IN THE SUPREME COURT OF MISSISSIPPI

CAUSE NO. 2011-IA-00456-SCT

HALEY BARBOUR, GOVERNOR OF THE STATE OF MISSISSIPPI — APPELLANT

VS.

WILLIAM J. MCCOY, SPEAKER OF THE HOUSE OF REPRESENTATIVES; REPRESENTATIVE JOHNNY W. STRINGER; and JIM HOOD, ATTORNEY GENERAL FOR THE STATE OF MISSISSIPPI *EX REL.* THE STATE OF MISSISSIPPI — APPELLEES

On Appeal from the Chancery Court of Hinds County, Mississippi, First Judicial District

BRIEF OF APPELLEES

ORAL ARGUMENT IS NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Haley Barbour, Governor of the State of Mississippi, appellant-defendant.
2. Michael B. Wallace and James D. Findley, Wise, Carter, Child & Caraway, PA, attorneys for appellant-defendant.
3. William J. McCoy, Speaker of the House of Representatives; Representative Johnny W. Stringer; and Jim Hood, Attorney General for the State of Mississippi *ex rel.* the State of Mississippi, appellee-plaintiffs.
4. Meredith M. Aldridge and George W. Neville, attorneys for appellee-plaintiffs.

SO CERTIFIED this the 2nd day of December, 2011.

GEORGE W. NEVILLE, Attorney for Appellees

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STATEMENT OF THE ISSUE

The Attorney General's duty to control litigation involving the public interest creates "a relationship with the State officers he represents that is not constrained by the parameters of the traditional attorney-client relationship."[1] His unique duty to represent both the public interest as well as government offices and officials sometimes causes conflicts that are resolved via *Allain*, not by a traditional application of Mississippi Rule of Professional Conduct 1.7(a).

This Court held many years ago that when the Attorney General must litigate against a government official, the public interest prevails, the Attorney General is not disqualified, and the government official adverse to the Attorney General is entitled to independent counsel. Consistent with this precedent, the Chancery Court denied the Governor's Motion to Dismiss and Disqualify the Attorney General. Now, with continuous full representation by independent counsel (authorized by the Attorney General) on this interlocutory appeal, the Governor urges this Court to ignore *Allain* and apply Rule 1.7(a) to disqualify the Attorney General and dismiss this case in a way that would completely change the legal landscape for current and future Governors and Attorneys General for years to come. The issue presented is whether, despite this clear precedent, Rule 1.7(a) should be applied to the Attorney General to strip him and his Office of the authority to challenge the conduct of other state officials.

STATEMENT OF THE CASE

Whether or not Governor Haley Barbour believes that the courts have authority to order coercive relief against him, or that the Attorney General has a right to file any such suit, the

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[1] *State ex rel. Allain v. Miss. Pub. Serv. Comm'n*, 418 So. 2d 779, 783 (Miss. 1982) (quoting *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1266 (Mass. 1977)).

people of Mississippi undeniably have an interest in having the Governor abide by the Constitution. This interlocutory appeal arises from Governor Barbour's unconstitutional partial veto in 2009 of Senate Bill 2041 and the Chancery Court's rejection of the Governor's procedural attempt to legitimize his unconstitutional veto by disqualifying the Attorney General.

Mississippi law sets limits on the Governor's veto power over the Legislature's authority to appropriate funds for specific purposes. An appropriations bill contains conditions that limit the purposes for which the funds may be used. A partial veto may never strike a condition while permitting the recipient to still use the funds. *Fordice v. Bryan*, 651 So. 2d 998, 1002 (Miss. 1995); *Barbour v. Delta Correctional Facility Auth.*, 871 So. 2d 703, 711 (Miss. 2004).

Senate Bill 2041 contained the Department of Public Safety's appropriation for Fiscal Year 2010. Section 1 of the bill appropriated $74 million to DPS, subject to certain conditions. [Senate Bill 2041, R. 1:7-23].[2] Governor Barbour did not veto Section 1 or any expenditure of funds under the bill. Rather, contrary to law, the Governor vetoed the sections of the bill that set conditions under which certain money could be drawn for certain purposes. [*Id.* at 1:20-21]. This attempted veto tried to strike three-and-a-quarter million dollars for raises for certain law enforcement officers. Governor Barbour's veto message stated that he would spend those funds as he saw fit, regardless of the conditions. [Veto Message, R. 1:1:24]. That action was unconstitutional.

Appellee-plaintiffs House Speaker Billy McCoy, Representative Johnny Stringer, and Attorney General Jim Hood filed a complaint in Chancery Court for injunctive and declaratory relief, challenging the Governor's improper veto. [Complaint, R. 1:1-38]. The Attorney General

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[2] Record citations herein use the form "R.[volume]:[page]."

filed the suit as a plaintiff in his official capacity and on behalf of the State of Mississippi. [*Id.*].

From the outset of the lawsuit, Governor Barbour has been represented by his private attorneys of record on this appeal, Michael B. Wallace and James D. Findley of Wise Carter Child & Caraway, PA. They filed various Motions to Dismiss, asserting that the Governor was immune from suit, that the court lacked jurisdiction, and that the suit was premature. They also filed a Motion to Dismiss and Disqualify the Attorney General pursuant to Miss. R. Prof. Conduct 1.7(a). [Motion to Dismiss and Disqualify, R. 1:39-43]. Then the appellee-plaintiffs filed a Motion for Summary Judgment. [Motion for Summary Judgment, R. 1:61-64]. Finally, the Governor filed an additional Motion to Dismiss asserting that the case was moot. [Motion to Dismiss, R. 1:113-15].

Governor Barbour's Motion to Dismiss and Disqualify claimed that the Attorney General lacked authority to file the lawsuit on behalf of the State of Mississippi. [Motion to Dismiss and Disqualify, R. 1:39-43]. The Governor further claimed that Miss. R. Prof. Conduct 1.7(a) barred the Attorney General from personally representing his co-plaintiffs because the Attorney General was serving as counsel for the Governor in another case, and that no other attorneys in the Attorney General's Office could represent his co-plaintiffs because of Mississippi Code section 7-5-5. [*Id.*].

The Chancery Court conducted a hearing and entered an Order and Opinion denying the Governor's Motion to Dismiss and to Disqualify the Attorney General pursuant to Miss. R. Prof. Conduct 1.7(a). [Order, R. 2:215-218]. The Order and Opinion held that pursuant to Mississippi Code sections 7-5-1 and 7-5-39, the Attorney General should not be disqualified because he is the chief legal officer of the state, charged with managing all litigation on behalf of the state, and also responsible for representing state officers in litigation. [*Id.* at R. 2:217]. The Chancery

Court added that Mississippi Code section 7-5-5 requires the Attorney General to designate three assistant attorneys general to defend governors against lawsuits, thereby resolving any potential conflicts of interest. [*Id.* at R. 2:217-18]. None of the other pending motions was decided by the Chancery Court.

The Governor filed a Motion for Reconsideration, arguing that the Attorney General's alleged Rule 1.7(a) conflict was not resolved through his representation by Wallace and Findley, that the Chancery Court's opinion regarding section 7-5-5 was error, and that the Attorney General and the attorneys representing him on the case should be disqualified. Following another hearing, the Chancery Court denied the Motion for Reconsideration.

Then Governor Barbour filed a Petition for Interlocutory Appeal as to his Motion to Dismiss and Disqualify the Attorney General, which this Court granted.

SUMMARY OF THE ARGUMENT

The Attorney General has the authority and the duty to protect the public interest by, when necessary, litigating against public officials including the Governor. Other duties of the Attorney General include controlling and managing all litigation on behalf of the state and its officials. While these duties may appear to be a source of potential conflicts, such as when the Governor and the Attorney General are parties on opposite sides of a lawsuit, well-settled law resolves any nascent conflict.

The landmark case is *State ex rel. Allain v. Mississippi Public Service Commission*, 418 So. 2d 779 (Miss. 1982). In *Allain*, this Court considered what happens when the Attorney General is adverse to another official or agency. It held that the Attorney General should not be disqualified, and that the official on the other side should have independent outside counsel.

The reasoning behind *Allain* is sound. The Attorney General's "paramount duty" is to

protect the public interest. Inevitably, he or she will disagree with another official about how best to do that. When that happens, the Attorney General must not be prevented from representing the public interest, and the official who is adverse to the Attorney General must be afforded independent counsel, unfettered by the Attorney General. And that is exactly what has happened in this case.

The Attorney General — like all government lawyers — is often in situations that have no analog in the private practice of law. In fact, the Mississippi Rules of Professional Conduct recognize that. Although Rule 1.7 does prohibit an attorney from representing a client when that representation might harm the interests of another client, the comments to the rule make clear that the rule does not always apply to government lawyers. It states that "government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party." Also, a government lawyer "may be authorized to represent several government agencies in intra governmental legal controversies where a private lawyer could not represent multiple private clients."

The comments caution that a disqualification argument "should be viewed with caution" because "it can be misused as a technique of harassment." The rules "can be subverted when they are invoked by opposing parties as procedural weapons."

Ultimately, whether a disqualifying conflict exists comes down to a consideration of the purpose of the rules. Rule 1.7, and others such as Rule 1.6, are designed to protect the client's interests in having the benefit of a lawyer whose loyalties are to the client and who will not compromise client confidences. In this case, the Governor has, and has had since the inception of this lawsuit, supremely competent and independent attorneys from an outside law firm. They have been free to represent the Governor without any influence or interference by the Attorney

General or his staff. And the Governor has not shown that any client confidences are in danger of being compromised; indeed, the Attorney General has no knowledge that might enable him to so compromise a confidence.

Additionally, several other courts around the country have rejected the Governor's same disqualification argument in their respective jurisdictions. When reaching that conclusion, and consistent with *Allain*, a clear majority of courts have reasoned that their attorneys general are not constrained by private lawyer conflict-of-interest rules when litigating against other state officials to protect an important public interest. That sound reasoning applies with equal force to this case.

The Chancellor correctly held that the Attorney General should not be disqualified. This Court should affirm that holding.

ARGUMENT

It has long been settled that Mississippi's independently elected Attorney General can litigate against the Governor, other elected or appointed state officials, and other arms of the government on matters of statewide importance. The Governor is not immune from suit when he exercises executive power in an unconstitutional manner, and the Attorney General has the duty to protect the public interest and authority to litigate against the Governor. *See, e.g., Barbour v. Delta Correctional Facility Auth.*, 871 So. 2d 703, 710-11 (Miss. 2004); *Fordice v. Bryan*, 651 So. 2d 998, 1003 (Miss. 1995). The Attorney General also has authority to litigate for and against opposing state officials and agencies. *Dye v. State ex rel. Hale*, 507 So. 2d 332, 338 (Miss. 1987); *Alexander v. State ex rel. Allain*, 441 So. 2d 1329, 1334 (Miss. 1983). The Attorney General may even defend the Mississippi Constitution by directly suing other constitutional officers. *State ex rel. Moore v. Molpus*, 578 So. 2d 624, 632 (Miss. 1991). When

that has been necessary, this Court has held that "[t]here can be no serious doubt of the standing of the Attorney General, in his official capacity, to bring [the] action on behalf of the State of Mississippi." *Id.*

In spite of these well-established principles, three years ago Governor Barbour tried and failed to convince this Court that the Attorney General lacks the authority to sue him. In *Barbour v. State ex rel. Hood*, 974 So. 2d 232 (Miss. 2008), Governor Barbour argued that there was no authority to sue him for issuing a writ of election contrary to state law. While this Court agreed with Governor Barbour as to the validity of his writ, it did not find any jurisdictional defect based on the Attorney General's authority to file suit. *Id.* at 238-43. In the wake of that defeat, Governor Barbour has gone back to the "old drawing board" and returned with a new anti-authority argument that he neglected to make in *Barbour v. State ex rel. Hood*: that the Attorney General is always absolutely disqualified from litigating against the Governor based on Rule 1.7(a) of the Rules of Professional Conduct. This new contention is also incorrect.

I. *Allain v. Mississippi Public Service Commission* Already Decided the Issue.

A. *Allain* Precludes the Attorney General's Disqualification from this Case.

Nearly thirty years ago, this Court held that when a conflict develops between the Attorney General and another officer, agency, or arm of the state, the Attorney General is not disqualified from litigating against that officer or entity. *State ex rel. Allain v. Miss. Pub. Serv. Comm'n*, 418 So. 2d 779 (Miss. 1982). The Attorney General's paramount duty is "to protect the interest of the general public" which trumps any duty to represent the contrary interest of a governmental officer. The Governor's disqualification argument is contrary to this settled law.

Allain began as a utility rate increase case before the Public Service Commission. *Id.* The Commission was represented by an assistant attorney general assigned to it full time, as well

as a part-time special counsel hired by the Commission. *Id.* at 779-80. Both attorneys were subject to discharge by the Attorney General at any time. Their employment required the Attorney General's consent, and the Attorney General was authorized to set their rate of pay. *Id.* at 780 (citing MISS. CODE ANN. §§ 7-5-5, 77-1-13 (1972)).

The Commission held public hearings on the rate increase and several parties intervened. *Id.* On the first day of the hearings, the Attorney General personally appeared at the proceeding, announced "I am representing the Commission and the public," and participated in the examination of witnesses. *Id.* The Attorney General also named a seven-member task force from his office to assist in the rate case. *Id.*

After the Commission granted the rate increase in part and denied it in part, both the utility and the intervenors appealed its decision to Hinds County Chancery Court. *Id.* During the appeal, the Attorney General moved to intervene on behalf of the State of Mississippi (a ratepayer) and on behalf of the people of the State of Mississippi (because taxpayers pay the State's utility bills). *Id.* The chancery court took the motion under advisement and allowed the Attorney General to participate in the appeal, but ultimately denied the motion to intervene before reaching a decision on the merits. *Id.* at 781. The Attorney General then appealed the chancellor's decision to this Court. *Id.*

On appeal the issue was specifically whether the Attorney General had any right to litigate on behalf of the State against the Public Service Commission. *Id.* As an initial matter, this Court restated that the Attorney General's duty to protect the public interest is well-founded on constitutional, common law, and statutory authority:

> [i]n *State v. Warren*, 254 Miss. 293, 307, 180 So. 2d 293, 299 (1965), this Court outlined generally the common law duties of the attorney general saying:

> At common law the duties of the attorney general, as chief law officer of a realm, were numerous and varied. He was chief legal adviser of the crown, was entrusted with management of all legal affairs, and prosecution of all suits, criminal and civil, in which the crown was interested. He had authority to institute proceedings to abate public nuisances, affecting public safety and convenience, to control and manage all litigation on behalf of the state, and to intervene in all actions which were of concern to the general public.
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> Later, in *Gandy v. Reserve Life Insurance Company*, 279 So. 2d 648, 649 (Miss. 1973), speaking to the attorney general's common law powers and authority, the Court said:
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> The Attorney General is a constitutional officer possessed of all the power and authority inherited from the common law as well as that specifically conferred upon him by statute. This includes the right to institute conduct and maintain all suits necessary for the enforcement of the laws of the state, preservation of order and *the protection of public rights*.
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> Also, consistent with this Court's pronouncement with reference to the attorney general being a constitutional officer and possessed with common law duties, Mississippi Code Annotated section 7-5-1 (1972) provides in part:
>
> The attorney general provided for by section 173 of the Mississippi Constitution shall be elected at the same time and in the same manner as the governor is elected. . . . He shall be the chief legal officer and advisor for the state, both civil and criminal, and is charged with managing all litigation on behalf of the state. No arm or agency of the state government shall bring or defend a suit against another such arm or agency without written approval of the attorney general. He shall have the powers of the attorney general at common law and is given the sole power to bring or defend a lawsuit on behalf of a state agency, the matter of which is of state-wide interest.

Id. at 781-82 (some internal citations omitted and emphasis supplied by *Allain* court). Next, taking into account the Attorney General's dual role of representing the public interest *and* various officers and arms of the government, it was obvious that conflicts would arise from time to time. This Court explained that

> [i]t is glaringly apparent from the pronouncements of this Court, cited above with reference to the attorney general's common law duties and the statute which reaffirms those duties, that he will be confronted with many instances where he

> must, through his office, furnish legal counsel to two or more agencies with conflicting interest or views. It is also readily apparent that in performing their duties, the agencies will from time to time make decisions, enter orders, take action or adopt rules and regulations which are, in spite of good intentions, either illegal or contrary to the best interest of the general public.
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> Under our scheme of laws, the attorney general has the duty as a constitutional officer possessed with common law as well as statutory powers and duties to represent or furnish legal counsel to many interests — the State, its agencies, the public interest and others designated by statute.

Id. at 782. Notwithstanding the duty to represent state government units, it was equally clear the Attorney General's duty to protect the public interest is always his most important function. Stated plainly, "[p]aramount to all of his duties, of course, is his duty to protect the interest of the general public." *Id.*

In light of that paramount duty, this Court considered how to resolve the inevitable conflicts between the public interest and individual officers and offices. It looked to the majority and minority rules applied in other states for guidance. *Id.* A majority of states recognized that where — as in Mississippi — the attorney general has common law powers, he should not be precluded from participating "in all suits affecting the public interest when he has no personal interest therein." *Id.* at 783. The minority view was that an attorney general could not advocate against a governmental body that he or she also had a duty to represent. *Id.* at 784.

This Court chose the majority rule, holding that it "will afford the maximum protection to the public interest as well as afford complete legal representation to the various state agencies." *Id.* Further, the *Allain* decision established that when the public interest conflicts with a state entity, the conflict should not be resolved by disqualifying the Attorney General. Rather,

> [his] large staff can be assigned in such manner as to afford independent legal counsel and representation to the various agencies. The unique position of the attorney general requires that when his views differ from or he finds himself at odds with an agency, then he must allow the assigned counsel or specially

> appointed counsel to represent the agency unfettered and uninfluenced by the attorney general's personal opinion. If the public interest is involved, he may intervene to protect it.

Id.

Allain thus firmly established two important and related points. First, when the Attorney General must choose between representing the public interest or an arm of the government, the public interest prevails. Second, in such a case, the Attorney General is not disqualified from litigating on behalf of the public interest. He or she may do so, while the government unit should be allowed to retain specially appointed counsel who is "unfettered and uninfluenced" by the Attorney General's personal opinion.

In this case, the first *Allain* factor is present. The public has an interest in seeing that the Governor does not exercise his veto powers in an unconstitutional manner.[3] The Attorney General's decision to represent the public interest here, where it is opposed to the Governor's self-interest, is consistent with *Allain*.

Also, the second *Allain* requirement has been met. Governor Barbour has independent counsel. The Attorney General should not be disqualified.

B. The Attorney General Has Complied With *Allain* in this Case and Every Other Case Where the Governor Has Been Entitled to Independent Counsel.

To prevent any potential ethical conflict between the Governor and the Attorney General in this case, independent counsel from the law firm of Wise Carter Child & Caraway, PA have represented the Governor. These highly regarded attorneys have never been constrained by the Attorney General's personal opinion, either in the trial court below, or in this appeal.

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[3] Constitutional limits on veto powers are an important public interest. *See, e.g.*, *Barbour*, 871 So. 2d at 703; *Fordice*, 651 So. 2d at 998; *State v. Holder*, 23 So. 643 (Miss. 1898).

The procedure in this case has been consistent with every other instance when the Attorney General has litigated against the Governor on behalf of the public interest. Each time, consistent with *Allain*, the Governor has had his own independent counsel, unfettered and unconstrained by the Attorney General.[4]

Each time the Governor and the Attorney General have been co-defendants, but have disagreed on how best to serve the public interest, the Governor has had his own independent counsel, unfettered and unconstrained by the Attorney General.[5]

At times, the Governor and the Attorney General have disagreed on how best to serve the public interest in cases where the Attorney General was neither a party nor a party's counsel. Each time, the Governor has had his own independent counsel, unfettered and unconstrained by the Attorney General.[6]

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[4] *See Barbour v. State ex rel. Hood*, 974 So. 2d 232 (Miss. 2008); *Barbour v. Berger*; 2008-M-01534-SCT (Miss. Sept. 18, 2008); *Hood ex rel. State Tobacco Litigation*, 958 So. 2d 790 (Miss. 2007); *Barbour v. Delta Correctional Facility Authority*, 871 So. 2d 703 (Miss. 2004). Notably, Governor Barbour never contended that the Attorney General, or any attorneys employed in his office, should have been disqualified from participating in these lawsuits against him due to a 1.7(a) conflict.

[5] *See Miss. State Democratic Party v. Barbour*, 529 F.3d 538 (5th Cir. 2008); *NAACP v. Barbour*, 2011 WL 1870222 (S.D. Miss. May 16, 2011); *Smith v. Clark*, Civil Action No. 3:01cv855-HTW-DCB (S.D. Miss.). Just as in cases where he has appeared on opposite sides of litigation from the Attorney General, Governor Barbour has never contended the Attorney General, or any attorneys in his office, should be disqualified from participating in these cases.

[6] *See HSBC Securities (USA), Inc. v. Barbour*, No. 2011-CA-00634-SCT; *Ayers v. Thompson*, 358 F.3d 356 (5th Cir. 2004). The Brief of the Appellant inaccurately summarizes what took place in HSBC Securities. In that case, Governor Barbour wanted to take a legal position with which the Attorney General disagreed. The Attorney General did not prevent Governor Barbour from taking the legal position. Rather, consistent with *Allain* and without objection, attorneys in the Attorney General's office ceased representation and the Governor retained outside counsel. No attorneys constrained by the Attorney General's personal opinion were involved in that case. Indeed, the same attorneys who represent the Governor on this appeal were his counsel of record in the *HSBC Securities* matter.

Throughout the past eight years, the Attorney General's Office has represented Governor Barbour, and occasionally been forced to litigate against him.[7] On every occasion where Governor Barbour's self-interests have departed from the Attorney General's opinion of the public interest, Governor Barbour has been represented by his own lawyers. The Attorney General has consistently followed *Allain* every time Governor Barbour's actions have forced him to do so. This case is no different. The result reached by the trial court in this matter should therefore be affirmed.

C. Governor Barbour's "By: Jim Hood, Attorney General" Pleading Argument is Irrelevant.

The requirements of *Allain* are clear. It is equally clear that Governor Barbour is represented by private attorneys of his choosing in this case, just like every other instance *Allain* has required it. In his brief, as he did in the chancery court below, Governor Barbour erroneously contends that the Attorney General *personally* represents him in other cases. The name of the Attorney General on a pleading, without more, does not mean the Attorney General has personally appeared in the case.

In the first place, Governor Barbour's form pleadings argument is misleading. The Governor contends that attorneys in the Attorney General's Office have appeared for the Governor in other cases that include the notation "By: Jim Hood, Attorney General" on filed

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[7] The *Allain* Court apparently did not find it significant that the Public Service Commission did not object to Attorney General Allain's action against it in that appeal, otherwise, the Court surely would have said so in its opinion. But since Governor Barbour finds significance in that fact at page 20 of his brief, it should not escape this Court that — as chronicled above — the Governor has litigated adverse to the Attorney General and been represented by attorneys in the Attorney General's Office throughout his eight-year tenure. Only now, when Governor Barbour is at the end of his tenure, has he chosen to assert his dubious conflicts argument for the first time.

pleadings. He says that pleadings notation means that Attorney General Jim Hood personally represents the Governor in every single case any such pleading is filed.

The pleadings notation "By Jim Hood, Attorney General" on papers filed by the Attorney General's Office merely signifies a filing by attorneys in the Attorney General's Office. [Affidavit of Roger Googe, R. 2:266; Affidavit of Billy L. Gore 2:267]. It is a practice that has been followed for years. The Attorney General's personal bar number and signature are not included.[8] Governor Barbour's references to the practice proves nothing more than an intent to signify the pleadings have been filed by Attorney General's Office. It does not prove the Attorney General has appeared personally whenever the practice has been used, because, in fact, it does not mean that.

Governor Barbour cannot point to a single instance — in a current or even past matter — where the Attorney General has appeared in court on his behalf, or actually signed any pleading on his behalf. Furthermore, the Governor has never disclosed any confidential client information personally to the Attorney General, or sought advice from the Attorney General personally. To the contrary, and in spite of "By: Jim Hood, Attorney General" appearing on pleadings, Governor Barbour has proclaimed the Attorney General personally does not represent him. [January 5, 2010 Letter, R. 3:366-68]. The Attorney General has never had a personal attorney-client relationship with the Governor.

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[8] Governor Barbour's reliance on federal Local Rule 11(a) and rules applicable to out-of-state lawyers in this Court fails to credit this point. Appellant Br. at pp. 14-15. The Governor wants the Attorney General to have "co-counsel" status pursuant to federal local rules but he neglects to mention that same Local Rule 11(a) requires attorneys to include their bar number if they are counsel on the case. Similarly, Governor Barbour neglects to acknowledge that the purpose of this Court's *pro hac vice* rules is to require foreign attorneys to include their names on pleadings so the Court can keep up with how many matters the attorneys appear on in any given year. M.R.A.P. 46(b)(8).

More importantly, even if the Attorney General could be considered the Governor's personal lawyer, disqualification is not appropriate here in light of *Allain*. In *Allain*, there was no dispute that Attorney General Allain was personally involved in the case. Initially, Attorney General Allain personally appeared on behalf of the Public Service Commission. 418 So. 2d at 780. Later, in the very same matter, Attorney General Allain proceeded adversely to the Commission on appeal. *Id.* In spite of that personal involvement, Attorney General Allain was not disqualified. *Id.* at 784. Appointment of an independent counsel relieved any conflict in proceeding adverse to the Commission on behalf of the public interest. *Id.*

If Governor Barbour could prove the Attorney General has ever personally represented him, that would simply put Attorney General Jim Hood personally in the same position now as Attorney General Bill Allain was in 1982. The Attorney General is proceeding adverse to another arm of the government on behalf of the public interest. Whether or not the Attorney General personally represents him is of no moment. Governor Barbour has been provided his *Allain* remedy.

D. *Allain* Should Not Be Overturned as Governor Barbour Suggests.

Rather than contesting *Allain*'s holding, Governor Barbour argues it should essentially be overturned to prevent a Mississippi Attorney General from challenging unconstitutional actions by a Governor whose office he represents in other matters. Accepting his argument would lead to obvious, unpleasant, and expensive consequences. Because independently advocating the State's interest against gubernatorial impropriety would no longer be compatible with representing Governors in *any other matter*, each Mississippi Attorney General would have to choose a portion of his duties to abdicate now and forever. Lacking middle ground upon which he or she could both represent the State against all lawsuits and sue public officials on its

people's behalf, every Mississippi Attorney General would face two options:

> (1) he or she could strictly do the Governor's bidding in *all* legal matters, *always* advocating the chief executive's view of the statewide interest *even when* he finds it contrary to the public good; or
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> (2) he or she could preserve the option of maintaining public-interest suits against the Governor while avoiding "conflicts" by never representing the Governor in *any* legal matter, with the State *always* paying instead for the Governor to have his own attorneys.

Either scenario would be contrary to well-established Mississippi law and state policy.

The first option would destroy the Attorney General's independent judgment and take away his or her constitutional duty and ability to protect the public interest. The Attorney General would no longer have "the right to conduct, and maintain *all suits necessary* for the enforcement of the laws of the state, the preservation of order, and protection of the public interest." *Capitol Stages, Inc. v. State ex rel. Hewitt*, 128 So. 159, 163 (Miss. 1930) (emphasis added). His authority to maintain "all suits necessary" would be restricted to "all suits necessary, as long as the Governor consents." The Attorney General would likewise no longer have the right "to control and manage all litigation on behalf of the state and to intervene in all actions which were of concern to the general public." *State v. Warren*, 180 So. 2d 293, 299 (Miss. 1965). *See also* MISS. CODE ANN. § 7-5-1 (establishing that the Attorney General "shall be the chief legal officer and advisor for the state, both civil and criminal, and is charged with managing all litigation on behalf of the state"). Instead, the Governor would control and manage all litigation on behalf of the state, because the Attorney General would always have to do whatever the Governor wanted. Furthermore, the Attorney General would not be able to participate in all actions concerning the public; rather, he or she would be reduced to participating only in actions with gubernatorial approval. As explained *infra*, the Mississippi Constitution of 1890 provides

for separate constitutional offices. The Attorney General is not a part of the Governor's cabinet, for one does not exist.

Additionally, if the Governor's paradigm is endorsed by this Court, then the Governor's own authority would be enlarged at the expense of the Attorney General. The Legislature has firmly established that "[n]o arm or agency of the state government shall bring or defend a suit against another such arm or agency without written approval of the attorney general" and that the Attorney General "shall have the powers of the attorney general at common law and is given the sole power to bring or defend a lawsuit on behalf of a state agency, the matter of which is of state-wide interest." MISS. CODE ANN. § 7-5-1. The Attorney General could not withhold consent to intra-governmental disputes, have any independent judgment over how to exercise his common law powers, or have independent authority to bring or defend a suit on behalf of a state agency. By the same token, the Governor's power to "bring any suit affecting the general public interests, in his own name for the State of Mississippi" would no longer be limited by the statutory requirement to "first request[] the proper officer so to do." MISS. CODE ANN. § 7-1-5(n). The Governor could simply bypass the Attorney General every time he or she believes that the public interest is at stake. The Attorney General could never refuse to file suit because his Office would merely be the Governor's subservient.

In short, the first option would inappropriately reduce the Attorney General to what Governor Barbour is really arguing for: a constitutional officer whose "paramount duty is to the public interest" (*see Allain*, 418 So. 2d at 782) while the Governor would be the sole arbiter of what that public interest is.

The second option would also restrict the Attorney General's authority and equally harm the people of Mississippi. If this Court rewrites *Allain* consistent with Governor Barbour's point

of view, the second option would require a complete divorce between the Attorney General's Office and representation of the Governor. That route would destroy the founding principles of the Attorney General's Office just as much as following the Governor's first untenable alternative. In that event, the Attorney General would similarly — only more directly — lose the ability to control and manage all litigation on behalf of the state. *See Warren*, 180 So. 2d at 299; MISS. CODE ANN. § 7-5-1. All litigation involving the Governor would simply be left up to someone else's management and control.

More importantly, if the Attorney General must sacrifice his authority to represent the Governor in order to preserve his authority to sue the Governor when the Governor acts contrary to law, then every officer, agency, and arm of the government could simply hitch their wagons to the Governor's argument. Instead of representing everybody in government, the Attorney General would end up representing nobody. Meanwhile, the State would have to foot the bill for inconsistent, de-centralized, and unsupervised legal services. Either way, Mississippi's interest in maintaining its Attorney General as the chief legal officer of the State would be severely compromised.[9]

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[9] The Governor's proposed new scheme would also damage the very structure of Mississippi's government. The Mississippi Constitution and laws establish a divided executive system, with executive authority dispersed among several elected officers. The Constitution and laws establish the extent to which each official must operate within his or her limited sphere of authority, without encroachment by the Governor or other state officials.

These officers (including the Governor and the Attorney General) must also perform duties and make policy decisions together as co-equal members of various commissions and boards. *See, e.g.*, MISS. CODE ANN. § 23-15-211 (Election Commission); MISS. CODE ANN. § 27-105-35 (Depository Commission); MISS. CODE ANN. §§ 31-17-1 & -101 (Bond Commission); MISS. CODE ANN. § 31-17-11 (Bond Retirement Commission); MISS. CODE ANN. § 69-1-25 (Agriculture Regulation).

Obviously, under this system, independent judgment is required of the Attorney General.

II. Rule 1.7(a) Does Not Disqualify the Attorney General from this Case.

Allain controls this case. Rule 1.7(a) must be read in conjunction with *Allain*. But even if *Allain* did not exist, Governor Barbour still should not be permitted to shield his unconstitutional action from judicial review by invoking Rule 1.7(a). The Attorney General, members of his staff, Governor Barbour's private attorneys, and all other Mississippi attorneys are certainly bound by the Mississippi Rules of Professional Conduct. However, those "rules of reason" should not be applied in an unreasonable manner to achieve Governor Barbour's desired result. *See* MISS. R. PROF. CONDUCT, Scope ("The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.") For several reasons, the Governor's proposed application of Rule 1.7(a) to the Attorney General ignores *Allain* and common sense, and is untenable.

A. The Rules Themselves Explain Rule 1.7(a) Should Not Disqualify the Attorney General in this Instance.

In relying exclusively on the language of Rule 1.7(a), Governor Barbour ignores other relevant portions of the Rules of Professional Conduct that expose the fallacy of his construction. The Rules should not be construed or applied to work disqualification in every instance involving government attorneys.

Governor Barbour's argument is strictly based upon the text of Rule 1.7(a):

> A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless the lawyer reasonably believes:

From time to time, the Attorney General must take positions on these commissions that are adverse to the Governor or other state officials. If the Governor's argument in this case is accepted, the Attorney General would be unable to do that.

> (1) the representation will not adversely affect the relationship with the other client; and
>
> (2) each client has given knowing and informed consent after consultation. The consultation shall include explanation of the implications of the adverse representation and the advantages and risks involved.

MISS. R. PROF. CONDUCT 1.7(a). When construed in a vacuum as Governor Barbour proposes, Rule 1.7(a) means that because the Attorney General's Office represents him in unrelated cases and is adverse to him in this case, the Attorney General and his Office, if there is an absence of a waiver, must be disqualified, and this case dismissed. In the field of a private attorney and client, the Governor's argument would make sense.

However, this case does not arise in a private attorney-client context. Rule 1.7(a) cannot be interpreted and applied all by itself. Consider the comment to the rule:

> Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, *there are circumstances in which a lawyer may act as advocate against a client. For example . . . government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party.*

MISS. R. PROF. CONDUCT 1.7, comment (emphasis added).[10] By stating that government attorneys are not per se disqualified in every instance where they must represent the government adverse to another part of the government, the drafters of the Rules recognized that Rule 1.7 cannot be applied here in the manner Governor Barbour suggests.

Other portions of the Rules likewise demonstrate that they should not be applied the way

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[10] Rule 1.7's official comment also cautions that a disqualification argument "should be viewed with caution" because "it can be misused as a technique of harassment." MISS. R. PROF. CONDUCT 1.7, comment. Similarly, the Scope of the Rules recognizes they "can be subverted when they are invoked by opposing parties as procedural weapons." MISS. R. PROF. CONDUCT, Scope.

the Governor urges. For example, the Scope of the Rules explains they are not to be applied to obstruct multiple representation by government attorneys in the same manner as they would for attorneys in the private sector:

> 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 the 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 officers. Also, *lawyers under the supervision of these officers may be authorized to represent several government agencies in intra governmental legal controversies where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.*

MISS. R. PROF. CONDUCT, Scope (emphasis added). Likewise, the official comment to Rule 1.13 dealing with organizational clients concedes that government attorneys are not constrained by unwavering allegiance to government clients when the legality of those clients' actions are challenged:

> The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority.

MISS. R. PROF. CONDUCT 1.13, comment. As these provisions recognize, there is a difference

between attorneys in the public and private sectors. Given these instances where the Rules point to exceptions in matters involving government counsel, applying Rule 1.7(a) to the Attorney General and his Office in the manner suggested by Governor Barbour inappropriately ignores these distinctions.

B. Applying Rule 1.7(a) to Disqualify the Attorney General Here Would be Inconsistent with the Rule's Purpose.

While the letter of the rule and selected Restatement passages might support disqualification of a private attorney from this case, the Governor cannot demonstrate that the Attorney General's proceeding against him here would thwart the rule's purpose.

For example, as the comments to Rule 1.7 make clear, the rule is designed to protect loyalty, which is "an essential element in the lawyer's relationship to a client." The rule also seeks to ensure that client confidences, such as those subject to Rule 1.6, are protected. Governor Barbour has not come forward with any evidence that the Attorney General or any attorneys in his office have ever departed from accepted standards of loyalty in representing the Governor in other cases. Likewise, the Governor has not identified a single client confidence related to this or any other case that has been compromised by the Attorney General's participation in this lawsuit.[11]

C. Rule 1.7(a) Disqualification Would Be Inconsistent With the Attorney General's Dual Duty to Represent the Public Interest and Public Officers.

The Attorney General's obligations to two discrete sets of clients are incompatible with the Governor's proposed per se application of Rule 1.7(a). The dual role of the Attorney General

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[11] As further discussed below, other courts that have rejected Governor Barbour's same argument found the lack of involvement of client confidences significant when holding conflicts of interest rules do not apply strictly to attorneys general in the manner suggested by the Governor here. *See, e.g., People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1231 (Colo. 2003).

does not exist for private attorneys.

The Attorney General's first set of clients is the people and the public interest. As *Allain* explained, and this Court has recognized on numerous other occasions, the Attorney General's paramount duty is to protect the public interest. *See Allain*, 418 So. 2d at 782. To that end, as the chief legal officer of the State, the Attorney General is vested with common law powers, including to "institute proceedings to abate public nuisances affecting and endangering public safety and convenience," to "intervene in all actions which were of concern to the general public," and "to conduct and maintain all suits necessary for the enforcement of the laws of the state, the preservation of order, and protection of public rights." *Capitol Stages*, 128 So. at 763.

The Attorney General's second set of clients includes state agencies, officers, other arms of the government, and the state itself. *See, e.g.*, MISS. CODE ANN. §§ 7-5-1, -25, -29, -39. Centralized representation through the Attorney General and his office is mandated. MISS. CODE ANN. § 7-5-1. The requirement that the Attorney General manage all litigation on behalf of the State promotes consistency and uniformity of representation in matters involving the government and its officials.

Occasionally, the Attorney General will have two sets of clients with adverse interests in a particular case, such as this one. But unlike a private lawyer, who may pick and choose his clients by declining representation or withdrawing from it, the Attorney General is obligated by law to represent both. Rule 1.7(a), concerned primarily with private lawyers and the private practice of law, is incompatible with the Attorney General's dual role if applied in an absolutist fashion.

D. Other Jurisdictions Have Overwhelmingly Rejected Use of Ethical Conflicts Rules to Eliminate Attorney General Authority to Litigate on Behalf of the Public Interest.

While the Attorney General's dual role in protecting the public interest and representing government officials is unique, ill-conceived challenges to public-interest authority of attorneys general premised on alleged ethical conflicts are not. Governor Barbour's argument has failed on numerous occasions in many other jurisdictions.

1. South Carolina rejected the Governor's precise argument in *Condon v. Hodges*.

In *State ex rel. Condon v. Hodges*, which arose out of a similar partial-veto dispute, the South Carolina Supreme Court rejected the very same position Governor Barbour presents on this appeal. 562 S.E. 2d 623 (S.C. 2002). The facts in *Condon* were strikingly similar to the facts here. The South Carolina General Assembly passed a 2001 General Appropriations Act that included base-line reductions to recurring budgets of the state's colleges and universities and ordered the state treasurer to transfer certain funds to the schools. *Id.* at 625-26. The governor vetoed portions of the Act and changed the manner of funding. *Id.* at 626. The maneuver left the state budget out of balance, which was ultimately remedied by a reduction in the amount of money the schools got. *Id.*

South Carolina's independently elected attorney general, in his official capacity, filed suit against the governor over the constitutionality of his actions. The governor raised exactly the same jurisdictional defenses as Governor Barbour has here, namely that the attorney general had no authority to sue the governor and the representation constituted an impermissible conflict of interest. *Id.* at 626-29. The South Carolina Supreme Court rejected the governor's "lack of authority" argument for three reasons.

First, the supreme court recognized the attorney general was required to

> appear for the State in the Supreme Court and the court of appeals in the trial and argument of all causes, criminal and civil, in which the State is a party or interested, and in these causes in any other court or tribunal when required by the Governor or either branch of the General Assembly.

Id. at 627 (quoting S.C. Code Ann. § 1-7-40 (Supp. 2001)). The state was obviously an interested party in the action because the handling of public funds and the governor's alleged violation of separation of powers were "clearly questions in which the State has an interest." *Id.* More important, no provision in the South Carolina code or Constitution explicitly prevented the Attorney General from bringing a civil action against the governor:

> As chief law officer of the State, [the Attorney General] may, in the absence of some express legislative restriction to the contrary, exercise all such *power* and *authority as public interests may from time to time require*, and may institute, conduct and maintain all such suits and proceedings as *he deems* necessary for *the enforcement of the laws of the State*, the *preservation of order*, and the *protection of public rights*.

Id. at 627 (quoting *State ex rel. Daniel v. Broad River Power Co.*, 153 S.E. 537, 560 (1929), *aff'd*, 282 U.S. 187 (1930)) (emphasis added by *Daniel* court).

Second, the attorney general had authority to bring the suit because his duty to the public trumped his purportedly conflicting duties to the governor:

> The Attorney General has a dual role. He is an attorney for the Governor and he is an attorney for vindicating wrongs against the collective citizens of the state. Allowing the Attorney General to bring an action against the Governor when there is a possibility the Governor is acting illegally is consistent with the duties of this dual role. Further, because the office of the attorney general exists to properly ensure the administration of the laws of this State, the Attorney General is merely ensuring that [the appropriation law] is being administered the way in which the General Assembly intended.
>
> The above precepts lead to the conclusion that the Attorney General can and should bring an action against the Governor if there is the possibility the Governor is acting improperly.

Id. at 627-28 (citations omitted).

Third, the attorney general had previously sued the governor on several occasions, even though the issue of the attorney general's authority to sue the governor had not been squarely raised in those actions. *Id.* at 628.

Based on all three of these reasons, the court concluded that "the Attorney General has the authority to sue the Governor when he is bringing the action in the name of the state for the purpose of ascertaining that a separation of powers violation occurred" and "the Attorney General can bring an action against the Governor when it is necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights." *Id.*

Then, the South Carolina Supreme Court turned to the governor's contention that a Rule 1.7 conflict of interest disqualified the attorney general. The governor argued that the attorney general had a duty to represent him in the case, if requested, and that would place the attorney general on both sides of the lawsuit. The governor also complained that the attorney general was representing the governor in other legal matters, and thus could not ethically bring a case against him. *Id.* The South Carolina Supreme Court rejected the governor's Rule 1.7 argument because the court had previously held that similar conflicting duties did not produce an ethical conflict, and the governor's position was incompatible with the attorney general's dual role representing state officials and the general public. Specifically, the court held that "[w]hile the attorney general is required by the Constitution to 'assist and represent' the Governor, the Attorney General also has other duties given to him by the General Assembly, and elaborated on by the Court, which indicate the Attorney General can bring an action against the Governor." *Id.* at

629.[12] The conflicts argument failed.

The facts in *Condon* are virtually identical to the facts in this case, as both concern an illegal partial veto. More importantly, Mississippi law is identical to the South Carolina law applied by the *Condon* court. The reasons why the attorney general could sue the governor, and why Rule 1.7 did not prohibit it, are just as well-established in Mississippi law as they were in South Carolina:

> (1) No provision in the Mississippi Code or Constitution bars the Attorney General's suit against Governor Barbour; furthermore, the Attorney General has the right to bring all suits necessary to protect the public interest. *See, e.g., Gandy*, 279 So. 2d at 649; *Warren*, 180 So. 2d at 299; *Dunn Constr.*, 2 So. 2d at 175; *Capitol Stages*, 128 So. at 763;
>
> (2) The Attorney General has a dual role in representing the public interest and individual officers of the government, and the public interest should prevail when the two may conflict. *See Allain*, 418 So. 2d at 784; and
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> (3) The Attorney General has litigated adverse to other government officials on numerous occasions. *See, e.g., Barbour*, 974 So. 2d at 238-43; *Delta Correctional Facility Authority*, 871 So. 2d at 710-11, *Fordice*, 651 So. 2d at 1003; *Molpus*, 578 So. 2d at 632.[13]

In this case, this Court should reach the same conclusion as *Condon*. Our cases, statutes, and Constitution demand it.

2. The Governor's Brief tries, but fails, to distinguish *Condon*.

Condon refutes Governor Barbour's argument in factually similar circumstances, which is

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[12] Notably, the South Carolina Supreme Court recognized in its holding that this Court's decision in *Fordice v. Bryan*, 651 So. 2d 998 (Miss. 1995), and several cases from other states, support the proposition that the Attorney General has not been prohibited from suing the governor. *Condon*, 562 S.E. 2d at 629 & n.8.

[13] *Condon* is different from this case in one respect. The South Carolina Supreme Court recognized that the attorney general had sued other government officers on occasion, but the authority argument was never raised. Here, Governor Barbour himself has raised the authority issue in this Court before, and it was rejected. *See Barbour*, 974 So. 2d at 238-43.

why he tries so hard to distinguish it. Specifically, Governor Barbour says *Condon* is irrelevant because South Carolina grants "statutory authority" to sue the governor while Mississippi does not. Governor Barbour's reading of *Condon* is inaccurate.

First, *Condon* did not simply rely on "statutory" authorization for the attorney general's lawsuit. Rather, it was the **absence of any prohibition to suit** which was outcome determinative for the South Carolina Supreme Court. South Carolina's attorney general had the authority to "institute, conduct and maintain all such suits and proceedings as *he deems* necessary for *the enforcement of the laws of the State*, the *preservation of order*, and the *protection of public rights*." *Condon*, 562 S.E.2d at 627 (quoting *State ex rel. Daniel v. Broad River Power Co.*, 153 S.E. 537, 560 (1929), *aff'd*, 282 U.S. 187 (1930)) (emphasis added by *Daniel* court).

Like its counterpart in South Carolina, this Court has, on numerous occasions, recognized that the Mississippi Attorney General has the exact same authority: the Attorney General has the power and duty to "institute, conduct, and maintain all suits necessary for the enforcement of the laws of the state, the preservation of order, and protection of the public rights." *Pursue Energy Corp. v. Miss. State Tax Comm'n*, 816 So. 2d 385, 389 (Miss. 2002) (quoting *Dunn Constr.*, 2 So. 2d at 174). Mississippi and South Carolina law are absolutely identical in that regard.

Second, even assuming for the sake of argument that Governor Barbour's "statutory authority" distinction merits consideration, the statute at issue in *Condon* and seized upon by Governor Barbour merely specified where the suit should be filed. South Carolina Code §1-7-40 required the attorney general to pursue his case directly in the South Carolina Supreme Court. Just because Mississippi law does not likewise specify where the Governor may be sued does not mean he cannot be sued. Governor Barbour's attempt to distinguish *Condon* does not diminish the persuasive import of *Condon*'s holding, nor does it negate this Court's previous decisions

that are consistent with *Condon*'s rationale.

3. Similar conflicts arguments have fared no better elsewhere.

In addition to *Condon*, numerous authorities from other jurisdictions also provide good reasons to reject Governor Barbour's conflicts argument here. As in *Fordice v. Bryan*, *Barbour v. Delta Correctional Facility Authority*, and *Barbour v. State ex rel. Hood*, other courts have entertained attorney general challenges to gubernatorial actions without finding any jurisdictional defect based on authority, ethical conflicts, or anything else. *See, e.g.*, *Commonwealth ex rel. Cowan v. Wilkinson*, 828 S.W.2d 610 (Ky. 1992) (attorney general suit against governor over allegedly improper self-appointment decided on the merits rather than lack of authority to sue or ethical constraints);[14] *In re Commonwealth ex rel. Beshear*, 672 S.W.2d 675 (Ky. Ct. App. 1984) (suit against governor over charging admission to view governor's mansion decided on merits, not lack of attorney general authority); *State ex rel. Douglas v. Thone*, 286 N.W.2d 249 (Neb. 1979) (action against governor allowed to proceed over whether implementation of state statute authorizing alcohol production should be enjoined).

Courts have also rejected conflicts arguments in suits brought by attorneys general against constitutional officers when matters of the public interest are at stake. For example, in *People ex rel. Salazar v. Davidson*, the Colorado Supreme Court recognized the common law power of the attorney general to sue the secretary of state and prevent elections from taking place under a

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[14] Several years after *Wilkinson*, the Kentucky Supreme Court determined that its holding on the merits in that case — dismissal of the attorney general's lawsuit against the governor because there was no violation of a personal right sufficient for injunctive relief alleged — was an error and re-affirmed the notion that its attorney general can litigate against other arms of the state. *See Commonwealth ex rel. Conway v. Thompson*, 300 S.W.3d 152, 172 (Ky. 2009). The *Thompson* court held there was "no doubt" about the standing of the attorney general to bring such a suit. *Id.*

redistricting plan that violated the state constitution in the name of the public interest. 79 P.3d 1221 (Colo. 2003). The secretary of state argued that she was the attorney general's client and that the Colorado Rules of Professional Conduct prevented the attorney general from pursuing the action. *Id.* at 1231-32. However, (and just as this case) the secretary could not identify any client confidences that would be breached on account of the suit. The Colorado Supreme Court therefore held that the broader institutional concerns of the state prevailed and that there was no ethical violation. It refused to dismiss the case based on the secretary's argument. *Id.* at 1232.[15]

Governor Barbour's argument has likewise been rejected on numerous occasions in intra governmental disputes involving lesser officers and agencies. Courts have consistently reasoned that the Rules of Professional Conduct do not disqualify attorneys general from litigating against government entities on behalf of the public interest:

- *State ex rel. Commissioner of Transportation v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 773 (Tenn. Ct. App. 2001) (finding unique role of the attorney general precluded application of ethics rules in a manner that would prevent him from litigating against government on behalf of the public interest);

- *Attorney General v. Michigan Public Service Commission*, 625 N.W.2d 16, 34-35 (Mich. Ct. App. 2000) (holding that strict application of Michigan's ethical rules to the attorney general's office was inappropriate where outside counsel could be appointed to protect the agency's adverse interest);

- *Superintendent of Insurance v. Attorney General*, 558 A.2d 1197, 1204 (Me. 1989) (reversing lower court's conclusion that attorney general could not seek judicial review of rate proceedings based on ethical constraints due to the duty to protect the public and

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[15] In addition to *Davidson*'s holding rejecting the argument Governor Barbour is making here, the Colorado Supreme Court also rejected the secretary's historical argument based on an edition of W. Holdsworth's *History of English Law*. 79 P.3d at 1232 & n.5. Contrary to Governor Barbour's reliance on Holdsworth likening himself to the king — as a principal who may not be sued by his agent — in this case, *Davidson* explained "[t]he Attorney General acts as the chief legal representative, *not of a king, but of the state*." *Id.* (emphasis added). No common law limitation on the Attorney General's authority to sue the king in 1607 applies to the Governor in 2011.

agency's having been provided independent counsel);

- *Commission on Special Revenue v. Freedom of Information Commission*, 387 A.2d 533, 537 (Conn. 1979) (explaining the unique position of the attorney general to represent the public "cannot be disregarded in considering the application of the code of professional responsibility to the conduct of his office" and that he can proceed against a state agency because "if the Attorney General is to have the unqualified role of chief legal officer of the state, he or she must be able to direct the legal affairs of the state and its agencies");

- *Gibson v. Johnson*, 582 P.2d 452, 456 (Ore. 1978) (finding ethics rules requiring attorneys to decline multiple representations in the event of a conflict does not apply with equal force to lawyers in attorney general's office who lack the ability to choose whom they represent);

- *EPA v. Pollution Control Board*, 372 N.E.2d 50, 52-53 (Ill. 1977) (recognizing that role of the attorney general is not precisely the same as that of a private attorney, and public interest must not give way to particular interests of state agencies); and

- *Feeney v. Commonwealth*, 366 N.E.2d 1262, 1266-67 (Mass. 1977) (declining to impose a traditional attorney-client conflict dynamic in a manner that would prevent the attorney general from prosecuting an appeal against the wishes of a state agency).[16]

If this Court considers the extreme minority view from other jurisdictions supporting Governor Barbour's contention that he cannot be sued based on an ethical conflict, numerous distinguishing factors demonstrate why this Court should not follow that guidance. For example, Governor Barbour and his private attorneys are no doubt familiar with the California Supreme Court's pre-*Allain* decision in *People ex rel. Deukmejian v. Brown*, 29 Cal. 3d 150, 624 P.2d 1206 (Cal. 1981). In *Brown*, California's attorney general sought constitutional review of labor legislation against the governor and other arms of the state in addition to a separate action brought by other entities. *Id.* at 154. The attorney general withdrew from representation of the governor and state entities prior to filing his petition. *Id.* Nevertheless, the court accepted the governor's argument that a conflict precluded the attorney general's action against him. *Id.* at

[16] These cases also demonstrate *Allain* represents a firm majority rule across the country. Each referenced case decided since *Allain* expressly relied on it in reaching its conclusion.

159-60.

The minority view taken by the *Brown* court cannot apply here for at least three reasons. First, as a matter of fact, before the attorney general went adverse to the state entities, members of the California attorney general's staff had met with members of one of the defendant state entities and discussed legal strategy in responding to the litigation. *Id.* at 154. In this case, that has not happened.

Second, *Brown* reasoned that the attorney general could not maintain the suit in light of the California constitutional provision providing that "[s]ubject to the powers and duties of the Governor, the Attorney General shall be the chief law officer of the State." *Id.* at 158 (quoting Cal. Const. Art. V, § 13). Mississippi's Attorney General is not "subject to" the Governor in this way. *See* MISS. CODE ANN. § 7-5-1 (investing Attorney General as chief legal officer without making him subject to authority of Governor); *Kennington-Saegner Theatres, Inc. v. State ex rel. Dist. Atty.*, 18 So. 2d 483, 490 (Miss. 1944) (explaining Attorney General alone has right to represent state in litigating matters of state-wide importance).

Third, *Brown*'s holding is entirely inconsistent with *Allain*, which was decided after the California Supreme Court's opinion. In *Allain*, this Court did not think it important to even mention *Brown* in its review of authorities from other jurisdictions. 418 So. 2d at 782-83. Moreover, this Court unequivocally chose not to follow the minority viewpoint represented by the few other cases decided like *Brown* in other jurisdictions. *Id.* at 784. Nearly thirty years after *Allain*, this Court should not reverse itself and take the extreme minority position of *Brown* or any other distinguishable cases like it that the Governor may argue support his viewpoint.

III. The Chancery Court's Ultimate Holding Should Be Affirmed.

The chancery court reached the correct conclusion that the Attorney General should not

be disqualified in this matter based upon a Rule 1.7(a) conflict. The court correctly recognized that there is no statutory bar to the Attorney General's suit against the Governor. [Order, R. 2:215-218; Order on Reconsideration, R. 3:422-24]. The court further properly found that MISS. CODE ANN. § 7-5-1 (providing Attorney General is chief legal officer of the State and charged with managing all litigation) and MISS. CODE ANN. § 7-5-39 (prescribing Attorney General's duty to act as counsel to state officers in suits in person or by his assistant) are compatible and do not merit the Attorney General's disqualification in this matter. [Order at R. 2:217; Order on Reconsideration at R. 3:423].

If the chancery court did make any mistake, that was only when it reasoned that "[a]ny conflict of interest that has arisen or may arise in this matter in regards to the Governor essentially being the Attorney General's former client, is resolved by Section 7-5-5." [Order on Reconsideration at R. 3:423]. The court's reference to the Governor as a former client is understandable because that is consistent with the correct determination that Rule 1.7(a) does not apply to the Attorney General in the manner suggested by Governor Barbour.[17] However, as the Governor expressly agrees, Section 7-5-5 does not provide an appropriate remedy when the Governor's actions force the Attorney General to take an adverse position to him.

Instead, as explained above in Section I. A., above, *Allain* prescribes the proper remedy in such circumstances. The Governor has his own independent counsel in this action consistent

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[17] Of course, the Governor has inappropriately tried to reshape the chancery court's reasoning that his relationship with the Attorney General is akin to "essentially . . . former client" status into a finding that he has an ongoing traditional attorney-client relationship with the Attorney General which is entitled to deference. Appellant Br. at pp. 12-13. The chancellor did not find any such traditional ongoing attorney-client relationship. Furthermore, the chancellor did not find any such relationship warranting disqualification under Rule 1.7(a). Rather, the chancery court expressly rejected that contention.

with *Allain*. If anything, the chancery court may have inappropriately opined that Governor Barbour should be assigned three assistant attorneys general to represent him in this lawsuit. But that should not distract this Court from affirming the chancery court's ultimate conclusion. The chancery court should be affirmed if there is any reason sufficient to sustain its decision. *See Stewart v. Walls*, 534 So. 2d 1033, 1035 (Miss. 1988); *Brocato v. Miss. Publishers' Corp.*, 503 So. 2d 241, 244 (Miss. 1987). Indeed, this Court has explained that "[w]e are first interested in the result of the decision, and if it is correct we are not concerned with the route – straight path or detour – which the trial court took to get there." *Hickox v. Holleman*, 502 So. 2d 626, 635 (Miss. 1987) (collecting authorities). The same principle applies in this case. The chancellor correctly held that the Attorney General should not be disqualified from this case based upon Rule 1.7(a). That decision should be affirmed for all the reasons set forth herein, and regardless of the chancellor's determination that Section 7-5-5 provides the Governor's remedy instead of *Allain*.

CONCLUSION

For the reasons set forth above, the Chancery Court's denial of Governor Barbour's Motion to Dismiss and Disqualify the Attorney General should be affirmed.

THIS the 2nd day of December, 2011

Respectfully submitted,

WILLIAM J. McCOY, SPEAKER OF THE HOUSE OF REPRESENTATIVES; REPRESENTATIVE JOHNNY W. STRINGER; and JIM HOOD, ATTORNEY GENERAL FOR THE STATE OF MISSISSIPPI *EX REL.* THE STATE OF MISSISSIPPI

BY: JIM HOOD, ATTORNEY GENERAL
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CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be mailed, via the United States Postal Service, first-class, postage prepaid, a true and correct copy of the foregoing document to the following persons:

Hon. Patricia D. Wise
Chancellor
P.O. Box 686
Jackson, MS 39205

Michael B. Wallace
James D. Findley
Wise Carter Child & Caraway, PA
P.O. Box 651
Jackson, MS 39205-0651

THIS the 2nd day of December , 2011.

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GEORGE W. NEVILLE