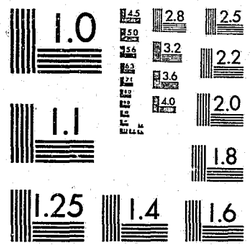

U.S. Department of Justice *National Institute of Corrections*

THE ROLE OF HOUSE COUNSEL IN CORRECTIONS: A JOB TASK ANALYSIS

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by

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These workshops have provided a significant forum on matters relating to the management of litigation in corrections. Special recognition is due to William C. Collins, Director of the Correctional Law Project (1978-79) and currently Assistant Attorney General, State of Washington for his insight and analysis on the occupation of corrections house counsel.

The focus for this monograph was provided through the discussion panels designed and conducted during three years of the Correctional Law Project workshops by Richard Crane, Attorney for the Secretary of Corrections, State of Louisiana and the first director of this project. Finally, the commentary by Michael A. Millemann, Chief General Counsel, Office of the Attorney General, State of Maryland provides an important perspective on the preventive law function of full time house counsel.

The authors owe special debts of gratitude to their colleagues Jess Maghan and David Rapoport of the American Correctional Association's professional staff for their valuable editorial assistance and managing the development of this monograph through all of its phases.

Finally, acknowledgement is made through this monograph to the new generation of correctional employees -- the house counsel who perform the difficult task of supporting managers and line staff in their service to the clients of the nation's corrections system.

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FOREWORD

The significant growth of prisoner litigation over the last two decades has had a profound impact on correctional agencies operations. Prisoner litigation has resulted in the development of new operating procedures, new lines of authority among management personnel, and a greater appreciation of the importance of accurate interpretations of correctional law. The appearance of administrators and wardens in court for the purpose of substantiating administrative rules and regulations and general operations is now an established fact of prison management.

Paralleling this development has been the emergence of the need for a full time legal counsel on staff as a key element for decision making by the command staff of state corrections agencies. Increasingly, state corrections agencies are establishing the full time house counsel as an executive support position, not only to assist in the management of litigation matters, compliance with court orders, formulation of case strategy, and the development of rules, regulations and grievance systems, but more importantly, as a key agent in providing a proactive, preventive law approach to the everyday decisions affecting operations of correctional agencies.

This monograph has been prepared to assist correctional administrators in analyzing the job function and organizational placement of the corrections house counsel. Special emphasis has been given to the discussion of this job function vis-à-vis other agency personnel, to those tasks that are non-legal in nature, and most importantly, to the identification of specific factors to support and maximize the effective utilization of this new and vital staff position in contemporary corrections.

Allen F. Breed
Director
National Institute of Corrections

March, 1981
Washington, D.C.

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INTRODUCTION

The position of house counsel in corrections is comparatively new and its growth parallels the revolution in correctional law during the last decade. Several major state prison systems have acquired full time house counsel to assist in managing litigation and to serve a preventive law function in agency operations.

Necessarily, the job function for a position of this magnitude needs to be analyzed in terms of both appropriate role and overall effectiveness. This is especially significant regarding specialized functions including contacts with the attorney general's staff and state regulatory bodies, contract reviews as well as those areas of responsibility of a non-legal nature such as legislative liaison activities.

It is hoped that this job task analysis monograph, by more clearly defining the role of the corrections house counsel, will assist in supporting preventive correctional law management in the administration of corrections agencies.

JOB AND TASK ANALYSIS

The use of job and task analysis has been an established methodological tool of employment, labor research and planning for professionals in the private sector and with various government agencies— especially the military—for quite some time. However, its use in criminal justice, and particularly in corrections, is comparatively new, occurring within the last decade.

CRIMINAL JUSTICE APPLICATIONS

The most noteworthy examples are the American Justice Institute's research entitled "Project Star",* including job analyses of the positions of prosecuting attorney, defense attorney, and judge and the "National Manpower Survey of the Criminal Justice System"** prepared by the National Institute of Law Enforcement and Criminal Justice, which included an analysis of the "professional education and training for judicial process occupations".

CORRECTIONS APPLICATIONS

This monograph complements these efforts through the specific examination of the criminal justice/corrections position of house counsel for state prison systems. This work has been prepared in an effort to more fully understand both the need for and appropriateness of the position of house counsel within state corrections agencies, but also to examine house counsel in relation to other attorneys utilized. The position of house counsel has existed long enough in several jurisdictions to have well-established functional duties as a support agent to the administration and management of corrections agencies.

Additionally, the diverse duties of house counsel are inter-related with other emergent positions crucial to the management of contemporary corrections systems. These include the positions of standards compliance coordinator, special master, prisoner advocate, prison ombudsperson, and legislative liaison officer. The full-time agency attorney or house counsel, working independently of but in concert with the assistant state attorneys general, has emerged as an important management support position for the correctional administrator.

STAFF RESOURSE

Consequently, the house counsel has become an important staff resource for correctional executives in developing rational operating procedures and delineating management authority for compliance with the plethora of state and federal laws increasingly regulating agency operations. The monograph concludes with a commentary on new and significant issues concerning the practice of preventive law by corrections lawyers.

It is hoped that this monograph will provide insight into the potential benefits to be derived from the presence of house counsel in departments of corrections, provide guidance on the optimal utilization of such professional legal services, and present a balanced perspective on the contribution house counsel can make to enhancing departmental operations.

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* Law Enforcement Assistance Administration, U.S. Department of Justice, 1974. Anderson Publishing Co., Criminal Justice Division, 646 Main Street, Cincinnati, Ohio 45201.

** Law Enforcement Assistance Administration, U.S. Department of Justice, 1975. Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, Stock No. 027-000-00642-6.

THE ROLE OF HOUSE COUNSEL IN CORRECTIONS: A JOB TASK ANALYSIS

WHY HAVE COUNSEL?

After over a decade of broadening judicial involvement in correctional affairs, the question, "why have legal counsel?" should no longer exist.

Institutional administrators are amused when asked "How many times have you been sued?" Most lost count scores of complaints ago, if they ever kept a tally of complaints. Prisoners' civil rights actions now comprise approximately 14.9 percent of all the civil cases filed in the federal courts.[1] Perhaps a decade ago no one anticipated this plethora of prisoner pleadings and while this article will not attempt to trace the causes of prisoner litigation,[2] such litigation is a fact of the correctional administrator's life and likely to remain so. Thus, one answer to "why have counsel?" is simply to have someone to defend the administrator in court, or provide specialized assistance to the courtroom lawyer.

There is, or should be, a greater role for counsel in the administrator's life than simply trotting off to court to defend civil rights actions.

Counsel should be part and parcel of many of the administrator's day-to-day functions and decisions — available to advise as decisions are being made, to help avoid potential litigation, and to assure that the agency, insofar as possible, adheres to the ever-changing requirements of the law. Time and resources will be lost, and judicial involvement increased, if counsel's only role is that of an after-the-fact defender of lawsuits.

Corrections is, in any given state, a multi-million dollar business. A corrections agency employs hundreds, perhaps thousands, of people. It spends huge quantities of public funds and enters into contracts both large and small. It is responsible for the safety and care of hundreds or thousands of people housed in its institutions. It is big business. In the private sector, no corporate president would consider operating a business the size of a corrections agency without the close, continuing involvement of legal counsel. Yet, how many administrators routinely include counsel in the day-to-day operations of their agencies, as opposed to consulting with their attorneys only in the face of litigation or threatened litigation?

ROLE OF HOUSE COUNSEL

While it may be natural for correctional administrators to think of attorneys only in conjunction with civil rights litigation, there are a number of other areas where counsel has a legitimate and important role:

Assisting with the agency's involvement in the legislative process. Proposed legislation often becomes the stuff of litigation and, hence, legal assistance in the first instance may reduce possible adverse legal consequences later. Attorneys should obviously be involved in the drafting of legislation the department may request. Additionally, legal counsel is valuable in reviewing statutes proposed by other sources which may affect a correctional agency. A single word or phrase in a statute, apparently innocuous to the non-lawyer, may nevertheless be of very significant effect. Likewise, passage of a new statutory right or entitlement may create an obligation greater than envisioned by a policymaker. Legal review, especially by one familiar with existing correctional law, is necessary for a complete analysis of pending legislation.

Closely related to the analysis of proposed statutes is the preparation of testimony for presentation to legislative committees. This is not to suggest that counsel should replace program specialists in testifying before committees, but simply a recognition that there are likely to be legal ramifications to any statute and these are best explained by counsel.

Interpreting new case holdings and giving "preventive" advice. Some types of lawsuits cannot be avoided but many can be avoided or their impact minimized if the agency receives and responds to what can be described as "preventive law" advice. Such advice frequently will be based upon newly developing trends of judicial holdings. One of the highest priorities of agency counsel should be to advise the agency of developing legal trends in areas which may affect its operations. Such advice obviously includes the general area of inmates' rights, but is not limited to this area alone.

For instance, complex areas of affirmative action and equal opportunity may only indirectly affect inmates, yet, may be of substantial legal significance to the agency. For instance, what is the current status of the law regarding the use of female correctional officers in a male maximum security institution?

Agency counsel is in a unique position to provide such preventive advice because he should be familiar both with the law in a given area and what, specifically, the agency is currently doing in that area. Armed with such dual frames of reference, counsel can structure advice in a way to minimize the adverse impact on agency operations while still keeping the agency abreast or ahead of the changing law.

It may be frustrating for an administrator to change policy or procedure "because of a couple of court decisions from somewhere or other." Yet, such changes may be far less wrenching if done pursuant to the advice of counsel knowledgeable in correctional practices, as opposed to being effected pursuant to court order where the change may be directed by a judge with little or no knowledge of corrections who is in turn, perhaps, being strongly influenced by an inmate's attorney whose feelings about corrections may differ considerably from those of the administrator-defendant. "An ounce of prevention is worth a pound of cure" is certainly not original advice, but it is, nonetheless, advice well heeded in the corrections context.

Monitoring implementation of court orders. Many court decrees in the correctional area are not satisfied with a single act (such as the payment of damages), but require a lengthy period of implementation and continued performance by an agency. The relief phase of the lawsuit may involve continued scrutiny of the institution or an entire correctional system by the court, plaintiffs' attorneys, and (in some cases) a special master.

Successful implementation often will depend in large part on the availability of attorney time to educate staff as to the contents of an order (and the context of litigation in which the order arises), to interpret its requirements for staff and generally to assist in seeing that the order is carried out or that the institution is able to demonstrate convincingly that it is incapable of carrying out the order to the letter. (Such incapability may or may not result in the court amending its order or deleting a portion of the order. However, unless a request for a change in the order is convincingly presented, there is little hope that the court will alter an order once issued.)

Having available an attorney who is familiar both with the contents of an order (and with litigation in general) may ease somewhat the operational problems an institution may confront in attempting to comply with an order. Lest the impression be given that implementation is a short-lived process, some conditions cases have been pending in the courts (primarily in the implementation phase) for a decade. In one such case where the plaintiffs have been represented by the same counsel for virtually the entire duration of the case, the state defendants have seen eight assistant attorneys general come and go as their legal counsel. The disadvantages of such a situation should be obvious.

Liaison with trial counsel on pending litigation. Defense and, in some cases, settlement of cases depends on a complete understanding of the legal issues, the agency's factual and policy positions in regard to such issues, and the implications to the agency of alternative ways of dealing with the case. House counsel, who should be able to have a clear understanding of all these questions, is in an ideal position to make informal recommendations to the agency as to case handling, defense positions, and possible settlement.

Advice on labor relations matters. The increase in the number and power of state employee unions, with the collective bargaining and labor disputes (including the possibility of strikes) that accompany unionization, increases the need for legal advice being included in agency decisions on labor relations issues.

Sentence computation and clarification. Depending on the complexity of the statutory sentencing structure a state may have, it may not be uncommon for trial court judges to err in the imposition of sentence. Such errors usually are ministerial mistakes, as opposed to errors of judgment or discretion and may be easily correctable. It is of value to have access to someone with legal skills who is familiar with state sentencing systems to detect such sentencing errors, and it also may be of practical value for an attorney to call such errors to the attention of the court as opposed to having a layperson perform this task.

Relations with private attorneys. Attorneys representing inmates frequently may contact a correctional agency with questions covering virtually everything from inquiries about sentence structure to details of prison disciplinary proceedings. House counsel can respond not only to the nonlegal, operational aspects of the question (e.g., "disciplinary proceedings at the penitentiary are conducted in accordance with rules which appear in the state administrative code. . .") but also to the legal implications of the question ("due process does not absolutely guarantee a right to confrontation and cross-examination in prison disciplinary hearings. . .").

[1] Annual Report of the Director of the Administrative Office of the United States Courts, 1979.
[2] Perhaps Pogo said it best: "We have met the enemy and he is us."

Because of the ability to respond to both legal and nonlegal aspects of a question, an attorney may be able to respond satisfactorily to questions from the private bar more easily than can a non-lawyer.

Preparation and/or review of proposed administrative rules and policies. Statutory and constitutional law is frequently implemented through administrative rule. Employees ultimately responsible for carrying out an agency's legal obligations may never see the statute, constitutional provision or court decision which is the source of the obligation, only the regulation which translates "the law" into operational requirements and guidelines.

Assistance in drafting these rules and regulations may be one of the most critical functions counsel can perform. Also, rules and policies generally create a duty or duties on the part of the agency and often create or closely define rights for inmates, as in the case of disciplinary rules. Counsel can assist in clarifying these right/duty rule implications.

Involvement in the policy planning process, including development of new and/or revised agency policy. Like it or not, a great deal of corrections planning and policy development today comes about as a result of litigation and trends in litigation or has direct legal implications (e.g., in construction of jails and prisons, planning adequate and constitutional facilities, space, programs, etc.). Exclusion of counsel from this process invites the creation of unnecessary legal entanglements.

Such implications range from the development of disciplinary rules to the design and construction of new jails and prisons where cell size, adequacy of space for programs and exercise, adequacy of lighting, heating and ventilation systems and a variety of other physical factors may be subject to potential judicial scrutiny.

Training. The correctional officer who does not understand at least something of prisoners' rights is short-changed in his training and likely to draw himself or the agency into litigation unknowingly. In the author's experience, someone without legal training is at a distinct disadvantage in attempting to explain prisoners' rights to correctional officer trainees. By the same token, training offered by a lawyer alone may not be well received by correctional officers, who may perceive the lawyer as lacking in practical correctional experience. This suggests using a lawyer-correctional officer training team for legal issues training.

Advising on personnel matters, especially in the preparation of a case against an employee contested under a civil service system. Many states require agencies to "progressively discipline" employees (warn, reprimand, suspend) before firing is allowed. Strict adherence to these or other procedural technicalities may be critical to a successful personnel action.

Affirmative action and equal opportunity. Legal issues surrounding the use of female officers in male institutions (and vice-versa) are already the subject of some litigation and will likely be heavily litigated in coming years. Without being overly pessimistic, it can be said that whatever responses are made to this issue, someone will be unhappy. The inmate may complain his rights to privacy are violated by a female's presence; the female officer will demand equal job opportunity; the male officer will complain if the female doesn't work everywhere he does, and if she does, that she is incapable of providing adequate security coverage.

In short, issues of class action lawsuits aside, there are a wide variety of what may be termed "traditional" management issues which warrant the involvement of counsel. Many of these issues do not necessarily involve litigation, except perhaps when all else fails.

ADVISORY ROLE

Aside from the practical value of counsel in an advisory role, there is perhaps a more philosophical need. Correctional administrators, as public servants, are obligated to uphold and follow the law. It can only erode the public's (to say nothing of the prisoners') respect for government in general, and corrections in particular, if an agency or administrator is found to be acting outside the law.

Given the advisory function of the attorney in this arena, the attorney who provides these services need not, and probably should not, be relied upon as a litigator. Given the time that will be consumed by work outside the courtroom, it will be difficult for a correctional legal advisor to hone and maintain the courtroom trial skills necessary to take the lead in complex correctional litigation.[3] As will be discussed shortly, it may be advisable for the agency attorney to maintain some limited contact with the courtroom in certain situations.

[3] To be a successful trial attorney requires more than a knowledge of the substantive law at issue in the trial. Development of courtroom techniques and knowledge of the procedural law which infuses courtroom proceedings is absolutely necessary. Mastery of these skills requires frequent involvement in the courtroom. In general, the correctional administrator will be better represented in court if his courtroom advocate is one who specializes in trial work than if he asks for a part-time legal advisor or part-time litigator.

TWO BASIC MODELS

At present, there are two basic models for providing legal counsel to correctional administrators. The more traditional approach is for all legal assistance to come from the office of the state attorney general. Indeed, some states require by law that the attorney general be the sole legal advisor for all state agencies.[4]

The second model is that of "House Counsel." Typically, in this model, the agency hires its own attorney(s) to fulfill the legal advisor role and relies on the attorney general's office for representation in litigation and for certain formal legal opinions. It is common under this model for the house counsel to be able to handle at least some litigation as well as assisting the attorney general in selected cases.

Both models offer certain advantages and disadvantages which should be understood if the maximum benefit is to be derived from the model (or variation thereof) with which the administrator is blessed.

TURNOVER PROBLEM

Perhaps the most frequently heard complaint about the attorney general model is the relatively transitory tenure of the individual assistants assigned to corrections work. As with many types of public employment, the office of the state attorney general cannot offer salary structures which keep pace with those potentially available in the private sector. Thus, an attorney general's office may be attractive to a young attorney as the place to "learn the ropes" and to begin to put into practice the skills and knowledge acquired in law school. Unfortunately, as the same attorney develops those skills, the siren song of high salaries may inevitably draw him or her away from government and into the private sector. The great opportunity for closer, more permanent ties with private clients is undoubtedly a relevant factor in drawing attorneys away from government work.

For whatever reason or reasons, the fact remains that reliance on assistant attorneys general as a sole source of legal assistance frequently means that the correctional administrator's attorney will often change and may also tend to be someone relatively new to the practice of law, to say nothing of the field of corrections.

By utilizing a house counsel system, the turnover problem may be checked somewhat. The correctional administrator can have greater control over salary (although still probably not matching that paid by the private sector). Moreover, house counsel, because of its closer proximity to seats of power in a correctional agency, may offer more career enticements than an assistant attorney general position (where career mobility usually involves advancement through the attorney general's office that likely results in an individual shifting from one substantive area of law to an entirely different area as the agency represented changes).

BENEFITS

Perhaps the great advantage to the house counsel system is that it offers the correctional administrator a legal advisor who should have a detailed knowledge not only of the law but also of the organization for which he works and corrections in general. The house counsel should be able to identify potential legal problems before they develop into lawsuits, to run interference for the administrator, and to allow the agency to spend more of its time and energy on fulfilling its responsibilities, rather than defending its actions in court.

However, contained in the benefits of having counsel as an integral part of the correctional management are the seeds for failure of the house counsel concept.

Basic to the ethics of the legal profession is the duty to "exercise independent professional judgment on behalf of a client."[5] In short, this means that from time to time counsel will tell a client "you cannot do that" or "you must do this." The relationship between correctional administrator and attorney must be such that the attorney can give such unwelcome advice without fear of losing his job or suffering other forms of informal castigation. If the pressure of the relationship between attorney and client converts the attorney to a "yes man" or informally compels the attorney to keep his mouth shut when faced with a situation he recognizes to be legally improper, the value of house counsel is lost.

[4] The Structure of State Legal Services, The National Association of Attorneys General, Committee on the Office of Attorney General, Chapter 6, pp. 51-56 (August, 1979).

[5] The Canons of Professional Responsibility, Canon 5.

INDEPENDENCE

Therefore, while counsel can be a valuable advisor to a correctional agency, the recipients of the advice must recognize that *to be effective, counsel has to retain a clear sense of independence and have the freedom to give advice which is sometimes contrary to the desires of his supervisors.*

An advantage of utilizing the office of the attorney general as the source of all legal advice is that the assistant attorney general, not owing his job to the correctional client, may feel a greater degree of freedom to give advice which he deems professionally appropriate but which he realizes may be unwelcomed by the client.

Closely related to the need for guaranteeing the independence of counsel is the need to afford counsel the opportunity to exercise that independence. Many questions may arise in the day-to-day work of a correctional agency which have some legal significance, yet seldom will these questions carry a prominently displayed "of legal significance" warning tag. Unless noted by counsel, the questions may never receive the specific legal scrutiny they require.

STAFF ACCESS

To be fully effective, counsel must be in a position to be cognizant of these questions as they arise. This probably means that counsel should be made a party to most, if not all, of the significant decisions that an administrator makes and serve as a distinct part of the correctional director's executive staff. Counsel should participate in both formal and informal staff meetings. He should have regular, frequent, informal contact with key agency personnel, including the director, so he can be knowledgeable about the full range of agency operations.

Restricting counsel to speaking only when spoken to will sharply limit his effectiveness simply by preventing him from being able to detect and respond to legal issues as they arise. The correctional administrator should not rely on his own personal sense of when a question has potential legal significance.

By securing the services of an attorney primarily for the purposes of advice and counsel, as opposed to trial defense, the correctional administrator helps assure that legal advice will be available when needed. Under the attorney general model, the best laid staffing patterns may succumb to the compelling pressure of litigation loads. The result is that all available attorneys are drawn into the courtroom, and time supposedly available for non-litigation work (training, advice on policy development, etc.) is simply lost because of the unforgiving need to meet court deadlines.

SKILLS MAINTENANCE

As with any other profession, attorneys constantly need to develop and maintain their professional skills. This means more than simply reading opinions or attending an occasional seminar. Continuous association with other attorneys in a professional context is of the utmost importance. Such association, in the correctional context, can be maintained in a number of ways.

One, alluded to earlier, is for the house counsel to continue to be involved in at least some litigation. By actively working on a limited number of appeals or proceedings at the trial court level which demand neither the quantities of time nor the courtroom skills required by full trials, the attorney has the opportunity to test his research, writing and advocacy skills in the adversary process. By having his work "tested" by a judge, an attorney can be more confident that his advice and perception of the law are in fact accurate and this should enhance his overall legal skills.

SPACE ALLOCATION

A second means of professional interaction is accomplished simply by bringing house counsel together frequently with other attorneys working in the correctional area. Unless an agency is large enough to have a staff of several house counsel, the logical source of such association is the attorney general's staff working with correctional matters. Consideration should be given to arranging for both house counsel and assistant attorney's general working in the area of corrections to share office space, at least on a part-time basis.

While permanently housing departmental counsel in the office of the attorney general may in part defeat the purpose of having counsel readily available, some regular, routine contact (more than occasional formal meetings) is beneficial. It not only helps keep the house counsel's legal wits sharp but also allows the trial counsel of the attorney general's office to maintain closer contact with the concerns of the agency.

The house counsel's increased accessibility to the legal research sources of the attorney general's office would be a practical benefit of sharing office space.

Where the office of house counsel consists of only one or two individuals, maintaining access to a relatively complete law library (an absolutely necessary tool for the attorney) may be a relatively expensive proposition. This expense can be sharply reduced if materials are available through the resources of an attorney general.

MUTUAL MISCONCEPTIONS

A common complaint concerning the gap between assistant attorneys general and house counsel expressed at the Correctional Law Project national seminars conducted by the ACA (1977-1980) is that "house counsel don't understand the real world (read this as meaning "courts") of correctional law. . .house counsel is the captive of the director, exercising no independent judgment, but instead is simply a puppet who is afraid to give any advice that might displease his client." Implicit in some of these comments is the suggestion that lawyers who do not appear in the courtroom are somehow second class attorneys, without the skills necessary to perform with the big boys, i.e., trial attorneys.

From house counsel's side come similiar critical comments: "The assistant attorney general forgets he has a client and never takes the time to learn the desires and policies of the agency. . .Assistant attorneys general are never prepared at trial, but just shoot from the hip. . .They treat house counsel like law clerks and go-fers, good only for doing legal research or leg work on cases. . .The assistant attorney general (always the youngest attorney in the office) simply does not understand the problems of running a prison and, therefore, never presents the complete picture to the court. . .The assistant attorney general tries to make policy decisions for the agency in the guise of legal advice."

If an assistant attorney general-house counsel relationship is to operate satisfactorily, these attitudes cannot be allowed to develop or fester. Each office must understand the role of the other and must perceive that each should complement the other.

ENGLISH MODEL

The relationship should be one somewhat similar to the barrister-solicitor relationship in English law, where the former does virtually nothing but try cases in court while the latter confines himself to advising the client outside of court and providing some limited assistance to the trial lawyer.

The major area of contact between house counsel and assistant attorneys general will come in litigation. If no cases are pending, the trial lawyer (the assistant attorney general) will have nothing to do with the operations of the agency. However, once a case is filed, the trial attorney suddenly needs to know a great deal about the agency (depending, of course, on the issues in the case). One obvious starting point for acquiring such information is the office of house counsel.

The house counsel, therefore, should be able to provide information as to what regulations or policies the department has which may be relevant to the issues in the case or be able to direct the assistant attorney general to the sources of such information. If legal research has gone into development of regulations or policies under challenge, house counsel should be able to advise the assistant attorney general of such efforts.

While the house counsel then may be able to provide his counterpart in the attorney general's office with an outline of the agency's reaction to issues under litigation (both on a legal and policy basis), the assistant attorney general should not assume house counsel exists only to prepare the case for trial.

By the same token, house counsel must realize that where the assistant attorney general may become involved with the agency only in the context of litigation, the assistant attorney general cannot be expected to have the knowledge of internal agency workings, agency policy, and prior legal positions which may be common knowledge to house counsel. Thus, house counsel properly serves a role as a source of information for the assistant attorney general, and properly should expect to "introduce" the attorney general to the agency and the persons that may be involved in the particular litigation as well as to some of the relevant law in the field.

DUAL SYSTEMS

In situations where both house counsel and assistant attorneys general exist, it is vital that the functional roles of each be clearly defined and understood by all concerned – the attorneys as well as the administrators whom the attorneys assist.

For instance, confusion is inevitable and severe conflict likely if both assistant attorney general and house counsel are available to respond to similar requests for advice. Administrators may get different answers to the same question (e.g., how a particular regulation should be interpreted) if they are free to ask either house counsel or assistant attorney general.

Similarly, if two sources of advice are available, "forum shopping" (asking the question until the desired response is received) is as certain as are prisoner complaints about food. The results of forum shopping are confusion and uncertainty as to who is right, dissension among the involved attorneys, and probably inconsistent interpretations of the law.

It is difficult, if not impossible, to assure that two separate offices which are in a position to give competing advice will always be aware of, let alone agree with, each other. Therefore, regardless of the closeness of communication which can be maintained between the assistant attorney general and house counsel, the system should be designed to keep the overlap of function to an absolute minimum and to assure that where overlap potentially exists, clear lines of communication are maintained.

ACCESS LIMITS

Another potential problem which should be of concern both to administrator and counsel, is the tendency to overuse legal services. Most attorneys who have provided advice to state agencies have had the experience of administrators coming to see virtually every decision as being dominated by legal implications. The result is that the attorney is turned to more than is necessary and is frequently asked to make what is primarily a policy decision. This allows the questioner to avoid responsibility (and limit debate) regarding a decision: "the lawyers said we have to do it this way. . ."

A dilemma is created by this approach. There is a need to make counsel easily accessible to several levels of an agency and/or an institution's administrative structure since top level administrators do not have a monopoly on making decisions with legal implications. Unfortunately, the more people on each level who have access to the attorney, the greater the likelihood of the "administrative cop-out" situation being presented.

An absolute requirement that all requests for legal advice be funneled through a designated office or be presented in writing may discourage the asking of legitimate questions or prevent a timely answer to questions such as "what do I do with the subpoena for all my records which says I have to appear in court tomorrow." Thus, any policy which attempts to organize and funnel legal questions leaves loopholes which allow staff to ask legal questions and receive immediate responses when the situation so dictates.

GOOD FAITH

There is probably no organizational cure for the "overuse" problem. Perhaps the only effective check on its occurrence is the good faith of the attorney(s) receiving the questions. Attorneys can sort out policy issues from legal issues and should do so for the questioner, offering advice on the legal issues but deferring on any policy and/or discretionary matters.

Just as governmental lawyers may at times see themselves overused, many administrators may be familiar with the lawyer who loses sight of the line between legal advice and policy decision. A strong administrator who maintains a familiarity with legal issues, and counsel who in good faith recognizes the limitations in his job description, are probably the best checks against problems of "over-advice" by counsel.

CONCLUSION

Like it or not, wide ranging legal concerns are part and parcel of the correctional administrator's professional existence. Legal counsel is as necessary to a complete administrative team as is budget advice and analysis.

Whatever model of legal counsel is selected by an administrator, if it is to serve any positive function, the administrator must be willing to listen to and carefully consider the advice of counsel. In the not so distant past, attorneys advising correctional agencies were often seen as agents of the devil. Their advice was often rejected outright or explicitly accepted and implicitly ignored. Correctional attorneys recognize that their advice will not always be of the "good news" variety. Nonetheless, the continued activity in the field of correctional law means that new legal challenges will continue to be thrust on the correctional administrator.[6]

The many aspects of correctional administration which were formerly entirely within the discretion of the administrator but which are now constitutionally controlled, (e.g., disciplinary rules) will require continued legal monitoring. While some proferred legal advice may give the administrator a relatively free choice of accepting or rejecting it, much carries with it the option of heading off litigation and probable court intervention or paying the fiscal and discretionary price of defending and perhaps losing yet another lawsuit.

LIABILITY POTENTIAL

Moreover, as inmate legal rights become more clearly understood and defined by the courts, the consequences of ignoring advice regarding conformance with those requirements becomes more significant. Violating a "clearly established constitutional right" may subject the governmental official to monetary liability under the Civil Rights Act.[7] Knowing violation of a constitutional right or actions taken with reckless disregard of whether a right was being violated may allow the award of punitive damages.[8] Punitive damages, as the name suggests, are awarded for the purpose of deterring or punishing violations of constitutional rights and can be substantial, even though the actual injury to the victim is relatively slight.

FEE AWARDS

Additional costs of ignoring the advice of counsel may be measured by the size of attorneys fees awarded to plaintiffs' attorneys who prevail on civil rights actions. Such fees are allowed by statute, 42 U.S.C. Section 1988, and in general are designed to compensate an attorney fairly for the time spent on a case. "Fairly" in this context refers to legal fees actually charged by private attorneys in the community. The purpose of this work is not to analyze the law regarding the award of attorneys fees (there is some legal debate over the appropriate means of computing such fees), but suffice it to say that fees measured in the tens of thousands of dollars are not uncommon and, in a lengthy, complicated case, fees well in excess of $100,000 may be expected.[9]

ADVICE AND COUNSEL

This monograph has attempted to outline at least some of the functions of corrections counsel, beyond simply defending lawsuits, and to discuss some of the issues which are relevant in deciding whether legal advice should be sought exclusively from the office of the attorney general and/or in-house counsel. The purpose of the preceding pages is not to advocate one model over the other, but to impress upon the reader the importance for correctional administrators to have available ample quantities and qualities of necessary legal advice and counsel.

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[6] Recent passage of P.L. 96-247, 94 Stat. 353 (42 U.S.C. 1997e), which allows the United States Department of Justice to initiate civil rights actions on behalf of institutionalized persons, should assure that the law in the area of inmate rights continues to develop. The business of state government, in general, will also continue to generate new legal issues; e.g., equal opportunity, environmental issues.

[7] Wood v. Strickland, 420 U.S. 308 (1975).

[8] Simpson v. Weeks, 570 F. 2d 240 (8th Cir., 1978).

[9] For a greater discussion of the fees issue, see Awards Against State Defendents Under the Civil Rights Attorneys Fees Award Act, National Association of Attorneys General, July, 1979.

COMMENTARY: THE PRACTICE OF PREVENTIVE LAW BY CORRECTIONS LAWYERS

State lawyers who represent corrections systems – whether they are called assistant attorneys general, special attorneys or house counsel – live in a somewhat schizophrenic legal world. On the one hand, they are called upon to be zealous and partisan advocates, representing corrections officials in cases that are often protracted and inflamed by the inherently angry relationship that exists between inmates and custodians. On the other hand, they must master and practice the techniques of prevention that not only keep their clients out of court but also are the indispensable means by which the laws are enforced.

Given the focus of law school and the legacy of the self-selection process that determines who becomes a lawyer, some proficiency in partisan advocacy results, equipping state lawyers representing corrections systems to do well in the courtroom battle. However, a review of the last decade of prison litigation leads to the conclusion that corrections lawyers have not paid adequate attention to the preventive law function.

Simply put, we have spent too much time defending the legally indefensible – for example, the confinement of inmates in bare solitary cells, the placement of two and three inmates in cells inadequate to accommodate more than one, discrimination against religious groups that are not familiar to us, etc. – and too little time helping our clients identify and solve chronic and apparent problems that, when left unresolved, lead inevitably to the courthouse door.

The "costs" of ignoring the preventive law function have been high. While the correctional decisions of the Warren Court and the Burger Court sometimes seem irreconcilable, the volume of lawsuits and often the results of lower court decisions seem to be unaffected by these judicial cross-currents. American corrections was recently described as a "city under siege." A June 1, 1980 article in the *New York Times*, which contained this characterization, indicated that major parts of 33 state prison systems in the United States have either been ruled unconstitutional or are under constitutional challenge.

There are many unhappy consequences of this litigation. We pay hundreds of thousands of dollars to lawyers for prisoners to identify problems that we should have identified and helped resolve ourselves. The legitimate policy options of corrections administrators are steadily eroded by justifiably outraged judges. The creative energy of these administrators is drained by the seemingly endless requirements of litigation: comprehensive data must be painstakenly hand-gathered and compiled, detailed affidavits must be prepared, depositions must be given, courtroom testimony must be prepared and, finally, evidence must be presented at trial. In the most extreme cases, court-appointed monitors administer the corrections systems, entirely displacing state corrections administrators.

The practice of preventive law will not end all inmate litigation or eliminate all of the above-noted "costs" of litigation. As long as we have prisons, we will have litigation by prisoners.

However, there is much that state lawyers can do, in addition to performing the traditional advice and counselling functions, to avoid some of the current prisoner litigation that has caused attorneys general's offices to establish correctional law divisions and that monopolizes such a significant part of the dockets of the federal courts.

DEVELOPMENT OF LEGAL EDUCATION PROGRAMS FOR CORRECTIONS OFFICIALS

It is a rare corrections system that does not require correctional officers to participate in pre-employment or continuing education programs. State lawyers should help design and teach a legal curriculum that communicates effectively the complicated body of corrections law – federal judicial decisions, state statutes, and state administrative regulations – that defines the responsibilities, as well as the potential for liability, of corrections officers and administrators.

A standard text and a most useful methodology for teaching corrections law to correctional officers has been developed by the National Street Law Institute, an outgrowth of a Georgetown University program started in 1971. Some variation of their model program should be implemented in all corrections systems if correctional officers and administrators are to be protected from the increasing risk of personal liability and if existing law is to be effectively implemented.

CREATION OF ALTERNATIVE DISPUTE RESOLUTION MODELS

Many of the inmate-officer disputes that provoke litigation could be resolved outside the court system. In Maryland, for example a federal litigation mediation program is in its infancy. It seeks to resolve by mediation inmate civil rights claims filed in federal court. While the primary goal of this project is to provide fair resolutions of inmate-officer disputes, it is hoped that the project will also reduce the lawyer, client and judicial hours that are now spent to adjudicate prisoner cases.

ENLARGING PUBLIC ACCESS TO PRISONS AND PRISON POLICY-MAKING

State corrections lawyers have a special obligation to "open up" corrections systems to public scrutiny. Many of our major institutions are still ancient fortresses with walls that keep the public out as well as inmates in. In addition, communication between the inside and outside world is restricted. Most prisons censor non-legal mail, decide to whom inmates may write, decide what inmates may read, control who may visit and how often, and restrict inmate communication with the media.

The invisibility of corrections policy-making also contributes to the insularity of prison life. Rarely are prison policies subject to state administrative procedure acts and, it many instances, policy-making sessions are not within the scope of state "sunshine" laws. Finally, the primitive nature of most corrections information systems means that the general public stills knows very little about prison populations and how they are managed by criminal justice and corrections officials.

The secretive nature of prison life contributes to the continuance of policies and practices that would not survive the traditional scrutiny of democracy under full and vigorous public debate. It does no favor to corrections administrators, who must compete for their share of increasingly diminishing state dollars, to hide or "paper over" fundamental prison problems that, when discovered, will invite protracted and expensive litigation.

State corrections lawyers, who know more about prisons than anyone except inmates and corrections officials, have a special obligation to both their immediate individual clients and the general public – their ultimate client – to help expose prison life to public review. For example, we should help assure that inmate advocacy groups are systematically involved in reviewing existing and proposed policies. If such a dialogue is institutionalized, it is more likely that prison policies will be legally viable. We can also encourage our clients to make themselves and their institutions available to the public and to develop and distribute essential corrections information. If we do so, we may well prevent much litigation that occurs as a direct consequence of prison insularity.

IMPLEMENTING CORRECTIONAL DECISIONS

Obviously, a comprehensive legal education program is the first step in communicating the essential ingredients of correctional law to prison officials and, thus, the first step in implementing this body of law.

In a number of recent cases, inmates have received substantial awards of monetary damages against prison officials who acted in reckless disregard of applicable law.[10]

While prison officials are protected by the "good faith" immunity doctrine in federal damage actions if they act reasonably, the implicit principle of many of these damage actions is that prison officials will be held accountable for the enforcement of applicable law whether or not they, in fact, were personally aware of all details of the binding law.

Indeed, this implicit principle was made explicit in one recent case in which the judge said:

> It would obviously be desirable for [the correctional official held to be liable] to be advised regularly by counsel on the development in prison law. The record in this case does not reveal whether he had the benefit of briefings of this kind. It does, however, reveal circumstances which would cause a prudent man in Superintendent Anderson's position to seek counsel about plaintiffs' right and to execute his responsibilities in a manner consistent with the advice he surely would have received. Accordingly, I hold

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[10] See e.g., *Fielder v. Bosshard*, 590 F.2d 105 (5th Cir. 1979) ($99,000 awarded against jail officials for indifference to the medical needs of a jailed inmate); *Johnson v. Anderson*, 420 F. Supp. 845 (D. Del. 1976) ($1,500 awarded to five inmates who were not provided procedurally fair hearings before being transferred to maximum security quarters); *Wright v. McMann*, 460 F. 2d 126 (2d Cir. 1972), *cert. denied* 409 U.S. 885 (1972) ($1,500 awarded to an inmate who was confined in a bare and unsanitary solitary confinement cell); *Furtado v. Bishop*, 604 F. 2d 30 (1st Cir. 1979), *cert. denied* 100 S. Ct. 710 (1980) (Over $56,000 awarded to inmates who were assaulted, improperly placed in maximum security quarters, and denied correspondence rights); *Bryant v. McGinnis*, 463 F. Supp. 373 (W.D. N.Y. 1978) ($3,000 awarded to Muslim inmates who were denied their right to practice their religion); *Taylor v. Clement*, 433 F. Supp. 585 (S.D. N.Y. 1977) ($2,750 awarded to two inmates who were placed in protective custody cells without required hearings); *Landman v. Royster*, 354 F. Supp. 1302 (E.D. Va. 1973) (Over $21,000 awarded to state prisoners for improper subjection to solitary confinement and the denial of other rights.)

that he has failed to establish an official immunity defense with respect to this portion of plaintiff's due process claim.[11]

It seems unassailable that prison officials should not have to ask in order to be informed about the developments in prison law. It is the responsibility of corrections lawyers to systematically inform them of such developments.

However, making corrections officials aware of mandatory legal principles is only the first step in assuring that the law is enforced. The assistance of state corrections lawyers is usually essential to assure that legal principles get translated into correctional practice. We must actively monitor each final court decision to assure that it is implemented fully. For example, where controlling decisions have fiscal implications, we should review annual budgets to determine if the necessary sums are appropriated to enforce these decisions. We should be just as zealous within government in our advocacy for adequate funding for legally required programs as we are when we defend our clients in court.

In addition, where management or information deficiencies contribute to the non-enforcement of judicial decisions, corrections lawyers should help identify and resolve these problems. We should, for example, be as vigilant in identifying the management problems that frustrate the implementation of overcrowding (usually single-celling) decrees as we are in defending overcrowding cases.

Such management issues may appear mundane: Is the corrections classification system functioning adequately? Is there a reliable mechanism that assures that all inmates are being credited with the correct amount of "good time"? Do parole practices contribute unnecessarily to the overcrowding problem – e.g.: (1) "holding" parole-eligible inmates for lengthy periods after parole hearings have been held while marginally useful information about them slowly makes its way from criminal justice or corrections systems to the Parole Board; or (2) failing entirely to consider short-term inmates for parole eligibility? Are large numbers of pre-trial inmates being detained unnecessarily because of an absence of effective pre-trial release programs? Are there classes of prisoners – e.g., those being held for non-support or non-payment of fines – who ought not be in prison at all? If so, how many?

These issues may not be as exciting as cross-examining plaintiffs' expert witnesses in the overcrowding case but if careful attention is paid to them, implementation of a single-celling decree – a task that at first blush may appear impossible – may not be impossible at all.

The above list is by no means an exclusive catalog of the techniques of preventive law. The traditional tasks of house counsel – reviewing regulations for legal sufficiency, drafting commercial documents and proposing necessary legislation – are the "bread and butter" of preventive law. More important than emphasizing any one technique is the acceptance by corrections lawyers of the vital importance of the preventive law function. It is an indispensable means for both keeping corrections clients out of trouble and helping insure that the law of corrections is enforced.

As law enforcement officials, state lawyers who represent corrections systems have the same duty to enforce valid corrections laws as our colleagues who have to enforce the criminal laws, antitrust laws and consumer protection laws. Justice Brandeis explained why we should pay careful attention to this important responsibility:

> In a government of laws, existence of the government will be imperiled if it fails to observe the laws scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.[12]

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[11] *Johnson v. Anderson*, 420 F. Supp. 845 at 850-51 (1976).

[12] *Olmstead v. United States*, 227 U.S. 438 (1928).

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