

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CAITLIN BERNARD, M.D., et al.,)	
)	
Plaintiffs,)	
)	
v.)	
)	Case No.: 1:19-cv-01660-SEB-MJD
THE INDIVIDUAL MEMBERS OF THE)	
INDIANA MEDICAL LICENSING BOARD,)	
in their official capacities;)	
THE MARION COUNTY PROSECUTOR,)	
)	
Defendants.)	
)	

Memorandum in Support of Motion to Strike Notice of Appearance of Daniel Bowman

This case is a challenge to the constitutionality of an Indiana State statute, brought against the individual members of the Indiana Medical Licensing Board and the Marion County Prosecutor. Dkt. 1. The Marion County Prosecutor was sued in his official capacity and designated by his official title under Federal Rule of Civil Procedure 17(d). Dkt. 1 at 3.

The Indiana Attorney General, through Solicitor General Thomas M. Fisher (dkt. 17), and Deputy Attorneys General Julia C. Payne (dkt. 18), Diana Moers (dkt. 15), and Christopher M. Anderson (dkt. 16), filed notices of appearance for *all* defendants because it is the responsibility of the Attorney General, and only the Attorney General, to defend the constitutionality of the statute through representation of these official-capacity defendants. Notwithstanding this clear, exclusive responsibility, Daniel Bowman, an assistant corporation counsel from the City of Indianapolis's Office of Corporation Counsel, filed a notice of appearance for the Marion County Prosecutor on May 10, 2019. Dkt. 19. Because only the Attorney General may represent the Marion County Prosecutor in this case, the Court should strike Mr. Bowman's appearance.

No lawyer other than a Deputy Attorney General may appear on behalf of the Marion County Prosecutor without the consent of the Attorney General

The legislature has chosen to vest the responsibility for the legal representation of the State in the Attorney General. *State ex rel. Sendak v. Marion County Superior Court, Room No. 2*, 373 N.E.2d 145, 149 (Ind. 1978). Indiana Code Section 4-6-2-1 provides that “[the] attorney-general shall prosecute and defend all suits that may be instituted by or against the state of Indiana.” Further, the Attorney General shall defend “any state governmental official or employee, whether elected or appointed, [if such person] is made a party to a suit, and the Attorney General determines that said suit has arisen out of an act which such official or employee in good faith believed to be within the scope of the official’s or employee’s duties as prescribed by statute or duly adopted regulation[.]” Ind. Code § 4-6-2-1.5(a). Prosecuting attorneys are among the state officials whose representation is entrusted to the Attorney General, both implicitly and by express statutory directive. *See* Ind. Code § 33-23-13-3. Through these statutes, “[t]he Attorney General is charged by law with defending State agencies, officers and employees, and must, of necessity, direct the defense of the lawsuit in order to fulfill his duty to protect the State’s interests.” *Sendak*, 373 N.E. 2d at 148.

The purpose of the office of the Attorney General is “to give the State independent legal representation and to establish a general legal policy for State agencies.” *Indiana State Toll Bridge Commission v. Minor*, 139 N.E.2d 445, 448 (Ind. 1957). Implicit in the legislature’s desire for “a general legal policy for State agencies” is the Attorney General’s responsibility to reconcile conflicting legal views of multiple state officials and harmonize the state’s legal position before the courts. And a corollary of the Attorney General’s responsibility to harmonize the potentially divergent views of multiple office holders is that the Marion County Prosecutor does not have authority to hire or designate any private counsel or other outside counsel to

represent him as a defendant in his official capacity. *State ex rel. Sendak v. Marion County Superior Court, Room No. 2*, 373 N.E.2d 145 (Ind. 1978) (granting, on writ of mandamus, Attorney General’s motion to strike appearance of private counsel on behalf of state officials).

Indiana has divided authority among many elected and appointed officials with discrete responsibility for executing various aspects of state law. But the legislature has designated only one of those officials—the Attorney General—to be the voice of *all* state officials in court. To permit others to speak for the State would engender chaos and confusion as to the position of the people of Indiana before state and federal courts, and indeed would cause “substantial prejudice to the Attorney General’s efficacy in defending his statutory client.” *Id.* at 148. Indiana would be stripped of its ability not only to defend its statutes with clear and carefully chosen arguments, but also to formulate coherent legal strategies across a range of cases, taking into account not only the will and interests of the people of Indiana but also the ongoing relationship between the State and the federal courts.

To be sure, Indiana Code section 33-23-13-5 provides that a judge or prosecuting attorney maintains a right to “select defense counsel of the judge’s or prosecuting attorney’s own choice at the judge’s or prosecuting attorney’s own expense.” Ind. Code § 33-23-13-5(1). Similar language appears in Indiana Code § 4-6-2-1.5(h), which provides that “[n]othing in this chapter shall be construed to deprive any such person [other Indiana state officials] of the person’s right to select counsel of the person’s own choice at the person’s own expense.” The Indiana Supreme Court, however, has already said such language does *not* authorize government officials to supplant the Attorney General with outside counsel in *official capacity* suits; rather, “the outside attorney may only act as an amicus curiae unless the Attorney General consents.” *Sendak*, 373

N.E.2d at 148 (citing *State ex rel. Young v. Niblack*, 229 Ind. 596, 603, 99 N.E.2d 839, 841 (Ind. 1951)). Here, the Attorney General does not consent to representation of the prosecutor by the Office of Corporation Counsel.

Furthermore, Indiana Code § 33-23-13-5 must be read in harmony with the other statutory provisions cited above giving the Attorney General exclusive authority to defend the State. If the prosecuting attorney were sued in his individual capacity, he would be permitted to hire an attorney to provide defense on individual liability issues. What the statute does not contemplate, and the Indiana Supreme Court foreclosed in *Sendak*, is a state official picking other counsel to litigate an official capacity case based on the official's personal views. The representation of defendants in official-capacity cases such as this rests with the Attorney General, who "shall ... defend the judge or prosecuting attorney in the suit." Indiana Code § 33-23-13-3. The Indiana General Assembly plainly has chosen to avoid a scenario where multiple government officials claim to be the voice of the people.

This Court has recognized this principle before, observing that the "Attorney General is charged with the responsibility of defending the State and its officers and employees when sued in their official capacities." *Buquer v. City of Indianapolis*, No. 1:11-CV-00708-SEB, 2013 WL 1332137, at *5 (S.D. Ind. Mar. 28, 2013) (quoting *Sendak*, 373 N.E.2d at 148). In that case, this Court struck the appearance of attorneys who were attempting to impose a litigation position on the State contrary to the Attorney General's position.

This Court should do the same here and strike Mr. Bowman's appearance. Otherwise, not only the Marion County Prosecutor, but every other state official who may disagree with the Attorney General's litigation position, will be emboldened to designate private counsel, agency counsel, or some other lawyer to represent that official's interests in court. Such a development

would not only thwart the will of the General Assembly but would also create uncertainty and inefficiency for the federal judiciary as it adjudicates cases against state officials.

Conclusion

The Attorney General represents the State of Indiana and its officers and employees, including prosecuting attorneys, when sued in their official capacities. Any appearance or statement of another attorney attempting to speak for the Marion County Prosecutor is, legally speaking, meaningless. The Court should accordingly strike Mr. Bowman's appearance for the Marion County Prosecutor.

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