
J. B. VAN HOLLEN,

Plaintiff,

v.

Case No. 08-CV-4085

GOVERNMENT ACCOUNTABILITY BOARD, et al.,

Defendants.

ATTORNEY GENERAL J. B. VAN HOLLEN'S OPPOSITION
TO DEFENDANTS' MOTION FOR DISQUALIFICATION

Plaintiff J. B. Van Hollen, acting in his official capacity as Attorney General of the State of Wisconsin, opposes the Defendants' Motion for Disqualification for the reasons set forth below.

INTRODUCTION

Wisconsin's top law enforcement officer, the Attorney General, has concluded that Defendants have failed to comply with state and federal election laws. However, despite the express statutory authority to bring this action, Wis. Stat. § 5.07, Defendants now claim that the Attorney General—and every other Department of Justice (“DOJ”) attorney—are barred from enforcing the law. As will be shown in this brief, the Defendants are wrong because, among other reasons, their motion ignores the single most important ethical rule that governs this situation. *See* SCR 20:1.11(f).

SCR 20:1.11(f) is the rule that determines when a disqualifying conflict of interest that attaches to one lawyer in a government agency is imputed to other lawyers in the same agency.

Ignoring this rule, Defendants' motion seeks to apply the imputation rule that governs private practice lawyers who, unlike the Attorney General and the DOJ, are not responsible for enforcing the law.

Defendants' motion also fails for additional reasons. First, the fact that the Attorney General's name ceremonially appears on pleadings filed by DOJ attorneys does not establish that the Attorney General has formed an attorney-client relationship with each and every agency and official involved in a lawsuit. Second, it is well-established that, while a private attorney is ordinarily barred from suing a current client, that rule does not and never has applied to the nation's attorneys general when they sue as prosecutors. As recently stated by the Seventh Circuit Court of Appeals, "government lawyers have responsibilities and obligations different from those facing members of the private bar." *In Re Witness Before Special Grand Jury*, 288 F.3d 289, 293 (7th Cir. 2002). "[G]overnment lawyers have a higher, competing duty to act in the public interest." *Id.*

Third, Defendants' attempt to apply private practice standards in a government context directly conflicts with the government lawyer's "higher, competing duty to act in the public interest." By law, the Attorney General and DOJ represent all state agencies, even when they are in dispute with each other. For example, a Department of Transportation ("DOT") road project might raise environmental concerns for the Department of Natural Resources ("DNR"). Although both agencies are, in a sense, "clients," individual DOJ attorneys can, and do, represent both agencies, but do so in a way that protects the interests of both. If Defendants are correct, DOJ attorneys could never counsel or represent the Wisconsin Employment Relations Commission ("WERC") because WERC often rules against state agencies in employment matters. The same is true of DOJ's defense of decisions by the Labor and Industry Review

Commission (“LIRC”). An Attorney General simply could not do the day-to-day work of state government if private sector ethical precepts controlled.

Finally, the present action is not the first, nor will it be the last time that a Wisconsin Attorney General has sought to enforce the law against a state agency or official that his office represents. There is nothing novel about this case.

DISCUSSION

I. GENERAL IMPUTATION RULES DON'T APPLY TO A GOVERNMENT LAW OFFICE.

Defendants are correct that the individual staff attorneys representing them in various other matters cannot sue them. However, they are wrong when they claim that this disqualification is imputed to the Attorney General himself as well as the assistant attorneys general appearing in this case. Defendants rely on SCR 20:1.10 (“Imputed disqualification: general rule”), which says that no lawyer in a “firm . . . shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so,” absent mutual consent. However, Defendants should have kept reading. Had they turned the page to SCR 20:1.11 (“Special conflicts of interest for former and current government officers and employees”), they would have come to subsection (f), which provides:

(f) The conflicts of a lawyer currently serving as an officer or employee of the government are not imputed to the other lawyers in the agency. However, where such a lawyer has a conflict that would lead to imputation in a nongovernment setting, the lawyer shall be timely screened from any participation in the matter to which the conflict applies.

Here, the Attorney General has deliberately and carefully screened the DOJ lawyers who would have a conflict were they in private practice. DOJ’s Division of Legal Services Administrator Kevin Potter has submitted an affidavit explaining the procedural wall that was created to avoid any conflict of interest that might harm the Defendants. (Affidavit of Kevin

Potter). This wall goes well beyond anything required by the Rules of Professional Responsibility. And DOJ, in an abundance of caution, has even made an inter-unit staff transfer to protect against an inadvertent sharing of confidential communications. All this was done in consultation with an ethicist with extensive experience (seventeen years) with the Office of Lawyer Regulation and its predecessor body.

The nonapplicability of SCR 20:1.10 is further confirmed by SCR 20:1.11(d)(1), which states: “Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee . . . is subject to SCR 20:1.7 and SCR 20:1.9.” The rules mentioned in SCR 20:1.11(d)(1) are conflict-of-interest rules. Significantly, SCR 20:1.10 is not included.

Now that Defendants’ imputation argument has been debunked, the rest of their argument falls like a house of cards. However, there are additional public policy reasons why it is quite appropriate for the Attorney General to prosecute agencies and officials who violate public laws, even those whom DOJ routinely represents.

II. THE GENERAL RULE AGAINST SUING A CLIENT DOES NOT APPLY WHEN THE ATTORNEY GENERAL ACTS AS PROSECUTOR.

Defendants cite SCR 20:1.7(a), which provides that

a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interests exists 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.

Defendants argue that this rule applies “even when the matters are wholly unrelated.” *See id.*, Comment, ¶ 6.

In the present action, however, the Attorney General is not representing “a client.” He appears as Attorney General in his official, prosecutorial capacity. As the Michigan Court of Appeals explained in *Attorney General v. Michigan Public Service Commission*, 243 Mich. 487, 625 N.W. 2d 16 (Ct. App. 2000)—a case inexplicably cited by the defendants¹—when an attorney general prosecutes a client agency, any ethical impediment disappears when independent counsel is appointed. “[W]hen the Attorney General is an actual party to the litigation, independent counsel should be appointed for the state agency in order to remedy the ethical impediment to the legal action brought by the Attorney General.” *Attorney General*, 625 N.W.2d at 30. The Mississippi Supreme Court agrees. *See State ex rel. Allain v. Mississippi Public Service Comm.*, 418 So.2d 779, 784 (Miss. 1982) (“Because the Superintendent is now represented by private counsel, there is no ethical impediment to the legal action brought by the Attorney General”).

Exactly that happened here. Mr. Pines has been appointed counsel for the defendants. He is independent counsel. Any ethical impediment has been removed.

III. THE ETHICAL STANDARDS APPLIED TO GOVERNMENT ATTORNEYS DIFFER FROM THOSE THAT APPLY IN PRIVATE PRACTICE.

Implicit in the cases cited above is that, because of the higher public responsibility imposed on an attorney general, the ethical rules applicable to private practitioners do not control an attorney general’s public responsibility. As noted, the reason is that “public business is

¹Defendants cite the Michigan case for the proposition that the Attorney General can assign assistant attorneys general to be on opposite sides of an agency-against-agency lawsuit – dual representation – unless the Attorney General is an actual party. The Michigan case does say that. *See id.* at 30. But that proposition has nothing to do with this case. In the present case, the Attorney General has not assigned two assistants to be on opposite sides. The relevant proposition from the Michigan Case is that the Attorney General cures any ethical problem in suing a client agency if the client agency has independent counsel. *See id.* at 510-11 and text above.

involved.” 20:1.13, Comment, ¶ 9. Or, as the Seventh Circuit said, “[G]overnment lawyers have a higher, competing duty to act in the public interest.” *See id.*, 288 F.3d at 293.

Paragraph 18 of the Preamble to the Rules of Professional Responsibility also notes the difference between government attorneys and private attorneys. It states:

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. **These rules do not abrogate any such authority.**

(Emphasis added.)

In other words, the Rules of Professional Responsibility do not abrogate Wis. Stat. § 5.07, which expressly empowers the Attorney General to bring this action against any violator, including the Defendants. Likewise, these Rules do not repeal Wis. Stat. § 19.37(1), which authorizes the Attorney General to sue any violator of the Public Records Law or Wis. Stat. § 32.26(4), which empowers the Attorney General to represent the Department of Commerce in a suit against any condemnor, including the Department of Transportation, acting in violation of chapter 32, the eminent domain law. The Rules do not repeal Wis. Stat. § 165.25(4)(a) which empowers the Attorney General to represent the Department of Natural Resources against any violator, including other state agencies, who might run afoul of the state's environmental laws. Finally, the rules do not repeal the Attorney General's ability to represent judges when sued even though the DOJ regularly appears before those judges as advocates.

The courts addressing the issue unanimously agree that an attorney general's role in government makes him unique when it comes to applying professional standards of ethics. In the Michigan case cited above, for example, the court said:

[W]hen the Attorney General disagrees with a state agency, he is not disqualified from participating in a suit affecting the public interest merely because members of his staff had previously provided representation to the agency at the administrative stage of the proceedings. Other less drastic means of insuring effective representation for state officers and agencies exist. The abandonment of the public interest, as was ordered in this case, is not necessary.

Attorney General, 625 N.W.2d at 30. The court continued, liberally quoting from the Connecticut Supreme Court on the same issue.

We do conclude, however, that the cited preamble and comments to the MRPC appropriately suggest the need for studied application and adaptation of the rules of professional conduct to government attorneys such as the Attorney General and her staff, in recognition of the uniqueness of her office and her responsibility as the constitutional legal officer of the state to represent the various and sometimes conflicting interests of numerous government agencies. In other words, the Attorney General's unique status *requires accommodation, not exemption, under the rules of professional conduct.*² In this regard, the observations of the Connecticut Supreme Court befit the present circumstances:

The Attorney General of the state is in a unique position. He is indeed *sui generis*. As a member of the bar, he is, of course, held to a high standard of professional ethical conduct. As a constitutional executive officer of the state ... he has also been entrusted with broad duties as its chief civil law officer and ... he must, to the best of his ability, fulfill his "public duty, as attorney general, and his duty as a lawyer to protect the interest of his client, the people of the state." This special status of the attorney general where the people of the state are his clients cannot be disregarded in considering the application of the provisions of the code of professional responsibility to the conduct of his office.

Attorney General, 625 N.W.2d at 28 (quoting *Connecticut Comm. on Special Revenue v. Connecticut Freedom of Information Comm.*, 174 Conn. 308, 318-21, 387 A.2d 533 (1978)).

The Mississippi Supreme Court put it this way in *State ex rel Allain v. Mississippi Public Service Comm.*, 418 So.2d 779, 782 (Miss. 1982):

[The attorney general] will be confronted with many instances where he must, through his office, furnish legal counsel to two or more agencies with conflicting interest or

²Emphasis the court's.

views. It is also readily apparent that in performing their duties, the agencies will from time to time make decisions, enter orders, take action or adopt rules and regulations which are, in spite of good intentions, either illegal or contrary to the best interest of the general public.

Under our scheme of laws, the attorney general has the duty as a constitutional officer possessed with common law as well as statutory powers and duties to represent or furnish legal counsel to many interests—the State, its agencies, the public interest and others designated by statute.

Paramount to all of his duties, of course, is his duty to protect the interest of the general public.

See also State of Hawaii v. Klattenhoff, 71 Haw. 598, 801 P.2d 548 (1990) (attorney general can prosecute an individual whom his office is representing in an unrelated, civil matter); *Superintendent of Insurance v. Attorney General*, 558 A.2d 1197 (Me. 1989) (attorney general can oppose an agency’s position even when staff attorneys provided counsel to the agency on the matter); *Connecticut Commission on Special Revenue v. Connecticut Freedom of Information Commission*, 174 Conn. 308, 387 A.2d 533, 537-38 (1978) (the attorney general’s role of “serving or representing the broader interests of the State” means he will “occasionally, if not frequently,” represent opposing agencies, as he must “if the Attorney General is to have the unqualified role of chief legal officer of the State”).

IV. THE KENNEDY AFFIDAVIT DOES NOT WARRANT DISQUALIFICATION.

Defendants suggest that the Attorney General and DOJ have somehow acknowledged a conflict of interest. According to GAB Director Kevin Kennedy, he was asked “if we, the Defendants in the Practical Political Consulting cases, Nos. 06-CV-3089 and 07-CV 2542, consented to have Assistant Attorneys General Lee, Flanagan and Burke continue representing them in those long-standing cases despite filing by the Attorney General” of the present action. (Second Kennedy Aff., ¶ 6). He also states that he received a “proposed conflict waiver form.”

(*Id.*, ¶ 6). However, Kennedy does not provide a copy of the form nor does he provide any details of the alleged conversation.³

Because of the steps taken to protect the interests of the Defendants as outlined in the Affidavit of Kevin Potter, there was no conflict of interest to be waived. Assistant Attorneys General Lee, Flanagan and Burke have no role in the present lawsuit, had no personal knowledge of it and had been screened from any participation. Perhaps they were acting out of an abundance of caution. Regardless, if they believed that they themselves had a conflict of interest, they were wrong. If they lead Defendants to believe that the Attorney General and other DOJ attorneys had a conflict of interest, they were not only wrong, but were acting without the authority to do so. Under these circumstances, their statements cannot be imputed to the plaintiff's position here. Indeed, the carefully crafted procedural wall separating the conduct of this case from those staff attorneys' representations precludes such an imputation.

V. **THERE IS A LONG-STANDING HISTORY OF THE ATTORNEY GENERAL PROCEEDING AGAINST CLIENT AGENCIES.**

Given the discussion above, it should come as no surprise that the Wisconsin Attorney General, going back into the 19th century, has had occasion to litigate one agency's case against another, or one constitutional officer's case against another. A brief enumeration of some of these

³Counsel representing the Attorney General in this matter have not attempted to obtain information from the Assistant Attorneys General representing Defendants in the other matters.

cases is footnoted.⁴ A useful illustration is that sometimes the Attorney General has represented a neutral decisionmaker in litigation against another agency, e.g., *DOT v. Personnel Commission*, 169 Wis. 2d 629, 486 N.W.2d 545 (Ct. App. 1992), and on another occasion has represented a state agency attacking the decision of that same decision-maker, see *Board of Regents v. Personnel Commission (Hollinger)*, 147 Wis. 2d 406, 433 N.W. 2d 273 (Ct. App. 1988).

Consistent with this tradition, the Legislature has stepped in even to empower the Department of Justice to appear on both sides of a lawsuit in certain environmental cases.

Wisconsin Statute § 165.25(6)(e) provides as follows:

(e) The department of justice may appear for and defend the state or any state department, agency, official or employee in any civil action arising out of or relating to the assessment or collection of costs concerning environmental cleanup or natural resources damages including actions brought under 42 USC 9607. The action may be compromised and settled in the same manner as provided in par. (a). At the request of the department of natural resources, the department of justice may provide legal representation to the state or to the department of natural resources in the same matter in which the department of justice provides defense counsel, if the attorneys representing those interests are assigned from different organizational units within the department of justice.

⁴*Thompson v. Craney*, 199 Wis. 2d 674, 546 N.W.2d 123 (1996) (upholding attorney general's challenge to a statute diminishing constitutional powers of the superintendent of instruction); *Martinez v. DILHR*, 165 Wis. 2d 687, 478 N.W.2d 582 (1992) (representing agency challenging constitutionality of the joint committee on administrative rules); *Wis. Vet. Home v. Div. of Nursing Home Forfeiture Appeals*, 104 Wis. 2d 106, 310 N.W.2d 646 (Ct. App. 1981) (representing Veterans Home against jurisdictional claim of Health and Social Services). *State ex rel. Dep't of Pub. Instruction v. Dep't of Indus., Labor & Human Relations*, 68 Wis. 2d 677, 229 N.W.2d 591 (1975) (representing DILHR against DPI challenge to jurisdiction); *State ex rel. Fulton Foundation v. Department of Taxation*, 13 Wis. 2d 1, 108 N.W.2d 312, 109 N.W.2d 285 (1961) (representing agency challenging gift tax exemption under the public purpose doctrine); *State ex rel. Larson v. Giessel*, 266 Wis. 547, 64 N.W.2d 421 (1954) (rejecting constitutional challenge of attorney general and budget director to law refunding taxes); *The State ex rel. Martin v. Zimmerman*, 249 Wis. 101, 23 N.W.2d 610 (1945), *overruled*, 22 Wis. 2d 544, 564, 126 N.W.2d 551 (1963) (attorney general's suit against the secretary of state challenging constitutional attack on ten-year-old apportionment upheld); *State ex rel. Raymer v. Cunningham*, 82 Wis. 39, 51 N.W. 1133 (1892) (attorney general's suit against secretary of state attacking payment of any sum in excess of constitutionally prescribed salary to the superintendent of public instruction upheld); *The State ex rel. Attorney General v. Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892) (attorney general's suit against secretary of state attacking legislative reapportionment upheld).

In summary, the Attorney General has always had the ability to enforce the law against state agencies and, in appropriate circumstances, represent one agency against another.

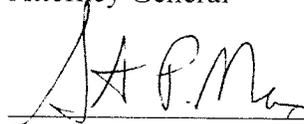
CONCLUSION

The Motion for Disqualification was filed without reference to the specific ethical rules that govern this situation and was filed before Defendants were informed on how the situation was being handled by DOJ. The Attorney General's unique role gives him the responsibility to proceed against state agencies who violate law, even while serving as chief legal officer to all state agencies. In this case, the Department of Justice took the added steps of erecting a communications wall to preserve confidential communications between the Defendants and staff attorneys representing it.

If, for some reason, Defendants continue to press the issue, the motion must be denied for the reasons stated herein.

Dated this 19th day of September, 2008.

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