To: Attendees of NAAG Ethics Meeting:

Director, State Attorney General Program at Columbia Law School

Date: May 29, 2008

The constitutional structure of the United States makes it difficult for any one part of government to act without approval or acquiescence of another part of government. Every American knows that the terms "separation of powers," "federalism," "checks and balances" and "Bill of Rights" are essential ingredients to our unique system of government. Every American also knows that the interplay of governmental actors is an ever changing process that requires on-going scrutiny.

The governments of the fifty states have adopted and expanded upon the federal government's dispersal of power. All but two states, when dealing with attorneys general, rejected the federal unitary executive model.

The states have divided their executive branch of government among several statewide elected officials. Aside from the Governor, who is elected in all states, these offices generally include an attorney general, a secretary of state, a treasurer and an auditor with some states electing other officers to head various departments including but not limited to agriculture, education and insurance.

All of us believe that the existence of independent state attorneys general has been and remains in the public's best interest. We therefore believe that it is important to assert the ability of state attorneys general to litigate broadly in the interest of the state's citizenry. That being said, the exercise of that authority must take place in an ethical manner.

Today’s Ethics Session, we will discuss the powers and duties of the state attorney general in a situation where the public interest of their state is subject to countervailing statutes and public policy.

PUBLICATIONS:


Holdsworth, The Early History of the Attorney General and the Solicitor General, 13 Ill. L. Rev. 602 - 614 (1918-1919);


Constitutional status and role of the state attorney general, S.M. Matheson, Jr. U. Fla. J.L. Pub. Policy, 1-31, Fall 1993

Note: Rethinking the Professional Responsibilities of Federal Agency Lawyers, 115 Harv. L Rev. 1170 (February, 2002)


Case Law:

The Attorney General is elected by the people; he is entrusted by them with the common law power to legally represent them or some of them in matters deemed by him to affect the public interest. . . . Regardless of the effectiveness of his efforts in particular public legal situations, at least the people have the continuing satisfaction of knowing that their elected Attorney General has the right to exercise his conscientious official discretion to enter into those legal matters deemed by him to involve the public interest, even though not expressly authorized by statute. State ex rel. Shevin v. Yarborough, 257 So.2d 891, 895 (Fla.1972) (Ervin,J., concurring)

The Attorney General should not be an unlimited monarch governed by his own judgment. State ex rel. State ex. rel Shevin v. Exxon Corp, 526 F 2d. 266, 276 (5th Cir, 1976) (Coleman, J. dissenting)
The role of the Attorney General when he represents the Commonwealth and State officers in legal matters is markedly different from the function of the administrative officials for whom he appears. Not only does the Attorney General represent the Commonwealth as well as the members of the Commission and the Personnel Administrator in accordance with G. L. c. 12, § 3, "[h]e also has a common law duty to represent the public interest. . . .[Citations omitted.] Thus, when an agency head recommends a course of action, the Attorney General must consider the ramifications of that action on the interests of the Commonwealth and the public generally, as well as on the official himself and his agency. To fail to do so would be an abdication of official responsibility." Secretary of Administration & Fin. v. Attorney Gen., 367 Mass 154, 163 (Mass 1975).

"The authority of the Attorney General, as chief law officer, to assume primary control over the conduct of litigation which involves the interests of the Commonwealth has the concomitant effect of creating a relationship with the State officers he represents that is not constrained by the parameters of the traditional attorney-client relationship." Feeney v. Commonwealth, 373 Mass. 359; (Mass 1977)

"[T]he straw man is the old high school civics class notion that it is the Legislature where policy is made and that the executive branch, whether the governor or in this case the Attorney General, merely executes that policy or. enforces the law. All of us know that in reality that's not true.. We do not simply defend law suits that are filed against the state; We do not simply answer requests for opinions; we do not simply initiate legal actions when we are requested to do so by other state officials that we serve.

I want to suggest to you we are policy makers. The law is after all policy. The law is a series of value judgments and principles, and when we respond for instance to a request for an opinion, we are making policy. Even in defending actions against our states, we are often policy makers, at least to the extent that we set priorities for which of those defenses are most important to us, who we assign in our offices to handle those various cases, and what involvement we have ourselves in that litigation."


The Attorney General was "an officer of a standing very different from that of the private attorney. He was not appointed by the same court nor was he subject to its discipline in the same way as an ordinary attorney." "A History of English Law," 6 W Holdsworth 467-468 writing about the Attorney

Scope and Preamble, Model Rules of Professional Responsibility:

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily repose in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

"The most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases the need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of pinning at least a technical violation of some act on the part of almost anyone…It is in this realm, in which the prosecutor picks some person he dislikes or desires to be embarrassed, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies."

Robert H. Jackson, Attorney General of the United States - 1941

"To the best of my recollection, I must recall on my memory, I cannot remember . . . I can say here to the Chair that I cannot recall in answer to your question other than to say I just don't recall my recollection . . ." Jimmy Hoffa responding to questions from Robert Kennedy.

"I like to bug that little bastard." Jimmy Hoffa commenting on his relationship with Attorney General Robert Kennedy

“Robert Kennedy, His Life and Times,” Arthur Schlesinger, Jr.

NOTES FOR ETHICS SPEECH
May 29, 2008

There are two major points that I want to make.

#1. Ethics is about doing the right thing.
Let’s start with Ethics.

Ethics (via Latin ethica from the Ancient Greek ἑθική [φιλοσοφία] "moral philosophy", from the adjective of ἔθος ἔθος "custom, habit"), a major branch of philosophy, encompasses right conduct and good life. It is significantly broader than the common conception of analyzing right and wrong.

A central aspect of ethics is "the good life", the life worth living or life that is satisfying, which is held by many philosophers to be more important than moral conduct. The major problem is the discovery of the *summum bonum*, the greatest good.

**Ethics:** Webster’s Dictionary:

1*plural but sing or plural in constr*: the discipline dealing with what is good and bad and with moral duty and obligation
2 a: a set of moral principles : a theory or system of moral values <the present-day materialistic ethic> <an old-fashioned work ethic> —often used in plural but singular or plural in construction <an elaborate ethics><Christian ethics>

b*plural but sing or plural in constr*: the principles of conduct governing an individual or a group <professional ethics>

c: a guiding philosophy
d: a consciousness of moral importance <forge a conservation ethic>

3*plural*: a set of moral issues or aspects (as rightness) <debated the ethics of human cloning>

Ethics are about doing the right thing.

**Ethics are about the study of values.**

Nowhere in these definitions is the word “rules.”

Ethics are not about rules.

Lawyers like rules. We like to take all abstract thought and put them in books.

We also begin with presumption that all lawyers are governed by the same rules

Taught that way in law school…the bar puts it on the Bar Exam –
If you follow the rules, then under the traditional analysis of lawyer conduct, you are ethical.

We are lawyers and like rules. We would much rather define Ethics as a rule, so that way we won’t have to think but simply follow along.

We are petrified at anyone saying that we broke an ethics rule…a charge that generally comes from private lawyers on the other side of public cases…

The Rules were not drafted by or focused on government lawyers.

Needless to say, the Rules have almost nothing to say about the public – and the public in the wake of many transgressions has responded in a myriad of ways.

AAG’s almost all believe themselves bound by the Rules – more about that later.

My personal observations after 25 years is that well meaning AAG’s – believing themselves no different than private lawyers - make very bad decisions as a result.

In fact, using the Rules as cover, they make very bad decisions and in doing so enable behavior within dysfunctional agency “clients.”

#2 AG’s are different

And they always have been.

Holdsworth
Sec of Admin
Feeney
Shevin
Lieberman
State Constitutions
State Laws
Common Law
Scope/Preamble

And the Rules acknowledge that. There are many other statutes. There are lots of cases. And a few articles.

And as AG’s and sr. staff, where all the decisions eventually flow, we see the difference everyday.

The Rules speak of three core concepts, and everyone of them is different in the governmental sector.

Zeal, Loyalty, Confidentiality
There is very little written about the ethics of public lawyers, but you should still look.

And it takes hard work to make #1 and #2 a reality.

The constant need to educate

The importance of explaining role in advance to state government

The importance of being on the Model Rules Committee of the state

Government lawyers should not expect private sector lawyers to understand the unique ethical situations faced by AG’s and their staffs. They have an affirmative obligation to educate the private bar.

Public lawyers are not in the business of representing clients.

They are in the business of justice.

The friction between AG’s and clients is there on purpose – 43 elected. 48 are independent. There is a reason.

Private Lawyers:

But there is a great deal going on the private side, so I will begin with the private sector and then bring these changes back to the public.

Distance from the Model Rules.

The fiction that lawyers are governed by rules of court and little else. A 20th cent fiction. A few even tried “inherent power.”

Diversification of legal ethics even as those who write in ethics simply go deeper and deeper in the Code believing that they will find the answer.

Legal Ethics are fragmenting. Society has decided that lawyers simply following the Rules are not ethical. I never believed it for a minute, and more and more people agree with me.

Society has decided that lawyers and the practice of law is too important to be left to self regulation – which is what the Model Rules truly are.

We are now used to most of these regulations -

Antitrust laws apply.
Civil rights laws apply.
Labor laws apply.
The First Amendment applies
Group legal services are authorized by federal law
Fraud laws apply – Savings and Loan, crime fraud exception (tobacco), OTS froze assets of Kaye Scholer and Paul Weiss. Enron and the Sup Ct allowed firms to escape by one vote.
1. Changes restrain the freedom of lawyers to pursue the interests of their clients at the expense of others. The trend toward lawyer as “gatekeeper.”
2. Requirements are very particularized – banking lawyers, tax lawyers and opinions, criminal defense bar (can’t be paid by forfeited money, listen to calls on confidentiality limitations, Thompson Memorandum,) security lawyers (both plaintiff and defense).
3. Lawyers are swept up in changes that include non-lawyers (debt collection. Bankruptcy, general laws on misrepresentation, etc.
4. Direct regulation of the bar
5. Regulation tends to the federal – All the above is federal,

All of this leaves private lawyers increasingly in a fog – more advice, more internal

More hard law and less moral

Lots of examples, but for our purposes the most important are Sarbannes-Oxley

It has been almost six years since SOX - Section 307 generated huge attention in the private bar. You’d have thought that the world was coming to an end.

What did it do? (And here you will see the relevance to AG’s….)

Private lawyers are now required to report material breeches of securities law or breeches in fiduciary duty to the corporate counsel or to the CEO. If they do not respond appropriately, the lawyer must report the concerns to a committee of the Board of Directors.

The rules implementing 307 are very long and very complex.

They require action even if the lawyer does not “know” them to be true and they must disclose substantial violations in progress even if they were not especially hurtful to the corporation.

The ABA reluctantly changed Model Rule 1.13 and 1.6 (b), but the changes have not been adopted by states in hopes that it will not apply to them.

Two things are relevant to the AG’s in these changes.

#1. The client is defined broadly. Private lawyers who represent corporations do not represent the officers personally.

#2. SOX was clearly enacted to protect the public, and not just the shareholders. Lawyers are authorized to share confidential material with the SEC.

SEC is directed to draft its rules to protect the public. Lawyers have an affirmative duty to prevent client misconduct

SOX – and the ensuing debate – has generated substantial thought and writing as to a lawyers need to step back and assume the role of a “Gatekeeper.”

Post SOX, Judges are being far more forceful in the entire area and chastising even the largest of law firms.

GC’s are increasingly being held legally accountable

The American Corporate Counsel Association (ACCA) is an outstanding organization that is assisting in-house counsel as they wrestle with the minutiae of SOX and the broad issue of identifying the client..
Huge debate over why lawyers acquiesce in client misconduct.

Let’s think about this insofar as this discussion is relevant to state attorneys general.

A corporation is a fiction that functions through its agents – and the agents owe their duties to the fiction. They are given great leeway (business judgment rule) but are still required to have a fiduciary duty. It isn’t just about themselves.

Corporate lawyers do not represent corporate officials individually.

This construct is very familiar to state attorneys general whose clients are never the individuals within state government but always the institutions themselves.

The situation of the corporate lawyer and the assistant attorney general is obviously not analogous. The corporate lawyer – if it all within the ring – owes diligence and confidentiality.

Now let’s return to public lawyers and think about the implications.

If corporate lawyers are now held to a private duty, certainly it is easier for public lawyers.

There are four levels of “client” – the individual, the agency, the government and the people.

These roughly approximate the levels in an AG office.

That is why information must flow up – it is the essence of ethics to make sure that the person at the top understands all of the issues.

And there is a reason why we elect out attorneys general.

Nowhere is this better seen but in a case settled in early May of 2008 by the Delaware Attorney General.

Ten month ago, Delaware media sources published a series of articles that detailed horrific conditions within the Delaware Psychiatric Center (DPC), a state institution that has long been an object of controversy. Delaware AG Joseph “Beau” Biden immediately, and without any public acknowledgement, commenced a full investigation.

Last week, Biden announced that his investigation had found “systemic violations” of the Delaware Mental Health Patient’s Bill of Rights. He stated that the DPC had failed to prevent both physical and emotional abuse, failed to correctly use restraints and used “unjustifiable force.” He announced a comprehensive agreement that includes an outside monitor and has not ruled out charges should the agreement not be fully implemented.

The DPC is a state agency and as such a “client” of the Delaware AG’s office. Lawyers assigned to the DPC report to Biden and they continue to represent the DPC on a wide variety of cases including a
pending investigation of the U.S. Dept of Civil Rights. Despite the protestations of the Governor and her staff (she is of the same political party as Biden), the AG proceeded with his investigation by not using those on his staff representing the DPC and instead used the staff of his Medicaid Fraud Division. Until last week’s announcement of an agreement, this entire matter took place outside the aura of media scrutiny.

AG Biden handled this matter with the highest degree of professionalism. He took on his own “client” and leaders of his own party regardless of the political implications in order to do the right thing for those vulnerable citizens who live at the DPC.

There are many in our country who do not understand that the state AG is unlike any other lawyer in their state. As its Preamble suggests, the Model Rules of Professional Responsibility simply do not apply to a state AG whose first duties are to enforce the law. The common law legacy of state AG’s allows them to take on corruption and malfeasance of their own “client” agencies which are too often captured by outside forces.