M E M O R A N D U M

OFFICE OF THE ATTORNEY GENERAL

TO: MEMBERS OF THE CONSTITUTIONAL REVISION COMMISSION

FROM: OFFICE OF THE ATTORNEY GENERAL

DATE: SEPTEMBER 10, 1990

RE: DISCUSSION OF ISSUES REGARDING THE CONSTITUTIONAL ESTABLISHMENT OF THE OFFICE OF THE ATTORNEY GENERAL

INTRODUCTION

This memorandum examines the issues which have been raised regarding the office of Attorney General in the Utah Constitution. We are informed that the method of selection of the Attorney General under the Constitution (election) is no longer under examination. We have discussed that issue here only as it relates to the mission and function of the office, particularly as to the authority of state agencies to hire persons authorized as "legal advisors", the differences between public and private law offices, and the peaceful coexistence of the roles of agency counsel and public guardian. More particular inquiries, such as the handling of criminal appeals, and statutorily provided in-house counsel for quasi independent authorities (Retirement Board and Industrial Commission), are not addressed here but will be addressed orally at the Commission's next meeting or more formally, in writing, if the Commission so desires.

I.

ELECTION VERSUS APPOINTMENT: THE CONTINUING RELEVANCE OF THIS ISSUE TO THE FUNCTION OF THE OFFICE.

The facts: Forty three of the fifty states provide for election of the Attorney General by the voters. Five states (Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming) employ gubernatorial appointment; of those, the systems of Alaska and Hawaii appear to be vestiges of territorial governance. Maine's Attorney General is selected by secret ballot of the state legislature. Tennessee's Attorney General is selected by the state's supreme court.

In the past century, only two states have changed methods of selection: Indiana and Pennsylvania both switched from executive appointment to election.

The foregoing facts about the fifty states are significant. Election is the rule in forty three of the fifty states, and there is no suggestion of a movement away from election as the prevailing method. The only discernable change is in the opposite direction. Why? Clearly, the vast majority of states have adopted a philosophy that the Attorney General occupies an office that must be independently accountable to the electorate. The Attorney General should not be a delegatee of the state executive (governor) but should be an independently elected official whose jurisdiction is separate from that of the governor, or any other elected official. The scope of that jurisdiction is discussed below.

An Attorney General elected separately by the people is accountable directly to the people for the responsibilities designated in the State Constitution, statutes, and case law. This accountability is fundamental, and serves as a part of an intentionally designed system of checks and balances within the executive branch that operate in state governments in addition to the more familiar separation of powers between the three branches of government. Within the executive branch of state government, the separately elected offices of Attorney General, Auditor, and Treasurer, are intended to operate independently from the other offices for the ultimate protection of the people.

Particularly in states with part-time legislatures, this political philosophy of power balancing within the executive branch requires that the Governor not invade the province of constitutional authority granted to the State Treasurer, the State Auditor, or the Attorney General. To do so would unravel the basic fabric of independence and separate accountability so carefully woven into the structure of our state executive branch of government.

While temporary impacts of personalities and poor performance may occur, it appears that this system has worked rather well in most states and the long term benefits of this fundamental framework have served the various electorates very well and as intended by constitutional framers.

II.

WHAT IS THE SCOPE OF THE ATTORNEY GENERAL'S JURISDICTION UNDER THE STATE CONSTITUTION?

The Constitution gives the Attorney General the sole authority as the "legal adviser" for state government. As such, the Attorney General is charged with the responsibility of ensuring that a consistent legal policy is adopted and applied throughout state government.

Thus, the jurisdiction entrusted to the Attorney General and for which the office is accountable to the electorate is that of "legal advisor of the state officers" and the development and maintenance of the legal policy which necessarily flows from that advisory role.

III.

WHY SHOULD THE ATTORNEY GENERAL BE THE SOLE CONSTITUTIONAL "LEGAL ADVISER" TO STATE OFFICIALS AND AGENCIES?

In most jurisdictions, as in Utah, the Attorney General represents virtually all state agencies although there are some agencies with in-house counsel.[1] Such agencies with explicit statutory authority to hire counsel are usually either quasi-

[1]NAAG, State Attorneys General: Powers and Responsibilities, p. 53. In Utah, see, for example, Utah Code Ann. 54-1-6 (1) (a) (1) (1990) giving the Public Service Commission the authority to hire attorneys along with accountants, engineers, statisticians, etc., to assist in performing its functions. The statute does not give the lawyers the authority to represent the Commission in court.

independent authorities (such as housing commissions or bonding authorities); large recipients of federal funds (such as highway departments); or specialized regulatory agencies (such as utility or public service commissions).

Only six states allow state agencies to hire in-house counsel which are not under the supervision of the Attorney General (even among those six, some may require the Attorney General's consent of the attorney hired).[2] Obviously, in the vast majority of states, the legal authority to advise state officials is vested exclusively with the Attorney General. Furthermore, the trend in the nation is towards more consolidation of legal representation in the Attorney General's office and away from state agencies.

There are several reasons supporting the clear national preference for consolidation of legal advisers under the Attorney General. The reasons fall into two categories: (1) philosophical principles of political governance, and (2) practical considerations.

A. PRINCIPLES OF POLITICAL GOVERNANCE SUPPORTING CONSOLIDATION OF LEGAL REPRESENTATION:

1. Uniformity and Consistency

One of the most important functions of the Attorney General is to establish a uniform and consistent legal policy on behalf of the people of the state in the interest of equity and

---

[2]These include Florida, Kentucky, Mississippi, Montana, South Carolina, and Texas. In four other jurisdictions there is at least some explicit statutory authority for particular state agencies to hire their own counsel although there are statutory ambiguities in the authorization. These are Indiana, Louisiana, New Mexico, and Tennessee.

good government. This uniformity and consistency is best effectuated by a consolidated office which serves as the advisory "hub" to the many state agencies which require legal services. Such an office assists the courts and the state's agencies and citizens by providing "legal consistency and a clear path for law development."[3] The people of the state of Utah should be able to rely on a single interpretation of the statutes and common law that the various state agencies use in their dealings with the public.

Where a lack of uniformity in interpretation of laws exists, citizens are subjected to more than mere inconvenience in their dealings with their government. They can in fact be prevented from understanding how to legally conform their behavior or from making use of governmental resources.

Absent the Attorney General's centralized power to make legal policy decisions, individual state agencies are left to make decisions through in-house counsel from the solitary perspective of the agency's own interest. Such "captive counselors" have little opportunity or incentive to assure that a broader legal policy is served.

2. Avoidance of Interagency Conflict

Interagency conflict is always a distinct possibility and when that conflict reaches into the province of legal policy, it is the duty of the Attorney General to resolve such differences in the interest of, not necessarily the particular agencies, but of both

---

[3] D. Frohnmayer, The Nature of the Office of the Attorney General--Its Powers, Responsibilities and Functions p.11, Speech to Attorneys General, Scottsdale, Arizona (May 14, 1984).

the government and the people. In this sense, the Attorney General is a centralized, mediating "hub", ensuring that the spokes of the wheel function consistently and for the good of all state government. Without such a centralized, mediating function, interagency conflicts involving legal policy could exacerbate to the detriment of the taxpayer. The Attorney General serves both the interests of the public, and the agencies, by coordinating legal interpretation and when necessary, resolving disputes of legal policy.

3. Clarification and Guidance

Consolidation of legal interpretation allows the citizens and agencies of the state to benefit from one coherent legal policy enabling them to conform their institutional policies and actions accordingly. Professors Henry Abraham and Robert Benedetti have described this concept:

> There is a need for state government officials to know the duties imposed on them by law if it is to be followed. The attorney general explicates the state of the law, positive and customary. Where it has been struck down he predicts the consequences. Where it has been obscured, he clarifies its prescriptions.[4]

A clear example of a legal issue which needs consistent statewide interpretation is the issue of governmental immunity. Practice in this area is described as "a continuing adventure"[5]

---

[4]Henry Abraham and Robert R. Benedetti, "State Attorney General: A Friend of the Court," CXVII University of Pennsylvania Law Review, (April, 1969) p. 820.

[5]Davis, "Recent Developments in the Field of Sovereign Immunity in Utah", p. 10. a paper presented at the Eighth Annual Conference on State and Local Government March 1990.

because of the rapidity of change in controlling legal authority. In a paper prepared for the Eighth Annual Conference on State and Local Government, Judge Lynn Davis of Utah's Fourth Circuit Court highlighted the need for specialized counsel and a single consistent legal policy in establishing and clarifying the limits of this complicated area:

> The Utah Governmental Immunity Act must be looked at as a whole, with a very broad, long lasting perspective. The goal should be to retain the substantive law, but at the same time to provide simplicity and clarity . . .Without dedicated attention, it will develop piece-meal. . . . We all get lost in a nightmare maze of rules and exceptions and the courts get equally mired, and we wonder why there is so little predictability.[5]

Governmental immunity is a good example of an already complicated, somewhat unpredictable, area of the law which needs long range and coherent interpretation to set legal policy. This is an issue that affects every state agency every single day. If each agency were to receive different advice from their own counsel on important immunity issues the results could be chaotic.

A consolidated state legal adviser develops and maintains a unified and coherent legal policy in this and other complicated areas, and advises the respective state agencies accordingly. In addition, a consolidated Attorney General's office can provide the added benefit of full-time specialist attorneys, assigned exclusively to complicated areas such as governmental immunity who can keep up with the latest developments and provide state-of-the-art representation.

---

[6] Id.

Writing opinions is one of the important ways that the Attorney General helps set a consistent legal policy for the state. State agencies with conflicting or unclear views about state law may seek clarifying advice from one source.

In Utah, the Attorney General has both common law and statutory duties to provide written opinions to government offices. Section 67-5-1 (6) Utah Code Ann. (1986) provides: "The attorney general shall: (6) give his opinion in writing and without fee to the Legislature, or either house, and to any state officer, board, or commission, and to any county attorney , when required, upon any question of law relating to their respective offices[.]" This statutory charge has existed basically unchanged since 1898.

Over 6,000 formal and informal written opinions have been issued by Utah Attorney Generals since the year 1945. These opinions are compiled, published in the State Bulletin, and kept available in several repositories including the Supreme Court Law Library, State Archives, in local law school libraries, Westlaw, Lexis (computer services) and of course, the Attorney General's office.

B. PRACTICAL CONSIDERATIONS SUPPORTING THE CONSOLIDATION OF THE STATE'S LEGAL ADVISOR

Practical considerations, though less lofty than those expressed above, are not easily dismissed when the cost of government is borne in mind. These considerations concern the preservation of economic resources and the enhancement of efficiency and performance. In other words, consolidation allows the job to be done better while saving money. These consolidations

include the following:

1. Consolidated staffing can provide for the varying agency needs through periods when permanent full-time resources are not necessary. "Full Time Equivalent" allocations within agencies may tend to take on a life of their own while lawyers in the Attorney General's Office can be assigned to serve more than one agency. This avoids "expansion" to full time employees when only part-time service is really necessary. The Attorney General employs many attorneys who serve multiple clients.

2. Attorneys who work in a centralized office have access to a wide variety of legal experience and talent, which maximizes on the job training opportunities for attorneys who might otherwise stagnate in captive-agency positions. Quality control through peer and supervisor review ensures a higher standard of legal work.

3. Facilities and legal resources receive maximum use in a consolidated office. Libraries, computer-assistance, form files, and other such resources can be widely shared. Individual attorneys scattered to various agencies would inevitably require multiple purchases of the same legal resources.

4. Support staff can be effectively allocated to a larger group of attorneys: paralegals, investigators, and law clerks can be allocated throughout the office to cover a myriad of assignments for many different agencies.

III.

CONSOLIDATION OF THE LEGAL ADVISOR ROLE FOR AGENCIES IS AS IMPORTANT IN NON-LITIGATION AS IT IS IN LITIGATION MATTERS

The Attorney General's centralized role as counsel for state agencies in litigation is necessary because of the need for consistency of approach to legal issues in the courts. Widespread acknowledgement of the need for the State's legal counsel to "speak with one voice" in the courts of Utah is based on those principles

discussed earlier here: our state clearly benefits from a consistent, coherent legal policy overseen by the elected Attorney General.

These principles extend to non-litigation counsel roles as well. The interests of both the public and state agencies is best served when the institutional "hub" of legal policy coordinates with key officers in state agencies as to how to proceed in all areas well in advance of the advent of litigation. As a practical matter, the agency's ability to avoid litigation is enhanced and the chances of prevailing in litigation are increased when the counsel who will go to court is the same counsel entrusted with the day-to-day legal representation of the agency.

When the attorney charged with ultimate litigation responsibility loses contact with the day to day legal issues of a state agency the state runs a great risk. By way of example, several states have had to defend their institutions of higher learning against complaints of a pattern and practice of sex discrimination.[7] These and other similar cases brought under Title VII of the Civil Rights Act of 1964 (42 U.S.C.sec 2000b.) are often instituted as class action challenges involving large numbers of plaintiffs in one suit. The public's interest in avoiding such costly law suits is best met by ensuring that all agencies are given the benefit of consistent, up to date interpretation, on a day to day basis, of established law.

---

[7]NAAG, State Attorneys General: Powers and Responsibilities, p. 272.

Lawsuits can be avoided, thereby protecting public and particular agency interests, if the Attorney General's counsel is involved in an ongoing relationship with the agency or institution, rather than simply being presented with the lawsuit after the fact.

Certainly, this essential relationship and accountability of the Attorney General to the public is not undermined or altered by the existence of law-trained employees in various agencies. Those persons provide services of great assistance not only to the agencies but also to the Attorney General's office. Most of these counselors coordinate their activities with the Attorney General now. What matters is that the critical accountability remains in place and the Attorney General's ongoing involvement allows adherence to a centralized legal policy in accordance with our Constitutional policy.

V.

THE PERCEIVED "CONFLICT OF INTEREST" BETWEEN THE ROLES OF AGENCY COUNSEL AND GUARDIAN OF THE PUBLIC.

Those who are opposed to a consolidated office also cite the possibility of conflicts of interest in an office that represents the state and its agencies while at the same time independently accountable to the people. They suggest that an agency head needs his or her own counsel accountable directly to the agency or executive. It is argued that it is an improper conflict of interest for an elected Attorney General's office to represent an agency when it may some other time bring an action

adverse to the interests of that agency, or agency head.

Such arguments liken the relationship between a state department or agency head and the Attorney General to that of a private business with its private law firm. The private attorney-client relationship is one with which most lawyers are familiar and comfortable; however it is not exactly analogous to the relationship of government lawyers to their state clients.

Douglas Parker, Professor of Law at the J. Reuben Clark Law School has stated in his report prepared for the director of the Utah Bar that fundamental differences make private attorney client relationships poor patterns to use in analysis of the Attorney General's office and its relationships with government agencies and heads.

> There is such a qualitative difference in the legislative status, statutory duties, office organization, and absence of the profit motive between an Attorney General's office and a private law firm that it is doubtful that the ethical considerations applicable to private attorneys are suitable for resolving the instant case [Whether the Attorney General was in conflict of interest in representing an agency head when other Attorney General personnel were involved on the other side of the conflict.][8]

These differences exist because important state interests are involved in the relationship between the Attorney General and

---

[8] Douglas Parker, "Report and Recommendation To Dean W. Sheffield, Executive Director of the Utah State Bar April 27, 1976, "regarding the ethical propriety of and possible conflict of interest in the Utah Attorney General's office representing both the Commissioners and the Director, Mr. Ira Hearn, in adverse proceedings and litigation between Mr. Hearn and the Liquor Commission. . .", Professor Parker is a professor of law at J. Reuben Clark Law School.

state agencies which are absent in private attorney client relationships. The American Bar Association recognizes that the Attorney General's special role requires him or her to represent interests which might be improper conflicts of interest were the relationship one of private client and private attorney. This special role stems from the fact that: "The Attorney General represents the state as his or her client, not simply the view of one agency or officer of the larger State entity."[9] The American Bar Association's Model Code of Professional Responsibility states that an Attorney General's office:

> . . .may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so.[10]

When the Attorney General is required to represent an agency or its head in conflict with another interest, tools are available to a consolidated office to alleviate conflicts.

> When the conflicts of representation are ultimately unavoidable and irreconcilable, representation is usually provided either by some administrative insulating barrier or "wall," by attorneys hired but not directly supervised by the Attorney General, or by attorneys entirely outside the control of the Attorney General.[11]

---

[9]NAAG, State Attorneys General: Powers and Responsibilities, pp. 69-74.

[10]American Bar Association Model Code of Professional Responsibility, Preamble, Scope and Terminology, (1983) p.12.

[11]NAAG, State Attorneys General: Powers and Responsibilities, P. 73.

(Emphasis added). These well-accepted tools for alleviating conflicts are available to handle any conflicts which might arise.

As many members of the Commission are aware, this office has recently formalized one of the structural tools available to prevent direct conflicts of interest. The reporting channels of divisions of agency counsel have been completely separated from those of public advocacy. Though these separations (ours follows the New York model) are not scientifically precise, they go a long way in clarifying duties and functions which can invite problems. The utilization of outside counsel has always been available, and is used where appropriate, though these instances are rare.

Finally, most "conflicts" perceived by theoreteians are, in actuality, theoretical only. People who actually serve in the roles both in state agencies and in the Attorney General's office, are well acquainted with the principles of public trust which makes the traditional model of private client to lawyer inapplicable. Both agency representatives and lawyers understand their <u>shared</u> goal and mission: to serve the public trust. That understanding eliminates the majority of situations which may be textbook conflicts in the private sector. Attorneys in the Attorney General's office can represent state agencies and agency heads vigorously and effectively and still be accountable to the public. Agency heads do not expect particular agency interests to prevail over the interests of the public: such a presumption underestimates those in public service.

In short, the Attorney General and state agencies

function very effectively in partnership to serve Utah. The relationship works smoothly because both attorney and client recognize that the "hired gun" has no place in the shared mission: a legal policy which best serves the people.

VI.
CONCLUSION

An elected Attorney General directly accountable to the people is an important part of the constitutionally designed system of checks and balances within the executive branch of state government which has served Utah and most other states very well. In Utah, as in most states, an important role of the elected Attorney General is the development of a consistent coherent legal policy for the state.

Only six states allows state agencies to hire in-house counsel, and the national trend is to consolidate the state's legal representation in the office of the Attorney General.

This national trend is the result of principles of political governments and practical considerations. Consolidated state legal representation under the Attorney General allows for uniformity and consistency in developing a state legal policy, helps avoid interagency legal conflicts, and provides maximum legal assistance to the state by allowing a single source to clarify and guide the state agencies in complicated areas such as governmental immunity. Practical consideration support in the consolidation of the state's legal advisor are the consolidation concerns resources,

maximizes efficiency, and saves money.

The unique role of a government lawyer recognized by legal scholars and professional organizations, allows the Attorney General to provide competent legal representation to agencies to achieve their individual goals while at the same time providing an independent legal officer accountable to the people, assuring state compliance with the law. The Attorney General's examination of this area and discovery of the points made in this memorandum lead persuasively to the conclusion that the current constitutional establishment of the Attorney General's office is appropriate and need not be amended.

The function and purview of the Attorney General's authority must be independent and separate from the purview of other elected officials. What the state constitution has reserved solely to the Attorney General is the role of legal adviser. The role must be carried out with a consistent and careful eye to the fundamental calling of the office: The creation and implementation of the best possible legal policy for Utah State government to serve the best interests of the people of Utah for whom such government exists.