



Office of the Attorney General

Governor
Jim Geringer

123 Capitol Building
Cheyenne, Wyoming 82002
307-777-7876 or 307-777-7841 Telephone
307-777-6869 Fax

Attorney General
Hoke MacMillan

Chief Deputy
Vicci M. Colgan

November 8, 2002

Honorable Randall Luthi
Wyoming State Representative
Chairman, Management Audit Committee
c/o Wyoming Legislative Service Office
213 State Capitol
Cheyenne, Wyoming 82002

Re: Agency Response to the Confidential Final Draft of a Program Evaluation Report entitled "Attorney General's Office: Assignment of Attorneys and Contracting for Legal Representation," dated October 29, 2002

Dear Chairman Luthi:

Thank you for the opportunity to respond to the program evaluation report (the "Report"). I also thank the LSO program evaluation team for their work. They performed their duties with dispatch and courtesy. The auditors were thoughtful, thorough, and professional.

The Report's commentary and recommendations comport with the steps that this Office has taken since I have been Attorney General. They also reinforce the conclusions and recommendations of another report we requested and received last fall from an independent evaluation team from the Conference of Western Attorneys General (CWAG). I was heartened to see that the two independent evaluators have reached many of the same conclusions I have. This is a well-run and efficient law office, reflecting the dedication and devotion of many of the best lawyers in the State of Wyoming. As with any organization, of course, there is always room for improvement, and we welcome the opportunity to work with the LSO staff, your Committee, and the Legislature to develop solutions to address the Report's recommendations.

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Upon appointment to this Office I began a vigorous effort to build on the efforts and accomplishments of my predecessors. Previous administrations had done much work to improve the law office, including development of manuals to assist agencies in preparing contracts and promulgating rules, and refinement of an office manual on policies and procedures. They had also worked to counter the effects of agency capture and overcome the burdens of an office funded by and housed in many agencies, in addition to the usual general fund resources.

In these past months, we have built upon that previous work and made further strides. In several places in the Report, the team notes that some improvements were underway or implemented during the evaluation period. Indeed, there were many more improvements taking place elsewhere in the law office during that same period, as the preparatory work was completed and the improvements brought into full effect. This necessary work to improve the law office and make our operations more efficient and cost-effective continues every day.

The Report, I believe, will assist this improvement process greatly. I hope it will be read in conjunction with the CWAG report for a fuller understanding of the work that yet needs our attention. However, in the areas of board and commission representation, workers' compensation representation, tort defense representation, and centralization of legal services the Report provides the Committee and the Legislature with a very helpful evaluation.

The Background Chapter. The Report begins with an overview of the entire Office of the Attorney General and notes matters related to the evaluation that exceeded the team's scope of review. The team's summary is accurate, and we agree with it generally. There are a few items, however, that the Committee should note:

ω *Divisional Structure.* The Report notes that the law office is divided organizationally into five divisions: Administrative Law, Civil, Criminal, Tort Litigation, and Water and Natural Resources. There is technically a sixth division B Administration B which is headed by the Chief Deputy Attorney General and is largely the "main office" that provides support to the law office and to the other Office administrative divisions (the Division of Criminal Investigation, the Peace Officer Standards and Training Commission, the Wyoming Law Enforcement Academy, the Division of Victim Services, and the Governor's Planning Council on Developmental Disabilities). I recommend that the Committee consider sponsoring corrective legislation to update the provisions of W.S. 9-1-607(a) to reflect that the Attorney General may appoint a chief deputy and additional deputies as he determines necessary.

ω *Narrow Scope.* The scope of the team's review was finely drawn. The law office division of this Office is only one part of a much larger law enforcement agency. The Report notes that the law office comprises only 18% of the Office's budget, although it further notes that this figure does not include assistant attorneys general paid by other agencies, nor those paid from the separate school finance and water litigation budgets. The Report duly notes that its evaluation did not include these other expenditures. One could erroneously conclude that the Report is a "snapshot" of the entire law office. It is not. I know that the Committee understands the necessarily specific scope of the evaluation and the resulting Report, but others should be as aware of this inherent limitation in the Report. As I have noted above, the CWAG report provides a broader picture of the law office's operations, although even that report is itself limited.

***Chapter 1 B Recommendation:* "The Attorney General should enhance supervision to support a centralized office."**

I could not agree more. I welcome the opportunity to discuss at length with the Committee and other members of the Legislature how we can improve the law office, particularly by centralizing for greater accountability and efficiency. We expect to continue to work closely with the Department of Administration and Information to consolidate our many physical locations into fewer, and perhaps even one, location. In the next few weeks, the Division of Victim Services will be consolidated with most of the Tort Litigation Division on the first floor of the Herschler Building's west wing. This effort, as it moves on to include other parts of the Office, will improve operational and supervisory efficiency and minimize the risks of "agency capture." Of course, these type of moves require adequate funding.

With consolidation will come a greater ability to centralize the law office's delivery of legal services directed by statute. Many centralizing procedures are already in place. As the Report notes, I have worked to make clear to agencies that this Office must always preserve the supervision and oversight of attorneys paid through their budgets, including the Attorney General's discretion to allocate other work as necessary to those attorneys. I have reminded the funding agencies that funding does not mean control over the attorney's work product or time, absent special circumstances such as federal funding. I believe agency directors are now aware that this Office also incurs costs to mentor, supervise, train, house, and provide support services and equipment for attorneys whose salaries and benefits are funded by other agencies. I have also required that all, including agency-funded, attorneys devote a significant part of their time to working in the physical space of the Attorney General's Office, if such space is available. This encourages the independence that is the hallmark of exemplary legal service and reduces the risk of "agency capture." This Office has instituted weekly

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meetings, as the Report notes, which encourage the collegiality of a private-sector law office and allow us to bring to bear the collective experience of our many seasoned, experienced lawyers to the concerns and problems of our clients. Other such private-sector law office procedures have been implemented.

Just as a private-sector client should expect a wide range of experience from its law firm, our clients deserve the full range of legal expertise of the entire law office to be available to address their legal needs. We look forward to working with the Legislature to further centralize the law office.

Another of the Report's underlying recommendations is to decrease the caseload carried by supervisors so that they can spend more time supervising and mentoring. I agree, but achieving this goal will require additional attorneys to take over the supervisors' caseloads. The process of taking more work in-house and reallocating workloads more evenly throughout the Office, without adding attorneys, has meant that the existing staff has been working at full efficiency and beyond. Many of our attorneys and staff are already regularly working overtime to meet these challenges; this is to be expected from time to time of professionals, but when it become a regular situation, we know the Office eventually will suffer lowered morale and increased turnover.

I asked in the last budget cycle, my first with the Office, for additional staff attorney positions to make the Report's recommendation possible, without success. We have renewed our requests for the additional positions and funding implicitly recommended in the Report. We hope for greater success in the upcoming legislative session.

Chapter 2 B Recommendation: "The Legislature and Attorney General's Office should explore alternatives for funding the boards= legal representation."

Again, I could not agree more. The primary concern is that the existing funding source B one-half of interest accruing on licensing fees B generates too little revenue to fully support the two existing attorney positions. The Report is correct in concluding that something must be done, and we welcome a dialogue to finding a solution. As the Report notes, the solution will likely require statutory changes. We would be happy to work with LSO staff to craft appropriate legislation.

I do note, however, that the alternatives suggested in the Report are ones that we have considered and found lacking, for the same reasons noted in the Report, i.e., allowing well-funded licensing boards to contract for outside counsel through this Office or independently, legislation to increase this Office's 50% portion of the interest earned on licensing fees, leg-

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islation to divert other revenue streams to increase funding of board representation, legislation to institute an “enterprise model,” and legislation to return all licensing fees to the general fund and fully fund their representation needs entirely from the general fund. I continue to believe that there is a solution that is workable and can be met reasonably. This Office is ready to lend any assistance to further these essential goals.

In addition, some aspects of the Report have become dated. For example, since April 2002, the prosecution function for licensing boards has been transferred to the Personnel Section of the Tort Litigation Division. Two attorneys in the Personnel Section, including the section supervisor, will be cross-training to handle prosecutions of licensing board disciplinary matters and spread this work among more than one attorney. The licensing board attorney who was previously assigned exclusively to prosecute these matters will in turn assume some responsibility for personnel matters. All attorneys handling contested licensing cases have kept detailed time records since April, broken down by licensing board served and by case or matter. These records are kept in a database to permit flexibility in analyzing and reporting the data. A similar time-keeping database has been developed for the attorney in the Civil Division who handles the day-to-day advisory function for the licensing boards. In all, the Office is already well along the road to implementing the recommendations from the Report. We expect that, as the information in the timekeeping databases grows, we will be better able to effect the longer-term recommendation to analyze usage of law office resources on a board-by-board basis.

Chapter 4 B Recommendation: “The Attorney General should maintain the option of contracting for tort defense.”

I agree wholeheartedly with the Report’s recommendation. I ask the Committee’s indulgence, however, to address the recommendation in Chapter 4 before I address the recommendation in Chapter 3.

This Office has worked very hard over the past several years to improve the efficiency and accountability of the tort defense aspects of the law office. As with any substantial improvements, they can work only when given time to develop and become part of the working environment. The successful strategies developed for this practice area are now being applied to the workers’ compensation practice.

I agree with the Report’s evaluation of the tort defense practice area. We know that there is a great benefit that accrues from developing, training, and retaining an experienced, seasoned staff of tort defense lawyers. The Report correctly concludes that expertise is the key to our ability to minimize the need for contract attorneys, and that expertise translates

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directly into the ability to do more work for less cost to the State. The times when turnover and illness were highest were also the times when the Office's need to turn to contract attorneys was the greatest.

The Report concludes that our existing tort defense staff is reaching the burn-out point, working "close to its saturation point." The recent market pay increase of salaries has gone a long way to reduce our turnover, just as that legislative initiative was in part designed to do. The tort defense practice area is not unique in the Office on this count; the Criminal Division has carried an increasingly heavily burden of appellate cases, which the Chief Deputy and I have worked diligently to reduce, both by workload reallocations to other attorneys in the law office and by very selective and temporary use of contract attorneys. In fact, this experience with the Criminal Division reflects the law office's ability to implement precisely what the Report recommends B strategic use of contract attorneys on a limited basis to address temporary workload issues.

As the Report recommends, the Office has taken huge steps to restrict use of contract attorneys to the barest minimum. If current conditions hold (low turnover, competitive salaries, no upsurge in federal-law based claims, etc.), then the current usage of contract attorneys should be sustainable at a 10% or so threshold. Of course, as the Report notes, circumstances directing increased need for contract attorneys are largely outside the Office's control.

Chapter 3 B Recommendation: "The Attorney General should continue to develop oversight systems and gather performance data on Workers' Compensation contracting."

I agree with the Report's recommendation. As in the other Report recommendations, we have been working for some time to address the same concerns as those identified in the Report. An audit report is of necessity a static document, and cannot account for changes which were beginning to occur and continue to occur in this Office as pertains to Workers' Compensation.

In responding to the recommendation in Chapter 4 of the Report, I noted our success in reducing, to historically low levels, usage of contract attorneys for tort defense. I discussed our tort defense practice area first, because it highlights the approaches we have used successfully and are now applying to the workers' compensation practice area. We have seen steady improvement in the tort defense practice area because we have been working on it for some time. Improvement in the workers' compensation practice area has only just begun,

and improvements will take some time to begin to bear fruit. Our time line, however, should be much shorter, as we draw upon experience gained from the tort defense practice area.

Six of the nine workers' compensation representation contracts have been or are being renegotiated under a new contract form, and the remaining three will be replaced with new firms under the new contract form. As the Report recommends, the new contract specifies an hourly fee schedule and requires the attorneys to report their time monthly in a standardized format to the Office and to the Workers' Compensation Division of the Department of Employment.

The contracts also require adherence to new billing and reporting guidelines. The guidelines require the attorneys to provide, to the Workers' Compensation Division and to this Office, disclosure statements describing the issues and, when applicable, identifying witnesses and exhibits proposed to be called or used at the hearing. The guidelines also establish new thresholds for pre-approval of certain expenditures, adding to the Office's ability to oversee and account for the cost of these contract attorneys.

In some instances, our work in this area predates the team's evaluations. Before we could properly reduce the number of open or dormant contracts, we first had to inventory them. We also developed office-wide databases of all contract attorneys and of all attorneys representing clients actively suing the State. It would be imprudent to enter into workers' compensation representation contracts (or any others) with firms that were already representing clients suing the State in other matters. Developing the information into a usable form took several months, a process that began last summer and continued into the winter. After completing this process, we determined to terminate some contracts when our new data-matching process disclosed conflicts of interest, ending the unseemly situation of paying a firm to help us while at the same time it was suing the State on behalf of another client.

After many months of preparation, we have begun actively implementing these changes. We will maintain the high quality of service we have contracted for in the past and also regularize the compensation system to one that is more equitable and lends itself to greater oversight. This has been and will continue to be a dynamic process that will increase the information base available to us and the Workers' Compensation Division. Firms serving under the new contracts will know both the standards and expectations by which their performance will be judged, and we will be better able to effectively oversee and supervise their efforts for greatest benefit to the State. As information from these changes develops, we will be periodically reevaluating the benefits of maintaining contracts with each firm and gaining the ability to better predict workers' compensation defense costs.

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Conclusion: “Bifurcated Funding and Responsibilities Pose Accountability Challenges to the Attorney General.”

We agree. The Report offers several suggestions to remedy this situation, and I look forward to talking with the Committee on strategies for accomplishing them.

I have been encouraged by the care and consideration taken by the LSO program evaluation team in researching and delivering its Report. I agree generally with all of its recommendations, and I am eager to begin the discussion to realize some or all of the recommendations.

The Office has already undertaken much of the hard work to getting there, but where funding and creation of positions is needed, our efforts alone have not proven to be enough. This has led the Office to the point where over one-third of the attorneys are on the budgets of agencies that have historically had greater success with the budget process than has this Office.

The burden of providing legal services will only get heavier. Most new statutes, whether state or federal, add increasing responsibilities on our state agencies, board, and commissions. State statutes that require contested case hearings or add parties to litigation increase the number, length, and complexity of the resulting litigation. As the legal demands increase upon State government, so do the demands on the Office of the Attorney General, which must advise and represent the numerous agencies, boards and commissions, county and district attorneys, elected state officials, and the legislature. Creation of new boards and commissions and addition of new programs to existing agencies add greater burdens on the system. Funding for the new laws is usually provided for in the legislation, but the hidden costs of additional space requirements and additional legal needs are almost never considered. Five years ago, the Wyoming Statutes contained about 160 provisions expressly requiring the services of the Attorney General's Office; today, the Report numbers them at nearly 300.

The mechanism for funding attorneys to meet these increased challenges has required the assistance of other agencies. But for that aid, this Office would be even less able to meet the State's legal needs in-house. That other agencies have been successful in garnering the needed funding and positions indicates a legislative desire to fund legal needs in context of agency needs.

The better course is to place those positions and funding where it properly belongs, in the agency charged with supervising, mentoring, and training the State lawyers. I agree with

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the courses and alternatives suggested by the Report to achieve the overall goal of increasing accuracy in budgeting and accounting for the legal needs of the State.

We stand ready to work with the Committee, the LSO staff, and the Legislature to bring these goals to fruition. Thank you for your consideration.

Sincerely,

Hoke MacMillan
Attorney General