UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CONCERNED PASTORS FOR SOCIAL ACTION, MELISSA MAYS, AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN, and NATURAL RESOURCES DEFENSE COUNCIL, INC.,

Plaintiffs,

v.

Case Number 16-10277
Honorable David M. Lawson

NICK A. KHOURI, FREDERICK HEADEN, MICHAEL A. TOWNSEND, DAVID MCGHEE, MICHAEL A. FINNEY, BEVERLY WALKER-GRIFFEA, NATASHA HENDERSON, and CITY OF FLINT,

Defendants.
_____/

OPINION AND ORDER DENYING MOTION BY ATTORNEY GENERAL BILL SCHUETTE TO FILE *AMICUS CURIAE* BRIEF

Michigan attorney general Bill Schuette has filed a motion for leave to file a friend of the court brief addressing a pending motion to dissolve a preliminary injunction. The Court had entered the preliminary injunction on November 10, 2016 ordering the State defendants (the Michigan state treasurer and the members of the Flint Receivership Transition Advisory Board (RTAB)) and the Flint defendants (the City of Flint and its city administrator) to ensure that Flint residents had properly installed and maintained faucet water filters, and, failing that, to deliver bottled water to households. The State defendants and the Flint defendants have moved to dissolve the injunction on several grounds.

General Schuette's motion is problematic for several reasons. *First*, he cites as authority for filing the motion a Michigan statute that authorizes the attorney general, "when requested by the governor," a "branch of the legislature," or on his own initiative, to "appear for the people of the state" in a court case "in which the people of this state may be . . . interested." Mich. Comp. Laws § 14.28. The problem with relying on that statute is that the attorney general, in the persons of assistant attorneys general Michael Murphy, Richard Kuhl, and others, has already appeared in this case on behalf of the state defendants. *Second*, General Schuette's proposed friend of the court brief takes a position diametrically opposed to that advanced by his other deputies and assistants. Allowing him to do so likely would create an ethical conflict that could delay the ultimate disposition of this case, because it would raise the specter of disqualification of his entire office from participating on behalf of any party in the case. *See People v. Doyle*, 159 Mich. App. 632, 406 N.W.2d 893 (1987). *Third*, the proposed brief does not raise any arguments that have not been addressed by the parties presently before the Court. *Fourth*, there is a technical fault with the motion, as it violates Rule 11 of the Court's electronic filing rules. The Court finds no good reason to permit the filing.

I.

In the motion to dissolve the injunction filed by the attorney general's office on behalf of the state defendants, those parties argue that the Court should vacate its preliminary injunction because there are no ongoing violations of the monitoring or treatment requirements of the Safe Drinking Water Act (SDWA), and they repeat their argument that delivery of bottled water will harm the Flint water system recovery by slowing the distribution of orthophosphate in the service lines. The proposed friend of the court brief that the same attorney general wants to file urges the Court to

maintain the injunction in place, because the Flint water system still is in violation of the SDWA's Lead and Copper Rule, and distribution of bottled water is necessary to protect the Flint residents. These arguments parrot many of the points already made by the plaintiffs on this record. And they are obviously adverse to the State defendants' position.

A well-known and fundamental tenet of attorney ethics states that "[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client." Mich R. Prof. Cond. §1.7(a). There are exceptions to this rule, such as when "the lawyer reasonably believes the representation will not adversely affect the relationship with the other client," or when "each client consents after consultation." *Ibid.* Neither applies here.

As the attorney general, Mr. Schuette has the duty to "to prosecute and defend all suits relating to matters connected with" the various departments of state, including, as in this case, "the treasurer or the auditor general." Mich. Comp. Laws Ann. § 14.29. Discharging that duty, the attorney general appeared on behalf of the State defendants — the state treasurer and the members of the RTAB — to defend the present lawsuit. As part of that defense, the attorney general opposed the plaintiffs' motion for a preliminary injunction, and after it was granted, filed a notice of appeal, and moved to stay the injunction in this Court and the court of appeals. After both stay motions were denied, the attorney general moved in this Court to dissolve the injunction.

It is that very motion — the one to dissolve the preliminary injunction — that Mr. Schuette seeks to address with his friend of the court brief. And in that brief he wants to advocate a position that is "directly adverse" to that taken by his clients — the State defendants — who brought the motion to dissolve the injunction. It is true that an assistant different than Michael Murphy is the one who wants to file the friend of the court brief, and that it came from the attorney general's

"office of special counsel," but that does not matter. Another well-known tenet of attorney ethics states that "[w]hile 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 Rule[] 1.7." Mich R. Prof. Cond. § 1.10(a).

The reference to a "firm" in Rule 1.10(a) is not limited to private law firms. Under the Michigan ethics rules, a government law department is treated as a single firm. *Barkley v. City of Detroit*, 204 Mich. App. 194, 208, 514 N.W.2d 242, 248 (1994) (referencing Rule 1.10(a), and stating that "[w]hile government lawyers are not mentioned in the rule, it appears that, at least in some circumstances, this rule applies to them"); *see also* State of Bar Mich. Standing Comm. on Prof'l Ethics, Informal Op. RI-43 (1990) (stating that a "prosecutor's office does constitute a 'firm' for the purposes of these Rules"). That principle applies with special force when the conflict originates with a government lawyer in a supervisory capacity, such as Mr. Schuette. *See Doyle*, 159 Mich. App. at 645, 406 N.W.2d at 899.

It is also noteworthy, perhaps, that the motion for leave to file the friend of the court brief was filed by the attorney general's "office of special counsel." Although the status of that office is not readily apparent, it is clear that the lawyers assigned to it report directly to the attorney general. They are not "independent special assistant attorney[s] general," a position recognized by the state legislature. *See* Mich. Comp. Laws § 333.16237(2). The important feature of the latter position is that "[o]nce appointed, an independent special assistant attorney general is not subject to the control and direction of the Attorney General." *Attorney Gen. v. Michigan Pub. Serv. Comm'n*, 243 Mich. App. 487, 491, 625 N.W.2d 16, 20 (2000).

It is beyond debate that "the rules of professional conduct do apply to the office of attorney general." *Id.* at 516, 625 N.W.2d at 33; *see also People v. Waterstone*, 486 Mich. 942, 942, 783 N.W.2d 314 (2010) (order) ("recognizing that the Attorney General is subject to the rules of professional conduct"). Several courts have recognized that state attorneys general occasionally are called upon to represent different divisions of government in the same action, and such dual representation is not necessarily conflict-provoking. *See Attorney Gen.* at 509-16, 625 N.W.2d at 29-33 (collecting cases). However, "the rules do recognize a clear conflict of interest when the Attorney General acts as a party litigant in opposition to an agency or department that she also represents in the same cause of action." *Id.* at 516, 625 N.W.2d at 33.

It is not clear who it is that Mr. Scheutte purports to represent through his friend of the court filing. It may be "the people of this state," *see* Mich. Comp. Laws § 14.28, or it may be himself. It is clear that he seeks to appear in his own name and office. He has, of course, no official stake in the matter (except, of course, arising from his duty to represent the State defendants), although perhaps he has a personal one. Either way, there is an obvious conflict, and if it is the latter, the conflict is more egregious, as he means to take a position adverse to his clients in the same lawsuit while advancing his own, personal position.

II.

In addition to the actual conflict, the proposed filing creates a positional conflict. As a general matter, a positional conflict "may arise when a lawyer's advocacy of a legal position in one case could have negative consequences for a second client in an unrelated matter." *ABA/BNA Laws. Man. on Prof. Conduct* § 51:117. Positional conflicts also are prohibited by Rule 1.7(a), *see* ABA Model R. Prof. Cond. §1.7(a) cmt. 24 (noting that a conflict of interest exists when "there is a

significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case."), and by Rule 1.7(b) (which prohibits a lawyer from representing a client where "the representation of that client may be materially limited by . . . the lawyer's own interests . . . unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation."). The general rule is that "a lawyer 'ordinarily may take inconsistent legal positions in different courts at different times,' but that a conflict is presented when there is a substantial risk that a lawyer's action in one case will materially and adversely affect another client in a different case." *ABA/BNA Laws. Man. on Prof. Conduct* § 51:118 (quoting *Restatement (Third) of the Law Governing Lawyers*) § 128, cmt. f (2000)).

Here, the positions taken by the attorney general manifestly are inconsistent, and the positional circumstances are aggravated because he has asserted them *in the same case*.

III.

The conflict introduced in this case by General Schuette potentially presents new complications. The State defendants understandably may have reason to doubt the loyalty they have a right to expect from their attorneys. *See Barkley*, 204 Mich. App. at 204, 514 N.W.2d at 246 (reaffirming the fundament that "[a]n attorney owes undivided allegiance to a client and usually may not represent parties on both sides of a dispute") (citing *Olitkowski v. St. Casimir's Savings & Loan Ass'n*, 302 Mich. 303, 309-10, 325-26, 4 N.W.2d 664, 668 (1942)); *CenTra, Inc. v. Estrin*, 538 F.3d 402, 413 (6th Cir. 2008) (stating that Rule 1.7(a) "has particular salience when the attorney is representing both sides in the same conflict"). That discomfiture has been exhibited in this case by

the State defendants' filing, which withdraws their initial concurrence in the motion for leave to file a friend of the court brief.

General Schuette's filing may be a cause for angst among the Flint defendants as well. The Michigan Supreme Court has held that "the Attorney General has broad authority to sue and settle with regard to matters of state interest, including the power to settle such litigation *with binding effect on Michigan's political subdivisions*." *In re Certified Question from U.S. Dist. Court for E. Dist. of Michigan*, 465 Mich. 537, 546-47, 638 N.W.2d 409, 414 (2002) (emphasis added). The proposed friend of the court brief is opposed to Flint's position on the pending motion.

Normally, when a lawyer is burdened with a conflict of interest, the lawyer is removed from the law suit. Mich R. Prof. Cond. §1.7(a); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Alticor, Inc.*, 472 F.3d 436, 439 (6th Cir. 2007) (on reh). Under Rule 1.10(a), that sanction may extend to an entire firm. *Barkley*, 204 Mich App 194; 514 NW2d 242 (1994). And when the "attorney concerned in the conflict of interest has supervisory authority over other attorneys in the office, or has policy-making authority, then recusal of the entire office is likely to be necessary." *Doyle*, 159 Mich. App. at 645, 406 N.W.2d at 899.

Removal of the entire attorney general's office from representing its clients in this case would be disruptive and cause substantial delay. Outside counsel would have to be retained (at considerable expense), and they would have to familiarize themselves with the complex legal, technical, and health issues that this lawsuit presents.

Such delay is not in the interest of the parties before the Court. The State defendants, in the person of Michigan's Governor, recently contacted the Court with a request to appoint a mediator, with the intention of exploring practical solutions to this water crisis that would be in the mutual

interests of all the parties, and expedite a resolution that will address the welfare of Flint's citizens. The Court agreed and appointed a mediator.

Of course, if the attorney general wants to weigh in with a sensible resolution, he has the authority to do so. Michigan's highest court has observed: "It is said that the Attorney General 'may control and manage all litigation in behalf of the state and is empowered to make any disposition of the state's litigation which [the Attorney General] deems for its best interests.'" *In re Certified Question*, 465 Mich. at 546-47, 638 N.W.2d at 414. However, as this Court noted in its injunction ruling, addressing the citizen's "best interests" requires a careful balancing of the safety, human, and budgetary interests and concerns that the parties have legitimately identified and have been struggling with throughout this litigation. Superficial posturing does not contribute to the search for an equitable solution.

It is not clear that the conflict created by General Schuette's filing is a bell that is easily unrung. The answer to that question may have to await another day, and the parties before the Court no doubt may want to address the question. Denying the motion for leave to file the friend of the court brief, however, is a good first step.

There are other remedies available for dealing with a conflict of interest. In addition to disqualification, *Barkley*, 204 Mich. App. at 208-09, 514 N.W.2d at 248, an attorney may be liable for damages in a malpractice action, *Lipton v. Boesky*, 110 Mich. App. 589, 598, 313 N.W.2d 163, 167 (1981) (holding that "a violation of the Code [of Professional Responsibility] is rebuttable evidence of malpractice") (citing *Zeni v. Anderson*, 397 Mich. 117, 129, 243 N.W.2d 270 (1976)), and disciplinary actions by the Attorney Grievance Commission have been upheld by the Michigan Supreme Court, *In re Estes*, 392 Mich. 645, 651, 221 N.W.2d 322, 324 (1974) ("Although named

and appointed coexecutor of the estate, respondent represented a client whose claim was contrary to the provisions of the will and was antithetical to the best interests of the estate and beneficiaries. This is a self-evident basis for discipline."). Once again, though, those actions are beyond the purview of the present motion.

IV.

As noted earlier, the arguments advanced in the proposed friend of the court brief are not novel, and they have been addressed in the plaintiffs' filings and the Court's prior orders. The most that can be said of the proposed brief is that it outlines the attorney general's personal position. However, as demonstrated above, that causes more problems than it solves. Advance consideration of the utility of such a filing would have been prudent.

V.

There also is a technical problem with General Schuette's motion. He originally docketed his motion as an "amicus brief," although no leave has been granted to allow that filing as such. And he appended a proposed order to the filing. Counsel is obliged to be aware of and follow the CM/ECF procedures. "Proposed orders must be submitted to the judge to whom the case is assigned . . . via the link located under the Utilities section of CM/ECF." E.D. Mich. Electronic Filing Policies and Procedures R11(a). If a proposed order is accepted, the Court will then docket it with the judge's electronic signature. "Proposed" orders should *never* be e-filed and docketed by a party. The motion will be denied, therefore, for the additional reason that it fails to comply with the electronic filing policies and procedures.

VI.

The proposed amicus brief has not introduced any new arguments or offered a perspective that has not been presented by the parties already. Instead, the attorney general has taken a position aligned with the plaintiffs and at odds with other attorneys in his own office. In doing so, he has managed to inject a troubling ethical issue into this lawsuit, potentially complicating adjudication of the serious legal questions before the Court, without adding anything of substance.

Accordingly, the motion by attorney general Bill Schuette for leave to file a friend of the court brief [dkt. #136] is **DENIED**.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: January 23, 2017

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on January 23, 2017.

s/Susan Pinkowski
SUSAN PINKOWSKI