No. _____

IN THE
SUPREME COURT OF ILLINOIS

BETTER GOVERNMENT ASSOCIATION and DAN SPREHE, Plaintiffs, v. OFFICE OF GOVERNOR ROD R. BLAGOJEVICH, Defendant-Respondent. _____ LISA MADIGAN, Attorney General of Illinois, Petitioner.	)	On Petition for Leave to Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-07-0406 There on Petition for Leave to Appeal from the Circuit Court for the Seventh Judicial Circuit, Sangamon County, Illinois, No. 2007 MR 5 The Honorable PATRICK W. KELLY, Judge Presiding.

PETITION OF LISA MADIGAN, ATTORNEY GENERAL OF ILLINOIS, FOR LEAVE TO APPEAL PURSUANT TO SUPREME COURT RULE 315

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PRAYER FOR LEAVE TO APPEAL

Petitioner Lisa Madigan, Attorney General of Illinois, seeks leave to appeal, pursuant to Supreme Court Rule 315, from the appellate court's summary denial of her petition for leave to appeal under Supreme Court Rule 306(a)(7). The Attorney General sought the appellate court's leave to appeal from the circuit court's April 16, 2007 order granting a motion to appoint independent counsel for Defendant Office of Governor Rod R. Blagojevich ("Office of the Governor"), and thereby disqualifying her from representing the Office of the Governor, under section 6 of the Attorney General Act, 15 ILCS 205/6 (2006).

The appellate court declined, without explanation, to address a question of first impression on a matter of significant public concern: Whether the Attorney General, the chief legal officer of Illinois, may be ousted from representing a state defendant just because an Assistant Attorney General, pursuant to her and the Attorney General's official duties, takes a position on a question of law contrary to the state defendant's position, where another Assistant Attorney General or Special Assistant Attorney General stands ready to assert any available good faith defense for the state defendant. This Court's review of this tremendously important question is warranted, either through this petition for leave to appeal under Rule 315, or through the motion for a supervisory order that the Attorney General has contemporaneously filed under Rule 383.

JUDGMENT OF THE APPELLATE COURT

On June 18, 2007, the Appellate Court of Illinois, Fourth Judicial District, issued a one-sentence order denying the Attorney General's petition for leave to appeal pursuant

to Supreme Court Rule 307(a)(7). App.0. No petition for rehearing was filed. The instant petition is being filed on June 25, 2007.

POINT RELIED UPON FOR SEEKING REVIEW

By declining to addressing a question of first impression, the appellate court let stand the circuit court's order disqualifying the Attorney General under section 6 of the Attorney General Act, 15 ILCS 205/6 (2006), from representing a state defendant just because an Assistant Attorney General, pursuant to her and the Attorney General's official duties, took a position on a question of law contrary the state defendant's position. The appellate court's refusal to step in leaves undisturbed a ruling that conflicts with precedents of this Court, including *Environmental Protection Agency v. Pollution Control Bd.*, 69 Ill. 2d 394 (1977) ("*EPA*"), holding that the Attorney General may be removed from representing a state defendant under section 6 only if she is an actual "party" in the litigation or "interested as a private individual."

STATEMENT OF FACTS

Factual Background

The United States Attorney for the Northern District of Illinois issued one or more subpoenas to the "Custodian of Records[,] Office of the Governor of the State of Illinois," in connection with a federal grand jury investigation. SR.41.[1] In July 2006, BGA sent the Office of the Governor a written FOIA request for copies of any and all federal

[1] For convenience stake, this petition for leave to appeal cites to the Supporting Record ("SR.__") filed in connection with the Attorney General's Rule 383 motion for supervisory order. The appendix to this petition is cited "App.__".

subpoenas for records or testimony, as well as for correspondence related to the subpoenas and compliance therewith, for the prior thirteen-month period. App.16.

The Office of the Governor sent BGA a letter denying the request. App.17. The letter stated that "this Office cannot confirm or deny the existence of the" subpoenas and that, alternatively, any such subpoenas would be exempt from release under section 7(1)(a) of FOIA. *Ibid.* In addition, the letter stated, the requested correspondence was not subject to disclosure under sections 7(1)(f) and 7(1)(n) of FOIA. *Ibid.* The letter also stated that BGA "ha[d] the right to appeal this denial to the Governor's Office." *Ibid.* BGA appealed, challenging the denial of the FOIA request. App.18-19. The Office of the Governor denied the appeal. App.20.

The Attorney General's Public Access Counselor

As part of the Attorney General's broad mandate as the State's chief legal officer, the Office of the Attorney General seeks to ensure that state and local governmental agencies throughout Illinois comply with FOIA and the Open Meetings Act ("OMA"). See http://www. illinoisattorneygeneral.gov/government/pac_bio.html (accessed June 24, 2007). To that end, the Attorney General established the position of Public Access Counselor, whose duties include responding to questions concerning FOIA and OMA, offering training to public officials, the media and members of the public, and taking action to resolve disputes arising under these laws. *Ibid.* Through the Public Access Counselor, the Attorney General's Office works to ensure that FOIA and OMA fulfill their goal of providing the public with access to government documents and decisionmaking. *Ibid.*; see also http://www.illinoisattorneygeneral.gov/government/pac.html (accessed June 24, 2007) (the Attorney General's Office works closely with

members of the public, the media, and government officials to resolve disputes under these laws and to ensure greater enforcement and compliance with them).

In 2006, the Public Access Counselor responded to 988 inquiries dealing with FOIA and OMA, and conducted 53 training sessions throughout Illinois for individuals, government officials, members of the media, and students. See Public Access Counselor Annual Report, An Overview of 2006, at 2 (App.30). Of the FOIA cases, 404 were written requests for assistance in obtaining documents from public bodies. *Ibid.*

In October 2006, approximately one month after the Office of the Governor denied BGA's appeal, the Public Access Counselor sent the Office of the Governor a letter stating that the Attorney General's Office had received numerous inquiries regarding FOIA requests for production of federal subpoenas, including BGA's request. App.21. The letter further stated that its purpose was "to ensure that the Office of the Governor . . . properly respond[s] to requests for information pursuant to [FOIA]," and that it appeared, based on the information furnished, that the FOIA exceptions cited by the Office of the Governor did not permit nondisclosure of the subpoenas. *Ibid.* The letter was copied to BGA. App.25.

Procedural Background

In January 2007, BGA filed the instant FOIA suit against the Office of the Governor to obtain disclosure of the subpoenas and related materials. App.14. The Office of the Governor asked the Attorney General to appoint former Justice Gino L. DiVito and two of his law firm colleagues as Special Assistants Attorney General (SPAAGs) (SR.43), which the Attorney General agreed to do (SR.45-46). (A SPAAG is an attorney who, although not employed full-time by the Attorney General, receives a

temporary appointment to represent a state entity and reports to the Attorney General's Office in connection with the representation. SR.45.)

Shortly thereafter, the Office of the Governor stated that, rather than accept DiVito as a SPAAG, it would file a motion for appointment of independent counsel. SR.43. In response, the Chief Deputy Attorney General assured the Office of the Governor that DiVito would "be free to fully represent the Office of the Governor and assert all good faith defenses, both legal and factual." SR.45. The Chief Deputy denied that any conflict precluded the Attorney General from representing the Office of the Governor, adding that because the Attorney General's Office was "considering the filing of an amicus brief" on behalf of the People in support of BGA's position, it would "assure that those with whom the SPAAG communicates are completely separate from those whom may be responsible for the filing of an amicus." SR.46.

On March 1, 2007, lawyers employed by the Office of the Governor, together with Londrigan, Potter & Randle, P.C. (collectively, "Londrigan Potter"), filed a motion asking the circuit court to appoint independent counsel for the Office of the Governor. SR.1, 7. The motion argued that the Public Access Counselor's letter required the appointment of independent counsel under section 6 of the Attorney General Act, 15 ILCS 205/6 (2006). SR.1-2, 15-17. The Attorney General responded that, as the chief legal officer for the State, she has exclusive constitutional authority to conduct the State's legal affairs, including representation of the State, its agencies and employees, and that she was not "interested" in the case within the meaning of section 6 of the Attorney General Act. SR. 59-70.

The Circuit Court's Order

On April 16, 2007, the circuit court granted Londrigan Potter's motion. App.1-3. The court acknowledged that the Attorney General "has broad and generally exclusive constitutional authority to conduct litigation on behalf of the State and its various agencies," and that her authority could be overcome under section 6 only if she "is either interested as a private individual or is an actual party to the action." App.1. The court found that the Attorney General had a "private" interest in BGA's lawsuit due to the Public Access Counselor's letter, reasoning that she "publicly and unequivocally committed herself to a legal position on the ultimate issue in this case" in BGA's favor, and that "it [was] difficult to imagine that the Attorney General would not have an interest in seeing her resolute, publicly espoused opinion ultimately upheld by this Court." App.2. In so holding, the court did not address whether the Public Access Counselor, in sending her letter, had acted pursuant to her and the Attorney General's official duties with respect to FOIA.

The Appeal

The Attorney General filed a petition for leave to appeal to the Illinois Appellate Court pursuant to Supreme Court Rule 306(a)(7). Londrigan Potter filed a motion to strike the petition, arguing that for purposes of Rule 306(a)(7), the Attorney General was not a "party"and the order did not "disqualify" the Attorney General, to which the Attorney General responded. Londrigan Potter also filed an answer to the petition. On June 18, 2007, the appellate court denied the petition. App.0.

ARGUMENT

The Attorney General has the exclusive constitutional authority to conduct the State's legal affairs and to represent the State and its agencies and officials in litigation. Over the past century, this Court time and again has affirmed the Attorney General's authority in no uncertain terms. See, *e.g.*, *Scachitti v. UBS Finan. Serv.*, 215 Ill. 2d 484, 516 (2005); *Lyons v. Ryan*, 201 Ill. 2d 529, 540 (2002); *Gust K. Newberg, Inc. v. Illinois State Toll Highway Auth.*, 98 Ill. 2d 58, 67-69 (1983); *People ex rel. Scott v. Briceland*, 65 Ill. 2d 485, 499-500 (1976); *Fergus v. Russell*, 270 Ill. 304 (1915). As the Court explained, "[t]o allow the numerous State agencies the liberty to employ private counsel without the approval of the Attorney General would be to invite chaos into the area of legal representation of the State." *Environmental Protection Agency v. Pollution Control Bd.*, 69 Ill. 2d 394, 402 (1977) ("*EPA*").

The circuit court contravened these settled principles in this case. In considering Londrigan Potter's motion to disqualify the Attorney General and appoint independent counsel, the circuit court acknowledged that the narrow exception to the Attorney General's exclusive authority to represent the State and its agencies in litigation, set forth in section 6 of the Attorney General Act, 15 ILCS 205/6 (2006), applies only where the Attorney General is a "party" to the suit or "interested as a private individual." *EPA*, 69 Ill. 2d at 400-01. Nonetheless, the circuit court disqualified the Attorney General, holding that she had a *private* interest in the BGA litigation because one of her subordinates, consistent with that subordinate's and the Attorney General's *official* duties with respect to FOIA, expressed a view prior to the litigation that, based on the

information then available, the Office of the Governor had articulated inadequate justification under FOIA to withhold the documents.

The circuit court's order is fundamentally flawed in numerous respects, not the least of which is mistaking the Attorney General's *official* duties to promote the State's compliance with FOIA for a *private* interest in the underlying dispute. The appellate court declined to grant review of this important matter under Supreme Court Rule 306(a)(7), thus warranting this Court's review by way of appeal or supervisory order.

A. The Attorney General May Be Disqualified from Representing a State Defendant Under Only Two Narrow Circumstances, Neither of Which Is Present Here.

The Attorney General's exclusive authority to represent Illinois and its agencies and officials is manifest. In *Fergus v. Russell*, 270 Ill. 304 (1915), this Court held under the 1870 Constitution that the Attorney General is "the only officer employed to represent the people in any suit or proceeding in which the state is the real party in interest, except where the constitution or a constitutional statute may provide otherwise. With this exception, only, he is the sole official adviser of the executive officers." *Id.* at 342. Similarly, the 1970 Constitution provides that "[t]he Attorney General shall be the legal officer of the State and shall have the duties and powers that may be prescribed by law," Ill. Const. 1970, art. V, § 15, and the Attorney General Act in turn provides that "[t]he duties of the attorney general shall be . . . [t]o defend *all* actions and proceedings against any state officer in his official capacity, in any of the courts of this state," 15 ILCS 205/4 (2006) (emphasis added). As this Court recently confirmed, "the Attorney General possesses the *exclusive* constitutional power and prerogative to conduct the state's legal affairs." *Lyons*, 201 Ill. 2d at 540 (emphasis in original); see also *Scachitti*, 215 Ill. 2d at

516 (same). As the Court has explained, "[t]o allow the numerous State agencies the liberty to employ private counsel without the approval of the Attorney General would be to invite chaos into the area of legal representation of the State." *EPA*, 69 Ill. 2d at 402.

Section 6 of the Attorney General Act sets forth a narrow exception to the foregoing principles: "Whenever the attorney general is . . . *interested in any cause or proceeding*, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause or proceeding . . . ." 15 ILCS 205/6 (2006) (emphasis added). In *EPA*, this Court held that the Attorney General has a disqualifying interest in only two circumstances: "where the Attorney General is interested as a private individual," and "where the Attorney General is an actual party to the action." 69 Ill. 2d at 400-01. The Court cautioned that, although an attorney-client relationship exists between a state entity and the Attorney General, "it cannot be said that the role of the Attorney General apropos of a State agency is precisely akin to the traditional role of private counsel apropos of a client." *Id.* at 401. Stressing that the Attorney General's duties include serving the broader interests of the State, the Court held that "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. Only in this way will the Attorney General properly serve the State and the public interest." *Id.* at 401-02.

Applying these principles, *EPA* concluded that neither of the two disqualifying circumstances existed merely because the Attorney General represented two opposing positions in a single case, explaining that "[t]he Attorney General's responsibility is not limited to serving or representing the particular interests of State agencies, . . . but

embraces serving or representing the broader interests of the State." *Id.* at 401. Thus, the Court held that the Attorney General was not disqualified from representing the Pollution Control Board (PCB) in an administrative review action brought by the Environmental Protection Agency (IEPA) from a PCB ruling entered in an administrative proceeding in which the Attorney General represented the IEPA. *Id.* at 402. Since 1977, this Court has consistently reaffirmed *EPA*, including its holding that the Attorney General can represent opposing parties in the same case. See *Scachitti*, 215 Ill. 2d at 499-500; *People ex rel. Sklodowski v. State*, 162 Ill. 2d 117, 127 (1994); *Pioneer Processing, Inc. v. Environmental Protection Agency*, 102 Ill. 2d 119, 138 (1984); *People v. Massarella*, 72 Ill. 2d 531, 535 (1978).

EPA rests on the premise that the Attorney General's representation of the IEPA before the PCB, and then on administrative review against the PCB, did not give the Attorney General a "private" interest in the dispute, and thus did not disqualify him from also representing the PCB. The Attorney General did not have a "private" interest in that dispute because, in representing the IEPA, the Attorney General was fulfilling his official duties as the State's chief legal officer. See *People v. Dall*, 207 Ill. App. 3d 508, 530 (4th Dist. 1991) ("Performance of one's official functions will not create a conflict of interest.") (citing *EPA*). The same holds here. The Public Access Counselor corresponded with the Office of the Governor pursuant to the Attorney General's official duties with respect to FOIA, and the fulfillment of those duties did not give the Attorney General a private interest in the dispute between BGA and the Office of the Governor.

B. The Attorney General's Role With Respect to FOIA Is Official, Not Private.

The circuit court correctly acknowledged that only a "private" interest warrants the Attorney General's disqualification under section 6 of the Attorney General Act. App.1. Yet the court held that the Public Access Counselor's role with respect to FOIA served the Attorney General's "private" interests, as opposed to having advanced her official duties as the State's chief legal officer. The court took the Public Access Counselor's letter as reflecting the Attorney General's "public[] and unequivocal[] commit[ment] to a legal position on the ultimate issue in this case," a position against the Office of the Governor and in favor of BGA. App.2. In the court's view, the letter created a disqualifying "personal interest" because "it was difficult to imagine that the Attorney General would not have an interest in seeing her resolute, publicly espoused opinion ultimately upheld by this Court," given her own "professional pride in being correct on an issue." App.2.

The circuit court's reasoning does not bear scrutiny. The Attorney General regularly represents opposing state agencies in litigation, with each agency assigned a different Assistant Attorney General or SPAAG. Illinois law recognizes that when the Attorney General files a brief on behalf of the first agency, she does not thereby obtain a "personal interest as a private individual" in the matter, or become "unequivocally committed" to a particular legal position due to her own "professional pride in being correct on an issue," as *EPA* and its progeny allow her to then file another brief, on the opposite side of the case, for the other agency. To take an example, in *Department of Children and Family Servs. v. Civil Service Comm'n*, No. 4-05-0642 (Ill. App.), one

Assistant Attorney General handled the matter for DCFS while another did so for the Commission.[2] Just as an Assistant Attorney General's preparation and filing of a brief for DCFS did not "unequivocally commit[]" the Attorney General to DCFS's side, so as to disqualify her (through the other Assistant Attorney General) from doing the same for the Commission, the Public Access Counselor's letter did not "unequivocally commit[]" the Attorney General to BGA's side, so as to disqualify her from representing the Office of the Governor in this case.

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[2] See also, *e.g.*, *Midwest Generation v. Pollution Control Bd.*, No. 3-07-0061 (Ill. App.) (one AAG for IEPA and another AAG for PCB); *Kincaid Generation v. Pollution Control Bd.*, No. 4-07-0075 (one AAG for IEPA and another AAG for PCB); *Central Mgmt. Servs. v. Labor Relations Bd.*, No. 4-06-0083 (Ill. App.) (AAG for Labor Board, SPAAG for CMS); *Service Employees Int'l Union, Local 73 v. Labor Relations Bd.*, No. 1-05-2874 (Ill. App.) (AAG for Labor Board, one SPAAG for Secretary of State and another SPAAG for CMS); *Central Mgmt. Servs. v. Labor Relations Bd.*, No. 4-05-0510 (Ill. App.) (AAG for Labor Board, SPAAG for CMS); *Department of Corrections v. Human Rights Comm'n*, Nos. 1-04-1423, 1-04-1928, 1-04-2112 (Ill. App.) (AAG for HRC, SPAAG for DOC); *Central Mgmt. Servs. v. Labor Relations Bd.*, No. 4-04-1001 (Ill. App.) (AAG for Labor Board, SPAAG for CMS); *Environmental Protection Agency v. Pollution Control Bd.*, No. 4-02-0560 (Ill. App.) (AAG for IEPA, SPAAG for PCB); *Environmental Protection Agency v. Jersey Sanitation, Inc.*, No. 4-02-0319 (Ill. App.) (AAG for IEPA, SPAAG for PCB).

The circuit court was wrong to suggest that the precedents allowing the Attorney General "to represent both sides of a dispute between state agencies" are distinguishable because "this case involves a non-governmental entity and a private citizen suing the officer of a constitutional officer." App.2. The reason the Attorney General may represent state agencies against one another is that such representation fulfills the Attorney General's official duties as the State's chief legal officer rather than advancing a private or personal interest. By the same token, facilitating the State's compliance with FOIA and other open government laws is among the Attorney General's official functions, not a means of advancing a private interest. See Bruce Rushton, "FOIA: Top secret uphill climb, Agencies often ignore FOIA and the people who request information," 4/29/07 Daily Southtown K3 (available at 2007 WL 9548326) (describing the Public Access Counselor as "an assistant Illinois assistant attorney general who prods government into obeying the state's Freedom of Information Act"); Emily Krone, "State official offers advice to open up government," 4/27/07 Chi. Daily Herald 3 (available at 2007 WL 8236061) (Public Access Counselor "has fielded more than 2,000 complaints, 75 percent of those from private citizens"). And that, ultimately, is what matters for determining whether, under section 6 of the Attorney General Act and *EPA* and its progeny, the Attorney General has a disqualifying private interest in the matter.

Because the Attorney General is not a party and has no private interest in the BGA lawsuit, the only appropriate disposition is that an Assistant Attorney General other than the Public Access Counselor — or, as the Office of the Governor originally requested, a SPAAG like former Justice DiVito — represent the Office of the Governor. The Attorney General's supervision of both the Public Access Counselor and the attorneys

defending the Office of the Governor is consistent with, and in fact required by, *EPA*'s mandate that the Attorney General direct the legal affairs of the State to properly serve the State and the public interest. See *EPA*, 69 Ill.2d at 402 ("allow[ing] the numerous State agencies the liberty to employ private counsel without the approval of the Attorney General would be to invite chaos into the area of legal representation of the State").

By holding otherwise, the circuit court ignored the realities of the Attorney General's unique role in our system of justice. As this Court recognized, representation by the Attorney General is not "precisely akin to the traditional role of private counsel apropos of a client." *EPA*, 69 Ill. 2d at 401. Under the circuit court reasoning, the Attorney General's or an Assistant Attorney General's public statement in favor of, say, the First Amendment rights of public university students would disqualify the Attorney General from defending every public official who is alleged to have violated those rights. Yet the Attorney General, whose duty it is to enforce the law, has the concomitant duty to defend an official accused of violating that same law. See, *e.g.*, *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc) (reversing summary judgment against dean of state university on First Amendment claim). The circuit court's order fails to account for this elemental fact of life under the Illinois Constitution and the Attorney General Act.

This is particularly true in the FOIA context. Where, as here, a state entity is sued for violating FOIA, the Attorney General has the duty to assert any available good faith defense. See 15 ILCS 205/4(3). However, as shown above, the Attorney General's official duties *also* include ensuring that the State complies with FOIA. Both duties derive from the Attorney General's status as the State's chief legal officer, not (as the

circuit court held) from an interest as a private individual, and fulfilling one duty does not disqualify her from performing the other.

Finally, it is important to address the circuit court's concern that "[t]o allow the Attorney General to represent Defendant here, after she has taken a public stand in favor of Plaintiffs, would potentially undermine the adversarial process and effectively allow the Attorney General, rather than the courts, to decide whether the records should be released." App.2. In the court's view, every time the Attorney General makes a decision or gives advice that is contrary to what the state official or agency wants, the adversary process will be destroyed and the judiciary's decisionmaking authority thwarted. That emphatically is not the law. See *Gust K. Newberg*, 98 Ill. 2d at 67-69 (because the Constitution makes the Attorney General the chief legal officer of the state's departments and agencies, state agency may not settle litigation without the Attorney General's approval). In any event, the circuit court's concern is not well-founded. What can and should happen here is that the Attorney General will represent the Office of the Governor (through an Assistant Attorney General or a SPAAG) by presenting any available good faith defense to BGA's claim. BGA (and perhaps the Attorney General representing the People of the State of Illinois as an amicus through a different Assistant Attorney General or SPAAG) will argue the contrary position. And, ultimately, the courts will decide the merits. This is what happens in *every* case where the Attorney General advances opposing views, whether inside or outside the courtroom, and this case is no different.

Given the magnitude of the circuit court's error, the appellate court should have granted review under Rule 306(a)(7). This Court should take whatever steps are

appropriate, whether by appeal or by supervisory order directed towards the appellate court or circuit court, to ensure that this important matter receives the review it deserves.

C. Londrigan Potter's Jurisdictional Arguments Are Without Merit.

Londrigan Potter opposed the Attorney General's Rule 306(a)(7) petition in the appellate court, and may oppose the instant Rule 315 petition, on three principal grounds. None has merit.

First, Londrigan Potter may contend that granting review would turn the Attorney General into a "party" and thus make her "interested" under section 6 of the Attorney General Act. That contention would be incorrect. Settled precedent holds that a non-party may appeal under circumstances such as these, and this Court and the appellate court have permitted the Attorney General, as the State's chief legal officer, to seek appellate review of a court or agency order without having been a party in the underlying proceeding. See, *e.g.*, *In re Estate of Tomlinson*, 65 Ill. 2d 382, 387-88 (1976); *People ex rel. Scott v. Illinois Racing Bd.*, 54 Ill. 2d 569, 573-76 (1973); *Pioneering Processing, Inc. v. EPA*, 102 Ill. 2d 119, 135-39 (1984); *Layfer v. Tucker*, 71 Ill. App. 2d 333, 336 (2d Dist. 1979).

Second, Londrigan Potter may contend that if BGA files an amended complaint naming the Governor in his official capacity as an additional defendant, the Governor, as an elected official, would be entitled to independent counsel under section 2(b) of the Indemnification Act, 5 ILCS 350/2(b) (2006), and *Tully v. Edgar*, 286 Ill. App. 3d 838 (1st Dist. 1997) (holding held that an elected state official was entitled to independent counsel under section 2 of the Indemnification Act where the Attorney General had abandoned the official and left her without representation). However, BGA elected not to

amend its complaint to name the Governor as a defendant, so any question regarding section 2(b) of the Indemnification Act and *Tully* is not presented here. And even if BGA did name the Governor as an official capacity defendant, the Governor would not be entitled to independent counsel for several reasons, including that, by contrast to the unique circumstances in *Tully*, the Attorney General has not abandoned the defense, but to the contrary stands ready to assert any available good faith defense. Moreover, even if the Governor were entitled to independent counsel, the question before the circuit court was (and this Court is) whether the Office of the Governor is entitled to independent counsel, and there is no conceivable basis to hold that the Office of the Governor — which is not an elected official — has any right to independent counsel under *Tully* or the Indemnification Act.

Third, Londrigan Potter may contend that the circuit court's order did not grant "a motion to disqualify the attorney for any party," and so was not reviewable under Rule 306(a)(7). Such an argument exalts form over substance, contrary to the well-established rule that a court "should look to [an order's] substance and effect rather than to its form." *Clemons v. Mechanical Devices Co.*, 202 Ill. 2d 344, 350 (2002). As noted above, the Attorney General has the exclusive authority to represent all state officers and agencies in litigation. Londrigan Potter specifically sought an order preventing the Attorney General from representing the Office of the Governor and appointing independent counsel in her stead. The circuit court's order granting that motion held that the Attorney General has an interest as a private individual that necessitates her removal from the case. It would be implausible to treat this order as anything other than one granting a motion to disqualify an attorney.

CONCLUSION

For these reasons, Lisa Madigan, Attorney General of Illinois, requests that this Court grant leave to appeal. In the alternative, the Attorney General requests that this Court issue a supervisory order directing the appellate court to allow the Attorney General's Rule 306(a)(7) petition for leave to appeal. In further alternative, this Court may wish to directly examine the circuit court's order through the Rule 383 motion for supervisory order filed contemporaneously herewith.

June 25, 2007

Respectfully submitted,

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APPENDIX

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

PROOF OF FILING AND SERVICE

The undersigned deposes and states that on June 25, 2007, she caused the original and nineteen copies of the attached **Petition for Leave to Appeal** to be filed with the Clerk, Supreme Court of Illinois, Supreme Court Building, 200 East Capitol Avenue, Springfield, IL 62701, and one copy to be served upon each of the following parties, by overnight delivery, unless otherwise indicated:

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SUBSCRIBED and SWORN to
before me on June 25, 2007.

_____
Notary Public