



## College of Law

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Kathleen Baydala Joyner  
Staff Reporter  
Fulton County Daily Report  
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Re: Updated Analysis of Statement of Attorney General Olens on Ethics Commission Matters

Dear Ms. Joyner:

I write to update the analysis I sent you on July 23, 2014 regarding the Statement of Attorney General Olens on Ethics Commission Matters after reviewing the following:

- Plaintiff Stacey Kalberman's Motion for Sanctions filed August 8, 2014
- Department of Law Response to Motion for Sanctions filed August 22, 2014
- Defendant Georgia Government Transparency and Campaign Finance Commission's Response to Motion for Sanctions filed August 22, 2014

The Attorney General's Response and supporting affidavits unfortunately raise a substantial issue as to whether the Office of the Attorney General acted in bad faith in not disclosing the July 17, 2012 LaBerge memo to the plaintiffs and the court in the Kalberman and Streicker cases.

The Attorney General has submitted an affidavit from the Assistant Attorney General responsible for the Kalberman and Streicker cases, Bryan Webb. Webb states that sometime after August 1, 2013 LaBerge told him that the Chair of the Ethics Commission, Kevin Abernathy, had told her to "write an account" of telephone and text communications from members of the Governor's staff regarding settlement of the Deal Campaign ethics complaints. Webb Affidavit ¶33, p. 12. According to the affidavit, "LaBerge told me that after she wrote the account, she housed the document in a place

outside of the official file. I recall her gesturing as if she took the document and put it off to the side on a shelf.” Webb Affidavit ¶34, p. 12.

Webb subsequently received and reviewed the LaBerge Memo, noting that it was entitled “Memorandum of Record.” Webb Affidavit ¶36, p. 13. The LaBerge Memo concludes with her name and official title, and there is nothing in the Webb Affidavit that indicates he had any doubt that LaBerge was acting in her official capacity in writing the memo or that he had any doubt that the LaBerge Memo was an official document of the Ethics Commission. Nonetheless, he states in his affidavit, “LaBerge had chosen not to make the document part of the official Commission file complied [sic] in the investigation and resolution of the ethics complaints against the Deal Campaign.” Webb Affidavit ¶38, p. 13. He states that had the document been “part of the official investigation file as maintained by the Commission, I would have produced the document.” Webb ¶40, p. 14.

The Attorney General offers two reasons for not disclosing the LaBerge Memo in response to the plaintiff’s request for “the entire investigative file concerning Nathan Deal.” (The affidavit from Benjamin F. Easterlin IV submitted in support of the Attorney General’s Response only offers the opinion that the LaBerge Memo was itself not “correspondence” but fails to address whether the memo should have been produced as part of the Commission’s “entire file.”)

The first reason given is “that production itself would have been an untruthful response; the Memorandum was not part of the file.” Response at 18. I see no way to interpret this reason as a good faith justification. Obviously production of the LaBerge Memo would have been accompanied with an explanation for why it was not included in the “entire file” previously produced and so would not be “untruthful.”

The second reason given is even more troubling: “The Ethics Commission and its staffers determine the contents of the agency’s investigative files; that is not a decision for their lawyers to make.” Response at 18. To the contrary, it is precisely the responsibility of the Office of the Attorney General to decide whether a government official it is representing has evaded a lawful discovery request by deliberately failing to place an official document in the agency’s official files.

When LaBerge finally disclosed the existence of the memo to Webb in August 2013, and then only in response to his questioning following deposition testimony indicating that LaBerge was pressured by the Governor’s “inner circle” to settle, Webb Affidavit ¶ 28-32, pp. 10-12, it is impossible to believe that Webb was not aware of the likelihood that LaBerge acted improperly in keeping the memo out of the official file, most obviously to avoid the obligations of Georgia’s Open Records Act or the request in the Streicker case to produce “all files concerning the investigation” of the complaints against the Deal Campaign, served on LaBerge a month before she wrote the memo. Indeed, the Attorney General’s Response strongly implies that LaBerge acted with

Kathleen Baydala Joyner  
Re: Updated Analysis of Statement of Attorney General  
Page 3 of 3

improper motives: LaBerge “intentionally did not create an electronic copy of the document, did not share it with her attorneys until more than a year after she created it, and chose to store it separately rather than including it in the investigative file.”  
Response at 18.

Lawyers in Georgia cannot take part in their clients’ fraudulent conduct. Georgia Rule of Professional Conduct 1.2(d). Indeed the Georgia Supreme Court has specifically prohibited lawyers from assisting clients to conceal documents having potential evidentiary value. Georgia Rule of Professional Conduct 3.4(a). Lawyers representing government agencies also have a duty to protect the integrity of state government if they know that agency employees are acting or refusing to act in violation of their obligations as public officials. Georgia Rule of Professional Conduct 1.13(b).

Sincerely yours,

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cc:  
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