State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers

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The state attorney general stands in a rare position in the legal community. Often she is required by statute to represent the state, including its officers and agencies, before the courts. In the majority of states, however, the attorney general is a constitutional office directly elected by the people, thus mandating that she also represent the public interest. The result is that state attorneys general actually have two clients: state officers and the people. But what happens if the interests of these clients conflict in the same case? In those situations, to whom does the attorney general owe her ultimate allegiance? Several courts have suggested that a traditional client-attorney relationship applies between the state officer-clients and the attorney general. Often the result of this type of holding is that the attorney general is unable to prosecute a case that she thinks is in the public interest. This Note argues that courts should not take this approach but should instead prioritize the public-client. State codes of professional responsibility are drafted with private lawyers in mind, resulting in a framework that does not adequately recognize the attorney general's dual client responsibilities. Therefore, courts should not apply state codes of responsibility to attorneys general, but rather look to the state constitution and statutes, as well as the attorney general's common-law powers.

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I. INTRODUCTION

Colorado was in the midst of a political war. In 2003, the newly Republican-controlled legislature, hoping to use their majority to affect the state's congressional delegation, passed redistricting legislation just one year after another redistricting plan had been put in place.[1] After Governor Bill Owens, a Republican, signed the bill into law, Ken Salazar, a Democrat and attorney general for the State of Colorado, petitioned the state supreme court to enjoin the secretary of state, Republican Donetta Davidson, from enforcing the new law.[2] Salazar's position: As the people's lawyer he had the authority to bring a suit to determine the constitutionality of the redistricting plan.[3] Davidson, however, disagreed.

In fact, Davidson could not believe what had happened. The attorney general had sued her in her official capacity over a law that she was entrusted to enforce. Neither she nor the governor had asked Salazar to challenge the act; the attorney general initiated the suit on his own.[4] Additionally, a group of citizens also sued the secretary of state challenging the redistricting plan on constitutional grounds similar to those raised by Salazar.[5] Davidson then initiated her own suit against Attorney General

1. Julia C. Martinez, *Remap Boosts GOP's Grip, New Lines Fortify Hold on House, Anger Dems*, DENVER POST, June 16, 2003, at A1. Originally in 2001 the Colorado legislature failed to agree on a redistricting plan, so the following year a Colorado state judge was required to set the new congressional boundaries. *Id.* Attorney General Salazar challenged the constitutionality of the subsequent legislatively designed congressional redistricting plan by arguing that Colorado law only allowed one redistricting after each national census. *See* Petition Pursuant to Colo. Const. Art. VI, § 3 at 17, People *ex rel*. Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003) (No. 03SA133).

2. Julia C. Martinez, *GOP Remap Challenged, Attorney General Asks Top Court to Block 11th-Hour Law*, DENVER POST, May 15, 2003, at B1. In November 2004, Ken Salazar was elected to the United States Senate. *See* Mark P. Couch & Karen E. Crummy, *Senate Seat Goes Blue as Salazar Ices Coors*, DENVER POST, Nov. 3, 2004, at A1.

3. *See* Answer Brief of Attorney General Ken Salazar (Concerning the Powers of the Attorney General) at 19–21, People *ex rel.* Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003) (No. 03SA147) (arguing that attorney general has power "to bring any action which he deems to be necessary for protection of public interest," including "power to initiate a suit questioning the constitutionality of a statute") (quoting State v. Finch, 280 P. 910, 912 (Kan. 1929)); 7 AM. JUR. 2D *Attorney General* § 7 (2003); *see also* Julia C. Martinez, *Remap Headed to Judges, State High Court Will Hear Petition from AG to Scuttle Redistrict Plan*, DENVER POST, May 16, 2003, at A1.

4. Petition for Writ of Injunction and Writ of Mandamus Pursuant to Colo. Const. Art. VI, § 3 at 8, *Salazar* (Colo. 2003) (No. 03SA147).

5. *Id.* at 6.

Salazar in the Colorado Supreme Court to stop his redistricting challenge.[6] Specifically, Davidson argued that the attorney general, as the secretary of state's statutorily appointed counsel, was obligated to defend her against any suit and was bound by the ethics rules of the client-attorney relationship.[7] Salazar, by challenging the redistricting plan, was suing his own client.

The situation in *People ex rel. Salazar v. Davidson*[8] is a continuing problem in state attorney general jurisprudence — to whom does the attorney general owe allegiance? Is the attorney general a lawyer for the state government and its officers, or is she the lawyer for the citizens as a whole? If these two duties are in conflict, which client prevails? A number of recent cases, including *Salazar*, illustrate that state officers and courts continue to wrestle with these questions. Indeed, these issues are likely to become even more important in the near future as a result of the federal government transferring many responsibilities and authority to the states.

Courts constantly struggle with the question of who the actual client is in a given situation for several reasons, but the underlying difficulty lies in the fact that a *person* must determine the wishes of *the people*. The people, as a collective, often do not officially express their voices except through elections or referenda, so their will must be interpreted. However, there are many people in state government who can legitimately assert that they speak for the people's interests, including the legislature, the governor, and the attorney general.

This Note addresses the following question: Does the attorney general violate ethics rules by bringing an action against state officers — officers who are often considered the attorney general's clients? In other words, does a traditional client-attorney relationship exist between the attorney general and the elected state officers? The state attorney general clearly is not a lawyer in the traditional sense of the word: she is an officer in the government and is expected to act with the best interests of the people in mind.[9] It is this dynamic — the struggle between the established

6. *Id.* at 3.
7. *Id.* at 15–16.
8. 79 P.3d 1221 (2003).
9. Of course, the same is true for district attorneys, assistant attorneys general, or any other government lawyer. To simplify matters, assistant attorneys general can be

professional ethics of a lawyer and the moral ethics expected of a statewide officer — which this Note examines.[10] Of course, a conflict of interest may arise in situations where the attorney general is expected to represent a state officer in opposition to her own interpretation of the public interest. More problematic are situations where the attorney general initially agrees to represent an officer or department, only to change her mind in the middle of the case when more facts come to light, or where a new person becomes attorney general, usually as the result of an election. In these instances, is it really fair to apply traditional client-attorney relationship rules to the possible detriment of the public interest?

Part II discusses the structure of state government and the divided executive branch, while Part III explains how the state attorney general represents both state officers and the public interest. Part IV examines how different state courts have tried to resolve the conflicts that can arise between the attorney general's representation of the government and of the public interest. Part V introduces the ABA Model Rules of Professional Conduct, the model for most states' ethical codes, and explains how these rules conflict with many of the attorney general's duties. In the last

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considered as acting under the command of the official attorney general. Additionally, many of the arguments in this Note could apply to district attorneys and other government lawyers, but often they are not constitutional officers in the same sense as the attorney general, and they do not act in the same capacity or with the same purpose.

10. This Note does not, however, address the client-attorney privilege at the federal government level. In the federal government, unlike most state governments, the U.S. Attorney General is appointed by the executive, and the U.S. Attorneys work directly under the Attorney General. For articles that address this issue, especially in the Independent Counsel context, see, e.g., Katy J. Harriger, *Damned If She Does and Damned If She Doesn't: The Attorney General and the Independent Counsel Statute*, 86 GEO. L.J. 2097 (1998); William K. Kelley, *The Constitutional Dilemma of Litigation Under the Independent Counsel System*, 83 MINN. L. REV. 1197 (1999); Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987); Michael Stokes Paulsen, *Who "Owns" the Government's Attorney-Client Privilege?*, 83 MINN. L. REV. 473 (1998). Also, this Note contains a broader focus on state attorneys general nationwide, as opposed to the attorney general of just one state. *See, e.g.*, Michael S. Gilmore, *Who Is the Public Attorney's Client?; How Do the Public Attorney's Rules for Conflict of Interest Differ from the Private Attorney's*, ADVOC., Feb. 2002, at 10 (briefly examining ethical role of Idaho attorney general); Bill Aleshire, Note, *The Texas Attorney General: Attorney or General?*, 20 REV. LITIG. 187 (2000) (discussing duties of Texas attorney general to its client, the state of Texas); Michael B. Holmes, Comment, *The Constitutional Powers of the Governor and Attorney General: Which Officer Properly Controls Litigation Strategy When the Constitutionality of a State Law Is Challenged?*, 53 LA. L. REV. 209 (1992) (examining Louisiana attorney general's role in controlling state litigation).

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part, this Note proposes that state attorneys general do not violate ethics rules by bringing actions against the state or state officers. Additionally, courts should not strictly apply ethics standards established by state bar associations because those rules were written for private lawyers, not government lawyers.

II. THE STRUCTURE OF STATE GOVERNMENT

A. THE DIVIDED EXECUTIVE BRANCH

Every American is familiar with the concept of separation of powers. Not only is it central to our system of government, but Americans, perhaps uniquely, regard it as an essential ingredient in a democratic society. After all, the Framers feared not only monarchies, but also unchecked populist legislatures.[11] Although the federal government was divided into three branches with the president as the exclusive chief of the executive branch, many state constitution framers took the opportunity to further divide the state executive branch. This structure is known as the "divided executive branch."[12]

Almost every state, to one degree or another, has an executive branch comprising several elected executive officers.[13] Aside from the governor, these officers generally include a secretary of state, a treasurer, and an auditor, as well as other officials that vary from state to state.[14] In forty-three states the attorney general is popularly elected.[15] Each elected office is provided for in the state

11. GORDON S. WOOD, THE AMERICAN REVOLUTION: A HISTORY 142–43 (2002) (explaining that by the mid-1780s, "[i]t began to seem that the once benign legislative power was no more trustworthy than the detested royal power had been").

12. Patrick C. McGinley, *Separation of Powers, State Constitutions & the Attorney General: Who Represents the State?*, 99 W. VA. L. REV. 721, 722 (1997).

13. *See id*. ("In forty-three states . . . the executive department operates under supervision of an elected Governor and elected executive department officers."). The states that do not have separately elected executive officers aside from the governor include Alaska, Hawaii, Maine, New Hampshire, New Jersey, Tennessee, and Wyoming. *See* STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 15 (Lynne M. Ross ed., 1990) [hereinafter STATE ATTORNEYS GENERAL].

14. McGinley, *supra* note 12, at 722. Of course, this is not true in all instances. For example, in New York, the comptroller and the attorney general are individually elected. N.Y. CONST. art. V, § 1. The lieutenant governor runs on a ticket with the governor, and they are both elected jointly. *Id.* art. IV, § 1.

15. Jason Lynch, Note, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2002 (2001); *see also* Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA.

constitution,[16] and each officer has certain duties as required by either the constitution or statutes.[17]

The framers of state constitutions, still wary of potential abuses of executive power, divided the executive branch so that no one person had too much control or authority.[18] As the Minnesota Supreme Court explained, "Rather than conferring all executive authority upon a governor, the drafters of our constitution divided the executive powers of state government among six elected officers. This was a conscious effort on the part of the drafters . . . ."[19] Still, while this type of system might constrain the traditional tyrant, it creates a whole new host of problems in a two-party system. Specifically, because there are several officers in the executive department that are elected directly by the people, there is a significant chance these officers will not all belong to the same political party.[20] A party split within the executive branch means different officers with different political views have legitimate claims to represent the people's voice. In addition, there may be intra-party conflict: the governor and attorney general, even when they belong to the same party, might be rivals or simply disagree on a legal policy issue. The point is that the citizens voted for *each* officer, giving *each* a mandate to carry

J. L. & PUB. POL'Y 1, 6 (1993). In five states (Alaska, Hawaii, New Hampshire, New Jersey, Wyoming), the governor appoints the attorney general, whereas in Maine the legislature picks the attorney general by secret ballot. Lynch, *supra*, at 2002. The Tennessee Supreme Court appoints its state attorney general. *Id.* This Note is primarily concerned with those forty-three states where the people directly elect the attorney general, although many of the arguments here could easily be applied to the other seven attorneys general, albeit in a modified form.

16. *See* State *ex rel*. Mattson v. Kiedrowski, 391 N.W.2d 777, 782 (Minn. 1986) (stating that state constitution framers made these offices constitutional because they did not intend "to afford the legislature the power to abolish these offices by statute").

17. *See, e.g*., McGinley, *supra* note 12, at 725 (giving examples of both West Virginian constitutional and statutory duties); *see also* MO. CONST. art. IV, § 12; MO. REV. STAT. §§ 27.010-27.100 (2001).

18. *See* Answer Brief of Attorney General Ken Salazar (Concerning the Powers of the Attorney General) at 11–12, People *ex rel*. Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003) (No. 03SA147); *see also* State *ex rel*. McGraw v. Burton, 569 S.E.2d 99, 110 (W. Va. 2002) ("This [executive] separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, namely, to preclude a commingling of these essentially different powers of government in the same hands." (quoting State *ex rel*. State Bldg. Comm'n v. Bailey, 150 S.E.2d 449 (W. Va. 1966))).

19. *Kiedrowski*, 391 N.W.2d at 782.

20. As of March 1, 2005, nineteen of the forty-three states that directly elect their attorneys general have a governor and an attorney general from different parties. *See* Project Vote Smart, *at* http://www.vote-smart.org (last visited Mar. 1, 2005).

out their collective will. Thus, the divided executive branch is ripe for conflict.

B. THE ATTORNEY GENERAL'S ROLE IN THE DIVIDED EXECUTIVE BRANCH

The office of attorney general, located within the executive branch, is usually constitutionally prescribed,[21] and in forty-three states is elected directly by the people.[22] In almost every state, the attorney general is the chief law officer.[23] Generally this means that the attorney general controls and manages all litigation on behalf of the state, defends the state in court, and offers legal advice to the other state officers, executive departments, and often the legislature.[24] These powers not only relate to actions defending the state but also extend to the ability to initiate litigation on behalf of the public interest.[25] Some states require the attorney general to work in conjunction with the governor,[26] but even these states agree that the attorney general is near-

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21. STATE ATTORNEYS GENERAL, *supra* note 13, at 15 ("The method of selection of Attorney General is specified by 43 states in their constitutions."); 7 AM. JUR. 2D *Attorney General* § 1 (2003); *see also* Deborah K. Kearney, *The Florida Cabinet in the Age of Aquarius*, 52 FLA. L. REV. 425, 427 (2000) (describing the Florida Attorney General as an independently elected member of Florida's executive cabinet); Aleshire, *supra* note 10, at 214 (describing the Texas Attorney general as an officer of the executive branch).

22. *See supra* note 15 and accompanying text.

23. *See, e.g.*, HAW. REV. STAT. § 28-1 (2002) ("The attorney general shall appear for the State personally or by deputy, in all the courts of record, in all cases criminal or civil in which the State may be a party, or be interested, and may in like manner appear in the district courts in such cases."); Hodge v. Commonwealth, 116 S.W.3d 463, 474 (Ky. 2003) ("[T]he Attorney General is the chief law officer and chief prosecutor of the Commonwealth . . . ."). *But see* Perdue v. Baker, 586 S.E.2d 606, 609, 614 (Ga. 2003) (explaining that while the attorney general is the chief legal officer of the state, neither she nor the governor has the exclusive power to decide the state's interest in litigation).

24. *See* State v. Heath, 806 S.W.2d 535, 537 (Tenn. Ct. App. 1990) (describing attorney general's powers including protecting the public interest, enforcing state laws in court, and participating "in litigation of a private character where it bears on the interest of the general public").

25. *See* Mem'l Hosp. Ass'n, Inc. v. Knutson, 722 P.2d 1093, 1097 (Kan. 1986) (noting that where there is a public interest, the attorney general has a right to intervene).

26. *See* State v. Finch 280 P. 910, 911 (Kan. 1929) ("And so, while primarily the Governor is charged with the execution of the law, next to him the Attorney General is the chief law officer of the state.").

supreme in her sphere of the executive branch and can bring suits that are in the state's interest.[27]

Every state has statutes that address the powers and duties of its attorney general,[28] but in some states the attorney general also retains common-law powers.[29] Most of the powers noted above are derived from the attorney general's traditional common-law powers, including the right to initiate and intervene in suits on behalf of the public interest. These states have determined that the attorney general's common-law powers exist in addition to constitutionally and statutorily granted powers so long as they do not conflict.[30] Today, most states follow this model and uphold the attorney general's common-law powers.[31]

However, a significant minority of states[32] has abandoned the common-law powers and asserts that the attorney general does not have any powers beyond those granted to her by the legislature and state constitution.[33] The arguments in favor of this abandonment are logical if one accepts the *expressio unius est exclusio alterius* canon of statutory interpretation. According to this argument, the legislature could have easily stated statutorily that the attorney general retains her common-law powers. In-

27. *See, e.g.*, CONN. GEN. STAT. § 3-125 (2003) ("The Attorney General shall have general supervision over all legal matters in which the state is an interested party, except those legal matters over which prosecuting officers have direction.").

28. *See, e.g.*, CAL. CONST. art. 5, § 13; N.Y. CONST. art. 5, § 1; ILL. COMP. STAT. 205/4 (2004); IOWA CODE § 13.2 (2004); MO. REV. STAT. §§ 27.030-27.060 (2001).

29. *See* Matheson, *supra* note 15, at 4 (stating that some state attorneys general retain common-law powers held over from England); *see also* State *ex rel*. Shevin v. Exxon Corp., 526 F.2d 266, 269 (5th Cir. 1976) (holding that Florida attorney general retains common-law powers).

30. *See Shevin*, 526 F.2d at 273–74 ("The fact that various statutes delegate specific portions of Florida's litigation power to state's attorneys in no way indicates an abrogation of the Attorney General's common law powers as to other types of litigation; those powers still obtain in the absence of express legislative provision to the contrary.").

31. 7 AM. JUR. 2D *Attorney General* § 7 (2004); *see also* State *ex rel*. Shevin v. Kerwin, 279 So. 2d 836, 837–38 (Fla. 1973); Parker v. State, 31 N.E. 1114, 1115 (Ind. 1892); Van Riper v. Jenkin, 45 A.2d 844, 846 (N.J. 1946).

32. The states that seem to have abandoned attorney general common-law powers include Arizona, Connecticut, Indiana, Iowa, New Mexico, New York, Oregon, Texas, Washington, and Wisconsin. 7 AM. JUR. 2D *Attorney General* § 7 (2003). Within the last several years, the West Virginia Supreme Court ruled the attorney general did not have common-law powers, but a more recent opinion suggests the court may be changing its mind once again. *See infra* note 35 and accompanying text.

33. *See, e.g.*, Blumenthal v. Barnes, 804 A.2d 152, 165 (Conn. 2002) (holding the attorney general does not have common law powers with respect to representing the public interest).

stead, the legislature chose to enumerate certain powers, leading to the conclusion that it must have decided to exclude every power not mentioned.[34] Over the last decade, with the rise of multistate litigation and more activist attorneys general, several states have moved to limit the attorney general by abrogating her common-law powers. Currently, though, that movement appears to have stalled, and some states are even starting to revert back toward the old common law.[35]

III. THE CLIENTS OF THE ATTORNEY GENERAL

A. THE PEOPLE AND THE PUBLIC INTEREST

As described above, the attorney general is the state's chief law officer and, as such, represents the people and the public interest. Sometimes this authority is conferred by statute, but it is also a long held common-law power. However, this does not mean the attorney general must only defend the public interest; she can also actively pursue any litigation the public interest requires. Therefore, both the people and the public interest can be considered the attorney general's "clients."

The attorney general may exercise all power and authority as the public interest may occasionally require.[36] In some jurisdictions this right has been held to be a common-law power while in others it is interpreted as a statutory duty.[37] Thus, a state attor-

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34. The *expressio unius* arguments are less persuasive when it is the state constitution that specifically outlines the attorney general's duties. This is because states retain plenary power, and thus state constitutions are often interpreted as limitations upon the government rather than grants of power. Under this viewpoint, anything not specifically mentioned in the state constitution must be retained. *See* Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 207 (2002) (explaining that state constitutions are generally regarded as limitations, unlike the federal constitution, thus resulting in a different interpretational approach). Still, many state constitutions do not describe the attorney general's specific duties in detail; they usually just set the method of election and term of office. *See* STATE ATTORNEYS GENERAL, *supra* note 13, at 40.

35. *See* State *ex rel*. McGraw v. Burton, 569 S.E.2d 99, 106–08 (W. Va. 2002) (explaining that attorney general has "inherent constitutional functions" which are not specifically enumerated but which the legislature cannot abrogate through legislation); *see also supra* note 32 and accompanying text.

36. *See* State *ex rel*. Shevin v. Exxon Corp., 526 F.2d 266, 271 (5th Cir. 1976); *infra* Part IV.A.1.

37. *See, e.g.*, MISS. CODE ANN. § 7-5-1 (2004); People *ex rel*. Castle v. Daniels, 132 N.E.2d 507, 509 (Ill. 1956).

ney general may represent a state officer or department provided the state has a real interest involved.[38] Also, under the common law, the attorney general has a right to intervene in all suits and proceedings that concern the general public.[39] With regard to these powers, the attorney general has the ability to decide what the public interest is. In her representation of the people, the attorney general has the power to initiate or intervene in almost any action as long as a real public interest is involved. Arguably, because the attorney general is elected directly by the people, this is the attorney general's core function.

B. OFFICERS AND EXECUTIVE DEPARTMENTS

The attorney general, though, does not just represent the people and the public interest. One of the other duties of the state's chief law officer is to represent and defend the state on behalf of its officers and executive departments.[40] In other words, the attorney general is the legal advisor to various departments, officers, and agencies within the state government.[41] This responsibility makes the attorney general the officers' lawyer, and she is often required to appear in court on behalf of an individual officer-client. This type of relationship can be characterized as similar to the one a private lawyer has with her client.

Therefore, a traditional client-attorney relationship exists between the attorney general and officers and executive departments. The rules mandating and governing this relationship are most often established in judicial/professional ethics rules,[42] but

38. *See* MINN. STAT. § 8.06 (2004); State *ex rel*. McKittrick v. Mo. Pub. Serv. Comm'n, 175 S.W.2d 857, 862 (Mo. 1943).

39. 7 AM. JUR. 2D *Attorney General* § 7 (2003).

40. *Id.* § 1; *see also* MINN. STAT. § 8.06; MISS. CODE ANN. § 7-5-1; TEX GOV'T CODE ANN. § 402.021 (Vernon 1998).

41. *See* People *ex rel*. Deukmejian v. Brown, 624 P.2d 1206, 1207 (Cal. 1981) (explaining attorney general gave legal advice to governor); *see also*, *e.g.*, ALASKA STAT. § 44-23-020 (Michie 2003) ("The attorney general is the legal advisor of the governor and other state officers.").

42. *See* Answer Brief of Attorney General Ken Salazar (Concerning the Powers of the Attorney General) at 30, People *ex rel*. Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003) (No. 03SA147); *see also* State *ex rel*. Condon v. Hodges, 562 S.E.2d 623, 627–28 (S.C. 2003). The reason ethic rules are also considered judicial rules is because often state supreme courts officially adopt these rules as part of their procedure. *See* Thomas J. Tallerico & Jeffery G. Raphelson, *Professional Liability of Attorneys*, 36 WAYNE L. REV. 815, 816–17 (1990) (explaining that state bar of Michigan approved modified version of ABA's Model

there are cases in which the client-attorney relationship has been judicially enforced.[43] This provides several interesting challenges because unlike traditional private attorneys, an attorney general has two sets of clients. If a traditional client-attorney privilege does exist, what happens when the clients' interests are in conflict? Can both the people and the officers be clients at the same time? The next Part examines the case law and how courts have tried to apply a client-attorney relationship within the context of the attorney general.

IV. CASE HISTORY: THE COURTS MODIFY THE TRADITIONAL CLIENT-ATTORNEY RELATIONSHIP FOR ATTORNEYS GENERAL

The case history discussing the client-attorney relationship between state officers and the attorney general is, admittedly, fairly limited. Several cases establish some basic foundations of this relationship, but mostly in contexts other than a suit by the attorney general against a state officer. This Part outlines these foundations and attempts to relate their holdings to the ability of the attorney general to initiate actions against state officers.

A. COMMON-LAW POWERS AND SUITS UNAUTHORIZED BY THE GOVERNOR

1. *The* Shevin *Case: The Right to Initiate Actions*

The principal case establishing the attorney general's right to represent the public interest is *State ex rel. Shevin v. Exxon Corp*.[44] In 1973, Florida's attorney general, Robert Shevin, filed an antitrust action against several major oil companies.[45] The defendants, lead by Exxon, argued Shevin did not have the right

Rules, and then submitted those rules to state supreme court, which invited feedback and made its own changes before promulgating the official Michigan Rules of Professional Conduct); Andrew D. Pugh, Comment, *The Antidiscrimination Amendment to Rule 8.4 of the Minnesota Rules of Professional Conduct: An Unnecessary and Unprecedented Expansion in Professional Regulation*, 19 WM. MITCHELL L. REV. 211, 211–12 (1993) (stating that in 1991, the Minnesota Supreme Court granted the state bar association's petition to amend Rule 8.4 of the Minnesota Rules of Professional Conduct).

43. *See, e.g.*, *Deukmejian*, 624 P.2d at 1207–08.
44. 526 F.2d 266 (5th Cir. 1976).
45. *Id.* at 267.

to initiate the lawsuit without explicit authorization from another officer or department within the executive branch.[46] The Fifth Circuit, reversing the district court's earlier finding, held that the attorney general had a right to initiate the suit under state law.[47]

The basis of the Fifth Circuit's decision was the common-law power of the attorney general. This holding was based in the historical precedent of the office originating under the crown. Relating this custom to the modern-day attorney general, the court wrote, "Florida has, since its pre-statehood period, enacted the common law in force where not in conflict with statute."[48] The court found that Florida's statutes were not comprehensive and acknowledged the Florida Supreme Court's recognition of the "continuing existence of the Attorney General's common law powers," concluding that the attorney general must still retain her common-law powers.[49]

As the court reasoned, the attorney general is "the attorney and legal guardian of the people,"[50] meaning she may initiate suits on behalf of the people.[51] The court emphasized, "The Attorney General has the power and it is his duty among the many devolving upon him by the common law to prosecute all actions necessary for the protection and defense of the property and revenue of the state."[52] The Fifth Circuit then took the opportunity to extend this reasoning by explaining that the attorney general's power to institute litigation on her own "is as broad as the 'protection and defense of the property and revenue of the state,' and, indeed, the *public interest* requires."[53]

Finally, the court addressed the question of whether, even if the attorney general has these common-law powers, she can initiate a suit without the authorization or direction of a state department or officer, such as the governor. Defendants cited two cases[54] in which the state supreme court held that certain agen-

46. *Id.*
47. *Id.* at 268.
48. *Id.* at 269.
49. *Id.* at 269–70.
50. *Id.* at 270 (citing State *ex rel*. Attorney Gen. v. Gleason, 12 Fla. 190 (Fla. 1868)).
51. *Id.* at 270–71.
52. *Id.* at 271 (citing State *ex rel*. Landis v. Kress, 155 So. 823, 827 (Fla. 1934)).
53. *Id.* (emphasis added).
54. The cases in question were Holland v. Watson, 14 So. 2d 200 (Fla. 1943), and Watson v. Caldwell, 27 So. 2d 524 (Fla. 1946).

cies were not required to allow the attorney general to represent them in legal matters and could instead hire their own special counsel.[55] The defendants argued that these precedents illustrated that the attorney general could not initiate suits on her own because an interpretation to the contrary would make the holdings of those cases meaningless. The Fifth Circuit distinguished the cases by explaining that they did not involve the attorney general's *litigation* powers. Furthermore, the court refused to address what would happen if a government body did object to the attorney general's unsolicited representation: "[I]t is difficult to imagine such objections," the court noted, because "[t]he individual government instrumentalities involved have something to gain from this suit."[56] Thus, the court left open the door for arguments about what happens when an individual government instrumentality objects to representation.

2. *The* Feeney *Case: A More Zealous Representation*

Feeney v. Commonwealth established that the Massachusetts Attorney General also retained common-law powers.[57] When Helen Feeney was refused certification for two civil service positions, despite receiving high scores on her tests, she filed a complaint asserting sex discrimination.[58] The Commonwealth of Massachusetts, the Division of Civil Service, the Civil Service Commission, and the Director of Civil Service were all named defendants and were represented by the attorney general. After the district court found Massachusetts's veterans' preference statute[59] unconstitutional, the Commission and the Director asked the attorney general not to appeal the decision on their behalf.[60] Despite these objections, the attorney general appealed the decision. The Supreme Judicial Court sided with the attor-

55. Shevin v. Exxon Corp., 526 F.2d 266, 272.
56. *Id.* at 273.
57. 366 N.E.2d 1262 (Mass. 1977).
58. *Id.* at 1263. Specifically, Feeney was upset with a "veterans' preference formula" which gave priority to veterans in the hiring procedure for public employment positions. Because she was a woman and thus not eligible for the draft, Feeney argued she was placed at an unfair disadvantage because of her sex.
59. MASS. GEN. LAWS ch. 31, § 23 (1978).
60. *Feeney*, 366 N.E.2d at 1264.

ney general, upholding his power to appeal a case without the consent of the state officials and departments.[61]

The court's holding in *Feeney* is consistent with both *Shevin* and the preamble of the ABA's *Model Rules of Professional Conduct*.[62] Like *Shevin*, the court found that the attorney general has a common-law duty to represent the public interest as well as the state and state officers.[63] Because of the public interest aspect, "the Attorney General must consider the ramifications of that action on the interests of the [state] and the public generally."[64] The attorney general is chief law officer, and to allow other executive officers, "who represent a specialized branch of the public interest," to manage the litigation "would effectively prevent the Attorney General from establishing and sustaining a uniform and consistent legal policy of the Commonwealth."[65] To rule otherwise would place other executive officers over the attorney general in specific litigation, rendering her status as chief law officer meaningless.

Finally, the court held that the traditional client-attorney relationship did not apply. The court explained, "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 . . . ."[66] The Supreme Judicial Court, in essence, wrestled with the question of whether the attorney general represents the public interest or the state officers. In the end, the court came out on the side of the public interest. Arguably, *Feeney* can be viewed as supporting the proposition that the public interest comes first, even when the attorney general is representing state officers. In fact, the public interest is the *reason* for representing these officers in the first place, and this is why only the attorney general, not executive officers, can control the litigation. The public interest is the *actual* client.

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61. *Id.* at 1267.
62. *See infra* Part V.F.
63. *Feeney*, 366 N.E.2d at 1266.
64. *Id.* (citing Sec'y of Admin. & Fin. v. Attorney Gen., 326 N.E.2d 334, 338 (Mass. 1975)).
65. *Id.*
66. *Id.* at 1267.

3. *The Attorney General Does Not Have to Appeal Adverse Rulings*

Two years before *Feeney*, the Supreme Judicial Court of Massachusetts questioned some of the attorney general's powers. In *Secretary of Administration & Finance v. Attorney General*, the Massachusetts Attorney General represented the Secretary in a civil case involving the sale of certain property to the Board of Trustees of State Colleges, but then subsequently decided not to appeal the court's adverse ruling.[67] The governor asked the attorney general to appeal the case, and the Secretary insisted that the attorney general follow the governor's request. When the attorney general still refused to prosecute the appeal, the secretary brought suit against the attorney general.[68] The secretary was represented by the governor's counsel, and even though a strict reading of the state statute[69] seemed to indicate only the attorney general could represent the secretary, the court held that in situations where the attorney general's powers were called into question, an executive officer or department could be represented by someone else.[70] This, however, was a very narrow exception and the court emphasized that, over the objections of the secretary, "something other than a traditional attorney-client relationship" exists between the attorney general and executive officers and departments.[71] In a situation where the governor or other state officer is simply in disagreement with the attorney general regarding an issue, such as whether to appeal a case, the Supreme Judicial Court made clear that it was inappropriate for the officers to be represented by outside legal counsel.[72]

The dissent in *Secretary of Administration & Finance* disagreed with this reasoning. Justice Kaplan argued that if an officer did disagree with the attorney general's decision to appeal or not to appeal, she should be able to take her case to the governor. "At that point the chief executive," the judge wrote, "if he sup-

67. 326 N.E.2d 334, 335 (Mass. 1975).
68. *Id.* at 336.
69. MASS. GEN. LAWS ch. 12, § 3 (1974).
70. *Sec'y of Admin. & Fin.*, 326 N.E.2d at 336.
71. *Id.*
72. *Id.* ("We emphasize, however, that this narrow exception applies only where the powers of the Attorney General's office themselves are in question, and not in the ordinary case of disagreement between an agency and the Attorney General.").

ports the official, ought to be able after due discussion to give directions to the chief law officer."[73] Justice Kaplan's dissent, however, relies heavily on the assumption that cases of disagreement will be rare, a position that is somewhat naïve considering the structure of the divided executive branch and the mixture of officers from different parties. He acknowledges that his approach, if it were the law, would virtually eliminate the attorney general as the chief law officer. Explaining his prioritization of officers, Justice Kaplan wrote, "I would accord so much primacy to the Governor. The opinion of the court intends to give a measure of primacy to the Attorney General, but leaves unclear just what it is."[74] Kaplan's solution to a disagreement between the governor and the attorney general, where the attorney general does not want to go against her conscience, is: "When directed in the exceptional situation to argue a cause truly repugnant to him, [the attorney general] steps aside and gives way to special counsel."[75]

B. THE REJECTION OF *SHEVIN*: CALIFORNIA APPLIES PRIVATE-LIKE CLIENT-ATTORNEY RELATIONSHIP STANDARDS

Perhaps the most important case to limit the discretion of the attorney general is *People ex rel. Deukmejian v. Brown*.[76] The case arose when the legislature passed the State Employer-Employee Relations Act ("SEERA"),[77] and while the Governor was considering the bill, the Attorney General wrote the Governor urging him to sign it.[78] After the Governor signed the bill into law, several organizations sued claiming the SEERA was unconstitutional.[79] The Attorney General then met with the State Personnel Board, the executive agency served with the summons, and "outlined the legal posture of the board and described four legal options available to it."[80] One week later, the Attorney General changed his position and initiated a suit against the Gover-

73. *Id.* at 340 (Kaplan, J., dissenting).
74. *Id.* at 341 (Kaplan, J., dissenting).
75. *Id.* (Kaplan, J., dissenting).
76. 624 P.2d 1206 (Cal. 1981).
77. *Id*. at 1207 (citing CAL. GOV'T CODE §§ 3512–3524 (West 1977)).
78. *Id.*
79. *Id.*
80. *Id.*

nor and other state agencies, asking for relief similar to that requested by the other organizations, but not representing them.[81]

The Supreme Court of California began its opinion with a discussion of ethics rules and the client-attorney relationship.[82] Oddly enough, aside from a lone Arkansas case, all the other cases cited by the court in this section were about private lawyers and the client-attorney relationship and did not address the unique situation of attorneys general. The state supreme court seemed to assume that a traditional client-attorney relationship existed between the state agencies and the attorney general. In fact, after describing the initial meeting between the agencies and the Attorney General, the court remarked, "This was a classic attorney-client scenario."[83] And although the court wrote that it "acknowledge[s] 'the Attorney General's dual role as representative of a state agency and guardian of the public interest,'" it insisted on applying a traditional private client-attorney relationship to the attorney general.[84]

The court noted, "We find nothing in that circumstance, however, to justify relaxation of the prevailing rules governing an attorney's right to assume a position adverse to his clients or former clients, particularly in litigation that arose during the period of the attorney-client relationship."[85] There are two possible readings of this statement. First, the *Deukmejian* holding might be limited to situations where there is a previous client-attorney relationship. This presupposes not only a pre-existing client-attorney relationship between the attorney general and state officer, but also the prerequisites to creating such a relationship. This is the best possible reading of *Deukmejian* because it narrowly construes the holding to distinguish it from many future cases. Such prerequisites for a client-attorney relationship might include being asked by the officer or agency for representation or advice. The *Deukmejian* court might have liked to broaden these prerequisites to include holding a meeting with agencies and offi-

81. *Id.*
82. *Id.* at 1207–09.
83. *Id.* at 1207.
84. *Id.* at 1209.
85. *Id.* In explaining why a private client-attorney relationship should be applied to the attorney general, the strange logic of the California Supreme Court appears to be that it is applied because it exists. In other words, it is not so much an explanation as an insistence by the court.

cials, but perhaps the court would have been satisfied simply with knowing that legal advice was given.

The second, more troubling interpretation of this statement is that the California Supreme Court realized its holding was limited in this case, but it was stating in dicta that the court could also foresee situations where the attorney general could *never* assume a position adverse to state officers. Under the second interpretation, the officer or agency is *always* the attorney general's client. There is some indication the court might have intended this meaning because it included the phrase "or former clients." According to this reasoning, the attorney general would be prohibited from taking an adverse position, not only in the present litigation, but also in all future litigation. This has the effect of freezing the attorney general's decisions in time.

Like the Massachusetts Supreme Judicial Court in *Secretary of Administration & Finance*, the California Supreme Court argued that these limitations did not mean the attorney general was powerless or had to represent a client against her wishes. The court stated that the attorney general cannot be compelled to represent state officers if she believes them to be acting contrary to the law, and the attorney general may even withdraw from the statutorily imposed duty to act as their counsel.[86] Still, the attorney general cannot be proactive and take a position adverse to those same clients.[87] In effect, the *Deukmejian* court rejected the *Shevin* approach and stated that the attorney general does not have common-law powers.

The state supreme court relied heavily on the state constitution, which states that "[t]he Governor shall see that the law is faithfully executed."[88] The court then compared that section with another section, which states that "[s]ubject to the powers and duties of the Governor, the Attorney General shall be chief law officer of the State."[89] The *Deukmejian* court claimed that these provisions clearly meant the governor was in charge of determining the validity of the attorney general's decisions, and the attorney general was her subordinate in such matters. This reading, however, is almost the exact opposite of a plain reading of the

86. *Id.*
87. *Id.*
88. *See id*. (citing CAL. CONST. art. V, § 1).
89. *See id.* (citing CAL. CONST. art. V, § 13).

constitution. A plain reading implies that the governor simply *ensures* the laws are enforced, and the attorney general's own powers are subject to the governor's in that respect. The responsibility to ensure the laws are enforced does not imply the ability to question the constitutionality of those laws. Therefore, though the attorney general defers to the governor as to the execution of the laws, the attorney general retains the authority to determine "wherein lies the public interest" on issues such as the constitutionality of the laws. This reading of the California constitution protects the attorney general's common-law powers rather than stripping them the way the *Deukmejian* court did.

C. RECENT CASE HISTORY

1. *South Carolina Upholds Attorney General's Power to Sue Governor*

Deukmejian, and all its limitations on state attorneys general and presumptions in favor of the governor's executive powers, has not been widely accepted. And although the California Supreme Court has not overruled the decision, it has not revisited the issue. More recently, the South Carolina Supreme Court examined many of the same issues in *State ex rel. Condon v. Hodges*.[90] In 2001, the South Carolina General Assembly passed an appropriations act that provided for baseline reductions to the recurring budgets of state colleges and universities.[91] Part of the appropriations bill required the transfer of $38.5 million from the Extended Care Maintenance Fund ("ECMF") to the state's colleges and universities.[92] The governor vetoed the appropriations act regarding the specific base-line reductions, which resulted in new expenditures.[93] In order to fix the imbalance, the governor indicated in his veto message that he had convinced several colleges and universities to return some of the funds appropriated from

90. 562 S.E.2d 623 (S.C. 2002).
91. *Id.* at 625.
92. *Id.* at 625–26.
93. *Id.*

the ECMF.[94] The attorney general then sued the governor for violating the separation of powers.[95]

In *Condon*, one of the rare cases in which an attorney general took action against the governor, the governor asserted that the attorney general did not have the authority to bring suit against him because of the client-attorney relationship. But the South Carolina Supreme Court held that "the Attorney General can bring an action against the Governor when it is necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights."[96] The constitutional provisions involved in *Condon* were very similar to those in *Deukmejian*.[97] Viewed in light of the alternative reading of *Deukmejian*,[98] this case can be seen as stating that although the attorney general must still defer to the governor when the governor is making sure the laws are faithfully enforced, she can step in when the governor is not ensuring the faithful enforcement of the law and sue the governor to uphold her duty. This would be consistent with the theory that the attorney general has the power to protect the rights of the public.

The South Carolina Supreme Court sided with the public interest over the constitutionally imposed client-attorney relationship.[99] The court interpreted article IV, section 15 of the state constitution as "being concerned with the Attorney General, through his assistance and representation of the Governor, bringing actions on the Governor's behalf, against the other branches of government."[100] Instead of imposing a client-attorney relationship, the court noted that "[t]here is no provision in the South Carolina Code or Constitution that explicitly prevents the Attorney General from bringing a civil action against the Governor."[101] Thus, the attorney general has the authority to bring suit against

94. *Id.*
95. *Id.*
96. *Id.* at 628.
97. *See id*. at 626 ("The Governor shall take care that the laws be faithfully executed. To this end, the Attorney General shall assist and represent the Governor. . . .") (citing S.C. CONST. art IV, § 15).
98. *See supra* Part IV.B.
99. *Condon*, 562 S.E.2d at 626 ("[T]he Attorney General shall assist and represent the Governor . . . .") (citing S.C. CONST. art. IV, § 15).
100. *Id.* at 627 (emphasis deleted).
101. *Id.*

the governor when it is to protect the public interest, such as "for the enforcement of the laws of the State, the preservation of order, and the protection of public rights."[102]

2. *Georgia's Exercise in Confusion*

Two years ago, Georgia faced a situation similar to the one Massachusetts faced in *Feeney*. In *Perdue v. Baker*, Georgia's governor, Sonny Perdue, sued to stop Attorney General Thurbert Baker from appealing a case to the United States Supreme Court.[103] After the 2000 census, the Georgia legislature reapportioned the state senate districts. In order to enforce the law, though, the state had to file a civil action in federal district court to obtain preclearance of the redistricting plan under the Voting Rights Act.[104] The federal district court held that Georgia failed to meet its burden of proving that the "redistricting plan did not have a retrogressive effect on the voting strength of African-American voters."[105] In response, the state legislature passed a new redistricting plan that achieved preclearance, but this new plan stated it would take effect only if the original redistricting plan could not be lawfully implemented under the Voting Rights Act.[106] Attorney General Baker appealed the ruling on the initial plan to the Supreme Court in order to obtain a final determination, and the Court agreed to review the case.[107]

Just over a week later, newly installed Governor Perdue requested that the attorney general dismiss his appeal.[108] Perdue insisted that the state constitution "vest[ed] his office with the chief executive powers to dismiss an appeal pending in the U.S. Supreme Court when the State of Georgia is the sole-named appellant."[109] Baker disagreed, claiming that the state constitution vested his office with "exclusive authority in all legal matters related to the executive branch in state government."[110] Because of

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102. *Id.* at 628.
103. 586 S.E.2d 606, 607 (Ga. 2003).
104. *Id.* (explaining holding of federal district court in underlying case).
105. *Id.*
106. *Id.* at 607–08.
107. *Id.* at 608.
108. *Id.*
109. *Id.* (reciting governor's position).
110. *Id.* (restating attorney general's arguments).

the attorney general's refusal to dismiss, the governor filed an action in the Georgia Supreme Court to force the attorney general to dismiss the appeal.

In its rather confusing opinion, the Georgia Supreme Court reaffirmed that the attorney general was the chief legal officer of the state.[111] But the court went on to state that "both the Governor and Attorney General have statutory authority to direct litigation on behalf of the State of Georgia."[112] Although the attorney general has the "independent authority to represent the State in any civil action without the Governor's request,"[113] the governor is the chief executive officer and is responsible for seeing that the laws are faithfully executed.[114] The result is that neither officer has the exclusive authority to control legal policy and actions involving the state.[115] The court wrote, "Instead, these provisions suggest that the Governor and Attorney General have concurrent powers over litigation in which the State is a party."[116]

Although the state supreme court found that both the governor and the attorney general could direct litigation involving the state as a party, it held that the governor could not stop the attorney general from appealing the state's redistricting case to the United States Supreme Court. In part this decision was based on the congruent duties of both officers, but the court also dismissed the governor's argument that the Georgia Rules of Professional

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111. According to the court,

> The constitution states that the Attorney General 'shall act as the legal advisor of the executive department, shall represent the state in the Supreme Court in all capital felonies and in all civil and criminal cases in any court when required by the Governor, and shall perform such other duties as shall be required by law.'

Id. at 609 (quoting GA. CONST. art. V, § 3, para. IV).

112. *Id.* (citing GA. CODE ANN. §§ 45-15-3(4), 45-15-35 (2003)).

113. *Id.* ("It is the duty of the Attorney General . . . [t]o represent the state in all civil actions tried in any court.") (citing GA. CODE ANN. § 45-15-3(6)).

114. *Id.* (citing GA. CONST. art. V., § II, para. II).

115. *Id.* ("Construed together, these constitutional provisions and statutes do not vest either officer with the exclusive power to control legal proceedings involving the State of Georgia.").

116. *Id.* The court then stated,

> Both executive officers are empowered to make certain that state laws are faithfully enforced; both may decide to initiate legal proceedings to protect the State's interests; both may ensure that the State's interests are defended in legal actions; and both may institute investigations of wrongdoing by state agencies and officials.

Id.

Conduct prevented the attorney general from taking a position opposite of the governor's.[117] If the rules were construed to limit the attorney general in this way, the court reasoned, it "would eviscerate the Attorney General's separate constitutional role."[118] Because Attorney General Baker was acting within his constitutional and statutory duties, the court found the governor could not force the attorney general to dismiss the appeal.[119]

3. *Colorado Establishes That Attorney General Can Sue the State*

People ex rel. Salazar v. Davidson[120] brought together many of the issues raised in the above cases. Both the secretary of state and the governor asserted that the attorney general violated the rules of professional conduct concerning conflicts of interest, the division of decisionmaking authority between the attorney and client, and client loyalty.[121] The attorney general argued that he did not violate the client-attorney relationship and took a position similar to the *Condon* court's — as attorney general he was representing the people of Colorado "in a highly important case."[122] Attorney General Salazar emphasized that the attorney general's "core responsibility is to represent the interests of the people of Colorado."[123] In this way, Salazar argued for prioritizing the public interest over the attorney general's other client — in this case the secretary of state. The public interest is at the "core," which means that it is the attorney general's first duty. It also implies the attorney general's other duties flow from this "core responsibility."[124] The traditional client-attorney relationship cannot interfere with the public interest, or else the "core responsibility"

117. The court stated,

> We also reject the dissent's narrow characterization of the Attorney General's role as merely that of legal counsel to the Governor. To imply that the Georgia Rules of Professional Conduct control the Attorney General's relationship to the Governor ignores the important and independent role assigned to the Attorney General under our constitution.

Id. at 610

118. *Id.*

119. *Id.* at 616.

120. 79 P.3d 1221 (Colo. 2003).

121. *See* Answer Brief of Attorney General Ken Salazar (Concerning the Powers of the Attorney General) at 30, *Salazar* (No. 03SA147).

122. *Id.*

123. *Id.* at 32.

124. *Id*. at 33.

would shift from protecting the public interest to protecting the state officers and agencies. In his brief, Salazar reminded the court that in government, the attorney general client-attorney relationship "does not match the contours of the private attorney-client relationship."[125]

On December 1, 2003, the Colorado Supreme Court handed down its decision in *Salazar*.[126] The court held that the attorney general had the right to bring an action before the state supreme court "in matters of great public importance."[127] The attorney general, when bringing these types of cases, was the appropriate person because "it is the function of the Attorney General . . . to protect the rights of the public."[128] Additionally, the court recognized that the state constitution allowed the court to determine original jurisdiction, and the separation of powers prevented the legislature from restricting this power.[129] Furthermore, the decision reinforced that Colorado's attorney general retained her common-law powers unless specifically repealed by statute.[130] Finally, the court ruled that the attorney general did not violate the Colorado Rules of Professional Conduct[131] by suing the state and naming the secretary of state as the defendant.[132] The court noted that the Rules "explicitly recognize that government lawyers may 'have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so.'"[133] Because the attorney general's client is the "government as a whole," she must consider the "concerns of the state" even though individual officers or agencies might not agree.[134] In other words, the attorney general must consider the concerns of the people. In this case, the attorney general was concerned with the

125. *Id.* at 31.

126. 79 P.3d at 1221.

127. *Id.* at 1229. Although there was no case directly on point, the court analogized the current case to People v. Tool, 86 P. 224 (Colo. 1905), which recognized the power of the attorney general to protect the integrity of the election process. *Salazar*, 79 P.3d at 1229.

128. *Salazar*, 79 P.3d at 1229 (quoting *Tool*, 86 P. at 236).

129. *Id.* at 1230 ("Hence, it is irrelevant that no statute authorizes the Attorney General to file his petition.").

130. *Id.*

131. COLO. RULES OF PROF'L CONDUCT, COLO. R. CIV. P. app. to chs. 18–20 (2004).

132. *Salazar*, 79 P.3d at 1230 ("We find no ethical violation. The Secretary of State is named as a party in her official capacity because she administers the election laws.").

133. *Id.* at 1231 (citing COLO. RULES OF PROF'L CONDUCT Scope).

134. *Id.*

constitutionality of the state's congressional redistricting plan, and because he had to advise the secretary of state on the implementation of election laws, the Colorado Supreme Court reasoned that it only made sense for the attorney general to challenge the law.[135] With the standing issue resolved, the court held the legislature's congressional redistricting plan violated the state constitution.[136]

D. A CURRENT CASE: MEDICARE AND MISSISSIPPI

In September and October of 2004, another fight between a governor and a state attorney general flamed up — this time in Mississippi. Governor Haley Barbour, in an effort to cut the state budget, decided that the state would no longer provide Medicaid to 48,000 people who also received federal Medicare coverage.[137] In response, several groups, including the Mississippi Center for Justice, AARP Foundation Litigation, the National Senior Citizens Law Center, and the National Health Law Program filed suit to enjoin the state Medicaid cuts.[138] Attorney General Jim Hood intervened on behalf of the plaintiffs, causing Governor Barbour to become incensed. "I've never heard of a case of a lawyer representing one party," the governor said, "then two days before the case goes to court, he switches and represents the other party."[139] Attorney General Hood countered that although his assistants had given advice to the Division of Medicare, the top Medicaid officials ignored his office's advice.[140] He then said that the govenor's office and the Medicaid program could hire outside counsel.[141] On October 1, U.S. District Judge Henry Win-

135. *Id.*

136. *Id.* at 1243 ("Consequently, the General Assembly's 2003 redistricting plan is not permitted by Article V, Section 44, of the Colorado Constitution because it is the second redistricting plan after the 2000 census. Hence, Senate Bill 03-352 is unconstitutional and void.").

137. *See* Emily Wagster Pettus, *Medicaid Bickering Echoes Past*, COM. APPEAL (Memphis, Tenn.), Oct. 3, 2004, at DS1 [hereinafter Pettus, *Bickering*].

138. Emily Wagster Pettus, *Hood Joins Fight to Delay Medicaid Cuts; Barbour Staff: AG Is Flip-Flopping Plan*, SUN HERALD (Biloxi, Miss.), Sept. 30, 2004, at 1 [hereinafter Pettus, *Hood Joins Fight*].

139. Geoff Pender, *Barbour Promotes Plans for Mississippi Fiscal Fitness; Governor Brings Message to Coast*, SUN HERALD (Biloxi, Miss.), Oct. 2, 2004, at 4.

140. *See* Pettus, *Bickering*, *supra* note 137.

141. Pettus, *Hood Joins Fight*, *supra* note 138.

gate ruled in favor of the attorney general and ordered the Medicaid coverage restored until January 31, 2005.[142]

E. SUMMARY

Applying a traditional client-attorney relationship is difficult because government lawyers, unlike private lawyers, potentially have multiple duties to multiple clients at the same time, in the same case. This situation mandates flexibility in any ethical standard that is applied to attorneys general. It is not entirely feasible for the attorney general and state officers always to be engaged in a client-attorney relationship because it would limit the attorney general's ability to represent the people effectively. Some courts have resolved this dilemma by holding that the attorney general represents officers when statutorily mandated and when the officers actually request advice or representation. The *Deukmejian* court took this approach. However, the California Supreme Court left the door open to the idea there might be some client-attorney relationship obligations even though there has been no request or advice given. Secretary of State Davidson presented this argument in *Salazar*. Davidson's argument, however, cannot be sustained because it, too, will impair an attorney general's ability to represent the people. Both of these arguments prioritize the representation needs of the executive officers and agencies over the representation needs of the people. There must be a balance between the attorney general's duties to his two clients.

V. THE ATTORNEY GENERAL, THE CLIENT-ATTORNEY RELATIONSHIP, AND THE ABA'S MODEL RULES OF PROFESSIONAL CONDUCT

Whether it has been established through professional conduct rules or case law, almost every state imposes some version of the client-attorney relationship between the attorney general and

142. *See* Geoff Pender, *Mississippi Medicaid Recipients Get Another Extension on Health Coverage*, SUN HERALD (Biloxi, Miss.), Oct. 15, 2004; Pettus, *Bickering*, *supra* note 137. This was a ruling in favor of the attorney general because the judge did not dismiss the action due to lack of standing, which implies that the court did not recognize a breach of the client-attorney relationship.

other executive officers and departments.[143] Therefore, it is important to evaluate this relationship in the context of the ABA Model Rules of Professional Conduct, which outline the traditional client-attorney relationship. Admittedly, the Model Rules are not, in fact, the rules anywhere. Instead, each state adopts its own ethics rules, but every state, with the exception of California, has modeled its own rules on one of the two ABA models.[144] Thus, this Note will use the ABA Model Rules. These ethics rules establish how a traditional private attorney should interact with her client. State attorneys general, however, are not private attorneys and have different obligations. Comparing traditional rules of professional conduct with the realities of the attorney general's office illustrates the problem with the application of this client-attorney relationship standard.

A. RULE 1.2

Rule 1.2(a) of the Model Rules of Professional Conduct states, "[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . . . A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation."[145] This rule sets out the idea that the client is in control of the objectives of the litigation, and it is the lawyer's duty to work towards achieving the client's lawful objectives. This includes abiding by "a client's decision whether to settle a matter."[146] Generally, however, the means by which these objectives are achieved are left up to the lawyer in consultation with her client.[147] In explaining the purpose of this rule, the Ohio Su-

143. *See supra* Part III.

144. *See* Lawrence K. Hellman, *When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 GEO. J. LEGAL ETHICS 317, 323 n.18 (1997) ("Although every state except California thus has in place a set of rules based on one of the two ABA "model" regimes [the Model Rules and its predecessor, the Model Code], most states have adopted the ABA models with alterations . . . ."); Jennifer Daehler, Note, *Professional Versus Moral Responsibility in the Developing World*, 9 GEO. J. LEGAL ETHICS 229, 231 (1995) ("In fact, the ethical rules governing the practice of law are regulated by each state. However, the Model Rules, or their very near equivalents have been enacted by most state bar associations."). In this Note, I have chosen to use the Model Rules primarily because they represent the ABA's current view of lawyers' ethical obligations.

145. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002).

146. *Id.*

147. *Id.* R. 1.2 cmt. 1 (2002); *see, e.g.*, Red Dog v. State, 625 A.2d 245, 247 (Del. 1993).

preme Court wrote, "Unlike a salesperson, the good lawyer's counsel is not directed to the sale of a product but to the best interests of the client. A lawyer's counseling is more than informing 'his client about the legal consequences of pursuing a particular objective that the client has already identified and chosen.'"[148] The purpose of this rule is to ensure a lawyer is a counselor and not just a service provider.

At first it might seem easy to apply this rule to attorneys general. It seems only reasonable to require the attorney general to act as counsel rather than running roughshod over her officer-clients. But before this rule can be applied, the threshold question of who is the "client" must be answered. As discussed in Part III, the state attorney general has two clients, and sometimes the clients' interests conflict with each other's. Most jurisdictions have applied the traditional client-attorney relationship to the attorney general and state executive officers and ignored the client status of the people and public interest.[149] Assuming, *arguendo*, the true client is the state executive officer, the next question is *when* the officer is a client.

People ex rel. Deukmejian v. Brown[150] implies the executive officer must ask for the attorney general's services before the attorney general is obligated to act as counsel and maintain a traditional client-attorney relationship.[151] In that case, the governor had asked for the attorney general's advice and so the court found no problem assuming the governor was the attorney general's client.[152] *State ex rel. Caryl v. MacQueen*,[153] a West Virginia case that has been superseded in part but not directly overruled,[154] explained that the attorney general was obligated to give legal advice, prosecute and defend suits, and appear in court on behalf of the state. Both cases recognize that the attorney general owes a duty to these officers and departments, and further recognize that this client-attorney relationship is activated *when* the officer or department asks for legal advice.

148. Akron Bar Ass'n v. Miller, 684 N.E.2d 288, 291 (Ohio 1997) (quoting ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 128–29 (1993)).
149. The ramifications of this will be discussed *infra* Part VI.A.
150. 624 P.2d 1206 (Cal. 1981).
151. *Id.* at 1207–09.
152. *Id.* at 1207–08.
153. 385 S.E.2d 646 (W. Va. 1989); *see also supra* note 35 and accompanying text.
154. *See supra* note 35 and accompanying text.

The approach taken in *Deukmejian* and *Caryl* is not effective in the majority of states that still recognize the attorney general's common-law powers. *Florida ex rel. Shevin v. Exxon Corp.* asserts that, as part of her common-law powers, the attorney general has the right to initiate lawsuits on her own and does not have to have the permission of the officer or agency to do so.[155] Surely any court that claims the client-attorney relationship attaches to the attorney general and state officers would assert the relationship still exists in *Shevin*-like situations. This conclusion could not be based on the "ask theory," however, because in *Shevin*-like situations the attorney general initiates the action on her own.

Simply applying Rule 1.2(a) to the attorney general does not clarify the client-attorney relationship in this context because the terms cannot be easily defined.[156] In a situation where there is more than one possible client, and there is a required duty to both, the rule is extremely difficult to interpret. What does "client" mean? Also, there are often provisions under state law that hold that the attorney general is in control of the litigation, even if the state officer is a client, and need not follow the client's directions as much as Rule 1.2(a) would direct in the private sphere.[157] It is difficult to apply this rule in the attorney general context.

B. RULE 1.6

Another traditional rule of the client-attorney relationship that is applied to attorneys general states, "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . ."[158] This was a central point in both *Deukmejian* and in *Secretary of Administration*

155. 526 F.2d 266, 270 (5th Cir. 1976).

156. The debate over the meaninglessness of definitions and their inapplicability to the law is a favorite among legal philosophy professors. For one of the most famous discussions of this debate, see H.L.A. HART, THE CONCEPT OF LAW 121–32 (1961). For a more current discussion, see Jeremy Waldron, *Does Law Promise Justice?*, 17 GA. ST. U. L. REV. 759, 766–67 (2001).

157. *See* Sec'y of Admin. & Fin. v. Attorney Gen., 326 N.E.2d 334, 336–37 (Mass. 1975) ("The Secretary contends that . . . it is up to him, as client, and not for the Attorney General, as attorney, to decide whether to prosecute an appeal. We cannot accept this contention.") (citations omitted).

158. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2002).

& Finance. In *Deukmejian*, the court felt it was improper for the attorney general, after discussing the case with the governor and offering him legal advice, to then take the opposing side.[159] The reason is presumably that the attorney general had access to confidential client-attorney documents and information that would be unfair to then use against the governor. In another example, the West Virginia attorney general was found to have violated the client-attorney relationship with the state tax commissioner when he released confidential tax information.[160]

This rule is not hard-and-fast, though, in the attorney general sphere. Several cases have explained that not all of the attorney general's documents are protected by the client-attorney relationship. For example, in *State v. Hogan*, the Indiana Court of Appeals wrote, "A client state agency may not defeat the production of evidence by merely forwarding a pre-existing document to the Attorney General in anticipation of litigation."[161] Furthermore, in a New York case, the documents at issue were not exempt from disclosure under the Freedom of Information Act because they only contained the state agency's final policy to be applied to all litigation in general — the documents were not work product for a particular case.[162] These cases illustrate that the attorney general is subject to the public disclosure of documents that a private attorney might otherwise not be. Because the attorney general has the power to litigate on behalf of the state, and even to prosecute state officers and departments, courts have struggled with this issue, trying to balance the protection of the attorney general's officer-client with effective representation the public-client.[163]

Rule 1.6 seems to prevent the attorney general from "playing" a state officer simply to gain information and access to documents that could not be obtained through traditional legal means. But some courts have realized it is not easy to apply this rule

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159. People *ex rel*. Deukmejian v. Brown, 624 P.2d 1206, 1207–08 (Cal. 1981).

160. State *ex rel*. Caryl v. MacQueen, 385 S.E.2d 646, 648 (W. Va. 1989). The confidential tax information in question was a tax compromise between the commissioner and a company that owed back taxes. *See id.* at 646–47.

161. 588 N.E.2d 560, 563 (Ind. Ct. App. 1992).

162. Charles v. Abrams, 199 A.D.2d 652, 653 (N.Y. App. Div. 1993).

163. *See* cases cited *supra* Part IV. *See generally* Gilmore, *supra* note 10; Aleshire, *supra* note 10; Holmes, *supra* note 10.

strictly.[164] Given that the attorney general is charged by state law to represent officials and departments, an official or department might take advantage of this mandate to protect incriminating evidence. Those courts that have not strictly applied Rule 1.6 understand that there should be some flexibility in order to protect the attorney general's role as chief law officer from abuse by the mandated clients.[165]

C. RULE 1.7

According to Rule 1.7(a), "[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest."[166] This Rule plainly states that representing two clients simultaneously is unethical when the attorney has a conflict of interest. The comments to Rule 1.7(a) note, "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client."[167] Even laypeople recognize this Rule's prohibition against conflicted representation as one of the foundations of the client-attorney relationship. Representing two clients in the same matter at the same time is riddled with potential difficulties. Yet, surprisingly, almost every state allows its attorney general to do just that — represent two officers at the same time on the same case.

State attorneys general can represent two agencies or officers at the same time without violating this ethical rule.[168] In *People ex rel. Sklodowski v. State*, the beneficiaries of a state retirement system sued the system, claiming the legislature and state officials were attempting to transfer retirement funds to the state's

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164. *See* People *ex rel*. Salazar v. Davidson, 79 P.3d 1221, 1231 (Colo. 2003) (explaining that attorney general's client is "generally the government as a whole," even though the attorney general may represent an individual officer in specific circumstances); Perdue v. Baker, 586 S.E.2d 606, 609–10 (Ga. 2003) (explaining that attorney general and governor have concurrent powers to defend state's interests in legal actions); State *ex rel*. Condon v. Hodges, 562 S.E.2d 623, 627 (S.C. 2002) (holding attorney general is not prohibited from bringing suits against the governor); Feeney v. Commonwealth, 366 N.E.2d 1262, 1267 (Mass. 1977) (stating attorney general can prosecute court appeals over the objections of state officers); Sec'y of Admin. & Fin. v. Attorney Gen., 326 N.E.2d 334, 336 (Mass. 1975) (holding attorney general can refuse to appeal case over objections of state officers).

165. For a list of some cases where the court found that the attorney general did not violate professional ethical rules, see the cases listed *supra* note 164.

166. MODEL RULES OF PROF'L CONDUCT R. 1.7(a) (2002).

167. *Id.* R. 1.7 cmt. 1.

168. 7 AM. JUR. 2D *Attorney General* § 21 (2003).

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general revenue fund.[169] The Illinois Supreme Court held the Attorney General could represent both the plaintiffs and the state retirement system as long as he did not have a personal interest.[170] The court reasoned, "[T]he Attorney General serves the broader interests of the State rather than the particular interest of any agency."[171]

Courts have recognized the duality of the attorney general in light of this rule. But the question remains: Who is the *client*? The Illinois Supreme Court implied the real client is the public interest, and this puts the attorney general in the strange position of representing both parties in the same case. The Model Rules explain that "[r]esolution of a conflict of interest problem under this Rule requires a lawyer to . . . clearly identify the client or clients."[172] This approach is almost laughable in the current context of the attorney general because, in many cases, it is nearly impossible to identify the people or the officer as the primary client. Courts have shown inconsistency between their recognition of the "public interest exception" to the conflict of interest rule, on the one hand, and their concern with Rule 1.6 and the revealing of information on the other. The only difference is that one representation is concurrent whereas the other representation is subsequent. Oddly enough, the concurrent representation is considered legitimate while the other is not.[173] It seems that in a subsequent representation situation, the court and parties are on notice and there can be some monitoring, while at the same

169. 642 N.E.2d 1180, 1181 (Ill. 1994).

170. *Id.* at 1183.

171. *Id.* at 1184.

172. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 2 (2002).

173. Cases where the attorney general has to represent two agencies at the same time appear to be fairly rare. In reality, where two agencies disagree or have colliding statutory mandates, the attorney general might ask the governor to pressure the agencies to arrive at an amicable solution. In the case of overlapping statutory mandates, the attorney general could also share his concern with the legislature and ask them to resolve it. Another option is for the attorney general to issue a formal opinion, which is not binding but is very persuasive to the court in future litigation.

Should these methods fail to resolve the problem, the agencies might actually go to court against each other. Often the attorney general is allowed to represent both agencies. Once the attorney general decides his "side" on the matter, however, he assigns the matter to different departments where the assistant attorneys general are required not to interact with each other over the specific case. The attorney general also gives up supervisory control over those staff members who are on the "side" opposed to the position he has selected. *See* E-mail from James Tierney, Former Attorney General of Maine, to Justin Davids (Jan. 26, 2004) (on file with author).

time the attorney general is cut off from further privileged information. In a concurrent representation situation, there is notice, but it will be more difficult to monitor what the attorney general knows and what she is passing on to — or keeping from — her clients. The attorney general has constant access to privileged information in these situations.

D. RULE 1.8

Finally, Rule 1.8(b) states, "A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent . . . ."[174] This rule is similar to Rules 1.6 and 1.7 and goes to the heart of the attorney general's representation. A classic example of the enforcement of this rule in the attorney general context is *Deukmejian*.[175] The court feared that if the attorney general could proceed with the action, she might use her previous knowledge against the governor.[176] This action, in turn, could cause the officer or department client not to be completely frank with the attorney general.[177]

The comment to the rule explains, "Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty."[178] But does an attorney general forever owe a duty of loyalty to the governor after giving legal advice? According to *Deukmejian*, the answer appears to be yes, at least with respect to the same case.[179] Not only does this protect the officer's interests, but it also encourages the officer to be completely honest with the attorney general. But perhaps the attorney general's duty of loyalty is to her other client, the people of the state. Would it not be a violation of loyalty to the people if the attorney general could not use the information, leaving her only option to withdraw completely from the case? Duty of loyalty is an especially confounding question in these situations be-

174. MODEL RULES OF PROF'L CONDUCT R. 1.8(b).
175. People *ex rel*. Deukmejian v. Brown, 624 P.2d 1206 (Cal. 1981).
176. *Id.* at 1208; *see also supra* Part IV.B.
177. This is often a complaint critics level against allowing attorneys general to switch sides. For a response to this criticism, see *infra* Part VI.B.1.
178. MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 5.
179. *See Deukmejian*, 624 P.2d at 1208.

cause to protect the officer-client, sometimes the public-client must come second.

E. RULE 1.11

One specific rule addresses government lawyers, however. Rule 1.11(d) states, "Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee (1) is subject to Rules 1.7 and 1.9 . . . ."[180] The first comment to Rule 1.11 stresses that "a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7."[181] The commission's intent seems to indicate that government lawyers must still abide by the requirements of Rule 1.7,[182] specifically concurrent representation, and the comment limits Rule 1.11's authority by explaining that this rule is subject to statutes and regulations which circumscribe it.[183] The second comment further limits the application of Rule 1.11 by noting that "paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers."[184] Thus, Rule 1.11 is a weak attempt to apply the Model Rules to government lawyers, but the several loopholes and exceptions illustrate the difficulty with this application in practice.

180. MODEL RULES OF PROF'L CONDUCT R. 1.11(d). Rule 1.11 also deals with issues regarding conflicts of interests when a lawyer used to work for the government but is now in private practice. *See id*. R. 1.11(a)–(c). Rule 1.11(d)(2) covers conflicts of interest regarding a government lawyer who used to be in private practice, or who is seeking employment with a party with which the lawyer participates "personally and substantially." *See id.* R. 1.11(d)(2). Because this Note involves the conflicts of interest of attorneys general with other governmental entities, only Rule 1.11(d)(1) is relevant for the purposes of discussion.

181. *Id.* R. 1.11 cmt. 1.

182. *See* Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 456–57 (2002) ("The Commission made Rule 1.11(d) the sole source for the obligations of current government lawyers, incorporating by reference the provisions of Rule 1.7 respecting concurrent conflicts . . . .").

183. MODEL RULES OF PROF'L CONDUCT R. 1.11 cmt. 1.

184. *Id.* R. 1.11 cmt. 2.

F. PREAMBLE AND SCOPE

In addition to the loopholes contained in Rule 1.11 and its comments, the scope section of the preamble to the Model Rules further limits the traditional client-attorney relationship in the government lawyer context. According to the preamble, a government lawyer is not subject to many of the rules relating to the private client-attorney relationship because of "various legal provisions, including constitutional, statutory and common law."[185] Among the exceptions noted is the authority of a government lawyer to "decide upon settlement or whether to appeal from an adverse judgment" on behalf of the government.[186] Also, the preamble notes that government lawyers, acting under the supervision of the state attorney general, "may be authorized to represent several government agencies in intragovernmental legal controversies . . . ."[187] These exceptions are not exclusive because they are preceded by the phrase "[f]or example," suggesting that the ABA acknowledges there are other areas where private lawyer rules of professional conduct do not apply to government lawyers.[188] The only guidance the ABA gives, then, is the initial statement about "constitutional, statutory and common law."

Interestingly, prior to the 2002 version of the Model Rules, the preamble also explained that government lawyers "may have authority to represent the 'public interest' in circumstances where a private lawyer would not be authorized to do so."[189] This language was stricken from the most recent edition of the Model Rules. This omission is somewhat confusing because its deletion could mean either that (1) the ABA no longer recognizes as a specific exception to the Model Rules that government lawyers have

185. MODEL RULES OF PROF'L CONDUCT Scope 18.

186. *Id.* ("[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 . . . .").

187. *Id.* ("[L]awyers 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.").

188. *Id.*

189. MODEL RULES OF PROF'L CONDUCT pmbl. 16 (1983), *reprinted in* 2003 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 186 (Thomas D. Morgan & Ronald D. Rotunda eds., 2003).

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the authority to represent the "public interest," or (2) private lawyers now have the authority to represent the "public interest" in the same way government lawyers do.[190] Although there might be some legitimate reasons for wanting private lawyers to consider the public interest,[191] the ABA probably did not intend to give private lawyers this type of free reign. Not only does this conflict with the role of government lawyers who are already designated to defend the public interest, it also dilutes the Model Rules' emphasis on "zealous advocacy." This is probably not the ABA's intended meaning. The other option is that the ABA is weakening the public interest exception for government lawyers. Although an authorization to represent the public interest might still be gleaned from the preamble because the exceptions for government lawyers are not exclusive, it is still telling that the ABA chose to remove this particular sentence.

G. CONCLUSION REGARDING THE RULES

The Model Rules, through Rule 1.11, apply themselves to government lawyers, including attorneys general.[192] But there are so many exceptions to the Model Rules — specifically those contained in Rule 1.11, the Preamble, and the Scope — that in practice the ability to enforce the traditional client-attorney relationship is weak. Considering the poor fit between the Model Rules and the role of an attorney general, it does not make sense to apply the traditional client-attorney relationship to the attorney general and her clients. States often mandate through ethical codes or other means that a client-attorney relationship exists between the attorney general and the state officers and executive

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190. Of course, the Model Rules do not authorize any action in the way a statute or the state constitution might. Instead they are ethical guidelines adopted by state bar associations and promulgated by state supreme courts. *See supra* note 42. The deletion of this language is significant, however, because it might indicate a change in the ABA's view of its ethical standard.

191. One theory that might suggest this sentence was struck to give private lawyers at least a claim to acting in the public interest is that professional ethics are eroding and part of the reason is the "displacement of the vocation of public-regarding lawyering onto a specialized 'public-interest' bar, academics and government lawyers." *See* Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1209 (2003).

192. *See supra* Part V.E.

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departments.[193] Still, courts have tip-toed around the issue and carved out some exceptions, which, up to a point, recognize the uniqueness of the attorney general's situation.[194] On closer scrutiny, however, these court rulings and ethical codes prove to be an inconsistent and incomplete patchwork. Most importantly, even the preamble to the Model Rules suggests the ABA recognizes the inapplicability of many of the rules to government lawyers. The numerous and unspecified exceptions to the client-attorney relationship for government lawyers illustrate the ineffectiveness of the Model Rules to the government context.[195]

In addition, the Model Rules were primarily drafted with the private bar in mind, not the government lawyer.[196] The result is that the rules do not provide clear answers to the ethical problems state attorneys general face.[197] This is not entirely surprising given that most of the drafters of the Model Rules were private lawyers. The first Model Rules were drafted in 1983 by the ABA's Kutak Commission, named for its chairman Robert Kutak.[198] Kutak, as co-founder of Nebraska's largest national law firm,[199] was a member of the private bar and in control of the committee charged with promulgating the ABA's new ethical standard. He was aided by Geoffrey Hazard, a well-known proponent of the private bar's ethical standard and reporter for the

193. *See*, *e.g.*, MO. REV. STAT. § 60.560 (2004) (stating that upon request attorney general shall advise Department of Natural Resources of any legal matter and represent in court); N.Y. AGRIC. & MKTS. LAW § 27 (McKinney 2004) ("The [eminent domain] proceeding shall be brought in the name of the [agriculture] commissioner as agent of the state and the attorney general shall represent the petitioner in the proceedings."); People *ex rel*. Deukmejian v. Brown, 624 P.2d 1206, 1208 (Cal. 1981).

194. *See*, *e.g.*, *supra* Parts IV.A, C.

195. *See supra* Part V.E.

196. *See* Tamara L. Tompkins, Note, *A Theory of Ethical Conduct for the Legal Advisor to the State Department: Applied for a Fresh Look at Abraham Sofaer and the ABM Treaty Reinterpretation Debacle*, 7 GEO. J. LEGAL ETHICS 523, 530 n.39 (1993) ("The Model Rules, like the Model Code, were written primarily to address the problems confronting private attorneys.").

197. *See* Miller, *supra* note 10, at 1293 n.1 ("These ethic codes, however, do not provide clear answers to the problem [of government lawyers' ethics] because they were written with private, not government, attornies [sic] in mind.").

198. *See* Brian C. Buescher, Note, *Out with the Code and in with the Rules: The Disastrous Nebraska "Bright Line" Rule for Conflict of Interest: A Direct Consequence of the Shortcomings in the Model Code*, 12 GEO. J. LEGAL ETHICS 717, 736 n.174 (1999).

199. *Id.* ("Robert Kutak, the chair of the Kutak Commission which wrote the Model Rules, was a native Nebraskan and co-founder of Nebraska's largest and only national law firm, Kutak Rock.").

Kutak Commission.[200] Today, the ABA's Ethics 2000 Commission reviews and reports on the Model Rules.[201] Although the Ethics 2000 Commission consists of judges and law professors in addition to private lawyers, it appears that only one member has any experience actually working as a government lawyer.[202] What works well for the private bar, however, does not necessarily

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200. *See* Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236, 1264 (2003) (stating that Geoffrey Hazard was the reporter for the Kutak Commission). Professor Hazard often testifies as an expert on ethics rules, and has even testified on the application of state rules of professional conduct to state attorneys general. *See, e.g.*, State v. Peters, CR. No. 98-2467 (Haw. Cir. Ct. Feb. 26, 1999) (decision regarding motion to dismiss and alternative motion to disqualify the attorney general of Hawaii and her deputies) (on file with author). Professor Hazard's argument in *State v. Peters* was that the Hawaii Attorney General violated the Hawaii Rules of Professional Conduct by bringing a case both civilly and criminally at the same time, thus violating the prohibition against conflicts of interest. *See* Declaration of Geoffrey C. Hazard, Jr. at 3, State v. Peters, CR. No. 98-2467 (Haw. Cir. Ct. Dec. 8, 1998). In short, Professor Hazard claimed the attorney general violated ethical rules because she did not have the authority to supercede the public prosecutor in criminal matters, and warned that there was the possibility that an attorney general with this power could use a criminal prosecution to facilitate a favorable civil recovery. *Id.* at 3–4. The state circuit court disagreed with Professor Hazard, however, and ruled that the attorney general could bring criminal cases when "an investigation would be in the public interest." State v. Peters, CR. No. 98-2467, at 2–3 (Haw. Cir. Ct. Feb. 26, 1999) (decision regarding motion to dismiss and alternative motion to disqualify the attorney general of Hawaii and her deputies). More importantly, the court recognized that the state professional conduct rules "may not abrogate the government attorney's authority in certain situations," *id*. at 4, and that the mere appearance of conflict did not preclude the attorney general from bringing both cases. *Id.* ("If an appearance of conflict were a test, there could seldom be any parallel civil and criminal proceedings brought by the Attorney General and the statutes giving the Attorney General that dual authority would be frustrated."). The court seemed persuaded that the attorney general should follow the statutes rather than the rules of professional conduct. Thus, even Professor Hazard, who has extensive experience in helping create the Model Rules, has trouble convincing courts that the Model Rules are completely applicable to the situations faced by state attorneys general.

201. Am. Bar Ass'n, Ethics 2000 Commission, *at* http://www.abanet.org/cpr/ethics2k.html (last visited March 6, 2005). On a related note, on its official web page the Commission states, "The Commission expresses its gratitude to the law firm of Drinker, Biddle & Reath, whose generous contribution helped make possible the continued, invaluable support of the Commission's Chief Reporter." Not only is this statement evidence of the private bar's involvement with the Model Rules, but it also indicates that at least one private law firm provided financial support to the ethics committee — a rather questionable move considering the committee's mission is to review the ethics rules that lawyers in this private law firm are expected to follow.

202. *See* Am. Bar Ass'n, Ethics 2000 Commission on the Rules of Professional Conduct, Appendix A — Biographies (on file with author) [hereinafter Ethics 2000 Commission Appendix]; *see also* Love, *supra* note 182, at 441 n.1 (noting that "Commission comprised practitioners, judges, academics, corporate and public section lawyers, and a lay public member"). Also, according to the ABA website, Geoffrey Hazard was still involved with the Model Rules, only this time as a member of the Ethics 2000 Commission. *See* Ethics 2000 Commission Appendix, *supra*.

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work well for government lawyers, including an attorney general. Because of the heavy influence of the private bar, the Model Rules are simply inapplicable to many situations and problems attorneys general face.

VI. THE NEW REGIME: ABANDONING THE APPLICATION OF PRIVATE BAR ETHICAL STANDARDS TO THE STATE ATTORNEY GENERAL

A. THE ATTORNEY GENERAL DOES NOT VIOLATE THE CLIENT-ATTORNEY RELATIONSHIP BY BRINGING ACTIONS AGAINST THE STATE OR STATE OFFICERS

1. *In* Salazar, *Secretary of State Davidson's Underlying Argument Would Allow Executive Officers to Unreasonably Intrude into the Legal Sphere*

The secretary of state of Colorado argued that attorney general Salazar could not petition for an injunction against her because neither she nor any other executive officer asked him to intervene.[203] Additionally, Davidson claimed the Colorado attorney general did not retain common-law powers and was not the "people's elected chief law officer."[204] Therefore, the secretary of state's position advocated that the attorney general can only act when the governor or other executive officer asks her to, and in cases where the attorney general does not want to act, she can

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203. Petition for Writ of Injunction and Writ of Mandamus Pursuant to Colo. Const. Art. VI, § 3 at 11–12, People *ex rel*. Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003) (No. 03SA147).

204. *Id.* at 9–14 (citing People *ex rel*. Tooley v. Dist. Court, 549 P.2d 774, 777 (Colo. 1976)). It should be noted, though, that many of the cases the Secretary of State cites in support of her claims regard the attorney general's criminal powers as opposed to his civil powers. Much of the support regarding civil powers is either dicta or inference. For example, the Colorado attorney general in *Tooley* argued his position, in a criminal prosecutorial manner, was analogous to the Attorney General of the United States, a purely appointed position within the president's cabinet and not a U.S. constitutional officer. Thus, the Colorado Supreme Court was rebuffing this odd analogy to the U.S. "chief law officer." This is not to say, though, that the Colorado Supreme Court did not view the attorney general's statutory authority and the case law as extending the office's powers to include protection of the public interest.

step aside.[205] This argument, if put into effect, would substitute any executive officer for the attorney general in matters of litigation. When considering whether to bring an action, whoever makes the final decision presumably will take into account the public interest. The secretary of state's position was that she, not the attorney general, should be the one to determine the public interest. Concededly, the secretary of state is an elected officer, but so is the attorney general. The question, then, is why a secretary of state, whose duties and responsibilities fall mostly outside of the legal sphere, is more qualified than an attorney general to make this public interest decision. If anything, an attorney general is uniquely qualified given the fact that the voters elected her to the post of state's lawyer, thus allowing her to represent the state in the legal sphere. However, Davidson did not answer this question and simply argued that Salazar did not have the ability to decide the public interest at all, in the end making him wholly subordinate to all other executive officers.[206]

2. *Allowing Attorneys General to Bring These Actions Against State Officers on Behalf of the Public Interest Leads to Optimal Construction of the Divided Executive Structure of State Government*

An attorney general's power to bring actions against state officers without their consent regarding the enforcement of laws actually leads to an optimal construction of the divided executive branch. As noted above, by creating the divided executive branch, framers of state constitutions obviously felt there were additional benefits to splitting up the branch into separately elected state officers and granting them specific spheres of power.[207] In the case of the attorney general, the framers must have considered the attorney general to be the executive officer of the legal sphere. As the executive branch officer situated in the legal sphere, the attorney general, through her powers to initiate

205. *Id.* ("Not only must an executive branch officer or the general assembly request that the attorney general initiate litigation but he or she is limited to representing the designated officials and agencies of the state . . ., not 'the people.'").

206. *Id.* at 12.

207. *See* Answer Brief of Attorney General Ken Salazar (Concerning the Powers of the Attorney General) at 11, *Salazar* (No. 03SA147); *supra* notes 18–19 and accompanying text.

and defend suits on behalf of the state, separates the powers of the other executive officers and ensures that no officer can spread her influence into other spheres.

Most courts would agree that the attorney general, acting as the "chief law officer" of the state, has "control over the conduct of litigation" involving the state.[208] The *Feeney* court reasoned that part of this control "includes the power to make a policy determination."[209] In the struggle to determine who gets to make the ultimate policy decision, it should be acknowledged that the attorney general is in the best position to bring these types of actions. First, the attorney general can be analogized to the law firm of the state.[210] Thus, the attorney general's office, by its nature staffed with lawyers dealing with various legal issues on a daily basis, is in the best position to deal with substantive legal issues. Aside from this fact, the attorney general is often required to defend the state in appellate courts.[211] The Supreme Judicial Court speculated that "[t]he Legislature thereby 'empowered, and perhaps required, the Attorney General to set a unified and consistent legal policy for the Commonwealth.'"[212] This is an interesting concept, which makes sense in the context of the public interest as the primary client. In other words, given the structure of the divided executive branch, where different officers can be from different parties, if the attorney general were simply the lawyer in a traditional client-attorney relationship, the result could be a patchwork quilt of policies argued before and enforced by the courts. But control over appeals is not necessarily only an affirmative power — the attorney general has the ability to also refuse to appeal a case against the wishes of the governor, such

208. *See, e.g.*, Feeney v. Commonwealth, 366 N.E.2d 1262, 1265 (Mass. 1977) (citation omitted).

209. *Id.*

210. In fact, the Vermont Attorney General's office makes this exact analogy. *See* The Office of the Attorney General, *at* http://www.atg.state.vt.us/display.php (last visited Oct. 31, 2004) ("First established by the Vermont Legislature in 1790, the Office of Attorney General has evolved from its one-person operation shortly after the turn of the 20th century to its current status as the State's largest law firm."). The Missouri Attorney General's office does as well. *See* About the Missouri Attorney General's Office, *at* http://www.moago.org/divisions/divisions.htm (last visited Apr. 1, 2005) ("The office is considered the state's premier law firm.").

211. *See*, *e.g.*, *Feeney*, 366 N.E.2d at 1265.

212. *Id.* (quoting Sec'y of Admin. & Fin. v. Attorney Gen., 326 N.E.2d 334, 338–39 (Mass. 1975)).

as in *Secretary of Administration & Finance*.[213] This interpretation — even to the extent that the governor is not allowed to hire outside counsel to pursue the appeal — is necessary to maintain the attorney general's chief legal officer status. Thus, both the *Feeney* and the *Secretary of Administration & Finance* courts see the attorney general as in the best position for helping to further a more consistent policy for the public interest in the legal sphere.

Another argument in favor of allowing the attorney general to bring these types of actions is efficiency. The attorney general does not have to be in favor of or against a law, but by bringing these actions she is only seeking a determination by a court about the constitutionality of the law.[214] By bringing these actions before a court early, rather than waiting until a law goes into effect and perhaps harms the people of the state, the attorney general might save the state time and money. The attorney general could save time because the court determines the statute's constitutionality before the law goes into effect. Money is also saved by preventing damage caused by enacting and enforcing a law that is eventually ruled unconstitutional. Although this approach requires the attorney general to carefully consider what challenges are truly in the public interest, aside from the attorney general's good-faith effort,[215] budget and time concerns will practically force her to pick specific battles rather than challenge every law the legislature passes that session.[216]

Finally, some critics will argue that unless constraints are imposed, zealous attorneys general will proceed with litigation of this nature only for political reasons. Notwithstanding the eco-

213. *See supra* Part IV.A.3.

214. *See* Answer Brief of Attorney General Ken Salazar (Concerning the Powers of the Attorney General) at 15, People *ex rel*. Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003) (No. 03SA147) ("The Attorney General does not presume to be the final arbiter of the statute's constitutionality . . . . Rather, he brings his good-faith concerns to this Court to seek its final determination . . . because he recognizes that this Court rightfully undertakes that responsibility.").

215. *See supra* notes 73–75 and accompanying text. Judge Kaplan's dissent in *Secretary of Administration & Finance* assumes a lot of self-control by the governor and other state executives, which this Note criticizes as being somewhat unrealistic. Although this Note suggests there will be self-control by the attorney general, unlike Judge Kaplan, this Note has mentioned practical concerns that would make constraints on litigation less about self-control and more about economic realities.

216. In fact, these powers and actions are restrained in part because the legislature has control over the attorney general's budget. *See* Lynch, *supra* note 15, at 2003.

nomic considerations mentioned above, this is not necessarily a bad thing. The most likely reason an attorney general challenges a law for political reasons is because the law is politically motivated. If any act is to be closely scrutinized, politically motivated acts are certainly some of the most worthy. The *Salazar* case is a perfect example of a politically motivated act. Only two years after Colorado's congressional districts were redistricted, the newly Republican-controlled legislature drew up new districts, with the effect of benefiting that party. Presumably, the point of redistricting is to ensure that state citizens are equally represented according to the state's population.[217] Although political gerrymandering is acceptable in principle, it is still impermissible to cause discriminatory vote dilution.[218] Because of the political reasons behind the legislature's passage of the new redistricting plan, it is not unreasonable for the attorney general to be politically motivated in challenging the case. This challenge assures that political measures that have a public interest element are subjected to the full checks and balances test before they become effective. The courts will decide the constitutionality and legality of these political measures before they can adversely affect the people directly, thus helping to improve the overall stability of the law.

Another response to the argument that attorneys general might be acting out of their own self-interest is that the political process will act to constrain over-zealous attorneys general. In the vast majority of states, the people directly elect the attorney general. Thus, if an attorney general is over-zealous and is creating unacceptable conflicts between government entities, she can be voted out of office. In other words, an attorney general who does a bad job can always be fired.

217. *See* Reynolds v. Sims, 377 U.S. 533, 568 (1964) ("We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.").

218. *See* Davis v. Bandemer, 478 U.S. 109, 132 (1986) ("[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."). However, in the Colorado case, Attorney General Salazar did not assert an equal protection violation. Instead, he argued his case only on state constitutional grounds, claiming that the Colorado constitution only allowed redistricting immediately after each United States census. *See Salazar*, 79 P.3d at 1243 ("Under our holding today, the General Assembly may only create a redistricting plan after the federal census (and the resulting congressional apportionment to the states) and before the ensuing general election.").

B. THE PRIVATE CLIENT-ATTORNEY RELATIONSHIP STANDARD SHOULD NOT APPLY TO STATE ATTORNEYS GENERAL AND STATE OFFICERS AND AGENCIES

1. *Current Conception of Client-Attorney Relationship Emphasizes the Officer-Client over the Public-Client*

Of course, in many instances the position of the officer-client and the position of the public-client are the same, so there is no real conflict. The attorney general can serve both equally without any trouble. But inevitably there will be situations where the two clients' interests will come into conflict with each other. The natural response to these situations is to prioritize the clients. Courts, it seems, have attempted to construct different prioritizations for different situations, but it appears that the result is a clear emphasis on the officer-client at the expense of the public-client. This prioritization is enforced against the attorney general through the haphazard application of the traditional client-attorney relationship. At the very least, in situations where there is a conflict between the two clients, the attorney general should be able to choose.[219] Instead, the attorney general often can only choose between representing the officer or stepping aside altogether, leaving the officer to secure her own counsel.

Another argument why the public-client should be prioritized over the officer-client is that state government exists to benefit the people, not any particular office or office holder. Officers are simply a means by which the people's will is to be carried out. Therefore, representing state officers can be seen as protecting the public interest. Officers are elected to perform certain tasks and assume certain responsibilities. But sometimes officers, intentionally or unintentionally, stray from these duties. When statutes instruct the attorney general to represent officers or agencies, they are actually instructing her to represent the public

219. Obviously if the attorney general decides not to represent the officer-client, the officers still have a right to legal counsel and representation. In these situations, the officers should be allowed to hire outside counsel or use their in-office counsel. This approach seems consistent with *Secretary of Administration & Finance*, where the governor's counsel represented the secretary to question the attorney general's powers. *See supra* Part IV.A.3.

interest as represented by these officers and not the officers themselves.

Some critics, attempting to defend the application of the traditional client-attorney relationship, note that allowing the attorney general to switch sides in the middle of a case (either because she changed her opinion or because there is a newly elected attorney general) chills relations between the executive officers. For example, the client-attorney relationship protects clients by ensuring that their lawyer will not use confidential information against them in the future.[220] Arguably this encourages clients to be truthful and forthright with their counsel. It would be naïve to suggest that this is not also a concern in the state attorney general case. However, this is not a major problem, considering that many of the conflicts between the governor and attorney general mentioned here involve questions of policy. This is not exactly analogous to the private attorney and client in either a civil or criminal suit. The interests being protected are different; the state officer is actually arguing over a policy position, and wants protection against the possibility that the attorney general will change her own position. Thus, while there is a slight concern, the risks are actually minimal.

2. *Reprioritization of Clients*

In order to account more for the public interest, there should be a reprioritization of the attorney general's clients. In situations where there is a conflict between the officer-client and the public-client, the public interest should trump the representation of state officers. Accomplishing this feat means abandoning the application of the traditional client-attorney relationship to attorneys general and state officers. The current client-attorney relationship standard was heavily influenced by private lawyers and was written to benefit the private bar.[221] Indeed, these rules might work well for the private bar, but they are not easily adjusted for the relationships encountered by government lawyers, including the attorney general. The Model Rules do not fully take into consideration the duty of government lawyers to repre-

220. *See* text accompanying *supra* notes 162–163.
221. *See supra* notes 196–202 and accompanying text.

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sent the public interest.[222] Legislatures and courts should recognize the primacy of the public interest and not attempt to apply the private attorney-client relationship standard to attorneys general.

Courts could allow state attorneys general to switch sides on an issue. Rule 1.7 is simply inapplicable where the identity of the attorney general has changed due to election or removal. It does not make sense to hold the new attorney general, who has no previous involvement in a case, to inflexible client-attorney rules. Even in situations where the current attorney general (as opposed to a previous attorney general) has provided some advice to an officer, there could be several reasons for an attorney general to want to change sides, such as discovering new information, or being legitimately convinced that her prior position was wrong. In cases where the attorney general has previously given advice to an officer, the court could require a "good faith" showing on the attorney general's part in order to avoid situations where an attorney general might only make the switch for political gain. This good faith showing could be applied either to the advice she previously gave to the officer or to the current case brought before the court. It is not necessary for the attorney general to actually prove good faith because simply providing a good faith reason — whether pretextual or not — provides an adequate check on client switching based on political motivations alone. In other words, it really does not matter if an attorney general had political motives if her actions can be also justified as protecting the public interest.

This type of flexibility is not unheard of for the attorney general. A recent example is the case of former Alabama Chief Justice Roy Moore. In 2003, then-Chief Justice Moore was sued by a group of citizens over a monument of the Ten Commandments he had installed in the Supreme Court building.[223] Initially, Alabama Attorney General Bill Pryor supported Moore, attending Ten Commandment rallies and even supplying lawyers from the attorney general's office to help in Moore's defense.[224] But when

222. *See supra* notes 189–191 and accompanying text.

223. *See* Jeffrey Gettleman, *Court Orders Alabama's Chief Justice Removed from Bench*, N.Y. TIMES, Nov. 13, 2003, at A1.

224. *See id.* In 2004, President Bush appointed Pryor to the Eleventh Circuit while Congress was in recess. *See* Michael A. Fletcher & Helen Dewar, *Bush Will Renominate*

Moore still refused to remove the monument after a district court, and later an appellate court, ruled that it violated the Establishment Clause, attorney general Pryor switched sides and filed ethics charges against Moore.[225] In his arguments, the attorney general said, "[T]he chief justice had put himself above the law. . . . What does it mean to have the rule of laws and not of men? That is the fundamental question."[226] After a short deliberation, the Alabama Court of the Judiciary voted unanimously to remove the chief justice from the state supreme court.[227]

Although this is a special case involving a judicial officer rather than an executive officer, it illustrates how an attorney general can change her stance in order to best serve the public interest. At first, Attorney General Pryor believed it was in the public interest to defend the chief justice. He acted in his capacity to defend and represent a state officer. If the traditional client-attorney relationship were applied, the attorney general would not have been able to switch sides against his former client. He would have been forced to step aside, the effective result being a continued standoff between the chief justice and the federal judiciary. Instead, when the attorney general felt it was in the public interest to remove Moore from the bench, he could proceed with filing ethics charges.

The Alabama case is one example of how the reprioritization of clients is possible and effective. The public interest was best served by allowing the attorney general to switch clients. An even better approach, though, is to view Pryor as never switching clients. Instead, the attorney general viewed the chief justice as a government officer with a duty to serve the public interest. According to this view, Pryor only represented one client the whole time — the people of Alabama. When Pryor no longer considered the chief justice as acting in the public's interest, he filed ethics charges. This is a good approach towards the role of the attorney

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20 Judges; Fights in Senate Likely over Blocked Choices, WASH. POST, Dec. 24, 2004, at A01. As of press time, Judge Pryor was still awaiting confirmation by the Senate. *See* STAFF OF SENATE COMM. ON THE JUDICIARY, 109TH CONG., JUDICIARY COMMITTEE REPORT ON NOMINEES (Mar. 28, 2005), *available at* http://judiciary.senate.gov/noms/108/committee_report.pdf (on file with author).

225. *See* Gettleman, *supra* note 223.

226. *Id.*

227. *In re* Roy S. Moore, No. 33, at 13 (Ala. Ct. Judiciary Nov. 13, 2003), *available at* http://www.judicial.state.al.us/documents/final.pdf.

general in the divided executive branch. The attorney general has one client — the people — and officers are subordinate to that client because the office itself is a tool for the people to govern. Considering this, it is odd to give deference to officers only because they are identifiable people whereas the public interest is an abstract concept. In order for the public interest to be realized, officers cannot be seen as individuals but need to be seen as abstract concepts themselves. When no real person is involved, it is doubtful that many courts would still insist on applying the traditional client-attorney relationship.[228] Courts insist on applying the traditional client-attorney relationship because they see two individual people, the attorney general and the officer, interacting with each other, but this is the wrong way to analyze the situation.

Finally, the Model Rules can be helpful as a set of "guidelines" for government lawyers. However, they are not "rules" that attorneys general should be required to follow. Instead, the Model Rules are advisory opinions only. Attorneys general, and government lawyers in general, should be subject to the constitution and laws — including ethics laws — that are passed democratically within their state. These laws carry with them the force of a democratic mandate. At least under this approach, the client-attorney relationship standard is determined by the people of the state — or by a legislature composed of elected representatives — and not by the private bar.

VII. CONCLUSION

State attorneys general are rare in the legal community because they owe allegiances to two clients — the "people" and the executive officers and agencies. Unfortunately, sometimes these clients come into conflict with each other. In order to decide which client receives priority during these conflicts, many courts

228. Admittedly, there are a couple of differences between the *Moore* case and the *Salazar* case. First, there was no statute in question requiring Attorney General Pryor to represent Chief Justice Moore. Second, Moore was personally reprimanded for violating his ethical duties, while Davidson was sued not for any violation on her part but because she was the officer authorized to carry out the new law. But the court still reprimanded Moore not based on his individual, personal beliefs, but because he violated his ethical duties as Chief Justice of the Alabama Supreme Court. In other words, Chief Justice Moore was removed for violating the duties of his office.

have applied various rules of the client-attorney relationship to the attorney general and the officers. These rules almost always favor the officers at the expense of the public-client. However, this outcome is at odds with the idea that the attorney general is elected by the people to serve the people of the state. Since the attorney general has the power to defend the public interest, she should prioritize the public interest over the personal interests of the officer. As part of her duties, the attorney general should be able to sue state officers in order to represent the public interest, without violating the client-attorney relationship with those officers. This is best accomplished by not applying the current Model Rules standard of the client-attorney relationship because those rules do not fully take into account the attorney general's duties. Instead, by holding attorneys general subject to the constitution and laws of their state, the public interest can be further advanced.