

# State Attorneys General Powers and Responsibilities

Edited by  
Emily Myers  
National Association of Attorneys General

FOURTH EDITION  
NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

Courtesy Chapter

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*This book is dedicated to Attorneys General  
and the men and women who work for them in the  
56 jurisdictions. They continue to make an important  
contribution to state government and the American legal  
system. Without them, there would be no book to write.*

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## CHAPTER 4

# Status in State Government

*By Emily Myers, Antitrust Counsel, NAAG*

The attorney general holds a unique position in state government. As the chief legal officer of the state, commonwealth, or territory, the attorney general is the legal advisor to state government branches and agencies and the principal legal representative of the public interest for all citizens. The responsibilities of the attorney general are described in greater or lesser detail in constitutional or statutory provisions in each state, which necessarily shape the attorney general's relationship to the executive, legislative, and judicial branches of state government.

The office of attorney general is established by the constitutions of 44 states and Puerto Rico. In six states (Alaska, Hawaii, Indiana, Oregon, Vermont and Wyoming) and three territories (Guam, American Samoa and the Virgin Islands), the office is statutorily established.<sup>1</sup> The office of the attorney general of the District of Columbia also is statutorily established. As noted in Chapter 3, the constitutional or statutory underpinnings of the office may affect its common law powers. Although gubernatorial appointment power in state government as a whole may have increased during the past decades, "[n]o state has changed from election to executive appointment of the attorney general."<sup>2</sup>

The powers and responsibilities of state attorneys general have expanded as state legislatures prescribe new responsibilities and functions for state governments. In addition to those expanded functions, attorneys general have used traditional causes of action to address emerging issues. New responsibilities for attorneys general have included such diverse tasks as investigation and prosecution of cybercrime and securities fraud, review of non-profit health care provider

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1 See Appendix A for a list of the jurisdictional bases for the offices of attorneys general.

2 Matheson, *Constitutional Status and Role of the State Attorney General*, 6 J. LAW. & PUB. POL'Y 1, 28 (1993).

mergers, ethics, statewide investigations, organized crime prosecution, crime victims' assistance, tobacco regulation and protection of vulnerable populations, including children and the elderly. This listing is representative rather than exhaustive. Both program responsibilities and civil enforcement obligations have been expanded in virtually every jurisdiction.<sup>3</sup> Many attorneys general have established specialized units or officewide task forces in their offices to handle these responsibilities.

These and similar programs by attorneys general have enhanced the role of the attorney general as a “public interest lawyer” and offer many opportunities to improve the quality of life for citizens of the states and jurisdictions. Attorneys general are uniquely qualified for this role because of their position and perspective in state government. As the Supreme Judicial Court of Massachusetts stated,

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 [state] 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.<sup>4</sup>

The attorney general occupies a strategic position in state government. Professors Henry Abraham and Robert Benedetti describe the attorney general as “the quasi-judicial officer in the administration whose job it is to bridge the gap between law and state practice.”

The attorney general does not fit neatly within the framework described by the doctrine of separation of powers, since he exercises both executive and judicial functions. As an executive he gives legal advice to the governor and to the rest of the administration; he conducts investigations into state practices, and in many states he has some role in the administration of justice at the local level.<sup>5</sup>

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3 New responsibilities of state attorneys general are wide-ranging. For example, the attorney general of New Mexico was directed to establish a unit within the office to “review, oversee and address concerns relating to the provisions of the Treaty of Guadalupe Hidalgo that have not been implemented or observed in the spirit of . . . the constitution of New Mexico.” 2003 N.M. Laws 101.

4 *Secretary of Admin. and Fin. v. Attorney General*, 326 N.E.2d 334, 338 (Mass. 1975).

5 Abraham and Benedetti, *The State Attorney General, A Friend of the Court?*, 117 U. Pa. L. Rev. 797 (1969).

Another student of the office, Professor Arlen Christenson, concurs: “[The attorney general] occupies a unique position. A part of neither the executive nor the legislative branch, he is legal advisor to both.”<sup>6</sup>

A number of courts have remarked on the attorney general’s special relationship to the branches of state government. The supreme court of Florida, for example, has stated that while the office is “in many respects judicial in its character,” the attorney general is “intimately associated with the other departments of the Government, being as well the proper legal advisor of the Executive and the Legislative department.”<sup>7</sup>

## AUTHORITY TO REPRESENT THE STATE

One aspect of the attorney general’s unique role in state government is the attorney general’s authority to represent the state in civil litigation.<sup>8</sup> As pointed out by the Tenth Circuit in 1980, in Colorado, the “right to represent the state as to litigation involving a subject matter of statewide interest” is the exclusive province of the state attorney general.<sup>9</sup> In *Feeney v. Commonwealth*, the Supreme Judicial Court of Massachusetts unequivocally confirmed “[t]he authority of the attorney general as chief law officer, to assume primary control over the conduct of litigation which involves the interests of the Commonwealth.”<sup>10</sup> This policy protects the interests of the state as a whole as a unitary client, rather than any one of the many potential agency manifestations of the state.

More recently, the Hawaii Supreme Court reaffirmed the attorney general’s exclusive control over all litigation for the state in a case involving the attorney general’s decision not to appeal a ruling by the Federal Aviation Administration. The court held that the attorney general’s decision to resolve the dispute between the State and the federal government fell squarely within her exclusive authority to control and manage “the settlement of imminent actions against the State.”<sup>11</sup> If

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6 Arlen Christenson, *The State Attorney General*, 1970 Wis. L. REV. 300. Under any state constitution based upon a separation of powers structure, it is unlikely that an attorney general can be an officer of a branch other than the executive branch.

7 *State ex rel. Landis v. S.H. Kress & Co.*, 115 Fla. 189, 155 So. 828 (1934).

8 See Chapter 6, *supra*.

9 *Mountain States Legal Found. v. Costle*, 630 F.2d 754, 771 (10<sup>th</sup> Cir. 1980). *But cf. Martin v. Thornburg*, 359 S.E.2d 472 (N.C. 1987).

10 366 N.E.2d 1262, 1266 (Mass. 1977).

11 *Office of Hawaiian Affairs v. State of Hawaii*, 2005 Haw. LEXIS 475, at \*47 (Hawaii 2005),

the court reviewed the attorney general's actions, it "would have clearly intruded into an area committed to another branch of government . . . and, as such, would have violated the doctrine of separation of powers."<sup>12</sup>

The authority of the attorney general to hire outside counsel to represent the state is well established in most states.<sup>13</sup>

## RELATIONSHIP TO THE EXECUTIVE

Although the attorney general typically represents all branches of government, he or she is considered primarily an executive officer. Many state constitutions so classify the position. Utah's Constitution, for example, provides that "the Executive Department shall consist of a Governor [and] Attorney General."<sup>14</sup> Courts have noted that the express inclusion of the attorney general and other statewide elected officials in the executive branch may be seen as a limit on the governor's power. For example, the Minnesota Supreme Court stated:

Rather than conferring all executive authority upon a governor, the drafters of our constitution divided the executive powers of state government among six elected officers. This was a conscious effort on the part of the drafters, who were well aware of the colonial aversion to royal governors who possessed unified executive powers.<sup>15</sup>

In addition to advising State officers and agencies, attorneys general may exercise various executive functions, such as approving contracts and bond issues. They also may serve on various boards or commissions that direct administrative programs. The attorney general's relationship to other parts of the executive branch can be complex.

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*vacated on other grounds, Office of Hawaiian Affairs v. State of Hawaii* 110 Haw. 338; 133 P.3d 767 (Haw. 2006).

12 *Id.* at \*49.

13 See Chapter 6 for more detailed discussion.

14 UTAH CONST. art. 7, § 1; see, e.g., ALA. CONST. art. V, § 112; CAL. CONST. art. VII, § 1(a); COLO. CONST. art IV, § 1; KAN. CONST. Art. I, § 1; NEV. CONST. art. V, §§ 19, 22; TEX. CONST. art. IV, §§ 1, 22.

15 *State ex rel. Mattson v. Kiedrowski*, 391 N.W.2d 777, 782 (Minn. 1986).

## *State Attorneys General Powers and Responsibilities*

Some of [the attorney general's] activities, such as decisions about criminal investigation and prosecution, call for independent judgment free of political influence from the governor. Other duties, such as advising a state agency on implementation of a major policy initiative, may call for close collaboration and accommodation with the governor and agency officials to serve the public interest.<sup>16</sup>

Only in Florida does the attorney general serve in the governor's cabinet.<sup>17</sup> This is not surprising. Because the attorney general is elected independently in most jurisdictions, the attorney general and the governor may be of different political parties.

In some states, the attorney general has sued the governor and courts have recognized the attorney general's authority to do so to protect the public interest. A Kentucky Supreme Court decision discussed these issues in detail. The attorney general filed a declaratory judgment action against the governor alleging that the governor had no authority to reduce the amount of money made available to a state university under a legislative appropriation. The court held that the attorney general's common law powers authorized him to bring any action thought "necessary to protect the public interest." and noted that the attorney general appears to have a duty to bring such actions. Earlier Kentucky decisions had held that the attorney general could challenge the constitutionality of a statute, and the court held there is no reason to differentiate between an unconstitutional or illegal statute and an unconstitutional or illegal executive action. The court also noted the unique fitness of the attorney general to challenge illegal or unconstitutional actions, rather than leaving it to other agencies or actors:

The ongoing functions of such entities and the costs of such litigation, in money and political good will, could make a legal challenge prohibitive despite whatever disagreement they may have with a Governor's or legislature's action. Because the Attorney General is the chief law officer of the Commonwealth, he is uniquely suited to

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16 Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. Fla. J. L. & Pub. Policy. 1, 4-5 (1993).

17 Compare NAAG, *Powers, Duties and Operations of State Attorneys General* (1977) at 32, with NAAG, *State Attorneys General Powers and Responsibilities* (1990) at 44. In Guam, the attorney general is described in other statutory contexts as serving in the Governor's cabinet, 5 Guam Code Ann. § 7101.

challenge the legality and constitutionality of an executive or legislative action as a check on an allegedly unauthorized exercise of power.

In conclusion, the court held, “the attorney general, as chief law officer of Kentucky, has broad authority to sue for declaratory and injunctive relief against state actors, including the Governor, whose actions the attorney general believes lack legal authority or are unconstitutional.”<sup>18</sup>

Similarly, the attorney general of South Carolina sued the state’s governor on separation of powers grounds when the governor arranged to have transferred to the state’s general fund monies that had been appropriated by the legislature for a specific purpose. The South Carolina Supreme Court, after analyzing the state’s Constitution, held that the attorney general could bring an action against the governor “when it is necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights.”<sup>19</sup>

Although the attorney general typically has exclusive authority to represent the state and its officers and agencies, some states have permitted the governor to retain a legal advisor or in-house legal counsel. For example, even though Utah reserves to the attorney general all authority over litigation, in 1992, the Utah Constitution was amended to allow the governor to appoint his own counsel.<sup>20</sup> The responsibilities of the governor’s counsel, however, usually are limited to policy advice, review of legislation, extraditions, pardons, and personnel appointments. In most states the attorney general continues to provide exclusive representation of the governor when he or she is sued even if the governor has his own counsel. In some states, including Montana and New Jersey, even though the governor’s counsel has authority to represent the governor when he or she is sued personally or in a representative capacity, in-house counsel seldom does so. In Michigan and Washington, the governor’s in-house counsel is appointed by the attorney general as a special assistant attorney general.

The legal representation of the governor can raise issues about the supervision and control of attorneys for the Governor or executive branch agencies. A recent decision addressed this issue in Louisiana. The governor filed suit against

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18 *Commonwealth ex rel. Beshear v. Commonwealth ex rel. Bevin*, 2016 Ky. LEXIS 435 (Ky., Sept. 22, 2016).

19 *State ex rel. Condon v. Hodges*, 562 S.E.2d 623, 628 (S.C. 2002). See, also, *Bryant v. Weiss*, 335 Ark. 534, 983 S.W.2d 902 (Ark. 1998); *Fordice v. Bryan*, 651 So.2d 998 (Miss.1995); *Commonwealth ex rel. Cowan v. Wilkinson*, 828 S.W.2d 610 (Ky. 1992); *State ex rel. Douglas v. Thone*, 286 N.W.2d 249 (Neb. 1979).

20 UTAH CONST. art. VII § 5(4). “The Governor may appoint legal counsel to advise the Governor.”

the attorney general, seeking a declaratory judgment that the governor is the superior constitutional officer, and that the attorney general has no role in supervising or approving actions of attorneys representing state agencies except as specified by statute. The court concluded that the governor is constitutionally superior to the attorney general. The attorney general “is vested with the authority to use his/her discretion in approving contracts for private legal counsel to state agencies” but once that counsel has been appointed, the attorney general does not have the authority to supersede or review their actions.<sup>21</sup>

In another case addressing the relationship between the governor and the attorney general, the Alabama Supreme Court held that the governor, not the attorney general, could control a Gambling Task Force, established by the governor by executive order. The court held that although the attorney general has broad common law powers, they do not conflict with the governor’s supreme executive powers, which are still paramount.<sup>22</sup>

In at least one state, employees of the attorney general are not subject to the governor’s authority for purposes of the state personnel statutes. In Virginia, terminated employees alleged that they were covered by the personnel statute. The attorney general argued that they were not covered by the statute, because that interpretation would “create an unworkable and irreconcilable conflict between the authority of the governor and that of the attorney general,” and the court agreed.<sup>23</sup> On the other hand, in California, a governor’s order furloughing all state employees, including those in the attorney general’s office, was affirmed. Although the attorney general and other state constitutional officers alleged that the furloughs “violate[d] the system of divided executive power embodied in the State Constitution and would interfere with the independent powers and duties that have been assigned to their offices,” the court held that the furlough order did not interfere with the ability of the constitutional officers to appoint those employees the officer deems necessary to perform the duties of his or her office.<sup>24</sup>

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21 *Louisiana Department of Justice v. Edwards*, No. 652,283 (La. 19th Jud. Dist. Ct. Dec. 14, 2016).

22 *Riley v. Cornerstone Cmty. Outreach*, 57 So. 3d 704 (Ala. 2010).

23 *Boynton v. Kilgore*, 623 S.E.2d 922 (Va. 2006).

24 *Brown v. Chiang*, 198 Cal. App. 4th 1203 (Cal. 3d App. Dist. 2011).

## RELATIONSHIP TO STATE AGENCIES

The attorney general plays a major role in articulating the respective powers and duties of the various agencies of state government through appropriate legal interpretation. This function may be exercised by issuing formal attorney general opinions,<sup>25</sup> by providing informal advice and counsel to state agencies, or by defending or challenging agency actions in court.

Ordinarily, attorney general representation of a state agency fulfills the public interest. This is the case because, “when an attorney general provides legal services to a state officer or agency, she does so to facilitate the officer or agency in exercising delegated sovereign power.”<sup>26</sup> Or, as one commentator suggested,

Perhaps a more workable dichotomy than representation of the state or the public is to view the attorney general’s role as combining loyalty to the executive with loyalty to the law. The attorney general, appointed or elected, fulfills responsibilities to the executive and the public by maintaining the obligation to respect and follow the law.<sup>27</sup>

A number of state supreme courts have prohibited or limited the use of counsel other than the attorney general by state agencies. For example, the Oregon Supreme Court affirmed the attorney general’s position that an independent public corporation created by statute could not employ outside counsel and institute legal proceedings without his authorization.<sup>28</sup>

State statutes also limit the ability of executive branch agencies to employ counsel other than the attorney general. For example, Georgia’s Constitution provides that “The Attorney General shall act as the legal advisor of the executive department”<sup>29</sup> and the Georgia legislature has expanded on this statement, making the attorney general the sole legal advisor of the executive branch, including executive departments, offices, institutions, commissions, committees, boards, and agencies. Georgia law also provides that the attorney general must authorize any executive branch entity’s hiring of counsel performing legal

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25 See Chapter 5, *infra*.

26 Matheson, *Constitutional Status and Role of the State Attorney General*, 6 J. LAW. & PUB. POLICY 1, 12 (1993).

27 *Id.*

28 *Frohnmyer v. State Accident Ins. Fund*, 294 Or. 570, 660 P. 2d 1061 (1983).

29 GA. CONST. art. V, § III.

services.<sup>30</sup> Similarly, Washington's Constitution designates the attorney general as "the legal adviser of the state officers."<sup>31</sup> Although the state supreme court held that the words "state officers" applied only to elective state officers named in the state Constitution, the Washington legislature expanded the attorney general's authority as legal adviser beyond this constitutional interpretation. Washington statutes make the attorney general the legal adviser of all executive branch entities, and prevent any executive entity from hiring any in-house or outside legal advisers.<sup>32</sup>

On the other hand, the Montana supreme court held that the authority to hire attorneys for the state does not rest exclusively with the attorney general<sup>33</sup> and the supreme court of Arizona acknowledged that the state's statutory scheme allows a client agency authority to decide, in some circumstances, not to accept the services of the attorney general.<sup>34</sup> The Mississippi legislature enacted legislation that would allow state agencies to employ their own counsel if the attorney general declines to represent the agency or if "there is a significant disagreement with the attorney general as to the legal strategy to be used in the case."<sup>35</sup>

Even when an agency is authorized by statute to employ outside counsel, the attorney general may still have a voice in deciding who will provide these legal services. For example, in Arizona, even though the attorney general may not impose restrictive supervisory conditions upon the client agency's use of

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30 GA. CODE ANN. § 45-15-34 (2002) ("The [office of Attorney General] is vested with complete and exclusive authority and jurisdiction in all matters of law relating to the executive branch of the government and every department, office, institution, commission, committee, board, and other agency thereof. Every department, office, institution, commission, committee, board, and other agency of the state government is prohibited from employing counsel in any manner whatsoever unless otherwise specifically authorized by law.")

31 WASH. CONST. art. III, § 21.

32 WASH. REV. CODE ANN. §§ 43.10.040 (2003) ("The attorney general shall . . . advise all officials, departments, boards, commissions, or agencies of the state in all matters involving legal or quasi legal questions, except those declared by law to be the duty of the prosecuting attorney of any county.") and 43.10.067 ("No officer, director, administrative agency, board, or commission of the state, other than the attorney general, shall employ, appoint or retain in employment any attorney for any administrative body, department, commission, agency, or tribunal or any other person to act as attorney in any legal or quasi legal capacity in the exercise of any of the powers or performance of any of the duties specified by law to be performed by the attorney general. . ."). *But see Goldmark v. McKenna*, 259 P.3d 1095 (Wash. 2011) (attorney general must appeal on behalf of state agency at agency's request).

33 See *Woodahl v. State Highway Comm'n*, 465 P.2d 818 (Mont. 1970).

34 *Fund Manager Pub. Safety Personnel Retirement Sys. v. Superior Court*, 731 P.2d 620, 623 (Az. 1986).

35 2012 Miss. H.B. 211.

outside counsel, the supreme court concluded that “the Attorney General serves as an approver of an agency’s choice of counsel, rather than as a decider whether outside counsel may be hired.”<sup>36</sup>

Most attorneys general observe an obligation to defend a state law against a challenge to its constitutionality. Consistent with the attorney general’s obligation to protect the public interest, however, the attorney general must sometimes determine whether to undertake such a defense or to challenge the statute’s constitutionality. Attorney general challenges to state statutes are discussed in Chapter 6. A more complex situation arises when a state agency takes action that the attorney general considers to be legally improper. As the supreme court of Hawaii observed, “[T]here is a risk, in any given case, that the attorney general’s professional obligations as legal counsel to her statutory client—a public officer or instrumentality of the state vested with policy-making authority—may clash with her vision of what is in the best global interests of the state or the public at large.”<sup>37</sup> In situations where the attorney general believes the agency’s actions conflict with the public interest, the attorney general may appoint special counsel for the agency and seek to protect the public interest through intervention in the suit or institution of separate proceedings against the agency.<sup>38</sup>

Two important cases on this issue were decided by the supreme court of Massachusetts. In *Secretary of Admin. and Finance v. Attorney General*,<sup>39</sup> the attorney general declined to appeal a trial court’s judgment against an agency. The court held that the attorney general’s control over litigation included a determination not to appeal. In *Feeney v. Commonwealth*,<sup>40</sup> the court held that the attorney general may appeal a decision even when the state agency objects.

In an Ohio case, the attorney general’s authority to continue to litigate a case, even when the state agency had declined to do so, was upheld by the state supreme court. The court held that the attorney general could pursue an appeal because the state, as well as the state agency, had been sued by the plaintiffs, and the state was thus a party aggrieved by the appellate court’s adverse decision. Also, although the state agency was responsible for the state’s natural resources, this did

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36 *Fund Manager Pub. Safety Personnel Retirement Sys. v. Superior Court*, 152 Ariz. 255, 258 (Az. 1986) (“Thus, the sole power conferred upon the Attorney General by A.R.S. § 38-848(k) with respect to the system’s legal representation is the power to approve the fund manager’s choice of counsel.” (emphasis added)).

37 *Chun v. Board of Trustees of the Employees’ Retirement System of the State of Hawaii*, 87 Haw. 152, 952 P.2d 1215 (Haw. 1998).

38 *Id.*

39 367 Mass. 154 (1975).

40 373 Mass. 359 (1977).

not “prohibit[ ] the state from litigating its interests in the public trust, including its right to appeal from a judgment that adversely affects those interests.”<sup>41</sup>

Attorneys general have on occasion resorted to litigation to halt legally unauthorized actions of entities that otherwise would be the attorney general’s clients.<sup>42</sup> For example, the New Mexico attorney general sought a writ of mandamus commanding the state’s Natural Resources Trustee not to give any effect to an agreement he reached with alleged polluters because the attorney general had not signed the agreement and it was therefore unenforceable against the state. The court held that the attorney general had “the authority to exercise judgment and discretion with respect to all such litigation-related matters involving the best interests of the state and the public.” Because the Natural Resources Trustee had incorrectly represented himself as “having the legal authority to bind the State in a manner that he clearly does not have, mandamus is a necessary and appropriate remedy.”<sup>43</sup>

In a case addressing evidentiary privileges in the context of state agencies and state attorneys general, the Pennsylvania Supreme Court held that there was no attorney-client or work product protection for documents sought by the attorney general from a state agency during a criminal investigation. In a grand jury investigation of procurement practices, the attorney general sought documents from the Turnpike Authority, a state agency with its own in-house counsel. The Turnpike Authority declined to produce some of the documents on the grounds that they were protected by attorney-client and work-product privilege. In this case, according to the court, “the ‘client’ is not simply the agency or the individual employees of the agency, or the public officials themselves, but rather the public, whose money funds their operations, and whom all of these individuals serve.”<sup>44</sup>

Several antitrust cases brought by groups of attorneys general have explored the relationship between the attorney general and state agencies for purposes of producing discovery. For example, in a case involving alleged anticompetitive acts by American Express, the defendant sought to compel the attorneys general

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41 *State ex rel. Merrill v. Ohio Dept. of Natural Resources*, 955 N.E.2d 935 (Ohio 2011) *but see Goldmark v. McKenna* 172 Wn.2d 568; 259 P.3d 1095 (Wash. 2011) (where statute provides that attorney general is only possible attorney for agency, attorney general must appeal when requested to do so by agency).

42 *See, e.g., Frohnmayer v. State Accident Ins. Fund*, 660 P.2d 1061 (Or. 1983); *Attorney General of Georgia v. The State Bar of Georgia*, Civ. Action No. 87-9032-2, Sup. Ct. DeKalb County, Georgia (Dec. 23, 1987), *vacated as moot*, Ga. Sup. Ct. (Mar. 10, 1988).

43 *State ex rel. Madrid v. Turner*, No. 26,035 (N.M. Dec. 14, 1999).

44 *In re Thirty-Third Statewide Investigating Grand Jury*, 2014 Pa. Lexis 426 (Pa. Feb. 18, 2014).

to produce discovery from a number of state agencies as to purchases made using American Express cards. The attorneys general argued that the state agencies were not parties, since the case had been brought in the attorney general's enforcement capacity. The magistrate judge held that the attorneys general had no means to compel the executive agencies to comply with party discovery. Characterizing the dual nature of state governments as "purposeful," the magistrate judge found that the state agencies are neither subject to common control nor interrelated with the attorney general. The court stated,

The State Attorneys General act outside gubernatorial control. . . . It is not for this court to interfere with the State Attorneys General's ability to exercise their state constitutional power to bring an enforcement lawsuit absent gubernatorial approval. To find that the State Attorneys General have control over the documents in possession of state agencies that operate wholly independently of the State Attorneys General would be giving the Governors' Offices and state agencies a "virtual veto" over the policy decision to bring an enforcement action that rightfully lies with the State Attorneys General.<sup>45</sup>

Historically, attorneys general have served on numerous state boards and commissions.<sup>46</sup> The trend, however, has been toward reducing statutorily mandated participation of attorneys general on such state boards.<sup>47</sup> Statutes often specifically provide for the designation of a deputy or assistant attorney general, or other representative, to serve on boards, and courts have interpreted such provisions broadly.<sup>48</sup> For example, the attorney general of Colorado was permitted to

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45 *United States et al. v. American Express Co.*, 2011 U.S. Dist. LEXIS 156580 at 15 (S.D.N.Y. July 29, 2011); see also, *Colorado v. Warner Chilcott Holdings*, No. 05-2182 (CKK), Magistrate Memorandum Order (D.D.C. May 8, 2007).

46 See, e.g., IDAHO CODE § 58-101 (State Land Board), TEX. CONST. ART. III § 28 (Legislative Redistricting Commission), UTAH CODE ANN. § 63M-7-202 (Commission on Criminal and Juvenile Justice), WYO. STAT. ANN. § 9-2-1101 (Public Safety Communications Commission).

47 For discussion of problems that could arise when attorneys general are required to render an opinion to a board or commission on which they serve, see *Brockbank v. Rampton*, 447 P.2d 376 (Utah 1968). Attorneys general have sometimes sought to have themselves removed from boards in order to ensure that they could thoroughly monitor and investigate the conduct of such boards without potential conflicts of interest. See, e.g., Stephen Ohlemacher, *Petro Wants to Drop Out of Pension Boards*, CLEVELAND PLAIN DEALER, October 9, 2003.

48 See, e.g., DEL. CODE ANN. tit. 11, § 8701 (Criminal Justice Council), MO. REV. STAT. § 109.250 (State Records Commission); N.C. GEN. STAT. § 8B-1402 (Child Fatality Task Force), 13 VT. STAT. ANN. § 5451 (Sentencing Commission).

designate a deputy attorney general to sit on a board relating to voter initiatives, despite the fact that there was no specific authorization for such designation in the statute.<sup>49</sup>

### Conflicts in Representation

By recognizing the attorney general as the chief legal officer of the state and approving the attorney general's control over legal services that would otherwise be controlled by individual agencies, courts have had to address recurring questions about the ethical and procedural due process consequences of multiple representation by attorneys general. The attorney general may face at least the following five types of conflicts:

1. two agencies represented by the attorney general may be on opposite sides of a legal argument respecting facts, law, or public policy;<sup>50</sup>
2. the attorney general may sue or be the attempted subject of a suit by an agency or its director, who also claims status as a client;
3. the attorney general may represent both a state board and an agency appearing before it;
4. the attorney general may represent or advocate the position of agency staff in a proceeding, such as an occupational license revocation, where the agency also, in its adjudicatory authority, requires legal advice from the attorney general or other counsel; or
5. the attorney general may intervene in an action or be joined as a defendant before a board or commission which he or she also represents or of which he or she is a member.

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49 *Title, Ballot Title and Submission Clause, and Summary with Regard to a Proposed Petition for an Amendment to the Constitution of The State of Colorado Adding Subsection (10) to Section 20 of Article X (Amend Tabor 25) v. Title Board*, 900 P.2d 121 (Colo. 1995).

50 Some states have sought to reduce this type of conflict through statutory requirements that one agency may not sue another unless the action is approved by the attorney general. For example, in Mississippi, the attorney general must approve in writing before one state agency sues another. *Board of Trustees of State Institutions of Higher Education v. Ray*, 809 So.2d 627 (Miss. 2002).

Challenges to the attorney general's authority to represent several parts of state government have typically taken one of three forms: 1) motions to disqualify the attorney general on conflict of interest grounds; 2) disciplinary actions before the state bar association alleging conflicts of interest; or 3) allegations by person appearing before a state agency that the attorney general's participation in multiple roles has violated procedural due process requirements. The attorney general has been given significant latitude in representing potentially or actually conflicting state government clients in each of these situations.

### Disqualification

When confronted with motions to disqualify the office of the attorney general because of alleged conflicts, the courts have frequently drawn a distinction between cases in which the attorney general is representing two opposing agencies and those in which the attorney general is an actual party to the dispute. The Michigan Court of Appeals thoroughly analyzed this situation in *Attorney General v. Michigan Public Service Commission*. In that case, the attorney general challenged a decision of the state Public Service Commission. The Commission was also represented by the attorney general's office. The Michigan Court of Appeals analyzed the applicability of conflict-of-interest rules to the attorney general's office and concluded that the attorney general must appoint independent counsel for an agency if the attorney general is an actual party opposing the agency.<sup>51</sup> The court reviewed cases from a number of states and found a "majority rule that, in most instances, an attorney general may represent adverse state agencies in intragovernmental disputes."<sup>52</sup> Where the attorney general is a party to the litigation, however, "independent counsel should be appointed for the state agency in order to remedy the ethical impediment to the legal action brought by the attorney general."<sup>53</sup> Turning to the question of the applicability of bar ethics rules to the attorney general, the court held

[W]hile mechanical application of these [ethics] rules is not possible because of the unique nature of [the Attorney General's] office, thus allowing dual representation in certain circumstances not otherwise permitted in the arena of private practice, the rules do recognize a clear conflict of interest when the Attorney General acts as a party

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51 *Attorney Gen. v. Michigan Pub. Serv. Comm'n*, 625 N.W.2d 16 (Mich. Ct. App. 2001).

52 625 N.W.2d at 29.

53 625 N.W.2d at 31.

litigant in opposition to an agency or department that she also represents in the same cause of action.<sup>54</sup>

In applying this rule to the attorney general's representation of state agencies, the court noted that it was not diminishing the powers of the attorney general's office to intervene as counsel for disputing state agencies, to defend the constitutionality of legislative enactments, or to act in an advisory role to state agencies or to initiate statutory review proceedings. The court also asserted that its ruling would assist the attorney general in fulfilling her obligations to protect the public interest, because "disallowing dual representation frees her to vigorously pursue her chosen side of the litigation and thereby better serve the public interest, while at the same time ensuring independent representation for the state agency or department."<sup>55</sup>

Even if the attorney general has previously counseled agencies whose actions the attorney general is now challenging, courts have declined to disqualify the attorney general entirely, merely requiring that the agency have independent counsel.<sup>56</sup> In 1989, the Maine Supreme Judicial Court ruled that the lower court erred in dismissing the attorney general's role as *parens patriae* and in ordering the attorney general to represent the state Superintendent of Insurance in court.<sup>57</sup> The action arose when the attorney general moved to intervene in health insurance rate proceedings. The lower court barred the attorney general from seeking judicial review because his office had advised the Superintendent in the administrative proceedings. The court found that the attorney general's duty to protect the public was paramount and that there was no ethical conflict because the Superintendent was provided private counsel.

A minority of state courts have concluded that their attorneys general cannot direct litigation in a manner contrary to the wishes of the particular state officials represented by the attorney general.<sup>58</sup> For example, in Washington, the

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54 625 N.W.2d at 33.

55 625 N.W.2d at 34.

56 *Attorney Gen. v. Michigan Pub. Serv. Comm'n*, 625 N.W.2d 16 (Mich. Ct. App. 2001), *State ex rel. Allain v. Mississippi Public Service Comm.*, 418 So.2d 779, 783 (Miss. 1982), *Superintendent of Insurance v. Attorney General*, 558 A.2d 1197, 1202 (Me. 1989).

57 *Superintendent of Ins. v. Attorney General*, 558 A.2d 1197 (Me. 1989).

58 *Chun v. Board of Trustees of the Employees' Retirement System of the State of Hawaii*, 952 P.2d 1215 (Haw. 1998); *see also*, *Manchin v. Browning*, 296 S.E.2d 909 (W.Va. 1982); *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206 (Cal. 1981); *Motor Club of Iowa v. Dept. of Transp.*, 251 N.W.2d 510 (Iowa 1977); *City of York v. Pennsylvania Public Util. Comm'n*, 295 A.2d 825 (Pa. 1972); *Arizona State Land Dep't v. McFate*, 348 P.2d 912 (Ariz. 1960).

attorney general declined to appeal a decision even though the Commissioner of Public Lands had requested the appeal. The court concluded that the attorney general is required by statute to provide representation to the Commissioner, especially because the state agency's inability to hire other counsel meant that the Commissioner would be left with no attorney if the attorney general did not represent him. The court rejected the attorney general's argument that his statutory duty was satisfied by representing the Commissioner in the trial court, stating "Rather than separate the various stages of litigation, we read these provisions as written: every phase of the litigation, whether trial court or appellate level, is an aspect of one proceeding, and therefore of one continuing duty."<sup>59</sup>

Even in states where the attorney general functions in a more traditional attorney-client relationship with the state agencies he represents, courts have recognized that the attorney general nonetheless has broader, independent decision-making authority when appearing in the name of his or her own office or on behalf of the State as a whole. For example, the Hawaii supreme court held that the state's attorney general could not appeal against the wishes of the state board she was representing, but could take action in her own behalf against the board if she felt the board's failure to authorize the appeal was the result of improper influence.<sup>60</sup>

Some states have addressed the problem of potential conflicts through statute. For example, Virginia law specifically authorizes the attorney general to represent multiple parties in the same transaction and multiple interests within the same agency. This legislative grant of authority confirms the mandate of the attorney general to represent Virginia in all civil matters even when individual state agencies appear to be in conflict.<sup>61</sup> This specific authority overrides any ethical rule that might have been read to require separate representation.

Courts have also allowed attorneys general to continue multiple representation in the context of criminal actions. In *Mechem v. Superior Court of the State of Arizona ex rel. Robert K. Corbin*, the court reiterated that absent specific communication on the very matter under investigation, the attorney general is not precluded from initiating proceedings before the grand jury involving the

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59 *Goldmark v. McKenna*, 172 Wash.2d 568; 259 P.3d 1095 (Wash. 2011).

60 See, e.g., *Chun v. Board of Trustees of the Employees' Retirement System of the State of Hawaii*, 952 P.2d 1215, 1239 (Haw. 1998); *Motor Club of Iowa v. Dept. of Transp.*, 251 N.W.2d 510, 516 (Iowa 1977) (attorney general could not appeal against wishes of board he was representing, but could get separate counsel for board and then enter an appearance on his own behalf to argue his view of public interest).

61 VA. CODE § 2.2-507 (2003).

governor, as the attorney general does not represent the governor when the governor is not performing official duties.<sup>62</sup>

The Michigan Supreme Court held that the attorney general's office was not disqualified from pursuing a criminal case against a judge, alleging subornation of perjury, even though a lawyer in the public employees section of the attorney general's office had briefly advised the judge in connection with the early stages of the case. After a number of appeals on the issue, the court held, "The Attorney General's unique status 'requires accommodation,' (citation omitted), and such accommodation is particularly apt where no evidence has been presented of any prejudice that would be suffered by the defendant."<sup>63</sup>

On the other hand, the Nevada attorney general was disqualified from prosecuting the state's lieutenant governor, who was indicted on several counts of misappropriation and falsification of accounts, based on his actions in connection with the state's newly created College Savings Plan (CSP) during his previous term as State Treasurer. The lieutenant governor moved to disqualify the attorney general's office from representing the state in the matter because several deputy attorneys general advised the Treasurer's office on matters relating to the CSP that were the basis for the indictment. These attorneys also had not been involved in the criminal investigation that led to the indictment, and the attorney general's office created an ethical wall between the attorneys involved in the civil investigation and the prosecuting attorneys. The court held that the attorney general's office should be disqualified. While acknowledging that Nevada statutes authorize the attorney general to represent state officials and to prosecute them, the court held that in this case, "the alleged criminal charges arise out of contracts and relationships on which the Attorney General's office gave advice and regarding which some of its attorneys will be called as defense witnesses." The court noted that the attorney general's office itself seemed to recognize the potential for conflict by implementing an ethical wall.<sup>64</sup>

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62 Supreme Court of Arizona, No. CV-87-040-SA, State Grand Jury Inquiry No. 23 S.G.J. 73, Nov. 18, 1987.

63 *People v. Waterstone*, 486 Mich. 942, 943 (Mich. 2010).

64 *State v. Krolicki*, No. C250045, Dist. Ct., Clark Cty., May 19, 2009. See also *Maldonado v. State*, 820 N.Y.S.2d 420 (N.Y. Ct. Claims, 2006) (AG office disqualified where attorney had previously represented plaintiff inmate in action against state); *People v. Tennesen*, 2009 Guam 3 (Guam 2009) (entire AG office disqualified where defendant was witness against AG in different criminal case and "Chinese wall" was ineffective).

## Bar Disciplinary Actions

When the attorney general's representation of multiple parties has been the subject of bar disciplinary actions, the attorney general has also been granted more latitude than a private practitioner. The supreme court of Tennessee, in analyzing a case where the attorney general represented two state agencies, stated,

There is, however, a need for studied application and adaptation of the ethics rules in the Code of Professional Responsibility to the Attorney General and his or her staff in recognition of the uniqueness of the office, the Attorney General's obligation to protect the public interest, and the Attorney General's statutory obligation to represent the various and sometimes conflicting interests of numerous state agencies.<sup>65</sup>

Recognition of the unique position of the attorney general as well as concerns about separation of powers have led courts to dismiss disciplinary proceedings alleging conflicts of interest by attorneys general. For example, when the attorney general of Georgia sued an agency to force it to comply with an open government law,<sup>66</sup> two legal actions ensued—an attempt to subject the attorney general to disciplinary proceedings for representing allegedly conflicting interests and a motion to disqualify him from proceeding in his lawsuit. The Georgia Superior Court granted the attorney general's petition for a writ of prohibition, holding that because the state bar is an administrative arm of the supreme court and thus part of the judicial branch, it must “refrain from pursuing complaints against elected constitutional officers who must be members of the Bar, where the possibility of suspension or disbarment . . . would be the equivalent of impeachment, and thus a violation of the separation of powers.” Soon thereafter, the supreme court of Georgia amended the state bar rules limiting the scope of the term “client” so that it did not include “a public agency or public officer or employee when represented by a lawyer who is a full time public official.”<sup>67</sup> The change by court order was made retroactive, thus disposing of the

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65 *State ex rel. Comm'r of Transportation v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 773 (Tn. Ct. App. 2001).

66 *Attorney General of Georgia v. The State Bar of Georgia*, Civ. Action No. 87-9032-2, S Sup. Ct. DeKalb County, Georgia (Dec. 23, 1987), *vacated as moot*, Ga. Sup. Ct. (Mar. 10, 1988).

67 *Atlanta Journal and the Atlanta Constitution v. Babush*, 364 S.E.2d 560 (Ga. 1988). The court's retroactive amendment of the bar rules led the court on March 10, 1988, to vacate as moot the Superior court decision cited *supra* note 64.

state bar's claim that the attorney general was in a conflict of interest in suing his own "client."

Several other state courts have analyzed the applicability to attorneys general of bar rules on conflicts of interest. In *Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission*, the Connecticut Supreme Court held

[E]ven if the Office of the Attorney General were representing both the board and [the Commissioner of Health] concurrently, it would not make sense to treat this situation as a conflict of interest. This court has recognized that the Attorney General is in the "unique position" of representing the state, the state's agencies, and the state's citizens. The Attorney General's ethical duties thus should be considered in relation to his "duties as the constitutional civil legal officer of the state," which include being available to represent these various constituencies.<sup>68</sup>

In Hawaii, the supreme court has recognized that

due to the [Attorney General's] statutorily mandated role[s] in our legal system, we cannot mechanically apply the [Hawaii] Code of Professional Responsibility to the [Attorney General's] office. . . . In large part, this is because . . . when the client is a governmental organization . . . in some circumstances the client may be a specific [officer,] agency [or instrumentality] while in other circumstances the client is "the government as a whole."<sup>69</sup>

An Arkansas court also analyzed the applicability of rules of professional conduct to the attorney general in a case where an engineer was accused of practicing architecture. The defendant sought disqualification of the attorney general because he represented both the State Board of Architects and the State Board of Registration for Professional Engineers. In holding that the attorney general did not need to be disqualified, the court stated,

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68 310 Conn. 276, 288-289, 77 A.3d 121 (Conn. 2013), see also *Commission on Special Revenue v. Freedom of Information Commission*, 174 Conn. 308, 318-20, 387 A.2d 533 (1978).

69 *Chun v. Board of Trustees of the Employees' Retirement System of the State of Hawaii*, 952 P.2d 1215, 1236 (Haw. 1998).

The Model Rules of Professional Conduct contain no specific exemptions for the Attorney General and his assistants. Therefore, as a lawyer and officer of the court, the Attorney General is subject to the Model Rules of Professional Conduct. . . . There is, however, a need for adaptation of the ethics rules in the Model Rules to the Attorney General and his staff in recognition of the uniqueness of the office, the Attorney General's obligation to protect the public interest, and the Attorney General's statutory obligation to represent the various and sometimes conflicting interests of numerous state agencies.<sup>70</sup>

Similarly, the New Hampshire Supreme Court held that a plaintiff's rights were not violated when two assistant attorneys general prosecuted him before the state Board of Veterinary Medicine, while another assistant attorney general acted as counsel to the Board. The court stated,

Accordingly, public and private attorneys have different ethical obligations in some circumstances. Lawyers under the supervision of the attorney general, for instance, "may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients." The rules of professional conduct do not abrogate this authority.<sup>71</sup>

The attorney general of Oregon issued a formal opinion regarding the applicability of state bar rules of professional conduct to the representation by the attorney general's office of two or more parties in contested proceedings. The attorney general's opinion determined that the client conflicts rule does not apply to the attorneys from the attorney general's office because "the state as a whole is considered the client for purposes of conflicts analysis. Therefore, there can be no multiple client conflicts of interest."<sup>72</sup>

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70 *Holloway v. Ark. State Bd. of Architects*, 86 S.W.3d 391 (Ark. Ct. App. 2002), *aff'd in part and rev'd in part*, *Holloway v. Ark. State Bd. of Architects*, 101 S.W.3d 805 (Ark. 2003).

71 *Appeal of Huston*, 840 A.2d 773 (N.H. 2003) (citations omitted). See also, *Mallinckrodt US, LLC v. Maine Dept. of Environmental Protection*, 2012 Me. Super. LEXIS 146 (Me. Super. Nov. 1, 2012) ("The Court is convinced that because of the unique nature of the Attorney General's office in pursuing the public interest, [citations omitted], assistant attorney generals do not violate ethical rules or violate constitutional due process requirements by serving as prosecutor and advisor to the same agency in two separate proceedings.")

72 Opinion on Interagency Conflicts, DOJ Ethics No. 08-06 (September 23, 2008).

The issue has also been addressed in Washington. An employee of a state college taught a class at the state penitentiary and was injured accidentally at the penitentiary by a guard. She was paid workers' compensation benefits by the Washington Department of Labor and Industry (DLI). Washington statutes authorize actions against third person tortfeasors for one who receives workers' compensation. In this case, the worker did not pursue a claim and DLI hired an outside attorney and filed a claim against the Department of Corrections (DOC). After DOC won at the trial court, DLI appealed, and an assistant attorney general appeared for DLI and moved to dismiss the appeal and to disqualify the private attorney retained by DLI. The court of appeals stated

A private law firm would be precluded from representing competing interests in the same lawsuit, such as the interests held here by DLI and DOC. . . . Ethical rules and case law treat the State Attorney General's Office differently, however. To the extent that the attorney general is not a party to an action or personally interested in a private capacity, the attorney general may represent opposing state agencies in a dispute.<sup>73</sup>

### Procedural Due Process

Courts have rarely found violations of a party's procedural due process in administrative proceedings in which assistant attorneys general are variously prosecuting, advising and presiding. For example, the Maryland Court of Appeals held, that "the combination of functions in the Attorney General's office, in itself, is clearly not a violation of due process of law."<sup>74</sup>

The New Hampshire courts have addressed this issue several times. The supreme court held that it was permissible for one assistant attorney general to represent a medical board in its quasi-judicial capacity and another assistant attorney general to prosecute the case before the board, unless there was a showing of actual bias. In this case, the assistant attorney general acting as the board's legal counsel did not participate in the investigation or the preparation of allegations against the doctor and the assistant attorneys general were employed in

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<sup>73</sup> *Burnett v. Department of Corrections*, 2015 Wash. App. LEXIS 786 (Wash. Ct. App. Div. 3, Apr. 16, 2015).

<sup>74</sup> *Consumer Protection v. Consumer Publ.*, 304 Md. 731, 501 A.2d 48 (1985). See generally *Withrow v. Larkin*, 421 U.S. 35 (1975).

different bureaus of the attorney general's office, with different supervisors and wholly distinct functions.<sup>75</sup>

In another New Hampshire case, the court stated that even if the assistant attorney general had commingled investigative and adjudicatory functions, the defendant would still need to show "actual bias" through "evidence that [the assistant attorney general] had a pecuniary interest in the outcome of the case, had become personally embroiled in criticism from [the defendant], had heard evidence in secret at a prior proceeding, or had been related to a party."<sup>76</sup> Similarly, in Iowa, the court held that the fact that an assistant attorney general advised a medical board or rulemaking and complaint issuance and also sought a rehearing in a disciplinary hearing did not give rise to a due process violation. The court said,

We fail to see how the assistant attorney general caused the board to become a prosecutor. The assistant attorney general did at times advise the board in its rulemaking and complaint-filing capacity. But this fact did not, standing alone, impute the prosecutorial role to the board. The board did not prosecute the case; the attorney general did. It is neither unlawful nor uncommon for the attorney general to both give advice to various administrative agencies, and thereafter prosecute actions brought by the agency.<sup>77</sup>

Iowa courts have also addressed due process claims involving attorney general representation of state agencies. After the University of Iowa brought disciplinary charges against a professor, he filed a lawsuit against a number of defendants, including the university's president, alleging he was entitled to whistleblower protections. While that suit was pending, a faculty panel concluded that he should be dismissed from his position, after a hearing in which the university was represented by an assistant attorney general. The professor alleged that the university had violated his procedural and substantive due process rights because the same assistant attorney general had represented the university in the disciplinary proceedings and the university's president in the professor's civil suit. The court held there was nothing in the record indicating that the assistant attorney general acted as an impermissible advisor to the university president in her disciplinary decision and that the professor did not demonstrate how the assistant

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<sup>75</sup> *Appeal of Trotzer*, 719 A.2d 584, 588 (N.H. 1998).

<sup>76</sup> *Correia v. Town of Alton*, 2008 N.H. Super. LEXIS 19 (N.H. Super. Ct. 2008).

<sup>77</sup> *Fisher v. Iowa Board of Optometry Examiners*, 510 N.W.2d 873, 877 (Iowa 1994).

attorney general's defense of the university president in the civil matter adversely affected his representation of the university in the disciplinary matter.<sup>78</sup>

The Louisiana Court of Appeals also found no impropriety in the attorney general's representation of different agencies, departments or boards of the state. The court stated, "The numerous and diverse responsibilities of the office of the attorney general make its presence far-reaching in the state's business but do not impugn the reputation of the office or its employees. Merely because two individual attorneys, both classified as assistant attorneys general, are involved at some level in the same matter does not rob the proceedings of the crucial appearance of fairness."<sup>79</sup> The Virginia Supreme Court held in this regard that the official conduct of assistant attorneys general is "entitled to a presumption of honesty and fairness no less than that accorded to acts of other public officials" and that without a showing of bias or improper conduct, impartiality and fairness should be assumed.<sup>80</sup>

The cases in which courts have recognized a violation of procedural due process are those in which the same individual is acting in several capacities within the same proceeding. The Arizona Supreme Court discussed due process issues in a case where the attorney general had been accused of campaign finance violations. Because campaign finance cases are referred for investigation by the secretary of state to the attorney general, a local prosecutor was appointed as a special assistant attorney general to investigate the case. The special assistant attorney general issued an order finding violations, which was appealed to an administrative law judge, as prescribed by Arizona law. The special assistant attorney general (acting in the capacity of attorney general) then made the final agency decision based on the ALJ's findings. During the course of a later appeal, the special assistant attorney general admitted that she had been involved in the litigation and preparation of the case before the ALJ. The court held, "where an agency head makes an initial determination of a legal violation, participates materially in prosecuting the case, and makes the final agency decision, the combination of functions in a single official violates an individual's

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78 *Juweid v. Iowa Board of Regents*, 2014 Iowa App. LEXIS 1143 (Iowa Ct. App. Nov. 26, 2014). See also, *Tobin v. Iowa Board of Medicine*, 843 N.W.2d 476 (Iowa Ct. App. 2014) (No procedural due process violation when assistant attorney general who advised the board did not act as a Board representative once a contested case proceeding began).

79 *Manoco v. State ex rel. Gaming Control Bd.*, 756 So.2d 430 (La.App. 1999).

80 *Hladys v. Commonwealth of Virginia*, 366 S.E.2d 98 (Va. 1988).

Fourteenth Amendment due process right to a neutral adjudication in appearance and reality.”<sup>81</sup>

In another decision, the Colorado Court of Appeals found that an appearance of impropriety and fundamental unfairness resulted when the assistant attorney general prosecuting the case before the Motor Vehicle Dealer Board also advised the board during its deliberations.<sup>82</sup> The Minnesota Supreme Court, in a local government case, indicated that an assistant attorney general’s prosecution of an administrative case, while advising the hearing officer and drafting the final order, violates the constitutional rule.<sup>83</sup> In a later case, the Minnesota Court of Appeals rejected plaintiff’s argument that “because an assistant attorney general assigned to advise the commissioner may inappropriately attempt to vindicate another assistant attorney general’s unsuccessful strategy before the ALJ, the commissioner must either forego legal advice or seek it from outside counsel.” The court found no evidence of improper conduct on the part of the attorneys, and declined to state new standards for assistant attorney general representation.<sup>84</sup>

### Resolution of Conflicts

Regardless of the structure of legal services or of the statutory scheme, conflicts between clients are sometimes unavoidable, and attorneys general have varying approaches to resolving these situations. When the conflicts of representation are ultimately unavoidable and irreconcilable, representation may be provided by attorneys working for the attorney general whose independent legal judgment is guaranteed by some administrative insulating barrier or “wall.” Such a “wall” was described by the Michigan Court of Appeals in *Attorney General v. Michigan Public Service Commission*:

The MPSC is separately and independently represented by attorneys assigned to the Public Service Division, while the Attorney General in her role as intervenor/appellant is represented by attorneys assigned to the Special Litigation Division. The Public Service Division is physically situated in the MPSC’s offices ... and the

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81 *Horne v. Polk*, 2017 Ariz. LEXIS 150 (Ariz. May 25, 2017). The court noted that this case involved a single individual, rather than the office as a whole.

82 *Spedding v. Motor Vehicle Dealer Board*, 931 P.2d 480, 485 (Co. Ct. App. 1996).

83 *Schmidt v. Independent School Dis. No. 1*, 349 N.W.2d 563 (Minn. App. 1984). The court went to say, however, that employing an independent hearing examiner would solve the problem.

84 *Sleepy Eye Care Ctr. v. Commissioner of Human Services*, 572 N.W.2d 766, 772 (Minn. Ct. App. 1998).

## *State Attorneys General Powers and Responsibilities*

Special Litigation Division is located wholly apart in a separate office building across the street. Each division is headed by an independent assistant in charge ... The two divisions function completely separately and independently from each other and indeed are even advised in appellate matters by different attorneys in the Solicitor General's office who themselves maintain a strict "conflict wall"...<sup>85</sup>

The attorney general may also seek to guarantee independent legal judgment by hiring or authorizing the hiring of attorneys not directly supervised by the attorney general, or by authorizing the hiring of attorneys entirely outside the control of the attorney general. Several attorneys general, including those of Arizona, Colorado, Minnesota, Nevada and West Virginia, have developed internal guidelines for handling such conflict issues. In addition, the vast majority of jurisdictions occasionally employ outside counsel in irreconcilable conflict situations. A few states have "house counsel" represent agencies when conflicts in representation arise. The supreme court of Arizona has decided that the obligation to serve a client agency can be placed directly on the attorney appointed to that agency and not with the attorney general (who may, nevertheless have the statutory duty to appoint or employ him).<sup>86</sup> In such a model, the role of the attorney general would, to some extent, be that of an attorney-broker for agencies needing legal services.

## REPRESENTATION OF STATE AGENCY EMPLOYEES

In the majority of states, the attorney general defends state employees when they are sued in connection with their official actions.<sup>87</sup> Pennsylvania's statute is typical, stating, "When an action is brought ... against an employee of the Commonwealth government, and it is alleged that the act of the employee which gave rise to the claim was within the scope of the office or duties of the employee, the Commonwealth through the attorney general shall defend the action, unless the

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<sup>85</sup> *Attorney Gen. v. Michigan Pub. Serv. Comm'n*, 625 N.W.2d 16, 24 (Mich. Ct. App. 2001).

<sup>86</sup> *Fund Manager Pub. Safety Personnel Retirement Sys. v. Superior Court*, 731 P.2d 620, 623 (Ariz. Ct. App. 1986).

<sup>87</sup> See, e.g., CONN. GEN. STAT. § 5-141d(a); 5 ILCS 350/1, *et seq.*; MO. REV. STAT. § 105.711; NEB. REV. STAT. § 81-8239.05-06; N.J. STAT. ANN. § 59:1-1, *et seq.*; N.Y. Pub. Off. Law § 17; OHIO REV. CODE ANN § 109.361; OR. REV STAT. § 30.285.

attorney general determines that the act did not occur within the scope of the office or duties of the employee.”<sup>88</sup> If the attorney general declines to represent the employee, most states require that counsel be retained for the employee, and that the employee be indemnified for his legal bills if successful in defeating the claim.

A number of state courts have addressed the issue of when and whether the attorney general must represent state employees. For example, in a Connecticut case, the attorney general was sued by a state correctional employee whom he had refused to defend in connection with an inmate’s suit. The employee alleged that the attorney general’s action violated his rights under 42 U.S.C. § 1983. The court held that the attorney general was entitled to absolute immunity, because the attorney general’s decision was analogous to that of a prosecutor, who decides when to initiate suit:

[T]he Attorney General’s decision directly—not derivatively—affects “the application of state legal resources, state policy, and state prestige.” . . . It is apparent to us that in deciding not to commit the state’s financial and legal resources to [the employee’s] defense, [the Attorney General] served as an advocate for the state and performed functions analogous to those of agency officials or prosecutors and other government attorneys whose decisions to commit or not commit the state are protected by absolute immunity.<sup>89</sup>

An Iowa court also addressed the representation of a state employee by the attorney general in the context of a criminal proceeding. The employee argued that because the agency where he was employed had an attorney-client relationship with the attorney general, the attorney general could not prosecute him. The court concluded that the state agency, not its individual employees, had an attorney-client relationship with the attorney general.<sup>90</sup>

Similarly, in a New York case, a state employee who had sued the state alleging sexual harassment at the state agency where she worked sought to disqualify the attorney general from representing the agency. The plaintiff alleged that the attorney general had a statutory authority and an obligation to assist her at one stage of proceedings, then appeared on behalf of the defendants she is suing at another stage of the same proceeding. The court held, “a statutory duty to represent government agencies and employees does not create an inherent conflict of

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88 42 Pa.C.S. § 8525.

89 *Mangiafico v. Blumenthal*, 471 F.3d 391, 396 (2d Cir. 2006).

90 *Iowa v. Wheeler*, Crim. No. SR235062 (Iowa Dist. Ct. Polk Cty. Crim Div., Mar. 4, 2010).

interest or the appearance of impropriety when the office later participates in a civil or criminal matter against an individual that it is authorized to represent in other circumstances.<sup>91</sup>

## RELATIONSHIP TO THE LEGISLATURE

The attorney general has several different roles in the legislative arena. Most legislatures now have their own legal staffs, and the attorney general's bill-drafting activities largely are confined to legislative proposals involving the attorney general's own programs or proposals of state executive agencies in which the attorney general is involved in his or her role as counsel for those agencies.<sup>92</sup> Many attorneys general give legal opinions to legislatures and individual legislators on request, some attorneys general are required by law to do so. Most attorneys general give opinions on the constitutionality of legislative bills when asked.<sup>93</sup> The legislature, of course, has broad authority over the attorney general and the office, including budgetary authority, although some states' courts have held that this authority is limited by the attorney general's constitutional or common law powers.<sup>94</sup>

In Maine the attorney general is chosen by a secret ballot of the Senators and Representatives in convention. If there is a vacancy in the office when the Legislature is not in session, the governor may appoint an attorney general, subject to confirmation by the legislature.<sup>95</sup> The attorney general of Maine is required to assist in conducting an ethics seminar for legislators after the general election and before the convening of the legislature and to provide each legislator with a bound compilation of the state laws pertaining to legislative ethics and conduct.<sup>96</sup>

Legislatures have sometimes sought to direct the attorney general to take legal action that the attorney general has declined to take. Such actions on the part of the legislature may raise questions about separation of powers.<sup>97</sup> For example, the New Hampshire legislature asked the state supreme court for an

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91 *Knight v. New York*, 1996 U.S. Dist. LEXIS 18021 (N.D.N.Y. Dec. 2, 1996).

92 See Chapter 7.

93 See Chapter 5.

94 See Chapter 3.

95 ME. CONST. art. IX, § 9.

96 ME. REV. STAT. ANN. tit. 1 § 1008.

97 For a discussion of separation of powers issues, see State Constitutional Law chapter.

opinion on whether a bill which required, “the attorney general to join the lawsuit challenging the Patient Protection and Affordable Care Act” violated the State’s Constitution. The court concluded that it did, holding that the constitution gives “the executive the *exclusive* power to *enforce* the law” and made the executive responsible for “initiating civil actions on behalf of the State. . . . The executive branch alone has the power to decide the State’s interest in litigation.”<sup>98</sup>

The Kansas legislature has also sought unsuccessfully to direct the attorney general to file an action. The legislature enacted a statute addressing protests at military funerals, which stated that the provisions of the Act regulating the time and place of protests at funerals would not become operative unless the Kansas Supreme Court or a federal court determined the funeral protest provisions were constitutional. The Act also directed the attorney general to file a lawsuit challenging the constitutionality of those provisions. The attorney general did not believe the provisions of the statute regarding the time and place of protests at funerals were unconstitutional, so he argued that the legislature could not direct the attorney general to take an action that the attorney general believes is without merit. The Kansas Supreme Court agreed, holding that neither the legislature nor the governor has the “constitutional authority to intrude into the attorney general’s duties as an officer of the court.” The legislature cannot override an attorney’s ethical duties to not “bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous.”<sup>99</sup>

In Indiana, several legislators sought to force the attorney general to defend a specific statutory provision. Plaintiffs had filed suit, challenging several parts of the state’s immigration statutes. After the case had been briefed, the U.S. Supreme Court struck down a different state’s statute that was identical to one in the Indiana litigation. The attorney general acknowledged that the identical Indiana statutory provision was unconstitutional, and declined to defend it. Three state Senators sought to intervene in the case to defend the statutory provision, and the attorney general opposed their motion. The court held that the legislators could not intervene because “The Attorney General is charged by law with defending State agencies, officers and employees, and must, of necessity, direct the defense of the lawsuit in order to fulfill his duty to protect the State’s interests.” If the legislators were allowed to intervene simply because they disagreed with the attorney

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98 *Opinion of the Justices (Requiring Attorney General to Join Suit)*, No. 2011-319 (N.H., June 15, 2011).

99 *State ex rel. Morrison v. Sebelius*, 179 P.3d 366 (Kan. 2008).

general's litigation strategy, it "would provide the legislators a trump card with respect to the Attorney General's statutorily derived discretion in this context."<sup>100</sup>

A Hawaii Supreme Court decision discussed the relationship between the attorney general's representation of the legislature and his common law power to represent the public interest. In that case, plaintiffs filed a *quo warranto* action against a state legislator, alleging that he did not live in the district he represented, as required by law. The legislature, represented by the attorney general, sought to intervene. The plaintiffs argued that the attorney general's client is the state of Hawaii, and the attorney general cannot represent the House of Representatives if that results in a position adverse to the general state interest. The court held "The Attorney General's common law duty to protect the public interest is subject to his or her definition of what is in the best interests of the state or public at large..."<sup>101</sup>

The attorney general of South Carolina may investigate and prosecute criminal violations of state ethics laws by legislators, even if the legislature has not referred the claims to the attorney general. The court likened the legislature to a state professional board, in that it has the authority to regulate its own members and impose disciplinary action, does not interfere with a simultaneous criminal investigation by the attorney general.<sup>102</sup>

In Arizona, the legislature enacted a statute under which "[a]t the request of one or more members of the legislature, the attorney general shall investigate any ordinance, regulation, order or other official action adopted or taken by the governing body of a county, city or town that the member alleges violates state law or the Constitution of Arizona." After the attorney general, acting on the request of a legislator, sued the city of Tucson, the city challenged the statute as a violation of the separation of powers, among other grounds. The court found that the legislature was not involved, other than to request that the attorney general undertake an investigation, and the attorney general retains his discretion to apply independent judgment when determining whether a municipal action violates state law.<sup>103</sup>

On occasion, attorneys general have intervened in litigation on behalf of the legislature against the governor. For example, the Mississippi attorney general has joined with state legislators to challenge the governor's veto of appropriation

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100 *Buquer v. City of Indianapolis*, 2013 WL 1332137 (S.D. Ind. Mar. 28, 2013).

101 *Hussey v. Say*, 139 Haw. 181 (Haw. 2016).

102 *Ex parte Harrell v. Attorney General*, 409 S.C. 60 (S.C. 2014).

103 *State ex rel. Brnovich v. City of Tucson*, 771 Ariz. Adv. Rep. 17 (Ariz. Aug. 17, 2017).

bills and to seek a declaratory judgment as to the validity of a Constitutional amendment.<sup>104</sup>

## RELATIONSHIP TO THE JUDICIARY

Authorities generally agree that the attorney general is not a judicial officer, although the rendering of advisory opinions is “quasi-judicial” in nature. Few attorneys general will render opinions on matters before a court or on allegations of error committed by a court. The office of attorney general serves as counsel for judges who are sued in their official capacity in almost every state. In some states, including Michigan, the attorney general represents the judiciary when courts are sued in connection with their administrative duties.

The attorney general of Tennessee, who has a unique relationship to the judiciary, is officially entitled the “Attorney General and Reporter for the State” and is selected for an eight-year term by the judges of the supreme court.<sup>105</sup> The Tennessee attorney general is required by law to give legal advice to the governor and other state officials but has never sat with the cabinet. The salary is defined by law as being the same as that of an associate justice of the supreme court. No other attorney general is so closely related to the state supreme court.

State attorneys general have the common law authority to seek writs of prohibition against actions taken by judges. In an Ohio case, a convicted defendant sought relief from a murder conviction on the grounds that the jury was not properly instructed. The district attorney, who had not been in office at the time of his original conviction, did not object. The judge granted the motion, and the defendant was released. The attorney general sought a writ of prohibition to compel the judge to vacate his granting of the defendant’s motion for relief. The court held that although there was no specific statutory authorization for this action by the attorney general, it was within his traditional common law powers.<sup>106</sup>

Many states have established judicial councils to promote judicial reform, collect statistical data, and recommend procedural changes that will improve uniformity and expedite court business. While the composition of these councils varies, the state’s chief justice is usually chairman, and membership includes

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104 *Fordice v. Bryan*, 651 So. 2d 998 (Miss. 1995), *State ex rel. Moore v. Molpus*, 578 So.2d 624 (Miss. 1991).

105 TENN. CONST. art. VI, § 5.

106 *State ex rel. Cordray v. Marshall*, 123 Ohio St. 3d 229, 915 N.E.2d 633(2009).

judges of both superior and lower courts and representatives of the bar. The attorney general is a member of such a council in many states, including Alabama, New Hampshire, North Dakota, South Carolina, Tennessee, the Virgin Islands, and Wisconsin.<sup>107</sup> In California, the attorney general is one of three members of a judicial appointments council that must consent to all gubernatorial appointments to the courts of appeal and the state supreme court.<sup>108</sup> In Colorado, the attorney general, with the governor and state's chief justice, select the members of the state's Judicial Nominating Commission.<sup>109</sup> In some states, including Iowa, Minnesota, Nevada, and Ohio the attorney general serves as counsel to the judicial disciplinary council or commission which is responsible for investigating or presenting cases that may result in the removal of judges under specified circumstances.<sup>110</sup>

The Nevada Supreme Court, however, concluded that the attorney general could not act as counsel to the Commission on Judicial Discipline or as a prosecutor before the Commission in matters regarding judicial misconduct.<sup>111</sup> The attorney general may represent the Commission if it or its members are sued for alleged tortious activity, but the attorney general may not represent the Commission if the matter involves the Commission's constitutional mandate to hear and decide misconduct complaints against judges.<sup>112</sup> In this case, the court found that the deputy attorney general had engaged in a very extensive investigation of the allegations on behalf of the Commission and had determined that many of the incidents alleged did not warrant further action by the Commission. The court held that this involvement by the attorney general's office impermissibly involved the executive branch in the judicial discipline process, in violation of the state's constitutional separation of powers doctrine. Similarly, in Minnesota, the Executive Secretary of the Board on Judicial Standards is authorized to "[e]mploy, with the approval of the board, special counsel, private investigators, or other experts as necessary to investigate and process matters before the board or the supreme court. The use of the attorney general's staff for this purpose shall

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107 ALA. CODE § 12-9-2; N.H. REV. STAT. ANN. § 494:1; N.D. CENT. CODE § 27-15-01; S.C. CODE ANN. § 14-27-20; TENN. CODE ANN. § 16-21-101; 4 V.I. CODE ANN. § 211; WISC. STAT. § 758.13.

108 WEST'S ANN. CAL. CONST. ART. 6, §§ 7.

109 COLO. CONST. ART. 6, §§ 24.

110 IOWA CODE § 602.2104; OHIO REV. CODE ANN. § 2701.11.

111 *Whitehead v. Nevada Commission on Judicial Discipline*, 878 P.2d 913 (Nev. 1994).

112 878 P.2d at 918. The court held that it was "a conflict of interest for the Attorney General to be prosecuting before the Commission the very judges that she represents as counsel, and before whom she appears in the course of prosecuting criminal and civil cases." *Id.* at 920.

not be allowed.”<sup>113</sup> Washington also specifically exempts the state’s commission on judicial conduct from representation by the attorney general.<sup>114</sup>

The Washington Supreme Court also addressed representation of judges by the attorney general in a judicial disciplinary proceeding. The attorney general investigated complaints about a state supreme court justice and brought a complaint to the state Commission on Judicial Conduct. The justice sought representation by the attorney general, but the attorney general declined to represent him. The justice was eventually admonished for his conduct. The justice then sought a declaratory judgment that he was entitled to be represented by the state. The state supreme court held that the attorney general’s duty to defend the justice was limited to his official actions. The court held that the justice should have known that his conduct was unethical, and therefore not an official act which the attorney general was required to defend.<sup>115</sup>

## RELATIONSHIP TO LOCAL PROSECUTORS

In Alaska, Delaware, and Rhode Island, along with American Samoa, Guam, Northern Marianas, and the U.S. Virgin Islands the attorney general has original jurisdiction in all criminal cases. In all other jurisdictions, the relationship between local prosecutors and the attorney general varies, but the attorney general’s discretion in dealing with local prosecutions is typically recognized. On the other hand, the attorney general is not typically able to terminate or replace local prosecutors.<sup>116</sup>

In Illinois, the supreme court recently held that the state’s attorney is a constitutional officer “with rights and duties analogous to or largely coincident with the attorney general, though not identical.” While the state’s attorney could act as the attorney general’s agent or assist the attorney general and could function as an active participant—with the attorney general—in appeals to this court from his or her county, “the Attorney General is the chief law enforcement officer of the state and, as such, is afforded a broad range of discretion in the performance of public duties, including the discretion to institute proceedings in any case of

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113 See Rules of Board on Judicial Standards, Minn. Rules of Court, Rule 1(d)(10).

114 WASH. REV. CODE § 43.10.067 (2003).

115 *Sanders v. State*, 207 P.3d 1245 (Wash. 2009).

116 For a detailed discussion of the attorney general and criminal justice, see Chapter 17.

purely public interest. [citations omitted] The primacy of the Attorney General in that respect is not open to question.”<sup>117</sup>

In a Missouri decision involving removal of a defendant from a sex offender registry, the offender petitioned for removal and the local prosecutor did not object. The attorney general was not required to be notified of the petition and sought to intervene upon learning of the petition several months later. The defendant argued that the intervention was untimely and that the state was already represented in the case by the local prosecutor. The court held that the plain language of the relevant state statutes does not extinguish the attorney general’s right to appear in a proceeding in which the state is represented by a local prosecutor, so the legislature apparently did not wish to limit the attorney general’s power in that way.<sup>118</sup>

The Kentucky Supreme Court cited the attorney general’s common law powers in holding that the attorney general had authority to conduct an investigation into drug trafficking without an invitation from the local prosecutor, as required by statute. The supreme court noted that the attorney general’s office is an investigatory body, and that courts had described an expansive role for attorneys general going back to Elizabethan England. “The OAG’s investigative authority is not plenary and must comport with relevant criminal and civil statutory directives. In other words, although such investigative power may no longer be in full Elizabethan plume, it is still a feather in the Attorney General’s cap.”<sup>119</sup>

On the other hand, the Mississippi Supreme Court held that the attorney general could not be appointed by a district court as a special prosecutor over the opposition of the local prosecutor. The court determined that neither the state Constitution, which establishes the office of attorney general, nor the common law, as recognized by Mississippi case law, “authorizes the attorney general to usurp or encroach upon the constitutional or the statutory power of the local district attorney in a criminal case”<sup>120</sup>

In Georgia, the attorney general may appoint a substitute prosecutor without review by the trial court. A prosecutor recused himself from a case because of a conflict, and notified the attorney general, pursuant to statute. The attorney

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117 *People ex rel. Alvarez v. Gaughan*, 2016 IL 120110 (Ill. Dec. 1, 2016). See also, *State ex rel. Pruitt v. Steidley*, 2015 OK CR6, 349 P.3d 554 (Okla. Ct. Crim. App. Apr. 22, 2015) (per statute, attorney general may take and assume control of the prosecution or defense of the State’s interest in any case, role of local prosecutor is “subservient to the attorney general.”)

118 *Dunivan v. Missouri*, 466 S.W.3d 514 (Mo. 2015).

119 *Commonwealth v. Johnson*, 2014 Ky. LEXIS 87 (Ky. Feb. 20, 2014).

120 *Williams v. State*, 2014 Miss. LEXIS a599 (Miss. Dec. 11, 2014).

general then appointed the prosecutor from a neighboring county to act as the prosecutor. The trial court held that the prosecutor had recused himself without a hearing or the consent of the defendant and vacated the attorney general's appointment. The appellate court held the attorney general is "the only person then authorized to appoint a substitute prosecuting attorney pro tempore." Although Georgia statutes provide that trial courts have the inherent authority to disqualify an attorney, they must specify the legal basis of such an order, which is then subject to appellate review. There is no similar language with respect to the appointment of a substitute prosecutor by the attorney general.<sup>121</sup>

The relationship between the attorney general and local prosecutors has also been examined in New Hampshire. A prosecutor who had been suspended from his duties by the attorney general while he was the subject of a criminal investigation reached a settlement with the attorney general. A plaintiff sought investigatory material from the attorney general through New Hampshire's Right to Know law. The attorney general withheld a number of documents on the grounds that, among other reasons, they were internal records pertaining to personnel practices. The New Hampshire Supreme Court held that the records should not be withheld on the grounds that they pertained to internal personnel practices. The court stated, "The Attorney General is simply not the County Attorney's employer." The court analyzed a number of factors in reaching this conclusion. Although the "attorney general does possess some supervisory authority over country attorneys," the local prosecutor is not selected by the attorney general, but rather elected; may only be removed by the court, and is not paid by the attorney general. Although there was a "legislative purpose to place ultimate responsibility for criminal law enforcement in the Attorney General, and to give him the power to control, direct and supervise criminal law enforcement by the county attorneys in cases where he deems it in the public interest," the attorney general is not the local prosecutor's "employer."<sup>122</sup>

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121 *State v. Mantoosh*, 2016 Ga. App. LEXIS 396 (Ga. App. 3d Div. July 1, 2016).

122 *Reid v. New Hampshire Attorney General*, 2016 N.H. LEXIS 238 (N.H. Dec. 23, 2016).