NO. 84704-5

SUPREME COURT OF THE STATE OF WASHINGTON

PETER GOLDMARK, AS CHIEF EXECUTIVE OFFICER OF THE DEPARTMENT OF NATURAL RESOURCES AND COMMISSIONER OF PUBLIC LANDS,

Petitioner,

v.

ROBERT M. McKENNA, ATTORNEY GENERAL,

Respondent.

ANSWER TO PETITION AGAINST STATE OFFICER

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I. INTRODUCTION

The Commissioner of Public Lands seeks to compel the Attorney General to pursue an appeal that, in the legal judgment of the Attorney General, should not be pursued. The issue now before the Court is whether the Commissioner's petition for writ of mandamus should be dismissed; retained by this Court for subsequent briefing, argument, and determination on the merits; or transferred to a superior court for determination on the merits. RAP 16.2(d). The petition should be dismissed because mandamus is not available as a matter of law.

Mandamus lies only to compel the performance of a nondiscretionary duty. The Attorney General is vested with substantial discretion in making legal decisions regarding the prosecution or defense of legal actions involving the State. In exercising that discretion the Attorney General must consider a number of factors including the implications and consequences of the litigation on the named agency or official, the implications and consequences for other state officers and agencies, the relative merits of the case and the likelihood of its success, and the special obligation of the Attorney General to assist the courts in the sound interpretation and development of Washington statutory law generally. In this case, the Attorney General exercised that discretion in declining to file an appeal of a superior court ruling. It was the legal

assessment of the Attorney General and his assistants that the superior court's decision was not erroneous and did not interfere with the State's obligations regarding the school trust lands at issue, while an appeal on the grounds advocated by the Commissioner could result in significant harm to the legal interests of other agencies of the state of Washington.

The decision at issue was discretionary and within the authority of the Attorney General. This Court should dismiss the petition to obtain a writ of mandamus.

II. STATEMENT OF THE CASE

This petition arises out of an eminent domain action, *Public Utility District No. 1 of Okanogan County v. Davis*, Okanogan County Superior Court Cause No. 09-2-00679-4, in which the Public Utility District seeks to condemn private and public land for a power line easement. The complaint named the State of Washington and the Commissioner of Public Lands as respondents. An Assistant Attorney General appeared on behalf of the State and the Commissioner in the action.

The Public Utility District's amended petition sought an order of public use and necessity and a proceeding to determine just compensation. The petition for a writ of mandamus arises from that portion of the condemnation proceedings determining public use and necessity. The Commissioner stipulated to public use and necessity but, at the

Commissioner's request, the Assistant Attorney General filed a motion for summary judgment challenging the authority of the Public Utility District to condemn an easement over the state lands at issue. The Assistant Attorney General worked diligently and professionally to present creative legal arguments supporting the Commissioner's position, but the superior court denied the Commissioner's motion. Proceedings to assess just compensation have not yet occurred. The Attorney General will continue to represent the State and the Commissioner in the underlying condemnation action to ensure that just compensation is received for the easement over the lands at issue.

The Commissioner asked the Attorney General to appeal the superior court's determination that the Public Utility District had the statutory authority to condemn an easement across the state lands. The Attorney General declined to pursue the appeal for three reasons: (1) the Commissioner sought to advance an interpretation of the statutes that, in the legal assessment of the Attorney General and his assistants, had little to no chance of success (success essentially would require the appellate court to judicially rewrite the statutory language and substantially deviate from existing precedent); (2) the superior court's ruling did not interfere with the Commissioner's legal obligations to manage the school trust lands at issue in this case; and (3) the statutory interpretation advocated by

the Commissioner could result in significant adverse legal consequences for other state agencies and for the state treasury.[1]

The Commissioner, through counsel acting independent of the Office of the Attorney General, thereupon filed the petition to obtain a writ of mandamus to compel the Attorney General to file an appeal on behalf of the Commissioner.

Conservation Northwest, an intervenor in the condemnation action, appealed the superior court's ruling to the Court of Appeals, Division III, as did the Public Utility District. The Office of the Attorney General filed a contingent notice of appeal on behalf of the Commissioner. If the Court

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[1] These reasons first were outlined in detail in a letter from the Attorney General to the Commissioner on June 8, 2010, one in a series of communications between the two state officers. The letter is appended to this brief, but submitted under seal as Appendix A (sealed), should the Court determine that review of the letter is necessary to its decision whether to dismiss this matter.

In this brief, the Attorney General has attempted to provide enough information to inform the Court of the factual circumstances leading to the petition to obtain a writ of mandamus, without unnecessarily revealing specific privileged information. However, to the extent the Commissioner may allege that privileged information has been improperly disclosed, we note that RPC 1.6(b)(5) authorizes a lawyer "to the extent the lawyer reasonably believes necessary," to "reveal information relating to the representation of a client to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client" or to "respond to allegations in any proceeding concerning the lawyer's representation of the client." *See also Pappas v. Holloway*, 114 Wn.2d 198, 204, 787 P.2d 30 (1990) (RPC 1.6(b)(2) allows an attorney brought up on charges of mismanagement to testify as to communications between himself and the client in order to defend adequately against such allegations); RPC 1.6, Comment 10 (RPC 1.6(b)(5) does not require the lawyer to await commencement of an action before disclosure in self-defense may be made.); *In re Bryan*, 61 P.3d 641, 656 (Kan. 2003) (same).

Because of the Commissioner's present allegation that the Attorney General improperly disclosed privileged information (*see* Goldmark Decl. ¶ 7, referring to a press release issued by the Attorney General's Office on June 8, 2010), we also append to this brief as Appendix B the press release issued by the Commissioner on June 8, 2010, to which the Attorney General's press release simply responded.

dismisses the petition, the Office of the Attorney General intends to withdraw the contingent notice of appeal.

On June 25, 2010, the Public Utility District filed a Statement of Grounds for Direct Review by the Supreme Court.

III. ISSUE PRESENTED FOR REVIEW

Whether the petition to obtain a writ of mandamus should be dismissed; retained by this Court for subsequent briefing, argument, and determination on the merits; or transferred to a superior court for determination on the merits.

IV. ARGUMENT

A. Mandamus Is Not Available To Compel A Discretionary Act

Mandamus is an extraordinary writ that is available to compel a state officer to undertake a mandatory ministerial duty. *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 599, 229 P.3d 774 (2010); *Walker v. Munro*, 124 Wn.2d 402, 407, 879 P.2d 920 (1994). "[M]andamus may not be used to compel the performance of acts or duties which involve discretion on the part of a public official." *SEIU Healthcare 775N*, 168 Wn.2d at 599, quoting *Walker*, 124 Wn.2d at 410.[2]

[2] This rule is of long standing. *See, e.g., State ex rel. Hawes v. Brewer*, 39 Wash. 65, 67, 80 P. 1001 (1905) (the writ of mandamus "cannot be used for the purpose of compelling the performance of a duty which requires the exercise of discretion"); *State ex rel. Clark v. City of Seattle*, 137 Wash. 455, 461, 463, 242 P. 966 (1926) (same).

B. The Attorney General Is Granted Authority And Discretion To Manage Litigation Involving State Officers And Agencies And To Determine Legal Strategies, Including Whether To Pursue An Appeal

The Commissioner contends the Attorney General has a mandatory statutory duty to represent the Commissioner and to file or cause to be filed an appeal at the behest of the Commissioner. Pet. at 9-12. The Commissioner has failed to distinguish mandatory duties from nondiscretionary duties, erroneously conflating the two. "A mandatory duty exists when a constitutional provision or statute directs a state officer to take some course of action." *Brown v. Owen*, 165 Wn.2d 706, 724, 206 P.3d 310 (2009). However, "even a mandatory duty is not subject to mandamus unless it is also ministerial, or nondiscretionary, in nature." *SEIU Healthcare 775NW*, 168 Wn.2d at 599. *Accord Brown*, 165 Wn.2d at 725 ("Where we find a mandatory duty, we must further determine whether that duty is ministerial or discretionary in nature."). A duty is ministerial only where "the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Brown*, 165 Wn.2d at 725 n.10, (quoting *State ex rel. Clark v. City of Seattle*, 137 Wash. 455, 461, 242 P. 966 (1926)). "A duty involving the exercise of discretion or judgment is

discretionary." *Id.*, citing *State ex rel. Linden v. Bunge*, 192 Wash. 245, 249, 73 P.2d 516 (1937).

To support his assertion that the Attorney General has a mandatory duty to file an appeal at the Commissioner's request, the Commissioner relies primarily on RCW 43.12.075[3] and RCW 43.10.040.[4] While these

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[3] RCW 43.12.075, which is contained within a chapter addressing the Commissioner's authority, provides as follows:

> It shall be the duty of the attorney general, to institute, or defend, any action or proceeding to which the state, or the commissioner or the board, is or may be a party, or in which the interests of the state are involved, in any court of this state, or any other state, or of the United States, or in any department of the United States, or before any board or tribunal, when requested so to do by the commissioner, or the board, or upon the attorney general's own initiative.
>
> The commissioner is authorized to represent the state in any such action or proceeding relating to any public lands of the state.

The Commissioner lacks authority to set policy for public lands managed by the Department of Natural Resources, including school trust lands. It is the Board of Natural Resources that sets policy and acts as the board of appraisers for school trust lands under article XVI, § 2 of the Washington Constitution . *See* RCW 43.30.215(2), (3). The Commissioner is the "administrator" of the Department of Natural Resources (not the "chief executive officer," as the caption to this case suggests), who is obligated to "conform" to policies established by the Board. RCW 43.30.105, .421. The Constitution provides no independent power to the Commissioner. Const. art. III, § 23.

Accordingly, the last sentence of RCW 43.12.075 cannot be understood to authorize the Commissioner to practice law or to be the legal representative and advisor for the Department; that role is reserved generally to the Attorney General. Const., art. III, § 21; RCW 43.10.030, .040, .067. The likely purpose of that sentence is to allow the Commissioner (and not the Board of Natural Resources) to be named as the party in interest in proceedings relating to public lands, without diminishing the requirement that his actions conform to the policies established by the Board.

[4] RCW 43.10.040 is contained within a chapter addressing the Attorney General's authority. It provides as follows:

> The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings, and advise all officials, departments, boards, commissions, or agencies of the state

statutes contain the word "shall." ("It shall be the duty of the attorney general . . ."; "The attorney general shall . . ."), the duties and obligations imposed on the Attorney General in fact provide substantial discretion, as explained below.

In RCW 43.12.075, for example, the duty is to "institute" or "defend" any action in which the Commissioner is a party or in which the interests of the state are involved. Even if, for the sake of argument, that duty were assumed to be mandatory, the Attorney General complied with the statute. An Assistant Attorney General appeared and defended the Commissioner in the underlying condemnation proceeding, and diligently developed and advanced the legal theory to support the outcome advocated by the Commissioner.

RCW 43.12.075 authorizes the Commissioner to "request" legal action by the Attorney General, but the statute gives the Commissioner no authority to "direct" legal strategy. The statute does not disturb the

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> in all matters involving legal or quasi legal questions, except those declared by law to be the duty of the prosecuting attorney of any county.

This statute was enacted in 1941 "to end the proliferation of attorneys hired by various state agencies and place the authority for representation of state agencies in the Attorney General." *State v. Herrmann*, 89 Wn.2d 349, 354, 572 P.2d 713 (1977).

Attorney General's legal discretion to determine the mode and extent of legal involvement—including whether to appeal an adverse decision.[5]

Like RCW 43.12.075, RCW 43.10.040 provides that the Attorney General "shall" "represent the state and all officials, departments, boards, commissions and agencies of the state in the courts" in all legal matters, and RCW 43.10.030(1) provides that the Attorney General "shall" "appear for and represent the state before the supreme court or the court of appeals in all cases in which the state is interested[.]" These statutes confirm the responsibility of the Attorney General to represent the state, but they do not cabin the Attorney General's exercise of legal discretion in that representation. In particular, the statutes do not mandate the Attorney General to pursue an appeal on behalf of a state official. The Attorney General is aware of no statute that imposes a specific duty on the Attorney General to pursue an appeal upon the request or direction of a client official or agency, nor is there any statute that grants the Commissioner the authority to direct whether and when to file appeals.

To the contrary, this Court consistently has recognized the legal discretion of the Attorney General when representing state officials and

[5] Interestingly, an 1895 statute provided that the Board of State Land Commissioners could "direct" the Attorney General to appear for and represent its interests. Laws of 1895, ch. 178, § 100. In 1927, the verb was changed to authorize the Board or the Commissioner to "request" representation by the Attorney General. Laws of 1927, ch. 255, § 194. Neither statute supersedes the discretion this Court has held to be vested in the Attorney General, as set out below.

agencies. In *State v. Gattavara*, 182 Wash. 325, 47 P.2d 18 (1935), for example, the Court upheld the exclusive statutory authority of the Attorney General to bring actions to collect delinquent industrial insurance premiums on behalf of the state Department of Labor and Industries. Like the statute here, the statute considered in *Gattavara* provided that "it shall be the duty" of the Attorney General to institute such actions; the Court held those statutes did not eliminate the Attorney General's discretion—his authority to "exercise his judgment as to whether the action shall be instituted." *Id.* at 330.

Similarly, in *State ex rel. Rosbach v. Pratt*, 68 Wash. 157, 122 P. 987 (1912), the Court dismissed an application for a writ of mandamus to compel the Attorney General and the Industrial Insurance Commission to initiate an action to collect delinquent assessments. The statutes at issue provided that "[t]he attorney general . . . shall represent [the department] in all proceedings, whenever so requested by any of the commissioners" and any unpaid assessment "shall be collected by action at law." *Id.* at 158. The Court held that neither of these provisions imposed a "requirement of absolute duty" on the Attorney General (or the Commission) to bring actions for unpaid assessments. *Id.* "Authority to commence such actions is conferred, but not compelled, by these sections," and the commencement of such actions

> are matters resting wholly within the discretion of the commission and the Attorney General, a discretion which cannot be controlled by mandamus. Such has ever been the ruling of the courts under statutes vesting the power to commence actions or institute proceedings on behalf of the state in the Attorney General.

Id. (citing cases).[6]

Relying on these same principles, the Court rejected a claim that the Attorney General had an absolute duty to bring an action to recover funds that had been disbursed to students attending private higher education institutions under a statute that subsequently was held unconstitutional.

> The Attorney General is designated by RCW 43.10.030(2) as the legal officer of the state responsible for bringing actions on behalf of state officers, departments or other agencies. [citing *Gattavara*] A similar statute, declaring the Attorney General to be the legal representative of the Industrial Insurance Commission and directing that sums due under the act "'shall be collected by action at law'" was held not to create an absolute duty to institute litigation, but rather a duty to be exercised wholly within the discretion of the Attorney General and the Industrial Insurance Commission. [citing *State ex rel. Rosbach*] This has been the consistent ruling of courts under statutes vesting power to commence actions or institute proceedings on behalf of the State in the Attorney General. [citing cases]

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[6] As the Court noted, "to compel a district attorney, against his will and contrary to his judgment, to merely *commence* an action would be an idle thing in the absence of power to compel him to prosecute it to final determination." *State ex rel. Rosbach*, 68 Wash. at 159 (quoting *Boyne v. Ryan*, 100 Cal. 265, 267, 34 P. 707 (1893)).

Berge v. Gorton, 88 Wn.2d 756, 761, 567 P.2d 187 (1977). The Court held that the "duty" imposed under RCW 43.10.030(2) was to "exercise discretion": "If in his judgment the proposed litigation was warranted, he could, as the Attorney General, have attempted to bring such an action. He was not, however, required by law to do so." *Id. Accord Boe v. Gorton*, 88 Wn.2d 773, 775, 567 P.2d 197 (1977).

Applying Washington law, the Ninth Circuit Court of Appeals reached the same conclusion as this Court:

> [The Attorney General] is not only the counsel for Washington but also the state official in charge of initiating and conducting the course of litigation. The determination whether to bring an action rests within the sole discretion of the Attorney General. It is the Attorney General who has the authority to prosecute the suit.

In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 747 F.2d 1303, 1306 (9th Cir. 1984) (internal citations omitted), *cert. denied sub nom. Eikenberry v. Standard Oil Co. of Calif.*, 471 U.S. 1100, 105 S. Ct. 2323, 85 L. Ed. 2d 841 (1985). This Court also has acknowledged the Attorney General's independent discretion in *State ex rel. Dunbar v. State Board of Equalization*, 140 Wash. 433, 249 P. 996 (1926), rejecting a contention that the Attorney General is barred from taking an action against a state officer because the Attorney General also is charged to represent state officers:

> The law can not be given any such construction. His paramount duty is made the protection of the interest of the people of the state and, where he is cognizant of violations of the constitution or the statutes by a state officer, his duty is to obstruct and not to assist; and where the interests of the public are antagonistic to those of state officers, or where state officers may conflict among themselves, it is impossible and improper for the Attorney General to defend such state officers.

State ex rel. Dunbar, 140 Wash. at 440. *Accord Reiter v. Wallgren*, 28 Wn.2d 872, 880, 184 P.2d 571 (1947) ("It has always been a paramount duty of the attorney general to protect the interests of the people of the state.").[7] The present matter does not involve any allegation of a violation of law by the Commissioner. But the fact that the Attorney General has sufficient authority and legal discretion to affirmatively file an action against a state official to protect "the interest of the people of the state" shows that he has sufficient authority to decline a state officer's request to

[7] *See also Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 207, 588 P.2d 195 (1978) (the Attorney General's status as legal advisor to state officials and agencies "contemplates something more than a mere passive role in the formulation and implementation of state governmental policies and practices"). The Commissioner cites *State ex rel. Winston v. Seattle Gas & Electric Co.*, 28 Wash. 488, 497, 68 P. 946 (1902), *petition for rehearing denied*, 70 P. 114 (1902), for the proposition that the Attorney General has no "common law" authority. Pet. at 11. The Court ultimately concluded in that case that where statutes placed legal authority to prosecute the action in the prosecuting attorney, the Attorney General did not retain common law authority to maintain it. But at least four times since *State ex rel. Winston*, this Court has upheld the Attorney General's exercise of legal discretion where the particular action was not explicitly authorized in statute based on a broad understanding of the Attorney General's legal discretion. *See Young Americans*, 91 Wn.2d at 207-210 (discretion to file amicus brief in the United States Supreme Court); *State v. Taylor*, 58 Wn.2d 252, 256, 362 P.2d 247 (1961) (discretion to enforce charitable trusts by way of an accounting action); *Boe v. Gorton*, 88 Wn.2d 773, 567 P.2d 197 (1977) (discretion not to initiate litigation to recover state-funded tuition supplements despite statutory "duty" to do so); *Berge v. Gorton*, 88 Wn.2d 756, 567 P.2d 187 (1977) (same).

pursue an appeal where, in the considered legal judgment of the Attorney General, the appeal threatens the public interest because of its potential adverse legal consequences for other state actions and associated impact on the state treasury.[8]

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[8] The cases cited in this section of our brief distinguish the power of the Attorney General in Washington from that of the Attorney General in West Virginia, limited in *Manchin v. Browning,* 170 W. Va. 779, 296 S.E.2d 90 (1982), based on that court's analysis of that state's law and history. Unlike the West Virginia court, this Court has recognized that the Attorney General has a duty to consider and protect the broad legal interests of the state and its citizens in determining whether and how to conduct litigation implicating the state's legal interests. This recognition is consistent with that of other jurisdictions, as illustrated by two examples:

> [A government attorney] has for a client the public, a client that includes the general populace even though this client assumes its immediate identity through its various governmental agencies. Thus, a government litigator must take positions with the common public good in mind, unlike the private practitioner who seeks vindication of a particular result for a particular client.

Humphrey v. McLaren, 402 N.W.2d 535, 543 (Minn. 1987), (citing ABA Committee on Ethics and Professional Responsibility, Formal Op. 342 at 10 (1975)).

> The role of the Attorney General when he represents the Commonwealth and State officers in legal matters is markedly different from the function of the administrative officials for whom he appears. Not only does the Attorney General represent the Commonwealth as well as the members of the [Civil Service] Commission and the Personnel Administrator. . . , (h)e also has a common law duty to represent the public interest. . . . Thus, when an agency head recommends a course of action, the Attorney General must consider the ramifications of that action on the interests of the Commonwealth and the public generally, as well as on the official himself and his agency. To fail to do so would be an abdication of official responsibility. It would also enervate the Legislature's clearly articulated determination to allocate to the Attorney General complete responsibility for all the Commonwealth's legal business. To permit the Commission and the Personnel Administrator, who represent a specialized branch of the public interest, to dictate a course of conduct to the Attorney General would effectively prevent the Attorney General from establishing and sustaining a uniform and consistent legal policy for the Commonwealth.

Feeney v. Massachusetts, 366 N.E.2d 1262, 1266 (Mass. 1977) (citations and internal quotations omitted).

Because the Attorney General's authority to maintain and control litigation entails discretion, the exercise of that discretion cannot be controlled through mandamus. *SEIU Healthcare 775NW*, 168 Wn.2d at 599; *Boe*, 88 Wn.2d at 775. Strategic legal decisions, including the propriety of appealing an adverse superior court decision, are assigned to the sound discretion of the Attorney General.[9]

C. The Attorney General Has Breached No Ethical Duty

The Commissioner asserts the Attorney General has an ethical duty under RPC 1.2(a) to abide by the Commissioner's decision whether to file an appeal. Pet. at 12-13. This assertion misapprehends the authority of the Attorney General and assumes that it is determined by the Rules of Professional Conduct.

Like the Attorney General for the Commonwealth of Massachusetts in *Feeney*, the Attorney General of Washington does not represent a single monolithic entity. Rather, the state is comprised of literally dozens of agencies, institutions, and officers, each dedicated to accomplishing discrete program objectives. At the same time, the legal positions advanced by those agencies, institutions, and officers in litigation—and particularly in appellate litigation—can have (and often do have) significant legal ramifications for the State as a whole. There is substantial value in having the State speak with a consistent voice in the appellate courts—"a voice that reflects not the parochial interests of a particular agency, but the common interests of the Government and therefore of all the people"; a voice that reflects not just "the immediate demands of the case *sub judice*," but "longer term interests in the development of the law." *United States v. Providence Journal Co.*, 485 U.S. 693, 706, 108 S. Ct. 1502, 99 L. Ed. 2d 785 (1988).

[9] While litigation can lead to changes in public policy, it should be recognized that most public policy is set through legislation and rule-making, not litigation. As in the present case, the primary role of the Attorney General is to interpret, apply, and enforce public policies established in legislation, not to set policy by arguing for judicial revision of legislation, even where that argument is advocated by a client.

While the Rules of Professional Conduct apply to all lawyers, including government lawyers, those rules do not operate in a vacuum. Rather, the Rules recognize that constitutional, statutory, and common law provisions addressing the authority and responsibilities of government lawyers affect the application of the Rules:

> Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. *For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government*, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. *These Rules do not abrogate any such authority.*

Comment [18] of Scope of the Rules of Professional Conduct (emphasis added).[10] *See also* RPC 1.13, Organization As Client, Comment 9, recognizing that the client may be the government as a whole, and that defining the government client is a matter beyond the scope of the Rules. The vesting of discretion in the Attorney General with respect to legal

[10] Identical language is found in Comment [18] of Scope of the Model Rules of Professional Conduct (2002). *See http://www.abanet.org/cpr/mrpc/preamble.html* (last visited June 25, 2010).

matters that ordinarily would reside with the client in a private attorney-client relationship is most directly expressed in *In re Coordinated Pretrial Proceedings*, 747 F.2d at 1306 (cited above at page 12) and is reflected in the many other cases discussed in this brief.

Under the Washington Constitution, the Attorney General is an independent, separately elected state officer who serves as the state's chief legal officer. That independence was intentional:

> [T]he people had in mind the same objects sought by the creation of the attorney general's office of the Federal government; that is, a severance of the various branches of the government, thereby creating one office a check upon the other.

Gattvara, 182 Wash. at 333.

D. The Commissioner Is Not Entitled To Attorney Fees

The Commissioner claims an entitlement to an award of attorney fees and costs if the Attorney General's defense to this petition is "frivolous and advanced without reasonable cause." Pet. at 13-14. The arguments advanced in this brief demonstrate that the Attorney General's defense to this petition is not frivolous. Indeed, because the Attorney General acted within the legal discretion granted by the constitution and statutes and recognized by this Court since statehood, mandamus may not lie, and the Commissioner's petition to obtain a writ of mandamus should be dismissed.

V. CONCLUSION

The Petition Against State Officer, requesting a writ of mandamus, should be dismissed.

RESPECTFULLY SUBMITTED this 28th day of June, 2010.

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APPENDIX A

(June 8, 2010 letter from the Attorney General to the Commissioner – filed under seal).

APPENDIX B

MCKENNA REFUSES TO STAND UP FOR WASHINGTON'S SCHOOLS, GOLDMARK IS FORCED TO SEEK OTHER OPTIONS

FOR IMMEDIATE RELEASE

June 8, 2010

MCKENNA REFUSES TO STAND UP FOR WASHINGTON'S SCHOOLS, GOLDMARK IS FORCED TO SEEK OTHER OPTIONS

DNR Seeks To Appeal Condemnation Ruling In Okanogan County

OLYMPIA – The Washington State Department of Natural Resources (DNR) today announces its intention to appeal the recent decision in the Okanogan County Superior Court regarding the condemnation of Common School Trust lands for an Okanogan PUD transmission line.

"We have a fiduciary responsibility to manage the trusts for current and future generations. I believe that Okanogan PUD's proposal will have unacceptable negative impacts, including increased fire risk and higher management costs for the trusts," said Commissioner of Public Lands Peter Goldmark. "I am deeply disappointed in Washington's Attorney General."

Unlike most court proceedings that are handled by the Office of the Attorney General, DNR will be forced to seek other counsel to represent the state given Attorney General Rob McKenna's refusal to do so. Commissioner Goldmark is currently assessing the state's options.

"By refusing to represent the Common School Trust and the non-tax revenue it generates, Mr. McKenna is choosing to allow the inappropriate use of eminent domain over Washington's schools," said Commissioner Goldmark. "Mr. McKenna is choosing to play politics with our state's heritage."

DNR has multiple concerns over the bifurcation of trust land parcels that cannot be mitigated. A transmission line cutting through the middle of trust land will reduce the value of the remaining lands and increase the cost of managing the trust's land including:

- Reduced income from the trust's land from road building and elimination of working lands.
- Increased fire risk from activities along the line's corridor. DNR has also had challenges with the PUD's vegetation management and inability to timely pay for fire costs.
- Increased road building would allow for more unauthorized use and increase enforcement costs.
- Increased costs to remove noxious weeds.

The state Attorney General's unwillingness to represent the trusts comes during difficult economic times and follows a year where DNR had to reduce staff by 114 people.

Washington Is A "Land Grant" State

Like many states in the American West, at statehood Washington received a checkerboard of "trust land" parcels from the Federal government. This land was meant to provide income for education and other public infrastructure. Unlike other states who have largely sold their granted lands, Washington's leaders have had the foresight to maintain this working lands base that is a vital economic engine.

Common School Trust

Since 1967, revenues derived on lands within the Common School Trust have provided about $3 billion in non-tax revenue for the capital construction of public school facilities. These non-tax revenues are generated by the private sector on trust lands through agriculture, grazing, and timber harvest.

DNR also manages various trusts for universities, state facilities and counties throughout the state.

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FILES

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NO. 84704-5

SUPREME COURT OF THE STATE OF WASHINGTON

PETER GOLDMARK, AS CHIEF EXECUTIVE OFFICER OF THE DEPARTMENT OF NATURAL RESOURCES AND COMMISSIONER OF PUBLIC LANDS, Petitioner, v. ROBERT M. MCKENNA, ATTORNEY GENERAL, Respondent.	CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of the Answer to Petition Against State Officer to be served on the following via electronic transmittal and First Class United States Mail, postage prepaid:

DAVID A. BRICKLIN
BRICKLIN & NEWMAN, LLP
1001 FOURTH AVENUE, STE 3303
SEATTLE, WA 98184

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DATED this 28th day of June, 2010.

Rosemary Sampson, Confidential Secretary