Serving Two Masters

Attorney General Dennis Vacco took an oath to defend the state in court. Was he wrong to back a lawsuit to overturn his government's HIV-testing disclosure policy? By Gene Bryan Johnson

Governor George Pataki strode up to the podium at the headquarters of the Association to Benefit Children two months ago announcing that the state had changed its mind. His administration had decided to settle a lawsuit in state Supreme Court seeking to institute a new program of mandatory HIV testing of all infants born in New York.

Currently, every newborn is anonymously tested for HIV, but the test results are kept confidential—used only for statistical analysis. The privacy rule preserves complete anonymity in the HIV testing process, based on the concern that women and babies found to be HIV-positive would be vulnerable to discrimination in housing, medical services and employment if their medical records were exposed—which is a common enough occurrence. AIDS advocates statewide have been passionate supporters of the privacy rule.

The lawsuit settlement would eliminate that anonymity, however, in an effort to direct medical assistance to HIV-positive newborns. From the time the association's case was filed in March, the Pataki administration let it be known that it was sympathetic to the organization's goal. The governor's announcement of an accommodating settlement, therefore, came as little surprise.

Pataki was not the only state official voicing support for the litigation. In fact, Attorney General Dennis Vacco was on record as supporting the association's pro-disclosure position. Yet Vacco was the same man responsible for defending the privacy policy in court. His equivocal position raises a long-disputed question: when a state policy conflicts with the politics of the state's attorney, should he recuse himself from the case?

Good Faith

Terry McGovern, an attorney with Manhattan's HIV Law Project and a "defendant-intervenor" in the lawsuit, believes that Vacco should have stepped aside. Others in the legal community agree.

The HIV Law Project represents homeless and other indigent men and women with AIDS. After the litigation had been brought, McGovern petitioned the judge to allow her to enter the case, she says, because she believed the Republican attorney general didn't intend to fight the suit in good faith. She raised a vexing legal and ethical issue:

"If this is the way these things are going to be handled, the governor simply needs to get his friends to bring lawsuits on issues that he wants to see policy changes on," says McGovern. "Then he can just have the attorney general settle."

"I believe the attorney general is the lawyer for the state, and lawyers traditionally don't make policy, they enforce policy."

To prove her point that Vacco was biased, McGovern cites an editorial Vacco wrote in the September 12 *Albany Times-Union*. "I firmly support the unblinding of HIV test results so parents can be provided with critically important information that will allow them to make necessary decisions," he wrote.

Stephen Gillers, a New York University Law School professor who teaches ethics, thinks Vacco's conduct straddled a serious ethical fault line.

"If the attorney general disagrees with state policy, what does he do when someone sues against that policy?" Gillers asks. " I believe the attorney general is the lawyer for the state and lawyers traditionally don't make policy, they [enforce] policy."

At issue is how much discretion an official like Vacco should have in choosing which lawsuits to vigorously fight. The New York State constitution merely stipulates that the attorney general is required to "defend all actions and proceedings in which the state is interested." The courts have never decisively ruled if this means the attorney general must fight all lawsuits with equal force.

Broad Discretion

Still, Gillers says he thinks Vacco should have recused himself from the case and allowed others to negotiate a settlement on his behalf. The replacement counsel could have been chosen by the state legislature or others in the administration.

"Vacco's job is to defend policy, not subvert it by putting up a weak defense," Gillers adds.

Not all ethicists agree, however. "This isn't an easy question," concedes Hofstra law professor Monroe Friedman. But Friedman thinks Vacco's behavior was in order. He says that an elected official has "broad discretion in such matters" and could decide which lawsuits to defend and which to concede.

Vacco himself has no doubts about his role. "It was the lawsuit that prompted a thorough review of existing regulations and laws, not vice versa," says his spokesperson, Joe Mahoney. "It wasn't as if, prior to the lawsuit, people [in Vacco's office] were going around saying we think that the tests should be unblinded.

"If the voters don't like the way policies are set," he adds, "they can change the leaders and go back to what they had before."

There is potential for this type of conflict on even more explosive issues than the HIV-testing lawsuit. During the 1994 race, Vacco, who campaigned on an anti-abortion stance, was asked if he could rigorously enforce laws guaranteeing access to abortion clinics. His answer: "I think it's ludicrous to suggest that I'm going to deny my oath of office."

That oath reads, in part: "to faithfully discharge the duties of the office of attorney general." One of those duties, Vacco's critics point out, was to defend the state against the HIV-testing lawsuit. ■

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