National Association of Attorneys General

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Wednesday, March 1  Sentencing Reform: A Balance of Policies

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DIVERGENT ISSUES IN REPRESENTING THE PUBLIC INTEREST:
ETHICAL CONSIDERATIONS CONFRONTING STATE ATTORNEYS GENERAL

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• The Attorney General is popularly elected in 43 states, Guam, the Northern Mariana Islands, and the District of Columbia.

• The Attorney General is appointed by the governor in Alaska, Hawaii, New Hampshire, New Jersey, Wyoming, American Samoa, Puerto Rico, and the U.S. Virgin Islands.

• Tennessee’s supreme court selects the state Attorney General and Maine’s is chosen by the state legislature.
Primary sources of Attorney General authority are state constitutions, state enabling statutes, and the common law.

In 44 states and Puerto Rico, the Office of Attorney General is established by the state (or territorial) constitution.

In six states and three territories, the office is statutorily established.
Basic tenet that shaped common law was principle that chief law officer should represent interests of sovereign

Over time, it developed into wider interpretation – role as protector of public interest

Preservation and protection of the public interest is the principle governing a court’s decision to recognize an AG’s exercise of power or prerogative that is claimed to have its source in the common law
In majority of states, Attorney General retains common law powers, including the right to initiate and intervene in lawsuits on behalf of citizens and the public interest.

- See *State ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976) (AG had power under common law to institute federal antitrust suit) for a discussion of the origins and continued strength of common law as the basis for AG actions.
In some states, however, the AG has no common law powers, but only those powers set forth in the state constitution or statutes.

- *State ex rel. Woods v. Block*, 942 P.2d 428, 431 (Ariz. 1997) (AG had discretion to bring action in name of state to enjoin illegal payment of public monies);
- *Padgett v. Williams*, 348 P.2d 944 (Idaho 1960) (AG has no common law power not subject to modification by statute)
WHO ARE THE AG’S CLIENTS?

- The “People” and the Public Interest
- Government as a whole
- Branch of Government (Legislative, Executive, Judiciary)
- Departments, Agencies, Boards and Commissions
- Public official or employee
- Any combination of the above
WHY THE IDENTITY OF THE CLIENT MATTERS

- Government lawyer’s conduct/duties are guided by constitution, statutes, rules, case law
- Rules of Professional Conduct impose certain obligations to clients
- Need to identify the client to determine what duty is owed and to whom it is owed
MULTIPLE ROLES OF THE ATTORNEY GENERAL

- Chief legal officer
- Advisor to State officers, agencies, departments, sometimes Legislature
- Controls and manages litigation on behalf of the State, its agencies and officers
- Civil and Criminal prosecution
- Providing opinions to clarify the law
- Law reform and legislative advocacy
- Investigative authority (civil and criminal)
AG has broad discretion in conduct of litigation, including whether to initiate, pursue & appeal

- **Public Defender Agency v. Superior Court**, 534 P.2d 947, 950 (Alaska 1975) (“[A]ttorney General is empowered…to make any disposition of the state’s litigation which he thinks best…This discretionary control over the legal business of the state, both civil and criminal, includes the initiation, prosecution, and disposition of cases.”)
ATTORNEY GENERAL’S ROLE IN LITIGATION

• AG authority to control litigation furthers objective of statewide consistency in development of legal policy. See *State ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268 (5th Cir. 1976) (Florida AG’s power to institute litigation “is as broad as the ‘protection and defense of the property and revenue of the state’ and, indeed, the public interest requires.”)

• This includes discretion over whether to appeal a decision adverse to an agency. See *Secretary of Administration & Finance v. Attorney General*, 326 N.E.2d 334 (Mass. 1975) (AG may refuse to appeal an adverse ruling that an agency head wants her to pursue)
AG AUTHORITY – INTERESTING OUTCOMES

- Application of traditional private client-attorney relationship to the California Attorney General
- AG cannot be compelled to represent state officers or agencies if acting contrary to law, and may withdraw from statutory duty to act as their counsel, but cannot proactively take a position adverse to those same clients
AG AUTHORITY – INTERESTING OUTCOMES

- **People ex. rel Salazar v. Davidson**, 79 P.3d. 1221 (Colo. 2003) ("something other than a traditional attorney-client relationship" exists between the AG and executive officers and departments)

- **State ex. rel Condon v. Hodges**, 562 S.E.2d 623 (S.C. 2002) (AG had statutory authority to bring action against Governor alleging separation of powers violation)

- **Perdue v. Baker**, 586 S.E.2d 606 (Ga. 2003) (AG could file appeal to Supreme Court against Governor’s wishes)
DILEMMAS

- Where the client is “the People” or the “public interest,” who determines what is in the “public interest” and how?
- Where agencies disagree on a course of action, who decides which position to take on behalf of the State – the Governor, AG, other? Do you advocate both positions, or neither?
- What is the AG’s responsibility to defend the constitutionality of a state statute she believes to be unconstitutional?
DILEMMA 1: AG v. PUBLIC OFFICER

- **Feeney v. Commonwealth**, 366 N.E.2d 1262 (Mass. 1977) (holding that the AG has discretion whether to appeal a decision adverse to an agency, as part of the prerogative to sustain a “uniform and consistent legal policy of the Commonwealth”)

- **Chun v. Board of Trustees of the Employees' Retirement Sys.**, 952 P.2d 1215, 1234 (Haw. 1998) (refusing to “accept the Attorney General's contention that, merely because she regards her duty to represent the ‘states’ legal interests as being paramount to her duty to represent her statutory client's legal interests, she may, in her sole discretion, so control the course of litigation as to advance her view of the ‘public welfare’ when it squarely conflicts with the substantive position taken by the policy-making state governmental instrumentality whom she represents as a named party to the litigation”)

DILEMMA 2: REPRESENTING OPPOSING PARTIES

- *Connecticut Comm’n on Special Revenue v. Connecticut Freedom of Information Comm’n*, 387 A.2d 533 (Conn. 1977) (holding that given the AG’s role as chief legal officer, there is no ethics violation where AG represents two agencies in adversary proceeding)

- *Environmental Protection Agency v. Pollution Control Bd.*, 372 N.E.2d 50 (Ill. 1977) (holding that the AG may represent two adverse agencies unless she is a named party or has a personal stake in the outcome)
DILEMMA 3: DUTY TO DEFEND

- **State v. City of Oak Creek**, 605 N.W.2d 526 (Wis. 2000) (holding that the AG does not have standing to argue the unconstitutionality of a statute because she has a duty to defend state statutes and no statutory authority to challenge them)

- **Fund Manager v. Corbin**, 778 P.2d 1244, 1249-50 (Ariz. Ct. App. 1988) (holding that the AG’s duty to defend the state and federal constitutions can encompass discretion to challenge statutes she believes, in good faith, to violate either)
ETHICAL IMPLICATIONS

• R. 1.1. “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

• R. 1.2(a). “[With reasonable limitations,] a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter.”

• R. 1.2(b). “A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.”
R. 1.7(a)(1). “[With small exceptions,] a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: the representation of one client will be directly adverse to another client . . .”

R. 1.7(b) Notwithstanding the existence of a concurrent conflict of interest, . . . a lawyer may represent a client if:

1. the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2. the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
3. each affected client gives informed consent, confirmed in writing.
ETHICAL IMPLICATIONS

- R. 1.11(a)(1). “[With small exceptions,] a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: the representation will result in violation of the rules of professional conduct or other law . . .”
- R. 1.11(b)(4). “[With small exceptions,] a lawyer may withdraw from representing a client if: the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement . . .”
- R. 1.13(a). “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”

Model Rules provide that government lawyers “may be authorized to represent several government agencies in intragovernmental legal controversies where a private lawyer could not represent multiple clients.” Scope, ¶ 18

With appropriate screening procedures, certain conflicts may not be imputed to entire office
GENERAL SCREENING MEASURES

- Acknowledgement by disqualified lawyer of the obligation not to communicate with any other lawyers or staff about the matter
- Notice of the screen and instructions to all persons working on the matter forbidding any communication about the matter with the screened lawyer
- Written notice of the screen and measures taken
GENERAL SCREENING MEASURES

- Physical file should be marked that access by the screened lawyer is prohibited
- Access by the screened lawyer to electronic records relating to the matter should be blocked
- Denial of access to other materials relating to the matter
- May be necessary to lock up files/materials relating to the matter
- Periodic reminders of the screen
SAFEGUARDS AND BEST PRACTICES

- Be aware of who the office does and does not represent
- Develop an office conflict policy
- Obtain informed consent, confirmed in writing, from each client (Rule 1.7)
- Hire outside counsel when appropriate
- Develop screening protocol
QUESTIONS?