

IN THE
Supreme Court of Indiana

No. _____

Court of Appeals Cause No. 49A02-0711-CV-987

FOUNDATIONS OF EAST CHICAGO, INC.,)	Appeal from the
successor by merger to EAST CHICAGO)	Marion Superior Court
COMMUNITY DEVELOPMENT)	
FOUNDATION, INC. and TWIN CITY)	Cause No.
EDUCATION FOUNDATION, INC.,)	49D13-0705-PL-019348
)	
Appellant (Plaintiff Below),)	The Honorable
)	S.K. Reid, Judge
v.)	
)	
CITY OF EAST CHICAGO,)	
)	
Appellee (Defendant Below), and)	
)	
STATE OF INDIANA,)	
)	
Appellee (Intervenor-Defendant)	
Below).)	

REPLY IN SUPPORT OF MOTION TO STRIKE *AMICUS CURIAE*
BRIEF OF THE INDIANA GAMING COMMISSION

Appellant Foundations of East Chicago, Inc. (“FEC”) asserts that the Attorney General is “mistaken” in stating that he has not consented to the Indiana Gaming Commission’s (“Commission”) use of outside counsel in this case. FEC Resp. 5. Putting aside the question of how FEC can purport to know what the Attorney General has or has not consented to, the Attorney General definitively states that he has never consented to the use of outside counsel in this case and does not now consent to the use of such counsel. The Commission’s *amicus curiae* brief in support of FEC’s Petition to Transfer must therefore be struck.

1. The Attorney General's authorization of the Commission's use of outside counsel in *City of East Chicago v. East Chicago Second Century, Inc.*, 878 N.E.2d 358 (Ind. Ct. App. 2007), *trans. granted*, 898 N.E.2d 1219 (Ind. 2008) ("*East Chicago I*"), does not extend to this case. The Commission and FEC both point to language in the Outside Counsel Agreements stating that the scope of private counsel's representation extended to "all lawsuits regarding disputes over the [East Chicago] local development agreements . . . including but not limited to" the *East Chicago I* trial court action and consolidated appeals. See Commission Resp. 2-3; FEC Resp. 7-8. However, neither the Outside Counsel Agreements nor the Attorney General's written authorizations specifically name *this* case as one that may be handled by outside counsel. Any ambiguity that may arise from the "including but not limited to" language in those documents is easily resolved by the Attorney General's earlier representation of the Commission in this case. After all, why would the Attorney General consent to the hiring of outside counsel in a case where he had already appeared on the Commission's behalf?

It is not the case, therefore, that "the course of conduct between the Commission and the Office of Attorney General" supports the conclusion that the Attorney General has authorized the Commission to retain outside counsel in this matter, as the Commission has incorrectly concluded. Commission Resp. 3. Rather, this "course of conduct" demonstrates exactly the opposite. In any event, Indiana Code § 4-6-5-3 provides that the Attorney General's consent to the hiring of outside

counsel must be in writing, so “course of conduct” cannot provide any sort of authorization.

Even if one assumes for the sake of argument that it was reasonable for the Commission to infer that the Outside Counsel Agreements authorized use of outside counsel in this case, the Attorney General’s view of the matter here and now is definitive. Indeed, even if the Attorney General at one time unambiguously granted the Commission the ability to be represented by outside counsel in this matter, the Attorney General has the power to retract that consent at any time. The Attorney General does not give up control over litigation policy for the State of Indiana simply by authorizing outside counsel in a particular circumstance. If, following consent, the agency and outside counsel embark on a course of litigation conduct that the Attorney General deems inimical to the interests of the State and its citizens, the Attorney General must have the power to revoke consent and assume the representation. Otherwise the Attorney General would have a heavy disincentive *ever* to approve outside counsel even when appropriate (such as when, for example, the Office of Attorney General lacks subject-matter expertise).

In this sense, the Attorney General’s consent for outside counsel is no different from any other ongoing personnel or policy determination made by an elected official. For example, the Governor’s consent is necessary for any particular individual to assume the duties of Executive Director of the Commission, and the Governor may revoke that consent at any time. Ind. Code § 4-33-3-18. That power is necessary for the Governor to be able to carry out the duties for which he is

accountable to voters. *See also Myers v. United States*, 272 U.S. 52 (1926) (affirming power of the President to remove executive officers of the United States whom he has appointed). The same is true of the Attorney General's power to decide who represents State agencies in court. Indeed, the Attorney General has the right to "employ the legal staff of his or her choosing" and, to that end, "shall have the power and authority to remove any deputy at any time." *Americanos v. Carter*, 74 F.3d 138, 143 (7th Cir. 1996) (quoting Ind. Code § 4-6-5-1). Why, then, should he have any less power over outside counsel?

When the Attorney General authorizes outside counsel, he is not making a contract enforceable by a State agency. He is instead exercising sovereign authority delegated to him by the General Assembly for which he is accountable to the voters of Indiana. Accordingly, his view as to whether consent for outside counsel exists is unimpeachable. Here, the Attorney General does not give consent for the Commission to be represented by outside counsel.

2. As a fallback, the Commission and FEC argue, without citing any statute or case, that the Commission does not need the Attorney General's consent to hire outside counsel in this circumstance. They suggest that somehow the Attorney General is not capable of representing the Commission while defending the constitutionality of the challenged statute. Of course, the Attorney General demonstrated earlier in this litigation that he is quite capable of representing the Commission when he secured its dismissal.

What FEC and the Commission are really saying is that, if the Commission has a point-of-view that it wants expressed in court, it should not have to convince the Attorney General to take that position—it should instead be able, without the consent of the Attorney General, to appear in court to make its views heard. Such an “every-man-for-himself” model of agency representation is exactly what the General Assembly rejected when it created the office of Attorney General.

In short, there is no such thing as a “conflict of interest” that arises from interagency disagreement over legal policy. *See* FEC Resp. 9-10. There is a mechanism for resolving such disagreements, and that mechanism is the sole authority of the Attorney General to speak in court on behalf of the State and its agencies. As the State’s chief legal officer, the Attorney General is the *only* official in a position to balance and reconcile multiple, competing State interests (including those of the Commission) in a single case. *Cf. Secretary of Admin. and Fin. v. Attorney General*, 326 N.E.2d 334, 338 (Mass. 1975) (“[W]hen an agency head recommends a course of action, the Attorney General must consider the ramifications of that action on the interests of the [state] and the public generally, as well as on the official himself and his agency.”); *State Attorneys General Powers and Responsibilities* 53 (Emily Myers & Lynne Ross eds., 2007) (“This policy [of unitary representation] protects the interests of the state as a whole as a unitary client, rather than any one of the many potential agency manifestations of the state.”).

If resulting disagreements between the Office of the Attorney General and a particular State agency regarding legal strategy constituted a conflict of interest requiring separate counsel, state courts would frequently receive briefs from multiple State agencies fancying themselves “friends of the court” with something to contribute to the legal debate. The notion that the State speaks with one voice in court would evaporate. The Court would instead get a series of potentially irreconcilable, parochial agency views that lack circumspection and respect for countervailing government and citizen interests.

3. Further attempting to erode the authority of the Attorney General to represent the interests of Indiana citizens with a clear, unquestioned voice in court, both FEC and the Commission argue that this Court recognized in *State ex rel. Sendak v. Marion County Superior Court*, 373 N.E.2d 145 (Ind. 1978), that outside counsel may represent state agencies as *amici curiae* even if the Attorney General does not consent. Commission Resp. 5; FEC Resp. 8 n.6. This is, to say the least, a novel and, indeed, breathtaking view of the *Sendak* holding, which has until now been understood to confirm the Attorney General’s absolute authority over state agency litigation matters. The view that *Sendak* authorizes agency participation as *amicus curiae* without Attorney General consent would blow a hole in the seamless garment of State legal interests—not even disagreement between an agency and the Attorney General would be necessary to justify the agency’s separate appearance in court.

Sendak straightforwardly and unequivocally confirms the Attorney General's statutory authority to approve agency representation by outside counsel, stating that "[n]o State agency is permitted to hire another attorney to perform legal services unless the Attorney General renders his written consent." *Sendak*, 373 N.E.2d at 148. In the course of making that pronouncement, the Court deemed it wise to comment on the ability of public officials to hire their own lawyers at their own expense to represent their *private* interests without the Attorney General's consent. Indeed, a statute expressly provides for that (*see* Ind. Code § 4-6-2-1.5), but that statute has never been understood to authorize the sort of public agency representation at issue here.

In *Sendak* the Court made the unremarkable observation that "public officials can[] hire outside counsel at their own expense to protect their personal interests," but that when they do so, "[n]otwithstanding this right to private counsel, when the suit involves State officers or employees in their official capacities, the outside attorney may only act as an *amicus curiae* unless the Attorney General consents." *Sendak*, 373 N.E.2d at 148.

What *Sendak* describes, therefore, is a situation where a public official wishes to hire private counsel to represent his own *personal interests* in a suit where State officials or employees are already named as parties in their official capacities. In such a case, the private counsel is only permitted to act in an *amicus curiae* capacity unless the Attorney General consents to something more. In other words, an attorney hired to protect a public official's private interests may not,

without the Attorney General’s consent, represent the official in his official capacity in court, though such counsel may file an *amicus* brief. This is entirely consistent with Indiana Code § 4-6-5-3, which provides that “[n]o agency, except as provided in this chapter, shall have any right to name, appoint, employ, or hire any attorney or special or general counsel to represent it or perform any legal service in behalf of such agency and the state without the written consent of the attorney general.”

The Hill, Fulwider firm and Mr. Funk have not appeared in this case on behalf of anyone in their private, personal capacities. They have appeared instead on behalf of the Indiana Gaming Commission as a state agency. *Sendak* in no way permits State agencies to reject the Attorney General’s representation by unilaterally hiring outside counsel—at public expense—to appear in court for the agency as an *amicus curiae*. Such an interpretation would lead to absurd results by allowing State officers and agencies to hire private counsel in order to weigh in as an *amicus* any time they disagree with the Attorney General’s legal policy or strategy. In such a circumstance, multiple state agencies might be on opposite sides of any given case. Such a result would contravene the very rationale for having an Attorney General, *i.e.*, “to give the State independent legal representation and to establish a general legal policy for State agencies.” *Sendak*, 373 N.E.2d at 148.

* * *

The Indiana Gaming Commission was once a defendant in this lawsuit, and, in pursuit of the State’s institutional legal interests, the Attorney General secured the Commission’s dismissal. Whether dismayed at that legal policy decision, or

whether merely sensing an opportunity to stretch its own authority into the litigation realm, the Commission now seeks to be heard in this Court. The Court, however, is not an open forum like the legislature where every agency may bring its separate agenda hoping to get attention. Here, only those authorized by law may speak in a representative capacity, and for state agencies the sole authority for such representation belongs to the Attorney General and those he consents to hire. In this case, that does not include outside counsel for the Commission.

CONCLUSION

The Attorney General's motion should be granted, and the *amicus curiae* brief of the Indiana Gaming Commission should be struck.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

As required by Indiana Appellate Rules 34(G)(2) and 44(F), I verify that this Reply in Support of Motion to Strike *Amicus Curiae* Brief of the Indiana Gaming Commission contains no more than 2,100 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of June, 2009, a copy of the foregoing was served via First Class United States mail, postage pre-paid upon the following:

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