COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CASE NO. 18-CI-379
ELECTRONICALLY FILED

COMMONWEALTH OF KENTUCKY,
ex rel. ANDY BESHEAR, ATTORNEY GENERAL, *et al.* PLAINTIFFS

v.

MATTHEW G. BEVIN, in his official capacity
as Governor of the Commonwealth of Kentucky, *et al.* DEFENDANTS

DEFENDANT'S REPLY IN SUPPORT OF MOTION TO DISQUALIFY THE ATTORNEY GENERAL AND THE OFFICE OF THE ATTORNEY GENERAL

The Attorney General's Response to the Motion to Disqualify him and his Office from this matter is essentially this: *rules are fine for everyone else, but I don't have to follow them*. His argument is self-defeating.

Despite the Attorney General's best attempts to cast himself a super-constitutional public advocate who is above the law, there are three irrefutable facts that require his disqualification: (1) he is a *lawyer*; (2) as a *lawyer*, he is subject to the ethics rules that govern all *lawyers*; and (3) he provided legal advice to members of the General Assembly and is now suing those same members regarding the very subject of his advice, which is plainly prohibited by the ethics rules for *lawyers*.

The Attorney General tellingly fails to discuss the applicable Rules of Professional Conduct. Were he to do so, he would be forced to confront the fact that those Rules prohibit a lawyer from suing someone when the lawyer has provided that

person with legal advice on the same subject. The plain language of Rules 1.7 and 1.9 sets forth this elementary principle. Of course, the Attorney General does not analyze—or even mention—these Rules in his Response. Why would he not address the two Rules that govern this scenario? Because they are fatal to his argument.

And there can be no legitimate argument that the Attorney General did not provide legal advice to the members of the General Assembly. The Attorney General himself said he was advising them. In the very first paragraph of his February 28, 2018 letter addressed specifically to legislators, the Attorney General stated that the purpose of the letter was to "advise" them on the legal issues pertaining to the proposed pension bill.[1] [Ex. A to Mot. to Disqualify].

Moreover, this is consistent with his statutory duty under KRS 15.020, which provides that the Attorney General is the "legal adviser" of all state agencies and officers. Thus, by statute, legislators are his clients. But, setting this point aside, the fact remains that he affirmatively undertook to provide legal advice to them. To argue that he can now sue them on the same subject matter is contrary to the Rules of Professional Conduct.

The Attorney General attempts to get around this by arguing that he is special and somehow above the Rules of Professional Conduct. This is a frightening

[1] Oddly, the Attorney General now claims that his letter was not intended to provide legal advice to legislators—even though that was precisely what the letter said—but was instead sent as a "demand" letter. [*See* Resp. to Mot. to Disqualify at 9]. Regardless of the fact that his after-the-fact justification is contrary to his own words, it is interesting that the Attorney General thinks it is his job to make threatening demands on the General Assembly.

proposition. The Attorney General loves to proclaim himself the watchdog who forces everyone else to follow the law. But who gets to watch the watchdog? In his view, no one, not even this Court—not even the Supreme Court—gets to do so. His view is manifestly wrong.

The Attorney General's Office is not above the Rules of Professional Conduct. He cites the commentary to Rule 1.13 as evidence that he has free rein to do as he wishes, but that simply is not the case. The commentary to Rule 1.13 merely states the obvious and uncontroversial proposition that it is not within the scope of the Rules of Professional Conduct to precisely identify the client of government lawyers in every given circumstance. *See* SCR 3.130(1.13), cmt. 9. But that issue is not a problem here because the Attorney General affirmatively and deliberately chose to "advise" officials on legal matters. He made it perfectly clear who his clients are.

The Attorney General is, however, partially correct—albeit unwittingly. He claims that government lawyers are not subject to the same constraints as private law firms, and he is correct, but not in a way that supports his argument. Although the Attorney General does not acknowledge it, Rule 1.11 does in fact set forth special conflicts-of-interest rules for government lawyers. Significantly—and contrary to his arguments here—those rules do not give him unfettered, freewheeling ability to sue those government officials to whom he has provided legal advice. Rather, Rule 1.11 simply sets forth a few special rules—which not even the Attorney General claims should be applied here—and it also unambiguously states that current government lawyers are "subject to Rules 1.7 and 1.9." SCR 3.130(1.11(d)(1)).

This is significant here for two reasons. First, it unquestionably demonstrates that the Attorney General is subject to the general conflicts-of-interest rules found in Rules 1.7 and 1.9. Second—and perhaps more importantly—it shows that the drafters of the Rules took into account the special circumstances of government lawyers like the Attorney General. In doing so, they created a special set of rules to accommodate those special circumstances. Thus, the special circumstances that the Attorney General relies on in arguing that he should be exempt from the Rules were already taken into account in crafting the Rule. Accordingly, with the exception of the special rules found in Rule 1.11, the Attorney General's Office should be treated like any other law firm. *See* SCR 3.130(1.0), cmt. 3 ("With respect to the law department of an organization, *including the government*, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct." (emphasis added)).

The Attorney General also relies on this Court's denial of a motion to disqualify him and his office in the University of Louisville Board reorganization case. That case presented a different set of circumstances though. The Court denied that motion because the advice at issue had not been provided directly to the Governor and had not been provided by the same Attorney General against whom the motion to disqualify was made. In other words, the motion was denied because "[t]he Attorney General did not provide the Governor with legal advice about the reorganization power at issue in [that] case." *Beshear v. Bevin*, Civil Action No. 16-CI-738, Order Denying Mot. to Disqualify at 5 (July 25, 2016). The present case is entirely different

because the Attorney General *did provide* legal advice to legislators regarding the same issue on which he is now suing them.

He also claims that Kentucky law supports his purported right to sue the legislature here. It does not. Nothing in Kentucky law authorizes the Attorney General to undertake actions that would otherwise be a violation of the Rules of Professional Conduct. Simply put, the Attorney General—like all other lawyers—must adhere to those Rules and should be disqualified when he is suing someone to whom he has provided legal advice on the same subject. The Attorney General's Response tries to obscure this point by citing cases that stand for the proposition that the Attorney General can represent the interests of the Commonwealth as a body politic when doing so conflicts with his *statutory duty* to represent state officials, but those cases are irrelevant. No one is arguing that the Attorney General cannot sue state officials. Rather, the argument is that he cannot sue state officials after undertaking to provide legal advice to them on the same subject. This is an entirely different issue altogether. The case law stands for the proposition that it is the Attorney General's statutory obligation to defend the law, not to defend the acts of individual officials. Thus, when there is a conflict between the statutory *duty* to represent state officials and the statutory *duty* to uphold the law, the latter prevails. But that is not the type of conflict at issue in the Motion to Disqualify. The conflict at issue here is not a conflict between statutory duties, but a conflict of interest—indeed, one prohibited by the Rules of Professional Conduct. And, given the Attorney General's statutory obligation to uphold the law, he should feel duty bound to

disqualify himself over this conflict. The Rules of Professional Conduct have the force of law, and if he is serious about defending the integrity of Kentucky law, he should not let himself violate those Rules.

But the Attorney General does not appear to be interested in the enforcement of those Rules. Rather, he essentially argues that the Court should ignore the *Kentucky* Rules in favor of out-of-state cases that produce the result he desires. Nevertheless, the out-of-state cases relied upon by the Attorney General are inapposite. This case is not about whether the Attorney General can sue the Governor, *see South Carolina ex rel. Condon v. Hodges*, 562 S.E.2d 623 (S.C. 2002), nor is it about whether different members of the Attorney General's staff can represent opposing agencies in matters related to administrative proceedings, *see Superintendent of Ins. v. Attorney General*, 558 A.2d 1197 (Me. 1989).[2] Instead, the issue here is whether the Attorney General can provide legal advice to legislators and then sue them on the same subject matter. The *Kentucky* Rules of Professional Conduct say that he cannot, and there is no other *Kentucky* authority to the contrary.

If the Attorney General wants to discuss out-of-state authorities, the one most directly on point is *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206 (Cal. 1981). The Attorney General feebly attempts to distinguish it on the ground that it turned

[2] One detail overlooked by the Attorney General in his Response is that the conflict in *Superintendent* involved multiple attorneys working in different divisions within the Attorney General's office. *See* 558 A.2d at 1198–99. Here, Attorney General Beshear personally signed the letter he sent to the legislators and has personally signed briefs and appeared in Court in this action. The issues addressed in *Superintendent* simply have no applicability here.

on peculiarities of California law, but that is not true. To be sure, the court discussed an alternate ground for its ruling that was grounded in California law, *see id.* at 1209, but the primary ground for its ruling was based in general principles of attorney ethics, which are the same in California and Kentucky. The essential holding of *Deukmejian* was that an Attorney General may not "represent clients one day, give them legal advice with regard to pending litigation, withdraw, and then sue the same clients the next day on a purported cause of action arising out of the identical controversy." *Id.* at 1207. The Supreme Court of California correctly held that this violated an attorney's ethical duties and that there was "no . . . ethical authority for such conduct by the Attorney General." *Id.* at 1207. Significantly, the California Attorney General had argued—just as Attorney General Beshear is arguing here—that he was "not bound by the rules that control the conduct of other attorneys in the state because he is a protector of the public interest." *Id.* at 1209. But the California Supreme Court soundly rejected that argument. *See id.* And it should be soundly rejected here as well. The Attorney General has no answer for the *Deukmejian* case except to say that it is "peculiar" to California. And that plainly is not so. The same conduct that creates an unethical conflict of interest in California also creates an unethical conflict of interest in Kentucky.

Finally, the Attorney General contends that the Governor has no standing to raise the Attorney General's conflict of interest. Essentially, he is arguing that he can violate the ethics rules as long as the right person does not complain. This cynical and lawless outlook is as disappointing as it is wrong. Courts recognize that parties

other than a client or former client can assert a conflict of interest against opposing counsel. *See, e.g.*, *Foley- Ciccantelli v. Bishop's Grove Condo Ass'n*, 797 N.W.2d 789, 794 (Wis. 2011) ("[A] non-client party may establish standing [to disqualify opposing counsel] . . . when the prior representation is so connected with the current litigation that the prior representation is likely to affect the just and lawful determination of the non-client party's position."); *Kenn Air Corp. v. Gainesville-Alachua Cnty. Reg'l Airport Auth.*, 593 So.2d 1219, 1222 (Fla. Ct. App. 1992) (similar); *see also Kevlik v. Goldstein*, 724 F.2d 844, 847–48 (1st Cir. 1984) (holding that a party's attorney has standing to seek disqualification on behalf of a non-client due to the attorney's duty to report misconduct); *United States v. Clarkson*, 567 F.2d 270, 271 n.1 (4th Cir. 1977) (same); *Brown & Williamson Tobacco Corp. v. Daniel Int'l Corp.*, 563 F.2d 671, 673 (5th Cir. 1977) (per curiam) (same). Such is the case here.

The Attorney General cites two unpublished Kentucky cases—one from a federal district court, and one from the Kentucky Court of Appeals—in support of his argument that the Governor lacks standing to raise the Attorney General's conflict of interest. Those cases are completely unlike this one. The first case, *Winchester v. Education Management Corp.*, No. 5:10-CV-00012-TBR, 2010 WL 2521465 (W.D. Ky. June 18, 2010), involved a situation in which a *pro se* plaintiff was arguing that the defense counsel should be disqualified because they represented multiple *defendants* in the case, which is a common practice. The case at hand obviously does not involve such a scenario. It is one thing to say that a plaintiff should not be able to challenge the ability of attorneys to represent multiple defendants, but it is an entirely different

thing to say that a defendant should not be able to challenge the Attorney General's ability to file a lawsuit over an issue on which he provided legal advice. The second case, *Goldberg & Simpson, P.S.C. v. Goodman*, No. 2005-CA-001273-MR, 2006 WL 2033997 (Ky. App. July 21, 2006), involved a third-party claim of legal malpractice. The Court of Appeals logically concluded that the non-client was not owed a duty by the lawyer, and therefore could not bring a malpractice claim against the lawyer. *See id.* at *3. Thus, the Court of Appeals held that the malpractice claim was appropriately dismissed under CR 12.02(f). This holding has absolutely nothing to do with situations like the case at hand, where a lawyer has provided legal advice and then subsequently filed a lawsuit on the same subject matter against those whom he advised.

CONCLUSION

The Attorney General's Response to the Motion to Disqualify repeatedly asserts that the Governor is attempting to prevent the Attorney General from fulfilling his duties and obligations, and that the Governor's theory would prevent the Attorney General from being able to challenge supposedly unlawful government conduct if he first warned the public about the conduct before it occurred.[3] Nothing could be further from the truth. All that the Governor is arguing is that the Attorney General—like all other lawyers—is prohibited from giving legal advice to an official and then suing the official on the same subject. This prohibition is imposed not by the Governor, but by the Kentucky Supreme Court's ethics rules. There is nothing

[3] Even if the Attorney General is disqualified from this case, there will still be two other Plaintiffs who are capable of litigating it.

special about either the Attorney General or his office that allows him to get around this fundamental concept of attorney ethics.

The salient question here is this: What limits are there on the Attorney General's ability to sue the very people to whom he has provided legal advice? The Attorney General says that he has absolute power; that there are *no limits on his power*. But the Kentucky Rules of Professional Conduct say otherwise. The Attorney General is not above the law. No matter how much he might dislike it, he must follow the rules like every other lawyer. And the rules say that when a lawyer has provided legal advice to someone, he cannot sue them on the same subject. Because that is precisely what the Attorney General is trying to do here, he and his Office must be disqualified.

Respectfully submitted,

/s/ M. Stephen Pitt
M. Stephen Pitt
S. Chad Meredith
Matthew F. Kuhn
Office of the Governor
700 Capital Avenue, Room 101
Frankfort, KY 40601
(502) 564-2611
Steve.Pitt@ky.gov
Chad.Meredith@ky.gov
Matt.Kuhn@ky.gov

Brett R. Nolan
General Counsel
Finance and Administration Cabinet
702 Capitol Avenue, Suite 101
Frankfort, KY 40601
Brett.Nolan@ky.gov

Counsel for Governor Bevin

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were served via email this 24th day of April, 2018, to Andy Beshear, J. Michael Brown, La Tasha Buckner, S. Travis Mayo, Marc G. Farris, Samuel Flynn, Office of the Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, Kentucky 40601, Jeffrey Walther, Walther, Gay & Mack, 163 E. Main St., Suite 200, Lexington, KY 40588, David Leightty, Priddy, Cutler, Naake, Meade, 2303 River Road, Suite 300, Louisville, KY 40206, David Fleenor, Capitol Annex, Room 236, Frankfort, KY 40601, Eric Lycan, Office of the Speaker, Capitol Annex, Room 332, Frankfort, KY 40601, Mark Blackwell, 1260 Louisville Road, Frankfort, KY 40601.

/s/ M. Stephen Pitt
Counsel for Governor Bevin

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