

Legislative Council Service

Information Memorandum

DATE: October 13, 2010

TO: Government Restructuring Task Force

FROM: Kim Bannerman

SUBJECT: PROPOSAL TO REQUIRE CONTRACTED LEGAL SERVICES BE PROVIDED BY THE ATTORNEY GENERAL'S OFFICE (AG) - INFORMATION REGARDING STATE ATTORNEYS AND CONTRACT ATTORNEYS

Following is information regarding the number of state employed attorneys, the amount spent annually by departments and agencies on contracted legal services and a brief overview of how other states handle legal matters. The information is provided based on the task force's interest in limiting the amount spent by the state on contracted legal services. Any opinions expressed are those of the author and do not necessarily reflect the opinions of the legislative council or other members of its staff.

In various state departments and agencies, excluding the AG's office, judiciary, district attorneys, public defenders and elected officials' offices, the state currently employs 240 attorneys in classified positions. The five largest employers of the state attorneys are the human services department (55), children, youth and families department (35), office of the state engineer (28), taxation and revenue department (17) and the public regulation commission (14). The average pay of lawyers in these positions is \$34 per hour, or around \$70,000 a year.

The state spends \$27.3 million a year on contracts for legal services. The three entities that spend the most on contractual legal services are the public defender's office (\$11 million), the risk management division of the general services department (\$11 million) and the office of the state engineer (\$1.3 million). However, only \$11.4 million of this money comes from the general fund. Neither the risk management division nor the offices of the state engineer utilize general fund dollars for their contractual legal services. The rest of the services are paid for by

special funds or internal transfers. Also, the public education department spent \$5.1 million on contractual legal services in 2009-2010, with \$4.9 million coming from the state equalization guarantee, i.e., the general fund.

Also included are examples of how state legal services are handles in five other states, as well as reference to the New Mexico statutes dealing with legal services for the state. Other states manage state legal services in a variety of ways. Multiple states prohibit departments from having legal counsel unless exempted under law. Florida has a department, separate from the attorney general's office, to handle all state legal services. Oklahoma is currently reviewing a proposal to consolidate all state legal services back in the attorney general's office, similar to the proposal from the task force. A portion of the Oklahoma bill diverts the money spent by the state on contracts for legal service to the attorney general's office to allow for increased hiring of assistance attorney generals.

Number of State Attorney Positions by Agency/Department (excluding the AG, judiciary, district attorneys and public defenders - only classified positions)

Agency	LAWYER-A	LAWYER-B	LAWYER-O	Grand Total
Aging & Long-Term Services Dpt	4			4
Children, Youth & Families Dpt	12		23	35
Department of Environment	8		4	12
Department of Finance & Admnst	1			1
Department of Health	6		1	7
Department of Public Safety	4			4
Department of Transportation	8		1	9
Dept of Workforce Solutions	2		2	4
Dept of Vocational Rehbltation	1			1
Dev Disabilites Planning Comm			1	1
Educational Retirement Board	2			2
Enrgy, Minrils & Ntrl Rsrcs Dpt	6		1	7
Gaming Control Board	1		1	2
Homeland Security & Emgncy Mgt	1			1
Human Services Department	19		36	55
Military Affairs			1	1
New Mexico Corrections Dept	5			5
NM Higher Education Department	1			1
Ofc of the State Engineer	26		2	28
Public Education Department	5	2		7
Public Employee Retiremnt Asso	1			1
Public Regulation Commission	14			14
Regulation & Licensing Dept	5			5
State Investment Council	1			1
State Land Office	5			5
Taxation & Revenue Department	10		7	17
Workers Compensation Admin	5		5	10
Grand Total	153	2	85	240

Note: The risk management division of the general services department has six attorneys, but all are exempt positions. Many lawyers for the state are in exempt positions.

Amount Spent on Contracts for Legal Service by Departments and Agencies, Including General Fund Share (excluding the judiciary, district attorneys and elected offices)

Agency	DESCR	Attorney Fees	GF Share	GF Amt
Taxation and Revenue	Admin Services	22.0	97.6%	21.5
Taxation and Revenue	Information Technology Div	10.5	97.6%	10.2
Taxation and Revenue	Revenue Processing Division	2.0	49.0%	1.0
Taxation and Revenue	Motor Vehicle Division	2.0	58.6%	1.2
Taxation and Revenue	Property Tax Division	82.5	18.4%	15.2
Taxation and Revenue	Tax Fraud Investigations	0.2	100.0%	0.2
SIC	State Investment Council	701.3	0.0%	-
PSIA	Program Support	117.5	0.0%	-
RHCA	Program Support	108.0	0.0%	-
GSD	Office of Secretary	4.0	0.0%	-
GSD	RMD Reserve-Public Liability	11,600.0	0.0%	-
GSD	RMD Reserve-Workers Comp	450.0	0.0%	-
ERB	Educational Retirement Board	221.1	0.0%	-
Public Defender	Public Defender	11,019.6	99.6%	10,970.4
DoIT	Program Support	90.0	0.0%	-
DoIT	Enterprise Operations	210.0	0.0%	-
PERA	PERA	746.0	0.0%	-
SPO	Personnel Board	8.1	100.0%	8.1
Board of Nursing	Board of Nursing	84.0	0.0%	-
State Fair	New Mexico State Fair	10.0	7.4%	0.7
Gaming Control Board	Gaming Control Board	8.9	100.0%	8.9
Cumbres and Toltec	Cumbres & Toltec Scenic	2.5	2.7%	0.1
Livestock Board	Administration	2.3	0.0%	-
Game and Fish	Administration Program	7.0	0.0%	-
ENMRD	State Parks-Operations	2.0	6.7%	0.1
State Engineer	Litigation and Adjudication	1,374.0	0.0%	-
Commission for the Blind	Cmsn for the Blind	15.0	19.2%	2.9
Human Services Department	Income Support Admin	32.0	11.5%	3.7
Workforce Solutions	Human Rights Bureau	2.0	0.0%	-
Workforce Solutions	Office Of The Secretary	7.5	6.9%	0.5
DVR	Rehabilitation Services	3.1	15.1%	0.5
DDPC	Office of Guardianship	315.0	100.0%	315.0
Miners Hospital	Miners' Hospital of New Mexico	16.2	0.0%	-
Health Department	Facilities Management	4.5	41.3%	1.9
CYFD	Juvenile Justice	5.8	100.0%	5.8
Corrections	Program Support	9.0	100.0%	9.0
Public Safety	Law Enforcement Program	55.0	70.6%	38.8
Transportation	Business Support	4.4	0.0%	-
	Total	27,355.0		11,415.6

Note: The public education department spent \$5.1 million on legal contracts during 2009-2010. \$4.9 million came out of the state equalization guarantee, in other words, the general fund. The audits of the school districts will need to be examined to determine exactly what this money was spent on, due process claims for example, and how much was spent district-by-district.

Examples of State Legal Services

State	Statutory Information
New Mexico	<p>§8-5-2.1: Legal service fees for state agencies. The Attorney General (AG) may charge state agencies for legal services as requested by the agencies.</p> <p>§8-5-4: In litigation matters, departments may contract legal services if the AG determines that the office cannot perform such services. The governor must approve the contracting. The costs of the contracted legal services will be paid by the contracting department.</p>
Arizona	<p>§41.192E: Only the AG shall employ legal counsel or use funds or incur indebtedness for legal services. A short list of departments that are exempt from this provision is included in the statute.</p> <p>§41.192F: If the AG determines that the AG is disqualified from providing legal services, the AG shall give written notification to the relevant state agency of such a determination. Upon receiving the written notification from the AG, the relevant state agency has the authority to contract legal services.</p> <p>§41.192H: The agency must reimburse the general fund for any money legislatively appropriated for legal services performed by the legal department with money from the agency's special funds, if money is available.</p>
Colorado	<p>§24-31-101.(1)(a): Declares the AG as the legal counsel and advisor of each department, division, board, bureau and agency of the state, other than the legislative branch.</p> <p>§24-31-101.(1)(e): A state agency may employ counsel of its own if the AG is unable, has failed or has refused to provide legal services to that agency. Legal expenses incurred by the agency in such a manner are considered to be a lawful charge against appropriations.</p>
Florida	<p>§16.015: Legal Services; Department of Legal Affairs, other counsel. The Department of Legal Affairs is responsible for providing all legal services. The AG can authorize contract legal services if a professional conflict of interest is found and where there is an emergency situation.</p> <p>§16.0155(2): The AG must issue a written determination allowing the Department of Legal Affairs to enter into a contingency fee contract with a private attorney.</p> <p>§16.0155(5): Contingency fees will not exceed \$50 million, despite the number of lawsuits filed and the number of private attorneys contracted.</p>

	<p>§16.535: Legal Services Trust Fund: (1) for use by the AG in providing contractual legal services to agencies; (2) agencies approved for contractual legal services are authorized to make advance payments on a quarterly basis.</p>
<p>Texas*</p>	<p>§402.021: The AG is the prime source of legal services for the state.</p> <p>§402.0212: The AG must approve a contract for legal services. If the AG does not approve a contract, then the AG must provide the legal services requested in the contract.</p> <p>* Not specified in statute: All large agencies have their own legal counsel who are employees of that agency, not of the AG's office.</p>
<p>Oklahoma*</p>	<p>§74-18: The AG is the chief law officer of the state.</p> <p>§74-18c.A.1: Employment of attorneys: No state officers, boards or commissions shall employ or appoint attorneys to advise or represent them. The boards and commissions that are exempt from the former provisions are found in §74-18cA2.</p> <p>§74-20i.A.3: An agency may contract legal services if the AG is unable to perform the services due to conflict of interest or lack of personnel.</p> <p>* HB2465: The proposal to consolidate all legal services back to the AG's office:</p> <ul style="list-style-type: none"> • strikes §74-18cA2, leaving no exceptions for contracting; • adds provision to §74-20i stating that requests for contracting legal services must go through the AG's office, and the AG must approve the requests; • diverts the money currently spent on contract legal services to the AG's office, allowing increased assistant AG deputizing; and • establishes the Private Attorney Sunshine Act, which requires that contracts for legal services and bids be posted online.