

ORIGINAL

In the
Supreme Court of Ohio

STATE EX REL. KENT LANHAM,

Relator,

v.

DANNY R. BUBP, STATE
REPRESENTATIVE

Respondent.

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: Case Number 2012-0131
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: Original Action in Mandamus
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**RESPONDENT'S OPPOSITION TO RELATOR'S MOTION TO DISQUALIFY
THE ATTORNEY GENERAL FROM SERVING AS LEGAL COUNSEL**

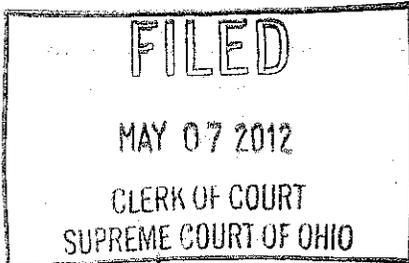
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**RESPONDENT’S OPPOSITION TO RELATOR’S MOTION TO DISQUALIFY
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Relator’s motion to disqualify the Attorney General from representing Respondent Bubp in this public records case must be denied for at least five reasons.

First, Relator lacks standing to challenge the Attorney General’s representation of Respondent Bubp. Relator asserts that the Attorney General should be disqualified from representing Respondent Bubp because his duties as a lawyer representing a state elected official from the legislative branch allegedly conflict with the Attorney General’s institutional interests as an elected official of the executive branch. This Court has held that “as a general rule, a stranger to an attorney-client relationship lacks standing to complaint of a conflict of interest in that relationship.” *Morgan v. North Coast Cable Co.*, 63 Ohio St.3d 156, 159, 586 N.E.2d 88 (1992). Relator is not a present or former

client of the Attorney General and lacks standing to challenge the Attorney General's representation of Respondent based on an alleged conflict.

Moreover, Relator's assertions fail to account for the particular constitutional, common law, and statutory authorities and obligations of the Attorney General, who has been recognized by the legislature and this Court to be the "chief law officer 'for the state and all its departments.'" *State ex rel. Merrill v. Ohio Dep't of Natural Res.*, 130 Ohio St.3d 30, 2011-Ohio-4612, 955 N.E.2d 935, ¶ 33, quoting R.C. 109.02. Each branch of government has long been recognized as a "department." *See State v. Lawrence*, 162 Ohio St. 412, 416, 123 N.E.2d 271 (1954) ("Our state and federal governments have been divided into three separate departments, viz., the legislative, the executive and the judicial.") (Lamneck, concurring). The Attorney General has represented public officials in all three departments. *See, e.g., State ex rel. Leland v. Mason*, 61 Ohio St. 513, 517, 56 N.E.468 (1900) (Attorney General appearing for the Speaker of the House of Representatives); *State ex rel. Bates v. Court of Appeals for the Sixth Appellate District*, 130 Ohio St.3d 326, 2011-Ohio-5456, 958 N.E.2d 162 (Attorney General appearing for Sixth District Court of Appeals); *State ex rel. Ohio AFL-CIO v. Voinovich*, 69 Ohio St. 3d 225, syll., 631 N.E.2d 582 (1994) (Attorney General representing the Governor, Auditor of State, and Treasurer of State).

Relator points to no case law suggesting that he has standing to challenge the Attorney General's representation here or that more than one-hundred years of Ohio legal precedent should be cast aside as an ancillary proceeding to this public records mandamus action.

Second, the General Assembly is constitutionally empowered to enact laws governing the authority of the Ohio Attorney General to the extent that such laws are consistent with the Attorney General's independent constitutional and common law authority. Ohio Constitution Article III, Section 1 provides that the attorney general is an officer of the executive department; Ohio Constitution Article II, Section 1 vests the legislative power of the state in the General Assembly. Thus, while the Attorney General has inherent common law powers, the General Assembly has the authority to delegate specific powers and duties to the Attorney General by statute. As explained by this Court:

Again, it will be helpful to see what the state constitution says about the attorney general. Section 1, Art. III, reads: "The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, and an attorney general, who shall be elected," etc. So that the attorney general of Ohio is a constitutional officer of the state, in the executive department thereof, chargeable with such duties as usually pertain to an attorney general, **and especially with those delegated to him by the general assembly of Ohio, exactly as duties are delegated to the other executive officers of the state,** the lieutenant governor, secretary of state, auditor of state, treasurer of state and any others created.

State ex rel. Doerfler v. Price, 101 Ohio St. 50, 57, 128 N.E. 173 (1920) (emphasis supplied). See also *State ex rel. Cordray v. Marshall*, 123 Ohio St.3d 229, 2009-Ohio-4986, 915 N.E.2d 633, ¶ 19 (Attorney General has common law and statutory authority); *Williams v. Spitzer Autoworld Canton, L.L.C.*, 122 Ohio St.3d 546, 2009-Ohio-3554, 913 N.E.2d 410, ¶ 11 (legislature delegates authority to Attorney General). Relator must thus establish that the Attorney General is not empowered by common law or statute to represent members of the legislature.

Third, the General Assembly has expressly authorized the Attorney General to defend public officers in litigation. Pursuant to its authority to enact laws in Ohio, the General Assembly adopted R.C. 109.361, which provides, in pertinent part, that “[u]pon the receipt of a written request by any officer or employee, the attorney general * * * shall represent and defend the officer or employee in any civil action instituted against the officer or employee.” For purposes of this statute, “officer or employee” includes any 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.” *Id.* State Representatives are elected state officials. Ohio Constitution, Article II, Section 2. The General Assembly has thus spoken specifically to authorize the Attorney General’s representation of state elected officials such as Respondent.

Fourth, this Court lacks jurisdiction to grant Relator the declaratory relief that would be necessary to render R.C. 109.361 inapplicable here. Relator acknowledges in a footnote that R.C. 109.361 authorizes the Attorney General to represent Respondent Bubp, but asks this court to declare R.C. 109.361 unconstitutional under vague “separation of powers” principles. Relator’s Motion to Disqualify at 4, n. 2. The Court’s jurisdiction in mandamus is limited to ordering a public officer or office to perform an affirmative duty; the Court lacks jurisdiction in an original mandamus action to grant declaratory relief. *See State ex rel Miller v. Warren County Bd. of Elections*, 130 Ohio St.3d 24, 2011-Ohio-4623, 955 N.E.2d 379, ¶¶ 21-23; *State ex rel. Obojski v. Perciak*, 113 Ohio St.3d 486, 2007-Ohio-2453, 866 N.E.2d 1070, ¶ 13.

Fifth, Relator has not established beyond a reasonable doubt that R.C. 109.361 is unconstitutional. Finally, should this Court hold that it has jurisdiction to declare R.C.

109.361 unconstitutional with respect to the Attorney General's representation of legislators, Relator fails to carry his heavy burden to prove the statute unconstitutional. While Ohio's Constitution reflects the concept of separation of powers, this Court has held that:

“The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments, and further that none of them ought to possess directly or indirectly an overruling influence over the others.”

State v. Bodyke, 126 Ohio St.3d 266, 276, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 44, quoting *State ex rel. Bryant v. Akron Metro. Park Dist. of Summit Cty.*, 120 Ohio St. 464, 473, 166 N.E. 407 (1929). This Court has construed this essential principle to prohibit actions by one branch which impede the ability of another branch to exercise its inherent powers or functions. *See id.*; *State v. Sterling*, 113 Ohio St.3d 255, 2007-Ohio-1790, 864 N.E.2d 630, ¶¶ 28-29. Relator has made no showing that the Attorney General's legal representation of legislators impedes or encroaches upon the inherent legislative powers of the General Assembly or of the Attorney General.

The inherent power of the General Assembly is to enact laws, not to represent its members when they are sued as a result of fulfilling their public duties. Indeed, the Attorney General's representation of public officers in this capacity clearly enables the General Assembly to fulfill its inherent functions more efficiently, by assuring state legislators that they will be represented if they are sued, as long as the challenged conduct falls within the scope of their official duties and is not malicious or in bad faith. *See R.C. 109.362*. Nor has Relator shown that the Attorney General's representation of public

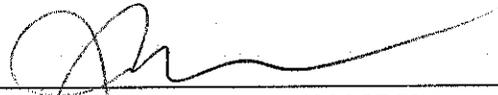
officers from the legislative branch would encroach on the inherent powers of the Attorney General. As noted above, such representation has been part of the Attorney General's duties for more than 100 years. Moreover, the General Assembly expressed its view that such representation is not an impediment by enacting R.C. 109.361, and the Attorney General likewise does not see that statute as an impediment to fulfillment of his constitutional, common law or statutory functions. Relator points to no case law whatsoever to suggest otherwise.

CONCLUSION

For the foregoing reasons, Respondent respectfully asks this Court to deny Relator's motion to disqualify the Attorney General.

Respectfully submitted,

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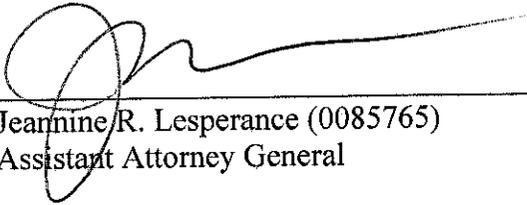
Counsel for Respondent

Danny R. Bulp, State Representative

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to Relator's Motion to Disqualify the Attorney General was sent by electronic mail and U.S. mail on May 7, 2012 to:

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