

May 27, 2011

The Washington Messenger



Mr. Tim Ford
Open Government Ombudsman
Office of Attorney
General of Washington
1125 Washington Street SE
PO Box 40100
Olympia, WA 98504-0100

Dear Mr. Ford:

Thank you for your May 20 critique of our flyer, "Legalizing Crime in Washington: The Windermere Prototype." Before we address the points you raised in your critique, let's look at one you didn't raise:

1. The AG's Office Is Directly Responsible For Its Clients' Unlawful Conduct

The Attorney General's Office is the legal advisor to the Department of Licensing (DOL). (See RCW 18.85.420). You are unusual legal advisors. The first concern of most lawyers is that their own clients do nothing unlawful. But for years, your client has been publicly committing unlawful acts, and you've done nothing to correct your client.

RCW 43.10.030(2) indicts your office even further:

[The attorney general shall:]

Institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer;

The Attorney General has the power to institute legal "*proceedings for, or for the use of the state*" to force DOL to do its job. Instead, he allows DOL to be used to benefit a wealthy and politically powerful corporation that habitually violates the Consumer Protection Act and causes great harm to the Washington public.

Should a private citizen notice, comment, or try to suggest the Attorney General do his job, the Attorney General's office challenges and threatens that citizen. It has happened to us. See Paragraph 9, below.

2. What Advice Has The AG Been Giving DOL?

Given that the Attorney General is DOL's legal advisor and given DOL's egregiously unlawful conduct over the years, Victims of Windermere wish to know what advice your office has been giving DOL. Why have no sanctions been meted out to Windermere? The cases are described on <http://Windermere-Victims.com>; we incorporate the contents of that webpage in this letter, by reference.

Asst. Atty. General Jody Lee Campbell told us that your office gives DOL "*option-based*" advice, and added: "*but any advice I give my client is subject to the attorney-client privilege.*" When we asked Campbell what statute gives DOL the "option" to enforce the law, she fell silent. Correspondence to be found at <http://renovationtrap.com/ag/index.html#dol>

And what advice has the AG given DOL on conflict of interest? DOL has *twice* invited Windermere's lawyer, John Demco, to rewrite Washington real estate laws. Demco founded the Demco Law Firm, Windermere's usual and customary defense counsel; Demco attorneys regularly represent Windermere agents who are under DOL investigation. Demco is/was a Windermere broker and owner of multiple Windermere franchises. Two of Demco's agents violated the Vulnerable Adult Act when they sold Whidbey Island waterfront view property (the property belonged to a mentally confused old widow) to themselves and their relatives at prices vastly below market value. Demco personally defended the

heinous act, in trial and on appeal, and lost both times (*Endicott v. Saul*, discussed on <http://Windermere-Victims.com>). Did your office approve DOL's selection of Demco to rewrite our laws? Once or twice?

3. Will You Invoke "Attorney Client Privilege" And Continue To Protect Government Secrecy?

Mr. Ford, as the Open Government Ombudsman, will you, like Asst. Atty. Gen. Campbell (above) tell us that the Attorney General's advice to DOL cannot be disclosed because it is protected by attorney-client privilege? That mechanism is classically used to protect government secrecy and wrongdoing. The "attorney client privilege" excuse defeats open government and ensures government by the ole boy system, or government by cabal.

Now, let us move on to your critique of *Legalizing Crime in Washington: The Windermere Prototype*. We have reproduced your text (in bold, below) and interlined our comments.

4. AG's Use Of Sham Defenses

[AG Letterhead]

May 20, 2011

Re: Flyer -- Legalizing Crime in Washington: The Windermere Prototype

Dear Mr. and Mrs. DeCoursey:

I received your letter dated May 12, 2011 which asks how the conduct of Attorney General McKenna, as alleged in the above-entitled flyer, promotes open government. The flyer does not accurately portray Attorney General Rob McKenna or the Office of the Attorney General. It is true that the role of the Office of the Attorney General includes defending state agencies in court.

Let us consider the definition of a "sham defense."

"A false or fictitious defense, interposed in bad faith, and manifestly untrue, insufficient, or irrelevant on its face." -- Black's Law Dictionary.

While the Attorney General is obliged to represent state agencies, he is in *no way* permitted to put up sham defenses. Moreover, Washington court rules (Civil Rule 11) prohibits any lawyer -- including Mr. McKenna's -- from submitting to the court statements known to be untrue, engaging in litigation attrition warfare, or using the courts to harass or delay. Lying on behalf of the client is also forbidden (RPC 4.1).

In 2005, after Redmond CPA Ed Clark reported a dishonest accountant, the Accountancy Board tried to extort him into silence by inventing false charges against him and threatening his CPA license. Even though the facts were crystal clear, the Attorney General defended the extortionists. Surely attorneys for The Mob would not be so bold?

When the facts so warrant, criminal defense attorneys often plead their clients "guilty." Mr. McKenna certainly should have represented the Board of Accountancy, but, as an officer of the court, he should have admitted to the truth. Instead, McKenna threw his weight behind the extortionists.

Mr. Clark had to spend \$800,000 of his own money to fight the AG's legal machine and clear his name. Now you say the Attorney General is, by law, forced to "defend" rogue government agencies and officers? No, he is not. He should represent them, advise them to obey the law, admit the truth of their wrongdoing in court, and lend his weight to correct the lawlessness and injustice.

Mr. Ford, what you are defending is outrageous.

5. Supreme Court Judges Prohibit So-Called "Defense" Of Lawless Government Officers

Supreme Court judges made it clear in the famous *Dunbar* case of 1926: The Attorney General must not defend lawlessness government officers. McKenna knows that, but does it anyway. McKenna cites

Dunbar and quotes the judge's words in his current dispute with Peter Goldmark/Department of Natural Resources. The *Dunbar* judges held that the AG must not:

"sit supinely by and allow state officers to violate their duties. ... [The AG's] paramount duty is made the protection of the interests of the people of the state, and, where he is cognizant of violations of the constitution or the statutes by a state officer, his duty is to obstruct and not to assist; and where the interests of the public are antagonistic to those of state officers, or where state officers may conflict among themselves, it is impossible and improper for the Attorney General to defend state officers." State ex. rel. Dunbar v. Board of Equalization 140 Wash. 433,249 P. 996 (1926)

(See McKenna's October 10, 2010 pleading to the Supreme Court, pg. 13)

6. Misrepresenting Our Flyer

The flyer characterizes this legal representation as follows: 'Thus Mckenna legalizes crime by giving it the color of law.'

Our flyer included substantive argument. You omitted the argument, and then quoted our conclusion out of context. ("Thus . . . etc.")

7. DOL's Job Is Clear and Written In Plain English -- But 500 Lawyers Need Another Lawyer To Explain?

Ultimately it is for a judge to decide if the Department of Licensing is required to sanction Windermere and its brokers.

Why is it necessary for a judge to tell the Attorney General that regulatory agencies must enforce state law? The Revised Code of Washington is crystal clear. RCW 18.85.041 (formerly RCW 18.85.040) states that the duties of the Director of the Department of Licensing is to "enforce all laws and rules" on those under its jurisdiction.

If DOL's day-to-day responsibilities need to be directed by the courts, why are we paying a DOL director and DOL employees to do the job? Especially in these times of economic duress . . .

According to your webpage at <http://atg.wa.gov/OfficeInformation.aspx>, the Attorney General's Office employs more than 500 lawyers. Can none of them read and understand the plain English meaning of RCW 18.85.041? Why do Mr. McKenna and his 500 lawyers need a "judge" (another lawyer) to spell it out?

8. Who Would Bring And Pay For The Lawsuit You Propose?

To bring the DOL before a judge would require a lawsuit. Who would take the DOL to court and who would pay for the action? Would you expect a private citizens to take on such a suit? Recall that Mr. Clark had to spent \$800,000 to fight the Attorney General, who, again you will recall, was defending extortionists.

As a lawyer, you surely know that using a private suit to rein in the DOL is a very bad idea. Aside from having to face the AG's litigation arsenal, the private plaintiff would have to prove that he/she had been personally damaged by the DOL's neglect of its lawful duty. Then the plaintiff would have to face Washington's Public Duty Doctrine -- the theory that, while the government has a duty to protect "the public," it has no duty to protect any individual member of the public. Thus, even if a citizen could show he/she was personally damaged, the agency would not be liable, and the court would dismiss the claim.

So when would the DOL face a judge? Never, of course.

9. Attorney General's Office Threatens Citizens
Who Would Use Courts To Correct Government Lawlessness

We remind you RCW 43.10.030(2) gives the Attorney General the power to:

“Institute and prosecute all actions and proceedings, for, or for the use of the state, which may be necessary in the execution of the duties of any state officer. “

Even though he has the power to correct Government lawlessness, and even though the *Dunbar* ruling admonishes him to do so, the Attorney General is belligerently in favor of the law-breaker.

In our naivety as newcomers to Washington, we thought the Attorney General's job was to enforce the state's laws. We did not dream he'd defend law breaking. On June 15, 2009, we wrote to Mr. McKenna asking that he file a Writ of Mandamus or use some other legal mechanism to compel the Department of Licensing to enforce the state's licensing laws.

The ensuing correspondence with Asst. Atty. Gen. Jody Lee Campbell made McKenna's position clear: McKenna would take no action to compel DOL to enforce the law, and would defend the DOL against anyone who attempted to use the courts to correct the situation. You will find the correspondence at: <http://renovationtrap.com/ag/index.html#dol>

10. “The King Can Do No Wrong”
vs.
Government By the People

It is not logical to assume that the attorney General McKenna legalizes crime merely because his office is required by law to defend state agencies in court.

We made no such statement, and made no such inference. But you have, effectively, just made that argument. Mr. McKenna must enforce the law by defending lawlessness. Yes?

Mr. McKenna's assumes the position that whatever a state agency does is “legal” and its conduct should be defended, no matter how egregiously that conduct offends public law and hurts the citizens. McKenna's stance that “the King can do no wrong” is both anti-republican and anti-democratic.

11. Department of Licensing Is Not Attorney General's Office.

Moreover the Department of Licensing (DOL) is a separate agency and the Director is appointed by the Governor.

We agree. The Department of Licensing is not the Attorney General's Office. It is a different agency.

12. Does The AG's Office Want Open Government
or Government Secrecy?

The Office of the Attorney General provides legal representation of the DOL, but the Attorney General does not direct its policy, nor should legal representation by this office be interpreted to mean that the Attorney General McKenna personally supports every action or non-action by a state agency.

Let us no longer pretend the Attorney General is an innocent bystander forced by law into making sham defenses for government employees who act like criminals. We know he is the legal advisor to the Department of Licensing (RCW 18.85.420), and we know that RCW 43.10.030 ultimately puts all DOL's legal and disciplinary powers in his hands.

Mr. McKenna has no wiggle room. For years, he has been responsible for DOL flouting the law. Please see Paragraphs 1, 2, and 3 for earlier discussion. Let Washingtonians know what advice the Attorney

General has been giving to DOL. Don't hide behind the attorney-client privilege. Let the sun shine in on government secrecy. Turn over a new leaf.

13. Washington Would Welcome Mr. McKenna's Change Of Heart

The flyer states "To reporter Carol DeCoursey, McKenna admitted he knows about Windermere's abuse of the law and DOL's refusal to enforce the law, but said he will do 'absolutely nothing' about it." It is not true that this office will do "absolutely nothing" regarding your concerns with Windermere.

On November 10, 2010, Mr. McKenna told Carol he would do "absolutely nothing" about the situation we described in our "Open Government -- For Big Business" flyer. See Carol's affidavit, <http://windermere-gallery.com/files/carols-affidavit.pdf>

Perhaps Mr. McKenna has been advised he should have not made such a statement, and is reconsidering his position? If he has had a change of heart, let him say so, and we believe Windermere Victims would welcome the news. Any politician willing to correct himself would rise in the esteem of all the citizens.

14. Please Do Not Redefine The Problem

Our concerns are not limited to "Windermere," as you suggest. Windermere is a private corporation. It could not effect its longstanding predatory program without the help of the Department of Licensing and the Attorney General's Office. We are concerned about the unlawful help Windermere gets from state agencies.

15. No More Mickey Mouse

You may file a complaint with our Consumer Protection Division at: <http://atg.wa.gov/SafeguardingConsumers.aspx> and the[y] will review your concerns. Sincerely, Timothy D. Ford, Open Government Ombudsman.

The complaint form to which you refer us is Mickey Mouse. You'd have us restrict our report to our own incident? In fact, we have reported ours, and many other court-proven or otherwise heavily documented incidents concerning Windermere. AND we have reported government complicity in Windermere's repeated law breaking.

Moreover, we have *already* made our reports to Mr. McKenna, and he has acknowledged receipt of the information. Asst. Atty. Gen. Jody Lee Campbell had the information two years ago and acknowledged receipt of the information. Now you have the information, too.

16. The Ball Is In McKenna's Court

RCW 43.10.030(2) gives the Attorney General the power to:

"Institute and prosecute all actions and proceedings, for, or for the use of the state, which may be necessary in the execution of the duties of any state officer. "

In addition, the Consumer Protection Act at RCW 19.86.080(1) provides that:

"The attorney general may bring an action in the name of the state . . . against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful; and the prevailing party may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee."

So Mr. McKenna could file a Consumer Protection Act lawsuit against Windermere himself, just like it says on his webpage. He can tap into many court-proven or otherwise documented cases of Windermere's

abuse at our website, <http://Windermere-Victims.com>. Mr. McKenna may also want to tap information at another website, <http://windermerewatch.com>.

You will observe that in many of the cases cited on <http://Windermere-Victims.com>, the courts have already found Windermere in violation of the Consumer Protection Act. That is, the courts have already done most of Mr. McKenna's work for him. He'd have to spend relatively little taxpayer money pulling his case together -- quite a recommendation in these tough economic times! Besides, the CPA has an attorney fee provision: Mr. McKenna can recover his costs.

In light of all this, surely it would be hard for Mr. McKenna to justify *not* filing a CPA complaint against Windermere?

On May 24 Liz Luce, Director of the Department of Licensing, announced to her staff that she is retiring. (Coincidentally, she made her announcement just seventeen days after the release of our flyer.) We suggest the Attorney General use the opportunity of her retirement to turn over a new leaf.

Mr. McKenna has the information, the tools, and the power to clean up both the Department of Licensing and Windermere. The ball is in his court.

17. Final Words

Allow us to paraphrase the judges in *State ex. rel. Dunbar v. Board of Equalization*:

(a) The paramount duty of the Attorney General is to protect the interests of the people of the state, not the big corporations or the ole boy network;

(b) When the Attorney General knows that a state officer is violating the constitution or statutes, he must do what he can to stop those violations;

(c) When the interests of the state officers are antagonistic to the interests of the public, the Attorney General must not defend the state officers.

The King Is Dead. Long Live Government of The People, by The People, and for The People.

Yours for Open Government,

Mark and Carol DeCoursey
8209 172nd Ave., NE
Redmond, WA 98052