

Decline in Attorney General Formal Opinions Private Advice Or Secret Law?

Suit seeks peek into attorney general's closed-door missives to agencies

By Mary Pat Gallagher
New Jersey Law Journal
August 15, 2008

Through the decades, the state Attorney General's Office has issued hundreds of formal advisory opinions to state agencies. The opinions had precedential effect, generally on the affected agency's interpretations of substantive law.

But in recent years, their numbers have fallen off drastically, to the point where they've nearly disappeared.

From a high-water mark of 116 formal opinions in 1949, the output fell to fewer than 10 a year in the 1960s. Since 1986, there have been only a dozen in all, and in 16 of the past 22 years, there were none. Three were released in 2007 - two on the ramifications of the civil unions law and the other on the constitutionality of property tax relief legislation.

The dearth of formal, public opinions is not because the attorney general has less to say. The Division of Law continues to issue hundreds of letters giving informal, nonpublic "administrative agency advice," cloaked in a blanket privilege.

Now, a public interest advocate is arguing in court that these advisory opinions should be public as well.

John Paff, the chairman of the New Jersey Libertarian Party's Open Government Advocacy Project, contends that these opinions should be public because they are the "functional equivalent" of the old formal opinions.

Paff filed suit on July 17 challenging the attorney general's denial of his Open Public Records Act request for a list or index of advisory opinions dating back to 2002.

His position, in *Paff v. Division of Law*, MER-L-1800-08, is that the Division of Law bears the burden of proving they are shielded by privilege.

In his brief, Paff traces the decline in formal opinions from 1949, when Attorney General Theodore Parsons began classifying opinions in three categories - formal, informal or memorandum - with only the formal opinions having precedential effect.

Since then, the formal opinions have dwindled to nil, but the Division of Law has continued to provide agencies with hundreds of informal nonpublic advice letters to guide them in the performance of their official duties.

Paff estimates that 200 advice letters are issued each year, based on the numbering of those that have come to light, usually when quoted in court opinions or released by the recipient agency.

For one, a 1997 opinion by Attorney General Peter Verniero posted on the Department of Community Affairs Web site, www.state.nj.us/dca/lgs/attnygnl/agmenu.shtml, advised the Division of Local Government Services that local governments cannot use credit cards.

Not posted on the DCA site is a 1991 advice letter from Attorney General Robert Del Tufo stating that municipal court judges and employees are not subject to the Local Government Ethics Law. Paff obtained a copy of the letter from the Borough of Manville when he asked for financial disclosures for a municipal judge.

Until 1984, the attorney general published the formal opinions in bound volumes. In the back of those same volumes, it published the memorandum opinions from 1954 to 1974.

The Attorney General's Web site, www.nj.gov/oag/ag-opinions.htm, links formal opinions going back to 1949. Rutgers University's Digital Legal Library site, njlegallib.rutgers.edu/ag/, has them, too, but also lists and indexes more than 200 memorandum opinions issued from 1954 to 1964. Westlaw and LEXIS have the formal opinions and some informal ones.

Attorney-Client Privilege Asserted

On April 22, Paff filed an OPRA request for a list of "Agency Advice Letters" from Jan. 1, 2002, to the present, showing the date of each letter, the author, the recipient and the topic.

A response on April 30 from Robert Sanguinetti, the Division of Law's records custodian, stated that the topics and recipients were protected by attorney-client privilege and asked whether Paff was interested in a list of just the dates and authors.

Paff followed up with a June 1 request for an index of the letters.

On June 5, he was told he would get nothing. "Upon further legal review, we have determined that the attorney-client privilege requires that any roster or listing of advice rendered to our clients be entirely confidential," wrote Sanguinetti.

The complaint, filed with an order to show cause, seeks access under OPRA and the common law to an unredacted roster or index of the informal opinions.

A portion of the Division of Law Attorney Handbook obtained by Paff through OPRA describes how requests for advice are centrally assigned, given docket numbers and classified based on how high up the chain they will be reviewed. Class IV is handled by a deputy attorney general, while Class I goes to the attorney general, the first assistant or the Division of Law director. All requests since 1972 are indexed and most are kept in an internal electronic archive meant to be used for research in other matters.

The handbook characterizes formal opinions, which have the force of law, as those that address issues "deemed to be so significant as to warrant broad circulation." Formal opinions are the only ones not presumed privileged. Informal opinions bind only the particular agency.

Paff contends that, contrary to the general trend toward open government, the attorney general "has created a body of secret law by increasingly withholding its legal interpretations from the public, thereby evading public oversight and accountability."

His lawyer, Montclair solo Richard Gutman, says agencies are "carrying out government functions based on secret interpretations." The attorney general is using a different name for what once would have been formal opinions, he says. They "used to be public without being asked; now you can't see it, even if you ask."

Former Attorney General John Degnan calls the drop in formal opinions "very surprising." He issued 65 of them during his tenure, 1978 to 1980.

Now chief operating officer for Chubb & Son in Warren, Degnan calls the recent lack of formal opinions a missed opportunity for attorneys general to exert a positive influence. "It is a mistake not to use the formal opinion as a way of communicating legally based guidance of general applicability to the public," he says.

W. Cary Edwards, attorney general from 1986 to 1988, issued no formal opinions but stresses their importance and says attorneys general should be making greater use of them.

He sees a "multiple hat" problem, with the individual lawyers who advise the agencies having a duty to protect client confidentiality while the attorney general has a broader obligation to the public. Edwards is chairman of the New Jersey State Commission of Investigation.

Del Tufo, who issued six formal opinions during his tenure as attorney general from 1990 to 1994, says the aim should be transparency where possible. Though client confidentiality must be maintained, it is "incumbent on the attorney general to issue public opinions on matters of public importance," adds Del Tufo, now with Skadden, Arps, Slate, Meagher & Flom in New York.

The case is pending before Mercer County Assignment Judge Linda Feinberg, with an Oct. 3 hearing date.

The Division of Law's response is due Aug. 29. Spokesman Lee Moore declines comment.