IN THE SUPREME COURT OF MISSISSIPPI

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

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

BRIEF OF APPELLANT HALEY BARBOUR, GOVERNOR OF THE STATE OF MISSISSIPPI

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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. William J. McCoy and Johnny W. Stringer, plaintiffs.

2. Jim Hood, relator on behalf of the State of Mississippi, plaintiff and counsel for plaintiffs.

3. George Neville and Meredith Aldridge, counsel for plaintiffs.

4. Haley Barbour, Governor of the State of Mississippi, defendant.

5. Michael B. Wallace and James D. Findley, Wise Carter Child & Caraway, P.A., counsel for defendant.

SO CERTIFIED, this the 29th day of August, 2011.

Michael B. Wallace

MICHAEL B. WALLACE
Attorney for Haley Barbour,
Governor of the State of Mississippi

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STATEMENT OF THE ISSUE

Whether M.R.Prof.Cond. 1.7(a) precludes Attorney General Jim Hood from suing Governor Haley Barbour where, since 2004, General Hood has consistently managed litigation on Governor Barbour's behalf without communicating any disclaimer of an attorney-client relationship.

STATEMENT OF THE CASE

i. Nature of the case

Notwithstanding this Court's unbroken line of precedents from *Vicksburg & M.R.R. Co. v. Lowry*, 61 Miss. 102, 105 (1883), through *Barbour v. State ex rel. Hood*, 974 So.2d 232, 238 (Miss. 2008), that Mississippi courts lack authority to order coercive relief against the Governor, Attorney General Jim Hood, on behalf of the State and two members of the House of Representatives, sought to enjoin Governor Haley Barbour from implementing his veto of a portion of the appropriations act for the Department of Public Safety for Fiscal Year 2010, ending June 30, 2010. R.1:1; R.E.4.[1] General Hood continues to seek such relief even though all Fiscal Year 2010 funds were expended consistently with the terms of the vetoed provisions, and the statute has now expired by its own terms. The Chancery Court for the First Judicial District of Hinds County, the Honorable Patricia Wise presiding, overruled Governor Barbour's motion to disqualify General Hood and to dismiss his claim on behalf of the State, and this Court granted Governor Barbour's petition for interlocutory appeal.

ii. Course of the proceedings

On August 3, 2009, General Hood filed his complaint against Governor Barbour on behalf of the State and two legislators, William J. McCoy, Speaker of the House of Representatives, and Johnny W. Stringer, Chairman of the House Appropriations Committee. Governor Barbour, acting in accordance with §§ 69 and 73 of the Mississippi Constitution of

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[1] The record is cited in the form "R.[volume]:[page]." The record excerpts are cited in the form "R.E.[tab] at [page]."

1890, had vetoed §§20 and 22 of Senate Bill No. 2041, appropriating funds for the Department of Public Safety for Fiscal Year 2010.[2] On September 21, 2009, Governor Barbour moved to dismiss the claim filed by General Hood on behalf of the State and to disqualify General Hood pursuant to M.R.Prof.Cond. 1.7(a) because of his ongoing representation of Governor Barbour. R.1:39; R.E.5. At the same time, Governor Barbour also filed a motion to dismiss, a motion to dismiss as premature, and a motion to dismiss for lack of jurisdiction. R.1:27, 31, 44.[3] On July 1, 2010, the day after S.B. No. 2041 expired by its own terms, Governor Barbour also filed a motion to dismiss as moot. R.1:113.

All dispositive motions were set for hearing on October 21, 2010, but the Chancery Court chose to consider only the motion to dismiss and to disqualify General Hood. On November 15, 2010, the Court issued an order declining to dismiss General Hood's claim or to disqualify him as counsel of record. R.2:215; R.E.2. Relying on Miss. Code Ann. § 7-5-5 (Rev. 2002), the Court continued "that the Attorney General is authorized, empowered, and directed, pursuant to Section 7-5-5 to designate three (3) assistant attorneys general to defend and aid in the current litigation against the Governor." R.2:218; R.E.2 at 218. The Court reasoned:

> Therefore, any 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. Within Section 7-5-5, the Legislature has provided an avenue for the Attorney General's Office to defend and aid in suits filed against the Governor, an elected official, even if it is the Attorney General who actually filed such suit.

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[2] S.B. No. 2041 and Governor Barbour's veto message are attached as exhibits to General Hood's complaint. R.1:7, 24; R.E.4 at 7, 24.

[3] The Chancery Court lacked jurisdiction because there has never been a justiciable dispute between the parties. The two vetoed sections of S.B. No. 2041 purported to require Governor Barbour to pay salaries for members of the Mississippi Highway Patrol in a particular way. Stephen B. Simpson, who was then Commissioner of the Mississippi Department of Public Safety, filed an affidavit declaring that, although he was under no legal duty to do so, he had exercised his discretion "to assure payments to sworn officers consistent with the purported mandate of §§20 and 22 of S.B. No. 2041." R.1:36. General Hood has never denied that representation, nor has he submitted any evidence to the contrary.

Id.

Because General Hood had never relied on § 7-5-5, Governor Barbour addressed the Court's construction of § 7-5-5 in a motion to reconsider filed November 29, 2010. R.2:219; R.E.8. After a hearing on February 9, 2011, the Court reaffirmed its opinion and overruled the motion to reconsider. R.3:422; R.E.3. At no point has General Hood ever complied with the Court's order to provide three assistant attorneys general to defend Governor Barbour.

On March 30, 2011, Governor Barbour filed in this Court his petition for interlocutory appeal. General Hood filed an answer for all plaintiffs on April 13, 2011. This Court issued its order granting the petition on May 13, 2011.

iii. Statement of facts

Governor Haley Barbour and Attorney General Jim Hood assumed their respective offices in January, 2004, and each was subsequently elected to a second term expiring at the end of 2011. Throughout their terms, whenever Governor Barbour has been sued, General Hood has defended him. General Barbour's original motion to disqualify General Hood cited the case of *Williams v. Barbour*, No. 3:09cv00179-DPJ-JCS (S.D. Miss.), then pending in the United States District Court for the Southern District of Mississippi. R.1:41; R.E.5 at 41. He provided a copy of defendants' answer in that case, which concludes, "BY: JIM HOOD, ATTORNEY GENERAL STATE OF MISSISSIPPI." R.2:160; R.E.6 at 160. Governor Barbour later called the Court's attention to the case of *Rayner v. Barbour*, filed in the Circuit Court of the Second Judicial District of Jasper County, and transferred to the First Judicial District of Hinds County, later reviewed by this Court as *Rayner v. Barbour*, 47 So.3d 128 (Miss. 2010). R.2:186; R.E.7. The name of Jim Hood also appears on filings in that case as counsel for the defendants, including Governor Barbour.

General Hood has consistently claimed the authority to manage the actions of the

Governor and other employees subject to the Governor's direction in other litigation instigated by General Hood. General Hood himself placed into the record a letter of January 5, 2010, from Governor Barbour's staff counsel concerning litigation conducted by General Hood in the Chancery Court of Rankin County,[4] revealing, "The Office of the Governor received your December 15, 2009 letter, advising the Governor not to speak with defense counsel in this case without counsel present." R.3:366. Despite Governor Barbour's rejection of General Hood's advice, General Hood sought an order restricting contact by defendants "for former employees and for current employees" of the State, R.3:370, arguing that "we do represent the State of Mississippi, and the Division of Medicaid, and anybody else as it relates to the information about this lawsuit." R.3:381. Even after the Chancery Court issued its original order in this case on November 15, 2010, General Hood continued to take the position that he had an attorney-client relationship with the director of the Division of Medicaid, who serves at Governor Barbour's will and pleasure under Miss. Code Ann. § 43-13-107(1), (2)(b) (Rev. 2009). R.2:224-28.

In opposition to the motion to reconsider, General Hood first submitted evidence in support of his position that he does not represent the officers and agencies named as parties in litigation where his name appears as counsel. R.2:244. He presented judicial filings bearing the names of attorneys general back to A. F. Summer, R.2:203, and contended that no attorney general had represented any of those parties. In support, he offered affidavits of Roger Googe and Billy L. Gore, former members of the Attorney General's staff, who described the "routine practice to include the Attorney General's name on pleadings" signed by others. R.2:266-67. They continued:

> This practice is necessary under §7-5-1 of the Mississippi Code, which states that the Attorney General "is charged with managing all litigation on behalf of the

[4] This Court can take judicial notice of the nature of that litigation. On February 6, 2008, this Court denied a petition for interlocutory appeal in that litigation in *Abbott Laboratories, Inc. v. State*, No. 2008-M-00024.

> state" and possesses "the sole power" to litigate on behalf of a state agency. It indicates that the documents are filed by a member of the Attorney General's Office, and it does not mean that the Attorney General is personally involved in the matter.

Id. Neither witness swore that no attorney-client relationship existed between the Attorney General and the state agency or officer upon whose filing the Attorney General's name appeared.

SUMMARY OF THE ARGUMENT

The Chancellor properly found an attorney-client relationship between General Hood and Governor Barbour, but erred in describing Governor Barbour as "the Attorney General's former client." R.1:218; R.E.2 at 218 (emphasis added). Governor Barbour introduced multiple documents filed in Court on his behalf which conclude, "BY: JIM HOOD, ATTORNEY GENERAL STATE OF MISSISSIPPI." R.2:160; R.E.6 at 160.

Mississippi statutes make the Attorney General the Governor's lawyer as a matter of law. Under Miss. Code Ann. § 7-5-39 (Rev. 2002), he must "act as counsel for any of the state officers in suits brought by or against them in their official capacity." The Governor may also direct the Attorney General in the performance of his duties under Miss. Code Ann. § 7-1-5(g)(h) (Rev. 2002). Moreover he must provide legal opinions for the Governor under Miss. Code Ann. § 7-5-25 (Rev. 2002). Case law likewise confirms that the Attorney General has "the duty to represent the many agencies of the State." *State ex rel. Allain v. Mississippi Pub. Serv. Comm'n*, 418 So.2d 779, 784 (Miss. 1982). Any special counsel representing state officers or agencies acts "under the supervision and control of the Attorney General and serves at his pleasure and may be dismissed by him." *Id.*, at 782.

The record supports the Chancellor's finding that General Hood has served as Governor Barbour's counsel. The record reflects that Governor Barbour manifested his intent that General Hood should provide him with legal services, and he introduced multiple court filings on his behalf bearing General Hood's name. This is sufficient to establish an attorney-client

relationship under *Restatement (3d) of the Law Governing Lawyers* § 14 (1998). There is no evidence that General Hood ever manifested a lack of consent to serve as Governor Barbour's lawyer, as § 14(1)(b) would have permitted him to do. General Hood's name on a pleading is a sufficient appearance in federal court in Mississippi, under Local Rule 11(a), and it is consistent with the definition of "appearance" in M.R.A.P. 46(b)(1)(ii).

Because General Hood is Governor Barbour's lawyer, M.R.Prof.Cond. 1.7(a) precludes General Hood from suing him. None of General Hood's arguments is sufficient to escape this ethical prohibition.

General Hood asserts that application to him of Rule 1.7(a) would prevent him from enforcing the law against the officers and agencies he represents. He fails to identify any litigation initiated by any prior Attorney General against the Governor or any other state officer of agency. Likewise, he fails to identify any statute authorizing him to bring such suits. Should such a suit against an officer or agency become necessary, this Court has recognized that a District Attorney may take such action. *State ex rel. Cowan v. State Highway Comm'n*, 195 Miss. 657, 13 So.2d 614 (1943).

In particular, General Hood identifies no authority to sue the Governor, and no previous Attorney General has ever attempted to do so. While he asserts that he has common law authority to sue the Governor, he cites no case from any common law jurisdiction recognizing common law authority in the Attorney General to sue the chief executive officer of government. In the one case on which he relies, *State ex rel. Condon v. Hodges*, 349 S.C. 232, 562 S.E.2d 623, 627 (2002), the Attorney General of South Carolina exercised statutory authority, which General Hood does not have. In addition, no statute gives him the authority to represent the two members of the House of Representatives who have joined this litigation as plaintiffs.

Finally, General Hood has not followed the requirements of *Allain*. When General Hood proceeds adversely to a state officer or agency, he must provide that officer or agency with representation "unfettered and uninfluenced by the Attorney General's personal opinion." *Allain*, 418 So.2d at 784. Here, General Hood has always exercised complete control over the lawyers assigned to represent Governor Barbour, and he continues to do so. As indicated by the letter attached as Exhibit 12 to Governor Barbour's petition for interlocutory appeal, General Hood refused to permit members of his staff to advocate Governor Barbour's position in *HSBC Securities (USA), Inc. v. Barbour*, now pending as No. 2011-CA-634 in this Court. Contrary to the belief of the Chancellor, the conflict is not resolved by the possible appointment of three assistant attorneys general to represent the Governor under Miss. Code Ann. § 7-5-5 (Rev. 2002). Such an arrangement might have satisfied *Allain* if General Hood had separated himself from those lawyers at the beginning of Governor Barbour's term, instead of continuing to manage litigation involving Governor Barbour, but he did not. In any event, § 7-5-5 does not bear the meaning ascribed to it by the Chancellor.

ARGUMENT

I. GENERAL HOOD IS GOVERNOR BARBOUR'S LAWYER.

A. The Chancellor properly found an attorney-client relationship but improperly ruled that General Hood can disregard it.

The Chancellor, in her order and opinion of November 15, 2010, did not doubt the existence of an attorney-client relationship between General Hood and Governor Barbour. As a matter of fact, she identified Governor Barbour as "essentially being the Attorney General's former client." R.1:218; R.E.2 at 218. As a matter of law, she concluded that "it is possible for the Attorney General to both, represent the Governor in one action and then represent the state against the Governor in another action." R.1:217; R.E.2 at 217. Her finding that Governor Barbour has been General Hood's client is fully supported by the record; her description of him

as a "former client" is not. Nor does the law support her legal conclusion that General Hood can disregard that relationship by appointing three assistant attorneys general to defend the Governor pursuant to Miss. Code Ann. § 7-5-5 (Rev. 2002).

Governor Barbour's disqualification motion cited the pending case of *Williams v. Barbour,* No. 3:09cv00179-DPJ-JCS (S.D. Miss.), as an example of General Hood's representation of him. R.1:41; R.E.5 at 41. General Hood's opposition relied solely on a federal court docket sheet showing two of his assistants as counsel for Governor Barbour. R.1:74. Governor Barbour's rebuttal memorandum attached as Exhibit A the actual answer in the *Williams* case, which concluded, "BY: JIM HOOD, ATTORNEY GENERAL STATE OF MISSISSIPPI." R.2:160; R.E.6 at 160. At oral argument, General Hood did not deny that he represented Governor Barbour. He said, "I represent them all, Your Honor," and that "the Attorney General has to represent all agencies." R.4:11. His assistant denied that he personally had represented Governor Barbour, but admitted, "From time to time, the General may have as a function of an office that he holds about a separate, distinct matter." R.4:15.

While General Hood's representation of Governor Barbour is fully supported by the record, nothing in the record supports the Chancellor's characterization of him as a "former client." In his motion to reconsider, Governor Barbour pointed out, "Factually, General Hood has never contended that Governor Barbour is a former client." R.2:220; R.E.8 at 220. General Hood's response did not argue that his attorney-client relationship with Governor Barbour had terminated. Instead, he simply argued that the appearance of his name on a court pleading did not establish his representation of Governor Barbour. R.2:239. His supplemental submission revealed many other officers and agencies he claims not to have represented, including the Mississippi Development Authority, R.2:252, Mississippi Public Broadcasting, R.2:271, the

Mississippi State Board of Architecture, R.2:280, Secretary of State Hosemann, R.2:305, and the State of Mississippi itself, R.2:268.

The submissions of the two sides had no effect on the Chancellor's opinion. Her order of March 10, 2011, continued to describe the Governor as "the Attorney General's former client," R.3:423; R.E.3 at 423, and she continued to describe § 7-5-5 as "an avenue for the Attorney General's Office to defend and aid in suits filed against the Governor, an elected official, even if it is the Attorney General who actually filed such suit." R.3:424; R.E.3 at 424. Although, as will be seen hereafter, § 7-5-5 does not solve General Hood's ethical problem, the Chancellor properly found that Governor Barbour was General Hood's client.

B. As a matter of law, General Hood represents Governor Barbour.

Mississippi law fully supports the Chancellor's conclusion that General Hood represents Governor Barbour. Mississippi statutes spell out the Attorney General's duties, and his duty to defend the Governor in court is mandatory.

The Attorney General's mandatory duties are set out in the first sentence of Miss. Code Ann. § 7-5-39 (Rev. 2002):

> The attorney general shall also represent the state, in person or by his assistant, as counsel in all suits against the state in other courts than the supreme court at the seat of government, and he shall, in like manner, act as counsel for any of the state officers in suits brought by or against them in their official capacity, touching any official duty or trust and triable at the seat of government.

These duties are neither ambiguous nor discretionary. "[H]e shall ... act as counsel for any of the state officers in suits brought by or against them in their official capacity...." Governor Barbour is a state officer. When he is sued, General Hood is bound to defend him.

Mississippi statutes also allow the Governor to direct the Attorney General in the performance of his duties. Under Miss. Code Ann. § 7-1-5(g) (Rev. 2002), "he may direct the attorney general to appear on behalf of the state and protect its interest" in a pending case.

Under § 7-1-5(h), he may direct the Attorney General to investigate any corporation doing business in Mississippi. No statute provides the Attorney General with any authority to disregard the Governor's directions. By contrast, the Attorney General does have some discretion under § 7-1-5(n):

> [The Governor] may bring any proper suit affecting the general public interests, in his own name for the state of Mississippi, if after first requesting the proper officer so to do, the said officer shall refuse or neglect to do the same.

This provision recognizes the possibility that the Attorney General will refuse the Governor's request to file suit, and arguably it even authorizes him to do so. It does not authorize him to disregard the mandatory duty of § 7-5-39 to defend the Governor when he is sued.[5]

The Attorney General also has a mandatory duty to advise the Governor and other officials under Miss. Code Ann. § 7-5-25 (Rev. 2002). In so doing, his duties differ somewhat from those of a private attorney. Under M.R.Prof.Cond. 1.6(a), a private lawyer cannot reveal his advice in public "unless the client gives informed consent." In advising State officers, that informed consent has been given by statute in Miss. Code Ann. § 7-5-23 (Rev. 2002), which requires the Attorney General to make a public record of his opinions. The State's statutory waiver of its right of confidentiality, however, does not destroy the attorney-client relationship that exists between the Attorney General and those, such as the Governor, whom he advises.

Perhaps the strongest statutory indicator of a fiduciary duty from the Attorney General to every State officer and agency is his authority to control their legal representation even in cases in which he declines to become involved. Reviewing "[t]he case law and statutes," this Court declared:

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[5] It should not escape notice that this section does not limit itself to the Attorney General. It allows the Governor to file suit "after first requesting the proper officer so to do." The Legislature by this language clearly recognized that the Attorney General is not the only officer who can decide to file suit on behalf of the State of Mississippi. While the Legislature in Miss. Code. Ann. § 7-5-1 (Rev. 2002) charged the Attorney General "with managing all litigation on behalf of the state," it did not give him sole authority to decide when suit should be filed.

> [N]o state agency may employ legal counsel without the prior approval of the attorney general and any such special counsel appointed performs their duties under the supervision and control of the attorney general and serves at his pleasure and may be dismissed by him.

State ex rel. Allain v. Mississippi Pub. Serv. Comm'n, 418 So.2d 779, 782 (Miss. 1982).[6] While circumstances might arise in which the Attorney General could not represent a particular State officer or agency, certainly, when the Legislature gave the Attorney General such extensive control over outside representation, it would have expected him to exercise that power within the constraints imposed by the Rules of Professional Conduct.[7]

The statutory plan, therefore, is clear. The Attorney General must advise the Governor. The Attorney General must defend the Governor in court. The Attorney General must represent the State in other matters at the direction of the Governor. The notion that the Governor is not the Attorney General's client is repugnant to the statutory scheme.

Case law likewise supports the conclusion that General Hood represents Governor Barbour as a matter of law. In *Allain*, the decision upon which General Hood places principal reliance, this Court affirmed that the Attorney General has "the duty to represent the many agencies of the State." 418 So.2d at 784. The cases from other jurisdictions on which this Court relied say the same thing. "[A]n attorney-client relationship exists between a State agency and the Attorney General ... ." *Id.*, at 782, quoting *EPA v. Pollution Control Bd.*, 69 Ill.2d 394, 372 N.E.2d 50, 52 (1977). Discussing *Finney v. Commonwealth*, 373 Mass. 359, 366 N.E.2d 1262

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[6] The Supreme Court in *Allain* did not identify a particular statute on which it relied for this principle. Subsequently, the Legislature declared that the Department of Finance and Administration shall not approve any "payment for legal services without first determining that the services and contract were approved by the Attorney General and the State Personnel Board." Miss. Code Ann. § 27-104-105 (Rev. 2010).

[7] Indeed, as will be discussed hereafter, this Court recognized those ethical constraints when prescribing procedures to be followed by the Attorney General "when his views differ from or he finds himself at odds with an agency." *Id.*, at 784.

(1977), this Court described the authority of the Massachusetts Attorney General to act "contrary to expressed objections of state officers whom he represented." 418 So.2d at 782-83 (emphasis added). Finally, this Court observed that the Rhode Island Attorney General had "previously represented the division as counsel" in a dispute before another agency of that State. *Id.*, at 783, quoting *Providence Gas Co. v. Burke*, 419 A.2d 263, 270 (R.I. 1980).

In *Allain* and in the cases on which it relied, as well as in those it distinguished, the analysis started, although it did not end, with the principle that an attorney-client relationship exists between the Attorney General and the officers and agencies he represents. Had there been no attorney-client relationship, there would have been no need for this Court in *Allain* to consider how to address its ethical ramifications. 418 So.2d at 784. This Court's precedents, like this State's statutes, incontrovertibly establish that General Hood is Governor Barbour's lawyer.

C. As a matter of fact, General Hood represents Governor Barbour.

In his answer filed in this Court on April 13, 2011, General Hood asserted for the first time that the existence of an attorney-client relationship between him and Governor Barbour depends on something other than the presence of his signature or his bar number on a court filing. He asked this Court to examine the record for evidence:

> To show that an attorney client relationship existed, a party must show that it sought representation from the attorney and that the attorney acquiesced to the representation. *Baker Donelson Bearman Caldwell & Berkowitz, P.C. v. Seay*, 42 So.3d 474, 485 (Miss. 2010) (Attorney client relationship exists when person "manifests" to a lawyer his intent to be represented by the lawyer and the lawyer "manifests" an intent to do so.) The determination of whether an attorney client relationship exists is a question of fact.

Answer at 5-6.

If General Hood is correct that the existence of an attorney-client relationship between him and Governor Barbour is a question of fact, then this Court must uphold the Chancellor's

finding that such a relationship existed.[8] General Hood's name is all over Governor Barbour's court filings, and it can hardly have been manifest error to find that Governor Barbour was General Hood's client. The manifest error was in finding that the relationship had terminated; General Hood has never pointed to any evidence in the record that would tend to establish the termination of a previous relationship.

The controlling law shows that the Chancellor would have had every reason to conclude that Governor Barbour had been General Hood's client. The principles cited by this Court in *Baker Donelson* were originally explained in *Singleton v. Stegall,* 580 So.2d 1242, 1244 & n.2 (Miss. 1991). That discussion rested on a provision in a preliminary draft which has now been approved as § 14 of *Restatement (3d) of the Law Governing Lawyers* (1998):

> A relationship of client and lawyer arises when:
>
> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
>
> (a) the lawyer manifests to the person consent to do so; or
>
> (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
>
> (2) a tribunal with power to do so appoints the lawyer to provide the services.

For multiple reasons, these principles establish the existence of an attorney-client relationship between Governor Barbour and General Hood.

Certainly, there can be no doubt that this record supports the conclusion that Governor Barbour manifested to General Hood his intention that General Hood should provide him with legal services. Governor Barbour alleged in his disqualification motion that General Hood

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[8] "Upon review, this Court will not disturb the findings of a chancellor unless 'manifestly wrong, clearly erroneous or a clearly erroneous legal standard was applied.'" *Corporate Mgmt., Inc. v. Greene Rural Health Ctr. Bd. of Trustees*, 47 So.3d 142, 145 (Miss. 2010), quoting *Bell v. Parker*, 563 So.2d 594, 596-97 (Miss. 1990).

served as his counsel, R.1:41; R.E.5 at 41, and he provided as support for that allegation multiple court filings on his behalf bearing General Hood's name. At no point before the Chancery Court did General Hood ever suggest that Governor Barbour had not intended to be his client.[9]

Further, there is no reason why the presence of General Hood's name cannot properly be interpreted as a manifestation of General Hood's consent under § 14(1)(a). Comment e to § 14 says that a lawyer "may indicate consent by action, for example by performing services requested by the client." The documentation shows that Governor Barbour requested representation and that General Hood provided it. That should certainly be enough to sustain the Chancellor's finding that an attorney-client relationship had existed between them.

An examination of local practices would confirm the conclusion that the absence of General Hood's signature does not prevent the creation of an attorney-client relationship. In the federal courts of Mississippi, their Local Rule 11(a) declares, "Consistent with Fed. R. Civ. P. 11, the filing of a signed pleading, motion or other document by any counsel is deemed to signify approval by all co-counsel." Accordingly, the signature of any of General Hood's assistants on a document in federal court indicates General Hood's approval for Rule 11 purposes. This Court applies a similar rule to the appearance of out-of-state lawyers in Mississippi courts:

> "Appearance" shall include the appending or allowing the appending of the foreign attorney's name on any pleading or other paper filed or served, or appearing personally before a court or administrative agency or participating in a deposition or other proceeding in which testimony is given.

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[9] By contrast, his answer in this Court relied on a letter from Amanda Jones, a lawyer on Governor Barbour's personal staff, denying General Hood's authority to represent the Governor and his office in Medicaid litigation in Rankin County. Answer at 6 n.11. That letter demonstrates that General Hood had claimed to have an attorney-client relationship, sufficient to invoke M.R.Prof.Cond. 4.2, with every present and former officer or employee of the State of Mississippi, including Governor Barbour. The fact that Governor Barbour had never authorized General Hood to file the Rankin County litigation on behalf of his office does not negate the existence of an attorney-client relationship in those cases properly authorized by Governor Barbour.

M.R.A.P. 46(b)(1)(ii). Certainly, the Chancellor and Governor Barbour could reasonably conclude that the appending of General Hood's name to a pleading should have no lesser effect.

Moreover, § 14(1)(b) imposes upon the lawyer the consequences of "fail[ure] to manifest a lack of consent to do so." On appeal, General Hood suggests for the first time that his true client is always the State, Answer at 4 n.7, but the *Restatement* requires him to make that principle clear to the State's officers and employees. Comment f says:

> Under Subsection (1)(b), a lawyer's failure to clarify whom the lawyer represents in circumstances calling for such a result might lead a lawyer to have entered into client-lawyer representations not intended by the lawyer. Hence, the lawyer must clarify whom the lawyer intends to represent when the lawyer knows or reasonably should know that, contrary to the lawyer's own intention, a person, individually, or agents of an entity, on behalf of the entity, reasonably rely on the lawyer to provide legal services to that person or entity . . . .

General Hood told the Chancellor, "[T]he Attorney General has to represent all agencies," R.4:11, and the record contains no suggestion that he ever informed any of the officers or agencies involved in litigation that he really represented the State and not the officers or agencies themselves.

No such suggestion is found in the belatedly submitted affidavits of Roger Googe and Billy Gore, two distinguished former members of the Attorney General's staff. Both of them disavowed any significance in the appearance of an Attorney General's name on court filings: "It indicates that the documents are filed by a member of the Attorney General's Office, and it does not mean that the Attorney General is personally involved in the matter." R.2:266-67. This statement proves simultaneously too little and too much. It proves too little because the witnesses do not assert that any Attorney General ever disclosed to any officer or agency that the appearance in court filings of his name, unlike the name of any other lawyer in Mississippi, did not create an attorney-client relationship. It proves too much because it compels the conclusion that no Attorney General has ever been personally involved in the cases on which his name

appears, notwithstanding his statutory duty of "managing all litigation on behalf of the state." Miss. Code Ann. § 7-5-1. It is noteworthy that neither witness offered an opinion that no attorney-client relationship existed between the Attorney General and state officers and agencies represented by his office.

The general principles set forth in § 14 and applied in *Singleton* and *Baker Donelson* fully apply to government lawyers. Indeed, comment c to § 97 of the *Restatement* specifically cites § 14 as applying to government lawyers:

> When a lawyer is retained to represent a specific individual ... in that person's public (see Comment *b*) ... capacity, the person (in the appropriate capacity) is the client, unless the use of the individual's name is merely nominal and the government is the interested party. As described above with a respect to multiple agencies, the identity and the specification of the capacity of the person represented by the lawyer is determined by the undertaking and reasonable expectations of both the lawyer and the individual (see § 14).

When the client has been identified, comment e confirms that "[g]overnment lawyers are generally subject to the conflict-of-interest requirements."

Thus, General Hood's belated suggestion that his subjective intent not to represent Governor Barbour negates the existence of an attorney-client relationship runs afoul of the objective evidence construed in light of the controlling law. General Hood put his name on Governor Barbour's court filings for years without making the slightest suggestion that he intended not to act as Governor Barbour's lawyer. On this record, the Chancellor properly found that an attorney-client relationship had existed between them.

II. M.R.PROF.COND. 1.7(a) PRECLUDES GENERAL HOOD FROM SUING GOVERNOR BARBOUR.

Governor Barbour seeks to enforce the basic ethical principle of M.R.Prof.Cond. 1.7(a) that a lawyer cannot sue his own client. In the official comment to M.R.Prof.Cond. 1.11, this Court explained that ordinary ethical principles apply to government lawyers like General Hood:

> A lawyer representing a government agency, whether employed or specially retained by the government, is subject to the Rules of Professional Conduct, including the prohibition against representing adverse interests stated in Rule 1.7 and the protections afforded former clients in Rule 1.9.

Nothing in the Rules exempts General Hood from this basic requirement.

General Hood's assistant boldly told the Chancellor that "1.7(a) of the Mississippi Rules of Professional Conduct, it doesn't apply to this office." R.4:17. His argument in this Court is somewhat more modest, contending that the Rule does not apply to him "Under The Instant Facts." Answer at 3. Addressing the judicial filings bearing his name on the Governor's behalf, he claims that he "has no involvement in these cases." Answer at 4. At the same time, however, he emphasizes that he "is charged with managing all litigation on behalf of the State." Answer at 11, quoting Miss. Code Ann. § 7-5-1. Even if § 7-5-39 allows him to represent Governor Barbour "by his assistant," as General Hood argues, Answer at 7,[10] he retains the duty under § 7-5-1 of "managing all litigation." Accordingly, Governor Barbour is not asking this Court to impute to General Hood, under M.R.Prof.Cond. 1.10, the conflicts of his assistants; rather, Governor Barbour asks this Court to recognize General Hood's own conflict created by his management of litigation on Governor Barbour's behalf.

Notwithstanding the obvious conflict, General Hood offers three reasons for ignoring it. First, he contends that enforcement of his ethical obligations would conflict with his general authority to enforce the law against all State officers and agencies. Answer at 2-3 & n.5. Second, it would interfere with his specific authority to sue Governor Barbour. Answer at 10-13. Finally, he contends that any conflict has been resolved because he "has followed this Court's

[10] The first clause of the compound sentence at the beginning of § 7-5-39 requires General Hood to "represent the state, in person or by his assistant, as counsel in all suits against the state." It is not immediately clear that the authority to proceed "by his assistant" applies to the second clause of the compound sentence, requiring him to represent state officers. However, even if § 7-5-39 would authorize General Hood to decline personally to defend Governor Barbour, the record shows that he has not done so.

holding in *Allain* expressly." Answer at 8. None of these three arguments excuses his failure to comply with Rule 1.7(a).

A. General Hood's ethical responsibility to the State officers and agencies he represents is not diluted by any duty to sue those officers and agencies.

General Hood asserts that application to him of the ordinary conflict of interest rules would have dire effects. "[A]cceptance of the Governor's position would create an unworkable quagmire for the State of Mississippi in attempting to provide legal services." Answer at 2-3. The result, he says, would be that "the Attorney General is required to advise state agencies and boards, but could not ... investigate that same agency or board if it became necessary." Answer at 3 n.5. This litigation does not require this Court to resolve whether General Hood can investigate his own client.[11] Whether or not the Attorney General has authority to sue his clients, history shows that the State of Mississippi has functioned very well since the adoption of the 1890 Constitution without his actually having done so.

The reported decisions of this Court disclose no instance of litigation initiated by an Attorney General against a state officer or agency. Although the Attorney General has statutory authority under Miss. Code Ann. §§ 11-31-1 *et seq.* (Rev. 2004) to initiate quo warranto proceedings against purported state officers, the only reported decisions involve county officials. *State ex rel. Patterson v. Land*, 231 Miss. 529, 95 So.2d 764 (1957) (county superintendent of education); *State ex rel. Collins v. Jackson*, 119 Miss. 727, 81 So.1 (1919) (members of board of

[11] Of course, anything that General Hood may learn in the course of representing the client concerning crime or fraud would not constitute a privileged attorney-client communication. M.R.E. 502(d)(1). This Court need not decide whether General Hood could bring suit against a client as a result of such information, but there is no doubt that he could refer the matter to the District Attorney to do so. This Court has recognized the authority of a District Attorney to act on behalf of the State in suing a state agency in appropriate circumstances. *State ex rel. Cowan v. State Highway Comm'n*, 195 Miss. 657, 13 So.2d 614 (1943).

supervisors).[12] In the most noteworthy case concerning the right to public office, *Alexander v. State ex rel. Allain*, 441 So.2d 1329 (Miss. 1983), state legislators purporting to serve on state executive boards and commissions sued the Attorney General. Only then did General Allain sue them, *id.*, at 1334, although this Court's opinion does not disclose whether he invoked his authority under the quo warranto statute. In any event, General Allain had no fiduciary duty to represent his adversaries because this Court concluded that they had no authority to occupy the offices they claimed. *Id.*, at 1346-47.

Later, in *Frazier v. State ex rel. Pittman*, 504 So.2d 675 (Miss. 1987), General Pittman initiated an ethics suit against a State Representative and a county supervisor. No attorney-client relationship existed between General Pittman and his two adversaries. However, had the need arisen to sue a state officer represented by General Pittman, no "unworkable quagmire" would have arisen. The principal holding of *Frazier* is that the Mississippi Ethics Commission has the authority to retain counsel to bring its own litigation, even over the Attorney General's objection, *id.*, at 689-93, despite the declaration of § 7-5-1 that he has "the sole power to bring or defend a lawsuit on behalf of a state agency."

Over 190 years after Mississippi's admission to the Union, this Court's decisions reflect the first original action by any Attorney General against any state officer, in *Barbour v. State ex rel. Hood*, 974 So.2d 232 (Miss. 2008). This Court denied General Hood relief on the merits without reaching the question of his authority to sue. *Id.*, at 238. General Hood's observation that General Moore had intervened in litigation against prior Governors in *Barbour v. Delta Correctional Facility Authority*, 871 So.2d 703 (Miss. 2004), and *Fordice v. Bryan*, 651 So.2d 998 (Miss. 1995), merely underscores the fact that each of those suits was instigated by an

[12] General Patterson also joined with the State Auditor in suing county officials in *State ex rel. Patterson v. Warren*, 254 Miss. 293, 180 So.2d 293 (1965). The Auditor, of course, has independent authority to sue state and local officers to enforce the law. *City of Belmont v. Mississippi State Tax Comm'n*, 860 So.2d 289, 297 (Miss. 2003).

injured plaintiff, not by the Attorney General. Recognition of the Attorney General's authority to sue his own client was hardly necessary to the workings of justice in either case.

In *Allain* this Court first allowed any sort of adversity between the Attorney General's office and one of his clients. This Court acknowledged the existence of an attorney-client relationship by finding that "the attorney general, through that office, is required by law to represent the Mississippi Public Service Commission." 418 So.2d at 780. However, recognition of the Attorney General's right to intervene in an appeal initiated by another party from the Commission's decision, *id.*, at 780-81,[13] is hardly the same thing as initiating suit against a client. Most importantly, the Commission did not object to its decision being attacked by its own lawyer. The motion to exclude General Allain from the appeal was filed by Mississippi Power and Light Company, not the Commission. *Id.*, at 784.

In the only subsequent case remotely similary to *Allain*, General Moore sought judicial review by writ of certiorari under Miss. Code Ann. § 11-51-95 (Rev. 2002) of a decision by Secretary of State Molpus not to call an election pursuant to an initiative petition in *State ex rel. Moore v. Molpus*, 578 So.2d 624 (Miss. 1991). General Moore and two other voters had presented the petition to Secretary Molpus, *id.*, at 630, and they subsequently secured a writ of certiorari to review his refusal, *id.*, at 631.[14] Unlike *Allain*, which was also a judicial review proceeding, the Attorney General had not represented the Secretary in the original administrative proceeding. In neither case did the Attorney General simply initiate an original judicial action

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[13] General Allain relied on Miss. Code Ann. § 77-3-67(1) (Rev. 2009), which authorized intervention by "[a]ny person whose rights may be directly affected by said appeal." He sought leave to represent "the State of Mississippi and all its agencies, as substantial purchasers of electricity." *Id.*, at 781. General Allain did not assert and was not granted the right to initiate a suit against any state agency.

[14] The use of the certiorari statute to review such administrative action by the Secretary had previously been approved by this Court in *Power v. Robertson*, 130 Miss. 188, 93 So. 769 (1922).

against an executive officer or agency, as he purports to do here with his complaint against Governor Barbour.

The State of Mississippi has functioned perfectly well for almost two centuries without recognizing any power in its Attorney General to sue any state officer or agency. General Hood offers no evidence to support his assertion that enforcement of the ordinary conflict of interest rules will cripple the rule of law. The quagmire he predicts does not exist.

B. No necessity compels General Hood to sue Governor Barbour.

General Hood resists the application of Rule 1.7 to his conduct by invoking his purported "paramount duty ... to the public interest." Answer at 13. Notwithstanding such cases as *Cowan*, *Frazier*, and *City of Belmont*, he continues to assert erroneously that "the Attorney General is the only State officer who can [file suit] on behalf of the State." Answer at 12 (footnote omitted). He squarely argues that this supposed statutory duty takes precedence over his ethical responsibilities. "Where the law and the Rules conflict, the law takes precedent [*sic*]." *Id.* In fact, because no conflict exists, Rule 1.7 should be enforced.[15]

General Hood has not identified any authority that allows the Attorney General to sue the Governor, in Chancery Court or anywhere else. He contends that "the attorney general has all powers invested in the attorney general at common law, in addition to that authority conveyed by statute," R.1:73, but he cites no statutory authority. Accordingly, his power to sue Governor

[15] General Hood characterizes Governor Barbour's ethical argument as his "latest legal theory in a continuing effort to obtain a ruling from this Court that it has no authority to rule on the legality or constitutionality of the Governor's actions." Answer at 11 n.15. General Hood mischaracterizes both Governor Barbour's arguments in the Chancery Court and the question presented on this appeal. Governor Barbour has consistently argued that General Hood has no authority to sue him, not that this Court lacks authority to issue legal and constitutional rulings in an appropriate case. The issue advanced by Governor Barbour on this appeal is the nature of General Hood's ethical responsibility; General Hood's insistence on the importance of his statutory duty makes it appropriate to inquire whether that duty really exists. Of course, because this interlocutory appeal gives this Court jurisdiction over the entire case, it may choose to rule on any issue properly presented by the record. *Public Employees Retirement Sys. v. Hawkins*, 781 So.2d 899, 900-01 (Miss. 2001).

Barbour stands or falls on § 7-5-1, which confers upon him "the powers of the attorney general at common law." His problem is that neither in Mississippi nor anywhere else in the English-speaking world has any Attorney General ever claimed authority under the common law to sue the chief executive officer of government.[16]

This Court has recognized the historic authority of the Attorney General: "He was the chief legal advisor of the crown and was entrusted with the management of all legal affairs, and the prosecution of all suits, civil and criminal, in which the crown was interested." *Capitol Stages, Inc. v. State ex rel. Hewitt*, 157 Miss. 576, 128 So. 759, 763 (1930), quoting 2 R.C.L. §§ 4-5 at 915-17. Because the executive powers of the English government were vested in the crown, the chief executive officer and the Attorney General enjoyed a principal-agent relationship. See 6 W. Haldsworth, *A History of English Law*, 467-68 (2d ed. 1937, reprinted 1966) ("The [attorney general] did not represent the king in his courts, for the king was always theoretically present, but he followed the case on his behalf. He must see that the rights of his theoretically present but actually absent principal did not suffer ....").

The powers of the Attorney General were extensive, but not unlimited, during the colonial period:

> By the seventeenth century the powers exercised by the Attorney General at common law were quite numerous. He was charged with the prosecution of all actions necessary for the protection and defense of the properties and revenue of the Crown; he was to bring certain classes of persons accused of crimes and misdemeanors to trial; by *scire facias* he was to revoke and annul grants made improperly in the name of the crown; by information, he was to recover money or

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[16] *State ex rel. Condon v. Hodges*, 349 S.C. 232, 562 S.E.2d 623 (2002), belatedly cited by General Hood in this Court, Answer at 9 n.13, is not a common law case. The Supreme Court of South Carolina began by determining that its Constitution did not authorize the Attorney General to sue the Governor. 562 S.E.2d at 627. However, the Court expressly relied on a statute which did confer such authority. "By bringing the action against the Governor, the Attorney General is simply doing what the statute allows ... ." *Id.* At no point in its opinion did the Court so much as hint that the common law would confer such power on the Attorney General, absent statutory authority. Here, by contrast, General Hood relies on nothing but the common law, but he can find no common law authority to support his argument.

> damages for wrongs committed on the possessions of the Crown; by *quo warranto* to determine usurpation of office or charter violations by corporations; by *mandamus* to compel admission of officers duly chosen to office and to compel restoration when illegally ousted; by information in chancery to enforce trusts and to prevent public nuisances; by proceedings *in rem* to recover property to which the Crown was entitled and to protect rights of lunatics and others under the protection of the Crown.

Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies,* 2 Am. J. Legal Hist. 304, 309 (1958) (footnote omitted).

Courts have placed upon the Attorney General the burden of proving that common law authority actually exists. In *Commonwealth ex rel. Ferguson v. Gardner*, 327 S.W.2d 947 (Ky. 1959), the Attorney General of Kentucky sought to intervene in a will contest on behalf of a charitable trust named in the will. Although the Attorney General had been granted common law authority by statute, the State's highest court reasoned that, "when it is sought to enforce in this state any rule of English common law, as such, independently of its soundness in principle, it ought to appear that it was established and recognized as the law of England." *Id.*, at 949, quoting *Aetna Ins. Co. v. Commonwealth*, 106 Ky. 864, 51 S.W. 624, 628 (1879) (emphasis added by *Ferguson* Court). The Court concluded, "The Attorney General has failed to satisfy the latter requirement in the case at bar." 327 S.W. 2d at 949. General Hood's failure in this case is equally apparent. Neither in England nor in any common law jurisdiction has he established common law authority to sue the chief executive. Indeed, because the Attorney General was charged with protecting the rights of the chief executive, he clearly did not have authority at common law to sue the chief executive.[17]

Nor does any statute grant the Attorney General authority to represent the two members of the House of Representatives who have joined this litigation as plaintiffs. Perhaps his

[17] This Court has not determined whether the Attorney General can sue the Governor because, from 1817 to *Barbour v. State ex rel. Hood* in 2008, there is no reported case in which any Attorney General ever tried to do so.

broadest statutory authority was granted in 1958, allowing him to represent almost any state or local officer or employee in any litigation or before "the Federal Civil Rights Commission." 1958 Miss. Gen. Laws ch. 257 § 1, codified at Miss. Code Ann. § 7-5-43 (Rev. 2002). However, even this wide-ranging statutory authority does not include representation of state legislators, certainly not as plaintiffs. Moreover, the proviso to § 7-5-43 declares that the newly created authority "shall not apply to or with respect to any suit, action, hearing or controversy which may arise between two (2) or more of the aforesaid officers or employees, ... which under existing laws of the State of Mississippi the attorney general is otherwise authorized or required to represent." Because the Attorney General is required by § 7-5-39 to defend the Governor, he is not authorized under § 7-5-43 to represent any other officer suing the Governor.

Should this Court reach the merits of General Hood's complaint on behalf of the State, therefore, it must conclude that he has no authority to pursue it.[18] It is not necessary, however, to reach the merits to reject General Hood's suggestion that some rule of necessity excuses him from the ethical duties imposed by Rule 1.7(a).[19] Even if authority to file suit exists, it is certainly not necessary for the Attorney General to ignore his ethical responsibilities in order to

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[18] It does not necessarily follow that the two plaintiff legislators have no authority to pursue their complaint. However, no assistant attorney general can represent them, because those lawyers under § 7-5-5 must "devote their entire time and attention to the duties pertaining to the department of justice," and that department has no authority to represent the legislators in this action.

[19] Just such a rule of necessity precluded the Supreme Court of South Carolina from enforcing Rule 1.7(a) against that State's Attorney General in *State ex rel. Condon*. There, the Court had already held that a statute authorized the suit against the Governor. 562 S.E.2d at 627. The Court continued:

> While 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. (footnote omitted). *State ex rel. Condon* can support General Hood's disregard of Rule 1.7(a) only if this Court concludes, as did the Supreme Court of South Carolina, that the Legislature has authorized General Hood to bring this action against Governor Barbour. However, no such authority can be found.

hold the Governor to account. For over a century, challenges to the Governor's exercise of the partial veto have been litigated in this Court, and not a single one of them was filed by the Attorney General. *Barbour v. Delta Correctional Facility Auth.*; *Fordice v. Bryan*; *Miller v. Walley*, 122 Miss. 521, 84 So. 466 (1920); *State v. Holder*, 76 Miss. 158, 23 So. 643 (1898). In each of those cases suit was brought by the persons who claimed a right to collect money under the statute that the Governor had vetoed in part.[20]

There is no support for the notion that only General Hood stands between Mississippi and despotism. Just as this Court is fully capable of enforcing the law against the Governor, it is likewise capable of enforcing Rule 1.7(a) against General Hood, and it should do so.

C. General Hood has not followed *Allain*.

In placing his principal reliance on *Allain*, General Hood finally admitted what he had spent over a year denying. In that case, "this Court dealt with the unavoidable conflicts that by course arise when an Attorney General is required to not only represent the State but its officers and agencies." Answer at 7. Indeed, General Hood is required to represent Governor Barbour, and he has done so for almost eight years. That representation does create conflicts, and General Hood has ignored them, instead of following the dictates of *Allain*.

In seeking to represent and to oppose the Public Service Commission at the same time, General Allain straightforwardly claimed the immunity from ethical restraints that General Hood seeks to achieve by indirection. "The attorney general personally appeared on the first day of the hearing and announced to the Commission that 'I am representing the Commission and the public.'" 418 So.2d at 780. On appeal, his authority to do so was challenged, not by the Commission, but by Mississippi Power and Light Company. This Court agreed that General

[20] Here, by contrast, no Highway Patrol officer filed this suit because the officers got their money, notwithstanding the veto. R.1:36. For this reason, there was never any justiciable controversy in this case, and any proper controversy that might have existed was mooted on June 30, 2010, when the appropriations statute expired by its own terms.

Allain could not simultaneously represent and oppose the Commission, but it held that the Company could not force him out of the litigation altogether. Rather, in allowing General Allain to continue to represent the State, this Court required him to surrender control over separate counsel for the Commission:

> 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.

Id., at 784. At its very next session, the Legislature acted to guarantee by statute the independence of the Commission's counsel from the Attorney General. 1983 Miss. Gen. Laws ch. 467 § 7, codified at Miss. Code Ann. § 77-3-9 (Rev. 2009).

General Hood contends that, notwithstanding Rule 1.7(a), he can sue any of his clients so long as the defendant can find "a state-funded and specially appointed counsel who is obviously acting independently of the Attorney General's Office." Answer at 9.[21] Indeed, General Hood contends that he "has no involvement" in other cases involving Governor Barbour "in which special assistants, not involved in this case, appeared on behalf of the Governor." Answer at 4. However, he squarely admits that he does not allow Governor Barbour's counsel to act "unfettered and uninfluenced by the Attorney General's personal opinion." *Allain*, 418 So.2d at 784. He acknowledges that "the Attorney General has refused" to advance Governor Barbour's position, Answer at 2, even though the Circuit Court of the First Judicial District of Hinds County accepted it.[22] It is as if General Allain continued to give instructions to the Public

[21] It should not escape notice that General Hood claims authority under § 27-104-105 to veto his adversary's chosen counsel, to set the rate of compensation, and to impose such conditions as he sees fit. The difficulty this supposed authority creates in securing truly independent counsel should be obvious.

[22] The letter, personally signed by General Hood, in which he refused to allow members of his staff to advance the Governor's position is attached as Exhibit 12 to Governor Barbour's petition for interlocutory appeal. This Court can take judicial notice from the record in *HSBC Securities (USA), Inc.*

Service Commission's independent counsel, notwithstanding his opposition to the Commission's rulings in other cases.

Moreover, this case presents a crucial question that *Allain* did not. There, the Commission did not object to its former lawyer's representing interests adverse to its own in litigation, effectively providing the informed consent that Rule 1.7(a)(2) permits. Governor Barbour has given no such consent. He objects to being sued by his own lawyer, and he especially objects to General Hood's continued interference in litigation in which General Hood purports not to be involved. True compliance with *Allain* would require, at a minimum, that General Hood permit Governor Barbour's lawyers, whether inside or outside the Attorney General's office, to represent Governor Barbour "unfettered and uninfluenced by the Attorney General's personal opinion." *Allain*, 418 So.2d at 784.

The Chancellor, to her credit, understood the serious problem created by General Hood's decision to file suit against one of his own clients. She creatively construed §7-5-5 as entitling Governor Barbour to the fully independent services of three members of General Hood's own staff. "[T]he Attorney General is authorized, empowered, and directed, pursuant to Section 7-5-5 to designate three (3) assistant attorneys generals to defend and aid in the current litigation against the Governor." R.2:218; R.E.2 at 218. Such an arrangement might have satisfied *Allain* if General Hood had separated himself from Governor Barbour's representation at the outset of their terms and had immediately provided those assistants to give the unfettered representation that *Allain* requires; instead, General Hood kept managing litigation involving Governor Barbour from the beginning of their terms through the entire pendency of this litigation, thus creating the conflict that *Allain* was designed to avoid.

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v. Barbour, No. 2011-CA-634, pending in this Court, that Judge Weill accepted Governor Barbour's argument and quashed the subpoena for his deposition.

Of course, this Court knows, as the Chancellor did not,[23] that General Hood rejects the Chancellor's construction of § 7-5-5. The Legislature in 1962, as he sees it, had no intention of providing lawyers for State officers sued by the Attorney General, free of the Attorney General's control. Rather, he contends that, under § 7-5-5, "the Attorney General is empowered to negotiate and enter into contingency fee agreements with outside counsel for civil litigation on behalf of the State and pay them without legislative modification." Brief of the State of Mississippi at 24-25, *Pickering v. The Langston Law Firm, P.A.*, No. 2010-CA-00362. *See also* Brief of Jim Hood at 21-23, *Pickering v. Hood,* No. 2010-CA-00881. Whatever the true meaning of § 7-5-5, no party to this action contends that it has anything to do with providing proper representation for State officers sued by the Attorney General.

In any event, the availability of assistant attorneys general who have no conflict does not remove General Hood's conflict. Because General Hood represents Governor Barbour, he cannot sue Governor Barbour. Because General Hood cannot sue Governor Barbour, any lawyers who do sue Governor Barbour must be completely insulated from General Hood's control, as *Allain* requires. Certainly, the assistants who have appeared in this case by General Hood's side cannot be said to be "unfettered and uninfluenced by the Attorney General's personal opinion." 418 So.2d at 784. It is possible that such lawyers may be found somewhere, but those who have appeared in this case must be disqualified along with General Hood.

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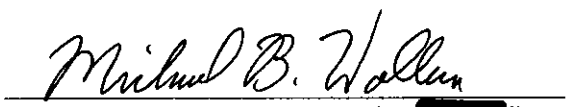
[23] General Hood never endorsed the Chancellor's statutory construction of § 7-5-5, either in the Chancery Court or in his answer in this Court. Certainly, the Legislature did not adopt § 7-5-5 for the purpose of alleviating the Attorney General's conflicts of interest. The three new assistant attorneys general were created in 1962 at a time when the Governor and other elected officials were being sued, not by the Attorney General, but by the United States Department of Justice and private civil rights plaintiffs. 1962 Miss. Gen. Laws ch. 487. When the current language of § 7-5-5 was adopted eight years later, the short title of the bill made plain the prior purpose of those lawyers: "AN ACT ... to provide that the assistant attorneys general assigned by law to federal litigation cases may perform other duties of the Attorney General." 1970 Miss. Gen. Laws ch. 348. While the language of § 7-5-5 might arguably be subject to broader application than its original intent, the language added in 1970 that "such assistants may perform any of the Attorney General's powers and duties" suggests that they cannot properly be segregated for the purpose envisioned by the Chancellor.

CONCLUSION

For the reasons stated herein, this Court should reverse the Chancery Court's orders of November 15, 2010, and March 10, 2011. This action should be remanded to the Chancery Court with instructions to disqualify General Hood and his assistants who have appeared in this action. The Chancery Court should be authorized to give plaintiffs a reasonable time to secure, if they can, counsel who has no conflict of interest.

This the 29th day of August, 2011.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I, Michael B. Wallace, do hereby certify that I have this day sent a true and correct copy of the above and foregoing, via United States Mail, postage pre-paid, and via hand delivery where indicated, to the following:

Hon. Patricia D. Wise
Chancellor
Post Office box 686
Jackson, Mississippi 39205

(Via: United States Mail)

Hon. Jim Hood
Attorney General
Post Office Box 220
Jackson, Mississippi 39205

(Via: Hand Delivery)

This the 29th day of August, 2011.

Michael B. Wallace
MICHAEL B. WALLACE