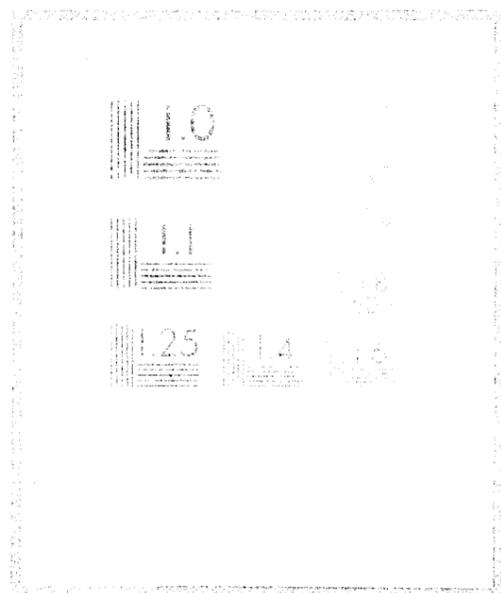


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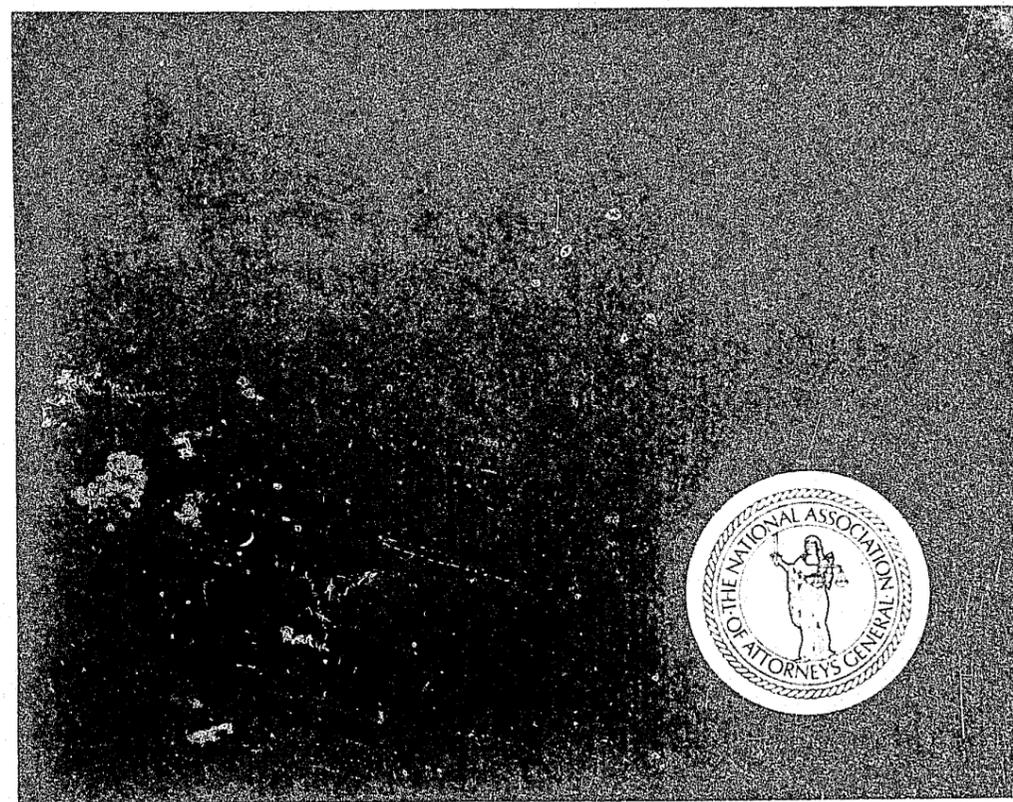
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The Structure of State Legal Services

December, 1976

The National Association of Attorneys General
Committee on the Office of Attorney General



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STRUCTURE OF STATE LEGAL SERVICES



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December, 1976

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1. THE SCOPE OF LEGAL SERVICES

This report reviews alternative arrangements for providing legal services to state agencies. These range from centralized legal services, under the Attorney General, to employment of counsel by numerous state agencies. All Attorneys General also employ special counsel on a temporary basis, although the frequency of such employment varies.

Number of Attorneys

Attorneys General now employ 4,661 attorneys, 4,323 of them on a full-time basis. Of these, 3,901 of the full-time and 239 of the part-time attorneys are paid by Attorneys General and the rest by other agencies. In addition, state agencies employ attorneys, although information is insufficient to give a total figure. These figures indicate the extent of legal services in terms of the number of attorneys delivering them.

Table 1 shows the number of attorney positions in Attorneys General's offices and whether they are paid by the Attorney General or by another agency. It should be noted that the source of funding may not reflect any advisory or supervisory relationship but, instead, may be merely a matter of disbursement. The table also shows the number of attorney positions in other state agencies, where this has been reported to COAG. These are not all house counsel positions. In three states, these attorneys are appointed by the Attorney General, although they are located in and paid by state agencies. More detailed information on these positions is given in Table 2 and throughout this report.

The number of full-time attorneys in Attorneys General's offices ranges from 7 in American Samoa and 11 in Montana, Nevada and North Dakota, to 449 in California and 464 in New York. Half of the Attorneys General's offices have fewer than 50 attorney positions. The offices may be grouped as follows.

- 1-24 attorneys: Arkansas, Guam, Idaho, Kansas, Montana, Nevada, North Dakota, Samoa, South Dakota, Vermont, Wyoming
- 24-49 attorneys: Alaska, Delaware, Hawaii, Kentucky, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, Oklahoma, Rhode Island, South Carolina, Tennessee, Utah, Virgin Islands, West Virginia
- 50-74 attorneys: Arizona, Georgia, Indiana, Iowa, Louisiana, Maine, North Carolina, Wisconsin
- 75-99 attorneys: Alabama, Colorado, Connecticut, Florida, Puerto Rico, Virginia
- 100-124 attorneys: Massachusetts, Oregon
- 125-149 attorneys: Maryland, Pennsylvania, Texas

TABLE 1: NUMBER OF ATTORNEY POSITIONS AUTHORIZED (Note: Attorneys who cannot appear in court have been excluded, whenever this information is known.)

	In Attorney General's Office			In Other Agencies Paid by Them
	Paid by AG	Paid by Other	Total	
Ala.-76 FY	51 FT	26 FT	77 FT	
Alaska-1976	29 FT	18 FT	47 FT	12 FT
Ariz.-76 FY	50 FT	22 FT	72 FT	
Ark.-75 FY	20 FT	No Response	20 FT	
Calif.-1976	449 FT	0	449 FT	over 600
Colo.-75 FY	83 FT	5 FT; 1 PT	88 FT; 1 PT	3 FT
Conn.-1976	75 FT; 1 PT	23 FT	98 FT; 1 PT	1 FT
Del.-1976	42 FT; 1 PT	0	42 FT; 1 PT	17 FT; 9 PT
Fla.-1976	75 FT	2 FT	77 FT	225 FT
Ga.-1976	53 FT	0	53 FT	8 FT
Guam-1976	17 FT	0	17 FT	6 FT; 8 PT
Hawaii-76FY	45 FT	No Response	45 FT	
Idaho-75 FY	13-1/2 FT; 2 PT	1/2 FT	14 FT; 2 PT	18-1/4 FT
Ill.-75 FY	156 FT; 180 PT	6 FT; 50 PT	162 FT; 230 PT	27 FT
Ind.-1976	85 FT	0	85 FT	1 FT; 2 PT
Iowa-76 FY	42 FT	17 FT	59 FT	8 FT (est.)
Kan.-76 FY	19 FT	0	19 FT	2 FT
Kty.-76 FY	32 FT; 2 PT	0	32 FT; 2 PT	Unknown
La.-1976	70 FT; 6 PT	2 FT	72 FT; 6 PT	Unknown
Maine-1976	35 FT	16 FT	51 FT	18 FT
Md.-1976	47 FT	94 FT	141 FT	6 FT; 1 PT
Mass.-1976	85 FT	17 FT	102 FT	Unknown
Mich.-76 FY	189 FT	3 FT	192 FT	0
Minn.-1976	34 FT; 6 PT	0	34 FT; 6 PT	73 FT; 28 PT*
Miss.-76 FY	26 FT	3 FT	29 FT	
Mo.-76 FY	41 FT; 12 PT	5 PT	41 FT; 17 PT	
Mont.-1976	11 FT; 4 PT	0	11 FT; 4 PT	68 FT; 20 PT
Neb.-1976	18 FT	10 FT; 4 PT	28 FT; 4 PT	5 FT; 1 PT
Nev.-1976	9 FT	2 FT	11 FT	32 FT
N.H.-76 FY	25 FT; 1 PT	1 FT	26 FT; 1 PT	4 FT
N.J.-76 FY	255 FT	0	255 FT	0
N.M.-1976	42 FT	0	42 FT	55 FT
N.Y.-1976	464 FT; 2 PT	0	464 FT; 2 PT	+476(est) 40(est)
N.C.-76 FY	55 FT	17 FT	72 FT	12 FT(est)
N.D.-1976	11 FT	0	11 FT	17 FT; 2 PT*
Ohio-76 FY	156 FT; 15 PT	44 FT; 39 PT	200 FT; 54 PT	Unknown
Okla.-1976	26 FT	1 FT	27 FT	85 FT
Ore.-1976	107 FT	0	107 FT	0
Pa.-1976	94 FT	33 FT	127 FT	362 FT
P.R.-73 FY	81 FT	No Response	81 FT	
R.I.-76 FY	29 FT	1 FT	30 FT	8 FT; 25 PT
Samoa-1976	6 FT	1 FT	7 FT	2 PT
S.C.-1976	48 FT	1 FT	49 FT	26 FT*
S.D.-1976	24 FT	0	24 FT	0
Tenn.-1976	25 FT	2 FT	27 FT	25 FT
Tex.-1976	124 FT	19 FT	143 FT	300 FT; 1 PT
Utah-1976	45 FT; 6 PT	0	45 FT; 6 PT	6 FT
Vt.-1976	15 FT	0	15 FT	42 FT
V.I.-76 FY	27 FT	0	27 FT	6 FT
Va.-1976	53 FT	35 FT	88 FT	9 FT
Wash.-1976	160 FT	0	160 FT	Unknown
W.Va.-75 FY	31 FT	0	31 FT	2 FT
Wis.-1976	73 FT; 1 PT	0	73 FT; 1 PT	179 FT
Wy.-1976	24 FT	0	24 FT	0

FT: Full-Time; PT: Part-Time (*Appointed by Attorney General)

150-174 attorneys: Illinois, Washington

175-199 attorneys: Michigan

200 and over attorneys: California, New Jersey, New York, Ohio

Information on the number of attorney positions in other agencies is less complete, as 18 states did not report this information. Of those states for which information is available, 13 have fewer attorneys in the Attorney General's office than in other state agencies. These states are: California, Florida, Idaho, Minnesota, Montana, Nevada, New Mexico, North Dakota, Oklahoma, Pennsylvania, Tennessee, Vermont and Wisconsin. In two of these states (Minnesota and North Dakota), the agency attorneys are appointed by the Attorney General. In two others (New Mexico and Wisconsin), the 1977 legislature will be asked to consider consolidation of legal services.

There has been a sharp increase in the number of attorneys employed by states in recent years. In 1970, approximately 3,000 attorneys were employed by Attorneys General, 2,760 of them on a full-time basis. By 1976, this had increased to 4,661 attorneys, 4,323 of whom were full-time. The following table compares information reported to COAG by states for 1970 and 1976. It is limited to those jurisdictions which reported information for both years. The numbers given include both positions in the Attorney General's office and in state agencies.

TABLE 2: INCREASE IN NUMBER OF ATTORNEY POSITIONS

Jurisdiction	1970	1976
Alaska	20 FT	59 FT
Delaware	10 FT; 9 PT	59 FT; 10 PT
Georgia	28 FT; 13 PT	61 FT
Guam	11 FT	23 FT; 8 PT
Indiana	80 FT	86 FT; 2 PT
Maryland	65 FT	147 FT; 1 PT
Minnesota	86 FT	107 FT; 34 PT
Montana	46 FT; 3 PT	79 FT; 24 PT
New Jersey	95 FT	255 FT
New Mexico	23 FT	97 FT
North Carolina	50 FT; 1 PT	88 FT; 1 PT
North Dakota	32 FT; 7 PT	28 FT; 2 PT
Oklahoma	61 FT	111 FT
Oregon	97 FT	107 FT
Samoa	4 FT	9 FT
South Carolina	25 FT; 1 PT	75 FT
South Dakota	19 FT; 6 PT	24 FT
Utah	24 FT	54 FT
Vermont	20 FT	56 FT
Virgin Islands	15 FT	33 FT
Virginia	35 FT	97 FT
Washington	131 FT	160 FT
Wyoming	16 FT	24 FT

In one state (North Dakota) the number of attorney positions appears to have decreased and in another (Indiana) there has been little change. In the rest of the states, however, the relative number has increased sharply. There are various reasons for this growth, including: the implementation of new programs, such as consumer protection and antitrust, that require a high percentage of attorneys on the staff; an increased number of suits against the state in such areas as corrections and welfare; the overall growth in state government, with a concomitant growth in the need for legal services; decreased use of special counsel in many states; and participation in federally-funded projects by many Attorneys General's offices.

Attorneys Serving in a Non-Legal Capacity

This report is concerned only with agency counsel. Figures herein do not include the many attorneys who work for state governments in a non-legal capacity, such as administrators. Neither do they include many who serve as legal advisors or participate in administrative law proceedings. For example, Washington reports that some agencies have on their staffs individuals who are admitted to practice, and serve as administrators and hearing examiners. Nebraska reports that attorneys are employed in various capacities throughout state agencies; they do not appear in court, and act primarily in an administrative capacity, but are called "agency legal counsel."

The distinction between who is and who is not serving as an agency counsel may be difficult to define. A California statute prohibits state agencies from employing any legal counsel other than the Attorney General or one of his assistants in any matter in which the agency is interested. An Attorney General's opinion held that an administrative adviser to a department, although required to be a member of the state bar, was not a "counsel" within the meaning of this statute.¹ However, the hiring of an attorney by a special crime commission was held to be unlawful.²

New Jersey's statute which prohibits the employment of counsel by state agencies permits them to "employ an attorney-at-law under full-time employment solely in the performance of administrative functions entailing the hearing of issues and determining facts in order that the said officer ... may perform his ... functions as required by law; provided, however, that no such attorney shall act in a legal capacity in the prosecution of any charge or complaint before any such officer"

A 1920 Montana case was adjudicated on this precise point. The Montana State Efficiency and Trade Commission was created to investigate the financial and business procedures of state agencies. The State Auditor refused to compensate him for his services, maintaining that such services must be performed by the Attorney General. The court held the fact that the claimant was an attorney did not alter the fact that his duties were not those assigned to the Attorney General.³ This ruling was followed in a subsequent case where the court permitted the commission to employ another attorney to prepare legislation to implement its recommendations.⁴ Likewise, the Ohio court ruled that the certification of land titles did not constitute "practice of law," and the highway department could independently employ attorneys or other persons to do this work.⁵

The Arizona Supreme Court held that the Industrial Commission's attorneys could engage in litigation, because the commission administered trust fund of insurance premiums. The commission was exempted from the prohibition against employing an attorney because his fee was paid from the fund, so "was not a state charge and was not paid out of money collected by general taxation."⁶

Type of Services

Attorneys employed by the state, whether in Attorneys General's offices or other state agencies, perform a great variety of legal services. A 1975 COAG report, *Selected Statistics on the Office of Attorney General*, gave some indication of this by listing the sections and divisions in each Attorney General's office. The list reflected numerous functional areas, corresponding to virtually all major programs of state governments, where legal staffs rendered services. It also reflected additional areas, such as anti-trust, consumer protection, and organized crime, where the Attorney General provides legal services directly, rather than on behalf of a state agency.

The following job description developed by the Wisconsin Department of Justice for a senior attorney shows the kinds of work that attorneys might perform for the state. The attorney:

Is responsible for the preparation, trial and argument of cases in various courts in the state and in federal district courts.

Is responsible for and handles matters appealed to the Supreme Court, Circuit Court of Appeals or U. S. Supreme Court.

Prepares pleadings, briefs and allied court papers in connection with suits, trials, hearings or other court procedures.

Performs legal research in connection with the preparation of trial and appellate briefs and formal and informal legal opinions.

Advises and assists state departments in the conduct of hearings and conferences and in the preparation of findings of fact, conclusions of law and decisions.

Acts as a legal expert and performs specialized legal services relating to one or more specific areas of law, but continues to remain proficient in and capable of acting in most areas.

Supervises the work of assistants.

Advises heads of departments and district attorneys.

Drafts formal opinions.

Examines and analyzes the legal sufficiency of contracts, leases, bonds and claims.

Examines abstracts of title and renders opinions thereon.

Performs legal investigations.

Answers correspondence.

Performs related work as required.

A recent Wisconsin study of 146 house counsel⁷ determined their average time allocation for different activities. Because of overlapping categories and averaging, the total percentage exceeds 100%; the results were as follows:

provide legal service to agency personnel	25%;
draft administrative rules and guidelines	5%;

represent agency at hearings	9%;
investigate possible law violations	9%;
represent agency in court	2%;
other litigation	7%;
draft legal documents	8%;
provide information or advice to other departments/public	13%;
administrative work	32%;
liaison with Department of Justice	3%;
other (review of legal drafts, training, drafting, legislation)	6%.

These two examples indicate the scope of state legal services in terms of the kinds of work performed. Many attorneys employed by the state, of course, may specialize in one type of work, and most specialize in one or more subject areas. Overall, however, state legal services encompass most areas of the practice of law.

2. AUTHORITY TO PROVIDE LEGAL SERVICES

Authority to provide legal services for the state is found in constitutions, statutes and case law. The common law also provides authority for such employment.

Constitutional Provisions

According to a 1970 study, 24 states have constitutional provisions which prescribe some duties of the Attorney General.⁸ Some of these relate to his role in providing legal services to state agencies.

An Illinois circuit court recently found unconstitutional legislation which empowered the state environmental protection agency to prepare and present cases before the Pollution Control Board. The state's constitution provides that "the Attorney General shall be the legal officer of the State and shall have the duties and powers that may be prescribed by law," and statutes require him "to institute and prosecute all actions and proceedings" which are necessary for the state. That part of the Environmental Protection Act which requires the EPA "to prepare and present enforcement cases before the [Pollution Control] Board" was held in Illinois ex rel. Scott v. Briceland et al., to be in contravention of these provisions and, therefore, unconstitutional insofar as it required the EPA to present cases before the Board without legal representation by the Attorney General.⁹

Statutory Authority

All states, by statute, direct the Attorney General to provide legal services for the state. Statutes usually define the Attorney General's duties in considerable detail. While there is great variation among these statutes, virtually all direct him to appear for the state in court, to render advisory opinions, and to otherwise serve as the state's lawyer. The statutes also usually define what agencies, other than the Attorney General, can employ counsel.

In states where the Attorney General controls all legal services, other agencies are usually prohibited by law from employing counsel. Michigan's law is typical. It states that "all legal services, including representation before courts and administrative agencies, rendering legal opinions and providing legal advice to any state department or agency, shall be performed by the Attorney General and no state agency shall employ or enter into a contract with any other person for such services."¹⁰

The Virgin Islands gives the Attorney General power "to supervise and direct the legal business of every executive department,..."¹¹ In Arizona, "no state agency other than the attorney general shall employ legal counsel or make an expenditure or incur an indebtedness for legal services," except for agencies specifically exempted by law.¹² Ohio law says that "no state, officer, board ... shall employ or be represented by, other counsel."¹³

Those agencies other than the Attorney General that employ counsel, usually do so under explicit statutory authority. Kentucky law, for example, says :

The Governor, or any department with the approval of the Governor, may employ and fix the term of employment and the compensation to be paid to an attorney ... for legal services to be performed for the Governor or for such department. Before approving the employment of an attorney the Governor shall consult the Attorney General as to whether legal services requested by departments are available in the Attorney General's office¹⁴

In most instances, however, legislatures only give specific agencies authority to hire counsel. This more customary approach is exemplified by Maryland's law, which gives the Attorney General exclusive authority to perform legal work, except as otherwise provided by statute:

The Attorney General shall have general charge, supervision and direction of the legal business of the State, except as provided in Sec. 12 of this article and any other provisions of law, and he, together with his assistants, shall perform the duties now or hereafter prescribed by the Constitution and laws of this State, and in addition thereto shall be the legal adviser and representative of and perform all legal work for the following boards, commissions, departments, officers and institutions:

[listing eleven agencies]

and also all other boards, commissions, departments, officers or institutions of the State government, except as provided in Sec. 12 of this article, or as otherwise provided by law.¹⁵

The section 12 referred to exempts a few agencies. This statute ensures the only exceptions to centralized legal services will be those approved by the agency.

An alternative is found in Minnesota law, which provides :

The attorney general shall act as the attorney for all state officers and all boards or commissions created by law in all matters pertaining to their official duties ...; and when, in his judgment, the public welfare will be promoted thereby the attorney general may, upon request in writing, employ a special attorney for any such board, commission, or officer and fix his compensation ... and when such special attorney is so employed his fees or salary shall be paid from the appropriation made for such board, commission, or officer. Except as herein provided, no board, commission, or officer shall hereafter employ any attorney at the expense of the state.¹⁶

This allows the Attorney General to decide whether agencies need to have special counsel assigned to them.

Another approach is found in Oregon. The statutes provide that "the Attorney General shall, when requested, perform all legal services for the state or any department or officer of the state";¹⁷ there are no exceptions to this. This statute, however, gives agencies certain controls over the Attorney General's authority, by providing that the counsel assigned to an agency must be approved by the chief administrator of the agency, and that the Attorney General shall not appear on behalf of any officer of agency without its consent. The same statute specifies "the responsibility of establishing policies for each agency, department, board or commission shall rest upon the chief administrator thereof."

These are a few examples of the statutory bases for state legal services. These and other approaches are discussed in more detail in the next chapter of this report.

Common Law Powers

The courts of most states have held that the Attorney General is charged with all the common law powers and duties pertaining to his office except insofar as they have been limited by statute.¹⁸ The extent to which the common law is recognized varies from state to state, and its application may be inconsistent within a state. However, the common law has been used as a basis for several decisions holding that state agencies may not employ counsel independent of the Attorney General.

The Attorney General of Illinois challenged an appropriation to the state insurance superintendent allowing the latter to employ an attorney. The state supreme court declared the appropriation was invalid and said that:

By our Constitution we created this office by the common-law designation of Attorney General and thus impressed it with all its common-law powers and duties. As the office of Attorney General is the only office at common law which is thus created by our Constitution. The Attorney General is the chief law officer empowered to represent the people in any suit or proceedings in which the state is the real party in interest, except the Constitution or a constitutional statute may provide otherwise. With this exception, only he is the sole official adviser of the executive officers, and of all boards, commissions, and departments of the state government, and it is his duty to conduct the law business of the state, both in and out of the courts.¹⁹

This case, Fergus v. Russel, was upheld in a more recent case, Department of Mental Health v. Coty.²⁰

In Darling Apartment Co. v. Springer, the Delaware court sought to determine whether a statute granting the State Liquor Commission the right to "... engage the services of experts and persons engaged in the practice of a profession" allowed the Commission to appoint its own counsel. The court said it did not, ruling that the language of the act must be read with reference to the office of Attorney General as it existed at common law:

In the absence of express legislative restricting, the Attorney General, as the chief law officer of the State, may exercise all of the powers and authority incident to the office at common law, it is manifest that there is nothing in the Act as a whole, nor in the particular language relied on, which, either expressly or by any reasonable intendment, indicates the legislative purpose to empower the Commission to appoint its own law officer to conduct litigation in supersession of the Attorney General, and to charge the public with the incidental expense, must rest on a plain and unambiguous grant of authority. It necessarily follows that the Attorney General has the power, and it is his duty, to represent the Commission in all judicial proceedings.²¹

Courts, however, have generally upheld the legislature's authority to limit the Attorney General's common law power by allowing other agencies to hire counsel. A New Jersey court upheld a statute authorizing the New Jersey Board of Public Utilities Commissioners to appoint its own counsel, saying in Board of Public Utilities Commissioners v. Lehigh Valley Railway Co. that:

The important question is that of control of the litigation, whether by the board and its counsel as state agents, or by the Attorney General as the usual accredited legal adviser of the state itself. On this branch of the case we conclude that the powers and privileges of the Attorney General as they existed at common law, and particularly as conferred by statute, are subject to change and modification by legislative enactment; and that in the matter of the board of public utilities the Legislature has conferred upon that board, and upon counsel appointed by it pursuant to the statute, the power of commencing and conducting litigation in which the board in exercise of the power vested in it, is seeking to enforce its mandates.²²

The court upheld the legislative modification of the Attorney General's powers.

The Colorado court, in State Board of Pharmacy v. Hallett,²³ followed the same reasoning, holding that the legislature had the authority to authorize an agency to retain counsel, even though this was a common law power of the Attorney General. In State v. Davidson,²⁴ the New Mexico Court rejected the Attorney General's claim that only he could represent agencies. The Kentucky court also upheld the legislature's right to assign the Attorney General's common law powers to agency counsel in Johnson v. Commonwealth ex rel. Meredith.²⁵ In Padgett v. Williams,²⁶ the Idaho Supreme Court upheld payment of an attorney for the Board of Highway Directors. The court found that the statutes gave the Highway Department control over its employees, and that its statutory duties implied the need for counsel. By implication, the department was entitled to employ counsel.

A different issue arose in the Montana case of State ex rel. Pew v. Porter.²⁷ The legislature had established a commission to investigate the financial policies of the state. The commission hired an attorney to conduct investigations, but the state auditor refused to pay him on the ground

he was performing duties required of the Attorney General. The court compelled the auditor to pay, saying that the attorney's duties were investigative and not part of the Attorney General's duties:

The duties of the attorney general are defined by the Constitution, by the statutes, and by the common law in so far as it is in force in this state, but nowhere, either by express declaration or by fair intendment, is the attorney general required to perform services of the character indicated. The duties defined by the Constitution attach themselves to the attorney general only by virtue of his membership on particular boards.²⁸

The Montana Supreme Court, in Woodahl v. Montana Board of Natural Resources and Conservation noted that the Attorney General clearly has power to give counsel, advice, and representation. However, such power is not exclusive, but depends upon whether the legislature has authorized another agency to hire counsel.²⁹

Case law interpreting statutory provisions on counsel is not extensive. A 1939 California case, Evans v. Superior Court, reviewed that state's law prohibiting state agencies from employing any legal adviser other than the Attorney General and stated that the purpose of law "was obviously to centralize the legal work done on behalf of the state, with certain exceptions, in the office of the Attorney General and to substitute the Attorney General, his assistants, and deputies in the place and stead of the various counsel who were formerly employed on state work in the several departments."³⁰

The Attorney General's Role

The Attorney General's role as attorney for state officers and agencies is usually viewed by the courts in the context of his broader role, as attorney for the people. Several recent cases illustrate this.

The Supreme Judicial Court of Massachusetts, in Secretary of Administration and Finance v. Attorney General held that the Attorney General, as chief law officer of the Commonwealth, has control over the conduct of its litigation and may refuse to prosecute an appeal in an action involving the head of a state agency. The court said,

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.³¹

The court also noted that the legislature, by consolidating the state's legal business under the Attorney General, empowered and perhaps required him to set a consistent legal policy for the Commonwealth.

3. AGENCIES WHICH MAY EMPLOY COUNSEL

A recent Kentucky case, Commonwealth ex rel. Hancock v. William Paxton et al., concerned the Attorney General's suit challenging the constitutionality of legislation, which named a state agency as defendant. The defendants challenged his standing to bring the suit, as he was the chief law officer and required by statute to commence actions on behalf of the Commonwealth. The court held:

The decision of the circuit court that the Attorney General has no standing to institute an action of the kind here in issue is sought to be supported by the appellees (including intervening defendants whose interest is in upholding the validity of the Acts in question) on the basis that under both the common law and our statute, KRS 15.020, the powers and duties of the Attorney General are to represent the "Commonwealth", which the appellees interpret to mean that hierarchy of officers, departments and agencies heading the executive branch of the state government.

It is true that at common law the duty of the Attorney General was to represent the king, he being the embodiment of the state. See Hancock v. Terry Elkhorn Mining Company, Inc., Ky. 503 S.W. 2d 710. But under the democratic form of government now prevailing the people are the king. Ky. Const. sec. 4, so the Attorney General's duties are to that sovereign rather than to the machinery of government.³²

The Illinois Supreme Court, in the 1974 case of People ex rel. Scott v. Illinois Racing Board,³³ also upheld the Attorney General's authority to appear in opposition to a state agency if the Attorney General determines in his discretion that the public interests so require. The court held that the Attorney General had standing and authority in the public interest to challenge an order of the Racing Board through court proceedings, although one of his representatives had participated in hearings held by the Racing Board and had advised it. The court based its holding on the Attorney General's common law powers and on the public interest in requiring strict observance of statutes by public officials and agencies.

Florida is among the states whose highest courts have upheld the Attorney General's right to intervene in proceedings. The basis for this was well stated in a concurring opinion in State ex rel. Shevin v. Yarborough: "It is the inescapable historic duty of the Attorney General, as the chief state legal officer, to institute, defend or intervene in any litigation or quasi-judicial administrative proceeding which he determines in his sound official discretion involves a legal matter of compelling public interest."³⁴

An examination of the Attorney General's role as representative of the public is beyond the scope of this report.³⁵ However, as the cases noted above illustrate, his role is much broader than that of an attorney for state government, and the provision of legal services must be viewed in that broader context. Chapter 7 of this report reviews some legal issues that have arisen in providing these services.

The statutes of a state usually specify who shall provide legal services for the state. In a few jurisdictions, this is explicitly limited to the Attorney General. In most states, however, the statutes specify the Attorney General shall provide legal services, but also specify that certain agencies, boards or commissions may employ attorneys. The number of agencies so authorized may be very small, or it may include a large share of government agencies. Existing approaches to providing legal services are discussed below.

Alternative Statutory Approaches

There are a variety of statutory schemes for providing state legal services. These may be grouped into the following categories which show the different approaches used by the states. These groupings include only those states which responded to COAG's 1976 survey.

(1) Jurisdictions where the Attorney General provides all legal services without exceptions (Connecticut, Guam, Minnesota, Oregon, Wyoming).

(2) States where the Attorney General provides all legal services for the executive branch, but the legislative or judicial branches are authorized to employ counsel (Georgia, Utah, Washington).

(3) States where the Attorney General provides all legal services, but is authorized or directed by statute to appoint deputies to serve state agencies (Delaware, North Dakota, South Carolina, South Dakota).

(4) Jurisdictions where the Attorney General provides most legal services, but some agencies have specific statutory authority to employ counsel (Alaska, California, Guam, Idaho, Indiana, Maryland, Nebraska, New Mexico, New York, Oklahoma, Pennsylvania, Vermont, Virginia, Wisconsin).

(5) States where the statutes specify that some agencies shall be represented by the Attorney General, some may hire their own counsel, and are silent about others (Montana).

(6) States where any agency may hire counsel upon prior approval of the Attorney General (Florida, Nevada, Maine).

(7) States where any agency may hire counsel, without the Attorney General's authority (Kentucky, Tennessee, Texas).

These various statutory provisions are described below. It should be noted that these restrictions apply only to attorneys who act in a legal capacity and who may go to court. In most states, many agencies employ attorneys in administrative and other positions.

1. Jurisdictions Where the Attorney General Provides All Legal Services. In some states the Attorney General is, by statute, the sole counsel for state agencies. Wyoming law places upon the Attorney General the

burden of prosecuting and defending suits involving state agencies. Although some attorneys are working in state agencies, they are not employed in a legal capacity. Minnesota's Attorney General appoints, removes, and sets salaries for all lawyers in state government who perform counsel or advocate functions; there are 40 civil service attorney positions in state government which the Attorney General does not control, but these do not act as counsel or go to court.³⁶

In Oregon, the statutes provide that the Department of Justice shall have "full charge and control of all the legal business of all departments, commissions and bureaus of the state, or of any office thereof, which requires the services of an attorney or counsel in order to protect the interests of the state." It is further provided that "no state officer, board, commission, or the head of a department or institution of the state shall employ or be represented by any other counsel or attorney at law."³⁷

In Guam, the Governor's office employs two attorneys. However, by statute in criminal cases and by practice in civil cases, only the Attorney General represents the government in court. The one exception is the public defender's office, which hires private attorneys on a part-time basis.

2. Jurisdictions Where the Attorney General Provides All Legal Services for the Executive Branch. Several states give the Attorney General exclusive authority to represent state agencies, boards and commissions, but allow the legislature and/or the courts to employ counsel. In Washington, the legislature has its own counsel, as it does in Utah.

Georgia law specifies that only the Attorney General may provide legal representation for the state and its officers in the executive branch, and by custom he represents members of the state judiciary and district attorneys. The Governor employs two full-time counsel, but they may not represent him or the state when he is sued in his official capacity. The Office of Legislative Counsel was recently authorized to provide legal representation to the General Assembly and its members in connection with their official business. In so doing, they may go to court. They do not represent the State of Georgia, but only the General Assembly and its members.

3. Jurisdictions Where the Attorney General Provides All Legal Services, but is Authorized to Appoint Deputies for Some Agencies. Some states give the Attorney General exclusive authority over the state's legal business, but authorize or direct him to appoint Assistant Attorneys General for some state agencies.

In South Dakota, the Attorney General has sole authority to represent the state in legal matters. The statutes specifically authorize him to appoint Assistant Attorneys General for certain agencies which he is required by statute to represent. These are the Department of Revenue,³⁸ the Public Utilities Commission,³⁹ and the Division of Highways.⁴⁰ The approval of the agency is required for the first two appointments, and they must be for a specified term of years. In North Dakota, the Attorney General has authority over the state's legal affairs. He "also, when he deems it necessary, may after consultation with the head of the state department or institution affected appoint special assistant attorneys general" Such appointments shall be in writing, and are revocable at the pleasure of the Attorney General.

Delaware's statute governing appointment of attorneys appears to be unique. The Attorney General is authorized to appoint Deputy Attorneys General or Special Deputy Attorneys General "to serve in any legal capacity in or for any office [or agency] ... of the state government on a part-time or full-time basis whenever, in the judgment of the Attorney General, such assignment will contribute to the efficiency of the operation of [such agency]." Such Deputies are paid by the Attorney General and remain under his control. In addition to attorneys authorized by appropriations, the Attorney General may appoint Deputies to be paid from federal funds and funds other than those appropriated to the Department of Justice. The statute specifies that the state shall not be obligated to continue the employment of such attorneys when funds to pay their salaries are no longer available.⁴¹

South Carolina law specifies that "no department or agency of the State Government shall hire any attorney as an employee to be engaged in legal work except upon the written approval of the Attorney General and at a compensation approved by him." It further specifies that "all such attorneys shall at all times be under the supervision and control of the Attorney General."⁴² This provision is contained in the law appropriating funds for the Attorney General's office, which also requires that the Attorney General assign and physically locate at least one of his Assistants to perform legal work for certain designated state agencies. These are the Department of Health and Environmental Control, the Tax Commission, Wildlife and Marine Resources Department, Highway Department and Public Service Commission. In Virginia, the Attorney General may appoint Special or Regular Assistant Attorneys General for assignment to agencies which request them; the 1976 legislature did not approve a proposed amendment which would have enabled any state agency to employ an attorney if the Attorney General was unable to provide the legal assistance required to the agency.

The New Mexico Attorney General's office is recommending a unique approach to the 1977 legislature. This would consolidate all attorneys under the Attorney General, except for the Public Service Commission and institutions of higher learning. The chief Assistant Attorney General assigned to major departments would be appointed by the Attorney General with the Governor's approval and all other Assistant Attorneys General would be appointed by the Attorney General. The "major departments" are now being identified. Under present law, a few agencies have limited authority to employ counsel, with the Attorney General's approval.

4. Jurisdictions Where Some Agencies Have Authority to Hire Counsel. In some jurisdictions, some departments are given statutory authority to hire counsel. The departments have full authority to select such counsel and to set their compensation. In Nebraska, such authority is given to the Department of Labor's Economic Security Division,⁴³ the Motor Vehicle Industry Licensing Board,⁴⁴ and the State Patrol. In Maryland, the statutes authorize the Human Relations Commission,⁴⁵ the Transit Authority,⁴⁶ and the Public Service Commission⁴⁷ to employ counsel. This authority is also given to the Public Defender's office.⁴⁸

In Guam, specific statutes authorize attorneys for the Power Authority Board,⁴⁹ Telephone Authority Board,⁵⁰ Airport Authority Board,⁵¹ Housing Corporation,⁵² and the Housing and Urban Renewal Authority.⁵³ Other statutes

authorize the Director of the Public Defender Service Corporation to appoint such personnel as may be required to provide effective legal aid to the indigent,⁵⁴ and specify that the organization of the legislature shall include a legislative counsel as an attache.⁵⁵ The Attorney General is given authority to permit private attorneys to collect accounts owed to any government agency.⁵⁶

Alaska law authorizes three components of state government to hire counsel who may go to court: the Division of Legislative Affairs, the State Housing Authority, and the court system. Bills introduced during the last session of the legislature would have permitted the Transportation, Public Utilities and Pipeline Commissions to employ their own in-house counsel. These bills failed to pass.

In Wisconsin, any agency, with the Governor's approval, may hire attorneys. Only two agencies, however, are authorized to hire attorneys who may appear in court; these are the Public Service Commission⁵⁷ and the Department of Industry, Labor and Human Relations, which may hire lawyers for Unemployment Compensation work.⁵⁸

Virginia statutes give two agencies the authority to hire their own counsel: the State Corporation Commission⁵⁹ and the Virginia Housing Development Authority.⁶⁰ Indiana authorizes the Athletic Commission, Toll Road Commission and Toll Bridge Commission to employ counsel. In Vermont, a substantial number of state agencies are authorized by specific statutes to hire their own counsel.

Pennsylvania reports that, generally, the only agencies which may hire their own counsel are authorities or clearly independent agencies. These include the office of the Auditor General, who is an elected official;⁶¹ the Pennsylvania Housing Finance Agency;⁶² the Pennsylvania Minority Business Development Authority;⁶³ and the Pennsylvania Industrial Development Authority.⁶⁴ A 1976 law authorized the Public Utility Commission to employ its own counsel;⁶⁵ this law followed the creation of an Office of Consumer Advocate in the Department of Justice which was empowered to litigate before the commission. Other than these statutory exceptions, the Attorney General appoints and fixes the compensation of all attorneys in state government.⁶⁶

California law⁶⁷ says that no state agency "shall employ" any legal counsel other than the Attorney General. However, another section of the statutes⁶⁸ lists 12 state agencies to which the restriction does not apply, and also exempts any other agencies which are authorized by law to hire counsel. In practice, however, not all agencies which are authorized to employ counsel do so. In answer to a COAG questionnaire, the Attorney General's office commented that several bills are introduced in the legislature each year to allow additional agencies to hire counsel, but that the office appears in opposition to these bills and is usually successful.

Idaho has a unique system. Until the mid-1950's, the Attorney General supplied all legal services for state agencies. A state supreme court decision made it possible for agencies to employ counsel, and house counsel proliferated. A law enacted in 1975⁶⁹ gave the Attorney General exclusive authority to represent agencies, except for the Governor, legislative court system, and agencies in the Department of Self-Regulating Agencies. These

officers and agencies may indicate in writing to the Attorney General that they wish to hire their own counsel, instead of being represented by the Attorney General; however, none have yet done so. This system allows flexibility for the agencies that are exempted from consolidation, because they continue to be served by the Attorney General unless they elect to hire their own attorneys.

5. Jurisdictions Where the Statutes Specify That Some Agencies Shall be Represented by the Attorney General and Some by Their Own Counsel. Montana appears to have a unique system. The Attorney General is the authorized attorney for 14 state agencies. Approximately 25 agencies have statutory authority to hire their own attorney. The statutes establishing other state agencies are silent about this. The Attorney General's office takes the position that the state cannot be represented by an attorney who does not hold a commission from the Attorney General, although this question has not been judicially determined.

6. Jurisdictions Where an Agency May Hire Counsel Upon Approval of the Attorney General. Another approach is to allow any agency to hire counsel upon prior approval of the Attorney General. Maine law provides that all legal services shall be rendered by the Attorney General or his deputies or assistants and that "officers or agencies of the State shall not act at the expense of the State as counsel, nor employ private counsel except upon prior written approval of the Attorney General."⁷⁰ Such counsel may be subject to the Attorney General's control in court actions. Florida's statutes make the Attorney General's authority to appoint other counsel discretionary in some circumstances and mandatory in others:

The department of legal affairs shall be responsible for providing all legal services required by any dependent, unless otherwise provided by law. However, the attorney general may authorize other counsel where emergency circumstances exist and shall authorize other counsel when professional conflict of interest is present. Each board, however designated, of which the attorney general is a member may retain legal services in lieu of those provided by the attorney general.⁷¹

Nevada law prohibits any agency from retaining outside counsel without approval of the Attorney General, unless the legislature has authorized such hiring.⁷² Legislative approval has been given to 17 agencies: Industrial Commission;⁷³ Contractors' Board;⁷⁴ Board of Medical Examiners;⁷⁵ Dairy Commission;⁷⁶ Employment Security Department;⁷⁷ Board of Optometry;⁷⁸ Board of Dental Examiners;⁷⁹ Board of Funeral Directors and Embalmers;⁸⁰ California-Nevada Interstate Compact Commission;⁸¹ Board of Registered Professional Engineers;⁸² Board of Accountancy;⁸³ Board of Osteopathy;⁸⁴ Board of Architecture;⁸⁵ Labor Commissioner;⁸⁶ Educational Communications Commission;⁸⁷ Colorado River Commission⁸⁸ and Review Board, Department Occupational Safety and Health.⁸⁹

7. Jurisdictions Where Any Agency May Hire Counsel. A few states allow any state agencies to hire attorneys, without the Attorney General's approval. Kentucky statutes authorize the Governor, or any department with the Governor's approval, to hire attorneys. Compensation is to be set by

the department and paid out of its appropriations. The statute requires that, "before approving the employment of an attorney the governor shall consult the Attorney General as to whether legal services requested by departments are available in the attorney general's office".⁹⁰ Another statute⁹¹ specifies that attorneys so employed shall have authority to represent the department in court.

Tennessee apparently has no statutory prohibition against agencies employing counsel, except for a limited number of instances where the agency must obtain the Attorney General's approval. The Attorney General's office supported legislation in the 1976 General Assembly which would have placed agency attorneys within that office, but the proposal was not enacted. In Florida, nearly all state agencies have authority to employ legal staff, either through statutory authority or through the appropriation process. All such attorneys can go to court. Texas reports that there are no statutory restrictions on agencies' hiring attorneys; the sole authority is the biennial appropriations bill.

Agencies Which Employ Attorneys

Table 3 lists the boards, commissions and agencies which employ attorneys, the number of attorneys employed by each, and whether the attorneys are full time or part-time. The information is from questionnaires returned in response to the current survey, unless otherwise indicated. Attorneys who may not appear in court have been excluded from the listing where this information is known.

In some of these states, the list of agencies which employ counsel is extensive, and would appear to be the result of random legislative developments. In others, however, there appear to be logical reasons for allowing agencies, like the following, which are frequently empowered to handle counsel.

(1) Quasi-independent authorities, such as bridge or housing commissions, or bonding authorities;

(2) Agencies which receive substantial federal funds, such as highway departments;

(3) Agencies before which the Attorney General may intervene on behalf of the public, such as public service commissions;

(4) Agencies before which the Attorney General might appear to represent a party in a controversy, such as a human rights commission;

(5) Branches of government other than the executive.

TABLE 3: STATE AGENCIES, BOARDS AND COMMISSIONS WHICH EMPLOY ATTORNEYS
(Note: FT means Full-Time; PT means Part-Time)

Jurisdiction	Agency, Board or Commission	Attorneys Employed
Alabama*	Agriculture and Industries	1
	Conservation	3
	Examiners of Accounts	1
	Finance	1
	Highway	5
	Insurance	2
	Mental Health	2
	Pensions and Security	5
Revenue	6	
Alaska	Division of Legislative Affairs	10 FT
	Alaska State Housing Authority	1 FT
	Court System	1 FT
Arizona	(No information)	
Arkansas	(No information)	
California	(Ten agencies are authorized by one statute to employ attorneys to engage in litigation; not all do so. There are also several specific statutes authorizing attorney representation in specified areas.)	
Colorado	(No information)	
Connecticut	Human Rights Commission (Note: Attorneys employed by the tax department may go to court on appeals of probate cases.)	1 FT
Delaware	Governor, Legislature, Legislative Counsel	8
	Department of Natural Resources	2
	Department of Health and Social Services	7
	Department of Highways and Transportation	2
	Department of Public Service	1
	Department of State Planning	1
	Department of Finance	1
	Department of Labor	1
	Department of Economic Development	2
Personnel Commission	1	
Florida	(Nearly all state agencies can employ counsel.)	
Georgia	Office of Legislative Counsel	8 FT

* Information from NAAG/COAG, Selected Statistics on the Office of Attorney General, 1975.

TABLE 3: STATE AGENCIES, BOARDS AND COMMISSIONS WHICH EMPLOY ATTORNEYS
(Note: FT means Full-Time; PT means Part-Time)

Jurisdiction	Agency, Board or Commission	Attorneys Employed
Guam	Public Defender Service Corp.	6 FT
	Election Commission	1 PT
	Economic Development Authority	1 PT
	Power Authority	1 PT
	Port Authority	1 PT
	Telephone Authority	1 PT
	Airport Authority	1 PT
	Housing Corp.	1 PT
	Housing and Urban Renewal Authority	1 PT
Hawaii	(No information)	
Idaho	(None)	
Illinois	(No information)	
Indiana	Athletic Commission	1 PT
	Toll Road Commission	1 FT
	Toll Bridge Commission	1 PT
Iowa*	Employment Security Commission	3 (est.)
	Iowa Commerce Commission	5 FT (est.)
Kansas	(No information)	
Kentucky	(No information)	
Louisiana	(Information not available, because no agency has this recordkeeping function.)	
Maine	Department of Transportation	12 FT
	Labor Relations Board	3 FT
	Public Utilities Commission	3 FT
	Maine Guarantee Authority, Municipal Bank, and University of Maine also retain part-time counsel.	
Maryland	(Public Defender's Office is not included)	
	Public Service Commission	3 FT; 1 PT
	Human Relations Commission	2 FT
	Maryland Transit Authority	1 FT
Massachusetts	(Numerous agencies employ counsel.)	
Michigan	(No information)	

TABLE 3: STATE AGENCIES, BOARDS AND COMMISSIONS WHICH EMPLOY ATTORNEYS
(Note: FT means Full-Time; PT means Part-Time)

Jurisdiction	Agency, Board or Commission	Attorneys Employed
Minnesota	(Note: The Attorney General appoints and sets salaries for the following lawyers, but they are paid by the client agencies.)	
	Highways and Public Safety	23 PT
	Department of Natural Resources	14 FT
	Department of Revenue	7 FT
	Pollution Control Agency	8 FT
	Department of Public Welfare	6 FT
	Department of Commerce	3 FT; 1 PT
	Department of Administration	4 FT; 1 PT
	Department of Labor and Industry	5 FT
	Attorney General	1 FT
	Housing Finance Agency	2 FT
	Energy Agency	1 FT
	Public Service Commission	4 FT
	Department of Health	3 FT
	Department of Employment Services	3 FT
	Department of Economic Development	1 PT
	Governor's Manpower Office	1 PT
	Iron Range Resources and Rehabilitation Commission	1 PT
	Education Agencies	4 FT
	Retirement System	1 FT
	Department of Human Rights	5 FT
State Planning Agency	2 FT	
Mississippi	(No information)	
Missouri	(No information)	
Montana	Department of Administration	2 FT; 2 PT
	State Auditor	1 FT
	Business Regulation	2 FT
	University System	3 FT
	Fish and Game	1 FT; 1 PT
	Governor's Office	4 FT; 1 PT
	Health and Environmental Science	4 FT
	Department of Highways	7 FT
	Department of Institutions	1 FT; 1 PT
	Department of Community Affairs	2 FT
	Labor and Industry	5 FT
	Lands	2 FT
	Legislature	5 FT
	Natural Resources	4 FT; 2 PT
	Professional Licensing	1 FT
	Public Instruction	1 FT
	Public Service Commission	3 FT
	Revenue	5 FT; 1 PT
	Social Services	2 FT
Campaign Finance and Practice	1 FT	

TABLE 3: STATE AGENCIES, BOARDS AND COMMISSIONS WHICH EMPLOY ATTORNEYS
(Note: FT means Full-Time; PT means Part-Time)

Jurisdiction	Agency, Board or Commission	Attorneys Employed
Nebraska	Nebraska State Patrol	4 FT ^(a)
	Motor Vehicle Industry Licensing Board	1 PT
	Department of Labor, Employment Security Division	1 FT
Nevada	Nevada Industrial Commission	3
	Employment Security Department	1
	Dairy Commission	1
	Occupational and Professional Licensing Boards (approximately 20)	20
New Hampshire*	Department of Employment Security	3
	Council on Aging	1
New Jersey	(No information)	
New Mexico	State Police	2
	Health and Social Services Department	20
	Employment Security Commission	2
	Highway Department	10
	Energy Resources Board	1
	Department of Hospitals and Institutions	3
	Bureau of Revenue	5
	Property Tax	2
	Oil Conservation	2
	State Land Office	2
	State Engineer's Office	2
New York	(Numerous agencies employ own counsel; list is not available.)	
North Carolina	(No information)	
North Dakota	(Note: The Attorney General has employed counsel for the following agencies.)	
	Director of Institutions	1 FT
	Land Department	1 FT
	Tax Department	4 FT
	Highway Department	2 FT
	Social Services Board	2 FT
	Public Service Commission	2 FT
	Game and Fish Department	1 PT
	Workmen's Compensation Bureau	1 FT
	Insurance Commissioner	1 FT
	Water Commission	1 FT
	Banking Examiner	1 FT
	Securities Commission	1 FT
	Health Department	1 PT

(a) To assist county attorneys in drug cases.

TABLE 3: STATE AGENCIES, BOARDS AND COMMISSIONS WHICH EMPLOY ATTORNEYS
(Note: FT means Full-Time; PT means Part-Time)

Jurisdiction	Agency, Board or Commission	Attorneys Employed
Ohio*	Bureau of Employment Services	10
	Department of Transportation	57
	Department of Mental Hygiene and Mental Retardation, Bureau of Support	6
	Public Utilities Commission	7
	Department of Administrative Services, Division of State Personnel	1
	Department of Natural Resources, Division of Wildlife	1
	Ohio Youth Commission	1
Oklahoma	Governor	1 FT
	State Highway Department	15 FT
	Commissioners of Land Office	4 FT
	State Insurance Commissioner	4 FT
	Corporation Commission	16 FT
	Department of Public Welfare	16 FT
	Employment Security Commission	1 FT
	Oklahoma Turnpike Authority	3 FT
	Board of Managers, State Insurance Fund	4 FT
	Oklahoma Tax Commission	6 FT
	Interstate Oil and Gas Compact Commission	1 FT
	Department of Public Safety	4 FT
	Grand River Dam Authority	1 FT
	Department of Consumer Affairs	1 FT
	Board of Regents, University of Oklahoma	2 FT
Board of Regents, Oklahoma A & M Colleges	2 FT	
Securities Commission	3 FT	
Pennsylvania	Governor's Office	2
	Agriculture Department	3
	Banking Department	1
	Securities Commission	6
	Health Department	7
	Transportation Department	62
	Insurance Department	9
	General Services Department	10
	Education Department	10
	Public Utilities Commission	31
	Revenue Department	28
	State Department	9
	Public Welfare Department	26
	Fish Commission	1
	Game Commission	1
Commerce Department	5	
Board of Parole	1	
Liquor Control Board	13	
Milk Marketing Board	2	
Community Affairs	3	
Historical and Museum Commission	1	

TABLE 3: STATE AGENCIES, BOARDS AND COMMISSIONS WHICH EMPLOY ATTORNEYS
(Note: FT means Full-Time; PT means Part-Time)

Jurisdiction	Agency, Board or Commission	Attorneys Employed
Pennsylvania (cont'd.)	Civil Service Commission	1
	State Horse Racing Commission	1
	Environmental Resources	34
	Labor and Industry	78
Puerto Rico	(No information)	
Rhode Island	(No information)	
Samoa	Public Defender Office	2 PT
South Carolina	(Note: The Attorney General has employed counsel for the following agencies.)	
	Department of Social Services	2 FT
	Criminal Justice Academy	1 FT
	Department of Mental Health	2 FT
	Department of Mental Retardation	1 FT
	Department of Corrections	2 FT
	Department of Health and Environmental Control	2 FT
	Insurance Department	3 FT
	General Services Department	2 FT
	Employment Security	2 FT
	Department of Consumer Affairs	2 FT
	Public Service Commission	4 FT
	Water Resources	1 FT
	Wildlife and Marine Resources	1 FT
	Alcoholic Beverage Control Commission	1 FT
	South Dakota	(None)
Tennessee	Board of Claims	3 FT
	Department of Economic Security	2 FT
	Department of Mental Health	4 FT
	Department of Human Services	6 FT
	Department of Transportation	10 FT
Texas	(Note: This is not an inclusive listing; some other agencies also have counsel.)	
	Education Agency	7 FT
	Governor's Office	3 FT
	Governor's Energy Advisory Counsel	3 FT
	Law Enforcement Officer Standards Commission	1 FT
	Legislative Counsel	17 FT
	Railroad Commission	18 FT; 1 PT
	Southmost College	1 PT
	Teacher Retirement System	1 PT
	Department of Public Welfare	38 FT
	Comptroller of Public Accounts	23 FT

TABLE 3: STATE AGENCIES, BOARDS AND COMMISSIONS WHICH EMPLOY ATTORNEYS
(Note: FT means Full-Time; PT means Part-Time)

Jurisdiction	Agency, Board or Commission	Attorneys Employed
Texas (cont'd.)	General Land Office	12 FT
	Adjutant General	1 FT
	Alcoholic Beverage Department	8 FT
	Air Control Board	6 FT
	Department of Community Affairs	1 FT
	Department of Corrections	13 FT
	Health Facilities Commission	6 FT
	Department of Health Resources	9 FT
	Department of Highways	13 FT; 2 PT
	Industrial Accident Board	4 FT; 2 PT
	State Board of Insurance	7 FT
	Mental Health and Retardation	19 FT
	Board of Pardons and Paroles	1 FT
	Water Rights Commission	11 FT; 1 PT
	Universities Systems	9 FT; 1 PT
Utah	Legislative Legal Services	6 FT
Vermont	Governor ^(b)	1
	Education ^(b)	1
	Employment Security ^(b)	1
	Transportation Agency	2
	Justice Commission	1
	Tax Department	1
	Human Services Agency ^(b)	1
	Corrections	2
	Legislature ^(b)	4
	Mental Health	2
	Public Service Board ^(b)	2
	Comprehensive Employment Training	1
	Social Welfare	4
Defender General	19	
Virgin Islands	(No information)	
Virginia	State Corporation Commission	9
	Housing Development Authority	5
Washington	Legislature	
West Virginia	(No information)	

(b) Can go to court only with Attorney General's permission.

TABLE 3: STATE AGENCIES, BOARDS AND COMMISSIONS WHICH EMPLOY ATTORNEYS
(Note: FT means Full-Time; PT means Part-Time)

Jurisdiction	Agency, Board or Commission	Attorneys Employed
Wisconsin	(Note: The following positions are classified as full-time legal counsel, but not all can go to court.)	
	Governor's Office	2 FT
	Department of Administration	5 FT
	Legislative Council	11 FT
	Department of Agriculture	4 FT
	Commissioner of Banking	1 FT
	Ethics Board	1 FT
	Department of Health and Social Services	8 FT
	Department of Industry Labor and Human Relations	21 FT
	Commissioner of Insurance	2 FT
	Investment Board	1 FT
	Department of Justice	73 FT
	Department of Natural Resources	12 FT
	Department of Public Instruction	2 FT
	Public Service Commission	2 FT
	Department of Regulation and Licensing	5 FT
	Department of Revenue	13 FT
	Commissioner of Savings and Loan	1 FT
	Secretary of State	2 FT
	Commissioner of Securities	4 FT
Department of Transportation	4 FT	
University of Wisconsin	2 FT	
Department of Veteran Affairs	2 FT	
Wisconsin Employment Relations Commission	1 FT	
Wyoming	(None)	

Trends in Authority to Hire Counsel

An analysis of available information indicates there appears to be an increasing number of agencies which may hire counsel in those states which have consolidated legal services. On the other hand, an increasing number of states appear to be consolidating legal services under the Attorney General.

In 1970, 17 of the 54 jurisdictions reported to COAG that only the Attorney General employed attorneys who could appear in court. There is no current information about one of these jurisdictions (Hawaii). Of the other 16 jurisdictions, two (Oregon and Wyoming) report that the Attorney General's staff still retains sole authority, but 14 report that some agencies now have counsel who can go to court. This authority is limited to the legislature in four (Delaware, Georgia, Utah and Washington) of the 14 jurisdictions, and to a very few agencies in six jurisdictions. In four of these jurisdictions (Illinois, Massachusetts, Ohio and Pennsylvania) there are now a substantial number of agencies which employ counsel. Only attorneys who can appear in court are considered as counsel for purposes of this report.

In Alaska, the legislature and the courts system now employ counsel, as does the State Housing Authority. In Connecticut, the Human Rights Commission employs an attorney who can go to court where there is a charge of discrimination against a state agency, and attorneys in the tax department may be authorized by the Attorney General to handle certain probate cases on appeal. In Samoa, the Public Defender's office hires counsel on a part-time basis. In Nebraska, the State Patrol employs four attorneys who can go to court to assist county attorneys in drug cases. The Motor Vehicle Industry Licensing Board and the Employment Security Division of the Department of Labor are also authorized to employ counsel. In Nevada, the Employment Security Division, the Industrial Commission and the Dairy Commission have counsel who can appear in court; the legislature has also customarily authorized boards regulating occupations and professions to hire contract attorneys.

In a few states, the number of attorneys in other state agencies has decreased since 1970. In that year, Colorado reported 28 full-time attorneys in the Attorney General's office and 8 in state agencies; in 1976, there are 83 attorneys in the Attorney General's office and only 3 in other agencies. In South Dakota, the number of attorneys in state agencies decreased from 10 to 6, while the number in the Attorney General's office increased from 9 full-time to 18 full-time. Virginia followed the same pattern, with the number of attorneys in the Attorney General's office increasing from 22 to 53, while the number in state agencies dropped from 13 to 9.

In terms of legislative developments, the trend appears to be toward continued consolidation of legal services under the Attorney General. Oregon reported that bills were introduced at the last two legislative sessions to return to the house counsel system, but the bills never passed either house. In California, various bills are introduced each session to permit agencies to employ their own counsel, but these are defeated. Bills introduced in the last Alaska legislative session would have allowed these commissions to employ counsel, but failed of enactment.

The Georgia Attorney General's office reports that, from time to time, proposals are made to establish various authorities. The question arises as to whether the Attorney General should provide legal counsel for these bodies. In each instance in recent years, the sponsor of the proposal has cleared the question of counsel with the Attorney General. These authorities all operate essentially for local purposes. In Florida, the Governor vetoed a 1976 enactment providing that the Department of Legal Affairs might provide legal services to a state agency only upon written request of the head of such agency.

A Wisconsin study of house counsel recommended amending statutes to require the Attorney General's approval of agency attorneys, and legislation to accomplish this probably will be introduced in the 1977 legislature.⁹² The New Mexico Attorney General anticipates the 1977 legislature in that state will act to consolidate legal services under the Attorney General, except for the Public Service Commission and institutions of higher learning. Since January, 1975, the Attorney General has been exercising his statutory authority to represent all state agencies. The agencies resisted this effort and, as a result, legislation was submitted in 1976 which would have given agencies broad authority to hire counsel of their choosing without consulting the Attorney General. As the result of a compromise, legislative action was delayed until 1977.

As this chapter indicates, a large number of states still permit many agencies to employ their own counsel. The trend, however, appears to be toward consolidating legal services under the Attorney General, but excepting a few boards or agencies from the rule against house counsel.

4. SPECIAL COUNSEL

In addition to attorneys employed on a regular basis, whether full-time or part-time, all Attorneys General occasionally hire attorneys for special, temporary projects. This chapter reviews the use of special counsel by Attorneys General. Information is not available on the use of special counsel by other state agencies which are authorized to hire attorneys.

Authority for Employment

All Attorneys General have authority to employ special or part-time counsel. Seventeen states report that the Attorney General may hire special counsel without the approval of another authority. In some states, another authority, usually the Governor, must approve such employment. Of the states for which information is available, gubernatorial approval of special counsel is required in Alabama, Georgia, Guam, Nebraska, New Jersey, North Carolina, Oregon, Pennsylvania, Samoa, Tennessee, Vermont, the Virgin Islands, Wisconsin and Wyoming. In California, approval must be granted by the State Personnel Board, which administers the state's civil service laws. Under California's civil service law, the Attorney General is not permitted to employ special counsel when employees hired through civil service procedures can perform the work; this restriction applies to all employees, not just attorneys. In Pennsylvania, both the budget office and the Governor must approve special counsel. Minnesota reports that a written request from the client agency is necessary for such employment; it is not clear, however, whether this requirement is statutory.

In some states the authority to employ special counsel is not expressly stated by statute, but is inferred from a general grant of authority to the Attorney General to represent the state. In other states the authority is expressly conferred by statute. Some statutes limit this authority. Nevada law, for example, authorizes the Attorney General to appoint deputies in remote counties of the state.⁹³ He is also empowered to employ attorneys when the Attorney General is disqualified;⁹⁴ this has been construed to mean disqualified from lack of expertise as well as a conflict of interest.

Texas reports that the Attorney General has authority to hire special or expert counsel by virtue of the appropriations bill and line item appropriation. Several other states comment that the limitation on using special counsel is budgetary, not statutory.

The use of special counsel has been challenged in the courts. An early Mississippi case questioned the authority of the Attorney General to hire counsel to assist him in certain suits in which the state was a party. The Mississippi Supreme Court held that the Attorney General had the power in the name of the state to employ such counsel to assist him whenever he felt such was necessary.⁹⁵ The Louisiana courts in two cases in the 1870's held that the Attorney General was authorized to hire a special attorney to assist in criminal prosecutions or to allow the special attorney to conduct the prosecutions alone.⁹⁶ The Ohio Supreme Court in 1924 held that, by statute, the Attorney General had authority to appoint a special counsel indefinitely or for a limited period of time for a particular purpose, or for

a designated proceeding, with any limitations that the Attorney General might impose. These included restrictions as to the manner of service and the compensation to be paid. Further, the Attorney General had the authority to dismiss or discontinue the services of any such special attorney at any time.⁹⁷

The Mississippi Supreme Court held that the Attorney General could employ special counsel to assist in the appeals from tax assessments but he could not bind the state to pay for such services.⁹⁸ The Alabama Supreme Court held that the Attorney General lacked authority to employ an attorney to represent the state for the protection and enforcement of a charitable trust, so the attorney could not recover fees for services rendered.⁹⁹ In Missouri, the supreme court held that a statute which authorized the Attorney General to employ such assistants as might be necessary gave him authority to employ a special counsel and to obligate the state to compensate the counsel, but not beyond the appropriations which had been made for the specific purpose.¹⁰⁰ In a more recent case, the Delaware Supreme Court held that the employment of special counsel to assist the Attorney General in representing the state before the United States Supreme Court was a proper exercise of his authority to appoint special counsel.¹⁰¹

In a few states, the Governor has statutory authority to employ special counsel. This is true in Oklahoma and in Georgia. The Governor of Georgia may authorize the employment of special counsel under several circumstances: 1) to conduct a prosecution of the Attorney General; 2) if the Attorney General refuses to provide representation for a state officer who would otherwise be entitled to such representation; and, 3) when a district attorney is disqualified and a request is made to the Governor for assistance, but the Attorney General is unable to provide such assistance.

Frequency and Purpose of Employment

All Attorneys General employ special counsel on occasion to supplement their own legal staff. There is considerable variation, however, in how often they use such counsel, and for what purposes. There are also differences in the way special counsel are paid.

Table 4 shows the frequency with which special counsel are employed and the kinds of work they do. The table uses the latest data available from each jurisdiction, with the year shown in parenthesis. According to these data, 13 of the 54 Attorneys General employ special counsel often, while 41 seldom employ them. This shows some changes from 1970, when, of 51 Attorneys General reporting, 16 often employed special counsel, 33 seldom did, and 2 never did so. A state-by-state comparison of the 1970 and 1976 data shows that 2 jurisdictions which never used special counsel in 1970 now do so seldom, while 7 which used them often now do so seldom, and 5 which seldom used special counsel now do so often. Apparently, such use depends on policies of the incumbent Attorney General and the particular office's changing needs.

Special counsel are used for a wide variety of purposes. Of 27 states reporting in 1976, 13 used special counsel for complex cases requiring special expertise; 7 used them in cases involving a conflict of interest;

TABLE 4: EMPLOYMENT OF SPECIAL COUNSEL

(Note: The year for which the information was given is shown in parentheses after the jurisdiction.)

Jurisdiction and Year for Data	Frequency of Employment	Kind(s) of Work for Which Employed
Alabama (75-76)	Often	No Response.
Alaska (1976)	Seldom	Outside the state; when state agencies are on opposing sides in a suit; specialized expertise.
Arizona (75-76)	Often	Special antitrust cases; areas where expertise of Attorney General is limited.
Arkansas (71-72)	Often	Collection of money due the state (special license fees, etc.); escheat actions.
California (1976)	Seldom	For collections or representation in other states.
Colorado (71-72)	Seldom	Whatever necessary, subject to budget limitations.
Connecticut (1976)	Seldom	Conflict of interest; special expertise.
Delaware (1976)	Seldom	No Response.
Florida (1976)	Seldom	Conflict of interest.
Georgia (1976)	Often	Land condemnation; title searches; loan placement; local counsel services in connection with enforcement of child support; Workmen's Compensation; admiralty; in some areas of specialized expertise; for some habeas corpus and sec. 1983 cases.
Guam (1976)	Seldom	Criminal prosecutions.
Hawaii (75-76)	Seldom	Litigation; Maritime Commission and Civil Aeronautic Board matters.
Idaho (71-72)	Seldom	For expertise.
Illinois (71-72)	Often	Title, condemnation and collection cases.
Indiana (1976)	Seldom	Highway condemnation; tort claims; legislation.
Iowa (75-76)	Seldom	Conflict of interest.
Kansas (75-76)	Seldom	Antitrust; civil actions against correctional institution employees.
Kentucky (75-76)	Seldom	Special cases.
Louisiana (1976)	Often	Boundaries and titles; difficult criminal cases; civil rights.
Maine (1976)	Seldom	Complicated cases in specialized areas.
Maryland (1976)	Seldom	Test cases; cases involving serious conflicts; defense of state employees; when workload dictates need.
Massachusetts (1976)	Seldom	Conflicts between agencies; certain time-consuming, repetitive cases; cases that are geographically inconvenient; specialized expertise.
Michigan (75-76)	Often	Represent state: Uninsured Motorist Fund; condemnation; Workmen's Compensation.
Minnesota (1976)	Often	Specialized litigation; antitrust; bonds.

TABLE 4: EMPLOYMENT OF SPECIAL COUNSEL

(Note: The year for which the information was given is shown in parentheses after the jurisdiction.)

Jurisdiction and Year for Data	Frequency of Employment	Kind(s) of Work for Which Employed
Mississippi (75-76)	Seldom	Eminent domain; cases of a special nature.
Missouri (75-76)	Seldom	Special litigation.
Montana (1976)	Often	Workmen's Compensation fraud; escheated estates; school bonds; defense of Attorney General.
Nebraska (1976)	Often	"On basis of need and economics."
Nevada (1976)	Often	Water rights claims; interstate stream flow adjudications.
New Hampshire (75-76)	Seldom	Matters of extensive litigation or areas requiring unique expertise.
New Jersey (1976)	Seldom	Highly technical work or conflict of interest.
New Mexico (1976)	Seldom	Specialized expertise.
New York (1976)	Seldom	No Response.
North Carolina (75-76)	Seldom	Special prosecutions; potential conflict of interest.
North Dakota (1976)	Seldom	Cases involving specialized expertise; matters involving the Attorney General personally.
Ohio (75-76)	Seldom	No Response.
Oklahoma (1976)	Seldom	As special prosecutors.
Oregon (1976)	Seldom	Conflict of interest; bond sales; trademark/copyright.
Pennsylvania (1976)	Seldom	Bond issues and other complex matters; outside of the Commonwealth or in a distant county.
Puerto Rico (71-72)	Often	Maritime; general matters out of Commonwealth.
Rhode Island (75-76)	Seldom	Antitrust; welfare; land condemnation.
Samoa (1976)	Seldom	Specialized expertise.
South Carolina (1976)	Seldom	Tidelands litigation; elections.
South Dakota (1976)	Seldom	Specialized areas of non-criminal law.
Tennessee (1976)	Often	Chiefly eminent domain work.
Texas (1976)	Seldom	Very specialized situations, such as a complex water law problem.
Utah (1976)	Seldom	Conflict of interest situations; specialized suits against the federal government.
Vermont (1976)	Seldom	Conflicts of interest; special expertise.
Virgin Islands (75-76)	Seldom	Tax appeals litigation; Civil Aeronautics Board proceedings; utility rate hearings and litigation; bond issues.

TABLE 4: EMPLOYMENT OF SPECIAL COUNSEL

(Note: The year for which the information was given is shown in parentheses after the jurisdiction.)

Jurisdiction and Year for Data	Frequency of Employment	Kind(s) of Work for Which Employed
Virginia (1976)	Seldom	Multidistrict antitrust litigation; collections; highway condemnation; and certain special cases.
Washington (1976)	Seldom	Antitrust; bond counsel; representing the public before utilities commission.
West Virginia (71-72)	Seldom	Special projects; conflict between two state agencies; requests of Governor or department head.
Wisconsin (1976)	Seldom	Out-of-state work.
Wyoming (1976)	Seldom	Where an administrator wishes to challenge a statute; cases involving a conflict of interest.

4 used them for legal work outside of the state; 4 for work in connection with bond sales; 3 used such counsel as special prosecutors, and 3 to represent one side when state agencies were in conflict. The following uses of special counsel were each reported by two or three states: work at a far distance from the Attorney General's office; title searches; condemnation; water rights law; Workmen's Compensation cases; and defense of the Attorney General. Numerous other uses were reported by different states, most of which involved a specialized area of the law.

In summary, special counsel are used primarily for three types of cases: 1) those requiring a high degree of specialized knowledge; 2) matters in another state, or in a remote county, where it would not be economical to send Attorneys General's staff; and, 3) in cases where the Attorney General does not wish to provide representation because there is a conflict of interest, or because state agencies are on opposing sides and he does not wish to represent both. This practice is in accord with a recommendation the National Association of Attorneys General adopted in 1971 concerning special or part-time counsel, which said that their use should be restricted to unusual circumstances. It stated,

Such counsel may be desirable when unusual expertise is required, when state agencies are adversaries in litigation, or when distance or other factors make it impractical for the regular staff to render service. Special counsel, however, tend to be an inefficient method of providing service and prevent unified services and consistent legal policy.

States follow different practices in determining the compensation of special counsel. Six report that special counsel are paid by contract, and five that they are paid on an hourly basis. The largest group of jurisdictions (12) report that both methods are used. In Florida, a monthly or annual salary may be used instead of these methods. In Oklahoma, special counsel are compensated on the same basis as district attorneys, and South

Carolina reports that a fee may be set by agreement as well as by contract. Indiana law authorizes the Attorney General to hire special counsel and to pay up to 10 percent of the amounts they collect.

5. FINANCING LEGAL SERVICES

The states use various methods of financing legal services. All funds for this purpose may be included in appropriations to the Attorney General's office, which may also be authorized to establish revolving funds for some purposes. Some funds for legal services may be appropriated to the Attorney General, and some to state agencies to hire their own counsel. Funds may be appropriated to agencies to pay the salaries and/or expenses of counsel assigned to them by the Attorney General, or to reimburse the Attorney General's office for services rendered by it to the agency.

Appropriations to Attorneys General's Offices

A 1975 Committee on the Office of Attorney General report, *Selected Statistics on the Office of Attorney General*, gave detailed information on appropriations to Attorneys General's offices. Using the latest year for which figures were available, this showed 40 jurisdictions appropriated over a million dollars a year to their Attorney General's offices, 2 reported under \$500,000, and the rest were between these figures.

These figures do not necessarily reflect accurately the amount spent by Attorneys General's offices for legal services. In some states, some agencies reimburse the Attorney General for legal services rendered, so his appropriation is less than his actual budget. In some jurisdictions, there are open-ended appropriations for special purposes, which could substantially increase the funds available. Sixteen Attorneys General's offices reported that they have special-purpose revolving funds, which would not be included in the appropriations figure. Appropriations data do not generally show a cost per attorney or other units. Some Attorneys General's offices, however, have developed systems of workload measurement that enable them to compute unit costs quite precisely.¹⁰²

Appropriations to State Agencies

In some states, Assistant Attorneys General are paid by the agencies to which they are assigned. In North Dakota, only the Attorney General may hire counsel. The custom, however, is for a state department to request employment of a Special Assistant Attorney General, often recommending the name of a particular person. If the Attorney General agrees with the recommendation, he makes the appointment, specifying that it is without compensation from his office. The agency then pays the attorney. In Minnesota, the Attorney General appoints and sets salaries for all attorneys in state government. The appropriations for many of these attorneys are contained in the budgets of the agencies to which they are assigned, rather than that of the Attorney General. In Vermont, certain agencies have Assistant Attorneys General assigned to them pursuant to statute. These assistants are appointed by the Attorney General and report to him, but are paid by the agencies.

South Carolina's system is different in that the Attorney General is required to assign and locate an assistant with specific agencies. The agencies do not pay the attorney's salary, but are required by statute to

furnish a secretary and pay for travel and other expenses. Minnesota is working to consolidate budgets for legal services by transferring funds from some agencies to the Attorney General's budget.

Funding restrictions in a particular state may require that attorneys be paid by a state agency, rather than by the Attorney General. In Michigan, for example, some attorneys assigned to the highway department are paid by that department, so that funds that are constitutionally-earmarked for highways can be used. They are, however, hired and supervised by the Attorney General.

Only a few of the Attorneys General's offices which responded to COAG's questionnaire were able to give information on state agencies' budgets for legal services. California commented that, while it was not feasible to supply this, "fairly substantial sums are involved." Montana replied that estimates would be difficult to make, because some agencies budget only for their attorneys' salaries, while others retain outside counsel, for widely-ranging fees.

A few states, however, did furnish such data. Vermont estimated that state agencies spent \$1,800,000 for legal services, compared to the Attorney General's budget of \$580,912. North Dakota estimated \$450,000 per year for agencies legal budgets, compared to the Attorney General's annual appropriation of approximately \$851,000. In Samoa, the Attorney General's office spends \$151,000 annually for attorneys' salaries, while the Governor's office spends about \$48,000 for this item. Tennessee reported that, as of July, 1975, agency expenses for legal salaries and related expenses come to \$1,670,000; the Attorney General's budget for the following fiscal year was \$826,497, plus \$56,745 for special litigation.

A few states gave information on individual agencies' budgets for legal services and also gave the number of attorneys employed by the agencies. Maine, for example, reported the following figures:

Department of Revenue-- 2 attorneys, \$35,000 budget;
Department of Social Services-- 5 attorneys, \$125,000 budget;
Department of Consumer Affairs-- 1 attorney, \$20,000 budget;
Department of Labor-- 3 attorneys, \$65,000 budget;
Department of Natural Resources-- 1 attorney, \$25,000 budget;
Department of Game, Fish, Parks-- 1 attorney, \$35,000 budget.

It is not possible to compute a valid per attorney cost from these figures, since they do not indicate what supporting costs (rent, supplies, travel, etc.) are included. It is obvious, however, that there is considerable variation from agency to agency. It is also apparent that, where various state agencies employ counsel, there may be inequities in compensation. For example, the Guam Housing Corporation pays counsel \$200 per month retainer plus \$50 per hour for additional work, while the Airport Authority pays a \$300 per month retainer, plus \$60 per hour.

In most states, attorneys employed by state agencies are not subject to the same salary schedules or restrictions on private practice as are members of the Attorney General's staff. This may create inequities and set a dual standard for the state's legal staff.

Of 29 states reporting, seven said that attorneys employed by state agencies were subject to the same pay schedules as Assistant Attorneys General, while 13 said they were not. Nine said that this depends on the agency. The responding states are grouped as follows:

Subject to the same pay schedules-- Alaska, Delaware, Florida, Minnesota, Pennsylvania, South Carolina, Virginia;

Not subject to the same pay schedules-- Georgia, Guam, Louisiana, Maryland, Massachusetts, Montana, Nevada, New Jersey, New York, Oklahoma, Samoa, South Dakota, Washington;

Depends on agency-- California, Maine, Nebraska, North Dakota, Tennessee, Texas, Utah, Vermont, Wisconsin.

According to the latest information available,¹⁰³ 43 of the 54 jurisdictions prohibit the private practice of law by members of the Attorney General's staff. This restriction is based on statute in 17 jurisdictions and by custom or policy in the other 26. These restrictions on private practice are not consistently applied to agency counsel. Of the 26 states responding, only seven said that house counsel are subject to the same restrictions on private practice as are Assistant Attorneys General. Four said they were not so subject, while 15 reported that this depended on the agency.

Systems of Billing Agencies

Some Attorneys General have instituted systems of billing state agencies for legal services rendered to them. Billing systems vary, as do costs included and the number of agencies billed. Several states use a billing system based on the hourly cost of providing legal services. The advantages of billing are that the costs of legal services are transferred to the agencies which actually use them; these agencies are more aware of costs, so use such services more carefully; accurate cost analyses are available; and, essentially, the Attorney General's relationship to state agencies becomes that of an attorney to his client. The limitations are that agencies may have problems in predicting legal needs and budgeting to meet them; they may be reluctant to use sufficient attorney time for advice; and that attorney-agency relationships may be weakened.

Oregon established a billing system in 1969. All services performed by the Department of Justice are billed to the agency on an hourly basis. The hourly rate, which is adjusted periodically to reflect actual costs, is discussed later. Funds for the Department come entirely from client agencies, so this system is quite comparable to a private firm.

Oregon's computerized billing system uses time sheets kept by individual attorneys on a quarter-hour basis. The time sheets have a case number, which represents the case, opinion or other matter. They also have a work code, which shows the type of work that was done, such as telephone advice, reviewing files, legislation, and so forth. Every agency has a billing number, which may be broken down further into codes for divisions or sections.

The Justice Department's billing system prepares statements or bills to users of its services. Inputs to the system are: attorney time cards, which are keypunched from weekly attorney activity reports; a data card, to date the statements; and an optional rate card. The department has intentionally stayed away from different rates for different attorneys, because multiple rates created more problems than they solved. Such rates also tend to average out over a period of time in any event. The department has law clerks for which it bills at half the hourly rate, and the department has investigators which it bills at a lower rate. This input information produces a print-out for the agency. It is on a sheet of paper designed to go into a window envelope and shows the work done, the hours, the attorney number, and the type of work. Bills are sent monthly.

The Attorney General of California is authorized by statute to charge special fund agencies, as distinguished from those which derive their principal budget from the state's General Fund, for services provided. The average cost of providing an attorney's services on an hourly basis is calculated annually. These billing charges are reviewed by the Department of Finance and are subject to its approval. Each attorney reports weekly on the number of hours devoted to each case to which he is assigned.

Nevada does not have an hourly fee system, but state agencies are billed in advance for the salary and benefits of the Deputy Attorney General assigned to the agency. In New Jersey, agencies with budgets for legal services reimburse the Attorney General's office within the state budgetary process by means of debits and credits.

The Wisconsin Attorney General's office use three different systems for billing agencies: the Department of Transportation is billed as designated average dollar amount per case; the Department of Natural Resources is billed on a per hour charge; and the Investment Board and Department of Employee Trust Funds are billed an estimated amount. Utah uses inter-account billing only when federal funds are involved.

Georgia also uses several systems. The Department of Law bills for services rendered in connection with federally-funded highway projects on the basis of the actual number of hours worked by its attorneys, with compensation based on actual salaries. The Department bills several agencies, under specific provisions of law, either a flat fee or a minimum fee subject to enlargement for additional services. Additionally, certain state authorities such as the Georgia Building Authority and the Georgia State Financing and Investment Commission have, by resolution of their governing bodies, authorized payment of a flat fee for legal services to the Department of Law. In New York, certain public benefit corporations and authorities reimburse the Department of Law for services rendered, based on the attorneys' salaries and fringe benefits.

The Alaska Attorney General's office bills for legal services to state-operated, federally-funded programs, such as highway condemnation, and when a state agency requires full-time legal service for a specific service program of its own. A State Reimbursable Service Agreement is used for such billing. This annual contract sets forth the scope of services, rates to be charged, and the maximum expenditures.

In Guam, any agency or autonomous public corporation which is allowed by law to retain counsel may also request the Attorney General's services if reimbursement is provided. Reimbursement is deposited in the General Fund and credited to the Attorney General. Any agency may also advance funds to the Attorney General for future services. A detailed billing system is being developed to implement this statutory provision. Washington has a legal services revolving fund, where the agency is required to pay in advance for anticipated legal costs on a quarterly basis. These costs are then adjusted every six months. Virginia reports that state agencies are billed for extraordinary costs of litigation, not for services; reimbursement is by interagency transfer of funds.

Several other states, including North Dakota and Wyoming, indicate that they are considering developing a billing system. Minnesota reports that it is developing an hourly billing system for some agencies which will be implemented on July 1, 1977. Idaho instituted a system of billing agencies for some services in July, 1976.

Some states report that specific expenses incurred in representing agencies are recovered from them, although there is no charge for attorneys' fees. Maine, Montana, and Pennsylvania bill agencies for court costs, printing, transcript fees, travel expenses, witness fees and similar expenses, but not for staff time.

Calculating Cost of Services

An accurate method of computing the cost of services is essential to an efficient billing system. Obviously, this cost will vary among states, depending on salary levels and many other factors. Four systems of computing the cost of attorney time are described below. These are Oregon, which charges \$33 per hour; California, \$33.10; Georgia, from \$20-\$50 per hour; and Wisconsin, \$24 per hour. In Oregon, law clerks are billed at half the attorney rate, investigators at \$20 per hour, and secretaries at \$7 per hour.

In Oregon, each agency is asked to estimate the number of hours of attorney time it will need during the forthcoming biennium. If an agency cannot make such an estimate, the Attorney General's office projects a figure. These agency projections are summarized to give the total number of attorney hours needed.

Based on past experience, it has been computed that each attorney in the Oregon office works an average of 115-1/2 hours per month. This is multiplied by 24 months, and the product is divided into the total number of attorney hours needed. This figure, which constitutes the attorney positions requested, must be approved by the legislature. The salaries and fringe benefits for attorney positions are calculated, and the estimated overhead costs for each position are added to this. The total cost is divided by the total number of attorney hours needed. This gives the billing rate of \$33 per hour.

Some variable costs are not included in the billing rate calculation, but are billed directly to agencies as they occur. These include such items as witness fees, long distance telephone tolls and travel costs.

California uses the following procedure to compute the number of attorney hours available: 1) total hours in work year, minus holidays, sick leave and vacation leave equals 2) total on-the-job hours possible, minus estimated time not providing legal services equals 3) total on-the-job productive legal hours possible, plus average hours of overtime equals 4) total possible productive hours for one attorney in one year. This is multiplied by the number of attorney positions to give the total possible productive hours. The hours lost due to position vacancies and for supervisory or training time are subtracted. The result is the net adjusted total possible productive hours for attorneys.

The net adjusted total possible productive hours is divided into the total estimated cost of attorneys to give a billing rate of \$33 per hour. As in Oregon, some costs of suits are billed directly to the client agency.

In Georgia, the billing rate ranges from \$20 to \$50 per hour, depending on the kind of legal work undertaken and the area of the state from which the attorney was hired. Agencies are billed for outside counsel, with the rate based on these factors.

6. AGENCY ATTORNEYS' RELATIONSHIP TO THE ATTORNEY GENERAL

Preceding chapters of this report have discussed statutory authority to hire counsel and the arrangements for financing them. This chapter discusses some other components of states' systems for legal services: location of attorneys, appointment authority, supervision, and relationships between the Attorney General and house counsel. All of these factors can be important in determining whether attorneys actually function as house counsel or as part of the Attorney General's staff.

Location of Offices

Where attorneys' offices are located may have a decided effect on whether they actually function as house counsel or as members of the Attorney General's staff. An attorney may be hired by and responsible to the Attorney General, but if he is assigned to and located with a state agency on a long-term basis, he may come to consider himself a member of that agency's staff. His response to questions may reflect those of his associates in the agency, rather than his fellow attorneys. He may gradually acquire administrative duties or assume an advisory role in non-legal matters, due to his proximity to agency administrators. He may lose touch with other staff attorneys and fail to keep informed about the Attorney General's policies.

Despite these possible difficulties, some Attorneys General's offices reported to COAG that no problems arose concerning location, although one of these said that some agencies provided better working conditions than others. Most of the responding states, however, mentioned one or more of the problems outlined above. The most frequent complaint was that attorneys become too involved in administrative matters, and do not have enough time for legal matters. Maine mentioned that close working relationships with agency staff may cause the attorney's legal judgments to be shaded by policy considerations. It was also one of several states to point out the difficulty of supervising or evaluating attorneys who are located outside of the Attorney General's office. Utah noted that an agency may take credit for the attorneys' work in such matters as welfare fraud recoveries.

California made the following comment on the advantages of locating attorneys with the Attorney General.

Although some agencies for whom we perform considerable services have, on occasion, in the past requested that the attorneys assigned be housed in their buildings, they generally are understanding when it is explained that the flexibility offered by keeping attorneys housed centrally in our own offices results in better support services, library services, etc. In one of two instances in the past when we have attempted to temporarily have an attorney occupy an office in an agency service it has resulted in poor working conditions and relations. We therefore have terminated a few such arrangements we previously had.

Several management studies have concurred in this position. A study of the New Jersey Department of Law and Public Safety said that bringing all attorneys into the Attorney General's office would "substantially increase the

cohesiveness and effectiveness of the division."¹⁰⁴ A report by the Governor's Economy Commission in Iowa said that "physical separation of various offices creates a communication problem" and that "informal communications are greatly hampered and efficient utilization of personnel, office machines, and reproduction facilities is difficult."¹⁰⁵

Some arguments can, of course, be made for housing attorneys with the agencies they represent. One is that, if agencies are a substantial distance from the Attorney General's office, attorneys might spend a significant amount of time going back and forth. Another is that the attorney may need continuing access to an agency's files. A third is that the attorney's presence makes the agency more conscious of legal considerations.

Although these arguments may have some merit, the trend is toward centralization. Of 28 states responding to COAG's questionnaire, only three said that all attorneys assigned by the Attorney General to state agencies have offices in those agencies. Seventeen said that some did, while eight reported that none were so located. These are:

All located with agency-- Pennsylvania, Vermont, Wyoming;

Some located with agency-- Connecticut, Delaware, Florida, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, North Dakota, Oregon, South Carolina, South Dakota, Utah, Virginia, Wisconsin;

None located with agency-- Alaska, California, Guam, Montana, Oklahoma, Samoa, Texas, Wisconsin.

A number of Attorneys General have centralized the location of their staff in recent years. Some others apparently plan to do so when adequate space can be acquired. New Mexico reports that the Attorney General is moving into remodelled offices and will have space for about half of the state's legal staff. A request is being made to the January, 1977 legislature by the Governor and Attorney General for a Department of Justice Building to house all of the attorneys, plus other components of the criminal justice system. Oregon physically consolidated staff a few years ago, when the State Supreme Court Building was remodelled and an entire floor assigned to the Attorney General. New Jersey did the same thing, when the Attorney General's offices were remodelled and expanded. Michigan centralized the Attorney General's staff when a state office building complex was constructed.

Another approach is found in Washington, which has developed "cluster complexes" outside of the Attorney General's office. These bring groups of from 15 to 13 lawyers in related areas into a single office. For example, a fiscal group includes lawyers whose work relates to the auditor, banking, budget, insurance, and purchaser. This allows attorneys to share library and other facilities, and also allows the attorneys to exchange ideas. Minnesota is developing a similar system.

As a general practice, secretarial services for an attorney who is housed with a state agency are provided by that agency. A few exceptions were reported. One state said this depends on the agreement with the agency, and another said both the agency and the Attorney General's office provide such services.

Attorney General's Authority Over House Counsel

There are great variations among the states as to the Attorney General's relationship with house counsel. This relationship is governed in part by statute and in part by practice.

The Attorney General usually has sole authority to appear for the state in court, which means that house counsel can litigate only if they are designated as Assistant Attorneys General. He may also have limited or complete power over the appointment of house counsel. In North Dakota, the Attorney General has statutory authority to appoint agency attorneys, but may not establish their salaries. In Tennessee, he has statutory authority to approve the appointment of attorneys for a limited number of agencies. In South Carolina, all attorneys are under the supervision of the Attorney General and he must give written approval for their employment, at a compensation approved by him. Georgia law requires the Attorney General to select the Consumer's Utility Counsel and to provide for his compensation; once appointed, however, he exercises no supervision over him. In Florida, the Attorney General's staff does not supervise house counsel, but acts as lead counsel in any case in which they are jointly involved.

Apparently, agencies which employ their own attorneys continue to rely on the Attorney General for advice on some questions even if he has no formal authority over them. Of the 26 states responding, 14 said that it depends on the agency. All Attorneys General issue advisory opinions on questions of law and most are assigned this function by statute. In a few states, such opinions are binding on recipients. Even where this is not the case, the weight of an Attorney General's official opinion would exceed that of an agency attorney.

Consultation With Agency About Attorney Assignment

Agencies which do not have house counsel, but which rely on the Attorney General's office for legal work, may still have a voice in the selection of counsel.

A COAG questionnaire asked whether, if the Attorney General provides all legal services for a state agency, he consults with the agency's administrator before assigning an attorney to it. Three Attorneys General report that they never consult the agency, eleven that they sometimes do, and seven always. In six jurisdictions, this depends on the agency. This indicates that such consultation is the rule, rather than the exception.

One state says that consultation is made only when filling the position of lead attorney for the agency. Another reported, although the Attorney General seldom consults with the administrator, assignments are always made with an awareness of his personality and the agency's special needs and requirements.

Oregon's Attorney General is required by law to assign attorneys to serve as agency counsel. The statute requires the counsel shall be approved by the chief administrator of the agency to which he is assigned, "provided, however, such approval shall not be unreasonably withheld."

The administrator may withdraw approval at any time, in which case the Attorney General shall assign replacement counsel.

One Attorney General's office says it never consults the administrator, but that the agency can request a specific attorney. Another says the agency is not consulted prior to appointment, but it can request a change, which is sometimes granted on the merits of the demand. One Attorney General consults the agency only when it is paying all or part of the attorney's salary, or in other unusual cases.

Conflicts With Agency Attorneys

Only a few states reported that any conflicts have developed between the Attorney General's office and agency attorneys. Maine said the only problem that developed was that the Attorney General's office might not be informed in a timely manner of positions taken in litigation which might be inconsistent with positions it had taken. Texas said house counsel might differ from the Attorney General's office concerning the strategy that should be followed in a suit; the Attorney General has final authority in all litigation, however, North Dakota reported that the few serious conflicts that do arise are resolved through conference; since all attorneys are either special or regular Assistant Attorneys General, the Attorney General often arbitrates the dispute. Oklahoma stated, a well-written Attorney General's opinion concerning such a conflict is quite curative and acts to resolve disputes. This would be especially true in a state like Oklahoma, where an Attorney General's opinion has the force of law.

Three states mentioned cases that have resulted from disputes between the Attorney General's office and state agencies. These are discussed elsewhere in this report.

7. CONFLICTS IN REPRESENTATION

When legal services are consolidated under the Attorney General, conflicts in representation may arise. These are of two kinds: 1) when agencies which the Attorney General represents are on conflicting sides of a legal matter; 2) when the Attorney General appears before a board or commission for which he serves as counsel or is a member.

Conflicts in Representing Agencies

A situation may arise when two or more agencies which the Attorney General normally represents are on conflicting sides of a legal argument. In such cases, some Attorneys General consider it appropriate for their office to represent both agencies, since different Assistant Attorneys General are assigned to the agencies, Delaware, Maryland, New Mexico, North Carolina and Oklahoma are among the states which report that the Attorney General's staff may appear as opposing counsel. Minnesota reports that the Attorney General will represent both agencies upon obtaining a recognition of the possible conflict and a waiver from each agency.

In Georgia, the Attorney General will resolve a conflict as to a matter of law between two or more agencies which he usually represents. If the agency, however, disagrees with the Attorney General's judgment, resolution of the dispute may be resolved by referral to the Governor who may, if he chooses, provide counsel for the opposed agency. In one recent case, the Attorney General declined to represent any one of the three different interests that were involved, but authorized each to retain counsel in the event that litigation might ensue; the matter, however, was settled without further proceedings. Georgia also reported that, on two recent occasions, a conflict developed between the Governor and individual legislators who served on agencies' governing boards. The Attorney General then represented the Governor, and the office of Legislative Counsel represented the legislators.

Maine also reports that conflicts are usually resolved by an Attorney General's opinion prior to litigation. On one recent occasion, an agency acted contrary to such an opinion and was subsequently authorized to have private counsel. Pennsylvania comments that, although the Attorney General can usually resolve the dispute, there are occasions where this is not possible. For example, where the Civil Service Commission renders a ruling adverse to a state agency and that agency appeals to court, the Attorney General normally represents the agency. Unless there is an attorney specifically assigned to the Civil Service Commission, it may appoint special counsel. The New Mexico Attorney General may permit an agency to retain its own counsel when the agency vigorously disagrees with the Attorney General's resolution of a dispute, and when the agency may have a legitimate claim which ultimately should be decided by a court.

Nebraska, South Dakota, Utah, Vermont and Washington report that, depending on the situation, the Attorney General may represent both agencies or may hire outside counsel. Another group of states reports that special counsel would be hired for one or both agencies. This group includes Alaska,

California, Guam, Louisiana, Massachusetts, Montana, Nevada, Tennessee and Wisconsin. Florida said that the agency retains its own counsel generally, unless there is a compelling reason for the Attorney General to become involved. Where special counsel are hired to represent an agency, they are designated as Special Assistant Attorneys General in many states.

Michigan's response to this problem was presented in an article describing the Attorney General's office, which noted that a conflict arose when the office was called on to represent two agencies on opposite sides of a controversy:

... This problem is easily handled if each agency is represented by a separate division of the office, for the two divisions can simply work independently in presenting each agency's case. If the two agencies are normally represented by the same division, two solutions are possible. First, the attorney general may assign each agency's case to a different assistant attorney general within the division, with instructions that they work independently. This, however, does little to remove the conflict. Alternatively, the attorney general may assign the representation of one of the agencies to the Special Litigation Division, while the other agency is represented by the regular division for that agency.¹⁰⁷

Attorneys General's Appearing Before Boards They Represent

A problem of representation may arise if the Attorney General intervenes or appears in a proceeding before a board or commission for which he provides legal representation. Such intervention has become common only in the last few years. Comparable problems may arise when an Attorney General represents a state agency which appears before a board or commission which he also represents. In response to COAG's questionnaire, five Attorneys General said that they often intervened, 17 that they seldom did so, and eight said they never intervened. The states were grouped as follows:

Often Intervene-- Massachusetts, Minnesota, Nevada, Samoa, Wisconsin;

Seldom Intervene-- Alaska, California, Connecticut, Delaware, Florida, Indiana, Maine, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Washington, Wyoming;

Never Intervene-- Guam, Louisiana, Maryland, Montana, Nebraska, Oregon, Tennessee, Vermont.

Instances of such conflict included: personnel boards, where the Attorney General's office represented both the board and an agency whose action was brought before the board; state agencies appearing before environmental protection boards; and the Attorney General representing consumers in rate hearings before public service commissions.

Respondents generally agree that there is an actual or potential conflict of representation in such cases. The most common way to solve or prevent such conflict is to hire outside counsel to represent one party, or to

assign attorneys from different units of the Attorney General's office to represent the board and to intervene. Several states commented that such conflicts are few, and are handled on a case-by-case basis.

Massachusetts is among the states which appoint outside counsel when conflicts arise. Private attorneys are designated as Special Assistant Attorneys General to represent the board or commission in the particular matter involved. The Texas Attorney General reports he would certify that he could not legitimately represent an agency if a conflict of interest arose, and authorize the agency to hire outside counsel. Alaska, California, Connecticut, Minnesota and Washington also report special counsel may be used in such instances.

Wisconsin assigns members of the Attorney General's staff to represent the board and to intervene, but selects them from different units within the office. Minnesota also reports that staff from different divisions have been used and required to work independently of each other. Nevada reports that problems often arise in hearings before the State Personnel Advisory Commission, before which one Deputy Attorney General presents an agency's case for disciplinary action against the employee and another Deputy renders legal advice to the Commission. The problem is alleviated by removing the Deputy who advises the Commission from any participation at the hearing or writing findings of fact, etc., and assigning that function to another Deputy, who is not present at the hearing.

Georgia acknowledges that the Attorney General may have an awkward position in proceedings before boards which he represents. It reports that the general posture is to present to a hearing officer or board evidence in such matters as license revocation, then to advise the board only on pure questions of law at a later date. The Attorney General's office has sought, unsuccessfully, to have a body of administrative law judges created. Counsel other than staff attorneys would present cases before such judges, leaving the staff attorney to serve solely as counsel to the board.

Pennsylvania commented that the Attorney General had intervened only before the Public Utility Commission, where he represented the state as a consumer in rate cases. This intervention was based on the independent nature of the Commission and the fact that, although the Attorney General appointed counsel for the Commission, such counsel were not subject to the same control as other Attorneys General. The Attorney General would not otherwise intervene before a board or commission which he represented, although he would feel free to interject himself to advise it on the legality of its actions if, in his opinion, it was acting incorrectly or improperly. The Attorney General of New Mexico is proposing that the Public Service Commission be permitted to hire counsel for rate proceedings, to avoid conflicts when the Attorney General's office intervenes.

Boards of Which the Attorney General is a Member

Another kind of conflict may develop if the Attorney General appears before a board of which he is a member. American Samoa notes that the Attorney General is Chairman of the Immigration Board, and also appears before it to advocate the government's interest in deportation or parole revocation

matters. Guam comments that a potential problem exists because the Attorney General provides legal advice to the Civil Service Commission, but may also be the object of an employee complaint brought before the Commission.

The Florida Legislature has foreseen a potential conflict in the Attorney General representing boards of which he is a member, and has authorized such boards to retain legal services in lieu of those provided by the Attorney General. This enables all cabinet agencies to retain private counsel.¹⁰⁸

Separate Counsel

One legislative response to this potential problem of conflicting representation has been to establish a "people's counsel" for the purpose of representing the consuming public. Such representation has most commonly been before public service commissions, but the counsel may have broader responsibilities. According to a 1975 report, ten states had established such counsels.¹⁰⁹

In Georgia, the Office of Consumer's Utility Counsel was established by law in 1975. The Attorney General appoints the counsel and provides for his compensation, but exercises no general supervision over the conduct of the office.

In 1967, the Wisconsin Legislature created a Public Intervenor, who is an Assistant Attorney General, appointed by the Attorney General. He intervenes at his own discretion whenever intervention is needed for the protection of public rights in water and other natural resources, and must intervene when requested to do so by administrators of state environmental agencies. Although this position is under the Attorney General, a recent study concluded that it "functions as a largely independent force with respect to the Attorney General and the Department of Justice."¹¹⁰

Several states have created offices that are completely independent of the Attorney General. New Jersey, in 1974, created a new cabinet-level agency called the Department of Public Advocate. The Public Advocate is appointed by the Governor, with the advice and consent of the senate. The concept of this agency has been characterized as "that of a public interest law firm positioned at the Cabinet level which is an adversary relationship with other state departments and private corporations in representing their view of the public interest."¹¹¹ Because the Attorney General represents all state agencies, it is not uncommon for the Attorney General and the Public Advocate to be on opposing sides of a case. The statute creating the department established the following divisions: the Public Defender; Office of Inmate Advocacy and Parole Revocation; Mental Health Advocacy; Rate Counsel; Public Interest Advocacy; and Citizen's Complaints and Dispute Settlement. As this structure indicates, the Public Advocate serves as an ombudsman as well as an intervenor.

Maryland has a "people's counsel," authorized by statute, and appointed by the Governor. He is empowered to appear before the Public Service Commission and the courts on "behalf of the public in general in any matter or proceedings, of which the Commission has original jurisdiction and in which he may deem the public interest to be involved"¹¹² In the 1975 fiscal

year, the Office of the People's Counsel participated in 55 cases before the PSC concerning the services and rates of utilities. Some states have established similar positions under the legislature. New Hampshire, for example, created a legislatively-controlled utility consumer's council in 1976, with authority to hire a lawyer.

Several states have taken a different approach and authorized the public service commission to employ counsel, so there would be no conflict if the Attorney General intervened in proceedings before it. In Pennsylvania, the Public Utility Commission was empowered by law to employ its own counsel, after an Office of Consumer Advocate, with authority to litigate before the commission, was established in the Department of Justice.

Issues in Conflicting Representation

Chapter 2 of this report discussed briefly the constitutional, statutory and common law bases of the Attorney General's authority. It noted that his specific statutory duties to represent state agencies must be viewed in the broader context of his duties in representing the public. This appears to be true in litigation concerning the question of conflicts in representation. The question of dual representation has been before the courts and, while the results are not entirely consistent, the Attorney General's right to represent both sides usually has been sustained.

A recent decision by a Connecticut lower court, now on appeal to the state's supreme court, concerned the question of dual representation by the Attorney General. A newspaper reporter who was denied access to documents by the Commission on Special Revenue sought relief from the Freedom of Information Commission, which ordered the documents disclosed. The Revenue Commission appealed. Both commissions were represented by Assistant Attorneys General on appeal and, on motion of the reporter, the court of common pleas disqualified both Assistants and ordered the Attorney General to appoint other counsel.¹¹³ Another Connecticut lower court decision held that the Attorney General, having represented both a complainant and the commission which heard its complaint, was disqualified from representing either on appeal of the hearing examiner's ruling.¹¹⁴ This decision was based largely upon application of the American Bar Association Code of Professional Responsibility. The court said, although the interests of the two clients were not in conflict at the public hearing, they were in conflict on appeal when the commission had to defend the decision of its hearing examiner in denying the petitioner's claim. It was improper for the Attorney General to represent both the commission and petitioner because of Canon 4, which deals with professional confidences, and Canon 5, which deals with representation of multiple clients with conflicting interests.

A memorandum prepared by the Utah Attorney General's office dealt with the subject of dual representation and reached a different conclusion. The Memorandum quoted Canon 5, which provides that "a lawyer should exercise independent professional judgment on behalf of a client," but stated reasons why it did not apply to an Attorney General's staff. First, "the evils to be prevented by the canon are those which predominate in the private practice of law and not in public law," because the Attorney General has no pecuniary interest in cases, and does not enjoy the option of rejecting a case. Second, the Attorney General is required by law to represent both

sides of the issue in given circumstances; even if he hires special counsel, such counsel are answerable solely to him. Third, Canon 5 "provides that the potential evils which are to be prevented are eliminated by full disclosure to the clients involved"; in the case of the Attorney General's office, this is done by the statutes which prescribe the conditions of representation. Finally, "the ability of assistant attorneys general to represent adequately the separate interests with minimal effect on their independent professional judgments is made possible by the diverse and independent nature of the attorney general's staff." The Memorandum also makes the point that the Attorney General, as a constitutional officer, is not accountable to the bar association, but only to the people.

A recent decision by the Massachusetts Supreme Judicial Court, Secretary of Administration and Finance v. Attorney General, also concluded that something other than a traditional attorney-client relationship exists where the Attorney General appears for a state officer, so the Canons do not necessarily apply.¹¹⁵ The same court apparently concluded in Boston Gas Co. v. Department of Public Utilities that the permissibility of a member of the Attorney General's staff appearing before an agency as an advocate and representing it on appeal depends on a case-by-case determination of the significant differences between the positions that must be taken on behalf of the parties.¹¹⁶

Utah's Supreme Court commented on the question of conflict in reviewing an order of a state commission dismissing its director. The court noted that members of the Attorney General's staff represented both the commission and the dismissed director, and that such representation was "improper." However, the court's objection seems to be based on the fact that the director was not acting in an official capacity when he appeared in opposition to his removal. The Chief Justice did not participate in the case, other than to observe this point was no business of the court.¹¹⁷

California's highest court, in D'Amico v. Board of Medical Examiners, refuted the argument that the Attorney General's representation of a licensing board conflicted with his duty to represent the public interest. The court acknowledged his "dual role as representative of a state agency and guardian of the public interest," and said that

... he has the duty to defend all cases in which the state or one of its officers is a party. In the course of discharging this duty he is often called upon to make legal determinations both in his capacity as representative of the public interest and as statutory counsel for the state or one of its agencies or officers. In the great majority of such cases no conflict will result because in representing the interest of his "client" the Attorney General will take a position consistent with what he deems to be in the public interest. In the exceptional case the Attorney General, recognizing that his paramount duty to represent the public interest cannot be discharged without conflict, may consent to the employment of special counsel by a state agency or officer. However, unless the Attorney General asserts the existence of such a conflict, it must be concluded that the actions and determinations of the Attorney General in such a law suit are made both as a representative of the public interest and as counsel for the state agency or officer.¹¹⁸

The Pennsylvania Supreme Court, in Pennsylvania Human Relations Commission v. Fesser, reversed a Commonwealth court holding that it was a denial of due process for an agency counsel to prosecute a case before the agency against third parties and to advise the agency on the law. The state's highest court said that the record did not show the attorney had given any advice in the particular case, and the mere fact the attorney otherwise advised the agency was not a sufficient conflict to violate due process.¹¹⁹ A petition for appeal is pending from another Commonwealth court decision, which held that due process of a party cited before a state department was violated by having an assistant chief counsel serve as hearing examiner while an attorney under his supervision prosecuted the case.¹²⁰

Intervention by the Attorney General before regulatory agencies or courts has been repeatedly allowed by the courts. The basis of this authority, as noted in Chapter 2 of this report, is his common law role as representative of the people.¹²¹ In one of these cases, the Wisconsin Supreme Court rejected an argument that the Attorney General should not be allowed to intervene in proceedings before the Public Service Commission because it was the commission's duty to represent the state in such proceedings. The court pointed out that this would create a conflict by making the commission "both judge and advocate at the same time."¹²²

In contrast, the Pennsylvania Supreme Court denied the Attorney General's position to intervene before that state's Public Service Commission on the grounds that a potential conflict of interest existed, because the Attorney General had authority to dismiss the commission's attorney.¹²³ Most courts, however, appear to recognize some degree of conflict is permissible because of the broad scope of the Attorney General's powers and duties.

8. CONCLUSION

After a two-year study of the office of Attorney General in the 54 states and territories, the National Association of Attorneys General adopted a series of recommendations concerning that office. Four of these concerned the structure of state legal services. These recommendations are quoted in full below.

All state legal staff should be under the Attorney General's supervision; he should determine their salaries and increments, classifications and otherwise control personnel.

The Attorney General cannot effectively control legal staff if salaries and promotions are determined by the agency to which they are assigned. The Attorney General should consult with the agencies, but should exercise final authority over legal staff for all boards, commissions, departments and agencies of state government.

The Attorney General should have sole authority to employ counsel and to represent the state in litigation.

In about twenty jurisdictions, all counsel are under the Attorney General. In others, up to forty-eight agencies have house counsel. Considerations of economy, efficiency and consistency of policy and services indicate that the Attorney General should provide all legal services.

The use of special or part-time counsel should be restricted to unusual circumstances.

All but two Attorneys General report that they employ special or part-time counsel; sixteen Attorneys General employ such counsel often. Such counsel may be desirable when unusual expertise is required, when state agencies are adversaries in litigation, or when distance or other factors make it impractical for the regular staff to render service. Special counsel, however, tend to be an inefficient method of providing service and prevent unified services and consistent legal policy.

The employment and compensation of special counsel should be a matter of readily accessible record.

The potential abuse of such employment makes special safeguards desirable. Employment and payment records of special and temporary counsel should be available to the general public, on a case or individual basis.¹²⁴

This report updates and expands the information on which those recommendations were based. It is apparent that, although an increasing number of states are consolidating legal services, many still retain a substantial number of house counsel, and many still make frequent use of special counsel.

Proposals to centralize legal services under the Attorney General usually meet with opposition from state offices and agencies, many of whom prefer to have in-house counsel. Proponents of house counsel contend that this permits more specialization, which is important for agencies involved in

complex fields of law. The counsel and his files are immediately accessible to agency personnel and can render advice on a continuing basis. However, the primary reason that agencies tend to prefer their own counsel is that the attorney is more responsive to their needs and ideas than someone assigned by the Attorney General would be, and has greater rapport with the agency's administrative personnel.

Proponents of consolidation not only agree with these contentions, but consider them as arguments against house counsel. Because house counsel are agency-oriented, they tend to use their legal skills to implement decisions of agency heads, rather than render objective advice. They may become so specialized that they view issues in an overly narrow context. Thus, the issue becomes one of the attorney's proper role in government.

It has been noted in this report that the Attorney General serves not only as attorney for some or all state agencies, but as attorney for the people. The common law origins of the office have given the Attorney General a unique status as the state's chief law officer, responsible for representing the interest not only of state government, but of the people. Proponents of a centralized system of legal services consider that he cannot meet those broad responsibilities unless he controls all state legal services.

Specific arguments in favor of consolidated legal services are summarized here. Obviously, the validity of each argument would depend on particular conditions in a state.

(1) Consolidation makes possible a reduction in staff. The number of attorneys and of supporting staff can be reduced, because agencies tend to employ more attorneys than they need. This is because they tend to staff for peak workloads, and because a large legal section can become a "status symbol" for an agency. Many small agencies employ a full-time attorney when their legal work could be handled adequately by an attorney assigned on a part-time basis. States which have consolidated services have been able to reduce the number of attorneys or to increase the legal services rendered. In Oregon, for example, centralization made it possible to reduce the number of attorneys employed by the state in 1969 from 107 to 87.

(2) Facilities can be used more effectively. Consolidation makes it possible to provide specialized facilities, such as a legal library, on a more efficient basis. It may also become feasible to use specialized support staff, like paralegal personnel.

(3) Consolidation permits better fiscal planning for legal services. There is more accountability for legal expenditures when they are the responsibility of a single official. Projection for future budgetary needs are usually more accurate and cost components are more easily arranged.

(4) Compensation plans, benefits and other cost factors are more consistent under a consolidated system. In state which allow house counsel, one agency may pay more than another for an attorney with comparable qualifications.

(5) Centralization of legal services usually results in a higher degree of professionalism. Attorneys who are working in an Attorney General's office are concerned primarily with legal issues, while house counsel tend to become involved with agency policy. Emphasis in an Attorney General's office is on the use of legal skills, rather than program administration.

(6) Centralization means that attorneys are in constant contact with other members of their profession. In contrast, house counsel work primarily with laymen. In the Attorney General's office, a back-up staff is automatically available to help with legal problems. Attorneys benefit from better rapport with their colleagues, and can share ideas and the product of their legal research.

(7) An Attorney General's office usually provides better procedures for review of legal work than do state agencies. Few agencies have large enough legal staffs to include supervisory personnel; instead, most house counsel agencies employ only one attorney. This means that there is no opportunity for review of his work by another attorney, and no one who can evaluate his work from a legal perspective.

(8) Statutory and case law are applied more consistently under a consolidated system. House counsel are usually familiar with only a narrow segment of the law and may tend to view issues within than restrictive context. A study in one state found that "most departmental attorneys reported instances where their legal work had conflicted with, or been inconsistent with, that of the Attorney General."¹²⁵ Staff of the Attorney General's office, on the other hand, are exposed to a broader range of statutes and case law, so interpretation of a particular law takes place in a broader context. This results in more uniformity of interpretation.

(9) Consolidation tends to reduce legal conflicts between agencies. The Attorney General is better able to resolve disputes among agencies concerning legal issues if they must turn to his staff for legal advice. As an official opinion issued by one Attorney General said, "a proper role of the Law Department is to advise units of the Executive Branch whose interests may be in conflict as to proper statutory interpretations as they affect their legal rights, and thus avoid intergovernmental litigation."¹²⁶

(10) The responsibilities of the Attorney General's office and state agencies are more clearly delineated if the Attorney General handles all legal matters. There is seldom a clear line of demarcation between the duties of house counsel and the Attorney General's office. The agency may continue to rely on the Attorney General for opinions and to handle some or all of its litigation. A consultant's report on house counsel in one state pointed out that "no one clearly understands who is supposed to do what at each stage of the litigation process.... Moreover, guidelines for referring nonlitigation problems to the Attorney General's office are lacking."¹²⁷

(11) The Attorney General, as the state's chief law officer, should be responsible for developing and applying consistent legal policies on behalf of the people of the state. This is not possible if agencies have their own counsel, who follow their own policies.

FOOTNOTES

1. 17 OPS. ATTY. GEN. 86.
2. 12 OPS. ATTY. GEN. 176.
3. State ex rel. Pew v. Porter, 57 Mont. 535, 189 Pac. 618 (1920).
4. State ex rel. Pigott v. Porter, 57 Mont. 539, 189 Pac. 619 (1920).
5. The State ex rel. Doria v. Ferguson, 145 Ohio, 12 N.E.2d 476 (1945).
6. Industrial Commission v. School District No. 48 of Maricopa County, 56 Ariz. 476, 108 P.2d 1005 (1941).
7. Wisconsin Department of Justice, House Counsel in Wisconsin State Government (April, 1976).
8. National Association of Attorneys General, Committee on the Office of Attorney General, THE OFFICE OF ATTORNEY GENERAL 26 (1971).
9. Illinois ex rel. Scott v. Briceland et al., No. 276-76, Illinois Seventh Judicial Circuit (July 1976).
10. MICH. STAT. ANN. § 3.185.
11. V.I. CODE tit. 3, § 114(a).
12. ARIZ. REV. STAT. ANN. § 41-192(E).
13. OHIO REV. CODE § 109.02.
14. KY. REV. STAT. § 12.210.
15. MD. CODE ANN. art. 32A, § 3.
16. MINN. STAT. § 8.06.
17. ORE. REV. STAT. § 180.060.
18. See National Association of Attorneys General, Committee on the Office of Attorney General, COMMON LAW POWERS OF STATE ATTORNEYS GENERAL (1975).
19. Fergus v. Russel, 270 Ill. 304, 110 N.E. 130 (1915).
20. Department of Mental Health v. Coty, 38 Ill. 2d 602, 232 N.E.2d 686 (1967).
21. Darling Apartment Co. v. Springer, 25 Del. Ch. 420, 22 A.2d 397 (1941).
22. Board of Public Utilities Commissioners v. Lehigh Valley Railway Co., 106 N.J. L. 411, 149 Atl. 263 (1930).

23. State Board of Pharmacy v. Hallett, 88 Colo. 331, 296 P. 540 (1931).
24. State v. Davidson, 33 N.M. 664, 275 Pac. 373 (1929).
25. Johnson v. Commonwealth ex rel. Meredith, 291 Ky. 829, 165 S.W.2d 820 (1942).
26. Padgett v. Williams, 82 Idaho 28, 348 P.2d 944 (1960).
27. State ex rel. Pew v. Porter, 57 Mont. 535, 189 Pac. 618 (1920).
28. Id.
29. Woodahl v. Montana Board of Natural Resources and Conservation, 155 Mont. 32, 516 P.2d 388 (1973).
30. Evans v. Superior Court, 14 Cal. 2d 563, 96 P.2d 107 (1939).
31. Secretary of Administration and Finance v. Attorney General, 326 N.E.2d 334 (1975); citations omitted.
32. Commonwealth ex rel. Hancock v. Paxton et al., Ky. 516 S.W. 865 (1974).
33. People ex rel. Scott v. Illinois Racing Board, 54 Ill. 561, 301 N.E.2d 285 (1973).
34. State ex rel. Shevin v. Yarborough, 257 So. 2d 891 (Fla. 1972); Ervin, J., concurring.
35. See National Association of Attorneys General, Committee on the Office of Attorney General, COMMON LAW POWERS OF STATE ATTORNEYS GENERAL (1975); ATTORNEYS GENERALS' INTERVENTION BEFORE REGULATORY COMMISSIONS (1975).
36. MINN. STAT. § 8.07.
37. ORE. REV. STAT. § 180.220.
38. S.D. COMPILED LAWS ANN. § 10-1-11.
39. S.D. COMPILED LAWS ANN. § 49-1-15.
40. S.D. COMPILED LAWS ANN. § 31-2-15.
41. 29 DEL. CODE § 2507.
42. S.C. CODE, § 203.
43. NEB. REV. STAT. § 48-462.
44. NEB. REV. STAT. §§ 60-439; 60-1414.
45. MD. ANN. CODE art. 48B.
46. MD. ANN. CODE art. 64B.

47. MD. ANN. CODE art. 32A, § 12.
48. MD. ANN. CODE art. 27A.
49. GUAM GOV'T. CODE § 21506.
50. Pub. L. 43-50, § 21606.
51. Pub. L. 13-57, § 62007.
52. GUAM GOV'T. CODE § 20003.
53. GUAM GOV'T. CODE § 13902.
54. Pub. L. 13-51, § 60008.
55. GUAM GOV'T. CODE § 1010.
56. Pub. L. 13-117, § 7002.
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