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## CHAPTER 4

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### Attorney General Contracting for Tort Defense Decreases

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The current Attorney General shares with his two predecessors the priority to reduce contracting for the defense of lawsuits against state departments, officials, employees, and local government peace officers. In the past, contract attorneys handled as many as 40 percent of the defense cases. Currently, contract tort defense is at an all-time low (8 percent of pending cases) and the Attorney General has put in place procedures designed to keep contracting at a minimum.

However, the level of pending tort litigation facing the state has also ebbed, and there are no guarantees that will continue. Nor are there assurances that the Office's in-house capability to defend lawsuits will remain strong. Therefore, the Attorney General must see that the Office maintains ready access to adequate defense counsel, even if that involves contracting.

### Wyoming Governmental Claims Act Created Need for State Tort Defense

In 1979, the Wyoming Legislature, like those in many other states, modified the doctrine of sovereign or governmental immunity by enacting the Wyoming Governmental Claims Act (W.S. 1-39-101 through 1-39-121). This act sets out how the state and its political subdivisions may be sued. Further, the act provides that when public employees acting within the scope of their duties face liability claims, the governmental entities employing them shall provide their defense.

***If public employees are sued while acting within the scope of their duties, the state must provide their defense.***

Initially, the state purchased insurance to cover most of the liability exposed by its Governmental Claims Act, and the insurers retained private legal counsel to provide defense of claims as needed. Staff in the Attorney General's Office defended claims in the areas of prisoner and employment litigation, two areas not covered by insurance.

### State Insures Itself to Cover Most Liability

By the mid-1980's, the state was no longer able to obtain liability insurance because costs had increased and carriers had exited the market. Thus, in 1986, the Legislature created the State Self Insurance Fund to self-fund the state's liability. The state's risk manager manages the fund through the Department of

Administration and Information (A&I), State Self Insurance Program (SSIP). The program also provides risk management consulting services and training on liability issues to state and local government agencies and employees.

#### State Self Insurance Program

**Statutes:** W. S. 1-41-101 – W.S. 1-41-111

**Average Annual Claims, 1996-2001:** 801

**Covered by Self Insurance:** auto liability, errors & omissions, general liability, and medical malpractice

**Most Costly Category of Claims:** errors & omissions, which includes deprivation of constitutional rights, wrongful termination, and employment discrimination

**Least Costly Category:** medical malpractice

**Budget:** \$10.1 million (FY '03-'04)

**Insurance Costs (including premiums and self-insurance):** \$9.1 million (FY '03-'04)

**General Fund Appropriation:** \$9.1 million

***State Self Insurance covers state officials and employees, as well as local government law enforcement officers.***

From General Fund appropriations to this fund, the state pays for defense and settlement of liability claims against state government and against state officials and employees. In addition, SSIP covers claims against certified law enforcement officers employed by state and local governments. SSIP also covers U.W. Family Practice Center physicians, including their residencies in other states.

In the beginning, SSIP program officials continued to contract with a small number of private attorneys to defend claims, with the Attorney General's approval. Then, in 1989, the Attorney General determined that hiring in-house lawyers would decrease defense costs, as well as create an advising resource to prevent future lawsuits. In response, the Legislature amended the SSIP statutes in 1989 to authorize it to fund "necessary personnel within the office of the attorney general" to defend claims.

## **Even With In-House Attorneys, the Attorney General Continued to Contract For Defense**

With the funding channeled into the Office's budget from SSIP, the Attorney General created a new Tort Litigation Division, and staffed it first with three, and then eventually, four attorneys and two support positions<sup>1</sup>. Even with the dedicated attorneys, Attorney General and SSIP officials found it necessary to continue to contract with private attorneys for some claims defense. SSIP reported payments to contract attorneys, for fees and expenses, reaching a peak of nearly \$700,000 in 1993, the same year law enforcement officer defense costs peaked.

***Costs for outside counsel peaked in 1993, at nearly \$700,000.***

Office and SSIP managers noted that the early 1990's marked a time when changes in the federal Civil Rights Act and the enactment of the Americans With Disabilities Act increased the kinds of actionable claims against the state, its employees, and law enforcement officers. As of FY '01, the four-year period FY '91-'94 accounted for 44 percent of the SSIP settlements and judgments paid out since program inception in 1986.

### **Case Specific Factors Create Need For Contract Counsel**

Officials in the Office told us that several factors determine whether or not outside counsel will be needed. Having in place an experienced staff of tort attorneys is a major determinant of the Office's in-house capability to handle cases. Officials said there have been years when this expertise was not in place, when the unit was suffering from staff illness and turnover.

***Individual employees and officials are often the clients in these cases, not the state.***

Also, having multiple defendants in the same case often creates a need to contract. In the tort cases for which SSIP funds defense, the clients are the individuals being sued, not necessarily the state. Plaintiffs sometimes sue state agencies, but they also sometimes sue as individuals all employees they allege to have caused damages. Multiple defendants may have conflicting individual legal interests surrounding the same occurrence. If so, under the Rules of Professional Conduct for Attorneys at

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<sup>1</sup> The Tort Division currently includes more attorneys than the four funded by the State Self Insurance Program. Also in the Division are the sections of Worker's Compensation and Employment and Personnel Law.

Law, an attorney in the Attorney General's Office can represent only one defendant, usually the state's interests; others must have counsel from a different law office.

***Contracting often occurs when there are multiple defendants with conflicting legal interests in the same tort case.***

The Office has also contracted to obtain expertise not available in the Tort Division staff, specifically medical malpractice defense. Those cases occur infrequently, giving the in-house staff little opportunity to develop the expertise to defend them. Under the Governmental Claims Act, the state faces a liability risk of up to \$1 million for all claims arising out of a single occurrence involving a physician it employs.

Finally, the Office contracts for tort defense when suits are filed in other states. Attorneys must be licensed in the states in which they appear in court. Occasionally, claimants, such as Wyoming prisoners incarcerated in other states, will file lawsuits.

#### **Attorney General's Practice Has Been to Keep Private Attorneys on General Contracts**

***Attorneys with contracts only receive compensation if they handle cases.***

Traditionally, the Tort Division and SSIP kept a roster of attorneys or firms throughout the state under general contract for tort defense. In July of 2001, this list included 46 firms, involving 103 attorneys. To be on the roster, attorneys or firms signed a contract obligating them to bear their own liability as independent state contractors, and to not represent clients opposing the state's interests. The contracts' compensation terms included specified hourly rates for attorneys and paralegal staff, a set mileage and copy expense rate, and actual expenses for other costs such as travel, telephone, and postage.

***The Office is not obligated to assign cases to firms with general contracts.***

The Tort Division automatically renewed these contracts at the end of each year, unless one of the parties chose to terminate. According to Tort Division and SSIP officials, over the years, the Office offered contracts for tort defense to law firms and attorneys upon their request. There was no formal request-for-proposals process. However, the existence of a general contract did not obligate the Office to assign cases to a firm or an attorney.

### Contracting For Tort Defense is Sole-Sourced

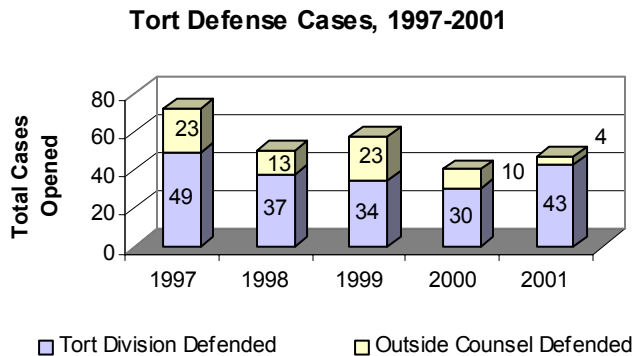
The Attorney General cites A&I rules as the authority to waive the competitive bid process in selecting private attorneys for state tort defense. These rules implement statute, W.S. 9-2-1016 (b)(iv)(C), that authorizes non-competitive contracting when competition is not feasible, as approved by state's purchasing administrator and the Governor.

***The Attorney General selects contractors based upon his professional judgment of qualifications.***

In the past, the Tort Division Deputy used professional judgment to determine with whom to contract. Several factors went into this determination, including knowledge of contractors' professional reputations and special expertise. The deputy also made efforts to assign cases to contractors that were geographically close to courts in which suits were filed. During the course of our study, this process became more formal. Now, the Tort Division will delineate in a memorandum the need to hire outside counsel and submit names of three possible contractors for the Attorney General's final decision.

### Contracting For Tort Defense Has Decreased, as Has the Number of Cases

Both the number of tort cases opened and those assigned to outside counsel have decreased in the period of time included in this analysis, 1997-2001. As the chart below illustrates, the number of tort cases opened fell from a high of 72 in 1997 to 50 or less in most years since then. By 2001, the number of new cases assigned to outside counsel had fallen to 4, or 8.5 percent of the total cases opened.



Source: LSO Analysis of Attorney General Data

Of the approximately 800 claims against SSIP each year, the risk manager says relatively few involve legal counsel. Most, the state risk manager handles like an insurance adjuster, and either denies or settles. Attorneys become involved when claimants file lawsuits, or when the risk manager thinks a claim might evolve into a lawsuit.

***Few tort cases actually go to trial.***

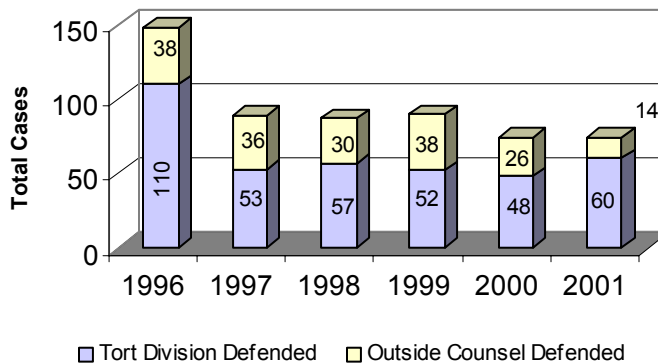
The risk manager also needs the counsel of the Attorney General in order to settle claims for more than \$50,000. W.S. 1-41-106 authorizes the risk manager to settle claims up \$50,000, and up to \$100,000 upon consultation with the Attorney General.<sup>2</sup> Tort Division and SSIP officials note that few cases actually go to trial: most are settled or dismissed through motions.

**Tort Division Attorneys Handle Most Pending Litigation**

Litigation cases tend to overlap from year to year. At the end of 1996, the Tort Division had a high number of cases pending at year-end. However, since then, both the numbers of tort cases pending at year-end and the number of those assigned to outside counsel have dropped, as the next chart illustrates.

***Since 1996, the number of cases carried over from one year to the next has decreased.***

**Tort Cases Pending at Year-End**



Source: LSO analysis of Attorney General data.

<sup>2</sup> The Governor must settle claims exceeding this amount, up to the maximum liability limits under the Wyoming Governmental Claims Act. Those are \$250,000 to any claimant for all claims from a single occurrence, or \$500,000 for all claims of all claimants for any number of claims arising out of a single occurrence and \$1 million for negligence of physicians employed by the state.

## Suits Brought by Prisoners Generated the Most Contracting

Between 1997 and 2001, suits arising from the claims of persons either arrested or held in jails or prisons dominated the cases for which the Tort Division contracted. The defendants in these cases were either local government law enforcement officers or the Department of Corrections and

its officials and employees. These kinds of cases, according to the Attorney General, often involve multiple defendants, and thus create the need for contract counsel to avoid conflicts.

### Contracted Tort Cases, 1997-2001

#### Issues of 73 Cases Assigned:

- Prisoner Claims: 17
- Excess Force in Arrests: 12
- Employment Issues: 11
- Government Administration: 9
- Jail Conditions: 6
- False Arrest: 4
- Other: 14

**Involved Law Enforcement Officers: 31**

**Number of Contractors: 20**

**Cases Contracted to Attorneys Located in Cheyenne or Casper: 82%**

Source: Attorney General, Tort Division Data

***Law enforcement officer cases often involve multiple defendants, and thus require contractors.***

From data provided by the Tort Division, the contracting during this period involved 20 different firms or independent attorneys, most located in Cheyenne or Casper. Tort Division officials reported selecting contractors primarily in locations in which there are federal or state courts. Federal courts, located in Cheyenne and Casper, hear cases alleging civil rights violations, such as sexual harassment or excessive force in arrest. Officials also say that tort cases are concentrated in the state's major populations centers, as well as in towns where state institutions are located.

## Current Litigation Uses Few Contractors

In late September 2002, the Tort Division reported a total of 61 pending cases: 54 were assigned to in-house attorneys, and 7 to contract attorneys. The seven cases went to outside counsel (five different attorneys) for a variety of reasons. In two cases, in-house attorneys are representing the state, challenging SSIP

coverage of the defendants. Three cases involve law enforcement officers, and one is a medical malpractice case. Most of the cases currently being handled in-house also stem from claims about prison conditions or law enforcement officer actions.

### **SSIP Costs for Tort Defense Total \$3.4 Million, FY '96-'02**

The Attorney General’s tort litigation unit was established to decrease costs for state tort defense. The savings occur because SSIP estimates costs for in-house attorneys at half the rate it pays outside contractors, and also because the in-house group handles approximately double the number of cases that are contracted.

***\$2.2 million funded in-house attorneys and \$1.2 million went to contractors.***

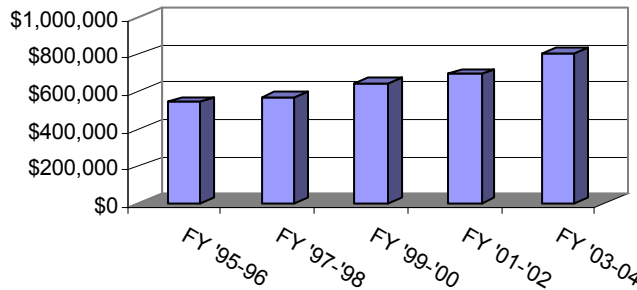
SSIP cost for tort defense totaled \$3.4 million for the period, FY '96-'02. Of this total, approximately two-thirds, \$2.2 million, supported the in-house defense unit in the Tort Division. During the same period, SSIP reports paying approximately \$1.2 million to outside attorneys, in fees and expenses.

### **In-House Tort Budgets Have Increased**

The amount SSIP pays to maintain attorneys in the Attorney General’s Office for tort defense has increased by 48 percent in the last five biennia. In the last biennium, SSIP requested approximately \$800,000 to fund the unit. Over 90 percent of the budget funds personnel, which includes four attorneys and two support positions.

***The cost to fund in-house tort defense has increased by 48 percent since FY '95-'96.***

**SSIP Budget for In-House Tort Defense**



Source: State Self Insurance Program Budget Requests, Dept. of A&I



### **In-house Attorneys Cost and Defend Twice As Much As Outside Contractors**

***In most of the years reviewed, in-house attorneys handled twice as many cases as contractors.***

Funding for in-house attorneys has been roughly double the funding for outside attorneys during the period reviewed for this study. A basic analysis of cases opened during this same period shows that, in most years, in-house attorneys also handled at least twice the number of cases as were assigned to contractors (see page 41). The exception was 1999, when in-house attorneys handled only 1.5 cases to every case that was contracted.

***The hourly rate used to calculate in-house attorney costs is half what contractors earn.***

For actuarial purposes, SSIP uses a \$45 per hour rate to calculate defense costs for cases handled by the Tort Division attorneys. At current salaries and benefits, the \$45 per hour covers the attorneys' salaries, leaving approximately 31 percent for supervision, administrative support, litigation expenses, and other overhead. This is less than the Office's 40 percent estimate for overhead, and the risk manager indicates that the hourly rate may need adjustment to better reflect actual costs.

***State Self Insurance Program tracks legal defense costs to better estimate cost of risk.***

In contrast, SSIP contracts for tort defense pay outside attorneys \$90 per hour, up recently from \$85 an hour. SSIP also reimburses contractors for actual expenses, and pays lower amounts to associate attorneys and paralegals. Tort Division officials report having set this rate, and say that there are no statutes or A&I rules that direct or limit it. This flexibility has been valuable in the rare cases where the Tort Deputy has needed to pay more in order to get necessary representation, such as for medical malpractice. Although the \$90 rate has turned away some contractors, officials say there are qualified attorneys who will accept it.

SSIP tracks the hourly-rate cost of legal defense, whether provided in-house or by contract attorneys. It does this to better estimate the cost of risk for insurance purposes, and also because by statute, it shares costs with local governments for defense and settlement to \$10,000 in cases involving law enforcement officers. The in-house tort attorneys have tracked their hours since 1997 for this purpose.

### **Contract Legal Costs Continue Until Cases Close**

Because it operates like an insurance company, SSIP attributes legal as well as settlement costs to the years in which incidents giving rise to claims occur. Since cases for past years are still open, SSIP cannot give final figures for the costs of legal counsel in each year for the period FY '96-'02. Instead, it reported what has been paid to date, in attorney fees and expenses, to contractors. This total is \$1,257,982, distributed among 17 firms.

### **Attorney General Has Reduced the Number of Attorneys Under General Contract**

Many firms and attorneys that formerly held general contracts for state tort defense are no longer positioned to get that work. In the last year, the Attorney General reported sending written notices canceling 28 of these general contracts. The canceled firms were located in 15 different towns throughout the state. The Attorney General winnowed the list of attorneys, eliminating those who had not defended cases for the state and those who put themselves in conflict with the state by suing it. Under the Attorney General's current policy on outside counsel, a conflict by one member of a firm disqualifies the entire firm.

***Attorney General's adherence to a strict policy on conflict of interest eliminated some attorneys.***

The Attorney General has chosen to maintain open contracts with some attorneys throughout the state so that the Office can respond to suits within the required 20-day filing period. At present, 17 firms or attorneys have active contracts to take tort defense work from the state; 7 of them have active cases and the rest have open, general contracts. Attorneys with active contracts are located in five in-state and two out-of-state cities. All private attorneys now handling cases must comply with the Litigation Management Guidelines, which the Tort Division and SSIP use to actively monitor contracted cases.

### **Sustained Attorney General Effort Resulted in Less Contracting For Tort Defense**

Several factors have come together to reduce contracting for tort defense. The Attorney General realized this long-held goal by putting in place an in-house tort staff with a high level of expertise.

In April 2002, the Tort Deputy put the group's cumulative experience at 80 years. He also noted that the 2001 salary adjustments helped in maintaining a strong in-house staff, and that having the four attorney positions filled was critical.

***Attorney General has applied more scrutiny to contracting for tort defense.***

Other factors reducing contracting are the steps the Attorney General has taken to make contracting a more scrutinized practice. These include adopting a policy that formalizes the circumstances under which the Office will contract and requires the Attorney General's approval of all contracts. The Attorney General has also instituted a more restrictive conflict of interest policy, and cancelled many general contracts that kept attorneys on "stand-by" for state work.

**Recommendation: The Attorney General's Office should maintain the option of contracting for tort defense.**

By funding a cadre of experienced tort attorneys in the Attorney General's Office, the state can expect that in-house attorneys will defend most lawsuits brought under the state's Governmental Claims Act or federal civil rights laws. Tort Division attorneys have handled the majority of cases in all the years we reviewed for this study, and the use of contractors has decreased.

***Circumstances that create a need for contracting are beyond the Office's control.***

However, we learned that circumstances that create a need for the Attorney General to contract for tort defense are largely beyond the Office's control. These include the nature of the suits filed: those with multiple defendants, which have been common, often require contractors to avoid conflicts.

The total number of claims requiring the involvement of counsel is also a factor. We calculated that the number of cases SSIP referred to attorneys decreased by 35 percent between 1997 and 2001, and cases referred to contractors dropped by a similar percentage. There may be a correlation between the two levels, and there is no assurance that the total level of cases will not increase.

***There are no assurances that the Office can retain a high level of in-house tort defense expertise.***

Further, attorney expertise is a main determinant of the Office's in-house capacity, and there are no assurances that it will remain at its current high level. Tort officials report that with most in-house attorneys carrying 13-15 cases, the group is close to its saturation point. They say tort defense is grueling work and that burn-out has been a problem in the past. The current tort attorneys already receive the highest salary the state offers for non-supervising attorneys, so it will be difficult for the Office to retain those who want higher compensation.

In light of these factors, the Attorney General must balance the commitment to reducing contracting with its responsibility to ensure the state can respond to lawsuits filed against its departments or employees. The Attorney General has implemented policies and procedures to ensure that contracting for tort defense will be a last resort. The winnowed list of preferred contractors limits the Office's ready access to attorneys throughout the state. With such high reliance upon the Office capacity to defend tort cases, the Attorney General will need to carefully monitor tort defense levels to ensure that the state's resources remain adequate.