

Exhibit 1



1
2
3
4
5
6
7
8
9
10
11
12
13

IN THE SUPREME COURT OF GUAM

IN RE:)	Supreme Court Case No. CRQ24-001
)	
)	
REQUEST OF LOURDES A. LEON)	
GUERRERO, I MAGA'HÅGAN)	
GUÅHAN, RELATIVE TO THE)	
DUTIES OF THE ATTORNEY)	DECLARATORY JUDGMENT
GENERAL OF GUAM TO)	
EXECUTIVE BRANCH AGENCIES.)	
)	
)	

This matter comes before the court upon the filing of a Request for Declaratory Judgment by *I Maga'hågan Guåhan* Lourdes A. Leon Guerrero (“the Governor”) on March 14, 2024. Her request concerns the responsibilities of the Attorney General of Guam (“AG”) to executive branch agencies under the Organic Act of Guam and the laws of Guam. We accepted this case on an expedited basis due to the pressing nature of the certified questions. *See* Order (Apr. 2, 2024) (“As it is unlikely for these questions to be resolved through the normal process of law outside a declaratory action, expedited resolution of these questions under § 4104 is appropriate.”). Our declaratory judgment in this order answers the certified questions, but we reserve jurisdiction to issue a written opinion consistent with this order in the future.

I. Jurisdiction

Besides having original jurisdiction over proceedings necessary to protect our appellate jurisdiction, the Organic Act grants the Supreme Court of Guam original jurisdiction “as the laws of Guam may provide.” 48 U.S.C.A. § 1424-1(a)(1) (Westlaw through Pub. L. 118-62 (2024)); *In re Request of Leon Guerrero*, 2023 Guam 11 ¶ 21. We have original jurisdiction over declaratory judgment actions regarding “the interpretation of any law, federal *or* local, lying within the

1 jurisdiction of the courts of Guam to decide, and upon any question affecting the powers and duties
2 of [*I Maga'håga*] and the operation of the Executive Branch” 7 GCA § 4104 (2005); *In re*
3 *Request of Leon Guerrero*, 2021 Guam 6 ¶ 8 (per curiam); *In re Request of Calvo*, 2017 Guam 14
4 ¶ 5. Additionally, the Organic Act grants us the authority to “govern attorney . . . ethics and the
5 practice of law in Guam, including . . . the conduct and discipline of persons admitted to practice
6 law.” 48 U.S.C.A. § 1424-1(a)(7).

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

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

13 *In re Request of Gutierrez*, 2002 Guam 1 ¶ 9. We issued an order finding these requirements were
14 met for the four questions the Governor posed. Order (Apr. 2, 2024). We decline to revisit that
15 decision and find these requirements are met as to all questions before this court.

16 **II. Factual and Procedural Background**

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

25 In each of his 22 letters to the agencies, the AG stated that the Guam Rules of Professional
26 Conduct (“GRPC”) may not apply to the Office of the Attorney General in the same manner they
27 apply to private attorneys. *Id.* at 4. So, the AG stated he would not implement ethical screens to
28

1 protect against potential conflicts nor would he appoint a special prosecutor. *Id.* The AG urged
2 the agencies to secure independent legal counsel to provide for their needs. *Id.*

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

7 Following these letters, the Speaker of the 37th Guam Legislature called an emergency
8 session, and the Governor called for two special sessions to address the issues that arose from the
9 AG’s “withdrawals.” *Id.* According to the parties, no legislation addressing the issue was passed
10 at these sessions.¹ On March 14, 2024, the Governor filed a petition in this court under 7 GCA §
11 4104 seeking declaratory judgment on several questions related to the AG’s conduct. *Id.* at 25-26.

12 The Governor argues that the AG “may not simply ‘temporarily’ refuse to perform the only
13 function the Organic Act has assigned to him and leave agencies to fend for themselves.” *Id.* at 5-
14 6. She requests this court issue a judgment declaring: (1) The AG may not withdraw from legal
15 representation of executive branch agencies, or otherwise decline to provide legal services to these
16 agencies, on the basis that the representation conflicts with his duties as Public Prosecutor; (2) In
17 the event the Office of the Attorney General receives a claim or complaint against an agency
18 official for actions performed in the course of the official’s employment or related to the official’s
19 employment with the agency, the AG shall implement conflict-of-interest protocols consistent with
20 the GRPC; (3) If the AG failed to implement conflict-of-interest protocols prior to initiating civil
21 and criminal investigations into agency actions, the AG is disqualified from representing
22 government agencies in any matter related to the investigations, and from participating in or
23

24 ¹ On September 12, 2022, the Legislature temporarily gave line agencies the ability to hire independent
25 counsel through Public Law No. 36-107 Chapter XII, Section 18(b): “Government of Guam departments and agencies
26 that do not customarily obtain professional services, such as . . . legal services . . . through an employee in the classified
27 service in that department or agency may contract to obtain such services.” However, the Legislature granted line
28 agencies this ability only for the fiscal year 2023. *Id.* The 2023 fiscal year began October 1, 2023, and ends September
30, 2024; thus, this Public Law is in effect at the time of this Order. *See* 5 GCA § 4102.1 (2005). Because this is a
temporary ability and not a permanent one, we refer to line agencies as though they are not authorized by statute to
hire outside counsel. However, Public Law 36-107 means that for Fiscal Year 2023, line agencies fall under the same
rules discussed below that apply to autonomous agencies statutorily authorized to hire outside counsel because they
have been temporarily granted the ability to hire outside counsel.

1 supervising investigations or prosecutions related to such matters; and (4) Agencies the AG is
2 investigating without having implemented conflict-of-interest protocols are permitted to employ
3 or contract with an attorney for the provision of legal services to their agencies, and the AG is
4 required to pay for such services. *Id.* at 38-39. The AG filed a response to the Governor’s Request
5 for Declaratory Judgment, arguing this court lacks jurisdiction to consider the Governor’s
6 questions and the Governor’s Request should be dismissed. Mem. Lack Jurisdiction at 20 (Mar.
7 21, 2024). The Governor filed an emergency motion to strike certain documents filed by the AG.
8 Pet’r’s Mot. Strike (Mar. 20, 2024).

9 On April 2, 2024, this court decided it had jurisdiction over all four questions posed by the
10 Governor and scheduled the matter for oral argument. Order (Apr. 2, 2024). The parties each
11 timely filed their briefs. *See* Pet’r’s Br. (Apr. 15, 2024); Resp’t’s Br. (Apr. 29, 2024); Pet’r’s
12 Reply Br. (May 6, 2024). Additionally, the Consolidated Commission on Utilities (“CCU”), Guam
13 Power Authority (“GPA”), Guam Waterworks Authority (“GWA”), Guam Memorial Hospital
14 Authority (“GMHA”), and Port Authority of Guam (“Port”) filed a joint *amici curiae* brief in
15 support of the Governor. *Amici* Br. (May 6, 2024).² Oral argument was held on May 20, 2024.

16 III. Discussion

17 A. We Grant the Motion to Strike

18 On March 15, the AG filed a Statement of Related Cases and a Statement of Interested
19 Parties. The Governor moved to strike these Statements, arguing that the cases and parties are not
20 related to this case as called for under Guam Rule of Appellate Procedure (“GRAP”) 13(l). Pet’r’s
21 Mot. Strike at 4. The Governor states that the Rules “do not permit Respondent Moylan’s wayward
22 filing of a standalone statement of related cases, and even if they did, Respondent Moylan’s filing
23 does not explain how the cases referenced are related to this case. Several of the cases identified
24

25
26 ² We note that the *amici* filed their brief and participated in oral arguments at this court’s invitation and in
27 compliance with the GRAP. *See* Order (Apr. 9, 2024) (“The court is satisfied that the four questions certified by this
28 court in its April 2, 2024, Amended Order impact the movant agencies, that they have a significant interest in the
outcome of this matter, and that the court would benefit from granting them permission to file a joint amicus brief.”);
Guam R. App. P. 14(a) (“The Government of Guam or any of its branches, agencies, or instrumentalities may file an
amicus curiae brief without the consent of the parties or leave of court.”); Guam R. App. P. 14(g) (“[A]micus curiae
may participate in oral argument with the court’s permission.”).

1 are not even pending before this court.” *Id.* Additionally, the Governor argues that the Statement
2 of Identified Parties was also inappropriate as GRAP 13(j) “requires counsel for private non-
3 governmental parties to attach to the inside cover of their initial brief a certificate listing all persons
4 and entities known to have an interest in the outcome of the case. [It] does not apply to Respondent
5 Moylan, a government party, and, even if it did, it does not authorize him to file a standalone
6 statement of interested parties outside of briefing.” *Id.* at 4-5. The Governor also states that the
7 AG violated Superior Court orders and the law by identifying parties in cases under seal. *Id.* at 6.
8 Additionally, the Governor argues that by listing these cases as being “related” to this case, the
9 AG made public the nature of the proceedings, which was under seal. Pet’r’s Reply at 9-10 (Mar.
10 22, 2024). The Governor requested this court strike the AG’s Statements of related cases and
11 interested parties. *Id.* at 7-8.

12 The AG countered by stating that he filed the Statements in response to this court’s March
13 15, 2024 Order calling for any objections to the panel. Resp’t’s Resp. Emergency Mot. Strike
14 (Mar. 20, 2024). The AG stated that “[t]he Statements are wholly consistent with the Court’s
15 March 15, 2024, Order, and are for use in preparation for briefing on jurisdiction as well as by the
16 Justices to consider disqualification and disclosure issues.” *Id.* at 2. As to listing sealed cases, the
17 AG stated there is no “Rule that requires that case numbers and potentially interested parties not
18 be identified in unsealed filings. Upon review of the applicable seal order, the entire cases were
19 not sealed, and the sealing orders were limited to certain documents.” *Id.* at 3.

20 We find that the AG’s Statement of Related Cases was inaccurately filed. GRAP 13(l)
21 states that “[e]ach party shall identify in a statement on the last page of its initial brief any known
22 related case pending in this court. As to each such case, the statement shall include the name and
23 docket number of the related case and describe its relationship to the case being briefed.” Guam
24 R. App. P. 13(l). The AG filed a standalone statement of related cases, independent of its initial
25 brief. Thus, the filing violated the GRAP. Nor did the AG describe the cases’ relationship to this
26 case, and based on this court’s own research, several cases listed are not “related” to this case as
27 contemplated in GRAP 13(l). Therefore, we grant the Governor’s Motion to Strike the Statement
28 of Related Cases.

1 Likewise, we find that the AG’s Statement of Interested Parties was filed in violation of
2 the GRAP. This statement is not required of government parties, and even for those private
3 attorneys to which it applies, the statement must be “attach[ed] to the inside cover of the initial
4 brief.” Guam R. App. P. 13(j). Again, the AG appears to have disregarded the requirements of
5 the GRAP. Therefore, we grant the Governor’s Motion to Strike the Statement of Interested
6 Parties. Although the AG argues that he filed both Statements in response to this court’s March
7 15 Order, that Order did not invite the AG to violate the GRAP.

8 Further, in addition to making filings outside the confines of the GRAP, the contents of the
9 AG’s filings were haphazard and raised concerns about contempt of court. The AG’s Statement
10 of Interested Parties listed and named parties in cases under seal. Although there are publicly
11 available documents in each case, most of the documents are under seal, and the nature of the
12 proceedings are not apparent from the public documents. By listing these cases as “related,” the
13 AG made public information intended to be under seal. Although we do not find this action worthy
14 of sanction now, we strongly advise the AG to be more careful in future filings.

15 **B. We Answer the Certified Questions as Follows**

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

19 The parties agree this question should be answered in the negative. Pet’r’s Br. at 18-38;
20 Resp’t’s Br. at 6 (“No. Guam law requires the AG perform both functions.”). We, too, answer
21 this question in the negative. But a full answer requires more guidance.

22 The AG may not completely withdraw from legal representation of any executive branch
23 agency. Additionally, the AG has mandatory duties from which he cannot withdraw or decline to
24 perform in any circumstance. These duties include: reviewing *all* contracts for “line agencies”;
25 reviewing contracts or procurements worth \$500,000 or more for all executive branch agencies;
26 and reviewing contracts for legal counsel for all autonomous agencies. *See* 5 GCA § 22601; 5
27 GCA § 5150; 5 GCA § 5121(b). The AG is also not permitted to withdraw from providing legal
28 services and litigation representation to “line agencies”—i.e., agencies that are not statutorily

1 empowered to employ private counsel—as doing so would prejudice them in violation of GRPC
2 1.16. *See* Guam R. Prof’l Conduct 1.16. The AG is, however, permitted to partially withdraw
3 from providing an autonomous agency with non-mandatory legal services and litigation
4 representation where the AG has already approved a contract for the agency to hire private counsel
5 and the withdrawal can be done (1) without material adverse effect to the agency, and (2) where
6 the AG can take steps to the extent reasonably practicable to protect the agency’s interests after
7 withdrawal. *See id.*; 5 GCA § 5121(b); *see also A.B. Won Pat Guam Int’l Airport Auth. ex rel. Bd.*
8 *of Dirs. v. Moylan*, 2005 Guam 5 ¶ 19 (“[A]lthough the Attorney General is authorized to institute
9 civil actions on behalf of the Government of Guam, an individual agency such as GIAA may
10 instead utilize its outside counsel for such purposes.”).

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

14 We answer this question in the affirmative. The AG has an attorney-client relationship
15 with executive branch agencies, and the rules of professional conduct apply. *See Morgan v. N.Y.*
16 *State Dep’t of Env’t Conservation*, 779 N.Y.S.2d 643, 645 (App. Div. 2004); *Attorney General v.*
17 *Mich. Pub. Serv. Comm’n*, 625 N.W.2d 16, 28 (Mich. Ct. App. 2000). However, as an inanimate
18 entity, an agency must act through its agents since it cannot speak directly to its lawyers. *Cf.*
19 *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 348 (1985). Thus, although the
20 client is the agency, when one of the constituents of an agency communicates with the agency’s
21 lawyer in that person’s official capacity, the communication is confidential. *See Jesse by Reinecke*
22 *v. Danforth*, 485 N.W.2d 63, 67 (Wis. 1992). If the agency’s attorney believes that the official’s
23 interests are adverse to the agency’s, he has a duty to explain to the official that he represents the
24 agency’s interests, not the individual’s. *See* Guam R. Prof’l Conduct 1.13(d).

25 As his clients, the AG owes a duty of confidentiality and loyalty to the agencies. *Barrett-*
26 *Anderson v. Camacho*, 2018 Guam 20 ¶ 24 (“We begin by rejecting the Attorney General’s request
27 for flexibility under the Guam Rules of Professional Conduct based on her unique position as the
28 Chief Legal Officer of the Government of Guam.”); *State ex rel. Comm’r of Transp. v. Med. Bird*
Black Bear White Eagle, 63 S.W.3d 734, 773 (Tenn. Ct. App. 2001); *Holloway v. Ark. State Bd.*

1 of *Architects*, 86 S.W.3d 391, 400 (Ark. Ct. App. 2002); *Application of Pioneer Mill Co.*, 33 Haw.
2 305, 307 (1935); *Law. Disciplinary Bd. v. McGraw*, 461 S.E.2d 850, 862 (W. Va. 1995). However,
3 despite these duties, the Office of the Attorney General may represent an executive branch agency
4 in civil matters while investigating and prosecuting an agency official in criminal matters without
5 violating ethical duties if the AG’s staff can be assigned in such a manner as to afford independent
6 legal counsel and representation in the civil matter, and so long as such representation does not
7 result in prejudice in the criminal matter to the official. See *State v. Klattenhoff*, 801 P.2d 548,
8 552 (Haw. 1990), *abrogated on other grounds by State v. Walton*, 324 P.3d 876 (Haw. 2014).
9 There is no inherent conflict of interest between the AG’s dual roles as Chief Legal Officer and
10 Public Prosecutor. See *United States v. Troutman*, 814 F.2d 1428, 1437 (10th Cir. 1987); *see also*,
11 *e.g.*, Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U.
12 Fla. J.L. & Pub. Pol’y 1, at *12 (1993) (“[I]t is imperative that the Attorney General simultaneously
13 represent both the state agency and the public interest.” (quoting Lacy H. Thornburg, *Changes in*
14 *the State’s Law Firm: The Powers, Duties and Operations of the Office of the Attorney General*,
15 12 Campbell L. Rev. 343 (1990))).

16 However, actual conflicts of interest may arise when the Office of the Attorney General
17 prosecutes a government official. The appropriate standard is whether an attorney, “by reason of
18 his professional relation with the accused, . . . has acquired knowledge of facts upon which the
19 prosecution is predicated, or which are closely interwoven therewith.” *State v. Coulter*, 67 S.W.3d
20 3, 29-30 (Tenn. Crim. App. 2001), *abrogated on other grounds by State v. Jackson*, 173 S.W.3d
21 401 (Tenn. 2005); *State v. McKibben*, 722 P.2d 518, 525 (Kan. 1986). Thus, an attorney in the
22 Office of the Attorney General, including the AG, has an actual conflict of interest when they have
23 advised a government officer in their official capacity on matters related to an offense the officer
24 is charged with. See *Troutman*, 814 F.2d at 1437; *People ex rel. Deukmejian v. Brown*, 624 P.2d
25 1206, 1207 (Cal. 1981) (in bank). Whether that conflict should be imputed to the entire Office of
26 the Attorney General should be decided case by case after considering the entire complex of facts
27 surrounding the conflict. See *People v. Pomar*, 313 Cal. Rptr. 3d 457, 467 (Ct. App. 2023), *as*
28 *modified* (Sept. 29, 2023).

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

5 We answer this question in the affirmative. Whatever the AG’s unique status, where a
6 conflict occurs between the prosecution of a public official and the representation of an agency,
7 he must act to guard his clients’ interests. The AG must not participate in a prosecution where
8 there is a significant risk his representation of the People will be materially limited by his
9 responsibilities to an agency. *See* Guam R. Prof’l Conduct 1.7(a). Even if an agency can be
10 considered a former client, the AG must not represent the People in a prosecution substantially
11 related to the matters on which the AG represented the agency. *See* Guam R. Prof’l Conduct
12 1.9(a). The AG must not use information relating to the AG’s representation of an agency to the
13 disadvantage of the agency—including prosecutions of government officials. *See* Guam R. Prof’l
14 Conduct 1.9(c)(1). If this information is confidential or privileged, the agency—and not the AG—
15 must make the decision whether to disclose it. *See* Guam R. Prof’l Conduct 1.6. As the head of
16 the Office of the Attorney General, the AG must make reasonable efforts to ensure that the Office
17 of the Attorney General has measures in effect that give reasonable assurance that all lawyers in
18 the Office of the Attorney General conform to the Rules of Professional Conduct. *See* Guam R.
19 Prof’l Conduct 5.1(a). The AG must also make reasonable efforts to ensure that the lawyers under
20 his direct supervisory authority conform to the Rules of Professional Conduct. *See* Guam R. Prof’l
21 Conduct 5.1(b). Whether that is recusing from a prosecution, erecting conflict walls, or appointing
22 a Special Assistant Attorney General is within his discretion. Faced with such a conflict, the AG
23 cannot simply choose to do nothing. *See, e.g., Lacey v. Maricopa County*, 693 F.3d 896, 933 (9th
24 Cir. 2012) (“[A] prosecutor has a legal ‘duty to avoid a conflict of interest’”).

24 //

25 //

26 //

27 //

28 //

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

6 Generally, where a statute places the duty of conducting the legal business of a government
7 agency on the AG, the agency has no power to employ outside counsel, unless authorized by statute
8 or implied from the powers granted to it. *See Salt Lake Cnty. Comm’n v. Salt Lake Cnty. Att’y*,
9 985 P.2d 899, 907 (Utah 1999); 73 C.J.S. *Public Administrative Law and Procedure* § 78. “Where
10 the public elects an officer who is to perform all duties of an attorney for a governmental entity,
11 they expect that that person will perform all duties within the scope of that office unless disabled
12 from doing so by some ethical or legal rule.” *Salt Lake Cnty. Comm’n*, 985 P.2d at 907. Where
13 such a public officer—in this case the AG—refuses to act, is incapable of acting, or is unavailable
14 for some reason, the agencies cannot be left without representation.

15 **a. Under specific circumstances, the Governor may appoint outside counsel to**
16 **agencies where the AG refuses to act, is incapable of acting, or is unavailable**
17 **for some other reason.**

18 The AG’s statutory duties to autonomous agencies include reviewing for form and legality
19 their contracts for procurements over \$500,000 and for outside legal counsel. Additionally, for
20 line agencies, the AG must review and approve all contracts, including those for legal services.
21 These are mandatory duties of the AG, from which he cannot withdraw. No statutory authority
22 provides agencies with an avenue for redress when the AG refuses or is otherwise unable to
23 perform his duties and responsibilities. But the Government of Guam cannot be left without
24 representation. *Id.* (resolving dispute between county commission and county attorney). Leaving
25 executive agencies without an avenue to secure the abovementioned services could put the
26 Government of Guam in jeopardy, halting the agencies’ ability to execute vital contracts and
27 opening them up to prosecution for actions that had to be taken without the advice of a lawyer.
28 Thus, we recognize the authority of the Governor to appoint counsel for an agency where the AG
 has explicitly “refuse[d] to act, is incapable of acting, or is unavailable for some other reason.” *Id.*

1 at 908; *cf. Coventry Sch. Comm. v. Richtarik*, 411 A.2d 912, 916 (R.I. 1980) (applying this standard
2 to municipal attorney).

3 “The right to hire outside counsel for any purpose, whether for advice or litigation, arises
4 only when the AG ‘refuses to act or is incapable of acting or is unavailable for some other reason.’”
5 *Salt Lake Cnty. Comm’n*, 985 P.2d at 907.³ This narrow exception to the general rule does not
6 arise where the agency merely disagrees with the advice of the AG or dislikes the way the AG
7 performs the duties of the office. *Id.* The determination of whether the elected AG “refuses to act,
8 is incapable of acting, or is unavailable for some other reason” is a critical and fact-intensive issue,
9 and leaving this determination to either party could lead to untoward results. *Id.* at 908. The AG
10 is the legal representative for the Government of Guam and cannot be displaced without the
11 agreement of the AG or a formal declaration by a proper authority⁴ that the AG is “unavailable”
12 to act in that capacity. *Id.* (finding the courts to be a proper authority and stating that “the trial
13 court is free to take evidence and make any factual findings necessary to frame the controversy
14 and to resolve the dispute”).

15 Parties should first attempt to settle the matter among themselves. Usually, the Office of
16 the Attorney General should be able to effectively determine for itself whether it is unwilling,
17 incapable, or unavailable to act and, if so, should appoint a Special Assistant Attorney General or
18 allow the agency to hire outside counsel. As relevant in this case, this situation may arise where
19 the AG communicates his intent to withdraw from all representation, declares the attorney-client
20 relationship ended, and/or advises agencies to find outside counsel. In the letters to the 22
21 agencies, the AG has unambiguously stated he is not the attorney for the agencies and told agencies

22
23
24 ³ This includes situations where a conflict of interest is imputed to the entire Office of the Attorney General,
25 rendering the entire Office “unavailable” or “disqualified.” *See Salt Lake Cnty. Comm’n v. Salt Lake Cnty. Att’y*, 985
26 P.2d 899, 907 (Utah 1999); *see also People v. Tennessen*, 2009 Guam 3 ¶ 37 (“[D]isqualification of the AG’s Office
27 would only be necessary if the particular conflicted attorney were not properly screened from the case.”). Generally,
28 where a conflict of interest exists that is so pervasive that it disqualifies the entire Office of the Attorney General, *see*
Tennessen, 2009 Guam 3, the AG himself should take measures to approve outside counsel or otherwise appoint a
Special Assistant Attorney General, *see* Guam R. Prof’l Conduct 1.16. But, when the AG refuses to do so, an
appropriate authority may declare him “unavailable” or “disqualified” and empower an agency to hire outside counsel.
Cf. Romley v. Daughton, 241 P.3d 518, 521 (Ariz. Ct. App. 2010) (applying this standard to county attorney).

⁴ We do not define the exact contours of who may fall into this category beyond saying it excludes the parties
and includes the courts of Guam.

1 to seek outside counsel. In these situations where the evidence is clear and unambiguous, so that
2 reasonable minds can come to but one conclusion—that the AG has refused to act, is incapable of
3 acting, or is unavailable for some other reason—the Governor may take appropriate steps. This
4 includes the Governor appointing a Special Assistant Attorney General for an agency to fill any
5 void left by the AG.⁵

6 However, other situations where the AG has not communicated his intent to withdraw from
7 all representation, declared the attorney-client relationship ended, and/or advised agencies to find
8 outside counsel require critical and fact-intensive review. If the parties fail to settle the matter, the
9 agency cannot simply hire independent counsel to handle all its legal matters. The agency must
10 first obtain a formal declaration from a proper authority that the AG is “unavailable”⁶ to act in his
11 capacity as the legal representative for the Government of Guam. *See Salt Lake Cnty. Comm’n*,
12 985 P.2d at 908. We recognize the paradox this may cause for an agency, particularly those “line
13 agencies” which are not statutorily empowered to hire outside counsel. *See id.* at 909 n.10 (“We
14 recognize that to appear before a court to obtain a determination of whether the County Attorney
15 is unable or unwilling to perform his or her duties, the Commission will almost certainly have to
16 retain an attorney for that limited purpose.”). We therefore hold that—absent the AG’s own
17 declaration and before a formal declaration by a proper authority that the AG is “unavailable”—
18 the Governor may appoint outside counsel for an agency for the limited purposes of (1) advice and
19 representation on whether the AG has explicitly refused to act, is incapable of acting, or is
20 unavailable for some other reason (including conflicts of interest); (2) seeking alternatives
21 available to resolve issues short of litigation; (3) filing an action for declaratory judgment to
22 determine whether the AG is unavailable to carry out his ordinary representation; or (4) to file a
23 mandamus action to compel the AG’s mandatory duties. *Cf. Romley v. Daughton*, 241 P.3d 518,

24
25
26 ⁵ Because the AG is the legal representative for the Government of Guam, he cannot be displaced indefinitely.
27 When new matters arise, those agencies that are not expressly authorized by statute to hire outside counsel should
28 seek advice regarding whether the AG continues to “refuse[] to act or is incapable of acting or is unavailable for some
other reason.” The resolution procedures set out in this order should then be followed: the parties should first attempt
to settle the matter among themselves; if they cannot, as a last resort, they should turn to the courts.

⁶ We use this as a shorthand for the entire standard—whether a public attorney has refused to, is incapable
of, or is otherwise unavailable to act as legal counsel.

1 521 (Ariz. Ct. App. 2010) (applying this standard to county attorney). After a proper authority
2 formally declares that the AG is “unavailable,” outside counsel appointed by the Governor may
3 then fill the void left by the AG—whether for advice or litigation.

4 **b. In extraordinary circumstances, the Governor may appoint Special Assistant**
5 **Attorneys General where the AG refuses to do so.**

6 Even with the agreement of the AG or a formal declaration by a court that an agency can
7 be represented by outside counsel, this outside counsel cannot perform contract review for form
8 and legality.⁷ *See, e.g.*, 5 GCA § 22601; 5 GCA § 5150. Some agencies, specifically those subject
9 to the Central Accounting Act (“CAA”), require the AG’s approval on all contracts. 5 GCA §
10 22601 (“All contracts shall, after approval of the Attorney General, be submitted to the Governor
11 for his signature. All contracts of whatever nature shall be executed upon the approval of the
12 Governor.”). Those not subject to the CAA require the AG’s signature for all contracts worth
13 \$500,000 or more. 5 GCA § 5150. Unlike general legal services and litigation representation,
14 these are duties the Legislature specifically assigned to the AG and withheld from the abilities of
15 any outside legal counsel.

16 Normally, if the AG neglects or otherwise refuses to perform a mandatory duty of his
17 office—such as reviewing contracts over \$500,000 for form and legality—a writ of mandate is the
18 proper vehicle to compel performance of his nondiscretionary duties. *See, e.g., Moylan*, 2005
19 Guam 5 ¶ 67 (granting mandamus relief to GIAA against AG). However, a writ is not always an
20 efficient and proper mode of redress, especially, as here, where the AG is refusing these services
21 to 22 agencies. In extraordinary circumstances such as these, the Governor’s ultimate
22 responsibility for the supervision and control of the executive branch can be properly invoked. *See*
23 *Bordallo v. Baldwin*, 624 F.2d 932, 934 (9th Cir. 1980).

24 The Organic Act states that “[t]he executive power of Guam shall be vested in an executive
25 officer whose official title shall be the ‘Governor of Guam.’” 48 U.S.C.A. § 1422. The Organic
26

27
28 ⁷ Nothing in this order is intended to limit the authority of counsel for autonomous agencies in contract review
as provided for by statute. *See, e.g.*, 12 GCA § 8104(e); 12 GCA § 14104(e); 10 GCA §§ 80109-116; 12 GCA §§
10105, 10109.

1 Act further states that “[t]he Governor shall have general supervision and control of all the
2 departments, bureaus, agencies, and other instrumentalities of the executive branch of the
3 government of Guam” and “shall be responsible for the faithful execution of the laws of Guam
4 and the laws of the United States applicable in Guam.” *Id.* When the Governor determines that it
5 is necessary for her to act lest the law go unenforced—whether based on the actions or inactions
6 of the AG—she may act. *See Riley v. Cornerstone Cmty. Outreach, Inc.*, 57 So. 3d 704, 722 (Ala.
7 2010). The Organic Act authority of the Governor to ensure the faithful execution of the laws
8 includes the authority to appoint a Special Assistant Attorney General. *See People v. Behan*, 235
9 N.Y.S.2d 225, 232 (Cnty. Ct. 1962). At least under circumstances like those presented here, the
10 Governor acts consistently with her Organic Act authority when she appoints Special Assistant
11 Attorneys General where the AG refuses to do so. *See Tyson v. Jones*, 60 So. 3d 831, 850 (Ala.
12 2010). This includes, but is not limited to, the authority to appoint Special Assistant Attorneys
13 General with the power to approve contracts for form and legality. *See* 5 GCA § 5150 (stating that
14 when properly designated, a Special Assistant Attorney General may approve contracts for form
15 and legality).⁸

16 Even so, like how agencies cannot freely hire outside counsel for any reason, the Governor
17 is empowered to appoint Special Assistant Attorneys General only in narrow and extraordinary
18 circumstances. *See Sec’y of Admin. & Fin. v. Att’y Gen.*, 326 N.E.2d 334, 335-36 (Mass. 1975)
19 (finding representation of the Secretary by the Governor’s legal counsel proper where the AG
20 refused to do so but emphasizing “this narrow exception applies only where the powers of the
21 Attorney General’s office themselves are in question, and not in the ordinary case of disagreement
22 between an agency and the Attorney General”). These extraordinary circumstances include where
23 the AG is unable or unwilling to perform the duties of his office, resulting in the law going
24

25 ⁸ To be clear, the Governor can appoint Special Assistant Attorneys General for multiple purposes. However,
26 a Special Assistant Attorney General cannot both advise an agency and approve its contracts for form and legality.
27 The Governor must only appoint Special Assistant Attorneys General to review contracts for form and legality who
28 are wholly independent from the agency. Contracts for legal services remain subject to approval by the AG for form
and legality. 5 GCA § 5121(b). However, “the Attorney General has no discretion to reject a contract that is lawful
and correct in form.” *Moylan*, 2005 Guam 5 ¶ 65. Given the extraordinary circumstances presented by this case, it
would be within the Governor’s authority to appoint an independent Special Assistant Attorney General to review any
agency contracts for outside legal counsel that this order contemplates.

1 unenforced and/or the inability of the executive branch to function, such as where the AG “act[s]
2 in [a] capricious, arbitrary or illegal manner in refusing to represent a governmental body.” *Id.* at
3 159 n.4. Thus, the Governor has the power to supersede the AG’s authority, discretion, or
4 representation only in extraordinary circumstances that threaten her duty to ensure the proper
5 function of the executive branch. *See Riley*, 57 So. 3d at 733.

6 As the question is not properly before us, we offer no opinion on who pays for legal services
7 of agencies that normally lack permission to hire counsel. *See Barrett-Anderson*, 2018 Guam 20
8 ¶ 32.

9 **IV. Conclusion**

10 We **GRANT** the Governor’s motion to strike. We enter **DECLARATORY JUDGMENT**
11 answering the questions certified to this court as stated above. We instruct the Clerk to prepare,
12 sign, and enter judgment without an opinion in accordance with GRAP 27(b)(2)(A)(ii), and to
13 serve on all parties the judgment and notice of the date when the judgment is entered in accordance
14 with GRAP 27(b)(2)(B). Because of the expedited nature of the certified questions, we shorten
15 the time within which any party may seek rehearing and **ORDER** that any petition for rehearing
16 in this case be filed within 14 days after entry of judgment. *See* Guam R. App. P. 30(a)(1). We
17 retain jurisdiction to issue a written opinion consistent with this order in the future, but such
18 issuance will not affect the time of entry of judgment or the time for filing a petition for rehearing.
19 *See id.*
20

21 **SO ORDERED** this 31st day of May 2024.
22

23
24 /s/
25 **F. PHILIP CARBULLIDO**
26 **Associate Justice**

23
24 /s/
25 **KATHERINE A. MARAMAN**
26 **Associate Justice**

27
28 /s/
ROBERT J. TORRES
Chief Justice

Exhibit 2



Filed

Supreme Court of Guam, Clerk of Court

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE SUPREME COURT OF GUAM

IN RE:)	Supreme Court Case No. CRQ24-001
)	
REQUEST OF LOURDES A. LEON)	
GUERRERO, I MAGA' HÅGAN)	
GUÅHAN, RELATIVE TO THE)	
DUTIES OF THE ATTORNEY)	ORDER
GENERAL OF GUAM TO)	
EXECUTIVE BRANCH AGENCIES.)	
)	
)	

This matter comes before the court on Respondent Attorney General of Guam’s Petition for Rehearing, dated June 14, 2024 (“Petition”), which seeks a rehearing of the declaratory judgment issued in this matter on May 31, 2024 (“Judgment”). We have jurisdiction under 48 U.S.C.A. § 1424-1(a)(1) and (7) (Westlaw through Pub. L. 118-70 (2024)) and 7 GCA § 4104 (added by Pub. L. 29-103:2 (July 22, 2008)).

A party may petition for rehearing under Rule 30 of the Guam Rules of Appellate Procedure (“GRAP”). *See generally* Guam R. App. P. 30. A petition for rehearing under Rule 30 “must state with particularity each point of law or fact that the petitioner believes the Supreme Court has overlooked or misapprehended and must argue in support of the petition.” Guam R. App. P. 30(a)(2). Rule 30(a)(2) also provides, “An issue not previously briefed by the parties cannot be raised for the first time in a petition for rehearing in the Supreme Court of Guam.”

After reviewing the petition for rehearing, we conclude rehearing is not warranted. The Attorney General makes five primary arguments for why he believes this court misapprehended material points of law, warranting rehearing and additional clarification. As both the Governor and Amici correctly point out, several points raised by the Attorney General are raised for the first time in his petition for rehearing and therefore should not be considered. The remaining



1 points raised by the Attorney General do not articulate a point of law this court misapprehended
2 so much as a general disagreement with the conclusion that was reached. We deny the petition
3 for rehearing.

4 **1. This court did not overlook or misapprehend any provision of Guam law relating to**
5 **communications between agencies and their attorneys.**

6 As the first three issues raised by the Attorney General all touch on the same issue—
7 whether Guam law authorizes agency counsel to disclose communications between the attorney
8 and the agency—we address them together.

9 First, the Attorney General states that the Guam Legislature adopted statutes that limit the
10 creation of confidential communications between agencies and their attorneys. Pet. Reh’g at 1
11 (June 14, 2024). He argues that all agency communications, including with an attorney about
12 legal matters, must be made public unless they fall under the narrow exceptions of 5 GCA §
13 8111(c). Pet. Reh’g at 1-5 (quoting 5 GCA §§ 8102, 8111(c)). He also cites the Sunshine Reform
14 Act of 1999 to argue “[t]he Act makes communications from those Agencies to their attorney
15 subject to disclosure, except for communications ‘pertaining to pending litigation to which the
16 agency is a party, until the pending litigation has been finally adjudicated or otherwise settled.’”
17 *Id.* at 4-5 (citing 5 GCA § 10108(a)). He states that the Attorney General must make public all
18 legal memoranda and opinions, except those prepared for pending litigation. *Id.* at 6-7 (citing 5
19 GCA § 30107).

20 Second, the Attorney General argues that a broad finding that all his communications with
21 executive agencies are subject to privilege “impinges the Organic and statutory powers and duties
22 of the Attorney General.” *Id.* at 8. The Attorney General states that the Attorney General holds
23 the right to the privilege of confidential communication between his office and executive
24 agencies, and only the Attorney General may waive the attorney-client privilege “when such
25 waiver is necessary for the enforcement of the laws of Guam, the preservation of order, and the
26 protection of public rights and interests.” *Id.* at 9.

27 Third, the Attorney General states that communications from the constituent of an agency
28 to the Office of the Attorney General (“OAG”) evidencing impropriety are not confidential. *Id.*

1 at 10. He repeats his claim that the Attorney General represents the People, not the agencies, and
2 the Attorney General and the OAG have the “inherent authority to report acts which threaten an
3 Agency, Guam, or its People.” *Id.* at 11-12.

4 For these first three issues, we conclude rehearing is not warranted as the Attorney General
5 fails to meaningfully articulate how this court’s decision misapprehended any material points of
6 law. Each of these first three arguments centers on communications between government
7 agencies and the Attorney General, through his capacity as the Chief Legal Officer of the
8 Government of Guam. In the Declaratory Judgment, this court held the Attorney General has an
9 attorney-client relationship with executive agencies and the rules of professional conduct apply.
10 The Attorney General’s arguments seek to undermine this basic conclusion of law, upending even
11 the most basic requirements of the Guam Rules of Professional Conduct. Like all attorneys and
12 their clients, the Attorney General owes a duty of confidentiality and loyalty to the agencies he
13 represents. *Barrett-Anderson v. Camacho*, 2018 Guam 20 ¶ 24 (“We begin by rejecting the
14 Attorney General’s request for flexibility under the Guam Rules of Professional Conduct based
15 on her unique position as the Chief Legal Officer of the Government of Guam.”). The Attorney
16 General’s arguments run directly counter to these duties.

17 The Governor is correct that the Attorney General misapprehends the distinction between
18 the attorney-client privilege and an attorney’s duty of confidentiality. *See Answer* at 3 (“The duty
19 of confidentiality is broader than the attorney-client privilege and prohibits disclosure of any
20 ‘information relating to the representation of a client’ unless the client consents or an exception
21 applies.” (quoting *In re Estate of Rabin*, 474 P.3d 1211, 1219 (Colo. 2020))). Even if the Attorney
22 General is correct that the attorney-client privilege could not be invoked (which is a dubious
23 proposition),¹ it does not follow that this would negate the duty of confidentiality (or loyalty for
24 that matter). And the Attorney General cites no authority to that effect.

27 ¹ As the Amici note, this court has unequivocally rejected this argument. *Amici Answer* at 5 (“Guthrie, as
28 a Deputy Attorney General, has the same duty of confidentiality as any other lawyer.” (quoting *In re Joseph A. Guthrie*, ADC04-002 (Guam Sup. Ct., Oct. 14, 2005))).

1 Amici persuasively argue that the Attorney General “makes no attempt to identify what
2 ‘point of law or fact’ he believes this court ‘overlooked or misapprehended’” but “instead,
3 fabricates his own rehearing standard based on mitigating ‘potential oversights’ caused by the
4 ‘expedited nature of this proceeding.’” Amici Answer at 7. They also contend that the Attorney
5 General raises his Open Government Law arguments for the first time in his petition for rehearing.
6 We agree with the Amici that it would be inappropriate to grant rehearing based on provisions of
7 law that were “overlooked” because a party did not raise them in their initial brief. Similarly, the
8 Governor notes that whether the Attorney General holds the attorney-client privilege for agency
9 clients was raised for the first time in the petition for rehearing. Answer at 10-11. The Amici
10 also persuasively argue that the Attorney General overlooked this court’s decision in *In re A.B.*
11 *Won Pat International Airport Authority*, 2019 Guam 6 ¶ 53, where the interplay between the
12 attorney-client privilege, the Open Government Law, and the Sunshine Act were discussed.
13 Amici Answer at 8-9. We agree that this court has not misapprehended or overlooked any
14 material points of law because “[t]he Attorney General’s insistence that agency attorneys should
15 be required to disclose confidential information that might inform a prosecution simply has no
16 basis in the law, and is directly contrary to the requirements of the ethics rules.” Answer at 15.

17 We generally agree with the Amici that “[t]his court should reaffirm its repeated holding
18 and find that Moylan—even as Attorney General—is subject to the Rules of Professional Conduct
19 in the same manner as any other attorney.” Amici Answer at 12.

20 **2. This court did not overlook or misapprehend any material points of law on conflicts**
21 **of interest.**

22 The Attorney General next argues this court was incorrect when it found that the Attorney
23 General has an actual conflict of interest when he advises “a government officer in their official
24 capacity on matters related to an offense the officer is charged with.” Pet. Reh’g at 13 (quoting
25 Declaratory J. at 8). He argues this court mis-cited to California and Arizona case law because
26 those states “do not have an Attorney General that is directed to prosecute public officials.” *Id.*
27 at 14. Instead, he says that on Guam, “the Attorney General is similar to the Governor” because
28 it is an elected position that has no direct oversight or control from the Governor. *Id.*

1 The Attorney General is bound by the Guam Rules of Professional Conduct and must
2 follow those ethical rules—particularly his duties of confidentiality and loyalty to his agency
3 clients. Although California and Arizona may have Attorneys General who do not hold the dual
4 role of Chief Legal Officer and Public Prosecutor, this does not remove the ethical concerns that
5 arise if a single attorney could advise a client on a matter and then prosecute the client for the
6 same matter. The Attorney General is bound by the rules of ethics, and that does not disappear
7 because of the dual role of the Guam Attorney General. As the Governor rightly notes: “Guam
8 law does not and cannot exempt Attorney General Moylan from application of the ethics rules.
9 Guam law cannot displace the Court’s exclusive authority to regulate attorney ethics.” Answer
10 at 13-14. That the Attorney General can distinguish persuasive authority cited by this court
11 (although much of this is an exercise in making distinctions without a difference) does not amount
12 to this court misapprehending material points of law. This court did not misapprehend points of
13 law when it used principles articulated in the civil case of *People ex rel. Deukmejian v. Brown*,
14 624 P.2d 1206 (Cal. 1981), and analogized them to a criminal prosecution. This is not a
15 misapprehension of the law—it is the act of performing legal analysis. That the executive
16 branches of California and Guam are organized differently has little bearing on *Brown*’s
17 discussions of the ethical obligations of a government attorney.

18 **3. This court did not overlook or misapprehend any material points of law about the**
19 **Governor’s authority.**

20 Finally, the Attorney General states this court was incorrect to find that the Organic Act
21 authorizes the Governor to appoint a special assistant attorney general should the Attorney
22 General be unwilling or unable to perform the duties of his office. Pet. Reh’g at 15. The Attorney
23 General states the “exercise of such power is ultra vires and inorganic. The United States
24 Congress and the Guam Legislature only gave the Governor certain enumerated powers, and set
25 forth certain procedures to replace the Attorney General. Allowing the Governor to appoint a
26 replacement for an Attorney General still sitting in office is not contemplated in the laws they
27 promulgated.” *Id.* at 17. The Attorney General states that “[o]nly the Attorney General may
28 delegate his authority.” *Id.* at 18 (citing 5 GCA §§ 30106, 30109).

1 While the Attorney General may be correct that the Guam Legislature did not explicitly
2 state that the Governor may appoint a special assistant attorney general should the Attorney
3 General be unwilling or unable to perform the duties of his office, it also did not explicitly direct
4 how to move forward when the Attorney General refuses to perform the required duties of the
5 office. But the Organic Act states that “[t]he executive power of Guam shall be vested in an
6 executive officer whose official title shall be the ‘Governor of Guam.’” 48 U.S.C.A. § 1422. The
7 Organic Act further adds that “[t]he Governor shall have general supervision and control of all
8 the departments, bureaus, agencies, and other instrumentalities of the executive branch of the
9 government of Guam” and “shall be responsible for the faithful execution of the laws of Guam
10 and the laws of the United States applicable in Guam.” *Id.* When the Governor determines that
11 it is necessary for her to act lest the law go unenforced—whether based on the actions or inactions
12 of the Attorney General—she may act. *See Riley v. Cornerstone Cmty. Outreach, Inc.*, 57 So. 3d
13 704, 722 (Ala. 2010). The Government of Guam cannot be left without representation, and if the
14 Attorney General refuses or, as happened in this case, withdraws from representing executive
15 agencies, it is within the Governor’s Organic Act power to respond to ensure the successful
16 function of the Executive Branch. This court explained that this power is not triggered easily and
17 outlined the narrow circumstances in which it may arise. Disagreeing with this court’s
18 interpretation of the Organic Act is not a sufficient showing of a misapprehension of a point of
19 law to merit rehearing.

20 As the Amici fairly point out, the Attorney General goes beyond the scope of this case as
21 he seeks rehearing to help “facilitate proper function of the Government of Guam in the future.”
22 Pet. Reh’g at 1; Amici Answer at 3. Here, the dispute is the Attorney General’s withdrawal from
23 the representation of 22 executive agencies. This court considered a narrow set of questions, and
24 the Attorney General raised new arguments and requests in his petition for rehearing. Amici
25 Answer at 3 (“He asks this court for guidance on newly-raised arguments about the interplay
26 between the Sunshine Reform Act and attorney client privilege. He makes no mention of his
27 withdrawal or violations of client confidentiality . . . that precipitated these proceedings.”). The
28 Attorney General’s petition for rehearing asks this court to make larger decisions about fact-

1 specific scenarios. We believe this is outside the scope of the original requests and will not be
2 considered now.

3 **Conclusion**

4 For all the above reasons, rehearing is not warranted. The petition for rehearing is
5 **DENIED**. The court retains jurisdiction to issue a written opinion consistent with its May 31,
6 2024 Declaratory Judgment.

7
8 **SO ORDERED** this 31st day of July, 2024.

9
10
11 /s/
12 **F. PHILIP CARBULLIDO**
13 **Associate Justice**

14 /s/
15 **KATHERINE A. MARAMAN**
16 **Associate Justice**

17
18 /s/
19 **ROBERT J. TORRES**
20 **Chief Justice**