

In Re: Hickenlooper v. Coffman
2015 SA 296

Attorney General's Brief Addressing Jurisdictional Questions

Exhibit D

ADMINISTRATIVE POLICY
THE OFFICE OF THE ATTORNEY GENERAL
STATE OF COLORADO

Topic: Organization	Policy No.: 1.1
Subject: Authority and Responsibilities of the Colorado Attorney General	Date: November 5, 2003 By Direction Of: Ken Salazar, Attorney General

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The Attorney General of Colorado is an independent, statewide, executive officer, whose position is established and governed by the constitution and laws of Colorado and filled by popular election.

COLORADO CONSTITUTION

Colorado has a "plural executive" system; the Colorado Constitution specifies that the executive department shall include at least five elected officers, including the Attorney General. Colo. Const. art. IV, §§ 1 and 3. In the case of the Attorney General, "[t]he very purpose of providing for the election of such legal counsel is to ensure their independence from other elected and appointed officials." *See Schnapper, Legal Ethics and the Government Lawyer*, 32 RECORD OF ASS'N OF THE BAR OF THE CITY OF N.Y. 649, 653 (1977). The independent role of the Attorney General reflects a conscious decision by the authors of the state constitution to create an additional check and balance in state government. *See State v. Gattavara*, 47 P.2d 18 (Wash. 1935). The constitutional structure reflects a view of the Attorney General as an officer who provides legal services to the state government, but always in the context of statewide concerns and the pursuit of the public interest. Before taking office, the Attorney General must take an oath to support the constitution of the United States and the constitution of the State of Colorado. Colo. Const. art. XII, § 8.

COLORADO STATUTES AND COMMON LAW

Under § 24-31-101, C.R.S. (2000) the Colorado Attorney General is the legal counsel and advisor for all agencies of state government other than the legislative branch. The Attorney General appears for the state and prosecutes and defends all civil and criminal actions and proceedings in which the state is a party or is interested. Examples of specific statutory authority of the Attorney General include: (1) the power to institute actions or proceedings to prevent or restrain violations of the Colorado Antitrust Act of 1992, § 6-4-11, C.R.S. (2000) (2) concurrent jurisdiction with the district attorneys to enforce the Colorado Consumer Protection Act, § 6-1-107, C.R.S. *et seq.* (2000), and the Colorado Securities Act, § 11-51-603, C.R.S. (2000) and (3) initiation of criminal or civil proceedings when required to do so by the Governor, § 24-31-101, C.R.S. (2000).

The Attorney General also is required to prosecute and defend for the state all causes in the appellate courts in which the state is a party or interested. When the Attorney General is unable or has failed or refused to provide legal services to an agency of state government, the Governor or the Chief Justice of the Colorado Supreme Court may make a finding of such failure and may employ outside counsel. § 24-31-101(1)(e), C.R.S. (2000).

By statute and by common law, the Attorney General also has powers to represent the people of the state with respect to any charitable, educational, religious, or benevolent trust. § 24-31-101(5), C.R.S. (2000). The Colorado Attorney General's traditional common law powers include the right to control the state's litigation and appeals, the right to intervene in legal proceedings on behalf of the public interest as in the case of charitable trusts, and the power to determine the state's legal policy. See *Colorado State Board of Pharmacy v. Hallett*, 296 P. 540, 542 (1931), ROSS, STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 37-38 (1990).

Section 13-51-115, C.R.S. (2000) provides that in a declaratory judgment action, if a statute, ordinance, or franchise is alleged to be unconstitutional, the Attorney General must be served with a copy of the proceeding and is entitled to be heard.

THE ATTORNEY GENERAL'S REPRESENTATION OF STATE INTERESTS

The majority view is that the Attorney General "protects the interest of the state as a whole as a unitary client, rather than any one of the many potential agency manifestations of the state." ROSS, STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 42 (1990). The U.S. Court of Appeals for the Tenth Circuit has determined that the Colorado Attorney General "is the exclusive legal representative of the state in all litigation with regard to matters of public interest, and he alone has the right to represent the state as to litigation involving a subject matter of statewide interest." *Mountain States Legal Foundation v. Costle*, 630 F.2d 754, 771 (10th Cir. 1980) (citing *State Board of Pharmacy v. Hallett*, 88 Colo. 331, 296 P. 540 (1937)).

The Colorado Supreme Court has recognized the Attorney General's common law powers. See *State Board of Pharmacy v. Hallett*, 88 Colo. 331, 296 P. 540 (1937). However, in *People ex rel. Tooley v. District Court*, 549 P.2d 774 (1976), the Court ruled that the Attorney General did not have general criminal jurisdiction because the General Assembly had granted such jurisdiction to the district attorneys.

Drawing on the sources cited above, it is possible to analyze the powers and duties of an elected Attorney General in the representation of governmental clients. What is the Attorney General's responsibility regarding the right to control litigation and appeals, the representation of adverse interests, and representation of the public interest?

Identifying the Attorney General's Client

Identifying the Attorney General's client is the first step in analyzing the Attorney General's powers and duties of representation. In most cases in which the Attorney General is involved, the client will be the state as a whole, just as a corporate attorney's client is the corporation as an entity. *See* Colorado Rules of Professional Conduct 1.13. However, unlike a corporation, state government does not have a single governing body with final and overarching decision making authority in all instances. State government not only has separate and coordinate branches and independent boards and commissions, it has deliberate tensions among them. In this system, the Attorney General represents the interests of the state as a whole.

The Attorney General's Right to Control Litigation and Appeals

The Preamble to the Colorado Rules of Professional Conduct notes that the responsibilities of government lawyers may include authority concerning legal matters that ordinarily repose in the client in private lawyer-client 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." Section 24-10-112, C.R.S. (2000) provides that the Attorney General may compromise or settle a claim against the state with the concurrence of the head of the affected state agency, except with regard to claims over which the State Claims Board (of which the Attorney General is a member) has authority. § 24-30-1509 (1)(b), C.R.S. (2000).

In Colorado, the Attorney General is elected as the chief lawyer for the state as a whole, and should consider the larger interests of the state and its citizens in determining the course of litigation. In *State Board of Pharmacy v. Hallett*, 88 Colo. 331, 296 P. 540 (1937), the court stated that the Attorney General has the exclusive right to represent the state in actions to protect its interests. An important component of this exclusive representation is the development of consistent legal policy that takes into account all of the interests of the state and its people. This is similar to the view of the U.S. Supreme Court that the United States is a unitary client which should speak with one voice as represented by the U.S. Attorney General and the Solicitor General. *See United States v. Providence Journal Co.*, 485 U.S. 693, 706 (1988).

Other states share this view of the role of the Attorney General. In *Feeney v. Massachusetts*, 366 N.E.2d 1262, 1266-67 (Mass. 1977), the court stated:

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 [state officials], "[h]e also has a common law duty to represent the public interest 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 General*, [367 Mass. 154, 163, 326 N.E.2d 334, 338 (1975)]. To permit [a state agency and administrator] who represent a specialized branch of the public interest, to dictate a 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. 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. . . . [T]he Attorney General is empowered, when he appears for State officers, to decide matters of legal policy which would normally be reserved to the client in an ordinary attorney-client relationship. . . . Where, in his judgment, an appeal would further the interests of the Commonwealth and the public he represents, the Attorney General may prosecute an appeal to the Supreme Court of the United States from a judgment of the District Court over the expressed objections of the States officers he represents.

The Alabama Supreme Court has stated that "[T]he attorney general, as the chief law officer of the state, [is] fully empowered to make any bona fide disposition of the cause as in his judgment might be deemed to be in the best interest of the state, unless inhibited by organic law." *State ex rel. Carmichael v. Jones*, 41 So.2d 280, 285 (Ala. 1949), *quoted in Ex Parte Weaver v. Blue Cross and Blue Shield*, 570 So.2d 675, 679 (Ala. 1990).

In practice, the Colorado Attorney General confers and works closely with state officers and agencies involved in litigation. In considering what course would best represent the state's interests, the Attorney General gives consideration to the views of officers and agencies whose interests may be affected.

The Attorney General's Representation of Adverse Interests

The Attorney General's office may represent state agencies or officers who are on opposing sides in a dispute. The state is a unitary client, but as government grows more complex the possibilities for interagency conflict multiply. Most such conflicts are resolved informally, without litigation. The policy of the Colorado Attorney General is to facilitate informal resolution of interagency disputes. However, on rare occasions the Attorney General may determine that the public interest is best served by a judicial resolution of differences among state agencies or coordinate branches of state government. At times "it may be incumbent upon the attorney general to both prosecute and defend an action." *Reiter v. Wallgren*, 184 P.2d 571 (Wash. 1947).

[T]he Attorney General's powers encompass advising and representing the State and all agencies in all legal proceedings. In addition, although an

attorney-client relationship exists between a State agency and the Attorney General, it cannot be said that the role of the Attorney General apropos of a State agency is precisely akin to the traditional role of private counsel apropos of a client. . . . (Citations omitted.) Indeed, where he or she is not an actual party, the Attorney General may represent opposing State agencies in a dispute. . . . (Citations omitted.) The Attorney General's responsibility is not limited to serving or representing the particular interests of State agencies, including opposing State agencies, but embraces serving or representing the broader interests of the State. This responsibility will occasionally, if not frequently, include instances where State agencies are the opposing parties.

Environmental Protection Agency v. Pollution Control Board, 372 N.E.2d 50, 52-53 (Ill. 1977), quoted with approval in *Connecticut Commission on Special Revenue v. Connecticut Freedom of Information Commission*, 387 A.2d 533, 537 (Conn. 1978).

Another type of "conflict" situation involves the coexistence of advocacy and adjudicatory functions when the Attorney General's office provides legal services to state agencies that have a prosecutorial as well as an adjudicatory role in the same case. As to this type of situation, the Colorado Court of Appeals ruled in *People ex rel. Woodard v. Brown*, 770 P.2d 1373 (Colo. App. 1989), that a doctor was not denied due process during disciplinary hearings because the Attorney General's office served as legal advisors both for some inquiry panels and some disciplinary hearing panels. The court noted that the Attorney General had established a system within the Department of Law designed to separate the regulatory law section from conflicts counsel. This system permitted "the assignment of counsel from the regulatory law section to represent the Board [of Medical Examiners] and the inquiry panel in its investigative functions, and the use of separate conflicts counsel to act as legal advisor to the hearings panel in its decision-making capacity." 770 P.2d at 1376. In previous cases the court had approved this method of avoiding an impropriety or the appearance thereof and maintaining the integrity of the administrative process. See *Horwitz v. State Board of Medical Examiners*, 716 P.2d 131 (Colo. App. 1985); *Ranum v. Colorado Real Estate Commission*, 713 P.2d 418 (Colo. App. 1985).

The Attorney General and the Public Interest

As the historical successor to the English Attorney General, the Attorney General in Colorado, and in other states, is vested with considerable discretion and autonomy.

The office of the 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; 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. . . . And the attorney general has wide discretion in making the determination as to the public interest.

State of Florida ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 268-69 (5th Cir.1976), cert. denied, 429 U.S. 829 (1976).

The Colorado Attorney General, as a statewide elected official, is expected to articulate policy on issues within the purview of the office. "We conceive the phrase 'legal adviser' in the context of the Attorney General's status in state government contemplates something more than a mere passive role in the formulation and implementation of state government policies and practices." *Young Americans for Freedom v. Gorton*, 588 P.2d 195, n.2 (Wash. 1978).

The Attorney General may, when in disagreement with a state agency, refuse to represent that agency, and the agency may then employ outside counsel. § 24-31-101(1)(e), C.R.S. (2000). Moreover, the Attorney General is not disqualified from seeking judicial review in a matter affecting the public interest merely because an assistant attorney general previously provided representation to the agency whose ruling is contested at the administrative stage of the proceedings. *Superintendent of Insurance v. Attorney General*, 558 A.2d 1197, 1204 (Me. 1989). "Because of the multiple duties imposed on the office, the status of the Attorney General is unique. As a member of the bar, he is subject to the ethical standards of the bar, but he is also charged with common law and statutory duties and powers. As an officer of government he is directed to control and manage the litigation of the State by providing counsel to state agencies and by approving the retention of private counsel. Of at least equal importance, however, is his role as the legal representative of the people of the State in pursuing the public interest." *Id.*

The Supreme Court of Mississippi, in granting the motion of the Attorney General to intervene in an appeal of a utility rate increase granted by the Public Service Commission, stated:

It is glaringly apparent . . . that [the attorney general] will be confronted with many instances where he must, through his office, furnish legal counsel to two or more agencies with conflicting interest or views. It is also readily apparent that in performing their duties, the agencies will from time to time make decisions, enter orders, take action or adopt rules and regulations which are, in

spite of good intentions, either illegal or contrary to the best interest of the general public.

Under our scheme of laws, the attorney general has the duty as a constitutional officer possessed with common law as well as statutory powers and duties to represent or furnish legal counsel to many interests -- the State, its agencies, the public interest and others designated by statute.

Paramount to all his duties, of course, is his duty to protect the interest of the general public.

State ex rel. Allain v. Mississippi Public Service Commission, 418 So.2d 779, 782 (Miss. 1982).

The prevailing rule is that an Attorney General with common law powers has the right to intervene in all suits affecting the public interest. "The unique position of the attorney general requires that when his views differ from or he finds himself at odds with an agency, then he must allow the assigned counsel or specially appointed counsel to represent the agency unfettered and uninfluenced by the attorney general's personal opinion. If the public interest is involved, he may intervene to protect it." *Id.* Thus the Attorney General may intervene on behalf of the general public, apart from the representation of state agencies by members of the Attorney General's office, when the public interest so requires.

The Attorney General and Public Information

It is important for the Attorney General to inform the public of actions taken in an official capacity. *Gold Seal Chinchillas, Inc. v. State*, 420 P.2d 698 (Wash. 1966). The Attorney General serves the interests of Colorado citizens by providing accurate and timely information about the activities of the Attorney General's office when doing so does not conflict with a rule or law restricting release of information. The subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy. Statements about legislative issues, policy matters, and formal opinions of the Attorney General are generally not subject to ethical or statutory restraints. ROSS, STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES, at 113.

The most widely applicable guidelines on press comments are contained in the Colorado Rules of Professional Conduct. Rule 3.6 deals with trial publicity. That rule prohibits a lawyer who is participating in the investigation or litigation of a matter from making extrajudicial statements likely to be disseminated by the news media, if the lawyer knows or reasonably should know that the statements will have a "substantial likelihood of materially prejudicing an adjudicative proceeding." The United States Supreme Court has concluded that the "substantial likelihood of material prejudice" standard satisfies the First Amendment. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

The Comment to Rule 3.6 notes that "it is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved." The Comment further states that the public "has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern."

In deciding whether a published extrajudicial statement would have a substantial likelihood of materially prejudicing an adjudicative proceeding, the following are factors to consider:

The timing of the statement. Statements made near the time of trial are more likely to result in substantial prejudice than extrajudicial statements made months in advance.

Whether the statement is likely to influence the pool of prospective jurors. The public interest involved and the reasons for the Attorney General's actions may be stated, but purely subjective or inflammatory comments should be avoided.

Whether the trial is to a jury or to the court. Judges and arbitrators may not be as sensitive to extrajudicial statements as juries.

The size of the community from which the jury pool will be selected. A larger population increases the likelihood of an unprejudiced jury venire.

Whether public safety is an issue. The Attorney General may provide objective and factual information regarding measures to assure public safety.

The extent of public interest in the matter. The Attorney General has an obligation to provide information on matters of significant public interest.

Whether the information already is in the public record. Statements may be made regarding information contained in the public record.

Whether the case is criminal or civil. Criminal matters generally are more sensitive to prejudice from pretrial publicity.

Whether the information is likely to be admissible at trial. Information that a lawyer knows is likely to be inadmissible at trial can create a substantial risk of prejudicing an impartial trial.

Responding to public misinformation. A lawyer may make a statement to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the client.

Public statements should not reveal confidential information gained in the professional relationship. However, confidential client information does not include what a lawyer learns about the law in the course of representing clients.

COLORADO RULES OF PROFESSIONAL CONDUCT

The Preamble to the Colorado Rules of Professional Conduct (January 1998) acknowledges the unique role of the government attorney:

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 a 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 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. They may also have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so. These Rules do not abrogate any such authority.

Rule 1.13 of the Colorado Rules of Professional Conduct addresses situations where a government organization is the client. The Comment to this Rule includes the following with respect to government agencies:

The duty defined in this Rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in the military service may be defined by statutes or regulations. Therefore, defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context. Although in some circumstances the client may be a specific agency, it is generally the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the government as a whole may be the client for purposes of this rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This Rule does not limit that authority.

The special status of the Attorney General has been aptly described as follows:

The attorney general of the state is in a unique position. As a member of the bar, he is, of course, held to a high standard of professional ethical conduct. As a constitutional executive officer of the state . . . he has also been entrusted with broad duties as its chief civil law officer and. . . he must, to the best of his ability, fulfill his "public duty, as Attorney-General, and his duty as a lawyer to protect the interest of his client, the people of the State." This special status of the attorney general where the people of the state are his clients cannot be disregarded in considering the application of the provisions of the code of professional responsibility to the conduct of his office.

Connecticut Commission Special Revenue v. Connecticut Freedom of Information Commission, 387 A. 2d 533, 437 (1978).

Powers and Duties of the Colorado Attorney General – Colorado Supreme Court

During the Summer and Fall of 2003, the Colorado Attorney General litigated the powers and duties of the Attorney General in the Colorado Supreme Court. The opinion in *Davidson v. Salazar*, No. 03SA 147 is reprinted here. The answer brief of the Attorney General, which contains a great deal of research and commentary on Colorado law, is reprinted here. An amicus brief filed in the case by 44 Attorneys General is reprinted here.

PROCEDURES:

None