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Tice v. Department of Transportation: A Declining Role for the Attorney General

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Tice v. Department of Transportation: A Declining Role for the Attorney General?

In North Carolina, as in most states, the rights and powers inherent in the Office of the Attorney General have been established and defined by the common law and by constitutional and statutory provisions.[1] One of the powers widely held to vest in the Office is the prerogative to manage and control litigation involving state and public interests.[2] In *Tice v. Department of Transportation*[3] the North Carolina Court of Appeals announced an exception to this general principle, holding void a consent judgment entered into by an assistant attorney general. In *Tice* an assistant attorney general had represented defendant Department of Transportation (DOT) and had failed to obtain the agency's agreement to the consent judgment. Although the court left undisturbed the Attorney General's power to manage litigation when bringing an action or prosecuting an appeal in the State's name, the court concluded that an attorney general acting in a representative capacity on behalf of a state agency or department is bound by the traditional rules governing the attorney-client relationship and may not concede the client's substantive rights without the client's approval.[4]

This Note analyzes the *Tice* decision to determine whether the court's ruling is consistent with constitutional, statutory, and common-law delineations of the powers vested in the attorney general. The court in *Tice* focused attention on the appropriateness of separating the roles of chief law officer and representative counsel[5] and, in the latter role, reduced the attorney general's customary responsibility to serve as protector of the interests of the state and public. This Note concludes that *Tice* is consistent with constitutional, statutory, and common-law concepts of the power of the attorney general. Because the court failed to restrict its holding, however, the possibility remains that further limitations on the Attorney General's powers may be imposed.

In *Tice* plaintiff sought to establish title to a parcel of land connecting a

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1. *See generally* COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, COMMON LAW POWERS OF STATE ATTORNEYS GENERAL (1980) (concise overview of the historical development of the office of attorney general and the specific common-law powers vested in the offices of attorneys general) [hereinafter cited as COMMON LAW POWERS]; COMMITTEE ON THE OFFICE OF ATTORNEY GENERAL, THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, POWERS, DUTIES AND OPERATIONS OF STATE ATTORNEYS GENERAL (1977) (focusing primarily on present-day powers, but also including a history of the development of the office of attorney general) [hereinafter cited as POWERS, DUTIES AND OPERATIONS]; Edmisten, *The Common Law Powers of the Attorney General of North Carolina*, 9 N.C. CENT. L.J. 1 (1977) (examining the development of the Office of Attorney General in North Carolina).

2. *See* COMMON LAW POWERS, *supra* note 1, at 68; POWERS, DUTIES AND OPERATIONS, *supra* note 1, at 194.

3. 67 N.C. App. 48, 312 S.E.2d 241 (1984).

4. *Id.* at 57, 312 S.E.2d at 246.

5. Edmisten, *supra* note 1, at 10, 18 (distinguishing the roles of chief law officer and counsel to state agencies and departments).

state road to the waters of Tulls Creek Bay in northeastern North Carolina.[6] Defendant DOT also claimed an interest in the land. After protracted negotiations,[7] the Assistant Attorney General representing the DOT[8] entered into a consent agreement with plaintiff, setting the boundaries of the state road and enjoining plaintiff from interfering with use of the road. Defendant DOT filed a motion to set aside the agreement, asserting that the stipulations on which it was based were untrue and that the Assistant Attorney General lacked authority to enter into the consent agreement without the DOT's approval.[9]

The court of appeals invalidated the agreement, basing its holding on the legislative delegation to the DOT of exclusive authority for decisions affecting the state highway system.[10] Judge Whichard, writing for a unanimous panel, reasoned that the attorney general's common-law power to control litigation reaches its limit when exercise of that authority would usurp the exclusive authority expressly granted to a state department by the legislature.[11] *Tice*, therefore, stands for the proposition that the powers inherent in the attorney general are less extensive when the attorney general is engaged as counsel to a state agency or department than when he brings an action or prosecutes an appeal on behalf of the state itself.

The Office of the North Carolina Attorney General was created in the state constitution. Article III, section 7(1) of the North Carolina Constitution provides for the quadrennial election of the attorney general,[12] and section 7(2) states that the attorney general's duties "shall be prescribed by law."[13] Article 6 of the Executive Organization Act of 1971 further provides that "[t]he Attorney General shall have such powers and duties as are conferred on him by this Chapter, delegated to him by the Governor, and conferred by the Constitution and laws of this State."[14]

The body of law that defines the duties and related powers vested in the constitutionally created Office of Attorney General is derived from statutory

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6. Plaintiff also sought injunctive relief to prohibit defendant DOT from trespassing on her property. *Tice*, 67 N.C. App. at 49, 312 S.E.2d at 242.

7. Negotiations between the Assistant Attorney General and plaintiff lasted for almost two years, during which time the Assistant Attorney General maintained regular contact with officials of defendant. Plaintiff Appellant's Brief at 12-13.

8. The Assistant Attorney General represented defendant DOT pursuant to N.C. GEN. STAT. § 114-4.2 (1983), which states:

> The Attorney General is authorized to appoint from among his staff such assistant attorneys general and such other staff attorneys as he shall deem advisable to provide all legal assistance for the State highway functions of the Department of Transportation, and such assistant attorneys general and other attorneys shall also perform such additional duties as may be assigned to them by the Attorney General, and shall otherwise be subject to all provisions of the statutes relating to assistant attorneys general and other staff attorneys.

9. Defendant also alleged that the stipulations upon which the consent judgment was based were executed by the Assistant Attorney General "by mistake and inadvertence under a misapprehension of the true facts." *Tice*, 67 N.C. App. at 50, 312 S.E.2d at 242.

10. *See infra* note 40 and accompanying text.

11. *Tice*, 67 N.C. App. at 54, 312 S.E.2d at 245; *see also infra* note 42 and accompanying text (attorney general may not concede state agency's substantive rights without agency's consent).

12. N.C. CONST. art. III, § 7(1).

13. N.C. CONST. art. III, § 7(2).

14. N.C. GEN. STAT. § 143A-49.1 (1983).

provisions[15] and the common law. The statutory provisions, although extensive, do not expressly enumerate the powers inherent in the attorney general. The attorney general's common-law powers, specifically the authority to initiate, conduct, and maintain legal actions, have developed throughout the evolution of the Office.[16] There is some authority for the proposition that the North Carolina Attorney General retains the common-law powers of the Office,[17] but the state's courts never have ruled expressly on the extent of these powers.[18] The North Carolina General Assembly has provided that when the common law is not antithetical to the state's elemental system of government, it shall be applicable.[19] Because of the lack of North Carolina cases dealing with the common-law powers of the attorney general, it is necessary to look to other jurisdictions for an understanding of the development of these powers.

The office of attorney general had its nascence in the *attornatus regis* of thirteenth and fourteenth century England.[20] The *attornatus regis* served as the sovereign's primary legal representative, with considerable power subject to limitation only by the King. The office was carried over to colonial America, where it eventually became the office of attorney general. All fifty states have an office of attorney general created either by constitution or statute.[21] The specific powers and duties vested in the office vary greatly among the states. Although some states restrict the attorney general's common-law powers by express statutory or constitutional language,[22] the large majority of states have chosen to recognize the existence of these powers.[23]

The most far reaching of the attorney general's common-law powers is the authority to control litigation involving state and public interests. It is generally accepted that the attorney general is authorized to bring actions on the state's behalf.[24] As the state's chief legal officer, "the attorney-general has power, both under common law and by statute, to make any disposition of the state's litigation that he deems for its best interest. . . . [H]e may abandon, discontinue,

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15. *Id.* § 114-2.

16. *See* COMMON LAW POWERS, *supra* note 1, at 68; POWERS, DUTIES AND OPERATIONS, *supra* note 1, at 194.

17. *See, e.g.*, Sigmund Sternberger Found., Inc. v. Tannenbaum, 273 N.C. 658, 161 S.E.2d 116 (1968) (common-law power to protect beneficiaries of charitable trusts); State v. Thompson, 10 N.C. (3 Hawks) 613 (1825) (common-law power to enter a nolle prosequi); *In re* Southern Bell Tel. & Tel., 30 N.C. App. 585, 227 S.E.2d 645 (1976) (common-law investigatory powers).

18. Edmisten, *supra* note 1, at 2.

19. N.C. GEN. STAT. § 4-1 (1981).

20. For a more detailed description of the development of the Office of Attorney General from its origins in England through the colonial period, see COMMON LAW POWERS, *supra* note 1, at 9-14; POWERS, DUTIES AND OPERATIONS *supra* note 1, at 17-22.

21. *See* POWERS, DUTIES AND OPERATIONS *supra* note 1, at 30-31.

22. *See, e.g.*, Island-Gentry Joint Venture v. State, 57 Hawaii 259, 554 P.2d 761 (1976) (attorney general has exclusive authority to control all phases of civil litigation in which state has an interest, unless authority has been expressly or impliedly granted to another department); State *ex rel.* Derryberry v. Kerr-McGee Corp., 516 P.2d 813 (Okla. 1973) (common-law duties and powers inhere in attorney general absent express statutory or constitutional restrictions).

23. *See* COMMON LAW POWERS *supra* note 1, at 25-27 (identifying 35 states in which the attorney general is recognized as having common-law powers).

24. Edmisten, *supra* note 1, at 10.

dismiss or compromise it."[25] In addition to having authority to initiate and manage an action, the attorney general may elect not to pursue a claim or to compromise or settle a suit when he determines that continued litigation would be adverse to the public interest.[26]

Most courts have given the attorney general "a broad discretion . . . in determining what matters may, or may not be, of interest to the people generally."[27] The investment of such discretion is based on the premise that the attorney general should act on behalf of the public interest, or as the "people's attorney."[28] In an early North Carolina Supreme Court decision, the court refused to interfere with the attorney general's use of his discretionary power to enter a nolle prosequi on grounds that the authority had not been used "oppressively."[29] Other courts have left undisturbed the use of the power to control litigation as long as the attorney general's actions are not arbitrary, capricious, or in bad faith.[30]

Like the North Carolina Court of Appeals, the courts of several other jurisdictions have recognized limitations on the attorney general's powers when "authority . . . has been expressly or impliedly granted to another department or agency."[31] An attorney general's authority may be restricted explicitly by the statutes governing the office, or it may be impliedly limited by legislative assignment of certain powers to another state governmental body. Thus, the constitutional and statutory framework underlying a legislature's delegation of powers must be read in its entirety to determine the extent of the attorney general's authority.

The court in *Tice* expressly acknowledged the attorney general's common-

25. State v. Finch, 128 Kan. 665, 671, 280 P. 910, 912 (1929).

26. Secretary of Admin. & Fin. v. Attorney Gen., 367 Mass. 154, 326 N.E.2d 334 (1975); Lyle v. Luna, 65 N.M. 429, 338 P.2d 1060 (1959); *Tice*, 67 N.C. App. at 51, 312 S.E.2d at 243; State *ex rel.* Derryberry v. Kerr-McGee Corp., 516 P.2d 813 (Okla. 1973); Cooley v. South Carolina Tax Comm'n, 204 S.C. 10, 28 S.E.2d 445 (1943) (per curiam). *But cf.* Arizona State Land Dep't v. McFate, 87 Ariz. 139, 348 P.2d 912 (1960) (attorney general has no power to initiate and pursue claims in the public interest except in a few instances in which power is conferred specifically by statute).

27. Mundy v. McDonald, 216 Mich. 444, 450, 185 N.W. 877, 880 (1921).

The breadth of the modern attorney general's discretion resembles that of his common-law counterpart. In reviewing the historical development of the Office of Attorney General, the United States Court of Appeals for the Fifth Circuit stated:

> As chief legal representative to the king, the common law attorney general was clearly subject to the wishes of the crown, but, even in those times, the office was also a repository of power and discretion. . . . Transportation of the institution to this country, where governmental initiative was diffused among the officers of the executive branch and the many individuals comprising the legislative branch could only broaden this area of the attorney general's discretion.

Florida *ex rel.* Shevin v. Exxon Corp., 526 F.2d 266, 268 (5th Cir.), *cert. denied*, 425 U.S. 930 (1976).

28. Edmisten, *supra* note 1, at 36.

29. State v. Thompson, 10 N.C. (3 Hawks) 613, 614 (1825).

30. *See, e.g.*, Feeney v. Commonwealth, 373 Mass. 359, 366 N.E.2d 1262 (1977) (discretionary power not to be used in arbitrary or capricious manner); Cooley v. South Carolina Tax Comm'n, 204 S.C. 10, 28 S.E.2d 445 (1943) (Attorney General found to have acted in good faith).

31. Island-Gentry Joint Venture v. State, 57 Hawaii 259, 265, 554 P.2d 761, 765-66 (1976); *see supra* note 22 and accompanying text.

law power to control litigation when acting on behalf of the state.[32] The court, however, refused to extend this authority to situations in which the attorney general acts in a representative capacity on behalf of a state agency or department. The court reached its holding after reviewing the statutory powers of both the attorney general and the affected agency.

North Carolina General Statutes section 147-17 provides the statutory basis for the attorney general's representation of state agencies and departments.[33] The attorney general is afforded the exclusive power of representation: "No department, agency, institution, commission, bureau or other organized activity of the State which receives support in whole or in part from the State shall employ any counsel, except with the approval of the Governor."[34] The governor is authorized to hire other counsel on behalf of an agency or department "[w]henever the Attorney General shall advise [him] that it is impracticable for [the Attorney General] to render legal services to [the] State agency."[35] One commentator has suggested that "the courts would probably construe this statute as exclusive and would not permit appointment or employment of counsel other than the Attorney General by state agencies in situations not specified by North Carolina General Statutes [section] 147-17."[36] These statutory provisions indicate that the general assembly intended to limit state agencies' use of outside counsel and that, absent unusual circumstances, the attorney general is to be their sole legal representative. Although neither the general assembly nor the courts have identified explicitly those circumstances under which it would be "impracticable" for the attorney general to provide legal services to an agency or department,[37] it is arguable that *Tice* presents such a fact setting. When the attorney general believes that a compromise or consent agreement is in the best interest of the state and the public and when such an agreement would concede the agency's best interest, gubernatorial appointment of outside counsel on behalf of the affected agency would be consistent with North Carolina General Statutes section 147-17.[38]

The North Carolina General Assembly has created a complex framework

32. *Tice*, 67 N.C. App. at 51, 312 S.E.2d at 243.

33. N.C. GEN. STAT. § 147-17 (1983).

34. *Id.* § 147-17(a).

35. *Id.* § 147-17(b).

36. Edmisten, *supra* note 1, at 21.

37. For a general discussion of the role of the Attorney General as counsel for state agencies and departments, see Edmisten, *supra* note 1, at 18-21. Edmisten states that "North Carolina has not produced significant judicial statements on the common law authority of the Attorney General to represent state agencies *to the exclusion of other counsel.*" *Id.* at 20 (emphasis added).

38. *See, e.g.*, Clerk of Superior Court v. Treasurer and Receiver Gen., 386 Mass. 517, 437 N.E.2d 158 (1982) (special counsel appointed when Attorney General determined that further litigation of case was not in the public's interest); Teleco, Inc. v. Corporation Comm'n of Oklahoma, 649 P.2d 772 (Okla. 1982) (special counsel appointed when Attorney General was personally disqualified because of prior membership on defendant commission).

The court in *Tice* expressed concern that vesting power in the Attorney General to enter into a consent agreement without the consent of the agency "could cause State agencies and departments, with the approval of the Governor as required by G.S. 147-17(a), to engage in more extensive employment of their own counsel. . . . This practice would . . . cause additional expense to the State." *Tice*, 67 N.C. App. at 55, 312 S.E.2d at 245. Because of this potential for added expense, § 147-17 should be construed narrowly to preclude wholesale use of outside counsel by agencies and depart-

of institutional bodies it believes are needed to provide the services essential to the people of the State. The Executive Organization Act enumerates these various state agencies, departments, bureaus, and commissions and their respective areas of responsibility.[39] The court in *Tice* focused on the purposes and powers of the DOT as delineated in the pertinent statutes.[40] From its research the court determined, "It is thus clear that the legislature has provided a comprehensive scheme in which all decisions relating to the State highway system have been delegated to defendant DOT."[41]

After reviewing the statutes governing the powers and duties of the Attorney General and the DOT, the court concluded that a consent agreement entered into by the Assistant Attorney General derogated the responsibilities and authority of the DOT and contravened the legislative intent evidenced by carefully delineated areas of responsibility. In recognizing the primacy of these statutory provisions, the court rejected application of the common-law notions governing the Office of Attorney General.

> We do not believe the legislature, by providing that the Attorney General would serve as counsel for State departments, intended to authorize him to make decisions in areas which have been specifically delegated to a designated department. That would be the effect of allowing the Attorney General to enter, without the consent of defendant DOT, a consent judgment which establishes the boundaries of a road and gives defendant DOT a right-of-way. We believe, instead, that the legislature intended that when the Attorney General represents a State department pursuant to G.S. 114-2(2), the traditional attorney-client relationship should exist.[42]

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ments dissatisfied with the attorney general's decisions regarding proper handling of litigation. *See also infra* note 59 and accompanying text (discussing appropriate use of outside counsel).

39. N.C. GEN. STAT. §§ 143A-1 to -245, 143B-1 to -492 (1983).

40. N.C. GEN. STAT. § 143B-346 (1983) provides that the DOT

> is to provide for the necessary planning, construction, maintenance, and operation of an integrated statewide transportation system for the economical and safe transportation of people and goods as provided for by law. . . . The Department of Transportation shall be responsible for all of the transportation functions of the executive branch of the State as provided by law . . . .

N.C. GEN. STAT. § 136-18(2) (Supp. 1983) states that the DOT has power

> to locate and acquire rights-of-way for any new roads that may be necessary for a State highway system, with full power to widen, relocate, change or alter the grade or location thereof and to change or relocate any existing roads that the Department of Transportation may now own or may acquire; to acquire by gift, purchase, or otherwise, any road or highway, or tract of land or other property whatsoever that may be necessary for a State highway system.

41. *Tice*, 67 N.C. App. at 54, 312 S.E.2d at 245.

42. *Id.* It is well established in North Carolina that in the traditional attorney-client relationship an attorney cannot enter into a consent agreement on behalf of his client without the client's consent. Howard v. Boyce, 254 N.C. 255, 118 S.E.2d 897 (1961); Bath v. Norman, 226 N.C. 502, 39 S.E.2d 363 (1946). An attorney, by virtue of inherent and implied authority, has considerable discretionary power in the management and control of litigation in which he is involved. Absent fraud or collusion, an attorney's actions, particularly those dealing with procedural matters, generally will be held to bind his client. *Bath*, 226 N.C. at 506, 39 S.E.2d at 365; Bizzell v. Auto Tire and Equip. Co., 182 N.C. 98, 108 S.E. 439 (1921). The courts, however, have been unwilling to deprive the individual litigant of the power to make decisions that constitute a compromise or concession of substantive rights in litigation. *Bath*, 226 N.C. at 506, 39 S.E.2d at 365. The attorney has neither inherent nor implied authority to compromise his client's cause or to consent to a judgment that

Thus, the DOT's statutorily conferred authority to determine the location of state roads and rights-of-way[43] constituted a substantive right not to be compromised or conceded without the Department's consent.[44] The Assistant Attorney General's disputed consent agreement constituted a usurpation of these powers in that it conceded the "whole corpus" of the Department's position.[45]

Although the logic of *Tice* is compelling,[46] the historical role of the attorney general as chief law officer and defender of the public interest may be undermined if certain principles underlying the holding are applied broadly. If the traditional attorney-client relationship is extended to all aspects of the attorney general's representation of state agencies and departments, thus eliminating the attorney general's common-law power to control litigation whenever he acts in a representative capacity, the decision could lead to a number of anomalous results.

Some authorities contend that, when acting as counsel to a state department or agency, the attorney general is not in a traditional attorney-client relationship with department or agency officials.[47] The Supreme Judicial Court of Massachusetts, for example, has held:

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concedes "the whole corpus of the controversy." *Bath*, 226 N.C. at 505, 39 S.E.2d at 365; *see also Howard*, 254 N.C. at 263, 118 S.E.2d at 903.

A consent agreement frequently has been compared to a contract. *See, e.g.*, King v. King, 225 N.C. 639, 35 S.E.2d 893 (1945); Rodriguez v. Rodriguez, 224 N.C. 275, 29 S.E.2d 901 (1944). Like a contract, a consent judgment results from an unqualified agreement between the parties. By refusing to permit an attorney to enter a consent judgment without the knowledge and acquiescence of his client, the courts have sought to ensure the primacy of clients' interests as clients perceive them.

It is important to distinguish the facts of *Tice* from those in cases involving suits brought by the attorney general on behalf of a state agency or department but not in a representative capacity. In Nash County Bd. of Educ. v. Biltmore Co., 464 F. Supp. 1027 (E.D.N.C. 1978), *aff'd*, 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981), the County Board of Education filed a federal antitrust action against certain dairy companies. Defendants moved for summary judgment on the ground that plaintiff's action was barred by res judicata. In an earlier action brought in state court, the Attorney General had claimed violations of state antitrust laws by the same defendants. That litigation ended when the parties reached a consent agreement. The court held for defendants, ruling that, for purposes of res judicata, the Attorney General and plaintiff Board of Education were the same party and that the Attorney General had the authority to act on behalf of the County and bind the County even though the County had not consented to the prior consent judgment.

43. *See supra* note 40.

44. "Neither expressly nor by necessary implication does North Carolina General Statute[s] § 114-2 authorize the Attorney General or his staff to concede a substantial right of a State agency as to a matter which the General Assembly has placed within the agency's authority and discretion." Defendant Appellee's Brief at 4.

45. Many of the compromise agreements entered into by a state attorney general involve unresolved tax liabilities. *See infra* note 49 and accompanying text. The distinction between these cases and *Tice* rests on the concept of substantive rights. When an attorney general negotiates a compromise agreement with a taxpayer, no substantive rights are conceded–the taxpayer's basic obligation to pay taxes is not disturbed. In *Tice*, however, there is no "middle ground." Either North Carolina will enjoy right-of-way access to the bay and complete use of the public road or it will not. An agreement that concedes either of these two points gives up a substantive right of the State.

46. The implied limitation on discretionary power to control litigation inhering at common law in the Office of Attorney General is clear from the express grants of authority to the DOT. *See supra* note 40 and accompanying text.

47. *See, e.g.*, Secretary of Admin. & Fin. v. Attorney Gen. 367 Mass. 154, 326 N.E.2d 334 (1975) (traditional attorney-client relationship does not exist when an attorney general "appears for" an officer, department head, or secretary); Edmisten, *supra* note 1, at 17.

> The Attorney General represents the Commonwealth as well as the Secretary, agency or department head who requests his appearance. . . . He also has a common law duty to represent the public interest. . . . Thus, when an agency head recommends a course of action, the Attorney General must consider the ramifications of that action on the interests of the Commonwealth and the public generally, as well as on the official himself and his agency. To fail to do so would be an abdication of official responsibility.[48]

Belief in the primacy of the common-law duty to represent the public interest has led some courts to uphold compromise settlements entered into by attorneys general when the agreements were challenged by those agencies on whose behalf the attorneys general ostensibly acted. Typically, these compromise settlements have occurred in tax cases in which the attorney general negotiated with the taxpayer for payment of some portion of an outstanding tax liability.[49] A comparable result was reached in an Oklahoma case in which the Attorney General compromised and settled a price-fixing claim contrary to the wishes of the Governor.[50] Courts generally have held that the attorney general has the sole authority to decide whether to appeal an adverse action relating to litigation involving state agencies and departments.[51]

In each of these situations, the attorney general's decision to proceed without the approval of the agency or office represented was based on a good faith determination that continued litigation was not in the public's best interest. The decisions to enter into compromise agreements did not concede the agencies' substantive rights.[52] These cases thus are distinguishable from *Tice* and are good examples of the practical application of the attorney general's common-law duty to defend the public interest.

Not all courts have been so willing to allow the attorney general this measure of discretion when he is engaged in a representative capacity on behalf of a state agency or department.[53] For instance, the Wyoming Supreme Court

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48. Secretary of Admin. & Fin. v. Attorney Gen., 367 Mass. 154, 163, 326 N.E.2d 334, 338 (1975).

49. *See, e.g.*, State *ex rel.* Carmichael v. Jones, 252 Ala. 479, 41 So.2d 280 (1949) (compromise agreement entered into by Attorney General representing Department of Revenue upheld); Lyle v. Luna, 65 N.M. 429, 338 P.2d 1060 (1959) (stipulation of settlement entered into by Attorney General representing Bureau of Revenue upheld despite challenge by Bureau officials); Cooley v. South Carolina Tax Comm'n, 204 S.C. 10, 28 S.E.2d 445 (1943) (per curiam) (compromise agreement between executors of estate and Attorney General representing Tax Commission upheld despite attack on agreement by two of three commissioners); *see also supra* note 45 (distinguishing tax liability cases from *Tice* on basis of substantive rights).

50. State *ex rel.* Derryberry v. Kerr-McGee Corp., 516 P.2d 813 (Okla. 1973) (absent legislative or constitutional expression to contrary, Attorney General had complete control over all litigation in which he appeared on behalf of the state).

51. Secretary of Admin. & Fin. v. Attorney Gen., 367 Mass. 154, 326 N.E.2d 334 (1975); State *ex rel.* Derryberry v. Kerr-McGee Corp., 516 P.2d 813 (Okla. 1973).

52. *See supra* note 45.

53. In a 1919 North Dakota decision, the state supreme court stated:

> [A]lthough it is perfectly obvious under the statute that the attorney general is the general and the legal advisor of the various departments and officers of the state government, and entitled to appear and represent them in court, this does not mean that the attorney general, standing in the position of an attorney to a client, who happens to be an officer of the government, steps into the shoes of such client in wholly directing the defense and the legal

stated:

> The rule . . . would seem to be that the Attorney General has power to settle and compromise a suit, when the rights of the state are in doubt and are in honest dispute, *at least when he acts with the approval of the executive head of the department* which may, in any case, have the matter involved in the suit in his particular charge.[54]

When confronted with a similar question, another court adopted a uniquely practical approach: it refused to allow an assistant attorney general to compromise a subrogation claim of the Workmen's Compensation Bureau. The ready availability of individuals with authority to approve the compromise and the absence of an emergency that precluded obtaining consent were significant considerations in the court's decision.[55]

Although the *Tice* court carefully limited its holding to an attorney general's entry into a consent judgment without the consent of the agency or department, some of the court's dicta reflect a concern over possible overreaching by the Attorney General and the potential for conflict between the Office of the Attorney General and the executive branch of state government.[56] It is unclear whether the court intended its language to be construed as a precursor to additional restrictions on the exercise of independent judgment by the attorney general when acting in a representative capacity, or whether the term "consent" as used by the court was intended to refer solely to consent agreements. If the court was forecasting additional restrictions, its decision in *Tice* may indicate a significant potential for change in the attorney general's common-law powers, with separation between the roles of chief law officer and representative counsel.[57]

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steps to be taken in opposition or contrary to the wishes and demands of his client or the officer or department concerned.

State *ex rel.* Amerland v. Hagan, 44 N.D. 306, 311, 175 N.W. 372, 374 (1919); *see also* Pennsylvania Liquor Control Bd. v. Kusic, 7 Pa. Commw. 274, 299 A.2d 53 (1973) (court distinguished between state agency acting in an executive capacity and state agency acting in a judicial capacity; held agency bound by Attorney General only when acting in former role).

54. State *ex rel.* Wilson v. Young, 44 Wyo. 6, 20, 7 P.2d 216, 221 (1932) (emphasis added).

55. Robinson v. State, 63 N.W.2d 521 (N.D. 1954).

56. After reviewing the constitutional and statutory provisions relating to the offices of Governor and Attorney General, the court stated:

> The constitutional independence of these offices, and their differing functions and duties, create clear potential for conflict between their respective holders. In the event of such conflict, power in the Attorney General to resolve, without their consent, controversies involving agencies or departments under the supervision of the Governor, could be abused by exercise in a manner effectively derogative of the Governor's constitutional duties to exercise executive power and to supervise the official conduct of all executive officers.

Tice, 67 N.C. App. at 55, 312 S.E.2d at 245.

57. Carried to its logical extreme *Tice* would lead to a "split personality" attorney general. When dealing with a matter not involving a state agency or department, the attorney general's primary goal would be to seek a resolution in the best interest of the public generally. When acting in a representative capacity on behalf of a state agency or department, however, the attorney general would be concerned only with implementing the will of agency heads–his role would be analogous to that of an outside counsel. Further, he would have little choice but to implement decisions he believed to be contrary to the public's best interest or to request appointment of special or outside counsel. *See also supra* note 38 (use of outside counsel should be restricted to avoid additional expense to state).

The North Carolina General Statutes provide that an agency may employ outside counsel if its request is approved by the Governor.[58] Obtaining outside counsel would appear to be appropriate for the limited number of cases in which the Attorney General concludes in good faith that a decision affecting the substantive rights of an executive agency would not be in the public's best interest.[59] For those disputes in which the agency's substantive rights are unaffected–that is, when expressly delegated authority is not usurped by the attorney general's proposed action–the common-law power to control litigation should be retained by the attorney general. The statutorily delineated powers of individual state agencies would be preserved, and the Attorney General would not be in a position of abdicating his official responsibility to protect the interests of the general public.

Some observers may be disturbed by the application of *Tice* to only consent judgment and substantive rights cases. One commentator has written that "the Attorney General should be extremely cautious in attempting to substitute his policy judgment as to what is in the public interest for that of a state agency for which he is the lawyer."[60] This cautionary note is appropriate. Decisions of the attorney general must not be arbitrary, capricious, or undertaken in bad faith; indeed, the courts likely will continue to overturn such decisions. Nevertheless, expansion of *Tice* would undermine the attorney general's role as the defender of the public interest, leaving the ultimate decisions as to the proper conduct of litigation in the hands of agency officials not vested either by statute or common law with this authority.

In *Tice* the North Carolina Court of Appeals crafted a narrow holding consistent with constitutional, statutory, and common-law notions of the powers inherent in the Office of Attorney General. The court's failure to preclude an expansion of its holding to a broader range of representational questions, however, leaves open the possibility that the attorney general's powers could be further diminished. Such a limitation of authority would affect adversely both the Office of Attorney General and the protection of the public interest that it provides. The court should close the door on this potentiality in order to preserve the common-law powers of the attorney general.

WILLIAM C. HAFLETT, JR.

58. *See supra* notes 33-36 and accompanying text.

59. Concerning the issue of an Attorney General's reluctance to do the bidding of an executive agency, the Massachusetts Supreme Court has stated:

> [W]here there is a policy disagreement between the Attorney General and the Governor or his designee, the appropriate procedure would be for the Attorney General to appoint a special assistant to represent the Governor's interests. It is only where the Attorney General believes that there is no merit to the appeal, or where the interests of a consistent legal policy for the Commonwealth are at stake, that the Attorney General should refuse representation at all.

Secretary of Admin. & Fin. v. Attorney Gen., 367 Mass. 154, 165 n.8, 326 N.E.2d 334, 339-40 n.8 (1975).

60. POWERS, DUTIES AND OPERATIONS *supra* note 1, at 34.