

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS  
SIXTH DIVISION

TIM GRIFFIN, in his official capacity as  
Attorney General of Arkansas

PLAINTIFF

VS.

CASE NO. 60CV-23-9637

ARKANSAS BOARD OF CORRECTIONS;  
BENNY MAGNESS, in his official capacity  
as Chairman of the Arkansas Board of Corrections;  
TYRONE BROOMFIELD, in his official capacity  
as Vice-Chairman of the Arkansas Board of Corrections;  
and JOHN FELTS; DR. WILLIAM “DUBS” BYERS;  
DR. WHITNEY GASS; LEE WATSON; and  
ALONZA JILES, in their official capacities as  
board members of the Arkansas Board of Corrections

DEFENDANTS

**ORDER**

On the 19<sup>th</sup> day of December, 2023, this matter came on for consideration and from the pleadings filed herein the court doth find and order as follows:

1. The *Complaint*, filed by the Attorney General, alleges the defendants have violated the Arkansas Freedom of Information Act and also alleges the defendants conducted “two illegal executive sessions.” The *Complaint* further alleges that the defendants have illegally entered into an agreement for legal services with special counsel and has asked this court to void such alleged illegal agreement.

2. Article 6, § 22 of the Arkansas Constitution states, in relevant part, “The Treasurer of State, Secretary of State, Auditor of State, and Attorney General shall perform such duties as may be prescribed by law;...”.

3. The Arkansas General Assembly has legislatively prescribed the duties of the Attorney General in A.C.A. § 25-16-702.<sup>1</sup>

4. In the case of *Holloway v. Arkansas State Bd. Of Architects*, 79 Ark. App. 200, 86 S.W. 3d 391 (2002), the Arkansas Court of Appeals held:

The final sub-issue presented by this appeal is the trial court's decision not to disqualify the Attorney General from representing the Board in this proceeding. Appellant argues that the Attorney General should be disqualified from representing the Board in this case because the Attorney General also represents the State Board of Registration for Professional Engineers and Land Surveyors ("Engineer Board") in disciplinary proceedings against engineers and, therefore, has a conflict of interest requiring disqualification in the present case.

This court reviews a trial court's decision on whether to disqualify an attorney under the abuse-of-discretion standard. *Seeco, Inc. v. Hales*, 334 Ark. 134, 969 S.W.2d 193 (1998); *Berry v. Saline Mem'l Hosp.*, 322 Ark. 182, 907 S.W.2d 736

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<sup>1</sup> § 25-16-702. Duties

(a) The Attorney General **shall** be the attorney for all state officials, departments, institutions, and agencies. Whenever any officer or department, institution, or agency of the state needs the services of an attorney, the matter shall be certified to the Attorney General for attention.

(b)

(1) All office work and advice for state officials, departments, institutions, and agencies **shall** be given by the Attorney General and his or her assistants, and no special counsel shall be employed or additional expense paid for those services.

(2) If, in the opinion of the Attorney General, it **shall** at any time be necessary to employ special counsel to prosecute any suit brought on behalf of the state or to defend a suit brought against any official, board, commission, or agency of the state, the Attorney General, with the approval of the Governor, may employ special counsel. The compensation for the special counsel **shall** be fixed by the court where the litigation is pending, with the written approval of the Governor and the Attorney General. The Attorney General shall not enter into any contract for the employment of outside legal counsel without first seeking prior review by the Legislative Council.

(c) If any official, department, institution, or agency of the state needs the service of an attorney and the Attorney General fails to render the service when requested in writing, then, upon the establishment of that fact, the Governor may appoint counsel to look after the matter or may authorize the employment of counsel by the officer, department, agency, or institution needing the services of an attorney.

(d) Any person violating the provisions of this section shall be subject to indictment and upon conviction fined in any sum not less than two hundred dollars (\$200) nor more than two thousand dollars (\$2,000) and, upon proper proceedings, removed from office.

(e) The Attorney General shall have authority to initiate civil lawsuits under all state and federal environmental protection statutes. (emphasis added)

(1995). An abuse of discretion may be manifested by an erroneous interpretation of the law. *Seeco*, supra. The Model Rules of Professional Conduct are applicable in disqualification proceedings. *Berry v. Saline Mem'l Hosp.*, supra; see also *Norman v. Norman*, 333 Ark. 644, 970 S.W.2d 270 (1998); *Saline Mem'l Hosp. v. Berry*, 321 Ark. 588, 906 S.W.2d 297 (1995). Disqualification can be warranted in the absence of an ethical violation. It is an available remedy to a trial court “to protect and preserve the integrity of the attorney-client relationship.” *Burnette v. Morgan*, 303 Ark. 150, 155, 794 S.W.2d 145, 148 (1990). Yet, it is a drastic measure to be imposed only where clearly required by the circumstances. *Burnette*, supra.

By statute, the Attorney General “shall be the attorney for all state officials, departments, institutions, and agencies.” Ark.Code Ann. § 25–16–702(a) (Repl.2002). Further, the Attorney General “shall be the legal representative of all state officers, boards, and commissions in all litigation where the interests of the state are involved.” Ark.Code Ann. § 25–16–703(a). In addition to the Attorney General's role as the State's principal civil litigator, the Attorney General is obligated to give the governor, secretary of state, state treasurer, members of the general assembly and other state officials, when called upon, legal advice and formal written opinions regarding the official discharge of their duties. Ark.Code Ann. §§ 25–16–706(a)(1), (3). Thus, “[a]ll office work and advice for state officials, departments, institutions, and agencies shall be given by the Attorney General...” Ark.Code Ann. § 25–16–702(b)(1).

As other courts have noted, the office of the Attorney General is a unique position. *Connecticut Comm'n on Special Revenue v. Connecticut Freedom of Info. Comm'n*, 174 Conn. 308, 387 A.2d 533, 537 (1978). As a member of the bar, the Attorney General is held to high standards of professional conduct. As a constitutional officer, the Attorney General has been entrusted with broad duties as the State's chief civil law officer and is expected to discharge these public duties to the best of his or her abilities. As a lawyer, the Attorney General must by statute provide legal representation to all departments and agencies of state government. The Model Rules of Professional Conduct contain no specific exemptions for the Attorney General and his assistants. Therefore, as a lawyer and officer of the court, the Attorney General is subject to the Model Rules of Professional Conduct. *Chun v. Board of Trustees of Employees' Ret. Sys.*, 87 Hawai'i 152, 952 P.2d 1215 (1998); *Attorney General v. Michigan Pub. Serv. Comm'n*, 243 Mich.App. 487, 625 N.W.2d 16 (2000); *State v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734 (Tenn.Ct.App.2001); *Manchin v. Browning*, 170 W.Va. 779, 296 S.E.2d 909 (1982). There is, however, a need for adaptation of the ethics rules in the Model Rules to the Attorney General and his staff in recognition of the uniqueness of the office, the Attorney General's obligation to protect the public interest, and the Attorney General's statutory obligation to represent the various and sometimes conflicting interests of numerous state agencies. *Chun v. Board of Trustees of Employees' Retirement Sys.*, supra; *Attorney General v. Michigan Pub. Serv. Comm'n*, supra; see also *McCuen v. Harris*, 271 Ark. 863, 611 S.W.2d 503 (1981).

By statute, the General Assembly has mandated a relationship akin to the traditional attorney-client relationship between the Attorney General and the state officials and agencies that the Attorney General represents. *Attorney General v. Michigan Pub. Serv. Comm'n*, supra; *Manchin v. Browning*, supra. Thus, the Attorney General owes a duty of undivided loyalty to his clients and must exercise the utmost good faith to protect their interests. See *McCuen*, supra; *Norfleet v. Stewart*, 180 Ark. 161, 20 S.W.2d 868 (1929).

Unlike lawyers representing private clients, the Attorney General is not necessarily prohibited from representing governmental clients whose interests may be adverse to each other. The majority rule is that the Attorney General, through his assistants, may represent adverse state agencies in intra-governmental disputes. *Chun v. Board of Trustees of Employees' Retirement Sys.*, supra; *Attorney General v. Michigan Pub. Serv. Comm'n*, supra; *State ex rel. Allain v. Mississippi Pub. Serv. Comm'n*, 418 So.2d 779 (Miss.1982). This rule applies, however, only when the Attorney General is not an actual party to the litigation. *Connecticut Comm'n on Special Revenue v. Connecticut Freedom of Info. Comm'n*, supra; *Environmental Protection Agency v. Pollution Control Bd.*, 69 Ill.2d 394, 14 Ill.Dec. 245, 372 N.E.2d 50 (1977); *Superintendent of Ins. v. Attorney General*, 558 A.2d 1197 (Me.1989); *Attorney General v. Michigan Pub. Serv. Comm'n*, supra. The case of *McCuen v. Harris*, supra, cited by appellant, is distinguishable in that it was a local prosecuting attorney, not the Attorney General, who was representing both sides in the same litigation. In the present case, the Attorney General is only representing one agency in an administrative proceeding against a private individual. There is no indication that the Engineer Board or the Architecture Board will develop adverse interests in this litigation.

Because the trial court did not abuse its discretion in affirming the Board's refusing to disqualify the Attorney General, we affirm on this point.

5. The case, at this juncture, from a procedural standpoint, is that the Attorney General has sued his own clients, in violation of his duties and responsibilities legislatively mandated to him by the Arkansas General Assembly.

6. Not only has the Attorney General acted in contravention of his statutory duties to represent the state defendants, by using his discretion to apparently not invoke the special counsel procedure, he is apparently attempting to deliberately deprive his state clients of any legal representation of any nature or kind.<sup>2</sup>

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<sup>2</sup> Pursuant to § 25-16-702(b)(2), it is within the sole discretion of the Attorney General to initiate the process for hiring special counsel for his clients. From the record presently before the court, it

7. The court is unable to proceed with the merits of this action at this time because the Attorney General is in clear violation of his mandated constitutional and statutory duty to either represent the state defendants or to initiate the special counsel procedure set forth in § 25-16-702. Clearly the state defendants are entitled to legal counsel.

8. The Attorney General is given thirty (30) days from entry of this *Order* in which to comply with his constitutional and statutory duty to either reach an accommodation with the state defendants concerning authorization and payment of the state defendants' current special counsel or invoke the above recited statutory process to assist the state defendants in obtaining special counsel to represent them in this matter.

9. In the event the Attorney General has not accomplished, within thirty (30) days, one of the two enumerated methodologies for securing special counsel for the state defendants, this case will be dismissed without prejudice for the Attorney General's clear violation of his statutorily prescribed duties mandated by the Arkansas General Assembly.

10. With respect to the Attorney General's numerous potentially serious ethical violations of the Arkansas Rules of Professional Conduct, the court leaves such issues to the state defendants herein to address, if they so choose, within the administrative process of the Arkansas Committee on Professional Conduct.

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appears the Attorney General has elected to use his discretion to not invoke the special counsel selection procedure. There is a secondary special counsel selection procedure set forth in § 25-16-702(c), which may be applicable in the present matter for situations in which the, "Attorney General fails to render the service when requested in writing...". The record is factually insufficiently developed at this point for the court to determine whether the requirements for the use of the secondary special counsel procedure have been met.

IT IS SO ORDERED AND ADJUDGED.



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TIMOTHY DAVIS FOX  
CIRCUIT JUDGE

12/19/23

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DATE