

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 18-CI-379
- AND -
CIVIL ACTION NO. 18-CI-414

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

PLAINTIFFS

v.

ORDER

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

DEFENDANTS

This matter is before the Court on Defendant Governor Bevin's Motion to Disqualify the Attorney General and the Office of the Attorney General. The case was called during Motion Hour on April 25, 2018. Having heard the arguments of the parties, reviewed the record, and otherwise being sufficiently advised, the Court hereby **DENIES** the motion for reasons more fully stated below.

DISCUSSION

The Governor's motion to disqualify the Attorney General is based on two unsolicited letters from the Attorney General to members of the General Assembly during the 2018 Regular Session advising them of potential statutory and constitutional infirmities within Senate Bill 1 ("SB 1")¹ and a tweet from the "KY House Democrats" which includes a photograph of the Attorney General and certain legislators with a caption that references discussing "legal options."

The Governor argues that these communications constituted legal advice given in the context of an attorney-client relationship. To the extent this characterization is accurate, the Governor's argument continues, allowing the Attorney General to sue any of the Defendants in

¹ The Attorney General's first letter, dated February 28, 2018, advised the General Assembly on SB 1. His second letter, dated March 6, 2018, advised the General Assembly on the Proposed Senate Substitute for SB 1. The substance of SB 1 was eventually included in an amended version of Senate Bill 151 and passed by the General Assembly on March 29, 2018. The Governor signed SB 151 into law on April 2, 2018.

this action creates a conflict of interest under the Kentucky Rules of Professional Conduct and, as such, the Attorney General and his office should be disqualified from participating in the present case.

The Governor's argument misconstrues the law, specifically as it relates to the office of the Attorney General, and the nature of his constitutional and statutory duties. The long established controlling law on this point emphatically provides that the Attorney General's true clients, to whom he owes his legal and fiduciary duty of loyalty, are the citizens of Kentucky and not any officeholder, department or agency. Given this duty, the letters sent by the Attorney General to the General Assembly cannot operate to create a conflict of interest which would disqualify him from participating in this case. Further, there are no allegations that the Attorney General advised the Governor on the passage of the legislation at issue in this case. It is abundantly clear from the record in this case and others, that the Governor did not seek or accept the legal advice of the Attorney General, nor did he agree with or follow the advice the Attorney General offered to the legislature. For these reasons, the Attorney General could not possibly have a conflict of interest and the Court must **DENY** the Governor's motion to disqualify.

The Governor is correct that lawyers owe a duty of loyalty to their clients. The attorney-client relationship is built on trust, and a major component of this trust is a client's confidence that her lawyer will be loyal to her. It is for that reason that the Rules of Professional Conduct provide that a lawyer may not "represent a client if the representation involves a concurrent conflict of interest" or "represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client" SCR 3.130 (1.7) and (1.9). Accordingly, a lawyer who works against the interests of his current or former clients violates his duty of loyalty under the Rules of Professional Conduct.

The Governor argues that as the “the chief law officer” for the Commonwealth with a statutory obligation under KRS 15.020 to provide every state agency and officer with legal advice, the Attorney General’s letters and other communications with the General Assembly around SB 1 constituted “legal advice.” Under the Governor’s theory, providing this “legal advice” created a duty of loyalty to the General Assembly which was breached, in violation of the Rules of Professional Conduct, when the Attorney General filed the present case. The Governor does not explain how this duty of loyalty extended to him since there are no allegations that the Attorney General provided “legal advice” to the Governor regarding SB 1.

While the Attorney General is the “chief law officer” of the Commonwealth, Governor Bevin, as the person who now occupies the office of Governor, is not the state. As Kentucky’s highest court has aptly noted, the Governor is not a King: “under a democratic form of government now prevailing, the people are king, Ky. Const. sec. 4, so the Attorney General’s duties are to that sovereign rather than to the machinery of government.” *Commonwealth ex rel. Hancock v. Paxton.*, 516 S.W.2d 865, 867 (Ky. 1974). In our democracy, “the source of authority of the Attorney General is the people who establish the government, and his primary obligation is to the people.” *Hancock v. Terry Elkhorn Mining Co., Inc.*, 503 S.W.2d 710, 715 (Ky. 1973).

Indeed, in that capacity, the Attorney General has not only an obligation, but a duty to bring suit “when he believes the public’s legal or constitutional interests are under threat.” *Beshear v. Bevin*, 498 S.W.3d 355, 362 (Ky. 2016). As such, the Attorney General’s attorney-client relationship is with the citizens of Kentucky and it is to the public, not any office or officeholder, that the duty of loyalty is owed. The language of KRS 15.020 does not somehow transform this duty of loyalty into an obligation to serve as private legal counsel to the General

Assembly, the Governor or any other state official in “the machinery of government.” Opining on this very issue, Kentucky Supreme Court held:

While KRS 15.020 imposes on the Attorney General the duty to “attend to . . . any litigation or legal business that any state officer, department, commissioner, or agency may have in connection with, or growing out of, his or its official duties,” we believe the statute, in stating at the outset that the Attorney General is “the chief law officer of the Commonwealth,” intends that in case of a conflict of duties the Attorney General’s primary obligation is to the Commonwealth, the body politic, rather than to its officers, departments, commissions, or agencies.

Paxton, 516 S.W.2d at 868.

The Governor cites one case from the California Supreme Court, *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206 (Cal. 1981), in support of his argument. However, that case is not helpful to the Governor because it is legally and factually distinguishable from the present case. Critically, the California Supreme Court “recognize[d] there are cases in other jurisdictions that permit their attorneys general to sue any state officer or agency, presumably without restriction” and, citing to *Paxton*, expressly identified Kentucky as an example of one such jurisdiction in which there were “peculiarities of the prevailing law” that were “not persuasive here.” *Id.* at 1209. In addition, putting aside the differing legal standards, the facts in *Deukmajian* are distinguishable. There, the California Attorney General met with representatives of the State Personnel Board, which had been served with a summons in connection with a pending lawsuit, and “outlined the legal posture of the board and described four legal options available to it.” *Id.* at 1207. These facts from *Deukmajian* clearly involve a relationship that bears a much closer resemblance to a private legal counsel relationship in which the agency relied on legal advice of the Attorney General. Here, the Governor has pointed only to two unsolicited letters and a tweet, none of which were relied upon by the Governor or the General Assembly.

There are no allegations that the Attorney General provided “legal advice” to the Governor himself. Significantly, the legislative defendants in this action have not asserted that the Attorney General acted as their counsel or breached any duty to them. The Attorney General’s professional duty is owed to the Commonwealth and its citizens, not to any individual officeholders or any part of “the machinery of government.”

The Court recognizes there are many important legal issues that can and should be contested in this action. The legitimacy of the Attorney General’s right to challenge the legislation at issue, and to contest the Governor’s legal position, is not one such legal issue. Case law is well established that the Attorney General has both the right and the duty to challenge statutes that he believes are unconstitutional. *Beshear*, 498 S.W.3d at 362. It would perversely twist the logic and purpose of the Rules of Professional Conduct to hold that the Attorney General is disqualified from challenging a statute because he rendered a legal opinion prior to adoption of the law that counseled against the actions adopted by the legislature.

CONCLUSION

Accordingly, the Court finds that the Attorney General breached no duty of loyalty to the General Assembly or the Governor and has no conflict of interest in participating in the present case. For those reasons, the Court **DENIES** the Governor’s motion to disqualify the Attorney General.

SO ORDERED, this 30th day of April, 2018.



The image shows a rectangular box containing an electronic signature. On the left is a circular seal of the State of New Jersey. To the right of the seal, the signature "Hon. Phillip J. Shepherd" is written in a cursive font. Below the signature, the text reads: "HON. PHILLIP J. SHEPHERD", "electronically signed", and "5/1/2018 9:01:01 AM".

PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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