

May 31, 2023

State Bar of Arizona
Attn: Bar Counsel Division
4201 North 24th Street, Suite 100
Phoenix, Arizona 85016-6266

RE: Bar Charge Against Attorney Kristin K. Mayes

To Whom It May Concern:

I respectfully request that the Bar Counsel initiate an investigation to determine whether attorney (and Attorney General) Kristin K. Mayes has breached the foundational duties of loyalty and confidentiality she owes to her clients, in violation of Arizona Rules of Professional Conduct 1.6 and 1.7. In just the last month, Ms. Mayes appeared on television to threaten one of her clients with an investigation that could carry potential criminal dimensions, and publicly admonished another client in letters that she distributed in a press release. These unseemly and performative political acts reflect a fundamental misunderstanding or disregard of the Attorney General's role. The Attorney General *serves* state agencies as a counselor and confidante; she does not (and cannot) control, regulate or punish them. The Attorney General's self-appointed status as the investigator of her own clients not only is inconsistent with her statutory responsibilities but compromises the ethical obligations that bind all members of the Arizona Bar.

Factual Background

On April 17, 2023 Attorney General Mayes transmitted a letter to Thomas Buschatzke, the Director of the Arizona Department of Water Resources ("ADWR"). After advising Director Buschatzke of ADWR's statutory duties, Attorney General Mayes launched into an extended critique of the agency's studies of so-called active management areas and demanded that Director Buschatzke supply her with documentation evidencing the agency's compliance with its responsibilities. See Letter of K. Mayes to T. Buschatzke (Apr. 17, 2023), available at https://www.azag.gov/sites/default/files/2023-04/waterletter20232_1.pdf. The letter went on to lambaste a recently issued ADWR regulatory determination and "urge[d]" Director Buschatzke to revise a recently issued policy statement. *Id.* A second letter sent on the same day instructed ADWR to "closely scrutinize" applications for wells by a certain private company, and advised that "[m]y office will be monitoring the ADWR well permit portal going forward." Letter of K. Mayes to T. Buschatzke (Apr. 17, 2023), available at https://www.azag.gov/sites/default/files/2023-04/waterletter20231_1.pdf. A few days after sending the letters, the Attorney General issued a press release boasting that she had "called on [ADWR] to fulfill its statutory duty" and condemning as "unconscionable" recent regulatory approvals. See "Attorney General Mayes Recognized Earth Day, Calls for Stricter Water Oversight" (Apr. 21, 2023), available at <https://www.azag.gov/press-release/attorney-general-mayes-recognizes-earth-day-calls-stricter-water-oversight>.

On May 21, 2023 Attorney General Mayes gave an extended interview to KPNX-TV's "Sunday Square Off" program,¹ when the topic of water management came up. When asked to confirm that the ADWR Director is answerable to the Governor (and not the Attorney General), Attorney General Mayes answered, "If the Department of Water Resources was following the law, I would say yes, but I don't believe that the Department of Water Resources for several decades now, especially the last decade, has been following the law" [starting at 11:32].

Earlier in the same interview [starting at 10:30], Attorney General Mayes was asked to comment on the recently enacted bipartisan budget, which ensures full funding for Arizona's Empowerment Scholarship Account program. After addressing speculation about her presumed gubernatorial ambitions, Attorney General Mayes—a vociferous opponent of parental choice in education—announced that her office "is going to be looking at fraud, waste and abuse in the universal school voucher program. We're going to take a hard look at this program." She suggested there was already "evidence" of putative wrongdoing, complaining that "there are no controls on this program, there's no accountability and they are spending hundreds of millions of dollars of taxpayer money and that needs to be looked at." Attorney General Mayes closed the interview by affirming that she has made a "commitment to investigate," the target of which appears to be the Arizona Department of Education ("ADOE").

Discussion

"In Arizona, unlike some other states, the Attorney General has no inherent or common law authority . . . [T]he authority of the Attorney General must be found in statute." *State ex rel. Brnovich v. Arizona Bd. of Regents*, 250 Ariz. 127, 130 (2020). The legislature has designated the Attorney General the "chief legal officer of the state," and in that capacity she is "the legal advisor of the departments of this state and [must] render such legal services as the departments require." A.R.S. § 41-192(A)(1). Although some agencies (including ADWR) are permitted by law to also retain their own legal counsel in their discretion, nothing in section 41-192 or any other controlling law excludes either ADOR or ADOE from the Attorney General's statutory attorney-client relationship with all state departments.

Attorney General Mayes' public criticisms of, and threats to investigate, her own clients are inconsistent with her duties of confidentiality and loyalty.

A. Duty of Confidentiality

Subject only to narrow exceptions in extenuating circumstances, "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation." Ariz. R. Prof. Conduct 1.6(a). Importantly, this "requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance." *Id.*, cmt. 6; *see also State ex rel. Thomas v. Schneider*, 212 Ariz. 292, 296 (App. 2006) (communications between city attorney and city officials in connection with their official powers and duties were privileged). Attorney General Mayes' April 17 letters to ADWR directly and substantively addressed the agency's statutory

¹ Available at https://www.youtube.com/watch?v=nsLL3MRxo&ab_channel=12News.

responsibilities, and even alluded to information that Director Buschatzke had shared during a prior meeting. As the Bar has recognized under similar circumstances, Attorney General Mayes' public dissemination of those communications, coupled with blistering criticism of her client's official actions, violated the confidentiality that E.R. 1.6 (in conjunction with A.R.S. § 41-192(A)(1)) secures for communications between the Attorney General and state agencies. *See* Opinion and Order Imposing Sanctions, *In re Andrew P. Thomas*, PDJ-2011-9002 (Apr. 10, 2012), at ¶¶ 29-37, available at <https://media.kjzz.org/s3fs-public/Thomas%20Aubuchon%20Alexander%20opinion.pdf> (county attorney breached ER 1.6 by sending out press release disclosing his advice to county board of supervisors and criticizing the board's related decisions).

B. Duty of Loyalty

A lawyer confronts a conflict of interest if “(1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.” Ariz. R. Prof. Conduct 1.7(a).²

Whether on behalf of some other client or for the sake of her own political projects, the Attorney General has publicly and explicitly positioned herself as adverse to two of her clients, to wit, ADWR and ADOE. The Attorney General’s mere disagreement with certain ADWR regulatory actions and decisions of course would not transgress any ethical obligation if it had been communicated confidentially and in good faith. Instead, however, the Attorney General distributed a public broadside of her agency client in a press release, boasting that she “call[ing] on the Department to fulfill its statutory duty” and smearing recent ADWR actions as “unconscionable.”

The Attorney General’s threats to ADOE are even more troubling. Not content to undermine her client rhetorically, the Attorney General took the unprecedented step of announcing an investigation of her own client—a quintessential conflict of interest. To be sure, the Attorney General may permissibly take action against *individual* public employees who engage in legal wrongdoing, so long as the Attorney General has fully disclosed to such individuals the identity of her client (*i.e.*, the agency) and the implications of that relationship. *See* Ariz. R. Prof. Conduct 1.13 & cmt. 10. Here, however, the Attorney General clearly intimated that she is not narrowly pursuing a specific individual(s) suspected of wrongdoing, but rather is investing the *agency itself* concerning its administration of the school choice program as a whole, with the thinly veiled purpose of undermining a policy achievement that offends her ideological preferences. Attorney General Mayes’ subordination of her client’s interests to her own political objectives is a textbook conflict of interest under ER 1.7(a).

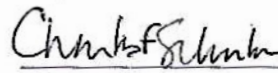
Finally, it is worth noting that the Bar has addressed similar allegations before. In 2021, the Arizona Board of Regents filed a bar charge against then-Attorney General Mark Brnovich, alleging that his public criticisms of, and adverse legal actions against, the agency violated his ethical responsibilities. Although the terms of the resolution of that charge apparently remain

² Although such conflicts may be waived in some circumstances if the affected client(s) provide informed consent, there is no indication that either of the relevant agencies has granted a conflict waiver to Attorney General Mayes.

confidential, news reports indicated that Attorney General Brnovich was impelled to enter into a “diversion agreement.” See Howard Fischer, *AG Brnovich Escapes Bar Sanctions, Enters ‘Diversion Agreement,’* Ariz. Cap. Times, Feb. 6, 2022, available at <https://azcapitoltimes.com/news/2022/02/06/ag-brnovich-escapes-bar-sanctions-enters-diversion-agreement/>. Given the Bar’s self-professed commitment to non-partisanship, I hope and expect that Attorney General Mayes’ conduct will be accorded the same scrutiny that her predecessor received.

Thank you for your attention to this matter.

Respectfully,



(Name)

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