

# ADVISORY ETHICS OPINION 90-01

## **SYNOPSIS:**

The Attorney General may represent a state agency in defending a claim of discrimination under the Vermont Fair Employment Practices Act without violating DR5-105 (A), where the complaint is pending for investigation and enforcement before the Vermont Human Rights Commission.

## **FACTS:**

An attorney requests our opinion as to whether the Attorney General is disqualified by reason of DR5-105 (A) from representing a state department in an equal pay complaint before the state Human Rights Commission. The attorney's client is an employee of the state department and alleges discrimination in the rare of pay on the basis of sex.

The Legislature has authorized the Attorney General, pursuant to 9 V.S.A. sec. 495b (a) (incorporating 9 V.S.A. sections 2458-2461) to investigate and enforce the provisions of the Vermont Fair Employment Practices Act 9 V.S.A. sec. 495-495a-495e. Prior to the creation of the Human Rights Commission it was the practice of the office of Attorney General to represent both the complaining party and the state agency in cases where the complaining party was a state employee. In such instances, the Attorney General would seek consent from opposing parties pursuant to DR5-105(C). This is the procedure required by our Opinion 81-8 where the Attorney General intends to represent opposing state agencies in the resolution of disputes.

There is no question that the Fair Employment Practices Act (FEPA) covers and provides protection to state employees. Thus, in 1987 the legislature added Chapter 141 to Title 9, creating the Human Rights Commission and empowering it to investigate FEPA complaints "when the party complained against is a state agency" and the Attorney General would otherwise have jurisdiction. 9 V.S.A. sections 4552(b), (c). In all other respects, the Human Rights Commission is limited to the investigation and enforcement of complaints of discrimination in public accommodations and rental and sale of real estate. Therefore, it is quite clear that the legislature intended to eliminate the actual, apparent or potential conflict of interest which would arise were the Attorney General to investigate and defend FEPA claims against state agencies.

## **QUESTION PRESENTED:**

May the Attorney General ethically appear as an advocate for state agencies if it does not have jurisdiction to investigate and defend FEPA claims brought against such agencies by their employees?

## **DISCUSSION:**

Our Opinion 81-8 contains a thorough discussion of the conflict of interest considerations involved were the Attorney General to represent opposing state agencies in the resolution of disputes by negotiation or litigation before administrative tribunals or courts. There, we concluded that the office of the Attorney General is subject to the requirements of the Code of Professional Conduct in general and DR5-105 in particular. In addition, we found that neither the common law nor the statutory authority to represent the state in civil actions overrode the requirements of the Code.

Even so, however, we do not perceive a conflict of interest to arise under the facts presented in the instant request. In giving jurisdiction to the Human Rights Commission to investigate and enforce complaints against state agencies for employment discrimination, the legislature intended to resolve any actual or appearance of conflict problems. All parties are represented by separate counsel. The Human Rights Commission, as a separate agency, investigates and enforces the anti-discrimination laws and may bring suit on behalf of the alleged victim. There is no likelihood that any of the attorneys involved, by virtue of their representation, would be likely to have their independent professional judgment adversely affected or be involved in representing differing interests as prohibited by DR5-105(A).

Because the Human Rights Commission is separate from the Attorney General's Office and has its own attorney, the executive director, it is not part of the "law firm" operated by the Attorney General. Thus, there is no "multiple employment" of the type we found contrary to the disciplinary roles in Opinion 81-8.

The requesting attorney calls our attention to Opinion 79-29 which concluded that the Attorney General should utilize his authority in 3 V.S.A. sec. 1102(e) to retain private counsel in order to avoid a conflict of interest when called upon to defend members of the judiciary. In that opinion, we were concerned that the Attorney General's office had matters pending before such judges and it would be impracticable to obtain consent from parties and opposing counsel in all those pending cases.

The Human Rights Commission is arguably a state agency. As such, it could request representation from the Attorney General in civil and other actions in which it may become a party or has an interest See 3 V.S.A. sec. 157. In addition, Human Rights Commission employees, against whom civil actions could be brought for acts or omissions within the scope of their official duties, are ordinarily entitled to be defended by the Attorney General unless he finds he cannot adequately represent the interests of the employees. In such event, however, private counsel must be retained at state expense.<sup>1</sup> The theoretical possibility that the Human Rights Commission might require representation by either the Attorney General or retained private counsel at state expense does not create such a potential for conflict that the Attorney General is disqualified under DR5-105(A) from representing other state agencies in actions initiated against them by the Human Rights Commission under the limited authority granted to investigate and enforce the Fair Employment Practices Act

Nor would the fact that the Human Rights Commission is a state agency entitle the office of the Attorney General, by virtue of its obligation to represent state agencies, to have access to any of the confidences, secrets or other information obtained by the Commission's staff in the course of investigating or enforcing the interests of a victim who complains of employment discrimination against another state agency.

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<sup>1</sup> 3 V.S.A. sec. 1102(e).