# COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS SAIPAN, TINIAN, ROTA and NORTHERN ISLANDS



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## **COMMONWEALTH REGISTER**

VOLUME 37 NUMBER 01

**JANUARY 28, 2015** 

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## **COMMONWEALTH REGISTER**

## VOLUME 37 NUMBER 01

**JANUARY 28, 2015** 

## **TABLE OF CONTENTS**

## **ADOPTED RULES and REGULATIONS**

(Impoundme	e of Certification and Adoption of Regulations of Public Auction of Vehicles) of Public Safety	036000
(Pesticide St Bureau of E	e of Certification and Adoption of Rule torage Certification Fees) nvironmental and Coastal Quality e Governor	036002
		000001
	ublic Notice of Certification and Adoption Regulations for CNMIAC Chapter 15-10:	
Coastal Res	ources Management Rules and Regulations	
Bureau of Environmental and Coastal Quality Office of the Governor		
Office of the	5 GOVERNOI	036004
LECAL OBI	MIONE	
LEGAL OPI	NIONS	
Legal Opini	on	
No.	2015-01	
Subject:	Concerning the Ability of the Office of the Attorney General To Defend Public Officials in Criminal Proceedings	
Office of the	Attornov Conoral	026007



## DEPARTMENT OF PUBLIC SAFETY

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
Jose M. Sablan Building, Civic Center Susupe
P. O. Box 500791 Saipan, MP 96950
Telephone: (670) 664-9001 (24 Hours) Facsimile: (670) 664-9019



## PUBLIC NOTICE OF CERTIFICATION AND ADOPTION OF REGULATIONS OF THE DEPARTMENT OF PUBLIC SAFETY

Publication in the Commonwealth Register as proposed regulations: Volume 36, Number 12, pages 035970-035987, December 28, 2014.

Terms and Substance: The proposed regulations provide for the impoundment and public auction of vehicles in the Commonwealth.

Regulations to be amended: NMIAC §§ 150, et seq.

Authority: The Department of Public Safety is authorized by 1 CMC §§ 9115, 2507(a), 6 CMC § 2151, and 9 CMC §§ 4104(g), 4113, 5808, 7114 to adopt rules and regulations for vehicle impoundment and administrative hearings.

Effective Date: Pursuant to 1 CMC § 9105(b), the adopted regulations will become effective 10 days after publication of this notice in the Commonwealth Register.

Comments: Pursuant to the Administrative Procedure Act, the Department of Public Safety has considered fully all written and oral submissions respecting the proposed regulations. If requested to do so by any interested person within 30 days of publication of this notice, the Department will issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption.

Attorney General Approval: The proposed regulations were approved for promulgation by the Attorney General in the above-cited pages of the Commonwealth Register, pursuant to 1 CMC § 2153(e). The adoption of the proposed regulations were approved by the Attorney, as evidenced by his signature upon this notice.

Adoption of Proposed Regulations: The Commonwealth of the Northern Mariana Islands, Department of Public Safety, hereby adopts as permanent regulations the proposed regulations which were published in the Commonwealth Register on December 28, 2014. The Department of Public Safety takes this action pursuant to the Administrative Procedure Act, 1 CMC §§ 9101-9115. As the Commissioner for the Department of Public Safety, I certify by signature below that:

As published, such adopted regulations are a true, complete, and correct copy of the referenced proposed regulations. Further, the proposed regulations are hereby adopted without modification or amendment.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on the 16th day of January, 2015, at Saipan, Commonwealth of the Northern Mariana Islands.

Certified and ordered by:	
James C. Deleon Guerrero Commissioner Department of Public Safety	01/20/2015 Date
Commonwealth of the Northern Mariana Islands	
EDWARD MANIBUSAN Attorney General Office of the Attorney General Commonwealth of the Northern Mariana Islands	1-21-15 Date
Filed and Recorded by:	
Emislitt	01.21.2015
Esther Nesbitt Commonwealth Register	Date
COMMUNICATION (ALLE INCENTION CONTRACTOR INCOME.	



Eloy S. Inos Governor

Ralph DLG. Torres

## Commonwealth of the Northern Mariana Islands OFFICE OF THE GOVERNOR

### Bureau of Environmental and Coastal Quality

DEQ: P.O. Box 501304, DCRM: P.O. Box 10007, Saipan, MP 96950-1304 DEQ Tel.: (670) 664-8500/01; Fax: (670) 664-8540 DCRM Tel.: (670) 664-8300; Fax: (670) 664-8315 www.deq.gov.mp and www.crm.gov.mp



Frank M. Rabauliman

David B. Rosario Director, DEQ

Frances A. Castro Director, DCRM

## NOTICE OF CERTIFICATION AND ADOPTION OF RULE

ADOPTION OF RULE: ADOPTION OF "RULE ON PESTICIDE STORAGE CERTIFICATION FEES"

ACTION TO ADOPT RULE: The Commonwealth of the Northern Mariana Islands, Bureau of Environmental and Coastal Quality (CNMI BECQ), HEREBY ADOPTS AS A RULE, the attached "Rule on Pesticide Storage Fee for Detained, Denied, and Impounded Shipments", pursuant to the procedures of the Administrative Procedure Act (APA), 1 CMC §§ 9102, 9105 and applicable regulations.

AUTHORITY: The attached rule is being promulgated by the CNMI BECQ, Division of Environmental Quality in accordance with the Commonwealth Environmental Protection Act, 2 CMC §§ 3101 to 3134, and the Pesticide Regulations, NMIAC Chapter 65-70, of the Commonwealth of the Northern Mariana Islands. These rules, regulations, technical provisions, and specifications shall have the force and effect of law and shall be binding on all persons and other legal entities subject to the jurisdiction of the Commonwealth of the Northern Mariana Islands Division of Environmental Quality.

PURPOSE AND OBJECTIVE OF RULE: To ensure compliance with the CNMI Pesticide Regulations, the Bureau of Environmental and Coastal Quality, Division of Environmental Quality ('DEQ"), requires the consignee/importer who imports a pesticide or device that has been detained or denied entry and impounded, shall pay a non-refundable storage fee. These fees shall be based on the volume and characteristics. Additional fees related to cartage, labor, shipping, and disposal costs may be assessed in accordance with the Pesticide Regulations.

**DIRECTIONS FOR FILING AND PUBLICATION:** These Proposed Regulations shall be published in the Commonwealth Register in the section on newly adopted rules and regulations (1 CMC § 9102(a)).

The Administrator will take appropriate measures to make this Rule is known to the persons who may be affected by them.

EFFECTIVE DATE: Pursuant to the APA, 1 CMC § 9105(b) and applicable regulations, this adopted Rule is effective 10 days after compliance with 1 CMC §§ 9102, 9105 and publication in the Commonwealth Register.

l, Frank M. Rabauliman, Administrator of the Bureau of Environmental and Coastal Quality, hereby approve the attached Rule.

Submitted by:	Frank M. Rabauliman Administrator Bureau of Environmental Quality	1/16/15 Date
Filed and Recorded by:	Esther SN. Nesbitt Commonwealth Register	01.28.2015 Date
Received by:	Esther S. Fleming Special Assistant for Administration	01/22/18 Date

Pursuant to 1 CMC § 2153(e) and 1 CMC § 9102(c), the rule attached hereto has been reviewed and approved as to form and legal sufficiency by the Attorney General and shall be published, 1 CMC § 2153(f) (publication of rules and regulations).

Edward Manibusan Attorney General Date



## Commonwealth of the Northern Mariana Islands OFFICE OF THE GOVERNOR

#### Bureau of Environmental and Coastal Quality

DEQ: P.O. Box 501304, DCRM: P.O. Box 10007, Saipan, MP 96950-1304 DEQ Tel.: (670) 664-8500/01: Fax: (670) 664-8540 DCRM Tel.: (670) 664-8300; Fax: (670) 664-8315 www.deq.gov.mp and www.crm.gov.mp



Eloy S. Inos
Governor
Ralph DLG. Torres
Lt. Governor

Frank M. Rabauliman Administrator David Rosario Director, DEQ Frances A. Castro Director, DCRM

## AMENDED PUBLIC NOTICE OF CERTIFICATION AND ADOPTION OF REVISED REGULATIONS FOR NMIAC CHAPTER 15-10: COASTAL RESOURCES MANAGEMENT RULES AND REGULATIONS

PRIOR PUBLICATION IN THE COMMONWEALTH REGISTER
AS PROPOSED REVISED REGULATIONS:
Volume 36, Number 9, pp. 035505–035611 (September 28, 2014)

ACTION TO ADOPT PROPOSED RULES AND REGULATIONS: In accordance with the Administrative Procedure Act ("APA"), the Commonwealth of the Northern Mariana Islands Bureau of Environmental Quality (BECQ), Division of Coastal Resources Management, HEREBY ADOPTS the proposed regulations published in the Commonwealth Register at the above-referenced pages. The Administrator of BECQ announced that he intended to adopt the regulations and now does so.

I certify by signing below that the regulations being adopted are set forth as proposed regulations in the Commonwealth Register as cited above, and that they are being adopted with the following minor modifications:

- § 15-10-020 Definitions: The following definitions have been moved to alphabetical order—"Coastal Zone," "Director," "Division of Coastal Resources," thereby re-lettering some definitions.
- § 15-10-360 Height Density, Setback, Coverage, and Parking Guidelinesis re-numbered as 15-10-350.
- § 15-10-825 Permit Enforcement Hearing: The redundant "Director[s]" are omitted:
- § 15-10-830 Remedies: The redundant "Director[s]" are omitted;
- § 15-10-1301 Director Access The "Director" in this heading should be bold
- § 15-10-1510 Federal Activities and Development Projects –
   "Commonwealths" should be changed to "Commonwealth's"
- § 15-10-1520(f) Federal Assistance "The The DCRM must notify" should only have one "The"
- All citations are to have a § symbol if appropriate;

**PRIOR PUBLICATION**: The proposed revised regulations were published on September 28, 2014 (Volume 36, Number 9, pp. 035505-03561) and the certification and adoption were published on December 28, 2014 (Volume 36, Number 12, pp. 035884-035886).

**AUTHORITY:** The Administrator is empowered by statutory authority to adopt rules and regulations in furtherance of his duties and responsibilities. See 1 CMC §2081, Executive Order 2013-24, effective January 12, 2014, 1 CMC §§ 9101-9115 (Administrative Procedure Act).

THE TERMS AND SUBSTANCE: The revised regulations concern the Division of Coastal Resources Management. The rules and regulations reflect the merger of the Division of Coastal Resource Management and the Division of Environmental Quality into the Bureau of Environmental and Coastal Resource Quality and establish the Director as the head of DCRM. In addition, the rules and regulations modify some definitions, create a new temporary permit for emergency repairs, establish exceptions to CRM permitting, clarify the permit process and change the fee scale, require a unanimous decision of a quorum of CRM Board members in order to approve a major siting permit, allow additional imposition of conditions with respect to management measures for control of nonpoint source pollution, and add a new seagrass and seaweed section. This listing of revisions is not exhaustive and the revised rules and regulations should be consulted.

**EFFECTIVE DATE**: Pursuant to the APA, 1 CMC§ 9105(b) and NOAA regulations, these adopted regulations are effective when both of the following conditions have been met:

 10 days after compliance with the APA, 1 CMC §§ 9102 and 9104(a) or (b), which, in this instance, is 10 days after publication in the Commonwealth Register.

**COMMENTS AND AGENCY CONCISE STATEMENT**: Pursuant to the 1 CMC § 9104(a)(2), the Administrator has fully considered all written and oral submissions regarding the proposed regulations. Upon this adoption of the regulations, the bureau, if requested to do so by an interested person, either prior to adoption or within 30 days thereafter, will issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption. There were no comments submitted in opposition to the adoption of these regulations.

ATTORNEY GENERAL APPROVAL: The adopted regulations were approved for promulgation by the Attorney General in the above-cited pages of the Commonwealth Register. (1 CMC § 2153(e), duty to review and approve, as to form and legal sufficiency, all rules and regulations to be promulgated by any department, agency or instrumentality of the Commonwealth government, including public corporations, except as otherwise provided by law).

I DECLARE under penalty of perjury that the foregoing is true and correct and that this declaration was executed on the day of January, 2015, at Saipan, Commonwealth of the Northern Mariana Islands.

Certified and ordered by:

FRANK M. RABAULIMAN

Administrator, BECQ

Filed and Recorded by:

**ESTHER S.N. NESBITT** Commonwealth Registrar 01 26. 2015

Pursuant to 1 CMC § 2153(e) (AG approval of regulations to be promulgated as to form) and 1 CMC § 9104(a)(3) (obtain AG approval) the proposed regulations attached hereto have been reviewed and approved as to form and legal sufficiency by the CNMI Attorney General and shall be published, 1 CMC § 2153(f) (publication of rules and regulations).

Dated the 26 day of January, 2015.

**EDWARD MANIBUSAN** Attorney General, CNMI



## Commonwealth of the Northern Mariana Islands

## Office of the Attorney General

2<sup>nd</sup> Floor Hon. Juan A. Sablan Memorial Bldg. Caller Box 10007, Capitol Hill Saipan, MP 96950

**Civil Division** 

**Criminal Division** Telephone: (670) 237-7500 Telephone: (670) 237-7500 Facsimile: (670) 234-7016 Facsimile: (670) 664-2349

Gilbert J. Birnbrich **Attorney General** 

> To Gilbert J. Birnbrich, Attorney General

Charles E. Brasington, Assistant Attorney General From:

Concerning the Ability of the Office of the Attorney General to Defend Subject:

Public Officials in Criminal Proceedings

ATTORNEY GENERAL'S LEGAL OPINION NO. 2015-01

Attorney General Gilbert J. Birnbrich requests an opinion on the issue of when, if ever, it is appropriate for members of the Office of the Attorney General to defend public officials or employees in a criminal matter. This opinion is meant as guidance for succeeding Commonwealth Attorneys General, as well as present and future Assistant Attorneys General and staff of the Office of the Attorney General

#### **OUESTION PRESENTED**

The Office of the Attorney General ("the Office") is constitutionally mandated to prosecute violations of law. The Constitution provides, in relevant part: "The Attorney General shall be the Chief Legal Officer of the Commonwealth government and shall be responsible for providing legal advice to the governor and executive departments (including public corporations and autonomous agencies), representing the Commonwealth in all legal matters, and prosecuting violations of Commonwealth law." NMI Const. art. Ill, § 11 (emphasis added). Is the Office of the Attorney General or its attorneys permitted to defend public officials in criminal proceedings?

#### SHORT ANSWER

No. The Attorney General and attorneys of the Office of the Attorney General do not have the power to defend public officials or employees in criminal proceedings. The Constitution requires the Attorney General to advise the Governor, represent the Commonwealth in legal proceedings, and "prosecut[e] violations of Commonwealth law." NMI Const. art. III, § 11. The Commonwealth Constitution does not empower the Office of the Attorney General to defend public officials or employees in criminal matters. Commonwealth statutes mostly provide that the Attorney General represents the Commonwealth, but allow the Attorney General to represent public officials or employees in civil proceedings against them. Importantly, a public employee may violate the Government Ethics Code's Conflict of Interest provisions by representing a private

individual before a "government entity." *But see* 1 CMC § 8537. A public official or employee that requests, orders, solicits, or otherwise attempts to secure representation from the Office of the Attorney General in a criminal proceeding violates the Government Ethics Code. 1 CMC § 8532(a). Finally, although some State attorneys general have Common Law powers in addition to those granted by statute, those powers most often relate to bringing actions on behalf of the public interest, and cannot be said to support the Commonwealth Office of the Attorney General's representation of a criminal defendant.

#### **ANALYSIS**

The question at hand requires analysis of the Commonwealth Constitution, the Commonwealth Code, and the powers of attorneys general at Common Law. This inquiry will begin at the highest level of authority, the Constitution, and thence shall consider the relevant Commonwealth statutes and case law concerning the inherent Common Law powers of attorneys general in other jurisdictions. The analysis of the Commonwealth Constitution, Commonwealth Code, and the Common Law powers of attorneys general demonstrates that it is improper for members of the Office of the Attorney General to represent public officials in criminal proceedings.

#### A. Constitutional Powers

The Commonwealth Constitution establishes an Attorney General for the Commonwealth. NMI Const. art. 111, § 11. This provision states in relevant part:

There is in the Commonwealth government an Office of the Attorney General to be headed by an attorney general. The Office of the Attorney General is established as an independent agency within the executive branch of the Commonwealth government. The attorney general shall be elected at large within the Commonwealth for a term of office of four years. The Attorney General shall be the Chief Legal Officer of the Commonwealth government and shall be responsible for providing legal advice to the governor and executive departments (including public corporations and autonomous agencies), representing the Commonwealth in all legal matters, and prosecuting violations of Commonwealth law.

*Id.* In interpreting the Commonwealth Constitution, Commonwealth courts apply the plain-meaning doctrine. *See Camacho v. N. Mar. Ret. Fund*, 1 NMI 362, 368 (1990) (applying "the plain, commonly understood meaning of constitutional language unless there is evidence that a contrary meaning was intended."). Thus under the Constitution, the Attorney General has three specific duties: (1) "providing legal advice to the governor and executive departments", (2) "representing the Commonwealth in all legal matters," and (3) "prosecuting violations of Commonwealth law."

The Constitutional text simply does not support the proposition that the Office can represent a criminal defendant. First, representing a criminal defendant is clearly not "providing legal advice to the governor and executive departments," though the Attorney General certainly can and should advise the Governor and executive departments against a given contemplated course of action when such conduct would violate Commonwealth or federal law. Second, the Attorney General must represent the Commonwealth in all legal matters. *Id.* This text limits the Attorney General's representation to the Commonwealth, though statutory provisions include defending Commonwealth employees in civil suits when the challenged conduct occurred within the scope of employment. *See* 7 CMC § 2209. Importantly, criminal actions are not within the scope of employment. *See*, *e.g.*, *Bahan v. Kurland*, 98 Cal. App. 3d 808, 812 (1979). Finally, any

criminal defense, of a public official or otherwise, is diametrically opposed to the Attorney General's duty to "prosecut[e] violations of Commonwealth law." Thus, the Constitution does not empower the Office from defending public officials in criminal matters.

While the text of the Commonwealth Constitution appears to answer the question presented, the Commonwealth Code should be examined to fully determine the scope of the Attorney General's power to represent public officials and public employees.

## B. Statutory Authorization

## 1. Powers of the Attorney General

The Commonwealth Code further defines the powers and duties of the Attorney General, including the power and duty to represent public officials and public employees. The Attorney General and his or her corresponding duties are established in Title 1 of the Commonwealth Code. 1 CMC §§ 2151–2157. Most of the duties assigned to the Attorney General are transactional in nature, *e.g.*, registering corporation, appointing and certifying notaries, reviewing and approving rules, regulations, contracts, bonds, etc. 1 CMC §§ 2153(a)–(g). The section most relevant to this inquiry requires the Attorney General "[t]o act, upon request, as counsel to all departments, agencies, and instrumentalities of the Commonwealth, including public corporations, except the Marianas Public Land Trust." 1 CMC § 2153(h). Importantly, the Office's enabling legislation directs the Attorney General to serve as counsel for "all departments, agencies, and instrumentalities of the Commonwealth," rather than serving as counsel for individuals. However, other portions of the Commonwealth Code provide for the limited representation of public employees.

The Attorney General is responsible for the representation of Commonwealth employees for allegedly negligent actions taken within the scope of their employment. Under the Government Liability Act, the Commonwealth assumes tort liability "arising from the negligent acts of employees of the Commonwealth acting within the scope of their employment." 7 CMC § 2201(a). Importantly, the Commonwealth's waiver of sovereign immunity is limited to actions sounding in negligence, and the Commonwealth is not liable for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 7 CMC § 2204(b).

The Attorney General represents public employees only in limited circumstances. The Commonwealth Code provides, in relevant part, that the "Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Commonwealth or his estate for any such damage or injury." 7 CMC § 2209. The Commonwealth Constitution establishes a general rule that the Attorney General only represents the Commonwealth or one of its instrumentalities. NMI Const. art. III, § 11. Section 2209 slightly alters or expands this general rule, providing for the personal representation of public employees in civil actions or proceedings. 7 CMC § 2209. The statutory interpretation doctrine *inclusio unius est exclusio alterius*<sup>2</sup> strongly suggests that the Attorney General cannot represent public officials or employees in criminal

The Commonwealth Supreme Court has held that under the Government Liability Act "government employees sued for negligent or wrongful conduct arising from actions taken within the scope of employment—including intentional torts—but under CNMI law, intentional torts will ordinarily fall outside the scope of employment." *Kabir v. CNMI Pub. Sch. Sys.*, 2009 MP 19 ¶ 49.

<sup>&</sup>quot;The inclusion of one is the exclusion of another."

matters.<sup>3</sup> See Antonin Scalia & Bryan A. Garner, Reading the Law: The Interpretation of Legal Texts 107–112 (1st ed. 2012).

There is some authority from other jurisdictions allowing attorneys general to defend public officials and public employees in criminal matters. For example, South Carolina Code § 1-7-50 provides:

In the event that any officer or employee of the State, or of any political subdivision thereof, be prosecuted in any action, civil or criminal, or special proceeding in the courts of this State, or of the United States, by reason of any act done or omitted in good faith in the course of his employment, it is made the duty of the Attorney General, when requested in writing by any such officer or employee, to appear and defend the action or proceeding in his behalf. Such appearance may be by any member of his staff or by any solicitor or assistant solicitor when directed to do so by the Attorney General.

S.C. Code Ann. § 1-7-50 (2014) (emphasis added). Importantly, however, this statutory provision is only legitimate due to the unique criminal justice scheme set forth in the South Carolina Constitution and Code. *See State ex rel. McLeod v. Snipes*, 223 S.E.2d 853, 855–56 (S.C. 1976). As there is no such statute or nuanced criminal justice system in the Commonwealth, such authority is not relevant to this inquiry.

### 2. Conflict of Interest Statutes

The Government Ethics Code also provides strong support for the proposition that the Office of the Attorney General cannot represent public officials or employees that have been charged criminally. The statutes relating to conflicts of interest, codified at 1 CMC §§ 8531–8545, are most relevant portion of the Government Ethics Code for the question presented. There are two important lines of inquiry: (1) whether the Attorney General and Assistant Attorneys General can represent private individuals outside of their employment; and (2) whether a public official or public employee is subject to criminal liability for seeking personal representation from the Office of the Attorney General in criminal proceedings.

These questions are very serious, in light of the harshness of the penalties for violation, codified at 1 CMC §§ 8571–8577. A violation of the Government Ethics Code can lead to "removal from office, or cancellation of contract rights," 1 CMC § 8571(b), "a fine of no more than \$500," 1 CMC § 8572, and can lead to "an action for accounting for any pecuniary benefit received by any person in violation of" the Government Ethics Code, 1 CMC § 8575.

i. The Attorney General and Assistant Attorneys General are forbidden from serving as private attorneys.

The Commonwealth Code provides: "A public official or public employee shall not appear as an attorney for another person before a Commonwealth governmental entity." 1 CMC § 8537(a). The Government Ethics Code defines "public employee" as "an individual who is an appointed employee of the Commonwealth government, whether part-time or full-time." 1 CMC § 8503(k). A "public official," by contrast, is defined as "any person holding any elected office of the

4

The Commonwealth Code does provide that the "Attorney General shall represent the [Commonwealth Ports] authority in all criminal cases." 2 CMC § 2128(c). Subsequent statutes make clear that this representation is for the prosecution of specific offenses against the Commonwealth Ports Authority. 2 CMC § 2131(b). Furthermore, the representation is limited to a Commonwealth instrumentality.

Commonwealth or any appointed, nonemployee member of the Commonwealth government, including members of boards, commissions, and task forces." 1 CMC § 8503(1). The Attorney General is clearly a public official and Assistant Attorneys General are clearly "public employees." For the purposes of the Government Ethics Code, the term "person" is defined as "an individual, proprietorship, firm, partnership, joint venture, joint stock company, syndicate, business trust, estate, company, corporation, association, club committee, organization, or group of persons acting in concert." 1 CMC § 8503(j). This is a very broad definition that certainly includes public officials and employees that are charged criminally. The term "government entity" is undefined. Black's Law Dictionary defines "public entity" as a "governmental entity, such as a state government or one of its political subdivisions." Black's Law Dictionary 605 (10th deluxe ed. 2014). The judiciary is a branch of government, and thus a "government entity" under this definition.

There are three exceptions to the general rule provided in Section 8537(a). A public employee may act as an attorney on behalf of: (1) "The public official or public employee in the public official or public employee's personal capacity"; (2) "A member of the public official's [or public employee's] immediate family"; or (3) "The government entity that is the public official or public employee's principal employer." 1 CMC § 8537. The first example simply means that the Attorney General or Assistant Attorneys General may represent themselves in court. The second example allows the Attorney General or Assistant Attorneys General to represent members of their immediate family. The third example, applied here, means that the Attorney General or Assistant Attorneys General may represent the Office of the Attorney General.

In light of the foregoing analysis, the Attorney General or Assistant Attorneys General would violate the Government Ethics Code by acting as an attorney for a private person, unless one of the afore mentioned exceptions applies.<sup>4</sup>

ii. Public officials may be subject to criminal liability for seeking representation from the Attorney General in criminal proceedings.

Any public official or public employee that requests, orders, or otherwise attempts to secure personal representation from the Office of the Attorney General in a criminal proceeding is subject to criminal liability for violating the Government Ethics Code. The Government Ethics Code provides:

A public official or public employee shall not use or attempt to use the public position to obtain private financial gain, contract, employment, license, or *other personal or private advantage*, direct or indirect, for the public official or public employee, for a relative, or for an entity in which the public official or employee has a present or potential economic interest.

1 CMC § 8532(a) (emphasis added). Criminal representation by the Attorney General or an Assistant Attorney General (*i.e.*, at the Commonwealth's expense) would certainly qualify as a "personal or private advantage," because, unlike a non-indigent member of the public, the public official or public employee would not need to pay an attorney for representation. Furthermore, the Government Ethics Code defines "financial interest" to include: "Any interest with a cost or present value of \$5,000 or more." 1 CMC § 8503(f)(2). In this case, any criminal representation has the potential to exceed \$5,000 at prevailing legal rates, especially if the matter goes to trial. In light of the broad language employed by Section 8532 and the Government Ethics Code generally,

5

PAGE 036011

lmportantly, this analysis does not mean that an Assistant Attorney General may represent a private individual even if within an exception of the Government Ethics Act. There are other legal issues that must be considered, such as whether his or her employment contract permits such representation.

it is eminently reasonable to conclude that a public official or public employee violates Section 8532(a) by attempting to secure criminal representation from the Office of the Attorney General.

### C. Common Law Powers

Any inquiry into the powers of the Attorney General is incomplete without addressing whether the Attorney General's Common Law powers allow the Attorney General or Assistant Attorneys General to represent a public official or public employee in a criminal proceeding. Many State courts hold that their respective Attorneys General possesses Common Law powers in addition to statutory and constitutional grants of power. See Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266 (5th Cir. 1976) (providing a quite thorough analysis of the Common Law powers of attorneys general); Minnesota ex rel. Hatch v. Am. Family Mut. Ins., 609 N.W.2d 1, 3 (Minn. Ct. App. 2000); Gandy v. Reserve Life Ins. Co., 279 So.2d 648, 649 (Miss. 1973) (The Mississippi "Attorney General is a constitutional officer possessed of all the power and authority inherited from the Common Law as well as that specifically conferred upon him by statute."); see also Nat'l Ass'n of Attorneys General, State Attorneys General: Powers and Responsibilities 27-44 (Emily Myers ed., 3d ed. 2013) [hereinafter State Attorneys General] (detailing the Common Law powers of attorneys general in United States jurisdictions). "Contemporary experience reaffirms that the Common Law is a vital source of power for attorneys general who seek to protect public interests in developing areas of law," Id. at 27. Locally, Commonwealth Courts have held that the Commonwealth Attorney General retains the Common Law powers inherent to his office. See Commonwealth v. Demapan-Castro, Civ. No. 04-0563 (NMI Super. Ct. Mar. 22, 2005) (Order Denying Various Motions to Dismiss, with Some Treated as Motions for Summary Judgment at 15–16) (explaining that there is no constitutional or statutory language that would lead a court to conclude that the Framers of the Commonwealth Constitution intended to divest the Attorney General of his or her Common Law powers). Therefore, to be completely thorough in this analysis, we must examine whether the Common Law gives the Attorney General the power to represent public officials and employees in criminal proceedings.

Attorneys general may waive a State's sovereign immunity. See generally Richardson v. Fajardo Sugar Co., 241 U.S. 44, 47 (1916) (the Attorney General of Puerto Rico can waive the territory's sovereign immunity). Attorneys general also often have the Common Law power to bring parens patriae actions, at least for injunctive relief. Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 258 (1972) (approving parens patriae action under the Clayton Act for injunctive relief, but not for treble damages); Georgia v. Pennsylvania R. Co., 324 U.S. 439 (1945) (upholding parens patriae action for injunctive relief). The broad Common Law powers of some attorneys general is demonstrated by Ex parte Young, 209 U.S. 123 (1908), where the U.S. Supreme Court noted that an "attorney general might institute, conduct, and maintain all suits and proceedings he might deem necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights. . . . "209 U.S. at 160. Other powers exist, but are not relevant to the present inquiry. See State Attorneys General at 37-44. Ultimately, however, the Common Law powers of attorneys general primarily involve the power to bring actions on behalf of the public or in the public interest.

Although this Opinion cites many U.S. Supreme Court cases, each case requires the Court to address the powers of the State or territorial attorney general in question. See, e.g., Ford Motor Co. v. Dep't of Treasury of State of Indiana, 323 U.S. 459 (1945) (removal of state action to federal court did not waive Eleventh Amendment immunity because the Indiana Attorney General did not have the power to waive the State's sovereign immunity); see State v. Home Brewing Co. of Indianapolis, 105 N.E. 909 (Ind. 1914) (pursuant to statute, the acts of Parliament after 1607 are not Indiana's common law).

The Common Law powers of the Commonwealth Attorney General do not allow the Attorney General or Assistant Attorneys General to represent public officials or public employees in criminal proceedings. The Common Law powers of attorneys general almost always relate to maintaining suits that are in the public interest. Defending a public official or public employee charged with a crime simply cannot be said to be in the public interest.

#### CONCLUSION

In light of the foregoing analysis, it is clear that the Office of the Attorney General cannot represent public officials or public employees in criminal proceedings. The only clear instance in which the Attorney General or an Assistant Attorney General can represent a criminal defendant is when the Attorney General or an Assistant Attorney General is representing him- or herself. I CMC § 8537. Accordingly, it is my opinion that the Attorney General and attorneys of the Office of the Attorney General do not have the power to defend public officials or employees in criminal proceedings.

#### CONCURRED IN AND APPROVED FOR PUBLICATION

Gilbert J. Birnbrich Attorney General Date