariz. Ethics Op. 93-08 (July 1993) (quoting *Perillo v. Advisory Committee on Professional Ethics*, 416 A.2d 801, 809 (1980)). Due to his role as an elected official, Attorney General Brnovich is held to an even higher standard. ER 8.4 cmt. 5 (“Lawyers holding public office assume legal responsibilities going beyond those of other citizens.”).

B. Lawyers from the AG’s Office providing or supervising the representation

Attached as Exhibit 1 is an organizational chart reflecting the division of responsibilities at the AG’s Office. Two Assistant AG’s have been assigned to provide election-related advice to the SOS on a day-to-day basis. Kara Karlson has been one of those lawyers since the SOS was elected; the other position has been filled most recently by Dustin Romney. Ms. Karlson and Mr. Romney are supervised by Eryn McCarthy. Set out below is a more detailed description of the involvement of the particular lawyers who are the subject of this complaint.

Mark Brnovich, Attorney General: Mark Brnovich and his Chief Deputy and Chief of Staff, Joseph Kanefield, make up the AG’s Executive Office, which oversees all other Divisions of the AG’s Office. Mr. Brnovich was counsel of record on behalf of the SOS in *Miracle et al. v.*

Hobbs and Voto Latino Incorporated, et al. v. Hobbs,¹ and his Assistant AGs appeared on behalf of the SOS in *Lohr v. Bolick, et al.*² Mr. Brnovich was counsel of record on the filings on behalf of a party adverse to the SOS in *Arizonans for Second Chances*,³ *Arizonans for Fair Elections, et al. v. Hobbs, et al.*,⁴ and *Miracle*,⁵ and he appeared as amicus curiae adverse to the SOS in *Lohr*.⁶

Joseph Kanefield, Chief Deputy: Mr. Kanefield had confidential attorney-client communications with the SOS regarding its positions and theories in *Arizonans for Second Chances* and in *Miracle*, and he appeared on behalf of a party adverse to the SOS in *Lohr* and *Arizonans for Second Chances*. Mr. Kanefield oversees attorneys in all Divisions of the AG's Office, including the State Government Division and the Appeals and Constitutional Litigation Division.

Dawn Northup, State Government Division Chief: Ms. Northup oversees the attorneys in the State Government Division of the AG's Office, including Eryn McCarthy and Kara Karlson. Ms. Northup had confidential attorney-client communications with the SOS in *Voto Latino* and repeatedly refused to abide by the SOS's objectives of the representation. In *Lohr*, Ms. Northup authorized or directed Ms. Karlson to withdraw from representing the SOS two hours before the SOS's filing deadline.

Beau Roysden, Solicitor General: Mr. Roysden oversees the attorneys in the Solicitor General's Office in the AG's Office, including Drew Ensign and Jennifer Wright. Mr. Roysden is currently supervising Ms. Wright in the [REDACTED] Mr. Roysden also appeared as counsel adverse to the SOS in *Lohr* and *Arizonans for Second Chances*.

Eryn McCarthy, Agency Section Chief Counsel: Ms. McCarthy oversees attorneys in the Agency Counsel Section of the State Government Division of the AG's Office, including Kara Karlson. Ms. McCarthy informed the SOS that the AG's Office was disqualified from representing the SOS regarding [REDACTED] and the *Arizonans for Second Chances* case, but only after attorneys in Ms. McCarthy's Section had already advised and/or obtained confidential information from the SOS in those matters.

Drew Ensign, Deputy Solicitor General: Mr. Ensign oversees attorneys in the Civil Appeals Section of the Solicitor General's Office in the AG's Office. Mr. Ensign appeared on

¹ See *Miracle*, SOS's Motion for Extension of Time, attached as **Exhibit 2**; *Voto Latino*, SOS's Motion to Dismiss Second Amended Complaint, attached as **Exhibit 3**.

² See *Lohr*, SOS's Pre-Trial Memorandum, attached as **Exhibit 4**.

³ *Arizonans for Second Chances*, Supreme Court Docket Sheet, attached as **Exhibit 5**.

⁴ *Arizonans for Fair Elections*, Attorney General's Motion to Intervene, attached as **Exhibit 6**.

⁵ *Miracle*, State's Answering Brief, attached as **Exhibit 7**.

⁶ See *Lohr*, Supreme Court Docket Sheet, attached as **Exhibit 8**.

behalf of the SOS in *Miracle*, but later withdrew and appeared on behalf of a party asserting positions adverse to the SOS in the same case. Prior to his withdrawal, he drafted work product on behalf of the SOS and had confidential communications with the SOS regarding its theories and positions in the case. Mr. Ensign also appeared as counsel on behalf of a party adverse to the SOS in *Arizonans for Second Chances* and *Arizonans for Fair Elections*.

Kara Karlson, Assistant Attorney General: Ms. Karlson routinely advises and represents the SOS regarding election matters, and she advised the SOS regarding [REDACTED]. Ms. Karlson appeared on behalf of the SOS in *Miracle*, *Voto Latino*, *Lohr*, and *Clayton v. West, et al.* Ms. Karlson also had confidential client communications with the SOS regarding its positions and/or prepared work product on its behalf in *Arizonans for Second Chances*, *Arizonans for Fair Elections*, *Miracle*, and *Lohr* before other attorneys in the AG's Office appeared in the same matter adverse to the SOS. Ms. Karlson also repeatedly threatened or refused to abide by the SOS's directives in *Voto Latino* and *Miracle*. In *Lohr*, Ms. Karlson withdrew from representation two hours before the SOS's filing deadline.

Jennifer Wright, Assistant Attorney General: Ms. Wright is the Assistant AG primarily responsible for handling the AG's investigation of the SOS regarding the inadvertent disclosure of voter registration data. [REDACTED]. Ms. Wright also appeared as counsel adverse to the SOS in *Lohr* and *Arizonans for Second Chances*.

Supervising attorneys at the AG's Office are responsible for their subordinates' violations of the ethical rules. A lawyer is "responsible for another lawyer's violation of the Rules of Professional Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." ER 5.1(c). Further, under ER 5.1(b), lawyers having "direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."

On the other hand, subordinate attorneys at the AG's office cannot shield themselves from their ethical obligations by blindly following orders. ER 5.2(a) ("A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person."). Although an attorney may rely on his or her supervisor's "reasonable resolution" of an "arguable question" regarding an ethical duty, ER 5.2(b), reasonable positions about arguable questions are not at issue here. For example, there is no "arguable question" whether the AG's Office can [REDACTED]. Nor is there any "arguable question" about whether an attorney can appear on behalf of the SOS in litigation, withdraw, and then appear on behalf of a party adverse to the SOS in the same litigation.

II. [REDACTED]

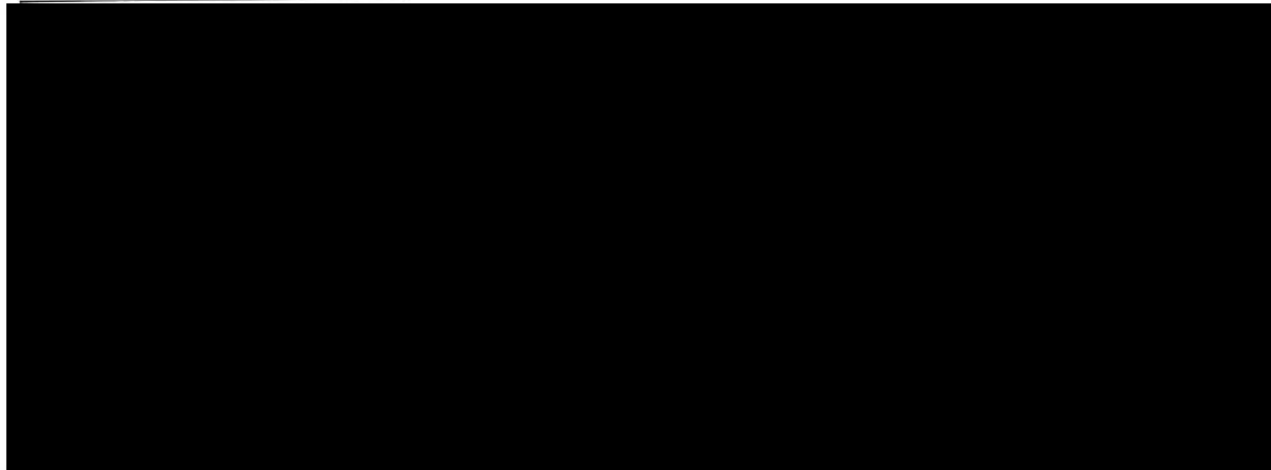
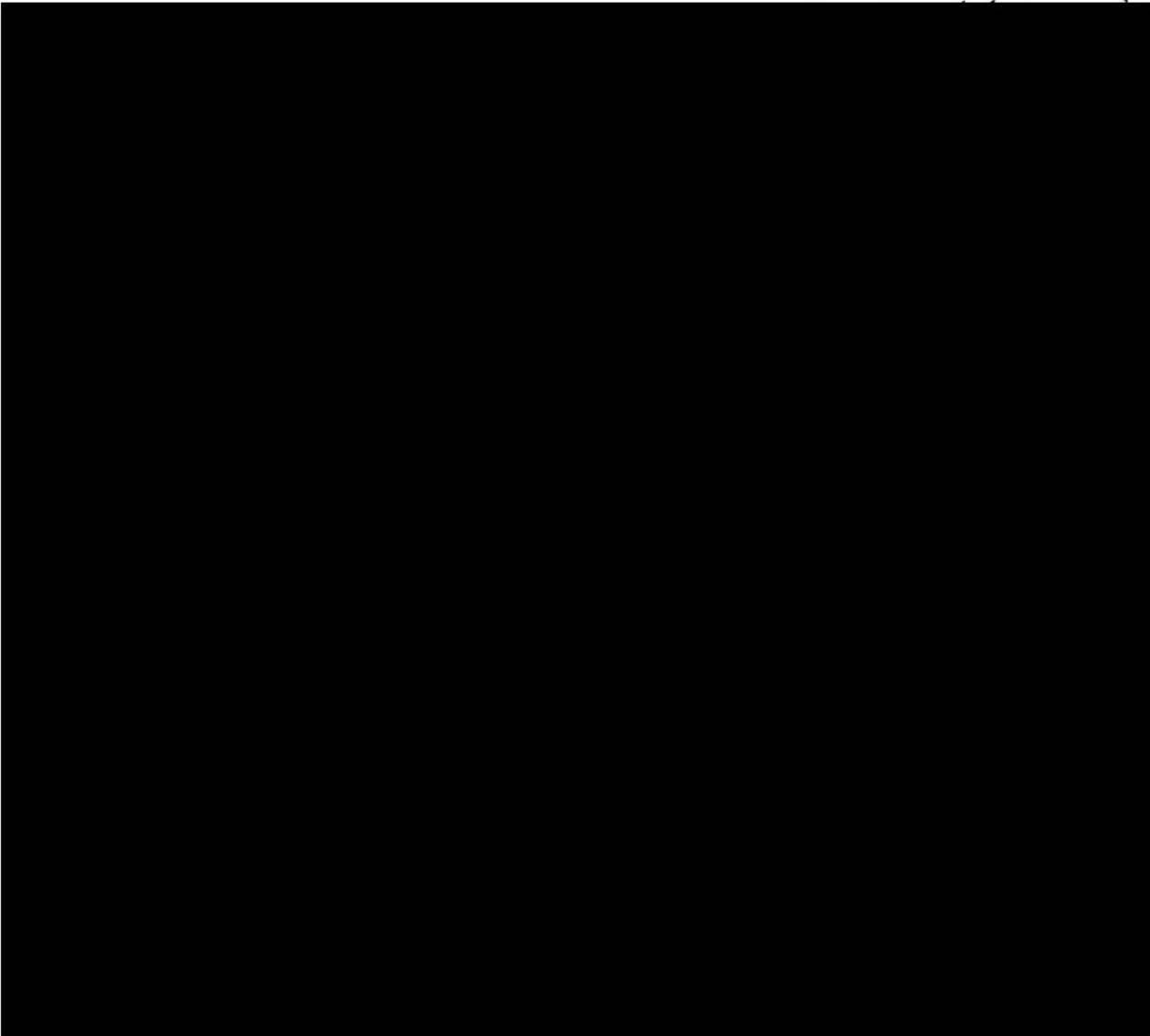
The AG's Office regularly advises the SOS on election-related issues. Recently, the AG's Office (i) received information from the SOS on an election issue, (ii) advised the SOS on that election issue, (iii) abruptly withdrew without explanation, and (iv) [REDACTED]

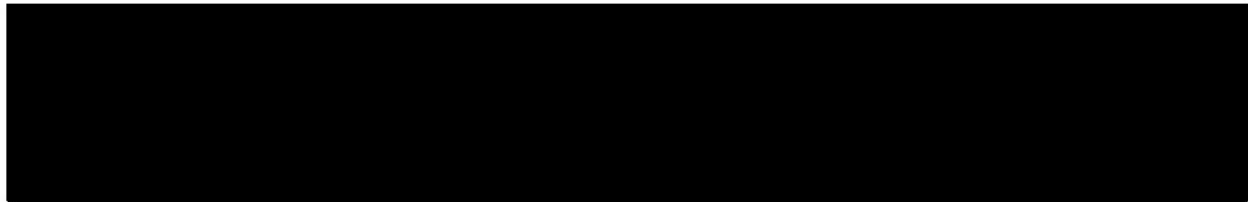
On March 17, 2020, the day of the Presidential Preference Election, the SOS learned that a functional error in the Arizona Voter Information Database ("AVID") caused the database to generate early ballot reports that inadvertently included confidential information regarding 76 protected voters.⁷ Certain counties provided those reports to the State's political parties during the election.

The SOS took immediate action to remedy the issue, including working with the vendor to correct the functionality error in the database, working with the counties to contact the political parties to ensure the reports were destroyed and contact every affected voter, and issuing a press a release. The SOS also shared information with the AG's Office and obtained legal advice about the remediation efforts.

[REDACTED]

[REDACTED]





III. The AG's Misconduct in Election Litigation

The AG's Office represents the SOS in election-related litigation, including multiple election matters over the past several months. Unfortunately, lawyers in the AG's Office, apparently at the behest of senior members of that office, have routinely violated the Rules of Professional Conduct in connection with that representation.

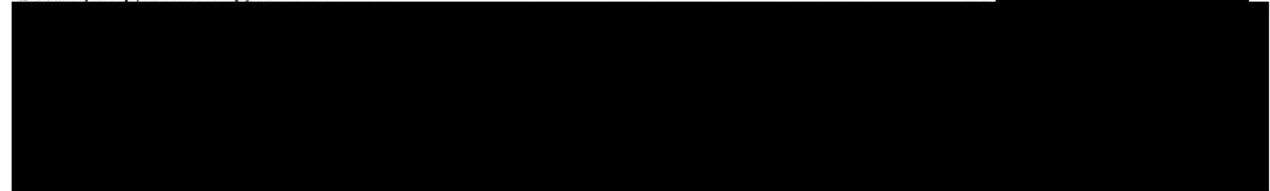
I. *Miracle, et al. v. Hobbs*

U.S. Court of Appeals for the Ninth Circuit, No. 19-17513
U.S. District Court for the District of Arizona, No. 2:19-cv-04694-SRB

This lawsuit challenged the constitutionality of an election statute governing signatures collected by paid or out-of-state petition circulators. Ms. Karlson and former Assistant AG Joseph La Rue represented the SOS in successfully defending the law at the trial court level. When the plaintiffs appealed the case to the Ninth Circuit, Ms. Karlson and Mr. Ensign represented the SOS on appeal.

The plaintiffs filed their opening brief on appeal on January 14, 2020. On February 18, 2020, Ms. Karlson sent Ms. Dul an 80-page draft answering brief, but she failed to mention that the brief was due that same day. Even after Ms. Dul responded to Ms. Karlson stating that the SOS was busy with election matters and did not expect to be able to review drafts until at least two days later, Ms. Karlson did not mention the same-day deadline.¹² Later that afternoon, Ms. Karlson finally informed Ms. Dul that the brief was due that day, but she assured Ms. Dul that the brief did not assert any new arguments that had not been raised below.

When Ms. Dul began reviewing the draft, however, she learned that the AG included a sweeping new argument that the SOS had not authorized in filings below.¹³



Ms. Dul advised Ms. Karlson that—



¹² February 18, 2020 email string between Kara Karlson and Bo Dul, attached as **Exhibit 14**.

¹³ February 18, 2020 email from Bo Dul to Kara Karlson, attached as **Exhibit 15**.

authorize—the AG’s Office should plan for a late filing. Ms. Karlson inaccurately asserted that [REDACTED] and, shockingly, threatened to file the brief without the SOS’s consent. In response, Ms. Bones explained why that was not accurate, and directed Ms. Karlson to [REDACTED]

Late that evening, without the SOS’s approval, the AG filed a motion for extension of time and a declaration of Ms. Karlson that misrepresented or omitted salient facts and painted the SOS in a negative light. The motion stated:

On the evening of February 18, the day of filing, the Secretary has informed the Office of the Attorney General that she requires additional time to review the draft of the Answering Brief due to other important election-related deadlines A short extension of time will permit the Secretary to further review the draft of the Answering Brief and avoid the potential need for the State of Arizona to intervene to defend its law in the event that the Secretary elects not [to] file a brief.¹⁵

The next day, Ms. Bones informed Ms. Karlson that this motion and supporting declaration misrepresented the reason for the extension and demanded that the AG file a correction. Ms. Karlson escalated the issue to Mr. Kanefield, and after much back and forth with the SOS, Mr. Kanefield refused to update Ms. Karlson’s declaration but agreed to file a corrected motion that added the following:

The Secretary was not provided the relevant briefs by the Attorney General’s Office until the morning of February 18, 2020, and was not informed in the email transmitting the draft that it needed to be filed that day. The Secretary believes that the draft brief that was transmitted to the Secretary contained new arguments and positions the Secretary had not previously considered or authorized in filings below.¹⁶

Rather than revise the answering brief to conform to the SOS’s objectives, the AG’s Office continued to insist on including the new arguments. Mr. Kanefield claimed that the AG’s

[REDACTED]

[REDACTED] At one point, Mr. Ensign emailed Bo Dul, copying Ms. McCarthy and Mr. Roysden, to propose that the AG’s Office

¹⁴ February 18, 2020 email string between Kara Karlson to Allie Bones and Bo Dul, attached as **Exhibit 16**.

¹⁵ Exhibit 2, *supra*.

¹⁶ Corrected Motion for Extension of Time, Feb. 20, 2020, attached as **Exhibit 17**.

[REDACTED]

Ultimately, Mr. Kanefield proposed that [REDACTED]
[REDACTED]

Because the SOS no longer had trust or confidence in the AG's Office to faithfully represent it in this matter and no time to obtain other counsel, the SOS was forced to become a nominal party since the "State" was intervening to defend the law as the AG saw fit. Mr. Kanefield assured the SOS that in return for stepping aside (as if it had any choice at the eleventh hour) the AG's Office would not criticize the SOS for its nominal party status. Despite this assurance, however, as detailed below, the AG then issued a press release that denigrated the SOS for not defending the law, tweeting the press release with a statement that, "[u]nlike some elected officials," the AG "will defend the law and not cave to political pressure."

Mr. Ensign withdrew as counsel for the SOS and appeared on behalf of the State, filing essentially the same brief that Ms. Bones previously instructed the AG's Office not to file or use.

2. *Arizonans for Second Chances, et al. v. Hobbs*
Arizona Supreme Court, No. CV-20-0098-SA

In this case, proponents of voter initiative petitions filed an emergency petition for special action requesting access to the State's electronic signature-gathering system managed by the SOS ("E-Qual") to collect signatures during the COVID-19 pandemic. After the SOS was served with the lawsuit, Ms. Dul immediately forwarded the pleadings to Ms. Karlson and Mr. Romney.¹⁹

Seven hours later, Ms. Karlson, presumably at the direction of her supervisors, emailed Ms. Dul [REDACTED]
[REDACTED] without providing any advice or analysis regarding the issues in the case.²⁰ Ms. Dul responded that the SOS [REDACTED]
[REDACTED]

Later that evening, Ms. Karlson sent Ms. Dul copies of a federal court lawsuit filed against the SOS seeking a similar injunction for access to E-Qual, *Arizonans for Fair Elections*,

¹⁷ February 19, 2020 email from Drew Ensign to Bo Dul, attached as **Exhibit 18**.

¹⁸ See February 20, 2020 emailing string between Joe Kanefield and Allie Bones, attached as **Exhibit 19**.

¹⁹ April 2, 2020 email from Bo Dul to Kara Karlson and Dustin Romney, attached as **Exhibit 20**.

²⁰ April 2, 2020 email from Kara Karlson to Bo Dul, attached as **Exhibit 21**.

²¹ April 2, 2020 email from Bo Dul, email attached as **Exhibit 22**.

et al. v. Hobbs, et al., U.S. District Court for the District of Arizona, No. 2:20-cv-00658-DWL. Ms. Karlson again [REDACTED] without providing any analysis or advice.²² In response, Ms. Dul asked Ms. Karlson for advice regarding [REDACTED]

Ms. Karlson did not respond. So Ms. Bones emailed Mr. Kanefield asking how the AG intended to proceed as the SOS's counsel, noting the urgency of the request because a hearing was set for the following day and Ms. Karlson still hadn't advised the SOS about the lawsuit. Mr. Kanefield responded that [REDACTED]

[REDACTED] The next morning, Mr. Kanefield declared that the AG "fundamentally disagree[d]" with the SOS's position in the lawsuit and that the SOS should seek outside counsel.²⁴ The AG's Office (including Mr. Kanefield, Mr. Roysden, Mr. Ensign, and Ms. Wright) then filed a motion to intervene on behalf of the State. During the litigation, the AG filed briefs in opposition to the SOS, claiming more than once that the SOS's filings were "self-serving" and factually inaccurate.²⁵

3. *Lohr v. Bolick, et al.*

Arizona Supreme Court, No. CV-20-0129-AP/EL
Maricopa County Superior Court, No. CV2020-004868

Ms. Karlson and Mr. Romney represented the SOS in this case. At issue was whether a state legislative candidate's status as a protected voter under A.R.S. § 16-153 excused her from providing her actual residence address on her nomination papers and petition sheets. The AG's Office had previously advised the SOS [REDACTED]

In other words, the advice previously provided by the AG's Office [REDACTED]

²² April 2, 2020 email string between Kara Karlson and Bo Dul, attached as **Exhibit 23**.

²³ April 2, 2020 email string between Joe Kanefield to Allie Bones, attached as **Exhibit 24**. Mr. Kanefield claimed that he was [REDACTED] yet the AG's Office was presumably already planning to intervene rather than represent the SOS, given that they intervened the following day and filed a substantive brief seeking a stay of proceedings.

²⁴ April 3, 2020 email from Joe Kanefield to Allie Bones, attached as **Exhibit 25**.

²⁵ See AG's Response to Amicus Briefs, April 27, 2020, attached as **Exhibit 26** (E.g., AG stating that an argument was "based solely on the Secretary's self-serving claims"; "the Secretary's contention . . . is contrary to her own words"; "while the Secretary[] strenuously den[ies] the import of what her own election director has said, the State is not required to accept self-serving characterizations at face value . . ."). The AG's Office (including Mr. Ensign) filed similar briefs in opposition to the SOS in the federal case, *Arizonans for Fair Elections*.

After the challenge was filed, Ms. Karlson informed the SOS [REDACTED]

[REDACTED] Ms. Karlson and Mr. Romney represented the SOS at the trial court level, and they filed a pretrial brief on the SOS's behalf explaining its policy of requiring candidates to include their residential addresses on candidate filings.²⁶ The SOS took this position to defend its election procedure, [REDACTED]

On appeal, without notice or consent, the AG's Office (Joe Kanefield, Beau Roysden, and Jennifer Wright) filed an amicus brief on behalf of Mark Brnovich asserting that A.R.S. § 16-153 applies to candidate papers—*i.e.*, the position directly adverse to that of the SOS in the same case. [REDACTED]²⁷ Ms. Karlson continued to represent the SOS and began preparing its brief in response to the AG's amicus brief, and Ms. Dul collaborated with Ms. Karlson to edit the brief.²⁸ Although it is an attorney's obligation to inform the client of conflicts of interest, the SOS asked Ms. Karlson whether there was an ethical problem with the AG's Office taking opposite positions in the same case, and Ms. Karlson consulted her supervisors. *Two hours* before the deadline to file the response, Ms. Karlson and Ms. Northup informed Ms. Dul [REDACTED]

[REDACTED] Ms. Karlson withdrew from representation and the SOS was forced to file its brief *pro se*.

4. *Voto Latino Incorporated, et al. v. Hobbs*

U.S. District Court for the District of Arizona, No. 2:19-cv-05685-DWL

This lawsuit challenged a statute that requires mail-in ballots to be received by election officials by 7 p.m. on Election Day. Ms. Karlson and Mary O'Grady of Osborn Maledon represented the SOS in defending the law. On March 17, 2020, Ms. Karlson sent Ms. Dul a draft motion to dismiss the plaintiffs' second amended complaint, which was due on March 20.

On March 19, 2020, Ms. Dul sent the AG's Office and Osborn Maledon a revised draft with the SOS's comments. The SOS directed counsel to remove an argument [REDACTED]

Ms. Dul explained that, [REDACTED]

²⁶ Exhibit 4, *supra*.

²⁷ *Lohr*, Attorney General's Amicus Brief, attached as **Exhibit 27**.

²⁸ See May 7, 2020 email strings between Kara Karlson and Bo Dul, attached as **Exhibit 28 and 29**.

²⁹ May 7, 2020 email string between Kara Karlson and Bo Dul, attached as **Exhibit 30**.

The next day, Ms. Northup and Ms. Karlson had a phone call with Ms. Bones, Ms. Dul, and SOS Legislative Affairs Director Will Gaona and contended that the argument should be kept in the motion to dismiss notwithstanding the SOS's direction to the contrary. After the call, Ms. Bones emailed Ms. Northup to make clear that the SOS's view was controlling: [REDACTED]

Ms. O'Grady emailed the SOS shortly thereafter with an updated draft of the motion that removed the argument. In response, the AG's Office [REDACTED] in contravention of the allocation of authority in ER 1.2. Only after the SOS refused to bow to the pressure of its own counsel did the AG's Office relent at the eleventh hour and agree to file the revised draft.³²

5. *Clayton v. West, et al.*

Arizona Supreme Court, No. CV-20-0249-AP/EL
Maricopa County Superior Court, No. CV2020-010553

Ms. Karlson and Mr. Romney represented the SOS in this lawsuit challenging an independent presidential candidate's aqualification to appear on the 2020 General Election ballot. The SOS took a nominal position on the substantive merits of the claims, but Ms. Dul informed Ms. Karlson and Mr. Romney that the SOS opposed an argument [REDACTED]

In response, Ms. Karlson advised Ms. Dul that the SOS [REDACTED] Ms. Dul reiterated the SOS's position that, [REDACTED] Ms. Dul asked Ms. Karlson and Mr. Romney to share this position with the court at the hearing that was scheduled for the next morning. The next morning, after Ms. Karlson and Mr.

³⁰ March 20, 2020 email from Allie Bones to Dawn Northup, Mark Brnovich, and Katie Hobbs, email string attached as **Exhibit 31**.

³¹ March 20, 2020 email string between Bo Dul, Linley Wilson, and Mary O'Grady, attached as **Exhibit 32**.

³² March 20, 2020 email from Dawn Northup to Allie Bones, attached as **Exhibit 33** [REDACTED]

³³ See September 2, 2020 email string between Kara Karlson, Dustin Romney, and Bo Dul, attached as **Exhibit 34**.

Romney still had not responded, Ms. Dul reached out to them again to make sure they were going to represent the SOS's interests at the hearing.

Mr. Romney responded that he would appear on the SOS's behalf at the hearing and that he intended to advise the court that the SOS [REDACTED]

Ms. Dul corrected Mr. Romney and again asked him to advise the court [REDACTED]. In response, right before the hearing, Mr. Romney informed Ms. Dul that [REDACTED]

Ultimately, the court addressed only scheduling issues at the hearing and there was no opportunity for the Secretary to voice her position [REDACTED] but if there had been the opportunity, Mr. Romney made clear his refusal to advance the SOS's position.

6. The AG's Misconduct in the Election Cases Violated Ethical Rules 1.2, 1.4, 1.6, 1.7, 1.8, 1.9, and 1.16.

1. ER 1.7 (concurrent conflicts of interest) and ER 1.9 (conflicts – former clients)

The Ethical Rules prohibit a lawyer from representing a client, absent the client's informed consent, where: "(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." ER 1.7(a). Further, where a lawyer formerly represented a client in a matter, the lawyer cannot "thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client," absent the former client's informed consent. ER 1.9(a). Lawyers at the AG's Office, like all lawyers, are "subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in ER 1.7 and the protections afforded former clients in ER 1.9." ER 1.11 cmt. 2.

The AG's Office has intervened, or appeared as amicus curiae, and taken a position materially adverse to the SOS, including in matters in which the AG's office represented the SOS in the same case. Notably, in *Miracle*, the same attorney at the AG's Office, Mr. Ensign, entered an appearance and drafted a legal brief on the SOS's behalf, and received confidential client communications from the SOS, including comments on the draft and [REDACTED]. Following these discussions with the SOS, Mr. Ensign withdrew as the SOS's counsel and entered an appearance for another party asserting a position adverse to the SOS's interests, while Ms. Karlson continued representing the SOS in the same case. In *Lohr*, the AG inserted himself into the litigation as amicus curiae to take a position directly adverse to his current client and directly

³⁴ See text messages between Dustin Romney and Bo Dul, attached as **Exhibit 35**.

contrary to [REDACTED] And in *Arizonans for Second Chances*, after the AG's Office asked for the SOS's theory and analysis of the lawsuit, it declined to provide representation and instead opted to intervene in opposition to the SOS.

The AG's Office did not obtain the SOS's informed consent to these conflicts of interest (if these were waivable conflicts, which they are not). This pervasive conduct violates the duty of loyalty and duties to current and/or former clients under ER 1.7 and 1.9.³⁵

2. The AG Cannot Use Screens to Avoid its Conflicts and Disloyalty

In the cases described above, the SOS's interests cannot not be sufficiently protected by implementing a "screen" because Attorney General Brnovich (and in most instances, Mr. Kanefield) cannot be screened from matters in which the office has a conflict of interest. The Attorney General is the head of the office, appears as the primary counsel listed on all court filings, and is his office's ultimate decision-maker. "Individuals who head a government law office occupy a unique position because they are ultimately responsible . . . Moreover, the attorneys who serve directly under them cannot be entirely insulated from those policy decisions, nor can they be freed from real or perceived concerns as to what their boss wants." *City & Cty. of San Francisco v. Cobra Sols., Inc.*, 135 P.3d 20, 29–30 (Cal. 2006); *see also People v. Doyle*, 406 N.W.2d 893, 899 (Mich. Ct. App. 1987) (where a prosecutor with supervisory and policy-making authority had a conflict of interest, recusal of his entire staff was required). Lawyers in the AG's Office cannot represent the SOS with "undivided loyalty" in matters in which the AG's Office is materially adverse, particularly given that the Attorney General constantly denigrates the Secretary and her legal positions in public statements.

Even if screens were permissible (and they are not), screens have not been implemented except in a handful of instances, to the knowledge of the SOS. And those screens were ineffective. For example, in *Miracle*, the AG's Office purported to implement a "screen" for Mr. Ensign, but failed to notify the SOS about the terms of the screening procedure sufficient to allow the SOS to evaluate its effectiveness. *See* 1.0(k); Restatement (Third) of the Law Governing Lawyers § 124 cmt. d(iii) ("Timely and adequate notice of the screening must . . . be given to the affected clients, including description of the screening measures reasonably sufficient to inform the affected client of their adequacy. Notice will give opportunity to protest

³⁵ The AG's conduct also violates his own Agency Handbook. *See* Ariz. Agency Handbook, Ch. 1 The Att'y Gen. and the Dep't of Law, § 1.9.2.4 (2018), https://www.azag.gov/sites/default/files/docs/agency-handbook/2018/agency_handbook_chapter_1.pdf ("When the Attorney General has interests adverse to those of another state agency . . . the Attorney General will not represent the agency . . . on the matter in controversy but may instead appoint outside counsel to provide representation in the specific matter."); *see also* § 1.9.3.4 (the Attorney General should withdraw from representing a state agency that is adverse to another agency, "if ethically appropriate," but if he "ethically cannot withdraw representation from one agency and continue to represent the other agency, then he . . . will withdraw from representation of both").

and to allow arrangements to be made for monitoring compliance.”).³⁶ The so-called screen in *Miracle* could not possibly have been effective because before he drafted the brief adverse to the SOS, Mr. Ensign had already represented the SOS on the other side of the “screen” in the same case when he (along with Ms. Karlson) drafted the SOS’s brief. ER 1.0(k) (defining a screen as the “timely imposition of procedures” to isolate disqualified lawyers “from any participation in a matter”) (emphasis added).

3. ER 1.6 (confidentiality of information) and ER 1.8 (concurrent conflicts of interest – specific conflicts)

The AG’s Office’s side-switching and its failure to screen conflicted lawyers or their supervisors also violate ER 1.6 and 1.8. After receiving confidential client communications from the SOS and drafting work product on its behalf, the AG’s Office has repeatedly turned around and attacked the SOS for its positions in the matter, including in the AG’s public statements described below, despite the ethical obligation to not “use information relating to representation of a client to the disadvantage of the client[.]” ER 1.8(b); *see also* 1.6(a) (“A lawyer shall not reveal information relating to the representation of a client[.]”). When this happens, there is also no indication that the AG’s Office takes any steps to prevent adverse lawyers in the same office from accessing “information relating to the representation” of the SOS. ER 1.6(e).

4. ER 1.2 (allocation of authority) and ER 1.4 (communication)

Lawyers must “abide by a client’s decisions concerning the objectives of representation and . . . consult with the client as to the means by which they are to be pursued.” ER 1.2(a). Yet the AG’s Office repeatedly has refused to accept the objectives and decisions of the SOS, seeking to instead substitute its own views, browbeating the SOS into accepting those views, refusing to speak on the SOS’s behalf, and threatening to quit or file separate papers opposing the SOS. This constitutes a violation of ER 1.2. *See Santa Rita Mining Co. v. Dep’t of Prop. Valuation*, 111 Ariz. 368, 371 (1975) (the AG cannot take action in litigation “against the wishes of his client,” because “[i]t is the [agency] director’s discretion which may be exercised and not the Attorney General’s. The Attorney General is the attorney for the agency, no more”); *Motor Club of Iowa v. Dep’t of Transp.*, 251 N.W.2d 510, 514 (Iowa 1977) (where the “department of state government was sued and the attorney general appeared to defend the department,” the attorney general’s role in the litigation was to serve as counsel for the department, “not to assert his vision of state interest”); *cf. Chun v. Bd. of Trustees of Employees’ Ret. Sys. of State of*

³⁶ Indeed, the Ethical Rules routinely contemplate that notice of the specific screening procedure should be provided to the affected client. *E.g.*, 1.10(d)(3) (requiring lawyers who implement a screen to give the client “a description of the particular screening procedures adopted” to allow the client to assess the screen’s sufficiency); ER 1.11(a)(2) (where a disqualified lawyer is screened from representing a government agency, requiring that “written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the . . . Rule, including a description of the particular screening procedures adopted [and] when they were adopted[.]”); ER 1.11 cmt. 6 (“Notice, including a description of the . . . screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.”); ER 1.18 cmt. 8 (same); ER 1.12 cmt. 5 (same).

Hawaii, 952 P.2d 1215, 1239 (Haw. 1998) (even where, unlike in Arizona, the attorney general has common law powers, the attorney general's conflicting position to protect "the interests of the state" deprived the state agency of "the loyal representation to which it was statutorily entitled").

Moreover, lawyers must "reasonably consult with the client about the means by which the client's objectives are to be accomplished" and "keep the client reasonably informed about the status of the matter." ER 1.4(a)(2), (3). But the AG's Office has consistently failed to communicate with the SOS about ongoing matters, including preparing briefs without even consulting the SOS about its objectives or giving it time to review the drafts. It is particularly important to Secretary of State, as an elected official, that her office has an opportunity to provide substantive input on court filings. Court filings are public statements made on the SOS's behalf, and reporters often use these filings to quote the SOS in the press.

5. ER 1.16 (terminating representation)

When the AG disagrees with the SOS, his office either threatens to submit filings without the SOS's consent or just withdraws from representation. In doing so, the AG has left the SOS in a bind multiple times, despite his obligation to take all steps "reasonably practicable to protect a client's interests" during the withdrawal. ER 1.16(d); *see also* ER 1.16(b)(1) (lawyers generally may withdraw from representing clients if "withdrawal can be accomplished without material adverse effect on the interests of the client"); ER 1.16 cmt. 10 (upon termination of representation, "the lawyer must take all reasonable steps to avoid prejudice to the rights of the client"). Indeed, on more than one occasion, the AG's Office has withdrawn as the SOS's counsel immediately before important court deadlines, leaving the SOS with no "time for employment of other counsel." ER 1.16(d).

The AG's Office also withdraws without an ethical basis to do so. It has repeatedly substituted its own judgment for that of its client, withdrawing on the ground that the AG "fundamentally disagrees" with the SOS's position. *See* ER 1.16(b)(4). But a lawyer should not withdraw on this basis "unless the disagreement is truly fundamental, and the client's position is so extreme as to be nearly impossible for most reasonable lawyers to countenance." Geoffrey Hazard, *The Law of Lawyering* § 21.12 (4th ed. 2019); *see also* Restatement (Third) of the Law Governing Lawyers § 32 cmt. j ("A client's intended action is not imprudent simply because the lawyer disagrees with it."). The SOS's positions in the election cases described above were entirely reasonable. In *Miracle*, for example, the SOS was willing to defend the law at issue, but the AG's Office insisted on asserting [REDACTED]

[REDACTED] Further, in *Arizonans for Second Chances*, Ms. Dul explained the SOS's anticipated position in the case and asked for advice and input from the AG's Office, but Mr. Kanefield cited a "fundamental disagreement" without even discussing the issue or providing any advice. Hazard, § 21.12 (explaining that "it would be improper to withdraw on this ground without first explaining the lawyer's proposed course of

action, so that the client has a chance to reconsider”).

IV. The Attorney General’s Public Disparagement and Accusations of Illegal Conduct about His Own Client Breach His Duty of Loyalty and Violate Ethical Rule 8.4

Compounding the AG’s unethical conduct while representing the SOS in these matters, the AG has issued multiple press releases and social media posts accusing his own client of violating the law or failing to fulfill her constitutional duties:

- “On appeal of this lawsuit, the Secretary of State declined to continue to defend the state law (which she supported as a legislator), electing to become a nominal party. As a result, the State was compelled to intervene through Attorney General Brnovich. This case is one of four instances in 2020 where the Secretary has declined to defend state election laws. In each instance, Attorney General Brnovich, either through the State or in his own name, has intervened to defend Arizona law.” Attorney General, Press Release, *AG Brnovich Prevails at Ninth Circuit Defending Arizona Election Law* (May 1, 2020), <https://www.azag.gov/press-release/ag-brnovich-prevails-ninth-circuit-defending-arizona-election-law>
- “Attorney General Brnovich intervened on behalf of the State after the Secretary of State declined to defend the statute. This is one of four times so far in 2020 where the Secretary has declined to defend state election laws.” Attorney General, Press Release, *AG Brnovich Successfully Defends Arizona Election Integrity Law* (May 5, 2020), <https://www.azag.gov/press-release/ag-brnovich-successfully-defends-arizona-election-integrity-law>
- “After the lawsuit was filed, the Secretary of State stated she ‘wo[uldn]’t oppose the request made by these [plaintiff] organizations.’ As a result, the State was compelled to intervene through Attorney General Brnovich to defend the century-old requirements of the Arizona Constitution and the statutes challenged by Plaintiffs. ‘*Special interests should not be able to use the pandemic as an excuse to sweep away a century-old fixture of Arizona’s Constitution simply because others will not stand up in defense of it,*’ said Attorney General Mark Brnovich. ‘*As Attorney General, I will enforce the law as it is and it is incumbent upon every other elected official to do the same.*’” Attorney General, Press Release, *Ninth Circuit Denies Request for Injunction in E-Equal Petition Signature Lawsuit* (May 7, 2020), <https://www.azag.gov/press-release/ninth-circuit-denies-request-injunction-e-equal-petition-signature-lawsuit>
- “Attorney General Brnovich intervened after the Secretary of State declined to defend the challenged laws. This is one of four times so far in 2020 where the Secretary has declined to defend Arizona's election laws.” Attorney General, Press Release, *Attorney General Brnovich Announces Arizona Initiative Law Upheld at State Supreme Court* (May 13,

2020), <https://www.azag.gov/press-release/attorney-general-brnovich-announces-arizona-initiative-law-upheld-state-supreme-court>³⁷



Mark Brnovich
@GeneralBrnovich

The AG's Office prevailed today on behalf of the State at the 9th Circuit in the Miracle case, successfully defending the integrity of the voter initiative process. Unlike other elected officials, I will defend the law and not cave to political pressure.

[azag.gov/press-release/...](https://www.azag.gov/press-release/)

4:05 PM · May 1, 2020 · Twitter Web App

44 Retweets 116 Likes



Mark Brnovich
@GeneralBrnovich

Abiding by the law is not a partisan matter. Glad to see the Secretary of State will be fulfilling her constitutional duties following our legal opinion. We are all called to protect the health & safety of employees, while simultaneously being transparent & respecting the law.

2:02 PM · Mar 25, 2020 · Twitter for iPhone

11 Retweets 40 Likes

38

³⁷ Discussing the SOS's decision not to oppose the narrow relief requested in that case, the AG's communications director publicly indicated that the SOS was acting unlawfully. He told reporters that, although COVID-19 is a serious health crisis, "elected public officials still need to follow the law." Howard Fischer, *Hobbs won't contest legal challenge to put initiative signature gathering online*, Ariz. Capitol Times (Apr. 6, 2020), <https://azcapitoltimes.com/news/2020/04/06/hobbs-wont-contest-legal-challenge-to-put-initiative-signature-gathering-online/>

³⁸ The AG made this tweet following his AG Opinion that the SOS violated Arizona law by directing candidates to use mail-in and drop box procedures to file their nomination petitions during the COVID-19 pandemic. The AG's public accusations against his own client are made all the worse by the fact that *the SOS asked the AG's Office for advice on this very issue* a week earlier, and Ms. Karlson advised the SOS

The AG's communications director has also publicly called on the Secretary of State to "do [her] job."³⁹ Even worse, he falsely suggested (in a since-deleted tweet) that the SOS filed an amicus brief in support of the Arizona Board of Regents as some sort of photo-op *quid pro quo* with Governor Ducey.⁴⁰

On June 17, 2020, the AG's Office (including Mr. Kanefield, Mr. Roysden, Mr. Ensign, and Ms. Wright), filed a motion to intervene in a lawsuit against the SOS in which the AG gratuitously attacked his own client.⁴¹ Among other unfounded accusations, the AG claimed that the SOS has "affirmatively undermined" efforts to defend Arizona law and taken an "active and affirmative *offense* against" the interests of the State of Arizona. Worse yet, the AG accused the Secretary of violating her "oath to support and defend the laws of the State." As a purported example of the Secretary's alleged "unwillingness to defend Arizona law," the AG again condemned her for becoming a "nominal defendant only" in *Miracle*, despite Mr. Kanefield's prior assurances that the AG would not do so.

Attorneys owe their clients "a duty of undivided loyalty." *In re Estate of Fogleman*, 197 Ariz. 252, 258 ¶ 19 (App. 2000). They "continue to owe current clients a duty of loyalty even if they are not acting as the clients' attorneys in the precise transaction at issue." *Id.* at 259 ¶ 21. Beyond that, all attorneys are subject to the basic obligation of "acting honorably and maintaining a professional, courteous and civil attitude" toward others (including, of course, their own clients). ER Preamble cmt. 9. Attorneys holding public office, like the AG, assume greater responsibilities than ordinary citizens. ER 8.4 cmt. 5.

The AG's public disparagement of his own client is unprofessional and breaches the duty of loyalty lawyers owe their clients. *E.g.*, *FMS Inv. Corp. v. United States*, 137 Fed. Cl. 99, 103 (2018) (when an attorney for law firm made "disparaging comments" to the press about the law firm's current client, he "created a breach of the duty of loyalty that cannot be cured"); *People v. Piccone*, 459 P.3d 136, 156 (Colo. O.P.D.J. 2020) (lawyer engaged in "egregious" ethical violations where her social media posts "needlessly disparaged her clients" and included information she learned through the course of representation). It is also prejudicial to the administration of justice. Public accusations (made by her own lawyer) suggesting that the Secretary has violated the law or ignored her duties have the potential to cause her significant harm. ER 8.4(d); *Matter of Martinez*, __ Ariz. __, 462 P.3d 36, 45 ¶ 33 (2020) ("ER 8.4(d) does not require a mental state other than negligence, and an Arizona lawyer may violate the rule

³⁹ Ryan Anderson Twitter, March 25, 2020, <https://twitter.com/ryanandersonaz/status/1242910898248802305>.

⁴⁰ Ryan Anderson Twitter, March 31, 2020, screenshot attached as **Exhibit 36** (publicly asking the Secretary of State whether her amicus brief was the "price of admission for [her] photo op" with the Governor).

⁴¹ *Arizona Democratic Party, et al. v. Hobbs, et al.*, U.S. District Court for the District of Arizona, No. 2:20-cv-01143-DLR, AG's Motion to Intervene, attached as **Exhibit 37**.

without committing any other ethical violation. A lawyer’s conduct violates ER 8.4(d) if it causes injury or potential injury.”) (citations and quotations omitted).

V. Conclusion

The attorneys at the AG’s Office have repeatedly disregarded their ethical obligations. Even after the SOS objected to the misconduct of these lawyers, the conduct continued. For the reasons described above, the SOS respectfully requests that the State Bar initiate formal disciplinary proceedings and take appropriate action to ensure that the Arizona Attorney General and lawyers working in that office honor their obligations under the Rules of Professional Conduct.

Request for Confidential Treatment

The SOS asks that this complaint be treated confidentially. The SOS does not intend to waive the attorney-client privilege, notwithstanding that it must share its privileged communications with the State Bar in order to make this complaint. A Request for Protective Order to the Presiding Disciplinary Judge of the Supreme Court of Arizona pursuant to Rule 70(g), Arizona Rules of the Supreme Court, will be submitted shortly. The SOS will confer with bar counsel regarding the scope of an appropriate Protective Order. Also, in an effort to reduce the size of this submission and limit the disclosure of privileged material, emails supplied as exhibits hereto in some instances do not include all of the attachments where the attachments are irrelevant to the issue at hand. But the SOS will provide those and any other documents upon request of the State Bar.

Sincerely,



Katie Hobbs
Secretary of State



Allie Bones
Assistant Secretary of State