No. 23-1021

In the Supreme Court of the United States

KARI LAKE AND MARK FINCHEM,
Petitioners,

v.

ADRIAN FONTES,
ARIZONA SECRETARY OF STATE, *ET AL.*,
Respondents.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

KURT B. OLSEN
Olsen Law PC
1250 Connecticut Ave NW
Suite 700
Washington, DC 20036
202-408-7025
ko@olsenlawpc.com

Patrick M. McSweeney
McSweeney, Cynkar &
Kachouroff PLLC
3358 John Tree Hill Road
Powhatan, VA 23139
804-937-0895
patrick@mck-lawyers.com

LAWRENCE J. JOSEPH
Counsel of Record
1250 Connecticut Ave NW
Suite 700
Washington, DC 20036
202-355-9452
ljoseph@larryjoseph.com

Counsel for Petitioners

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SUPPLEMENTAL BRIEF

Pursuant to this Court's Rule 15.8, petitioners submit this supplemental brief regarding the ethical and legal implications of the respondents' waiver of a brief in opposition ("BIO") and their failure to respond to petitioners' Motion to Expedite. Although petitioners reserve the right to move for monetary or nonmonetary sanctions under Rule 8.2, this supplemental brief focuses on the ethical and procedural issues related to respondents' waiver of their BIOs.

STATUTORY PROVISIONS INVOLVED

The Supplement Appendix contains the relevant statutory and regulatory authorities discussed here.

STATEMENT OF THE CASE

The Ninth Circuit affirmed the district court's holding that petitioners' injuries are too speculative for Article III based in part on false representations that Maricopa County performed required pre-election logic and accuracy ("L&A") testing and used certified and approved voting system software. The Petition for a Writ of *Certiorari* amends petitioners' allegations of jurisdiction to address those issues. On March 20, 2024, petitioners moved this Court to expedite the Court's consideration of this matter, providing evidence that Maricopa did not do the required L&A testing and used altered, and hence, uncertified software. On March 27, 2024, respondents all waived their BIOs, and the April 1, 2024, deadline for responding to petitioners' Motion to Expedite expired without a response.

REASONS TO GRANT THE WRIT

The petition raises critical issues on Article III standing in the election context, which provide ample

reasons *to grant* the writ. The new developments here provide a reason *not to deny* the writ. Specifically, respondents have a duty to correct prior false material evidence presented to the lower courts, on which those courts relied to find petitioners' injuries too speculative for Article III. The duty to correct expires when the litigation—including appeals or the time to appeal—expires. Allowing respondents to run out the clock by waiving a response would put this Court's imprimatur on respondents' misconduct:

- If respondents previously knew their evidence was false, they committed a fraud on the courts.
- If respondents learned of their evidence's falsity from petitioners' Motion to Expedite, respondents violated their duty of candor by waiving their BIOs.

Either way, this Court should not *deny* a writ of *certiorari* without at least requesting BIOs or a response to petitioners' Motion to Expedite. Alternatively, this Court can summarily grant the writ and reverse, without the need for merits briefing.

I. RESPONDENTS' WAIVER OF THEIR BIOS CONSTITUTES AN AFFIRMATIVE MISREPRESENTATION THAT WARRANTS FURTHER REVIEW.

A week after petitioners' Motion to Expedite put respondents on notice that respondents presented false material evidence to the lower courts, respondents waived their BIOs to a petition based—in part—on amended allegations of jurisdiction to that effect. Under respondents' ethical duty of candor, those waivers are affirmative statements that respondents have nothing to correct. Because a duty to correct

could expire with the denial of *certiorari*,[1] petitioners have advised respondents of petitioners' intent to move for sanction if respondents have not filed a correction by April 12, 2024. Reserving the right to monetary sanctions in the form of an attorney-fee award, the more pressing issue will be nonmonetary sanction to compel not only respondents but also their counsel to correct their false evidence filed below. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991) (courts have "discretion … to fashion an appropriate sanction for conduct which abuses the judicial process"). This issue is relevant to a decision on whether to rule on the petition without BIOs, as well as *how to rule* on the petition (*e.g.*, whether to grant, deny, or request BIOs, whether to rule summarily).

A. Respondents' duty of candor to this Court converts their waivers of BIOs to affirmative statements.

While respondents in any case have an interest in waiving their BIO, respondents here did not have that option, assuming *arguendo* that petitioners' new evidence is correct. To the contrary, waiving a BIO in that circumstance would violate the duty of candor because the waiver falsely implies that respondents have nothing to correct.

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[1] *See* ARIZ. R. PROF'L. COND. 3.3 cmt. 13 ("A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.").

1. The duty to correct under Arizona Rule 3.3(a)(1) applies here.

Pursuant to either this Court's Rule 8.2 or Arizona law and 42 U.S.C. §1988(a), respondents have a duty to correct false material evidence filed below.

a. Arizona's Rule 3.3(a)(1) applies an affirmative duty to correct.

Under Rule 3.3(a)(1), lawyers must not knowingly either "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." ARIZ. R. PROF'L. COND. 3.3(a)(1). Regardless of whether respondents' counsel knew the evidence was false when filed, they are on notice now that the material evidence was false.

Rule 3.3(a)(3)'s duty to correct includes disclosure to the tribunal:

> If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

ARIZ. R. PROF'L. COND. 3.3(a)(3); *cf. In re Ireland*, 146 Ariz. 340, 342-43 (1985) (attorneys must not mislead courts).[2]

The Arizona Supreme Court's Attorney Ethics Advisory Committee recently found the Arizona duty

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[2] An Arizona lawyer's duty of confidentiality to his or her client does not extend to Rule 3.3. *See* ARIZ. R. PROF'L. COND. 1.6(a) ("lawyer shall not reveal information relating to the representation of a client unless … the disclosure is permitted or required by paragraphs (b), (c) or (d), or *[Rule] 3.3(a)(3)*") (emphasis added).

of candor to overcome counsel's duty of confidentiality to clients who benefited from prior false evidence:

> This opinion reviews the ethical dilemma posed when an attorney learns that, due to a former client's apparent perjury in a civil proceeding, the attorney has offered false material evidence to a tribunal. The Committee concludes that the Arizona Rules of Professional Conduct, under the facts of this case, provide that *the attorney's duty of candor to the tribunal overcomes the ethical duty of preserving the former client's confidences* and that the attorney must take reasonable remedial measures effective to undo the effect of the false evidence with respect to the affected tribunal.

Supreme Court of Arizona, Attorney Ethics Advisory Committee, Ethics Opinion EO-20-0007, 1 (May 19, 2021) (emphasis added).[3]

b. The duty to correct applies under this Court's Rule 8.2.

Rule 8.2 authorizes sanctions for "conduct unbecoming a member of the Bar," S.CT. R. 8.2, based on "case law, applicable court rules, and 'the lore of the profession,' as embodied in codes of professional conduct." *In re Snyder*, 472 U.S. 634, 645 (1985). Although the duty of candor applies under the codes of conduct of all states and the case law, *McCoy v. Court of Appeals, Dist. 1*, 486 U.S. 429, 440 (1988); *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1233 n.9 (9th Cir. 2013), Arizona's Rule 3.3(a)(1) may go beyond Rule 8.2's duty to correct. Specifically, the "lore of the

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[3] Ethics Opinion EO-20-0007 is reprinted at Supp.App:2.

profession" may protect client confidences at the expense of candor, whereas Arizona's recent ethics opinion inverts that ordering. *See* Section I.A.1.a, *supra*.

c. Arizona Rule 3.3(a)(1) applies to this civil-rights litigation under 42 U.S.C. §1988(a).

Petitioners seek to enforce the Due Process Clause under both the officer-suit exception of *Ex parte Young* and 42 U.S.C. §1983. Am. Compl. ¶¶177-183 (Pet.App:103a-105a). Consequently, "the common law, as modified and changed by the constitution and statutes of the State" applies to this action if "not inconsistent with the Constitution and laws of the United States." 42 U.S.C. §1988(a); *Lynch v. Household Fin. Corp.,* 405 U.S. 538, 544 n.7 (1972) ("Title 24" includes §1983). For federal civil-rights actions in Arizona, Arizona's Rule 3.3(a)(1) applies directly, rather than indirectly under *Snyder*.

2. Respondents have a duty to correct on the facts here.

Petitioners' amended allegations of jurisdiction go to issues the lower courts decided against them, based on respondents' false evidence. Pet.App:19a-20a, 27a-30a; Pet.App:3a-4a. The Ninth Circuit expressly relied on false representations that Maricopa's elections were protected from manipulation:

> Before being certified for use in elections, the tabulation machines are tested by an accredited laboratory and the Secretary of State's Certification Committee. Ariz. Rev. Stat. §16-442; see also §16-552 (identical testing requirement for tabulation of early ballots). The certified machines are then

> subjected to pre-election logic and accuracy tests by the Secretary of State and the election officials of each county. Ariz. Rev. Stat. §16-449; Ariz. Sec'y of State, 2019 Election Procedures Manual ("2019 EPM") at 86.

Pet:App:3a-4a. Respondents' false statements were thus material below and are therefore squarely within respondents' duty to correct here.

3. Lawyers with a duty to correct cannot file waivers or otherwise "duck" an issue.

Assuming *arguendo* that Rule 8.2 and Arizona Rule 3.3(a)(1) impose a duty to correct, waiving a BIO violates that duty: "Simply filing a non-opposition notice, as she did here, is insufficient to discharge this duty." *Champlin v. Bank of Am., N.A.*, 231 Ariz. 265, 268, ¶17 (Ct. App. 2013). To the contrary, "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." ARIZ. R. PROF'L. COND. 3.3 cmt. 3. This Court should not allow respondents and their counsel so lightly to evade accountability under Rule 8.2 and Arizona Rule 3.3(a)(1).

If respondents and their counsel contend that the new evidence proffered by petitioners in support of the Motion to Expedite is inaccurate, petitioners can seek review in the lower courts, FED. R. CIV. P. 60(d)(3), although the time to seek relief under Rule 60(b)(3) has expired. *Id.* 60)(b)(3), (c)(1). Whether knowingly or not, respondents' BIO waivers are affirmative statements that respondents have nothing to correct regarding the false statements made below regarding Maricopa's L&A testing and use of altered uncertified election software.

B. This Court need not request BIOs before ruling summarily.

In responding to the materials distributed under Rule 15, the Court's order "may be a summary disposition on the merits." S.Ct. R. 16.1. While the Court typically does not issue writs of *certiorari* without a respondent's BIO, a case that the Court can decide summarily presents a different posture than a merits case. For example, BIOs are the respondent's opportunity to identify any perceived misstatement of fact or law in the petition. *See* S.Ct. R. 15.2. When the Court summarily decides a case, the issues of what issues respondents waive in the merits phase, *see id.*, recedes in importance.

C. Given petitioners' new allegations of jurisdiction and their new evidence in support of expediting this matter, summary reversal and remand to the district court is proper.

The petition requests summary reversal, Pet. 34-36; as does the Motion to Expedite (at 10-11, 22-23). The as-yet unrebutted new allegations of jurisdiction support summary reversal—even without new evidence in a related motion—because the amended allegations of injury go to issues that this Court has found to affect the immediacy and concreteness of a party's claimed future injury. *See* Pet. 24 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-72 & n.7 (1992), regarding procedural injury's lowering the Article III threshold for immediacy); *id.* at 24-25 (citing *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974), regarding past injury as evidence of future injury). At bottom, because the issue of Article III standing is based on allegations, the issues here are purely legal,

and "the Court has not shied away from summarily deciding fact-intensive cases" in appropriate circumstances. *Wearry v. Cain*, 577 U.S. 385, 394-95 (2016) (collecting cases). Where *Wearry* involved "lower courts … egregiously misappl[ying] settled law," *id.*, this case involves judgments procured with false evidence. The facts here are not even "intensive" because respondents claimed L&A testing and certified software ensured nothing could go wrong, but the predicate was false: In fact, the software was altered and uncertified and Maricopa did not conduct required L&A testing but also falsely certified it had, dissolving any presumptions of regularity. *See* Pet. 19 n.5 (discussing Arizona's "bursting bubble" theory of nonstatutory presumptions). Summary reversal is appropriate here to allow the district court to sift the evidentiary issues in this classic Article III dispute.

II. RESPONDENTS' FAILURE TO RESPOND TO PETITIONERS' MOTION TO EXPEDITE WAIVES OPPOSITION TO EXPEDITING THIS MATTER.

Under Rule 21.4, respondents had 10 days—until April 1, 2024—to respond to petitioners' Motion to Expedite consideration of this matter. S.Ct. R. 21.4. Respondents' failure to oppose petitioners' motion waives their opposition to expediting this matter and warrants summarily deciding the case, as argued in petitioners' motion and petition. Pet. 34-36; Mot. to Expedite 10-11, 22-23.

A. Failing to respond to a motion waives an opposition to the motion.

Courts generally treat a failure to oppose a motion as consent to the relief requested. *See*, *e.g.*, *Weil v. Seltzer*, 873 F.2d 1453, 1459 (D.C. Cir. 1989) (appel-

lant who failed to file response within time prescribed by [the court's rule] "is deemed to have waived his opposition"); *Law Funder, L.L.C. v. Munoz*, 924 F.3d 753, 759 (5th Cir. 2019); *Crispin-Taveras v. Municipality of Carolina*, 647 F.3d 1, 8 (1st Cir. 2011). This principle applies even to dispositive motions. *See*, *e.g.*, *Finch v. Hughes Aircraft Co.*, 926 F.2d 1574, 1577 (Fed. Cir. 1991); *Alioto v. Town of Lisbon*, 651 F.3d 715, 719 (7th Cir. 2011); *Vaughner v. Pulito*, 804 F.2d 873, 877 n.2 (5th Cir. 1986). Relatedly, when "a party fails to assert a legal reason why summary judgment should not be granted, that ground is waived. *Vaughner*, 804 F.2d at 877 n.2. Simply put, "[e]ven appellees waive arguments by failing to brief them." *United States v. Ford*, 184 F.3d 566, 578 n.3 (6th Cir. 1999); *Roth v. U.S. Dep't of Justice*, 642 F.3d 1161, 1181 (D.C. Cir. 2011); *Mironescu v. Costner*, 480 F.3d 664, 677 n.15 (4th Cir. 2007); *United States v. Dreyer*, 804 F.3d 1266, 1277-78 (9th Cir. 2015) (*en banc*). To be sure, if this Court directs respondents to respond to the petition or to the motion, the Court will have their response.

The question is whether the Court *should* request responses or—instead—merely rule summarily on the unopposed Motion to Expedite. Sitting *en banc*, the Ninth Circuit proposed some guiding principles based on extraordinary circumstances such as avoiding the miscarriage of justice and preserving the integrity of the judicial process:

> Generally, an appellee waives any argument it fails to raise in its answering brief. But the rule of waiver is a discretionary one, and we can make an exception to waiver in the exceptional case in which review is *necessary*

> *to prevent a miscarriage of justice or to preserve the integrity of the judicial process*.

Dreyer, 804 F.3d at 1277-78 (emphasis added, alterations, citations, and internal quotations omitted). Here, petitioners show that—inadvertently or not—respondents prevailed below based on false evidence and now intentionally declined either to defend or to correct the allegedly false statements. This Court need not decide the evidentiary issue (*i.e.*, whether Maricopa used altered uncertified software or conducted required L&A testing). It is enough that petitioners' motion credibly raised evidentiary issues and their petition credibly made amended allegations of jurisdiction.

B. This Court should grant petitioners' Motion to Expedite.

Because respondents do not oppose petitioners' Motion to Expedite, this Court should grant the motion. *See* Section II.A, *supra*. The question remains *how* this Court should grant the motion. Petitioners respectfully submit that the Court should reverse the judgment below summarily.

Given the importance of election integrity to our system of government, *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 189 (2008), petitioners respectfully submit that avoiding a miscarriage of justice and preserving the integrity of the judicial process require this Court to take one of two actions. *See Dreyer*, 804 F.3d at 1277-78 (quoted *supra*). Either this Court should—as petitioners request, *see* Pet. 34-36; Mot. to Expedite 10-11, 22-23—summarily reverse the judgment below and remand for the district court to resolve the evidentiary issues here, or the Court should hear this matter expeditiously on the merits.

Assuming *arguendo* the truth of petitioners' new evidence supporting their motion—and thus the new allegations of jurisdiction supporting their petition—a miscarriage of justice already has occurred. Even in litigation between private parties, "tampering with the administration of justice"—which as "a wrong against the institutions set up to protect and safeguard the public" therefore "involves far more than an injury to a single litigant." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944). Here, the litigation involves the most fundamental right—the right to vote—which is preservative of all other rights. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Unless this Court finds fault in petitioners' evidence and amended allegations—fault that respondents did not bother to explain—the Court cannot countenance Maricopa's apparent flouting of Arizona election law.

By contrast, assuming *arguendo* that respondents could validly explain the discrepancies in software versions and testing records that petitioners have unearthed, the integrity of the judicial process requires that *some court* bring out that respondents' side of the story, even if respondents declined to do so. This Court can be that court—notwithstanding the evidentiary issues involved—or this Court can defer the evidentiary issues for the district court to resolve on remand.

Because petitioners' amended allegations of jurisdiction—backed, by their evidence in support of the Motion to Expedite—raise the prospect of a miscarriage of justice, summary reversal and remand with instructions to resolve this matter expeditiously is appropriate.

CONCLUSION

The petition for a writ of *certiorari* should be granted, the judgment below reversed summarily, and the case remanded for the district court's expeditious review.

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Respectfully submitted,

LAWRENCE J. JOSEPH
Counsel of Record
1250 Connecticut Ave NW
Suite 700
Washington, DC 20036
202-355-9452
ljoseph@larryjoseph.com

KURT B. OLSEN
Olsen Law PC
1250 Connecticut Ave NW
Suite 700
Washington, DC 20036
202-408-7025
ko@olsenlawpc.com

Patrick M. McSweeney
McSweeney, Cynkar &
Kachouroff PLLC
3358 John Tree Hill Road
Powhatan, VA 23139
804-937-0895
patrick@mck-lawyers.com

Counsel for Petitioners

SUPPLEMENTAL APPENDIX

ARIZ. R. PROF'L. COND. 3.3(a)-(c) 1a

Supreme Court of Arizona, Attorney Ethics Advisory Committee Ethics Opinion File No. EO-20-0007... 2a*

* Available online at https://www.azcourts.gov/Portals/26/AEA%20Committee/Issued%20Opinions/EO-20-0007%20Opinion.pdf (last visited April __, 2024).

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by ER 1.6.

Ariz. R. Prof'l. Cond. 3.3(a)-(c).

SUPREME COURT OF ARIZONA ATTORNEY ETHICS ADVISORY COMMITTEE ETHICS OPINION FILE NO. EO-20-0007

The Attorney Ethics Advisory Committee was created in accordance with rule 42.1.

This Opinion was originally issued by the State Bar of Arizona, Rules of Professional Conduct Committee in 2005. The Arizona Attorney Ethics Advisory Committee (the "Committee") has updated the Opinion but its conclusions remain unchanged.

This opinion reviews the ethical dilemma posed when an attorney learns that, due to a former client's apparent perjury in a civil proceeding, the attorney has offered false material evidence to a tribunal. The Committee concludes that the Arizona Rules of Professional Conduct, under the facts of this case, provide that the attorney's duty of candor to the tribunal overcomes the ethical duty of preserving the former client's confidences and that the attorney must take reasonable remedial measures effective to undo the effect of the false evidence with respect to the affected tribunal.

FACTS

The inquiring Attorney, who was not identified in the original opinion due to State Bar of Arizona, Rules of Professional Conduct Committee confidentiality rules, represented Client in an unemployment compensation proceeding. Client's employer had discharged Client, accusing Client of specified wrongdoing. Denying the allegations, Client sought unemployment benefits. An examiner denied Client any unemployment benefits on the basis of dishonesty

and committing a criminal offense against the employer. Client has never been charged with any criminal offense arising from the employer's allegations. Client retained Attorney to appeal the denial of the unemployment claim. Attorney and Client participated in an appeal before a Department of Economic Security single-member "appeal tribunal." *See generally* A.R.S. § 23-671 (describing appeal process from examiner's decision).

The employer introduced certain evidence on appeal supporting its allegation of Client's dishonesty. Attorney, through Client's testimony, countered that evidence and offered additional evidence supporting Client's case. The appeal tribunal ultimately ruled that the employer did not prove wrongdoing on Client's part and awarded Client unemployment benefits. Subsequent to the hearing, a third party told Attorney that Client had not been truthful with Attorney or in testimony before the appeal tribunal. Attorney confronted Client about the alleged perjury, and Client admitted the perjury and other material facts to Attorney, establishing that false evidence had been presented to the tribunal. After Attorney privately remonstrated with Client about the need to correct the record, Client discharged Attorney. Attorney believes that although the employer has appealed the hearing officer's decision, Client has found other employment and is no longer receiving unemployment compensation.

QUESTION PRESENTED

Must an attorney take reasonable remedial measures upon learning of a former client's false

testimony to an unemployment compensation hearing officer, and, if so, what measures must be taken?[1]

RELEVANT ETHICAL RULES[2]

ER 1.0 Terminology

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(m) "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

ER 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d) or ER 3.3(a)(3).

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[1] This opinion does not address a lawyer's option to voluntarily reveal client confidences reasonably necessary to prevent a client from committing certain crimes or frauds. *See* ER 1.6(d) (1) – (2).

[2] All citations to the Ethical Rules and related Comments are to 17A Ariz. Rev. Stat. Ann., Rules of the Supreme Court, Rule 42 (West 2004).

ER 1.9 Duties to Former Clients

(c) A lawyer who has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

ER 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; [or]

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by ER 1.6.

RELEVANT ARIZONA ETHICS OPINIONS

Opinions 2002-02, 2001-14, 93-10, 92-2, 91-02, 80-27.

OPINION[3]

This opinion addresses the continuing quandary of an attorney's ethical obligations upon learning that a client has testified falsely before a civil tribunal.[4] Under the previously used Arizona Code of Professional Responsibility, the ethical rules generally did not require or permit an attorney to reveal confidential information learned from a client even in the face of knowledge that the client

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[3] This opinion does not address whether an attorney has any legal duty to protect confidential client communications. *See* A.R.S. § 12-2234 (establishing attorney-client privilege in civil proceedings); A.R.S. § 13-4062(2) (establishing attorney-client privilege in criminal proceedings). Opinions on the law are beyond the Committee's jurisdiction.

[4] This opinion does not concern an attorney's ethical duties upon learning of a client's false testimony made during the course of a criminal proceeding. Criminal proceedings present legal and constitutional issues not applicable in civil matters. *See generally Nix v. Whiteside*, 475 U.S. 157 (1986); ER 3.3 cmt. [7] ((citing *State v. Jefferson*, 126 Ariz. 341 (1980), and *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978), and recognizing that some courts have held that the duties imposed by ER 3.3 "is subordinate" to constitutional considerations present in criminal proceedings)); Geoffrey C. Hazard, Jr., et al., 2 *The Law of Lawyering* §§ 32.16 to 32.18 – (4th ed. Supp. 2015) (discussing client perjury in context of criminal case representation); Ariz. Op. 2002-02, at 6-8 (same).

committed perjury. *See generally* Ariz. Op. 80-27 (noting that under DR 7-102(B)(1) (as in effect on December 12, 1980), an attorney was not ethically required to reveal a client's fraud on a tribunal if to do so would violate the client's confidential communication to the attorney as defined by then-existing DR 4-101).

Under the present Arizona Rules of Professional Conduct, however, the balance has shifted away from preserving client confidences and towards the attorney's duty of candor to the tribunal. ER 3.3(c) explicitly requires the disclosure of a client's false testimony notwithstanding that the attorney "knows" of the false testimony via a client's confidential communication. The Rules make the policy determination that insuring the integrity of the decision-making process trumps, in some instances, a lawyer's traditional duty to protect a client's confidences. Ariz. Op. 93-10, at 3-4 (recognizing that the "tension" between an attorney's duty to a client and to the court has been resolved in favor of the court in the context of a client giving false evidence); Geoffrey C. Hazard, Jr., et al., 2 *The Law of Lawyering* § 32.11, at 32-25 (4th ed. Supp. 2015) [hereinafter, Hazard, *The Law of Lawyering*].

Ethical Duty Under ER 3.3

ER 3.3(a)(3) plainly requires an attorney to refrain from knowingly offering false evidence. Further, when an attorney later learns that he or she has offered false material evidence to a tribunal, including evidence offered directly by a client or former client,[5] the attorney must take "reasonable

[5] An attorney owes similar ethical duties of confidentiality to former clients as to existing clients. ER 1.9(c).

remedial measures, including if necessary, disclosure to the tribunal." ER 3.3(a)(3); *see also* Hazard, *The Law of Lawyering*, § 32.20, at 32-59 (discussing analogous section of the Restatement (Third) of the Law Governing Lawyers (2000) which provides that duty of candor to the tribunal survives termination of the attorney-client relationship). The duty to take remedial measures lasts until "the conclusion of the proceeding." ER 3.3 cmt. [13]. A proceeding is deemed concluded when the result of the proceeding has been upheld on appeal or the time for the appeal has otherwise expired. *Id.* In this case, then, the Committee must examine (1) whether Attorney "knows" that false evidence was presented, (2) whether the purportedly false evidence was offered to a "tribunal," (3) whether the evidence was "material," (4) what "reasonable remedial measures" are necessary under the circumstances, and (5) the duration of Attorney's obligation to take such measures.[6]

1) Attorney's Knowledge

Attorney here first received an indication of Client's false testimony from a third party. Attorney then privately confronted Client about the third party's allegations, and Client admitted the perjury in addition to other material facts. To Attorney, these admissions conclusively established the falsity of

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[6] Because each of the five elements must be present to trigger the duty under ER 3.3(a)(3), each element is potentially a "threshold" element, i.e., an element which if not present renders it unnecessary to determine the existence of the remaining elements. Because the Committee seeks to provide guidance to members on all the elements, the Committee chooses to discuss all of them notwithstanding that in this case Attorney's duty may have lapsed due to the "conclusion" of the proceedings." See Parts 5a and 5b, *infra*.

Client's prior testimony. Thus, here there is no dispute that Attorney now "knows" that Attorney unwittingly offered Client's false testimony. *See* ER 1.0(f) (stating that "actual knowledge of the fact in question" satisfies ER's knowledge requirement); Ariz. Op. 93-10, at 4 (stating that attorney's "knowledge" of client's false testimony is "ordinarily based on the client's own admissions to the attorney"). *Cf.* Hazard, *The Law of Lawyering*, § 32.21, at 32-60 to 32-61 (emphasizing that knowing of a client's false testimony means more than a mere suggestion or suspicion that the client has committed perjury).

2) Definition of Tribunal

The duty found in ER 3.3 applies to all "tribunals," not just courts of law. ER 1.0(m) defines tribunal in broad terms. It includes any administrative agency acting in an adjudicative capacity involving a neutral decision-maker who receives evidence and/or legal argument from opposing parties and is then to render a legally binding judgment affecting the parties' interests. The appeal hearing process described earlier fits this definition of a "tribunal." *See* A.R.S. § 23-671 (describing "appeal tribunal" process including requirements that tribunal be impartial, conduct a fair hearing at which "all interested parties" have an opportunity to be present and heard, and to render a decision); *see also* Hazard, *The Law of Lawyering*, § 32.03, at 32-9 (discussing intended breadth of "tribunal"). *Cf.* Ill. Ethics Op. 99-04 (finding that a hearing before an Administrative Law Judge of the Social Security Administration was a "tribunal" under Illinois version of ER 3.3).

3) Material Evidence

It seems equally clear that the false testimony in this case was "material evidence." Without recounting so much of the facts that it would in all likelihood identify Attorney and Client, Client made specific false denials under oath to directly refute the employer's evidence. Attorney unwittingly used this false testimony to discredit the employer's proof of Client's dishonest behavior. Although the Committee cannot know with certainty that this evidence swayed the appeal tribunal's decision, it must have been considered "material" to it because the false evidence went directly to points in dispute and was relevant to the proceedings and decision. *See* Ariz. Op. 93-10, at 4 (deeming client's inconsistent and irreconcilable testimony in two separate proceedings material evidence).

4a) Reasonable Remedial Measures – Generally

Given Attorney's actual knowledge of having unwittingly offered false material evidence resulting from Client's deception, Attorney now has an ethical duty under ER 3.3(a)(3) to take "reasonable remedial measures." The Committee stresses, however, that disclosures made pursuant to ER 3.3 should be narrowly tailored and no broader than necessary to undo the effect of the tainted evidence. *See* ER 3.3 cmt. [10] (stating that purpose of reasonable remedial measures is to "undo the effect of the false evidence"). *Cf.* ER 1.6(b).

Normally, the first remedial measure should be to confidentially approach and attempt to persuade the client that the client should cooperate in seeking to withdraw the false evidence. Such private remonstration should also include the advice that the attorney is ethically bound to take remedial

measures, including, if necessary, disclosure to the tribunal of the false evidence. If the client agrees to seek withdrawal of the false evidence, the attorney should proceed accordingly by moving to withdraw the tainted evidence from the record but without disclosing the fact of the client's misconduct.[7] In most circumstances this should be a sufficient reasonable remedial measure, if the timing of the withdrawal allows the tribunal to react to the change in evidence (e.g., the proceeding is still pending). If pressed for a reason why the evidence is being withdrawn, the attorney should cite client confidentiality, attorney-client privilege, and, if appropriate, the client's Fifth Amendment right against self-incrimination. *See* ABA Formal Op. 98-412, at 2 & n.5 (recommending as one course of action the attorney's withdrawal of the false evidence and reliance on the cited privileges).

Even if the client does not agree to the withdrawal of the evidence, the next reasonable measure generally would be for the attorney to move to withdraw the evidence from the tribunal's consideration without the client's consent. If an attorney can refuse to offer evidence the attorney reasonably believes to be false,[8] *see* ER 3.3(a)(3), there seems to be no good reason why the attorney could not move to withdraw evidence from a tribunal's consideration that he or she knows to be false. This measure, too, should be done without revealing any

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[7] The Committee envisions in most cases such a motion being made to the tribunal with notice to all appropriate parties. This opinion does not condone inappropriate *ex parte* communications with a tribunal. *See* ER 3.5(b) (prohibiting unauthorized *ex parte* communications).

[8] This right to refuse to offer such evidence does not extend to the testimony of a criminal defendant. *See* ER 3.3(a)(3).

client misconduct. The attorney should cite client confidentiality, attorney-client privilege, and the client's Fifth Amendment privilege, if appropriate, should the tribunal insist upon an explanation why the attorney is seeking withdrawal of the evidence. Again, whether this might be a sufficient remedial measure depends on whether the tribunal could effectively react if it grants the motion to withdraw the evidence.[9]

In cases unlike this one, where the false evidence has not been offered, but the client so intends and cannot be dissuaded from that course, another possible reasonable remedial measure might be seeking to withdraw from the representation of the client. *See generally* ER 1.16(b) (listing grounds for termination of the representation). Arguably, however, in some circumstances mere withdrawal from the representation may be insufficient under the present version of the Rule.[10]

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[9] Whether the lawyer's withdrawal of evidence without the client's consent creates a conflict of interest under ER 1.7(a)(2) is something the lawyer placed in that situation must determine on a case by case basis. *See* ER 1.16(b) (describing when an attorney may terminate a representation).

[10] The Committee recognizes that an argument could be made that even if an attorney had forewarning of a client's intent to perpetrate a fraud on a tribunal, mere withdrawal may be insufficient. ER 3.3(b) requires an attorney to "take reasonable remedial measures" when the attorney "knows that a person intends to engage" in "criminal or fraudulent conduct related to the proceeding." Under a prior version of the rule, a simple withdrawal would have been sufficient because the rule only forbade an attorney from "assisting a criminal or fraudulent act by the client." ER 3.3(a)(2) (1998). Thus, mere withdrawal was sufficient under that Rule because the attorney was no longer

When an attorney withdraws from the representation (or, as here, is discharged), the attorney may reasonably conclude that the termination of the representation will not undo the effect of the tainted evidence and so further remedial measures might be necessary. In that circumstance, the attorney should advise the client that retention of successor counsel would be in the client's best interests because the withdrawing (or discharged) attorney has a duty to take reasonable remedial measures including possibly informing the tribunal of the false evidence.[11]

If neither withdrawal of the evidence nor termination of the representation would effectively remediate the fraud, the attorney should consider disclosing the client's misconduct to the tribunal. This drastic step should be taken only after all other reasonable measures have first been tried and failed or carefully considered and rejected. The Committee believes that in most instances an attorney's motion to withdraw evidence should be sufficient to remediate the fraud because such a motion is

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"assisting" the client. *See* ABA Formal Op. 98-412. Under present ER 3.3(b), however, an attorney is no longer simply required to "avoid assisting" the client but appears to have an affirmative duty to warn the court of the impending fraud if mere withdrawal would not deter the client. Because Attorney has already been discharged in this case, however, this opinion need not address this issue.

[11] In cases involving the termination of the representation and notwithstanding that an attorney may have concluded that further reasonable remedial measures are necessary under ER 3.3(a)(3), the attorney nonetheless owes the former client ethical duties under ER 1.9 and ER 4.3 (if no successor counsel is retained) to the extent those duties are not superseded by ER 3.3(a)(3).

reasonably calculated to sufficiently warn the tribunal of the situation concerning the unreliability of the false evidence and "the tribunal [would] no longer be powerless to defend itself against" it. Hazard, *The Law of Lawyering*, § 32.19, at 32-52. Disclosure of the client's misconduct (as opposed to putting the tribunal on notice that certain evidence should not be considered as part of the record) would seem to be rarely, if at all, necessary to undo "the effect of the false evidence," the goal behind requiring remedial measures.

Thus, and unless the ethical obligation under ER 3.3 has run its time limit, an attorney is ethically obligated to "make such disclosure to the tribunal as is reasonably necessary to remedy the situation" even if to do so would otherwise contravene ER 1.6. ER 3.3 cmt. [10]. Further, the fact that a client may ultimately face a prosecution for perjury is not a reason for an attorney to withhold disclosure. *See* ER 3.3 cmt. [11]; *see also* Ariz. Op. 93-10, at 4 (stating that if a lawyer has "knowledge" of a client's perjury in a proceeding in which the lawyer represented the client, then ER 3.3 requires disclosure to the tribunal if intermediate remedial measures prove ineffective).

4b) Reasonable Remedial Measures In This Case

Assuming Attorney's duty under ER 3.3 has not terminated because the proceedings have concluded (*see 5b infra*), Attorney has some reasonable remedial measures still available. As noted earlier, Attorney has already privately remonstrated Client. This effort was unsuccessful. Despite Attorney's appropriate efforts to convince Client to take proper remedial measures, Client rejected that advice and discharged

Attorney. The fact of that discharge limits the remaining available remedial measures.

First, because Attorney is no longer counsel of record, Attorney cannot move the tribunal to withdraw the tainted evidence from the proceedings even without Client's consent. Second, Attorney can no longer move to withdraw from the representation. Even if withdrawal of the representation were possible in this case, however, it would not be a "reasonable remedial measure" because Attorney's withdrawal by itself would not cure the fraud by undoing the effect of the tainted evidence.

In these circumstances, the Committee believes Attorney should consider as an option enlisting the aid of Client's present legal counsel, if any. *See* Restatement (Third) of the Law Governing Lawyers § 120, cmt. h (2000) ("If a lawyer is discharged by a client or withdraws . . . the lawyer's obligations [of candor to the tribunal] under this Section are not thereby terminated. In such an instance, a reasonable remedial measure may consist of disclosing the matter to successor counsel."). Although this would not relieve Attorney of Attorney's own ethical obligations to the tribunal under ER 3.3, the combined efforts of former and successor counsel in private remonstrance with Client may persuade Client to consent to seek withdrawal of the false evidence. In addition, because Attorney is no longer Client's counsel of record, only successor counsel of record, if any, can move to withdraw the tainted evidence without Client's consent. Should this step succeed either because the Client ultimately relents and allows any successor counsel to move to withdraw the false evidence or because any successor counsel so moves even without Client's consent, Attorney would have

taken a reasonable remedial measure sufficient to undo the effect of the tainted evidence and, thus, satisfied Attorney's personal obligations under ER 3.3(a)(3) notwithstanding that Attorney did not personally inform the tribunal.[12]

If there is no successor counsel of record, Attorney's only apparent option is to inform the tribunal by letter (with a copy to Client) that specific evidence is unreliable.[13] Again, such a step should normally not include an express revelation of Client's misconduct. The Committee is of the opinion that in this case such a communication would be an effective remedial measure while not disclosing more than what is necessary to undo the effect of the false evidence.[14]

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[12] The facts of any given case may lead to the reasonable conclusion that not involving successor counsel and, instead, informing the tribunal directly would be the remedial measure that undoes the effect of the tainted evidence while doing the least harm to a former client. Thus, attorneys who have terminated, or been discharged from, a representation should consider whether contacting any successor counsel or directly informing the relevant tribunal best fulfills the ethical obligations under ER 3.3 while doing the least damage to the former client's case.

[13] Whether the tribunal chooses to inform the opposing counsel and party remains a decision for the tribunal and subject to any legal and ethical requirements operating on the tribunal.

[14] There is no talismanic language for the contents of such a letter. So long as the letter is reasonably calculated to put the tribunal on notice that certain evidence is unreliable and that Attorney would not have offered the evidence if Attorney had known of certain facts at the time Attorney introduced the evidence, the Committee believes that Attorney's ethical obligations are satisfied.

This case also presents the related question of the proper "tribunal" Attorney should notify. The Committee believes that the proper entity is that entity which has jurisdiction of the proceeding at the time the disclosure is made. Thus, Attorney must determine, by examining the appropriate statutes, rules, and case law, whether the original examiner, hearing officer, or any subsequent entity is the appropriate "tribunal" to which to make any disclosures.

5a) Duration of Ethical Obligation – Generally

ER 3.3(c) makes clear that the ethical obligation to take reasonable remedial measures survives the end of the attorney-client relationship. The ethical obligation terminates only when the tainted proceedings have concluded. If the time for appeal or other review has not yet expired and there has not yet been a final decision on the matter, then the ethical obligation to inform the tribunal exists. ER 3.3(c) & cmt. [13]. Otherwise, the duty to take remedial measures no longer exists because the proceedings would be deemed to have concluded.

5b) Duration of Ethical Obligation In This Case

In this particular instance, Attorney must learn whether the proceedings have reached their "conclusion." Whether proceedings have concluded is ultimately a legal question. Certainly, if the original appeal of the tribunal decision to award compensation is still under active review, either by the Unemployment Insurance Appeals Board or the judiciary, the proceeding is not concluded and

Attorney's ethical obligation to take reasonable remedial measures continues.

If that decision is no longer under review, but Client is still receiving benefits which can be modified at any time, then the proceeding may not be concluded, and Attorney's ethical obligation may continue. *See* Kan. Op. 98-01 (requiring a lawyer to take remedial measures where the lawyer learned of a client's false testimony made in a workmen's compensation proceeding and the client was still receiving benefits which could be modified at any time).

If however, as Attorney believes, Client is no longer receiving unemployment compensation and the unemployment case is now closed, Attorney's ethical duties have terminated regardless of whether the proceeding could be re-opened at any future time or a new and separate proceeding could be instituted against Client for the recovery of previously paid compensation. Otherwise, there would never be a conclusion to these types of administrative proceedings, and the Committee believes that such an open-ended ethical obligation would be inconsistent with the "practical time limit" intended by ER 3.3(c). *See* ER 3.3 cmt. [13].

Accordingly, Attorney should ascertain the present procedural posture of Client's award and then consult applicable statutes, rules, and case law to determine if the proceeding is concluded. *See generally Casillas v. Arizona Dep't of Econ. Security*, 739 P.2d 800, 802 (Ariz. Ct. App. 1986) (discussing the finality of DES decisions); *Rogers v. Arizona Dep't of Econ. Security*, 644 P.2d 292, 293 (Ariz. Ct. App. 1982) (same).

CONCLUSION

Unless the proceedings are deemed concluded (e.g., an appeal ended or the time to take an appeal has expired), an attorney in a civil proceeding must take reasonable remedial measures upon learning that he or she has unwittingly offered false material evidence due to a client's deception. The duty to take such measures applies only when the attorney has actual knowledge of the false evidence and the evidence is material. Reasonable remedial measures are to be taken in steps and should be no broader than necessary to undo the effect of the tainted evidence. The first step should normally be a private consultation with the client explaining the need to withdraw the tainted evidence and advising that the attorney has a duty to take remedial steps even if the client refuses.

Failing that attempt at counseling, the attorney's second step should be to seek withdrawal of the evidence from the tribunal's consideration without the client's consent. The attorney can cite ethical obligations as the reason for seeking withdrawal of the evidence, but should normally not inform the tribunal of the client's misconduct (e.g., that the client committed perjury), if such a withdrawal of the evidence would undo the effect of the false evidence. In that circumstance, an attorney must also consider whether he or she has a conflict of interest with the client necessitating an attempt to withdraw from the representation.

As a last step and only if no other steps would undo the effect of the false evidence, an attorney must make an explicit disclosure of the client's misconduct to the tribunal. In addition, if an attorney has terminated, or been discharged from, a representation

and the former client has retained successor counsel, the former attorney should consider whether involving successor counsel would be part of an appropriate remedial measure.