

NO. 30094

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

STATE OF WEST VIRGINIA ex rel. DARRELL V.
McGRAW, JR. IN HIS CAPACITY AS ATTORNEY
GENERAL FOR THE STATE OF WEST VIRGINIA,

Petitioner,

v.

GREGORY A. BURTON, CABINET SECRETARY OF
THE DEPARTMENT OF ADMINISTRATION;
NICHELLE PERKINS, DIRECTOR OF PERSONNEL
OF THE DEPARTMENT OF ADMINISTRATION; KAY
HUFFMAN GOODWIN, CABINET SECRETARY OF
THE DEPARTMENT OF EDUCATION AND THE
ARTS; MIKE CALLAGHAN, CABINET SECRETARY
OF THE DEPARTMENT OF ENVIRONMENTAL
PROTECTION; PAUL NUSBAUM, CABINET
SECRETARY OF THE DEPARTMENT OF HEALTH
AND HUMAN RESOURCES; JOE MARTIN, CABINET
SECRETARY OF THE DEPARTMENT OF MILITARY
AFFAIRS & PUBLIC SAFETY; BRIAN KASTICK,
CABINET SECRETARY OF THE DEPARTMENT OF
TAX & REVENUE; and FRED VANKIRK, CABINET
SECRETARY OF THE DEPARTMENT OF
TRANSPORTATION, ET AL.

Respondents.

AMICUS CURIAE BRIEF
OF THE WEST VIRGINIA STATE TREASURER

WEST VIRGINIA STATE
TREASURER'S OFFICE, By Counsel

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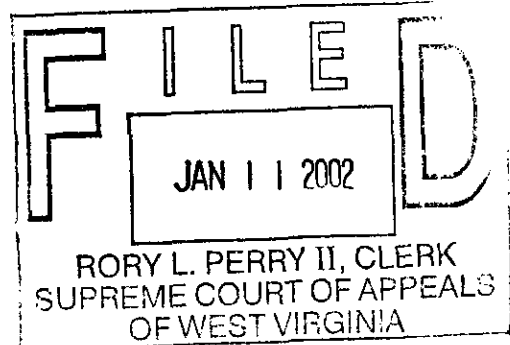


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**AMICUS CURIAE BRIEF
OF THE WEST VIRGINIA STATE TREASURER**

I. INTRODUCTION

The Attorney General of the State of West Virginia, Darrell V. McGraw, Jr. (the "Petitioner"), filed a Petition for Writ of Mandamus with this Honorable Court, seeking to have all persons providing the services of an attorney in the executive branch transferred to his office, such attorneys to be deemed at-will employees of the Attorney General; to have the funds appropriated for legal services for the executive branch transferred to his office, declaring prior expenditures unlawful; to have the Attorney General named the manager of all legal services delivered to the state, not just the executive branch; to eliminate all legal positions in the classified and classified-exempt service ; and to have such other relief as needed to effectuate the Court's judgment.

The Petitioner takes the position that no one, not even the West Virginia Legislature, can usurp his inherent powers and duties as the chief legal officer of the state as they are derived from the West Virginia Constitution. He goes on to offer that while representing the executive branch he will establish the policies of the executive branch according to his views of the interests of the state. Petitioner does not offer just how he will determine the interests of the state in each case, preferring instead to infer that he must serve as a check on the dubious actions of officers of the executive branch.

II. PROCEDURAL HISTORY

A Petition for Writ of Mandamus was filed by Petitioner on September 4, 2001. This Honorable Court then issued a rule to show cause on November 8, 2001, and made all cabinet secretaries party respondents. Then on December 3, 2001, the West Virginia State Treasurer (the "Treasurer") filed a Motion to Participate as Amicus Curiae. The Treasurer's motion was granted December 6, 2001, and, by Counsel, he now files this Amicus Curiae Brief.

III. ARGUMENT

As there are so many defendants, intervenors and amicus curiae briefs being filed in this matter, the Treasurer desires to state his general agreement with the arguments made in the memoranda and briefs that oppose the Attorney General's Petition and to concentrate in this Brief on matters that pertain specifically to the Treasurer.

A. The Attorney General must abide by the Rules of Professional Conduct.

"A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice. . . . As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." Preamble of the West Virginia Rules of Professional Conduct. Sometimes lawyers find these responsibilities in conflict, which in turn may cause difficult ethical problems. The Rules

of Professional Conduct offer assistance in resolving these problems, as well as a mechanism by which the profession is regulated.

Some of the Rules are imperatives, while others are permissive. In the matter at hand, we are dealing with a government attorney, the Attorney General of the State of West Virginia. To further complicate the situation, responsibilities of government lawyers may include responsibilities usually reserved for clients in the private attorney-client relationship, depending on the grant of authority by law. See Rules of Professional Responsibility.

Certain of these responsibilities apply to the roles of and to the communications between a governmental agency as the client and the Attorney General as the lawyer. See State ex rel. Caryl v. MacQueen, 182 W. Va. 50, 385 S.E.2d 646 (1989) in which the relationship between the Attorney General and the Tax Commissioner was determined to be attorney to client and the release of confidential tax information by the Attorney General was unlawful; and Arizona Department of Economic Security v. O'Neil, 183 Ariz. 196, 901 P.2d 1226 (1995) in which the attorney-client relationship existed between DES and the Attorney General, as well as the attorney-client privilege.

Syllabus Point 4 of Manchin v. Browning, 170 W.Va. 779, 296 S.E.2d 909 (1982), provides that the West Virginia "Attorney General has the duty to conform his conduct to that prescribed by the rules of professional ethics." Past failure to abide by the Rules of Professional Conduct must concern all of his clients. See Lawyer Disciplinary Board v. McGraw, 194 W.Va. 788, 461 S.E.2d 850 (1995) in which this Court held that the Attorney General violated Rule 1.6(a) of the Rules of Professional Conduct when he voluntarily disclosed information provided him by his client, the Division of Environmental Protection;

and McGraw v. Caperton, 191 W. Va. 528, 446 S.E.2d 921 (1994), in which the Attorney General sued his own clients and then without discussion with the client defendants required them to be represented by a prosecuting attorney with no knowledge of purchasing matters and one client's in-house counsel.

Clients will be asking, what is the appropriate course of action when a conflict of interest arises? Does the Attorney General have to appoint true independent counsel, may he appoint a prosecuting attorney to provide representation, or may he hire outside counsel, all without any discussion with the client? What happens when the Attorney General takes a very public position that is contrary to the position of his client and then claims he can erect a chinese wall and provide representation to both sides.

The Attorney General must obviously determine whether the State's interests are adverse to the position taken by an officer named as a party in litigation. However, Petitioner appears to believe that as the sole constitutional provider of legal services, he will be forced to represent the interests of the state regardless of the interests of executive officials. Accordingly, if successful the Petitioner will be establishing the policies of the executive branch in accordance with his views of the interests of the state, not in accordance with the Rules of Professional Conduct.

B. The West Virginia Legislature must establish the duties of the Attorney General.

The Petitioner argues that the statutes enacted within the past ten years authorizing hiring of and contracting with counsel by state agencies are unconstitutional. Arguing that constitutional officers of the state are precluded from holding another office during a term

of office and that no other officer may exercise the powers of the Attorney General, Petitioner draws the conclusion that the West Virginia Constitution and the West Virginia Code require the Attorney General to provide all legal services for the state. See W. Va. Const. art. IV, §8; art. VII, §1; and art. VII, §8 and W. Va. Code §5-3-2.

The problem with this conclusion is that it allows the Petitioner to take the position that no one, not even the West Virginia Legislature, can limit or usurp his inherent powers and duties as the chief legal officer of the State. However, given the number of statutes enacted granting authority to agencies to hire their own counsel, the Legislature must have had at least one reason for doing so.

In Caryl this Court found that an attorney-client relationship existed between the Attorney General and the Tax Commissioner, and then stated, “[w]e believe this situation properly reflects the general rule that the Attorney General remains the legal representative of the State and its agencies unless specifically exempted by statute.” The seminal case in this matter is Manchin v. Browning, 170 W. Va. 779, 296 S.E.2d 909 (1982), which was authored by the Attorney General himself. Holding in the first Syllabus Point that “[t]he powers and duties of the Attorney General are specified by the constitution and by rules of law prescribed pursuant thereto.”

The legislative grant of authority to the Treasurer to employ legal counsel is not an “insidious practice” as suggested by the Petitioner that has the Treasurer exercising the inherent powers of the Attorney General. To the contrary, W. Va. Code §12-4-8a lawfully avoids the general provisions of W. Va. Code §5-3-2 by granting the Treasurer the specific authority to employ counsel, “notwithstanding the provisions of section two, article three, chapter five” of the Code.

C. A writ of mandamus will not issue as Petitioner is unable to meet the requirements.

Syllabus Point 2, State ex rel. Kucera v. City of Wheeling, 5153 W.Va. 538, 170 S.E.2d 367 (1969), provides that a "writ of mandamus will not issue unless three elements coexist—(1) the existence of a clear right in the petitioner to the relief sought; (2) the existence of a legal duty on the part of respondent to do the thing which petitioner seeks to compel; and (3) the absence of another adequate remedy."

Petitioner argues that officials with ministerial functions are mere "nominal parties" who will only advance their own personal viewpoints or interests. This Court states in Syllabus Point 7 of Manchin that "[s]tate officers are entitled to have their lawful public policy determinations vindicated in the courts just as individuals are entitled to vindicate their personal rights at law. . . ."

Petitioner also argues that there can be accountability for legal services only if he is the exclusive provider. This position is short sighted as several officers have internal auditors, and are subject to review by auditors of the Department of Administration, the Legislative Auditor and Performance Evaluation and Research Division, and numerous other entities.

Clearly the Treasurer, as an elected official, will be held accountable by the electorate and any other entity with law enforcement authority. If Petitioner is allowed to establish any or all of the policies affecting the State Treasurer's Office, Petitioner will be exercising the authority of the Treasurer by supplanting his judgment for that of the Treasurer. If the Petitioner is successful, every four years when the Treasurer faces re-election, he will have to try to explain that certain of the public policies of his office were

thrust upon him by the Attorney General. If such power is vested in the Attorney General, Petitioner's fear of abusive or autocratic actions may well occur, but in the opposite manner contemplated.

IV. CONCLUSION

As discussed herein, the Petitioner has not shown a clear right to the relief sought, nor has he demonstrated that the Treasurer has a legal duty to ignore proper legislative enactments. For these reasons, a writ of mandamus cannot issue.

THE TREASURER OF THE STATE OF WEST
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