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Title: Are the duties of a state attorney general always consistent with the Model Rules of Professional Responsibility?

Thank you. As a reminder, I am speaking only for myself and not the National Association of Attorneys General. My remarks will take about 20 minutes after which we will engage in an ethics role playing hypothetical, so be ready for "cold calling" from Prof. Tierney!

This session is about "ethics" and by attending you will receive "ethics" credit for continuing education purposes. We are being recorded so you should assume that any questions you ask or comment you make will be public. I am putting together a more formal article on this presentation complete with citations and footnotes that I have placed on my website, http://www.stateag.org.

Today we talk about the relationship between State Attorneys General and their offices and the Model Rules of Professional Conduct.

Let's begin by looking up the definition of "Ethics" in the dictionary and you will find it as "The moral principles that govern a person's behavior."

Ethics is about doing the right thing.

Look up "Lawyer Ethics" and you get the Model Rules of Professional Conduct.

The truth is that there are times in the world of State AG's when they are not just the same thing.

While the duties of an OAG and the Model Rules generally work in tandem, there can often be friction that arises most often in the definition of "client," and herein lies today's discussion.

The culture of the AG's is one in which laws are enforced within the bounds of a professional governmental agency.

The culture of the Model Rules do not spend much time discussing the identity of a client because in the private sector it is most often self evident, and the Rules are permeated with a culture of deferral to clients on decision making. Indeed, it is usually "unethical" for a private lawyer to not follow client instructions.

Let's start with a discussion of AG's in order to understand how it is that a culture honed in private practice just doesn't always fit in the world of state attorneys general.

The Office of Attorney General is an institution with deep roots in our constitutional framework.

The office of AG did not just show up overnight.

AG's are the very embodiment of the principle that we are a government of laws, and not a government of the whim of those within federal or state government who believe they can just do what they want whenever they want.

Laws define how we live together, and the very purpose of the OAG is to enforce those laws within the context of the statutory language and our Constitution that of course restricts what it is that government – the "clients" – of attorneys general can do.

We call that our Bill of Rights augmented by amendments that go a long way in protecting human dignity.

Enforcement of the law inherently restricts someone in our society and for AG's that someone is often another branch of government.

It is the prime responsibility of the AG to advise, represent, and occasionally push back and even investigate or prosecute other government agencies. Most often that is done privately and so does not raise issues with the Rules, but often it must be done publicly and that is where the friction arises.

The bottom line is that we are talking about government power and how it is used - or not used - and that is difficult to say the least.

20th Century political theorist Harold Lasswell defined power as – "Who gets what, when and how."

One of the problems recognized by our Founding Fathers, of course, is that if you have power, you want to keep it.

In the debate over the NH constitution in 1783 – that predates our own and was drafted in large part by John Adams – one of the delegates stated – "The love of power is so alluring that few have ever been able to resist its bewitching influence. Wherever power is lodged, there is a constant propensity to enlarge its boundaries. A despotic government is that where any man, or set of men, have the power of making what laws they think proper or executing them in their own way."[1]

Our Constitution and laws anticipate this thirst for power and were established to diffuse it so that it could not be centralized, but this quest for power is not easily constrained. Laws are stretched or twisted or ignored so our common law created institutions to serve as a break on unrestrained power.

And one of those institutions is the Attorney General.

But if AG's are the enforcers that only begs the question of who provides the rules for the enforcers? Who limits what an AG can do?

Clearly there are limits to AG's - the constitution and laws of the state, the judiciary and the legislative branch of government.

Or do some of those limitations come from the ABA and its Model Rules? I would say that they do but marked with significant caveats.

Let me be clear. Both governmental and the Model Rules are needed - and in fact both are required because as lawyers we swear to both - but they are not the same thing.

AG's need to live with the Model Rules, but the Model Rules have to live with the AG's.

To figure this out, let's talk about a little more AG history.

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[1] Wood, at 447, citing Address of the N.H. Convention, Boutin et al., State Papers of N.H., IX, 846.

We stand on the shoulders of AG's of principle and AG's of shame.

Let's start with principle.

Any fair review of the history of AG's provides ample evidence of attorneys general standing up for the highest ideals of our society and the rule of law.

Certainly during my 40 years of intimate involvement in the world of attorneys general – I have known and worked with hundreds - my experience has been that AG's collectively and individually stand up for what they believe to be "right" - even at their personal and professional peril – more often than any other collection of elected officials.

Time and time again AG's turn from the politically expedient and do the right thing. We all see it all the time.

But that doesn't mean AG's do not need rules, because the history of the office is also filled with shame.

Again, some history.

In the 1600's the AG of Massachusetts prosecuted women for witchcraft.

In the 19th century many joined the Klan and even into the 20th century turned their backs on lynching.

In my state in 1941, when asked by a legislative advisor whether there was money the State of Maine owed the tribes, Attorney General Frank Cowen said the amount was "some millions." He said it was "fairly apparent" in the state's history that tribes "were robbed left and right." Yet AG Cowan did nothing about it.

Into the 1950's almost all fought to maintain racial segregation by upholding *Plessy v. Ferguson* and battling ferociously against *Brown v. Bd. Of Education* and its implementation.

And even into the 1960's most AG's opposed constitutional protections we all take for granted such as the requirements for court appointed counsel.

And only six years ago a sitting AG was convicted and sent to prison. She was the most recent but others had gone before, and I have written more than one letter to former AG's while they were in the penitentiary.

I find the real friction between the duty of an AG and the Model Rules does not occur in headlines of the national cases.

It occurs in the day-to-day work of representing government. It requires an understanding of the traditional functions of an AG.

Which again requires some history.

In the late 1200's, the Office of Attorney General rose from the common law in order to centralize the legal representation of the King that had previously been spread over a multitude of courts.[2]

The centralization was essential. The King now had one lawyer and that lawyer was the AG.

At first the AG did what the King told him to do. Just like any private lawyer today, the client made the decisions.

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[2] The roots of the Office of the Attorney General date back to the thirteenth century, when English kings appointed attorneys to represent regal interests in each major court or geographical area.6 Initially, the attorneys had limited powers, based either on the courts in which they appeared or the business that they were assigned to conduct.7 During the Middle Ages, however, this practice was superseded by the appointment of a single attorney with broad authority, including the power to appoint subordinates to carry out his responsibilities.8 The Attorney General emerged as chief legal adviser to the Crown and was often appointed for life tenure--a practice that continued until the reign of Henry VIII when it was changed to service at the pleasure of the Crown.9,

William P. Marshall, Break Up the Presidency? Governors, State Attorneys General and Lessons from the Divided Executive, 115 Yale L.J. 2445-2469 (2006)

And then as the common law grew and there were civil wars governmental power became diffuse as a protection from autocracy. Pretty soon there was a parliament and then the AG because something different from every other lawyer.

The AG became independent.

And the emergence of this independence of the AG became a core element of the growth of democracy. [3]

Of course it sometimes didn't always work out so well for the Attorney General. Thomas More was a lawyer and the Lord High Chancellor for the King Henry VIII, who after getting legal advice he didn't appreciate promptly executed him. More's last words were: "O die the King's good servant and God's First."

On the plus side, Thomas More is the only AG to my knowledge to be an official saint by Pius XI in 1938. In fact, in 2000, Pope John Paul II declared Thomas More to be the patron saint of politicians and in doing so seems to be suggesting that it is good to stand for principle even if it means your head ends up on a pike on London Bridge.

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[3] Throughout the sixteenth and seventeenth centuries, the duties of the Attorney General continued to evolve and expand; with eminent tenants such as Edward Coke and Francis Bacon, the Office also continued to gain in prestige.10 The Attorney General was often summoned by writ of attendance to the House of Lords where he was consulted on bills and points of law.11 In 1673, he began to sit in the House of Commons, advising that body and ***2450** assisting in the drafting of legislation.12 He also gave legal advice to the various departments of state and appeared for them in court.13

Importantly, during this period, the Attorney General established that his duty of representation extended to the public interest and not just to the ministries of government.14 In fact, by 1757, the Attorney General was able to refuse "to prosecute or to stop a prosecution on the orders of a department of the government, if he disapproved of this course of action."15 Accordingly, the Attorney General became less the government's lawyer and more an independent public official "responsible for justice."16

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By the dawn of the 18th century the AG became the primary enforcer of the rule of law. He – and they were all men – increasingly did not always do what the King or the Parliament told him to do. He was expected to use his own judgement in making the legal decisions of the day.

The AG was to serve the law and in doing so serve as a break on Executive Power and therefore autocracy. He was a key player in what would emerge as the separation of powers, a political theory that said the most effective way to restrain autocratic power exercised by government is to establish complementary governmental institutions with their own sphere of authority.

The Governor. The Legislature. The Courts. And the Attorney General.

John Calvin. Montesquieu. Locke.

You remember, right?

All of the colonies adopted an AG. The AG in the colonies were appointed in a variety of ways but most often not by the Colonial Governor. In 1650 the RI AG became our first elected AG, so from the beginning the AG was to possess an element of independence.

The AG's job was to uphold the law.

Here is the description of the Virginia AG's authority written in 1692. The AG job was "to investigate and prosecute treasons, murders, felonys, piracy, breaches of the peace, misdemeanors, contempts, prosecute officials who should break any penal laws, appear on behalf of the commonwealth is disputed land claims, and put in suit shipping and customs bonds. He also seems to have exercised a large degree of control over the collections of the public moneys and revenues."[4]

Sound familiar? It could have written yesterday.

After 1776 and our Constitution of 1787 and the Judiciary Act of 1789, the AG endured.

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[4] "The Attorney General in the Colonies," Oliver W.Hammonds, Anglo-American History Series, January, 1939 at pp 21

Yet even now the parameters of an AG's authority deliberately remain undefined, something that can be maddening to law professors, the private bar and to some degree by the ABA who strive to have everything written down.

It is perhaps best stated by the 5th Cir. in 1976 – almost 50 years ago - in the oft quoted *Shevin v. Exxon, 526 F 2d 266, 268-269 (5th Cir, 1976).* The then AG of Florida, Richard Shevin, was the Maura Healey of his day and sued Exxon without getting the approval of various state agencies. The 5th Circuit responded that attorneys general "have enjoyed a significant degree of autonomy. Their duties and powers are not exhaustively defined….but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires.[8] And the attorney general has wide discretion in making the determination as to the public interest"[5]

All of the states have adopted an Office of AG – usually but not always in their state constitution - with only a few words because it was understood that the common law gave AG's some degree of independence. In fact, having an AG

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[5] The office of attorney general is older than the United States and older than the State of Florida. As chief legal representative of the king, the common law attorney general was clearly subject to the wishes of the crown, but, even in those times, the office was also a repository of power and discretion;[5] the volume and variety of legal matters involving the crown and the public interest made such limited independence a practical necessity. Transposition of the institution to this country, where governmental initiative was diffused among the officers of the executive branch and the many individuals comprising the legislative branch, could only broaden this area of the attorney general's discretion.

As a result, the attorneys general of our states have enjoyed a significant degree of autonomy. Their duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires. And the attorney general has wide discretion in making the determination as to the public interest.

Shevin v. Exxon, 526 F 2d 266, 268-269 (5th Cir, 1976)

being independent was the whole point. The new republic needed someone with the independence to uphold the law.[6,7]

Although the main concern animating the initial formulation of the independence doctrine related to the powers of the King and the executive branch, the doctrine developed in America recognized that legislatures could be lawless, too.

The New Hampshire Constitutional Convention, working from a draft Constitution put together by John Adams, understood the danger of an out of control legislature noting that "power in the hands of the people's 'immediate representatives' in the lower houses of the legislatures was basically no different, no less dangerous, than power in the hands of senators, governors and judges." Portsmouth, New Hampshire Herald Gazette, March 15, 1783.

As the 19 and 20th century rolled along, the state AG became an elected official and by the end of the 20th the majority had assumed common law powers and

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[6] The Office of the Attorney General was brought over to the colonies, where t was modeled after its English counterpart;17 and at the time of the founding, it existed in all thirteen of the original states.18 The terms of tenure varied considerably. North Carolina, for example, provided for a lifetime appointment by the legislature.19 In New York, the Attorney General was appointed by the Governor with the advice and consent of an Executive Council but he could be impeached and removed from office for “mal and corrupt conduct” only by a two-thirds vote of those present in the Assembly.20 Delaware allowed the Governor to appoint the Attorney General, upon confirmation by the Privy ***2451** Council, for a term of five years.21 Rhode Island, alone among the original states, provided that the Attorney General would be popularly elected.22

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[7] People v. Miner, 2 Lans. 396, 398 (N.Y. App. Div. 1868) "Most, if not all, of the colonies appointed attorney-generals, and they were understood to be clothed, with nearly all the powers, of the attorney-generals of England," including the duty to "prosecute all actions, necessary for the protection and defence of the property and revenues of the crown.".

centralized the legal representation of state government and the *parens* authority and discretion that came with it.[8][9]

The centralization of legal authority in the Office of State Attorney General that so many of us now take for granted remains a very big deal. In almost all states it is the AG who decides when the state goes to court – or doesn't go to court. This centralization is a key element in the restriction on the Governor and varying agencies that otherwise would speak with multiple legal voices.

The policy reasons for this are overwhelming and well rooted in case law and policy. The rationale for this structure is discussed in many cases and the majority's rationale is clear. State government grants to the AG the sole authority to represent the state in litigation so that the judiciary will hear a single clear voice as to state government's views of the law. Otherwise, courts would face a myriad of administrative voices.

These decisions are never without dissent and all allow for judicial intervention if the AG acts in an arbitrary or capricious manner.

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[8] As the nation matured, many states created independent attorneys general and afforded the Office even greater autonomy by making it a popularly elected position. Again, the states' purpose was to weaken the power of a central chief executive and further an intrabranch system of checks and balances.

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[9] Accordingly, as the nineteenth century unfurled, most new states provided in their constitutions for the popular election of an attorney general (and other executive branch officials) while many of the established states amended their constitutions to the same end. As a result of this trend, at present, forty-three state attorneys general are elected and forty-eight are free from gubernatorial control.27 Notably, no state has reversed direction and made its Attorney General subservient to the Governor.28

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And of course, the legislature can – if it does not trust the AG – take away or limit the AG from being the exclusive voice either through litigation or other means such as restrictive budgets.

The fight goes on in state after state.

Just this term the United States Supreme Court has upheld the majority rule by ruling that the AG of Kentucky could pursue an appeal over the objection of the "client agency".[10] It also expected to uphold the ability of the NC Legislature to limit an AG's exclusive right to be heard in court.[11]

Most states now have put this common law authority in statute so that when an AG's discretion is challenged by a state agency or other elected official, the AG usually wins in court.

But the truth is that the AG often loses this authority especially if the AG tries to stop the Governor or state agencies from going to Court by denying counsel. And the AG also often loses in a political scramble if the AG flaunts the will of the rest of state government. The requests of Governors and Legislators and state agencies for their own counsel with right to litigate continues unabated.

At the end of the day the AG's authority – his or her power – is directly linked to the credibility of the Office.

The more an AG acts like a Congressman the more he will be treated as a Congressman.

The majority of AG*'s* nonetheless continue the historic common law tradition and that includes the responsibility to be adverse to "client" agencies if the AG believes they were violating the law or exceeding its authority, and it also contains the authority of AG's to take affirmative action if the public interest so requires.

Please note a strong minority of courts - led by California – have ruled that the AG lacks common law power and must do what the Governor and his or her agencies direct. In these states it means that AG's cannot litigate against an agency it

[10] 20-601 Cameron v. EMW Women's Surgical Center, P. S. C. (03/03/2022) (supremecourt.gov)

[11] Berger v. North Carolina State Conference of the NAACP - SCOTUSblog

traditionally represents but it can be adverse in the sense because the AG can always withdraw from representation when the AG believes the agency is legally wrong.

The rule is therefore that the majority of the states continue to uphold the AG's authority to control litigation and in no state is an AG required to take a position urged on them by any party that the AG believes to be ultra vires.

What about the **Model Rules of Professional Conduct?** Where do they fit in?

Again, we need some history.

Professional associations and ethical codes for lawyers and judges began to appear in the United States in the early 1800s. States formed bar associations in the early 1800s to organize and facilitate the legal profession.

There were few rules about how to become a lawyer but as they did emerge nationwide as law schools were created and bar exams required.[12]

In 1887, the Alabama Bar Association adopted the first comprehensive code of ethics. Other states followed suit.

The American Bar Association had been formed in Saratoga, New York, on August 21, 1878, by a group of 289 lawyers. For many years the ABA examined and debated the various state codes of ethics and, in 1908, adopted and promoted the first Canons of Professional Ethics. The 32 canons were intended to be model rules that states could adopt as regulations of legal conduct.

Courts or legislatures in most states adopted this first set of standards. The ABA replaced them in 1969 with the Model Code of Professional Responsibility. The Model Rules of Professional Conduct as we understand them were adopted by the ABA in 1983.

[12] https://www.law.virginia.edu/news/2003_fall/hylton.htm

We all study them and follow them and cannot be lawyers unless we understood them.

But let me again say the obvious.

The Model Rules were drafted by private lawyers to govern the behavior of private lawyers with private disputes. That was the entire point.

They are today enforced in most states by a professional staff of private lawyers who are overseen by private lawyers usually appointed by each state's Supreme Court.

In other words, and to be perfectly blunt, the Model Rules were not drafted with government lawyers in mind.

The core principles of the Model Rules - honesty and candor and integrity – are obviously shared by government and non government lawyers alike, so the friction between the Model Rules and government lawyers comes down to the mandate of allegiance to a "client."

The legal profession spends very little time in defining "client." For the private bar, the client is whoever pays the lawyer. For the public interest bar, it is whomever is immediately aggrieved – the person charged with a crime, the tenant evicted, the person negligently injured.

Never is the "client" upholding the law.

Never is it what is right for the system.

Never is it about policy.

The entire thrust of the Model Rules is not supposed to be policy. The Rules are about deferral to clients wishes and client directed advocacy.

AG's have a different job.

It should not surprise you that AG's have been wrestling with this friction for a long time.

Here are the remarks of the then AG of Connecticut Joe Lieberman at the June 10, 1986 Summer Meeting of the National Association of Attorneys General held in Seattle, Washington.

"We do not simply defend lawsuits 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 officials that we serve.

I want to suggest to you that we are policy makers. The law after all is policy. The law after all is a series of value judgments and principles, and when we respond for example 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 the litigation.

So what I am suggesting is that in almost everything we do we are policy makers…"[13]

So is Lieberman correct? Are AG's independent policy centers? If so then who is the AG's client?

Can AG's simply pass it off as "the public interest"? I hear AG's say this all the time and I must admit to having said it myself more than once.

But simply saying "the public interest" really provides no standard. The "public interest" cannot mean that the AG's real client is whatever an AG thinks at any

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[13] Transcript of the Summer Meeting of the National Association of Attorneys General (NAAG), Seattle Washington, Plenary Session, June 10, 1986

moment. We all know that that really doesn't work. The issue is far more nuanced than a general "public interest" assertion.

And of course in the vast number of cases, the "client" is another elected official or public agency with their own statutory responsibilities – and remember, they have sworn to uphold the law, too and may have their own "in house" lawyers – so and their relationship with the AG whose primary oath is to uphold the law and the constitution that may – or may not – comport with the view of the government "client."

As I noted in my historical review, the AG's independence will carry with it friction.

Let me emphasize.

There is supposed to be friction!

That is what history calls for! It is what independence is all about!

The AG must enforce the law even against state or federal agencies who ignore it.

The noise of the moment may be cast as politics, but the truth is that the independence of the AG has obviously been an important element of our democracy for a very long time.

The AG is a key element on the preservation of state separation of powers, and also a key part of upholding the US and state constitutions. Often the AG is the only way to stop another governmental actor – state or local or federal – from exceeding its authority.

In the early 1980's this friction between the role of the AG and the Model Rules came to a head.

After endless rounds of negotiation between NAAG and the ABA, led for NAAG by the Office of the Massachusetts and the AG at the time the Hon. Francis X.

Bellotti who will turn 99 years old on May 3 - the result was a Preamble to the Model Rules that exists in most of your state codes.

The Preamble to the Model Rules is brief and deserves your attention. It places all of the other rules in context.

I. Model Rules of Professional Conduct

a. **Preamble and Scope: n. 18**: Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes 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.**

Several State Supreme Courts have spoken eloquently to the fact that there are limits to the degree that the Model Rules constrain an AG.

AG's are not "the usual advocate." [14] The AG's duties are "markedly different" from those of the private bar.[15]

[14] Rhode Island v. Lead Paint Industries, 951 A2d 428, (Track III) (2008*, "In view of the grave responsibilities of attorneys general vis-á-vis the public holder of that high office, as distinguished from the usual advocate, has a special and enduring duty to "seek justice."

[15] Feeney v. Commonwealth, 373 Mass 359 (1977) "To permit the Commission and the Personnel Administrator, who represent a specialized branch of the public interest, to dictate a

And as I have said, while these are the views of the majority and that there is a sizeable minority who define the role of the AG more narrowly

So now the wheel spins once again.

The harshness of our world comes into this clash.

Let me be clear and it is why I am here with you today.

AG's and AAG's are now being increasingly challenged within the framework of the Model Rules on how they – you - enforce the law.

Several AG's have had personal ethics complaints filed with state the state bar against them by political and policy opponents based on the discretionary decisions made by the AG.

In some ways more disturbing AAG's can be in the line of fire as private parties attempt to intimidate staff with a Bar Complaint.

Because Bar Complaints are confidential bar complaint statistics are not always public, although NAAG staff does its best to keep track of them. Further, in many cases until these private Rule enforcing lawyers make their decisions these complaints hang over AG's and AAG's with no public input potentially undermining the ability of the AG office to do its job.

Even if the complaint is frivolous, it remains a serious problem for that AAG. Working for very little money and often defending agencies that have made mistakes – we all make mistakes, right? Isn't that when we need lawyers? – these complaints sit on their shoulders.

AG's must pay attention to this continuing issue. I strongly urge every AG to have an internal ethics officer who is an expert in your state Rules to whom staff can turn. NAAG has long advocated this position and has advocated the creation of a "Chief Integrity Officer." [16] AG's and Chief Deputies must play close and

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course of conduct to the Attorney General would effectively prevent the Attorney General from establishing and sustaining a uniform and consistent legal policy for the Commonwealth.".

[16] https://www.naag.org/attorney-general-journal/ethics-corner-creating-chief-integrity-officer/

personal attention to decisions of well meaning Model Rule Commissioners that might impinge of the ability of an AG or AAG to do his or her job.

Trust me, this is an emerging issue that isn't going to go away.

With the time left to us, let's try a not-so-hypothetical and see how you do.

"Who is the Client? A Role-Playing Hypothetical"

WHO IS THE CLIENT? - HYPOTHETICAL

You are the newly elected Attorney General of Everett, and you arrive to find an emergency meeting convened in your office. In your office is the Chief Deputy Attorney General, the Deputy Attorney General in charge of the Criminal Division, the Assistant Attorney General assigned to the Department of Corrections, the Assistant Attorney General assigned to handle tort claims, and the Chief of Staff for the Attorney General's Office (who was also your press secretary in your recently hard won election).

The Chief of Staff informs you that he had just been informed by the Associated Press that there is going to be a press conference in 30 minutes in which "explosive" allegations are going to be made about the regional youth detention centers operated by the Department of Corrections, and that the press is going to be looking for an immediate reaction from you.

For the last ten years, the State of Everett has proudly operated four regional youth detention centers that assist troubled adolescents before they commit serious crimes. These "boot camps" each house, educate, and rehabilitate 40 to 50 boys between the ages of 13 and 17. The success of these centers has been so high that the senior U.S. Senator of Everett, Bill Ellis, has regularly praised them on the floor of the U.S. Senate and last spring held a widely publicized hearing of the Judiciary Committee at a center that was even attended by his colleagues from across the aisle.

None of this, however, makes any difference to Mark Trail (Harvard ’69 and Harvard Law School ’75). Having lived as a recluse in the mountains for thirty years, Trail reactivated his law license, and claims that he has “shocking” information. Trail and his team of paralegals (with the secret help of an unnamed whistleblower from the Department of Corrections and a law school clinic located at his alma mater) have just finished interviewing dozens of young boys who have recently left one or more of the four regional youth detention centers. Each of his clients tells the chilling story of having been repeatedly assaulted by Center staff. Several boys allege that older inmates and other staff often watched and actually filmed these abusive encounters.

Trail, who will be joined by several legislators from both parties, is about to hold a press conference to announce his allegations.

In addition, he also stated that he would (1) File a public records request under the Everett Freedom of Information Act in which he asks for the personnel records of all Center staff; (2) File a similar request for any and all photographs or films in the possession of the Department of Corrections that in any way depict his clients; (3) Demand that the Attorney General, as part of his oft stated initiative on to protect Everett's children, initiate a complete investigation of his charges and bring appropriate criminal or civil action; and (4) Announce his intention to sue the State of Everett for monetary damages, including legal fees, on behalf of his clients and all similarly victimized boys.

You go around the room and ask those present what you should do.

The Assistant Attorney General assigned to the Department of Corrections, says that the Department is outraged by these allegations, insists that they are completely false, and wants you to open an investigation into the leaking of confidential information by some obviously disgruntled Department employee. She reminds you that there are strict confidentiality statutes designed to prevent the release of any information about youthful offenders and the release of any information about personnel matters.

The Assistant Attorney General assigned to handle tort claims, says that these allegations, if true, could result in substantial exposure not only for the

State, but also for the individuals who allegedly participated in such actions. Unless the (budget–strapped) Attorney General's Office is prepared to foot the expensive bills for hiring outside counsel to defend the State and the individual employees, it is best to say as little as possible to avoid being disqualified in any subsequent civil litigation.

The Deputy Attorney General in charge of the Criminal Division, says that there is a criminal statute that specifically makes it a crime not only for individuals in charge of youthful offenders to assault kids in their custody, but also to fail to report others who conduct such abuse. He believes that an investigation into these allegations should be opened immediately, and pursued wherever it goes, and that little should be said to avoid compromising the investigation.

Your non-lawyer Chief of Staff reminds that you did run on a "Kid's First" platform. He thinks that even if it would cause problems in later prosecuting the people who may have assaulted the kids, or defending the employees accused of assaulting the kids or failing to report abuse conducted by others, you ought to make it clear that your first interest is the welfare of the kids.

The Chief Deputy Attorney General, says that everyone in the room has a legitimate point, and that you were elected Attorney General to make the right decision. What do you do?