

ABSTRACT

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The Government's Litigator: Taking Clients Seriously

52 Admin. L. Rev. 1409 (2000)

Abstract by Peter Hack

This article examines various conflicts between clients encountered by Department of Justice Attorneys in their representation of federal agencies. The first section of the article details the decision making process for determining which lower court rulings will be appealed. The authors point out the strategic significance of these decisions. Often there may be a conflict between the agency's aims and the broader aims of the federal government. The decision to appeal is made through a process that involves all the relevant parties. The second section of the article addresses the importance of unity in the government's litigation stances, and how speaking with one voice can be difficult. Indeed, internal components of the Department of Justice may have competing aims. The potential for conflict between litigation goals in different cases can be subtle, but the process of determining the need for appeal helps to eliminate conflict. The third section of the article address conflicts that may arise for the government attorney in defending federal statutes. Often an agency may change policies over time and no longer wish to enforce a federal law. If that law is challenged the agency may not wish to advocate for the validity of the law. The government lawyer, however, may have to. Generally, government lawyers have a constitutional duty to defend any law for which a reasonable argument can be made. Further conflict arises, however, when the law challenges the power of the executive branch or is patently unconstitutional. The fourth section of the article addresses the conflicts that may arise in attempts by the government to reach settlement over the objections of the agency. The final section of the article details conflicts that stem from government representation of individual officers. In this situation the government lawyer becomes identical to the private lawyer, except for certain limitations. The article concludes that the illusion that government lawyers are simply advocates for the federal government is misleading, and points out the manifold and often conflicting client relationships of the Department of Justice attorney.