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# CHAPTER 1

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## Diffused Funding Challenges Centralization of Attorney General's Office

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Like most states, Wyoming has sought to centralize its legal representation in the Attorney General's Office (Office). The benefits of a centralized office are maintaining consistent legal advice, and facilitating the efficient use of legal resources. We found many policies, procedures, and management structures that support centralization in the Wyoming Attorney General's Office.

However, the Office's reliance on funding from multiple agencies, and the location of some attorneys outside of Attorney General's offices, undermine its centralization foundations. We recommend that the Attorney General continue current efforts to strengthen Office centralization, especially by dedicating more resources to supervision, to overcome the challenges posed by the Office's diffused funding.

### National Trend To Centralize State Legal Services Within Attorney General Offices

Since 1990, an overwhelming majority of attorneys general have endorsed maintaining a single source of legal services both to ensure unified legal advice and to make the most efficient use of state legal resources. As far back as 1971, the National Association of Attorneys General (NAAG) adopted resolutions that the Attorney General should have the sole authority to employ counsel and represent the state in litigation, and to supervise all state legal staff.

***Only the Attorney General should employ counsel and litigate on behalf of the state.***

A few states allow agencies to retain their own counsel and set individual legal policies. Under this scenario, which Idaho followed until 1995, state agencies have their own attorneys, hire their own private counsel, and occasionally sue one another. Currently, some large states allow agencies to employ in-house counsel for non-litigation matters, to enable agencies to comply with increasing volumes of state and federal regulations. But it

remains a standard that only the Attorney General litigates on behalf of the state, to protect the interests of the state as a whole.

### Wyoming Office’s Organization, Procedures, and Policies Focus Upon Centralization

***We found management controls covering these legal services (see box).***

Over the years, Wyoming Attorneys General have implemented organizational structures and policies to set the Office on a centralized course, with the objective of providing consistent legal advice. We reviewed these policies, procedures, and organizational plans, as well as extensively interviewed Office managers about them. Specifically, we looked to see what controls cover

<b>2001 Attorney General Statistics</b>	
<b>Contested Cases:</b>	2,733
<b>Informal Opinions/Letters of Advice:</b>	1,470
<b>Formal Written Opinions:</b>	1
<b>Contract/Bond/Lease Reviews:</b>	7,209
<b>Rule Reviews:</b>	99
<b>Reviews of Pre-filed Bills:</b>	539
<b>Session Bills Tracked:</b>	161
<b>Reviews of Enacted Laws:</b>	216
Source: Attorney General figures	

the legal services the Office provides (see box). From our research, we concluded that centralization controls are in place.

### Attorney General Processes Aim to Control Contested Cases

The Office has supervisory and review processes in place to ensure consistency in state legal policy developed through litigation or contested cases. Office litigation includes any case pending before a court of law, an administrative hearing body, or contested case hearing officer. In these cases, Office attorneys present arguments that support appealed agency actions.

***Written policies make it clear that the Attorney General controls litigation.***

The Office’s written policies make the Attorney General’s control of litigation explicit. For example, one policy states, “when a controversy reaches the hearing or litigation phase, it is controlled by the Office,” although the preference is to act in full agreement and cooperation with its agency clients. Policies also advise that critical and controversial decisions require more front-end input from Attorney General Office supervisors.

### **Attorney General Lacks Control of Litigation in Two Areas**

***Attorney General does not actively supervise some contract counsel.***

The scope of our research included Attorney General contracting for private counsel and the Office's representation of professional boards and commissions. Some of the litigation that occurs in these areas does not appear to have the same Attorney General control as other state litigation. With workers' compensation defense, Office involvement has been limited to sporadic review and monitoring of cases handled by contractors. With respect to boards and commissions, the Office has not supervised the private attorneys with whom three boards contract for legal representation and prosecution of license holders.

### **Office Has Extensive Review of Formal Opinions and Legal Advice**

***CWAG said process was too elaborate.***

The Office's procedures for ensuring that its opinions and advice meet the centralization standard of consistency are apparently more than adequate. The Attorney General requires one point of review clearance for opinions requested by agency heads, legislators, and county attorneys. In its findings, the review team from the Conference of Western Attorneys General (CWAG) said that the Office's process for advising client agencies was too elaborate and time-consuming for routine advice. The report recommended that the Attorney General relax and decentralize the provision of routine advice and most informal opinions.

### **Written Guidance in Place for Contracts and Rules**

***By statute, the Attorney General must approve all state contracts.***

From the statistics reported to the Legislature, reviewing contracts is a significant body of work for the Office. Officials say that while the volume of contracts passing through the Office for review is high, the time dedicated to that work is not proportionally as high. W.S. 9-1-403(b)(v) mandates that every contract for services must be in writing and approved by the Attorney General. In 1996, the Office put considerable effort into ensuring uniformity in state contracts by developing an extensive contract manual, updated in 2000. The Office has also produced a manual of written guidance for drafting administrative rules.

## **Organizational Structure Sets Up a Foundation for a Centralized Office**

The Office has an organizational structure of divisions, sections, deputies, and supervisors, connected through a series of weekly meetings. This structure offers the opportunity for the Attorney General and all staff attorneys to communicate, and for the Attorney General to monitor for continuity in the Office's legal advice.

### **Supervisors Key to Centralized Structure, But They Have Limited Time to Supervise**

Office officials acknowledged that many of the supervisors carry full workloads and do not always have enough time for supervisory duties. This is critical because Office officials say they rely upon supervisors to ensure consistency in legal advice. Supervisors are at the section level, where attorneys share related assignments, to the extent possible. Deputies also directly supervise staff attorneys when there are no section supervisors.

***The Office faces developing its supervisory capability to meet expectations.***

The role of supervisors in keeping the office centralized has evolved. We learned that former Attorneys General established the supervisory structure in part to create career opportunities for attorneys. Now, Office officials see supervisors as integral to a unified law office, but acknowledge obstacles to their ability to supervise. CWAG recommended that the role of supervisors be redefined and made explicit, to emphasize developing and assisting other attorneys rather than maintaining heavy workloads. The report also noted the need for training in this area. Thus, the Office faces developing its supervisory capability to meet current expectations.

## **Diffused Funding and Dispersed Offices Decentralize the Office**

While Office organizational structures and policies provide the foundation for a centralized office, there are also some decentralizing features. These are its diffused funding, and the attorneys' dispersed offices. The Attorney General expert with whom we consulted said in terms of maintaining an independent and centralized office, having attorneys stationed in the agencies is more troublesome than having the agencies fund them.

### Other Agencies Fund Nearly Half the Attorneys

***Some agencies transfer funding and positions to the Office for attorneys; others keep them in their own budgets.***

The Attorney General relies on other agencies for funds to support 29 of the Office's attorneys. Of the 60 attorneys under the Attorney General's supervision, 21 are counted as positions and funded by fourteen other agencies. Also, while the Office counts another 8 attorneys as its positions, different agencies transfer funding into the Office budget for their salaries and benefits.

Agencies Funding 29 Attorneys	
A&I: 7	Employment: 5
DEQ: 3	Health: 2
WYDOT: 2	Corrections: 2
Audit: 1	Revenue: 1
DFS: 1	Game & Fish: 1
State Lands & Investments: 1	
Oil & Gas Commission: 1	
Water Development Office: 1	
DCI (within AG agency): 1	

For the attorneys covered by the Office's budget, the General Fund provides the primary source of funding. The agencies that carry attorneys in their budgets fund them with a variety of revenues, including the General Fund, federal grants, special revenue funds, and internal funds.

***Diffused funding is common among attorney general offices.***

This funding arrangement is not unusual among attorney general offices in the nation. In fact, NAAG used to track attorneys in offices throughout the country according to how many were paid by the attorney general, and how many by other agencies. NAAG has not updated this information since 1990. However, the expert we interviewed said that a 50/50 payment division is about normal.

### Office Attorneys Do Not Have Centralized Offices

The attorneys in the Office work in 14 different locations spread throughout seven buildings in Cheyenne. Most attorneys have offices either in the Capitol or Herschler Buildings, and most work in groups that include other members of their divisions, as well as their supervisors.

***Some attorneys have offices in the agencies they represent.***

However, at least ten attorneys have offices within the agencies that fund them, and are thus physically separated from their supervisors and colleagues. Some of these attorneys have two offices, one with their divisions, and one in the agency. Three attorneys are stationed in two agency locations in Casper.

## **Diffused Funding, Dispersed Offices Challenge Office Centralization**

Attorney General Office officials and experts both indicated that the diffused attorney funding and dispersed office locations challenge centralization. The following paragraphs describe some of the ways in which these features work against both maintaining consistency in legal advice and actions, and making the most efficient use of the state's legal resources.

### **Difficulties in Supervising and Controlling Allocation of Attorneys' Time**

***Agencies have pulled attorney funding because they did not get expected dedicated services.***

Office managers face challenges in allocating work among attorneys because agencies that pay attorneys expect those attorneys to work exclusively on their behalf. To respond to the Office workload, however, deputies need the flexibility to assign agency-funded attorneys work that is outside the scope of their client agencies' activities. Office managers say this has been difficult to do because some agency heads object. Agencies have even gone so far as to pull their funding of attorney positions when they did not receive the dedicated services they expected. In addition, some agencies fund their attorneys with federal funds that require attorney time be used for specified purposes.

The Attorney General has addressed this issue by writing to agency heads, telling them that while their work receives priority from those attorneys they fund, deputies will allocate additional work when necessary. Agencies do not fully cover the overhead costs of the attorneys they fund, a cost the Office estimates at 40 percent of salary and benefits, to cover supervision, support staff, training, and supplies. Further, the Attorney General reminded agency heads that statute gives him authority to direct all assistant attorneys general.

Now, Office managers are reportedly assigning attorneys work unrelated to their funding agencies. If federal funding prohibits such work during the time it covers, affected attorneys must work additional hours.

### **Attorney General Unable to Control Attorney Numbers**

***Attorney positions are vulnerable to cuts and turnover.***

The Attorney General also reported that attorneys, uncertain about the funding of their positions, sometimes decide to leave the Office. Further, agency heads can reclassify vacant positions once held by attorneys, or place the positions at such a low priority that the Governor or the Legislature eliminates their funding. This leaves the Attorney General unable to control the number of attorneys available to do the state's legal work.

### **Agency Funding and Offices Create Risk for Agency Capture**

A common assumption about the practice of agencies funding attorneys is that "agency capture" will occur. This concept is usually described as attorneys losing their independent, law-based perspective and instead advocating the positions of the agencies that fund them.

***Although attorney independence has not been affected, the risk is high when agencies house attorneys.***

Those we interviewed differed as to whether or not this is occurring within the Office. All Attorney General officials with whom we spoke repeatedly emphasized being watchful for this, as well as the importance of supervision and mentoring in avoiding it. We concluded that the Office has adequate controls in place to guard against agency capture.

The CWAG review team reported seeing few instances in which there appeared to be a threat to the independence and competence of Office attorneys' legal advice. However, the report commented that the risk of attorneys losing their independence is highest when attorneys are both hired with agency funds and stationed full-time at the agencies. The report concluded that the Office should address this risk.

## **Agency-Funding of Attorneys Initiated to Provide More Legal Representation**

The practice of having state agencies fund attorneys began around 1987, according to former Office officials. This happened over the years, as agencies requested more legal representation than the Attorney General had resources to provide. To meet both the need for services and the statutory requirement that only the Attorney General can appoint attorneys to represent the state, officials made agreements in which the agencies provided the positions and funding, and the Attorney General hired and supervised the attorneys.

***Agencies have funded most of the 18 attorneys added to the Office since 1990.***

Through this approach, agencies have funded most of the 18 attorneys added to the Office since 1990. Of these attorneys, the Office budgets for eight, and agencies fund and count as employees ten.

Attorney General officials would prefer to have all attorneys in the Office's budget. However, they say the practice of placing them in agency budgets has continued because the agencies are more successful at getting authorization for the positions. For example, they say, in the last legislative session, the Office requested 7 additional positions and received none. In contrast, the Legislature funded the Department of Audit request for a minerals tax attorney, who will serve as an assistant attorney general under the Attorney General's Office.

***Agencies may have added attorneys by reclassifying existing positions, not by requesting them from the Legislature.***

However, the Legislature may not have authorized all of the attorney positions in the agencies. State personnel rules allow agencies to reclassify existing positions, with Administration and Information (A&I) Human Resource Division approval. We found that the state does not maintain records that would show whether a position has been reclassified over time, so it is not possible to determine which of the 18 attorney positions added since 1990 were authorized by the Legislature, and which were created in this manner.



### **Dispersed Offices A Result of Lack of Space**

Officials say the stationing of some attorneys in offices in the agencies is a simply a response to lacking a single facility adequate to house them all, while also acknowledging that agency heads often welcome the easy access. At the request of A&I, the Attorney General managers have prepared specifications for a facility that would house the entire Office. A&I will use these specifications as part of its overall planning, and work towards meeting the Office's needs as funding and opportunities arise.

### **Recommendation: The Attorney General should enhance supervision to support a centralized office.**

The Attorney General has taken several steps to bolster the foundations already in place to ensure that the Office operates as a unified source of legal representation for the state. These include instituting formal weekly meetings between all levels of management and staff, formally communicating to agency heads that only the Attorney General directs the attorneys, and implementing more detailed logging systems for opinion requests and litigation schedules.

***Consolidated funding is less critical than adequate supervision and a shared location.***

Devoting increased resources to supervision and mentoring will be important to enhanced centralization. The Office has also taken some steps in this area, but officials acknowledge that many deputies and supervisors carry important legal responsibilities that can easily trump their supervisory work. The expert sources we consulted for this report indicated that supervision is vitally important in coordinating the state's legal work and in seeing that the state is consistently represented. In order for the Attorney General's Office to realize the full potential of the supervisory structure in place, supervisors must also have good management training.

Attorneys general in some states have worked toward funding consolidation to ensure office independence and coordination. However, from what we learned, doing this is not critical as long as adequate supervision and a shared location exist. The Office

***The Attorney General  
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attorneys with their  
supervisors.***

has prepared specifications for a facility that would house the entire staff. An intermediate step to total office co-location would be to house all attorneys, or as many as possible, in offices with their supervisors and division colleagues, full-time. This essentially would be a “satellite office” model, which may suit the Office best anyway, because of some ethical conflicts of interest inherent in the divisions’ work. The Office is close to this situation now, and should work with A&I to make the necessary changes, so that attorneys can move out of the agencies.

***The Attorney General  
should report total  
size and cost of the  
Office, including  
attorneys funded by  
other agencies.***

If funding of attorneys is to remain spread throughout the agencies, the Attorney General will need to ensure the support of executive branch leadership in recognizing Attorney General authority to direct all assistant attorneys general. The Attorney General reports this support now, but it is likely a message that will need repeating as administrations change. Also, with funding and positions for the Office diffused, the Attorney General needs regularly to report the total size and cost of the Office in one document, either an annual report or budget narrative. This would enable the Legislature to maintain a better understanding of the state’s legal resources.