J. Kevin Stitt
Office of the Governor
State of Oklahoma

July 11, 2023

Via Email

The Honorable Charles McCall
Speaker of the Oklahoma House of Representatives
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The Honorable Greg Treat
President Pro Tempore of the Oklahoma Senate
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Dear Speaker McCall and President Pro Tempore Treat,

On June 16, 2023, the Attorney General provided to each of you—but not his desired client, the Governor—a letter in which he "invited the Legislature's entreaty that [the Attorney General's Office] assume the defense of Oklahoma's interests in the Cherokee Nation Lawsuit and bring it to an expeditious end."[1] Despite the expressed desire to represent the Governor, General Drummond articulated that he adamantly opposes his prospective client's position and objectives in a federal lawsuit, *The Cherokee Nation et al. v. Comanche Nation et al.*, U.S. District Court for the District of Columbia Case No. 20-2167 (the "Lawsuit"). Respectfully, the Attorney General's Office does not have the authority to unilaterally assume representation of the Governor—a defendant the Cherokee Nation, the Chickasaw Nation, the Choctaw Nation, and the Citizen Potawatomi Nation (collectively, the "Plaintiffs") decided to sue—and the Oklahoma Rules of Professional Conduct governing attorneys explicitly prohibits the Attorney General's Office from doing so. I'll address each issue in turn.

General Drummond suggests that state law provides him "the discretion 'to take and assume control of the prosecution or defense of the state's interests[.]'" He then asks legislative leadership to formally request that the Attorney General "assume the defense of the Cherokee Nation Lawsuit[.]" Although he does not explicitly say it, General Drummond presumably desires to assume representation of the Governor. As support for the suggestion and formal request, the Attorney General points to 74 O.S. § 18b(A)(3). Read in a vacuum, language in that subsection appears beneficial to the Attorney General's

[1] Prior to a media outlet having provided the letter to the Office of the Governor, on July 5, this Office was unaware of the Attorney General's ambitions associated with the litigation.

pursuit. The analysis, however, runs deeper when representation of the Governor is at play and when the Governor and the Attorney General have competing objectives.

Section 6 of Title 74 of the Oklahoma Statutes grants the Governor the "power to employ counsel to protect the rights or interests of the state in any action or proceeding . . . , and the counsel so employed by him may, under the direction of the Governor, plead in any cause, matter, or proceeding in which the state is interested or a party[.]" Section 18c of Title 74 further confirms that the Governor is uniquely situated in the issue the Attorney General has presented to you:

> A.4. All the legal duties of [state] officer[s] . . . shall devolve upon and are hereby vested in the Attorney General; *provided that*:
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> a. *the Governor shall have authority to employ special counsel* to protect the rights or interest of the state as provided in [74 O.S. § 6.] (emphasis added).

Further research reveals that the Oklahoma Supreme Court long ago made clear that, where the Governor and the Attorney General are at odds over a litigation objective, the Governor's decision prevails under the State's constitutional framework. In short, while the Attorney General is statutorily vested with authority to assume control of litigation in many, if not most, contexts where the State's interests are implicated, such authority does not apply here.

Even if that authority did exist, the Oklahoma Rules of Professional Conduct are an insurmountable obstacle to the Attorney General's Office's representation of the Governor in the Lawsuit. Lawyers are prohibited from representing a client if "the representation will result in violation of the Rules of Professional Conduct or other law[.]" OPRC 1.6(a). In light of remarks included in the June 16 letter and elsewhere, there is no reasonable doubt that the Attorney General's representation of the Governor in the Lawsuit would require numerous violations of the Rules of Professional Conduct. Simply put, the ethical rules to which attorneys are bound do not allow an attorney to provide representation after having publicly committed to a hostile position against a prospective client and their litigation objectives.

First, "a lawyer shall abide by a client's decisions concerning the objectives of representation[,] [and a] lawyer shall abide by a client's decision whether to settle a matter." OPRC 1.2(a). A comment to that section emphasizes that such language "confers upon the client the ultimate authority to determine the purposes to be served by legal representation[.]" In his letter and elsewhere, the Attorney General has made clear he would not pursue his prospective client's, *i.e.*, the Governor's, objectives.

Second, "A lawyer shall act with reasonable diligence and promptness in representing a client." OPRC 1.3. The opening note to that rule explains, in part:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

Through the Attorney General's words regarding the Lawsuit, he has established that his plan, after assuming representation of the Governor, would be to advocate against the Governor's interests rather than with commitment and dedication to the Governor's interests.

Third, reasonable communication between the lawyer and his client is required. *See* OPRC 1.4. As articulated in a comment to the rule, "Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation." Given that the Attorney General's Office still has not informed its prospective client, the Governor, of the June 16 letter or the substance therein, there is no expectation that attorney-client communications required by the Rules of Professional Conduct would occur if there were, in fact, an attorney-client relationship in this context.

Fourth, lawyers are prohibited from using "information relating to representation of a client to the disadvantage of the client unless the client gives informed consent[.]" ORPC 1.8(b). The Attorney General explained in his letter to you and elsewhere that the purpose of his representation would be to use information relating to representation of the Governor to his explicit disadvantage.

This Office does agree with the Attorney General that the Lawsuit has been protracted and that finality is preferred. Of course, neither the Governor nor the defendant smaller tribes initiated the lawsuit. They were forced into litigation by Plaintiffs. The defendants have since filed dispositive motions to bring closure to the Lawsuit. Plaintiffs, on the other hand, have fought expeditious closure and continue to prolong the litigation. If the Attorney General or others would like to see an end to the litigation, the ask is misguided. Plaintiffs, with the filing of a single motion, could have the Court dismiss the Lawsuit. The Governor would welcome that.

Finally, it should be no surprise that the Governor has mounted a legal defense after having been sued. Moreover, General Drummond has highlighted in his letter the necessity of outside counsel to mount such a defense, as the Attorney General's Office has ethical and positional conflicts barring that Office's ability to provide representation. Hence, the Governor's Office is necessarily represented by a highly competent law firm[2] with an office in Washington, D.C.—where the action is pending. Respectfully, the Attorney General's request is a legal and ethical impossibility.

If you have questions or would like to discuss, please do not hesitate to contact this Office.

Respectfully,

Trevor S. Pemberton
General Counsel

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[2] Contrary to a statement in the Attorney General's June 16 letter, the Governor's Office is not using "several Washington, D.C. and New York City law firms." Sullivan and Cromwell, a firm with an office in Washington, D.C., serves as primary litigation counsel in place of a different firm that previously served as counsel. An Oklahoma City firm provides logistical support.