

No. 84704-5

ALEXANDER, J. (concurring)—I am of the view that the attorney general has a mandatory duty, in almost every instance, to pursue an appeal at the request of an elected state official such as the commissioner of public lands. The attorney general should, however, have discretion to decline such representation if the appeal is frivolous. I say that because our attorney general is a member of the Washington State Bar Association and, as such, he is an officer of the courts of this state, a separate branch of government.¹ The attorney general must, therefore, abide by the oath of attorney and the rules of professional conduct promulgated by the Supreme Court.

The oath that all Washington attorneys must take provides that in civil cases a lawyer shall not “counsel, or maintain any suit, or proceeding, which shall appear to me to be unjust, or any defense except as I believe to be honestly debatable under the law.” APR 5(e). In addition, RPC 3.1 says that “[a] lawyer shall not bring or defend a

¹Although the state constitution, article III, section 21, indicates that the attorney general is “the legal adviser of the state officers,” there is no provision specifically requiring the attorney general to be a member of the bar of the state of Washington. Our current attorney general, like all of his predecessors, is, however, a member of the state bar.

No. 84704-5

proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.” We have stated that an appeal is frivolous if “the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal.” *Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hearings Bd.*, 170 Wn.2d 577, 580, 245 P.3d 764 (2010) (citing *Tiffany Family Trust Corp. v. City of Kent*, 155 Wn.2d 225, 241, 119 P.3d 325 (2005)); see RAP 18.9(a).

Here, the commissioner of public lands sought to have the attorney general undertake an appeal of a judgment of the superior court that aggrieved the commissioner and the department of natural resources. Because in rejecting the request the attorney general has not asserted that such an appeal would be frivolous, he should have acceded to the request. I, therefore, concur in the result the majority reaches.

No. 84704-5

AUTHOR:

Justice Gerry L. Alexander

WE CONCUR:
