

I. Purpose of the Guidelines

These guidelines apply to adjudicatory proceedings in which two or more assistant attorneys general ("AAsG") and/or staff attorneys are required to perform different roles or functions. These guidelines replace and supersede the guidelines issued in June, 1983. In essence, the guidelines establish a "Chinese wall" mechanism to insulate AAsG from possible conflicts in our representation and advice functions. The "Chinese wall" mechanism traditionally has been used by private law firms as a screening procedure that prevents an individual or section within a law firm from becoming involved in a matter handled by another individual or section of the law firm. See, e.g., Note, The Chinese Wall Defense to Law Firm Disqualification, 128 U.Pa.L.Rev. 677 (1980). We believe this approach is the best method for the Attorney General's Office to fulfill its constitutional and statutory duties to represent and advise State agencies in all their legal matters, but avoid, to the greatest extent feasible, even the appearance of a conflict.

There are several specific goals we hope to accomplish through the use of these guidelines:

- (a) we want to provide fair adjudications to those affected by State agency action;
- (b) we want to vigorously present cases before a decision-maker when we perform the advocate function; and
- (c) we want to provide well-informed advice to our clients.

The following guidelines fulfill these goals by:

- (a) assuring, where feasible, a separation of functions between the advisor role and the advocate role;
- (b) reducing even the appearance of undue influence that could affect judgment or advice in individual cases; and
- (c) establishing separate lines or channels of supervision over lawyers performing separate functions.

II. Application and Scope of the Guidelines

These guidelines apply only to the functions of AAsG in "administrative adjudicatory proceedings" (as defined in Part III) and appeals, and not to any financial or personal conflict of interest that might affect an individual assistant attorney general. They apply not only to "contested cases" under the Maryland Administrative Procedure Act, but also to other similar adjudicatory hearings held by agencies which affect the rights, duties, statutory entitlements, or privileges of specific parties. These guidelines do not apply to quasi-legislative hearings or to AAsG assigned to the Consumer Protection or Securities Divisions who are required by law to adjudicate cases. In addition, one or more guidelines would not apply in the event that all parties consented in writing to a waiver after full disclosure and understanding of the potential conflict involved.

These guidelines are adopted by the Office of the Attorney General on a voluntary basis in an effort to improve the administration of the Office's various roles in administrative proceedings. In adopting these guidelines, the Office is going beyond the current requirements of the U.S. and Maryland Constitutions, the State Administrative Procedure Act and other applicable statutes, regulations and rules of professional conduct. The adoption of these guidelines should not be read as an admission that either past practices of the Office of the Attorney General have not met the requirements of applicable law, nor that alternative practices would not meet the requirements of applicable law. Nor do these guidelines establish any rights different from or independent of current statutory or constitutional law.

III. Definitions

The following terms are used throughout the guidelines and have these definitions:

"Advisor" is any assistant attorney general who renders legal advice to a decision maker regarding any matter pertaining to a specific case considered by that decision maker.

"Decision maker" is any board, commission, department, department head, officer, employee or other person or body, which adjudicates cases in which the Office of the Attorney General is required to render legal advice. It does not include State or federal courts.

"Advocate" is any assistant attorney general who presents, prosecutes, or defends a case before a decision maker, or advises someone who presents, prosecutes, or defends a case before a decision maker. An assistant attorney general who advises an agency during a quasi-legislative hearing is not acting as an advocate.

"Adjudicatory proceeding" is any proceeding established to determine a specific party's rights, duties, statutory entitlements, or privileges, by use of an adjudicatory hearing regardless of whether the proceeding is a "contested case" under the Maryland Administrative Procedure Act.

"Agencies" as used in paragraphs 4 and 5 of the guidelines refers to departments or divisions within the Attorney General's Office headed by a division chief, principal counsel, or supervising attorney.

IV. Guidelines

1. These guidelines apply to any adjudicatory proceeding after formal proceedings are initiated. Formal proceedings are initiated whenever the party is given notice of agency action that initiates an adjudicatory proceeding, or when a party files a request that initiates an adjudicatory proceeding.

2. In an adjudicatory proceeding in which one AAG serves as advisor and another AAG serves as advocate, there should be no ex parte communications between the advisor and the advocate regarding any issue of fact or law in the case after formal proceedings are initiated.

3. Where one AAG serves as advisor and another serves as advocate, each AAG shall maintain separate files. Access to the files or the work product of each should be denied the other.

4. Throughout the period of time in which he or she serves as an advisor, in agencies where there are five or more AAsG, an AAG who serves as an advisor to a decision maker should not serve as an advocate before that decision maker on any cases involving the same program or general subject matter as cases on which the assistant attorney general acts as an advisor. Similarly, in those agencies, an AAG who is an advocate should not advise a decision maker on any cases involving the same program or general subject matter as cases on which he or she serves as an advocate.

5. In all agencies where there are four or less AAsG, an AAG should not serve as an advisor and advocate in the same case. An AAG should not serve as an advisor for any case involving the same issue as a case pending before the decision maker on which the AAG acted as an advocate.

6. Except where specifically required by law, an AAG should not serve as a decision maker or hearing officer for adjudicatory proceedings in State government in which the State is a party.

7. An AAG who advises one level of decision maker about an individual case may advise subsequent levels of administrative review. For example, an AAG who advises a board or commission about an individual case may also advise the Secretary in reviewing the board's decision. An AAG who advises a decision maker may also act as an advocate for the agency on the same case in any State or federal court. An AAG who acts as an advocate before the Office of Administrative Hearings may not subsequently act as an advisor to the agency on the same case or on any case pending before the agency involving the same issue(s).

8. An AAG (such as a division head or counsel to a department) should not serve as an advocate before a decision maker, if the decision maker is receiving advice from another AAG who is under the direct supervision of the advocate. However, an AAG (such as a division head or counsel to a department) may advise a decision maker before whom another AAG, directly supervised by the adviser, presents evidence.

9. An AAG who is an advocate at one stage of an adjudicatory proceeding may not advise a decision maker at another level with respect to the same adjudicatory proceeding.

10. In matters concerning a specific case, there should be separate channels of supervision for advocates and advisors up to the level of division head or principal counsel to the department. These separate channels of supervision should not cross and the supervisors should not communicate with each other on matters pertaining to the specific case while the case is pending before any decision maker.

11. Intentional violation of any of these guidelines by an AAG or other employee of the Office of the Attorney General will be viewed as a serious matter. Any problems in complying with these guidelines, which may arise either in the context of a specific adjudicatory proceeding or otherwise, should be brought to the attention of the Chief of Litigation, or the Deputy Chief of Litigation, as soon as possible after learning of the problem.

12. In certain exceptional circumstances, it may be highly impracticable or impossible to follow all aspects of these guidelines. In such circumstances, the AAG may seek a specific waiver of a guideline or part of a guideline. A request for a waiver should be made to the Chief of Litigation or the Deputy Chief of Litigation.

13. These guidelines apply only to adjudicatory proceedings initiated after December 1, 1991.