

# ADVISORY ETHICS OPINION 79-29

## **SYNOPSIS:**

In order to avoid any possible conflict of interest, the Attorney General's Office should not represent any Judges of the State Court bench or Justices of the Supreme Court bench, but rather such Judges and Justices should be represented, when required by statute, by other legal counsel as provided for in 3 V.S.A. 1102(e).

## **FACTS:**

The Vermont Attorney General's Office, pursuant to 3 V.S.A. 1102, provides counsel to State employees who become involved in litigation. On occasion, they are called upon to defend the State's Superior Court Judges, as well as the Vermont Supreme Court Justices.

When representing such Judges or Justices, how may the Attorney General's Office avoid conflict when the Attorney General's Office has matters pending before such Judges or Justices?

## **OPINION:**

Under the present law, the Attorney General's Office may not decline to represent a State employee under certain circumstances provided for in 3 V.S.A. 1102, except as otherwise provided in such section. In order for the Attorney General's Office to avoid a conflict when the State is required to represent a Judge or Judges of the State Superior Court bench or Justices of the Supreme Court bench under 3 V.S.A. 1102, it would appear that the Attorney General's Office should determine that it cannot adequately represent the interest of such Judge, Judges or Justices. Private counsel should be retained for such Judge, Judges or Justices pursuant to 3 V.S.A. §1102(e), which provides:

“In any case in which the State is obligated to provide legal representation for a State employee under this chapter, if the Attorney General finds that he cannot adequately represent the interest of the employee, he shall authorize the employee to retain legal counsel at State expense. The terms under which private counsel is retained for a State employee at State expense under this section must be approved by the Attorney General.”

Following the provision as provided for in 3 V.S.A. §1102(e), the Judge, Judges or Justices would be represented by the State of Vermont (taxpayers), not the Attorney General's Office.

As an alternative to the above, it would be appropriate, although terribly cumbersome for the Attorney General's Office, to inform all of its opposing counsel in pending cases and in cases filed in the future that the Attorney General's Office does in fact represent these Judges and Justices, and that should the opposing counsel wish, they would withdraw, or as an alternative, they could sign a waiver allowing the Attorney General's Office to continue with that particular case. Any opposing counsel who objected to the Attorney General's continuing representation would effectively require the Attorney General's Office to withdraw its representation of that particular case and outside counsel would have to be hired.

Of the two alternatives, it seems that the first alternative is the more logical and less cumbersome.