ADVISORY ETHICS OPINION 81-08

SYNOPSIS:

The representation of opposing state agencies by Assistant Attorneys General in the resolution of disputes, whether by negotiation or by litigation before administrative tribunals or courts, violates DR 5-105(A) unless such representation is authorized under DR 5-105(C).

QUESTION PRESENTED:

May Assistant Attorneys General represent opposing state agencies in the resolution of disputes, by negotiation before administrative tribunals or courts, without violating DR 5-105?

DISCUSSION:

The question under consideration was presented by the Attorney General of Vermont. We are informed that he and his staff historically have represented state agencies which are in conflict with each other. The propriety of continuing this practice is under review in his office.

The Attorney General of Vermont is a statutory officer rather than a constitutional officer.[1] The position was created early in this century.[2] The holder of the position traditionally has been a member of the Vermont Bar. His professional conduct as an attorney must measure up to the Code of Professional Responsibility.[3] The Code as promulgated by the Vermont Supreme Court is slightly different from the current Code of the ABA as amended, but the differences do not pertain to the subject matter at hand.

DR 5-105 of the Code relates to conflicts of interest and provides:

> *DR 5-105 Refusing to Accept or Continue Employment if the Interest of Another Client May Impair the Independent Professional Judgment of the Lawyer.*
>
> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interest, except to the extent permitted under DR 5-105(C).
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
> (D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

For purposes of the Disciplinary Rules, "differing interests" are defined to include "every interest that will adversely affect wither the judgment or the loyalty of a lawyer to a client, whether it will be a conflicting, inconsistent, diverse or other interest."

The Attorney General has urged that the question under consideration be viewed with recognition that his relationship to state agencies is somewhat different from the traditional attorney-client relationship occurring in private practice. We agree. There are a number of respects in which the public practice of the Attorney General differs from private practice. Under the Code a government lawyer in both criminal and civil cases has a special duty to seek justice which tempers the zealous advocacy in which he may engage.[4] By statute he may have the power to decide whether and how to settle litigation in which the state is engaged.[5] We need not canvass all the differences at this time.

[1] 3 V.S.A. §151.
[2] Acts of 1904, No. 57.
[3] 12 V.S.A. App. VIII, A.O. 9, §21.
[4] *See* EC 7-13, EC 7-14, and DR 7-103.
[5] 3 V.S.A. §159; 1972 Op. Atty. Gen. 338.

Nevertheless, we are satisfied that the Attorney General is bound to conform to the Code, at least in the absence of statutory law or common law authorizing him to conduct his practice of law otherwise. The Supreme Court of Vermont did not distinguish government attorneys from non-government attorneys when it imposed the Code, with certain amendments, as "the proper standards for measuring the professional conduct of attorneys admitted to practice in the courts of Vermont…"[6] Looking at the Code as a set of canons with ethical and disciplinary ramifications, we are satisfied the Code was designed to apply to public practice as well as private practice.

We proceed to consider whether the Office of the Attorney Genera is one firm for the purpose of DR 5-105(D). We conclude that it is.

The Office of the Attorney General, by statute and operationally, is set up as one large law firm. The Attorney General appoints his assistant attorneys general, may remove them at his pleasure, and is responsible for their acts.[7] He is vested with general supervision of criminal and civil litigation on behalf of the state.[8] The Office of the Attorney General generally functions like a well-organized proprietary law firm.

Although the Office of the Attorney General is the largest law office in the state, its size does not warrant different treatment under DR 5-105(D). "[T]here is no basis for creating separate disqualification rules for larger firms even though the burden of complying with ethical considerations will naturally fall more heavily upon their shoulders."[9]

The Attorney General has drawn our attention to various authorities, including Formal Opinion 342 of the ABA Committee on Ethics and Professional Responsibility (Nov. 24, 1975). That opinion pertained to the interpretation of DR 9-101(B) and discussed the relationship of DR 9-101(B) to DR 5-105(D). The remarks quoted from that opinion by the Attorney General are as follows:

> The relationships among lawyers within a government agency are different from those among partners and associates of a law firm. The salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice.

For the purpose of DR 5-105(A) and DR 5-105(B), we are not convinced that this difference is significant.

> Lawyers who practice their profession side-by-side, literally and figuratively, are subject to subtle influences that may well affect their professional judgment and loyalty to their clients, even though they are not faced with the more easily recognized economic conflict of interest.[10]

Earlier opinions of this committee have treated other non-profit law offices with salaried attorneys as single firms for the purposes of the Code.[11]

Having determined that the Office of the Attorney Genera is one firm for the purpose of DR 5-105(D), we next consider when opposing state agencies engaged in a dispute should be deemed separate clients with differing interests. For agencies having the capacity to sue and be sued, we conclude that they should be deemed separate clients with differing interests no later than the time when they have failed to resolve a dispute between them in the light of the opinion that each has received from the Office of the Attorney General. Our further consideration of the representation of opposing state agencies in the resolution of a dispute will be based on the assumption that the opinions to the opposing agencies from the Office of the Attorney General have not resulted in a resolution of the dispute.

DR 5-105(C), quoted earlier, does permit a law firm to represent multiple clients with differing interests if it is obvious that the law firm can adequately represent the interest of each and if each consents to such representation after full disclosure of the possible consequences. We need not expound in this opinion upon the usefulness of DR 5-105 (C) in the representation of state agencies by the Attorney General.[12]

We now reach consideration of whether there is any overriding statutory law or common law authorizing the representation by Assistant Attorneys General of opposing state agencies in the resolution of disputes.

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[6] 12 V.S.A. App. VIII, A.O.9 §21.
[7] 3 V.S.A. §153(c).
[8] 3 V.S.A. §§153(a) and 159.
[9] *Westinghouse Electric Corporation v. Kerr-McGee Corporation*, 580 F.23 1311, 1321 (7th Cir. 1978).
[10] *Borden v. Borden*, 277 A.2d 89, 91 (D.C. Cir. 1971).
[11] Opinion No. 76-18 (Public Defender System); Opinion 77-10 (Vermont Legal Aid).
[12] *See* generally *Annotated Code of Professional Responsibility*, pp. 243-245 (ABE 1979).

The Attorney General invokes 3 V.S.A. §§152 and 157 are statutory authority for the representation of opposing state agencies in the resolution of disputes. These provisions read as follows:

> *§152. Scope of authority*
>
> The attorney general may represent the state in all civil and criminal matters as at common law and as allowed by statute. The attorney general shall also have the same authority throughout the state as a state's attorney.
>
> *§157. Appearance for state*
>
> The attorney general shall appear for the state in the preparation and trial of all prosecutions for homicide and civil or criminal causes in which the state is a party or is interested when, in his judgment, the interests of the state so require.

The latter provision has not been construed to require that the Attorney General, personally or through his staff, appear for the state. Pursuant to other statutory provisions, including 3 V.S.A. §§5 and 153(c), the services of special counsel have been properly engaged from time to time to carry out the Attorney General's responsibilities.[13]

When a civil action is brought against a state employee whom the Attorney General is obliged to defend, the Attorney General has specific statutory authority to allow the retention of private counsel at state expense if he finds that he cannot adequately represent the interest of the employee.[14] This committee has opined that the authority contained in 3 V.S.A. §1102(e) should be used to avoid any conflict of interest in violation of DR 5-105(A) or DR 5-105(B) when the Attorney General is called upon to defend members of the judiciary of Vermont Opinion No. 79-29.

We have been unable to discover any statute giving the Attorney General, either expressly or by necessary implication, general authority to represent opposing state agencies in the resolution of disputes. Nor have we discovered such authority in the reported decisions of the Vermont Supreme Court. We have gone further and conducted a review of the authorities from other jurisdictions.

The ABA maintains a central bank of professional ethics opinions at its headquarters. Inquiry by this committee produced a response that as of the end of January 1981 there were no opinions on file pertaining to conflicts of interest for an attorney general.

We also have reviewed the case law from other jurisdictions, but we have not found any reported decisions which persuade us that the common law of Vermont should be deemed to permit his Attorney General to represent opposing state agencies in the resolution of disputes.

In *Arizona State Land Department v. McFate*[15], the standing of the Attorney General of Arizona to bring a suit to enjoin allegedly illegal sales of public land by a state agency was in issue. He was denied such standing. The opinion mentions that there are occasions when the Attorney General may appear in opposition to a state agency or may represent opposing state agencies through his deputies, but states that these instances are dependent upon specific statutory grants of power.[16]

In *City of York v. Pennsylvania Public Utility Commission*[17], the authority of the Attorney General of Pennsylvania to intervene of behalf of the Commonwealth in an appeal from the administrative approval of a public utility merger was in issue. He was denied such authority. The opinion mentions that there are occasions when an attorney general is required to represent both sides of a case, but the only illustration given is the situation under Pennsylvania statutory law when the Highway Department appeals from a Public Utility Commission order.[18]

In *Environmental Protection Agency v Pollution Control Board*[19], the issue in dispute was whether a state agency may employ private counsel and have the fees of such counsel paid by the Attorney General of Illinois in the absence of appointment of such counsel by a court or the Attorney General. The agency was denied such authority. The opinion states that the Attorney General of Illinois may represent opposing state agencies, except in two instances, but such dual representation is predicated upon the status of the Attorney General of Illinois as a constitutional officer and particular provisions of Illinois statutory law defining when outside counsel may be appointed for state agencies.

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[13] See *Petition of Roger S. Dusablon*, 126 Vt. 362, 230 A.2d (1967).
[14] 3 V.S.A. §1102(e).
[15] *Arizona State Land Department v. McFate*, 87 Ariz. 139, 348 P.2d 912 (1960).
[16] 348 P.2d at 915-916.
[17] *City of York v. Pennsylvania Public Utility Commission*, 449 Pa. 136, 295 A.2d 825 (1972).
[18] 295 A.2d at 832.
[19] *Environmental Protection Agency v. Pollution Control Board*, 69 Ill. 2d 394, 372 N.E.2d 50 (1977).

In *Connecticut Commission on Special Revenue v. Connecticut Freedom of Information Commission*[20] the issue was whether a trial court erred when it ordered the Attorney General of Connecticut to withdraw as counsel for both of the opposing state agencies involved in the litigation. The order of the trial court was reversed with heavy reliance upon the status of the attorney general as a constitutional officer.[21] We do not regard the opinion as persuasive in a state where the attorney general is a statutory officer.

In *United States v. Interstate Commerce Commission*[22] the appearance of the Attorney General of the United States on both sides of the controversy was approved when he had statutory duties requiring him to appear for both sides. The Code had not been adopted by the ABA at the time, and the opinion does not discuss the conflict problem from the standpoint of professional ethics.

We conclude that there is no statutory law or common law in Vermont which generally authorizes Assistant Attorneys General to represent opposing state agencies in the resolution of disputes.

There are related problems to the question addressed in this opinion upon which we do not intimate any view. One such problem is whether an Assistant Attorney General may represent a quasi-judicial tribunal when another Assistant Attorney General represents one of the parties before it. Another such problem is whether the Office of the Attorney General should be disqualified from representing any one of multiple state agencies involved in a dispute when representation of all of them would violate DR 5-105(A) or DR 5-105(B).

Finally, we do not reach consideration of whether authorization of representation of opposing state agencies by the Attorney General, if there were statutory of common law authorization in Vermont, would necessarily override the provisions of DR 5-105(A) and DR 5-105(B).[23]

[20] *Connecticut Commission on Special Revenue v. Connecticut Freedom of Information Commission*, 174 Conn. 308, 387 A.2d 533 (1978).
[21] 387 A.2d at 537-538.
[22] *United States v. Interstate Commerce Commission*, 337 U.S. 425 (1949).
[23] See *Kramer v. McClafferty*, 282 A.2d 631 (Superior Court Del. 1971).