



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL
HARRISBURG, PA 17120

KATHLEEN G. KANE
ATTORNEY GENERAL

January 20, 2016



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The Honorable Lisa Baker
SENATE OF PENNSYLVANIA
362 Main Capitol Building
Senate Box 203020
Harrisburg, PA 17120-3020

Dear Senator Baker:

I am writing in reply to your letter of January 13, 2016, which poses numerous questions about operational procedures in the Office of Attorney General (OAG) both generally, and in specific situations. As you will see from my responses below, where I was able to do so, I answered the question(s) you asked. However, in many instances I could not supply an answer as I have no knowledge of what occurred because neither I, nor any of the attorneys I supervise, had any involvement in the event(s) or occurrence(s) about which you have inquired.

By way of preface, I would like to mention that all of us who testified jointly on November 18, 2015, and indeed the vast majority of OAG employees, would like to have a full fair and independent review of the emails about which your letter has raised various questions. Transparency demands nothing less. However, we are greatly concerned that any review be conducted in a manner that comports with Pennsylvania law, not just to ensure the integrity of that review and any action(s) that may result from it, but also to avoid any potential liability to the Commonwealth that may flow from unauthorized conduct.

I must note one other thing: several of your questions pertain either entirely or in part to grand jury related-matters such as maintenance of grand jury secrecy. Those very principles, however, prevent me and other OAG staff members from providing a response absent permission from a supervising judge. As you will see from the response to question 18, the supervising grand jury judge has authorized me to furnish certain limited information, which I have included.

I will answer your questions in the order they appear in your letter:

1. I am aware of no written or otherwise established procedure for making such a determination at present, nor any criteria to be utilized. To the best of my knowledge, in the comparatively few instances when such an appointment has been made in the past, it has been purely at the discretion of the Attorney General. The OAG has procedures for the hiring of outside civil counsel, but the duties performed by persons hired as such do not include the criminal law/prosecutorial functions contemplated by the Charge.

2. As you are no doubt aware, Pennsylvania no longer has a statute that allows for the appointment of independent counsel. The previous statute, the Independent Counsel Authorization Act expired on February 18, 2003, *see* 18 Pa.C.S. §9352, and has not been renewed or replaced at any time since. The Attorney General's authority to appoint a Special Deputy Attorney General derives from the Commonwealth Attorneys Act (CAA), 71 P.S. §732-101 *et seq.*, specifically the provisions set forth in §732-201(c), which provides, in relevant part, that "[t]he Attorney General shall appoint and fix the compensation of a first deputy attorney general . . . and such other deputies, officers and employees who may, at any time, exercise such powers and perform such duties as may be prescribed by the Attorney General." Notably, the authority to appoint must be exercised in a way that ensures compliance with other applicable state and federal laws. For example, the Attorney General cannot appoint someone as an OAG employee or official if that appointment would violate the State Adverse Interest Act (SAIA), 71 P.S. §776.1 *et seq.*, which prohibits the appointment/employment of individuals who have a financial interest in contracts into which the Commonwealth has entered. Here, as you know, BuckleySandler has a contract with the Commonwealth to provide support services to any Special Deputy appointed to review the emails in question. Because Mr. Gansler is a partner in BuckleySandler, he cannot be appointed as an OAG official or employee. *See* 71 P.S. §§776.2 and 776.4-776.6. Such an appointment would amount to a criminal offense. Each violation of the SAIA constitutes a misdemeanor punishable by imprisonment (up to 1 year) and a fine (up to \$1000).
3. I do not know. As far as I have been able to determine, no OAG attorney was consulted about, or otherwise involved in, the decision to appoint a Special Prosecutor or Special Deputy Attorney General. This question, I believe, would need to be directed to the Attorney General.
4. I do not know who wrote either the Charge or the Contract. Again, this question should be addressed to the Attorney General.
5. Generally, all agency contracts for goods and services, including legal services, must be submitted to the Legal Review Section of the OAG for review and approval before performance can begin. This process is mandated by the CAA and the State Procurement Code. The contract in question with Mr. Gansler's law firm, BuckleySandler, was reviewed and approved on December 5, 2015.
6. Not to my knowledge.
7. Executive Deputy Attorney General Robert A. Mulle performed those duties.
8. We are not aware of a sufficiently-similar past appointment or contract for services that would serve as a basis for comparison.

9. I do not know. This matter was not addressed in any memo sent by myself and the Executive Deputy Attorneys General to the Attorney General dealing with the OAG's operation in the wake for her license suspension. Neither I, nor they, had any knowledge of her intent to make an appointment of this sort.

10. I do not know. This question, I believe, would need to be directed to the Attorney General.

11. As the responses to some of the questions below explain in more detail, at present, Mr. Gansler has no official status or relationship with the OAG. Several members of my staff and I have had a series of conversations with Mr. Gansler and other BuckleySandler personnel in an effort to try to agree upon a contract for his services that would comport with Pennsylvania law. To date, those efforts have not been successful.

12. At this time, I am unable to answer due to the fact that this is a matter still under review.

13. I do not know. This question, I believe, would need to be directed to the Attorney General.

14. To my knowledge, it has always been routine OAG practice, not to release any materials without prior review of the materials by counsel to ensure that release of the same would not violate state and federal law and regulations. This would include not only grand jury-related obligations and privilege-based obligations such as attorney-client communications, but also treatment and employment materials that are subject to disclosure restrictions or prohibitions. In this instance, I have no knowledge of whether or not any review of this sort was conducted prior to the transmittal of emails to BuckleySandler.

15. I do not know, although we have received correspondence from BuckleySandler indicating that the firm has in its possession some 850,000 emails.

16. To the extent this question involves grand jury-related information, I am unable to respond. With respect to the remaining issues, I do not know, as I do not know what has been furnished to BuckleySandler.

17. To the extent this question might involve grand jury-related information, I am unable to respond. With respect to the remaining issues, I do not know. I am able to advise you that I have not been provided with any documents reflecting a waiver of any kind.

18. Given that this question appears to involve grand jury-related information, I am unable to respond other than to say that the grand jury judge has authorized me to inform you that no order permitting the disclosure of any grand jury materials that may be contained in the emails which have been transmitted to BuckleySandler has been issued and that he is taking appropriate steps to investigate the possible unauthorized disclosure of secrecy-protected grand jury materials. I

would point out that, as a general matter, under the Pennsylvania Grand Jury Act, any release of materials subject to grand jury secrecy without the prior permission of a supervising judge, constitutes a violation of the Act. *See* 42 Pa.C.S. §4549(b). Subsequent execution of a secrecy oath does not cure or remove the violation.

19. Yes, I have, in recent conversations with Mr. Gansler and other representatives of his firm. At my direction, Mr. Mulle also previously requested their return. Both I and the senior staff attorneys believe that before any emails were released, there should have been a review of the material(s) to be disclosed to ensure that there will be no violation of state and/or federal law associated with their disclosure. We also believe that it is improper to provide any of this material to any individual unless and until there is a clear indication that the individual's status allows him/her to receive it. Mr. Gansler has no contract with the OAG and therefore at this time he has no official status or relationship with the OAG.

20. I believe my previous response explains why it became necessary to seek the return of the emails given to BuckleySandler. Those requests have been refused.

21. We are continuing to review this issue. It appears that a provision of the Administrative Code, specifically permits the First Deputy to assume this and other responsibilities. That provision, which is codified at 71 P.S. §762 ("§762"), and which is entitled "Duty of person next in authority to act during vacancy or absence of incumbent," provides that

[w]hensoever, by reason of the absence, incapacity, or inability of the head or chief of any of the departments of the State Government to perform the duties of his office, or whenever a vacancy in the office of the head or chief of any of the departments of the State Government occurs, the duties of the head or chief of such department shall be performed by the deputy, chief clerk, or other person next in authority, until such disability is removed or the vacancy filled.

22. As explained during our testimony, at the time the Attorney General's law license was fully suspended, she immediately became unable to engage in any activity that involves the practice of law. By operation of Pennsylvania law, specifically, pursuant to §762, which is quoted above, the First Deputy Attorney General was invested with the authority to perform those duties by operation of law. Thus, to the extent the Attorney General sought to delegate criminal law-based/prosecutorial authority on a special prosecutor, she was unable to do so as she lost the ability to perform those functions and could not delegate

23. Please see my response to the next question.

24. Shortly after our testimony before your committee, we found it necessary to again attempt to resolve abiding operational issues caused by the Attorney General's suspension of her law

license. To that end, the three Executive Deputy Attorney Generals and I wrote to the Acting Chief of Staff Jonathan A. Duecker. In a memorandum of November 24, 2015, a copy of which I am enclosing, we emphasized the legal and ethical importance of ensuring that any matter which in any way requires legal knowledge or expertise be handled and/or overseen by an attorney. A copy of that memorandum was also provided to the Attorney General. We stressed in our memorandum, that for various reasons, such assignments could not be handled by someone not licensed to practice in Pennsylvania.

To date, we have not received any response to our memorandum, and we have concerns, based on recent events involving the appointment of Mr. Gansler, that its contents are being ignored. The appointment of a special deputy/prosecutor is not merely an employment decision. It encompasses a host of legal issues that must be considered and resolved prior to any action. These include, but are not limited to, ascertaining whether there is a proper, legal basis for the action, whether the proposed appointment complies with any other laws that may apply in the particular circumstances, and what powers the appointee may legitimately exercise. At no time, was I or any other member of the legal staff I supervise, consulted with respect to the appointment of Mr. Gansler. Indeed, I did not even become aware of it until it was announced in press reports.

Of equal concern has been the release of materials to BuckleySandler. In our memorandum of November 24, 2015, we specifically instructed Mr. Duecker that no agency records or documents in any form were to be released absent prior approval by myself or my designee. Despite this, without any prior notice to—or consultation with—me, a large quantity of emails was provided to BuckleySandler. I learned of this only after the fact. These developments are extremely distressing to me and to the members of the OAG's legal staff, many of whom have voiced their dismay at these highly irregular and ill-advised actions.

As a courtesy, we are providing the other members of the Special Committee with a copy of this correspondence.

Please do not hesitate to contact me if you need additional information or clarification.

Very truly yours,



BRUCE R. BEEMER
First Deputy Attorney General

Encl.

Cc: Kathleen G. Kane, Attorney General
Lawrence M. Cherba, Executive Deputy Attorney General
James A. Donahue, Executive Deputy Attorney General
Robert A. Mulle, Executive Deputy Attorney General
Special Committee on Senate Address

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL
November 24, 2015

SUBJECT: Procedures During License Suspension

TO: Jonathan A. Duecker
Acting Chief of Staff

FROM: Bruce R. Beemer *BRB*
First Deputy Attorney General

James A. Donahue, III *JAD*
Executive Deputy Attorney General
Public Protection Division

Robert A. Mulle *RAM*
Executive Deputy Attorney General
Civil Law Division

Lawrence Cherba *LC*
Executive Deputy Attorney General
Criminal Law Division

As you know, it has been more than a month since we wrote to the Attorney General on the subject of her license suspension and its effect on office operations. With each passing day, the need to resolve these important issues becomes more acute and the attorneys who carry out our agency's responsibilities require guidance from us on a wide variety of operational issues. In order to properly carry out the work of the office, we must provide clear and definitive answers. We are very willing to work with you to ensure that we, and all the attorneys in our various divisions, comply with the Rules of Professional Conduct and the substantive law that governs OAG operations. Compliance with the ethical obligations of our profession is not only required, but it is also in everyone's best interest including your own.

It is imperative that, in making any adjustments to office procedures that may be needed as the result of the suspension, steps be taken to ensure that all matters which *in any way* require legal knowledge and expertise be handled by attorneys and that the work of attorneys be supervised only by attorneys. These tasks may not be assigned to persons who are not authorized to practice law in Pennsylvania as such would constitute a violation of the Rules of Professional Conduct and may expose the non-attorney to criminal charges for the unauthorized practice of law. See 42 Pa.C.S. §2524; Pa.R.P.C. 5.1, 5.3. In order to avoid ethical violations of this sort and to allay concerns by OAG attorneys about aiding or abetting the unauthorized practice of law, we are advising our attorneys to bring to our attention any assignment or professional involvement that appears to violate these well-established ethical standards as well as any other matter of which they may be aware.

To be specific, several areas are of particular concern to us at this time. One area is compliance with process such as subpoenas for documents and/or attendance at proceedings that are directed to this office, or to OAG employees, including those directed to "the custodian of records." Compliance with a subpoena is a legal matter often involving multi-faceted issues of law and must therefore be handled by an attorney. While the assigned attorney may need to consult with and/or seek the assistance of non-attorneys in performing this work, the decisions about what action(s) will be taken regarding compliance must be made by the attorney, and the attorney must oversee and co-ordinate the involvement of any non-attorneys whose help has been enlisted.

A second area of legal concern deals with the issuance of press releases and other public statements on behalf of the Office of Attorney General. As an agency devoted to the practice of law all press releases have the potential to effect current cases as well as expose the office and it's employees to liability in the federal or state courts. Several recent cases have cited the contents of press releases and public statements to support various allegations of bad faith and illegal or tortious conduct by officials and employees of this agency. Likewise, such releases have jeopardized current appellate cases and important work on behalf of the Commonwealth. Therefore we must insist that all statements and releases issued by the press office or any part of the Office be reviewed for form and legality by either the respective Division Director or the First Deputy before release to the press or any other party. Lawyers are required to insure that all press releases comply with Pennsylvania Rule of Professional Conduct 3.6.

A somewhat related concern deals with the release of agency documents and records in any form. Such a release must only occur after the review and approval by the First Deputy or his designee. Improperly releasing certain documents may harm third parties and create liability for the Office and consequently the taxpayers of Pennsylvania. Moreover, persons releasing said documents could face potential liability. We would also remind you that such records are Commonwealth property and may only be used for official agency purposes.

You should take note that all Commonwealth employees have an affirmative duty to comply with the laws of the state and to consult and follow the advice of agency legal counsel. Such cooperation is a condition for the receipt by the individual of Commonwealth defense and indemnification in the event that individual is the subject of a legal or equitable action arising from acts taken under the color of public service.

We remain available to discuss the above with you and your subordinates. Please know that we expect full compliance with the principles set forth above.

cc Kathleen Kane, Attorney General