STATE OF WISCONSIN | CIRCUIT COURT BRANCH 2 | DANE COUNTY

---

J.B. VAN HOLLEN,

Plaintiff,

Case No. 08-CV-4085

vs.

GOVERNMENT ACCOUNTABILITY BOARD,
THOMAS CANE, GERALD NICHOL,
MICHAEL BRENNAN, WILLIAM EICH,
VICTOR MANIAN, GORDON MYSE,
KEVIN J. KENNEDY and NATHANIEL E. ROBINSON.

Defendants.

---

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR
DISQUALIFICATION OF PLAINTIFF'S COUNSEL
AND FOR STAY OF PROCEEDINGS

---

## I. INTRODUCTION.

Every attorney in this state, including the Attorney General, is bound by the Rules of Professional Conduct found in the Supreme Court Rules, Chapter 20. Simply put: pursuant to Supreme Court Rules 20:1.7 and 20:10.1, no attorney and no law firm, including the Wisconsin Department of Justice, may represent a client and sue that client at the same time.

Before the Attorney General sued the Government Accountability Board, its staff and Board members in this lawsuit, the Attorney General and lawyers in the Wisconsin Department of Justice were already representing the Government Accountability Board, its staff and Board members in two other lawsuits, including a consolidated lawsuit pending in the Dane County Circuit Court, *Practical Political Consulting, Inc., d/b/a*

*Wisconsin Voter Lists and Barry Ashenfelter v. Government Accountability Board, et al.*, Case Nos. 06-CV-3089 and 07-CV-2542. Despite the fact that the Government Accountability Board, its staff and Board members are currently his clients, the Attorney General, in his official capacity, has sued them. Not only is the Attorney General the Plaintiff in the new lawsuit, the Complaint was signed and filed under his name. His clients, the Government Accountability Board, its staff and Board members, were served with a Summons also issued under his name directing them to respond to the Complaint.

Such behavior by any lawyer would be a gross violation of the ethical rules that govern every lawyer's conduct, which are plainly set out in the Supreme Court Rules, which have been in force for decades and which every lawyer in Wisconsin has studied. For the Attorney General, the chief law enforcement officer of this state, to blithely ignore those rules is behavior that is stunning in its audacity and an utter abdication of his duty of loyalty to his clients.

The Defendants have asked the Court to disqualify the Attorney General and the lawyers at the Wisconsin Department of Justice from appearing as counsel in this case and to stay all proceedings in this case until this matter has been decided. This brief will explain in detail why such disqualification is necessary.

## II. THE DUTY OF LOYALTY REQUIRES DISQUALIFICATION OF THE ATTORNEY GENERAL AND THE ATTORNEYS AT THE WISCONSIN DEPARTMENT OF JUSTICE.

### A. The General Conflict of Interest Rule.

Supreme Court Rule 20:1.7 sets forth two general rules regarding conflicts of interest. The first rule, specific to conflicts involving current clients, applies here:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> > (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
> >
> > (2) each client consents in writing after consultation.

This general conflict of interest provision serves "to protect the interests of a government client just as they protect the lawyer's private clients. . ." *ABA Formal Opinion 97-405.* It provides that a conflict exists whenever representation of one client is directly adverse to another existing client.

As stated before, the Government Accountability Board and Kevin Kennedy ("Kennedy") its Director and General Counsel, are Defendants in two open records mandamus actions combined into one matter, currently pending before the Honorable Richard Niess in the Dane County Circuit Court. *Kennedy Aff.* ¶ *2.* That matter is captioned *Practical Political Consulting, Inc., d/b/a Wisconsin Voter Lists and Barry Ashenfelter v. Government Accountability Board and Kevin Kennedy in his official capacity as Legal Counsel for the Government Accountability Board,* and bears case numbers 06-CV-3089 and 07-CV-2542. *Kennedy Aff.* ¶ *2.* The Government Accountability Board and Kennedy are represented in the *Practical Political Consulting* litigation by the Attorney General and attorneys he supervises in the Wisconsin Department of Justice. *Kennedy Aff.* ¶ *4.* Specifically, the Attorney General and Assistant Attorneys General Maureen McGlynn Flanagan and Mary E. Burke first formally appeared in that case on September 15, 2006 - - more than two years ago. *Kennedy Aff.* ¶ *4.* Other assistant

attorneys general have participated in the representation, including Assistant Attorney General Alan Lee. *Kennedy Aff. ¶ 5.*

The Attorney General and attorneys he supervises in the Wisconsin Department of Justice are also currently representing Defendants Cane, Nichol, Brennan and Eich, sued in their official capacities as members of the Government Accountability Board in litigation in the United States District Court for the Eastern District of Wisconsin. *Kennedy Aff. ¶ 9.* That suit, *Swaffer, et al. v. Deninger, et al.*, Case No. 08-CV-0208, is a civil rights case brought under 42 U.S.C. § 1983. *Kennedy Aff. ¶¶ 9,10.* Assistant Attorneys General Chris Blythe and Jennifer Sloan Lattis first formally appeared for the Government Accountability Board defendants in that case on March 17, 2008, and Assistant Attorney General Alan Lee has also participated. *Kennedy Aff. ¶ 10.*

SCR 20:1.7(a)(1) and (2) allow a lawyer to disregard a conflict and sue a current client only if the lawyer reasonably believes the action will not adversely affect the relationship with that client, and **both the sued client and the suing client consent to the conflict.**

Neither the Government Accountability Board nor Kevin Kennedy nor any member of that Board has consented to being sued by their current attorney: J.B. Van Hollen, Wisconsin Attorney General. *Kennedy Aff. ¶ 8.* Nor have they consented to having any attorney from the Wisconsin Department of Justice represent the Attorney General in a lawsuit against them. *Kennedy Aff. ¶ 8.* Consequently, J.B. Van Hollen, the Attorney General of this state, by having brought and appeared in this lawsuit, is in violation of SCR 20:1.7 and, therefore, is disqualified from appearing as counsel in it.

Likewise, because Van Hollen is disqualified under SCR 20:1.7, every other lawyer in the Wisconsin Department of Justice is disqualified as well because once a lawyer, like Van Hollen, has a conflict of interest as prohibited by SCR 20:1.7, the other lawyers with whom he works at a law firm or organization also have a conflict of interest. SCR 20:1.10(a) states in relevant part:

> SCR 20:1.10 Imputed Disqualification: General Rule
>
> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by SCR 20:1.7 or SCR 20:1.9 unless:

(1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

The prohibition on Attorney General Van Hollen's participation in this case is based on SCR 20:1.7. Likewise, Assistant Attorneys General Flanagan, Burke, Lee, Blythe and Lattis are barred from suing the Government Accountability Board by virtue of SCR 20:1.7.[1]

Consequently, all the attorneys employed by the Attorney General, including Assistant Attorneys General Steven P. Means and Charles D. Hoornstra, the attorneys from the Wisconsin Department of Justice whose names are on the pleadings along with the Attorney General, cannot by virtue of SCR 20:1.10, appear in any case against the Government Accountability Board. *See Complaint, p. 17.*

---

[1] SCR 20:1.10(a)(1) does not relieve the conflict of interest in this case. No attorney at the Wisconsin Department of Justice has any personal interest in any matter related to the Government Accountability Board or any open records lawsuit.

Indeed, the Department of Justice knows it has a conflict: the day after this lawsuit was filed against the Defendants, Assistant Attorney General Alan Lee asked Kennedy to waive the conflict of interest that its filing caused in the *Practical Political Consulting* case. A few days later, Assistant Attorney General Mary E. Burke sent a proposed waiver form to Kennedy. It was not signed or agreed to. Neither the Government Accountability Board nor Kennedy have any intention of waiving the conflict presented by this lawsuit. *Kennedy Aff.* ¶ *6, 7.*

## III. THE CONFLICT DISQUALIFIES THE DEPARTMENT OF JUSTICE EVEN IF THE REPRESENTATIONS ARE WHOLLY UNRELATED.

The Comments to SCR 20:1.7 provide additional guidance about why the Attorney General and all of his deputies and assistants are disqualified in this case.

> **Comment: Loyalty to a Client.** Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation.
>
> * * *
>
> As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, **even if it is wholly unrelated.**

*Comments to SCR 20:1.7 (emphasis added).*

In the comment regarding litigation, specifically, the ban on advocating against a current client is repeated "even if the other matter is wholly unrelated."

The application of this disqualification rule in circumstances even where the representation of a client is wholly unrelated to a lawsuit against the client by the same

firm is well-illustrated by *Manoir-Electroalloys Corp., et al. v. Amalloy Corp., et al.*, 711 F. Supp. 188 (D.N.J. 1989). There, Carmelo Iacono had used the Hannoch Weisman law firm for many years for estate planning and tax advice. While that representation was underway, the Hannoch firm was retained by the Borin Group to sue a number of people and companies, including Iacono. Other parties in the suit sought the Hannoch firm's disqualification under Model Rule 1.7 (adopted in Wisconsin as SCR Rule 20:1.7). The United States District Court for the District of New Jersey agreed that the Hannoch firm was disqualified from participation in the suit due to its current representation of Iacono. Quoting the same comment as appears above, the court reasoned:

> This rule arises out of the fundamental proposition that an attorney owes a duty of undivided loyalty to his or her client. "Simply stated, it is unethical conduct for an attorney to participate in any lawsuit against his own client without the knowledge and consent of all concerned." *Ransburg Corp. v. Champion Spark Plug Co.*, 648 F. Supp. 1040, 1045 (N.D. Ill. 1986). . . . As one treatise stated: "A lawyer should not be allowed to sue an individual client on behalf of another present client, even if the lawyer represents the first client in an wholly unrelated matter, such as drafting his will." C. Hazard and W. Hodes, *The Law of Lawyering:* A Handbook on the Model Rules of Professional Conduct at p. 130 (1987 Supp.)

*Manoir-Electroalloys Corp.*, 711 F. Supp. at 192; *see also International Business Machines v. Levin*, 579 F.2d 271, 281 (3d Cir. 1978) (Though firm had no assignments from IBM the day it sued IBM for another client, IBM was a current client and therefore firm was disqualified).

Courts from around the country, including Wisconsin, agree that doubts should be resolved in favor of disqualification. *In re Guardianship and Protective Placement of Lillian P.*, 2000 WI App. 203, ¶14, 238 Wis. 2d 449, 617 N.W.2d 849. Courts from outside of Wisconsin have held that when the representation at issue is against an existing client, not just a former one, "the balance shifts even more significantly toward disqualification." *Manoir-Electroalloys Corp.*, 711 F. Supp. at 194-95, *quoting Heathcoat v.*

*Santa Fe International Corp.* 532 F. Supp. 961, 963 (E.D. Ark. 1982) *and citing Melamed v. ITT Continental Baking Co.*, 592 F.2d 290 (6th Cir. 1979); *Cinema 5 Ltd. v. Cinerama*, 528 F.2d 1384 (2d Cir. 1976).

While it is generally recognized that an Attorney General's office may at times properly represent two state agencies in litigation against one another (see comments to SCR 20:1.7), perhaps through the maintenance of a "conflict wall" between personnel assigned to the two clients, it is also widely recognized that an Attorney General may do so **only when he or she is not an actual party in a dispute with the agency.** *See Attorney General Granholm v. Michigan Public Service Commission*, 625 N.W.2d 16, 30 (Mich. 2001) *and cases cited therein.*

Here the Attorney General is, in his official capacity, the adverse party. A "conflict wall" cannot erase that fact. That leaves a fundamental ethical breach: the Attorney General is representing a client and suing that client at the same time. Doing so violates the principle of undivided loyalty, precisely what Supreme Court Rule 20:1.7 prohibits. And, that is why the Attorney General and every attorney at the Wisconsin Department of Justice must be disqualified from acting as counsel in this case.

## IV. THE COURT HAS THE AUTHORITY TO DISQUALIFY ATTORNEYS WHO HAVE CONFLICTS OF INTEREST.

It is well-established that Wisconsin courts may disqualify attorneys from continued representation in a case where a conflict or serious potential for conflict exists. *In re Guardianship and Protective Placement of Lillian P.*, 2000 WI App 203, ¶¶12-13, 238 Wis. 2d 449, 617 N.W.2d 849. Indeed, "trial courts have not only the power but the duty to intervene where the professional misconduct of an attorney [is involved] before it affects the substantial rights of the parties." *Ennis v. Ennis*, 88 Wis. 2d 82, 97, 276 N.W.2d 341 (Ct. App. 1979).

To grant Defendants' motion, the Court need only determine that (1) the Attorney General and the Wisconsin Department of Justice attorneys that he supervises have undertaken representation that is adverse to the interests of a present client, and (2) the client has not waived the conflict. Once that two-part test has been met, as it has been here, it is more than appropriate for the Court to disqualify those attorneys from representing the Plaintiff against the Defendants in this case. *See Lillian P.,* ¶¶12, 13; *see also In the Interest of Steveon R.A.*, 196 Wis. 2d 171, 178, 537 N.W.2d 142 (Ct. App. 1995). This disqualification is particularly apt because in the *Practical Political Consulting* case, the Government Accountability Board, Kennedy and several Assistant Attorneys General have invested countless hours, dollars, and resources working together to defend against the claims made in that case. That attorney-client relationship must be preserved to the extent possible.

## V. THE COURT SHOULD STAY ALL PROCEEDINGS UNTIL THIS MOTION IS DECIDED.

For a very compelling reason the Court should stay all proceedings until the Defendant's Motion for Disqualification is decided: no current client of a lawyer should have to expend time, money and resources to defend against a lawsuit brought by that client's own lawyers while a motion to disqualify is pending before a court. Having to do so would make a mockery of the Supreme Court Rules on conflict of interest. That is particularly true where, as here, the Plaintiff seeks to accelerate the various aspects of this litigation.

## VI. CONCLUSION.

The Court should grant Defendants' Motion.

Dated this 16th day of September, 2008.

Respectfully Submitted,

CULLEN WESTON PINES & BACH LLP

____________________________________

Lester A. Pines, SBN 1016543
Tamara B. Packard, SBN 1023111
Nicholas E. Fairweather, SBN 1036681
Attorneys for the Defendants

Mailing Address:

122 West Washington Avenue
Suite 900
Madison, WI 53703
Telephone: (608) 251-0101
Facsimile: (608) 251-2883
pines@cwpb.com
packard@cwpb.com
fairweather@cwpb.com