

Case No. 2012-0131

**SUPREME COURT
OF THE STATE OF OHIO**

**STATE OF OHIO *ex rel.*
KENT LANHAM,**

Relator,

v.

DANNY R. BUBP, Putative State Representative,

Respondent.

Original Action in Mandamus

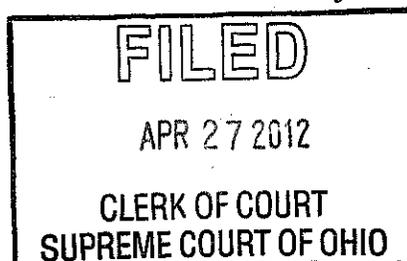
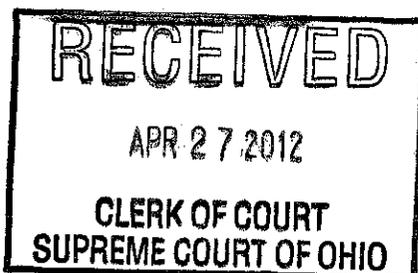
**RELATOR'S MOTION TO DISQUALIFY THE ATTORNEY GENERAL
FROM SERVING AS LEGAL COUNSEL FOR RESPONDENT BUBP AS
A PUTATIVE MEMBER OF THE LEGISLATIVE BRANCH OF GOVERNMENT**

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OF THE STATE OF OHIO**

STATE OF OHIO <i>ex rel.</i>	:	Case No. 2012-0131
KENT LANHAM,	:	
	:	
Relator,	:	
	:	
v.	:	
	:	
DANNY R. BUBP,	:	RELATOR’S MOTION TO DISQUALIFY
Putative State Representative,	:	THE ATTORNEY GENERAL FROM SERVING
	:	AS LEGAL COUNSEL FOR RESPONDENT
	:	BUBP AS A PUTATIVE MEMBER OF THE
Respondent.	:	LEGISLATIVE BRANCH OF GOVERNMENT
	:	

Comes now the State of Ohio, by and through Kent Lanham (“Relator”), and hereby moves to disqualify the Attorney General, an officer of the executive branch of government, from representing or serving as legal counsel for Respondent Danny R. Bulp, a putative member of the legislative branch.¹ This motion is brought in order to ensure and to protect the foundational principle of separation of powers which this Court has characterized as the “first, and defining, principle of a free constitutional government.” *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424 ¶39. Stated otherwise, as a basic and fundamental principle of constitutional law, the Attorney General may not serve, *i.e.*, is constitutionally disqualified from serving, as legal counsel for the General Assembly or any member thereof. In support hereof, the following memorandum is tendered.

¹ As developed in the Verified Complaint, Mr. Bulp has engaged in certain activities that, pursuant to self-executing provisions of Article II, Section 4 of the Ohio Constitution and R.C. § 101.26, have resulted in Mr. Bulp forfeiting, as a matter of law, the public office of state representative. Thus, Mr. Bulp’s status as a state representative is simply putative, as opposed to *de jure*.

MEMORANDUM IN SUPPORT

“The principle of separation of powers into three coequal branches – executive, legislative, and judicial – and the checks and balances that principle ensures are now deemed fundamental to our democratic form of government.” *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 375-76, 2006-Ohio-1825 ¶55. “While Ohio, unlike other jurisdictions, does not have a constitutional provision specifying the concept of separation of powers, this doctrine is implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government.” *S. Euclid v. Jemison*, 28 Ohio St.3d 157, 158-159 (1986). The separation of powers doctrine “represents the constitutional diffusion of power within our tripartite government. The doctrine was a deliberate design to secure liberty by simultaneously fostering autonomy and comity, as well as interdependence and independence, among the three branches.” *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799 ¶114.

In assuming the role and function of legal counsel to the General Assembly, including any member thereof, the Attorney General has unconstitutionally placed himself in a subservient or subordinate position to the legislative branch. For in such a situation, the Attorney General *qua* an officer of the executive branch of government has unconstitutionally allowed himself to become an officer or agent of what is supposed to be a separate and co-equal branch of government. *See* Ohio Const., art. III, sec. 1 (explicitly designating the Attorney General as an officer in the executive department or branch of the government); *see also State v. Palmer*, 2012-Ohio-580 ¶15 (“the Ohio attorney general, an officer of the executive branch”); *see also* G. Giesel, Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship, 86 NEB. L. REV. 346, 347-48 (2007)(“[w]hen discussing the attorney-client

relationship, the legal community and society at large commonly refer to attorneys as ‘representing’ clients. Such statements informally recognize the formal relationship lawyers and clients have as agents and principals. There is no disagreement on this basic premise. In the usual and customary manner of legal reasoning, identifying lawyers as the agents of their client-principals invokes the established body of agency law that has developed from – and applies to – other agent-principal relationships” (internal citation omitted); *Raible v. Raydel*, 162 Ohio St. 25, 28-29 (1954).

This Court has recognized that “[t]he overriding consideration in the attorney-client relationship is trust and confidence between the client and his or her attorney.” *Fox & Assoc. Co., L.P.A. v. Purdon*, 44 Ohio St.3d 69, 71 (1989). For “[t]he attorney stands in a fiduciary relationship with the client and should exercise professional judgment ‘solely for the benefit of the client and free of compromising influences and loyalties.’” *Disciplinary Counsel v. Moore*, 101 Ohio St.3d 261, 2004-Ohio-734 ¶15 (quoting *In re Disciplinary Proceedings Against Gibson*, 124 Wis.2d 466, 474-475, 369 N.W.2d 695 (1985)). “A lawyer's fiduciary duty to his client requires him to deliberate with and counsel the client to make wise decisions in furtherance of the client’s goals. To that end, the lawyer's duties of trust and confidence and the ethical rules incumbent upon Ohio lawyers require that ‘*the personal desires of the lawyer must be subordinated to those of the client.*’” *Cincinnati Bar Assn. v. Hackett*, 129 Ohio St.3d 186, 2011-Ohio-3096 ¶7 (quoting *Akron Bar Assn. v. Miller*, 80 Ohio St.3d 6, 9 (1997) (emphasis added)); see Ohio Rules of Prof. Conduct, Rule 1.2(a)(“a lawyer shall abide by a client’s decisions concerning the objectives of representation”); Rule 1.2, cmt. a (the client has “the ultimate authority to determine the purposes to be served by legal representation”).

Thus, by the Attorney General *qua* a constitutionally-designated member of the executive branch taking on the legal representation of Mr. Bulp *qua* a putative member of the legislative branch of government, the Attorney General must subordinate himself, *i.e.*, be subservient to, the legislative branch of government. *See Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992) (“the control or influence by one branch of another branch’s internal operating procedures could interfere with the independence of the second branch and possibly place the enforcing branch in a superior position”). Such subordination of the Attorney General to the legislative branch is repugnant to and in violation of the constitutional principle of separation of powers. Additionally and historically, the Attorney General has been recognized as being legal advisor and counselor for the executive, not the legislative, branch of government. *See Knapp v. Thomas*, 39 Ohio St. 377, 390 (1883)(“the attorney general, the executive’s law officer”); *State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943 ¶60 (“the Attorney General, the chief legal executive officer for the state”).

Because the Attorney General is an officer in the executive branch of government, he may not, in conformity with the fundamental constitutional principle of separation of powers, undertake legal representation or serve as a legal advisor for the General Assembly or a member thereof, less the executive branch or a member thereof be subordinated or subservient to the legislative branch. “The three branches of our government are coordinate, and no act of the legislature can make any one branch subordinate to either of the other two.” *Ohio Bureau of Motor Vehicles v. Hill*, 12 Ohio Misc.2d 7, 10 (1984).² If the foundational constitutional

² Arguably, the Attorney General is providing representation of Mr. Bulp in this case pursuant to the provisions of R.C. §§ 109.36 to 109.366. Specifically, R.C. § 109.361 provides that “[u]pon the receipt of a written request by any officer or employee [as defined in R.C. §§ 109.36], the attorney general . . . , shall represent and defend the officer or employee in any civil action instituted against the officer or employee.” *See* R.C. § 109.36(A)(1)(defining, for

principle of separation of powers means anything, it is that no one branch (or any officer of such branch) can be placed in a subordinate or subservient position relative to the other two branches; any such subservience means that there are not three separate, but equal, branches of government.³ In this instance, the legislative branch is allowed to be placed in a dominant

purposes of R.C. §§ 109.361 to 109.366, “office or employee” as including “[a] person who, at the time a cause of action against the person arises, is serving in an elected or appointed office or position with the state or is employed by the state”); R.C. § 109.36(B) (defining, for purposes of R.C. §§ 109.361 to 109.366, “state” includes the General Assembly).

Assuming, *arguendo*, that Mr. Bulp actually submitted the written request as mandated by R.C. § 109.361, while the Attorney General’s representation of Mr. Bulp may be in conformity with state law, such representation, as developed herein, is not in conformity with the Ohio Constitution and the principle of separation of powers. “[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives – or the hallmarks – of democratic government.” *INS v. Chada*, 462 U.S. 919, 944 (1983) (holding ability of either house of Congress to veto an action of the executive branch, *i.e.*, a congressional veto, to be unconstitutional as violative of separation of powers).

Accordingly, to the extent R.C. §§ 109.36 to 109.366 allows or obligates the Attorney General, as an officer of the executive branch, to provide legal counsel to or representation of the General Assembly or its members, such statutory provisions are unconstitutional. *See, e.g., State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 136, 2000-Ohio-115 (holding that challenged statute “violates the doctrine of separation of powers and is therefore unconstitutional”); *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 1999-Ohio-123 (declaring that legislation was “in violation of the Ohio constitutional doctrine of separation of powers and, therefore, is unconstitutional”).

³ On the national level, both the United States House of Representatives and the United States Senate have their own legal counsel who serve and represent their members. Such legal counsel are part of the organizational structure of each house, *i.e.*, the legislative branch.

In the United States Senate, the Office of Senate Legal Counsel serves as legal counsel for the Senate and its members. The Office of Senate Legal Counsel is established as an office of the Senate itself. 2 U.S.C. § 288(a)(1). The appointment and regulation of Senate Legal Counsel is purely an internal matter of the Senate itself. 2 U.S.C. § 288(a)(2) (appointment by president *pro tempore* of the Senate); 2 U.S.C. § 288(a)(3) (appointment effective upon approval by the Senate); 2 U.S.C. § 288(a)(3) (term of appointment only for the Congress to which appointed); 2 U.S.C. § 288a (office is “directly accountable to the Joint Leadership Group” consisting of bipartisan leadership of the Senate). And Senate Legal Counsel, when directed by the Joint Leadership Group, is specifically obligated to “defend the Senate, a committee, subcommittee, Member, officer, or employee of the Senate in any civil action pending in any court of the United States or of a State or political subdivision thereof, in which the Senate, such committee, subcommittee, Member, officer, or employee is made a party defendant and in which there is placed in issue the validity of any . . . action. . . taken by the Senate, or such committee,

position vis-a-vis the executive branch. Accordingly, through the basic application of the fundamental constitutional principle of separation of powers, the Attorney General may not serve, *i.e.*, is constitutionally disqualified from serving, as legal counsel for the General Assembly or its member, Mr. Bupp.⁴

subcommittee, Member, officer, or employee in its or his official or representative capacity,” as well as to “defend the Senate or a committee, subcommittee, Member, officer, or employee of the Senate in any proceeding with respect to any subpoena or order directed to the Senate or such committee, subcommittee, Member, officer, or employee in its or his official or representative capacity.” U.S.C. § 288c(a).

In the United States House of Representatives, the Office of General Legal Counsel is established as an office of the House itself. 2 U.S.C. § 130f. As provided for in clause 8 of rule II of the Rules of the House of Representatives (a copy of which is available on-line at <http://www.rules.house.gov/singlepages.aspx?NewsID=160&rsbd=165>):

There is established an Office of General Counsel for the purpose of providing legal assistance and representation to the House. Legal assistance and representation shall be provided without regard to political affiliation. The Office of General Counsel shall function pursuant to the direction of the Speaker, who shall consult with a Bipartisan Legal Advisory Group, which shall include the majority and minority leaderships. . . .

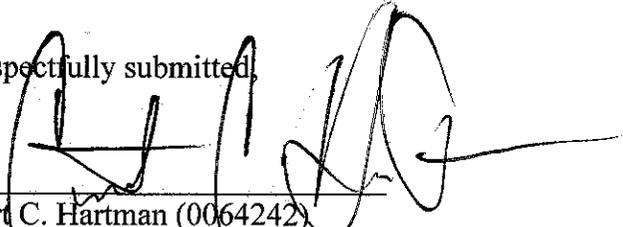
And as for the scope of serving as legal counsel for the House and its members, the webpage of the Office of General Counsel (<http://www.ogc.house.gov/>) describes its role as follows:

The OGC provides legal advice and assistance to Members, committees, officers and employees of the House, without regard to political affiliation, on matters related to their official duties. The OGC represents Members, committees, officers and employees, both as parties and witnesses, in litigation arising from or relating to the performance of their official duties and responsibilities. The OGC also represents the House itself in litigation, both as a party and as *amicus curiae* in cases in which the House has an institutional interest.

The bottom line is that the United States House of Representatives, the United States Senate and their members rely upon officers and employees of the legislative branch for legal services. Doing so protects and respects the doctrine of separation of powers at the national level.

⁴ It should also be noted that each caucus within the Ohio House of Representatives and the Ohio Senate already have their own legal counsel. *See* R.C. § 101.301(B). Such caucus legal counsel are employees of the legislative branch, not the executive branch, of government. Thus, the disqualification of the Attorney General from serving as legal counsel for the legislative branch or its members, besides being in conformity with the Constitution (which must ultimately control), will also not result in the lack of readily available legal counsel for Mr. Bupp, though

Respectfully submitted,

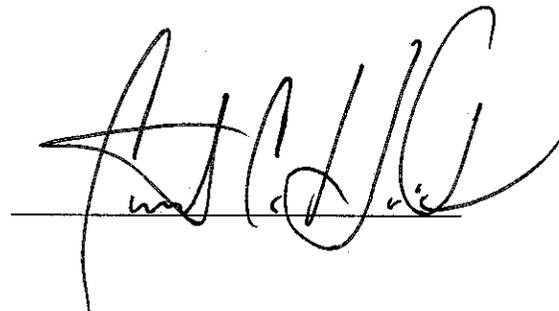


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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via regular mail, on the 26th day of April 2012, upon the following:

Jeff Clark
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such consideration cannot be allowed to control the fundamental constitutional issue raised herein.