# THE STATE ATTORNEY GENERAL†

ARLEN C. CHRISTENSON*

## I. INTRODUCTION

The Attorney General of Wisconsin heads one of the state's largest law offices, staffed by over 40 lawyers. His clients include the Governor; the Legislature; three other constitutional officers (Secretary of State, Treasurer, and Superintendent of Public Instruction); 41 state departments,[1] boards and commissions; 71 district attorneys;[2] 30 county corporation counsels;[3] and over 4 million citizens of the State of Wisconsin. These clients generate a case load of 400 new cases each year, receive over 500 written legal opinions, and occupy approximately 12,000 man-hours annually in consultation with their legal advisers on the Attorney General's staff.[4] The litigation and legal advice handled by the A.G.'s office cover almost every aspect of every kind of lawyer's work, from complex anti-trust litigation, to administrative litigation before a state or federal agency, to day-to-day legal advice to client departments and agencies.

Each state has an Attorney General. The office of Attorney General of Wisconsin is typical of that office as it exists in other states: the Attorney General is elected in a state wide partisan election;[5] he is the chief legal advisor for the Governor and other state executive and administrative officers as well as the legislature; and he is responsible for representing the state and its agencies in litigation.[6]

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* Assistant Professor of Law, University of Wisconsin. B.S., 1958, Wisconsin State University, River Falls; LL.B., 1960, University of Wisconsin. Deputy Attorney General of Wisconsin, 1966-68; Executive Assistant Attorney General, 1968-69.

1 WIS. BLUE BOOK 369-74 (1968). This figure includes 13 licensing boards attached to the Department of Regulation and Licensing for routine clerical functions only, retaining their independent rule-making and licensing functions.

2 Wisconsin has 72 counties but Menominee County shares a district attorney with Shawano County. *Id.* at 596.

3 The office of County Corporation Counsel is optional. WIS. STAT. § 59.456 (1967). In counties without corporation counsel, the duties are performed by the district attorney.

4 These figures are based upon data from office records for 1968.

5 This is the case in Wisconsin and 41 other states. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STUDY OF THE OFFICE OF ATTORNEY GENERAL § 1.1. (Preliminary Draft, Oct. 1969). The other eight states are Alaska, Hawaii, New Hampshire, New Jersey, Pennsylvania, and Wyoming where the Attorney General is appointed by the Governor; Maine, where he is appointed by the Legislature; and Tennessee, where the Supreme Court makes the appointment.

6 *Id.* at §§ 1.3, 4.1.

The Attorney General's duties as legal adviser and attorney for the state and its agencies require that he and his staff play an important role in governmental policymaking. They influence their governmental clients' decisions much the same as private attorneys —through legal advice and handling litigation. Often the role of legal adviser becomes quite naturally a role of adviser on general policy, whether the lawyer involved is general counsel to a private corporation or Attorney General. Moreover, the Attorney General may in some cases initiate legal action, commence investigations, or take other action on his own initiative that can significantly affect governmental policy and the interests of the public. Finally, the Attorney General's legal opinions, published and unpublished, may establish the law for particular cases or particular subjects, thus casting the Attorney General in the role of lawmaker.

In spite of the obvious importance of the office and its substantial role in the formulation of public policy, there is "a paucity of scholarship in this area."[7] This article will help fill this gap by analyzing the legal work of one typical Attorney General's office. In this article I will examine the work of the Wisconsin Attorney General's office and the way in which that work is carried on. I will discuss the varying functional roles played by the Attorney General and his staff, and draw some conclusions with respect to the ways in which the Attorney General and his staff influence state policy. Although the Attorney General of Wisconsin has responsibilities outside his role as the state's chief legal officer,[8] this article is concerned only with the Attorney General and his staff as lawyers.

## II. THE POWERS AND DUTIES OF THE ATTORNEY GENERAL

The present office of Attorney General was created by the Wisconsin constitution of 1848.[9] In creating this office the drafters were continuing, at least in name, an office which originated in England, was adopted by each of the American colonies, and was included in the structure of the federal government after 1789.[10]

The Attorney General in each of these jurisdictions—England, the federal government, and various states—performs the same basic role: chief legal officer of his jurisdiction. Each represents his government in court and provides legal advice for the govern-

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[7] Abraham & Benedetti, *The State Attorney General: A Friend of the Court?*, 117 U. PA. L. REV. 795 (1969).

[8] He is also the administrative head of the State Department of Justice, which includes divisions of criminal investigation and law enforcement services.

[9] WIS. CONST. art. VI, § 1.

[10] Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AM. J. LEGAL HIST. 305 (1958); Kramer & Siegel, *The Attorney General of England and the Attorney General of the United States*, 1960 DUKE L.J. 524, 525.

ment and certain of its officers.[11] At the same time, the duties and powers of the different Attorneys General differ in many respects.

In England, the Attorney General, since 1673, has sat in the House of Commons. He is often called upon to represent the Government before the House of Commons.[12] The United States Attorney General, on the other hand, is a part of the executive, a member of the President's cabinet, and does not provide legal advice for the Congress.[13] In Wisconsin, as in most states, the Attorney General is required to give his legal opinion to the legislature upon request;[14] moreover, as an elected official, he is directly responsible to the people and is not a part of the executive in the same sense as are a President's cabinet members or a Governor's appointees. The Wisconsin constitution labels the Attorney General an "administrative" officer along with the Secretary of State and the Treasurer.[15] Only the Governor is included within the "Executive."[16] The Attorney General, therefore, occupies a unique position. A part of neither the executive nor the legislative branch, he is legal adviser to both.

The Wisconsin Constitution of 1848 left the duties of the Attorney General to be specified by law.[17] The first state legislature, sitting in 1849, established the basic powers and duties of the office: (1) to represent the state in all matters before the State Supreme Court in which the state or its citizens have an interest; (2) to prosecute or defend for the state, at the request of department heads, all legal actions connected with their departments; (3) to represent the state, at the direction of the Governor or the legislature, in any other litigation in which the state or its citizens have an interest; (4) to provide legal advice for the legislature, the Governor, or the heads of the state departments; and (5) to assist and advise the district attorneys in performing the duties of their offices.[18] Except for minor wording changes, these five general duties remain the same.[19]

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11 *Id.*

12 Jones, *The Office of Attorney General*, 27 CAMBRIDGE L.J. 43 (1969).

13 Kramer & Siegel, *supra* note 10, at 529-30.

14 WIS. STAT. § 14.53(4) (1967).

15 WIS. CONST. art. VI, § 1.

16 *Id.* at art. V, § 1.

17 *Id.* at art. VI, § 3.

18 WIS. REV. STAT. ch. 9, §§ 36-41 (1849).

19 The first legislature also assigned four other specific tasks to the Attorney General: (1) he was a member of the elections board of canvassers, WIS. REV. STAT. ch. 6 § 69 (1849); (2) he was a commissioner of school and university lands (with the State Treasurer and the Secretary of State), WIS. CONST. art. X, § 7 (1848), WIS. REV. STAT. ch. 24 (1849); (3) he was generally responsible for using the powers of injunction and quo warranto to keep corporations and their officers from acting beyond their authority, *id.* ch. 114; and (4) he was to enforce various bonds on behalf of the state as obligee, *id.* ch. 115, § 32. The legislature has steadily

The statutory duties of the Attorney General fall into three general categories: (1) litigation, (2) legal advice, and (3) administrative duties. The category of administrative duties includes the criminal investigation and law enforcement functions of the new Department of Justice as well as membership on boards, commissions, and committees. These duties are largely outside the scope of this article. The legal work of the office is included within the other two categories.

### *A. Litigation*

Attorneys General in most states, particularly when the office is created by the state constitution, have the inherent power to initiate litigation to protect or promote the interests of the state or its citizens.[20] In Wisconsin, however, despite the constitutional origin of the office, the Supreme Court has consistently said that the Attorney General has no such inherent power,[21] and his only authority to engage in litigation is that delegated by statute. In Wisconsin this delegation makes him responsible for all of the state's litigation before the Supreme Court, but he appears at the trial level only upon the request of a state department head, the governor, or the legislature.[22] Without such a request, the Attorney General can litigate at the trial level only if he is so authorized by a specific statute.

The basic scheme established by the 1849 legislature for handling the state's litigation made the Attorney General the state's appellate lawyer and the local district attorneys the state's trial lawyers. District attorneys were required to represent the state in all civil and criminal matters in the trial courts of their counties.[23] This scheme was, of course, eminently sensible in 1849 when it would have been out of the question to ask an Attorney General with no assistants to handle trial litigation involving the state, whether it arose in Dane or Douglas County.[24]

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expanded upon this assignment of specific tasks to the point where there are now 161 such separate statutory assignments.

[20] Toepfer, *Some Legal Aspects of the Duty of the Attorney General to Advise*, 19 U. CIN. L. REV. 201, 206 (1950); *see also* Sheppard, *Common Law Powers and Duties of the Attorney General*, 7 BAYLOR L. REV. 1 (1955).

[21] State *ex rel.* Beck v. Duffy, 38 Wis. 2d 159, 163, 156 N.W.2d 368, 371 (1968); State *ex rel.* Reynolds v. Smith, 19 Wis. 2d 577, 584, 120 N.W.2d 664, 668 (1963); State *ex rel.* Jackson v. Coffey, 18 Wis. 2d 529, 538, 118 N.W.2d 939, 944 (1963); State v. Snyder, 172 Wis. 415, 417, 179 N.W. 579, 580 (1920); State *ex rel.* Haven v. Sayle, 168 Wis. 159, 163, 169 N.W. 310, 311-12 (1918); State v. Milwaukee Ry., 136 Wis. 179, 190, 116 N.W. 900, 905 (1908).

[22] WIS. STAT. §§ 14.53(1), (2) (1967).

[23] WIS. REV. STAT. ch. 10, § 63 (1849).

[24] The first legislative authorization for the Attorney General to hire an assistant came in 1858 when he was permitted to hire one assistant at $600 per annum. WIS. REV. STAT. ch. 10, § 58 (1858).

Today the district attorneys still handle all criminal prosecutions in their counties' courts on behalf of the state.[25] The Attorney General is involved in criminal prosecutions at the trial level only in those relatively rare instances when he is authorized to prosecute by the governor or one house of the legislature, when a district attorney requests his assistance,[26] or when he is authorized to prosecute violations of a specific statute.[27]

District attorneys also handle a substantial volume of trial court level civil litigation on behalf of the state.[28] In this area, however, there is overlapping jurisdiction because of the Attorney General's authority to represent state departments in all litigation connected with the departments, and because of numerous special statutes giving the Attorney General the authority to initiate actions on behalf of the state. The Attorney General's authority to represent state departments includes the voluminous litigation created by actions in circuit court for judicial review of administrative decisions. This activity alone has created an ever increasing volume of civil litigation handled by the Attorney General.

Since 1849 the legislature has regularly added to the legislation specifically athorizing the Attorney General to initiate litigation. From two such statutes in 1849, the number had grown to 44 by 1967. In some instances these initiative powers are insignificant; however, there are several areas in which the Attorney General may commence litigation which could significantly influence state public policy.[29]

The Attorney General is empowered to represent the state in all matters before the State Supreme Court in which the state or its citizens have an interest.[30] Thus, when a criminal matter is taken

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[25] WIS. STAT. § 59.47(1) (1967).

[26] When a district attorney requests assistance in litigation, the practice is to obtain authorization from the Governor. The Attorney General then has all the powers of a district attorney to act as prosecutor. WIS. STAT. § 14.531 (1967); State *ex rel.* Arthur v. Superior Court, 257 Wis. 430, 43 N.W.2d 484 (1950).

[27] *E.g.*, the Attorney General is authorized to prosecute violations of lobbying laws. WIS. STAT. § 13.69(3) (1967).

[28] *Id.* § 59.47(1).

[29] The Attorney General, for example, is the principal enforcer of the state anti-trust and unfair discrimination in trade laws, *id.* § 133.01(2). He has important powers to regulate the solicitation of funds for charities, *id.* § 175.13(2); he may enjoin public nuisances, *id.* § 280.02; he may supervise corporate conduct by injunction, *id.* § 286.325, and by quo warranto, id. § 294.04; he may enforce certain liquor laws, *id.* § 66.054(17)(a); he has the duty to enforce charitable trusts, *id.* § 231.34; and he may proceed against unfair trade practices, *id.* § 100.20(4). The Attorney General has also been given the authority to investigate crime which is statewide in nature, scope, or influence, *id.* § 14.526(1), although no statute specifically gives him the power to prosecute cases arising out of such investigations. To prosecute such cases he must seek the authorization of the Governor or, conceivably, one branch of the Legislature.

[30] *Id.* § 14.53(1).

to the Supreme Court, it becomes the Attorney General's responsibility, and he takes over from the district attorney who prosecuted the case originally. The district attorney may still participate in the case, but he does so under the supervision and control of the Attorney General. Likewise, the Attorney General is in charge of all appeals in civil matters, regardless of the way in which the case was initiated.

The Attorney General's authority to represent the state and its citizens also permits him to invoke the original jurisdiction of the Supreme Court without specific authorization from the Governor or the legislature or a specific client.[31] The Supreme Court exercises original jurisdiction through the traditional writs such as mandamus and prohibition, the exercise of its superintending powers over inferior courts, and in certain other cases of great public moment and urgency.[32] If the Attorney General can invoke the jurisdiction of the Supreme Court through one of these means, he may himself initiate litigation.

### *B. Legal Advice*

The Attorney General is required to provide legal advice at the request of the Governor, the legislature, the heads of state departments,[33] and the local district attorneys and county corporation counsels.[34] His duties in this respect have remained essentially unchanged since 1849, the only changes being the addition of more department heads and county corporation counsels to the list of those entitled to advice.

The Attorney General receives requests for legal advice from sources other than those specifically authorized by statute. Legislative committees, individual legislators, administrators below the level of department head, municipal officials, and citizens of the state all, from time to time, seek such advice. A strict construction of the Attorney General's powers would prohibit giving legal advice to anyone other than those specifically authorized by statutes. In practice, however, informal advice is often provided for others. The Attorney General and his staff must work with legislative committee representatives and lower level administrators

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[31] The authority of the Attorney General to invoke the original jurisdiction of the Wisconsin Supreme Court has not been questioned and has generally been assumed. *See, e.g.*, State *ex rel.* Warren v. Reuter, 44 Wis. 2d 201, 170 N.W.2d 790 (1969); State *ex rel.* LaFollette v. Reuter, 36 Wis. 2d 96, 153 N.W.2d 49 (1967). The court in State *ex rel.* Haven v. Sayle, 168 Wis. 159, 163, 169 N.W. 310, 311 (1918) viewed a similar question as one of the court's prerogative rather than the Attorney General's authority.

[32] WIS. CONST. art. 7, § 3; State *ex rel.* Reynolds v. County Court, 11 Wis. 2d 560, 105 N.W.2d 876 (1960); State *ex rel.* Martin v. Zimmerman, 249 Wis. 101, 23 N.W.2d 610 (1946).

[33] WIS. STAT. § 14.53(4) (1967).

[34] *Id.* § 14.53(3).

and, in the process, give legal advice.[35] Even private citizens receive replies to their letters which, with an appropriate disclaimer and usually an admonition to seek private counsel, include some advice on the legal issues raised.[36]

## III. THE ATTORNEY GENERAL'S OFFICE

### *A. Office Organization*

In 1967 the Wisconsin legislature adopted the Governmental Reorganization Act[37] which, among other things, created the Wisconsin Department of Justice headed by the Attorney General.[38] The act left the preexisting duties and staff of the Attorney General untouched, and included within the new department all of the state's criminal investigators and the state crime laboratory. As a result of this reorganization, the Attorney General now heads a department of nearly 200 people. The administrative structure of the Department of Justice includes an administrative division; an office of consumer protection; the Council on Criminal Justice; and three operating divisions: the legal division, the division of criminal investigation, and the law enforcement services division.

The legal division inherited the staff and duties of the predecessor Attorney General's office.[39] Before 1967 the Attorney General's office consisted of the Attorney General, his deputy, and the assistant attorneys general, together with a small staff of investigators and the necessary clerical support. The deputy attorney general, who is appointed outside the classified service and serves at the pleasure of the Attorney General, was primarily responsible for the administration of the office. All of the assistant attorneys general reported directly to the deputy or to the Attorney General. The administrator of the legal division now handles many of the administrative duties previously handled by the deputy. The Attorney General and the deputy, however, still retain some administrative duties and, of course, retain the ultimate authority

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35 Even formal opinions are sometimes prepared at the request of legislative committees. In earlier years this was the express policy of the office, 8 OP. WIS. ATT'Y GEN. 288 (1919). More recently, however, the policy has been to provide opinions only in response to a resolution adopted by one house of the legislature. The files indicate that the practice of routinely preparing opinions for the chairmen of the legislative committees was discontinued with the 1931 session of the Legislature.

36 *See* discussion following note 49, *infra*.

37 Ch. 75, [1967] Wis. Laws 154-73.

38 *Id.* § 20, at 165.

39 The division includes 43 assistant attorneys general including the division administrator, all of whom are appointed within the classified service subject to a civil service merit system, WIS. STAT. § 14.52 (1967). The assistant attorneys general are, for the most part, career government lawyers, the average length of service among the present staff being eight years.

over all of the affairs of the department, including the legal division.[40] The precise division of administrative responsibility among the Attorney General, the deputy, and the administrator is likely to vary considerably from time to time as well as from one Attorney General to another.

Although the Attorney General and the deputy may assume direct responsibility for a case or an opinion or advise a client directly, the bulk of the department's legal work is handled by the assistant attorneys general. Only a small fraction of the office's approximately twelve hundred pending cases receive more than fleeting attention from the Attorney General. The legal opinions issued by the Attorney General are generally reviewed and approved and often revised by the Attorney General or the deputy or both, but are almost always originally drafted by an assistant attorney general.

The Attorney General's staff is not organized according to formal bureaus or specialized units. Each assistant attorney general is assigned to handle the legal affairs of one or more state departments or agencies, or to work in one or more areas, such as criminal law or anti-trust law, where no client agency is involved.[41]

### *B. The Work of the Office*

A review of the statutory duties and authority of the Attorney General, no matter how thorough, does not reveal what he and his staff actually do. Such a review, in fact, might provide a misleading picture of their activities. The following discussion is based upon an examination of the Attorney General's litigation docket and correspondence files for the calendar year 1968, and upon the returns from a questionnaire circulated among the assistant attorneys general in 1969 regarding their work in 1968. It is designed to present as clear a picture as possible of the actual work done by the Attorney General and his staff in 1968.

The work done by the Attorney General and his legal staff may appropriately be divided into three general categories: 1) litigation, 2) legal advice, and 3) other miscellaneous activities usually ini-

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[40] WIS. STAT. § 14.52 (1967).

[41] In 1968 the Attorney General's office handled the legal affairs of 41 independent state departments, boards, and commissions. In addition, the work of the office was divided into 23 other categories for assignment purposes. The Departments of Industry, Labor and Human Relations; Natural Resources; Taxation; and Transportation; The Wisconsin Employment Relations Commission; and the State Investment Board were assigned one or more full-time attorneys. Attorneys were also assigned full-time in the fields of anti-trust law, consumer fraud, and criminal law. In all, 23 assistant attorneys general devoted all or nearly all of their time to the affairs of one of these nine clients or specialized fields of law. The remaining 55 clients and specialties were divided among the 16 remaining assistant attorneys general.

tiated by correspondence from sources other than the Attorney General's official clients.

### 1. LITIGATION

Litigation is the greatest part of the office's total work load. At the end of 1968 there were 1192 pending cases on the Attorney General's litigation docket. Of these, 392 were opened in 1968, while during that same year, 318 cases were closed. Handling the work generated by this volume of litigation required approximately 53 percent of the assistant attorneys general's time. In comparison, the assistant attorneys general spent approximately 13 percent of their day preparing written legal opinions and an equal amount conferring with and advising clients on legal matters. The remainder was spent on administrative matters, responding to citizens' inquiries and other unofficial mail, committee work, and other miscellaneous matters.

The Attorney General is responsible for all litigation in the Wisconsin Supreme Court in which the state is interested or a party.[42] It thus would be expected that he and his staff would carry on an active appellate practice. The Attorney General's office does, in fact, have a far larger appellate practice than any law firm in the state.[43] However, the vast bulk of the Attorney General's litigation is not at the appellate level. The typical case on the Attorney General's docket is a civil action at the trial court level in which he represents a state administrative agency. More likely than not, the case will be an action to review or enforce an administrative determination, probably involving the Department of Industry, Labor and Human Relations. One hundred twenty-nine cases, 40.5 percent of all of the cases closed in 1968, were cases in which the Attorney General represented the Department of Industry, Labor, and Human Relations. All but 21 of these cases were trial court level review or enforcement actions. All told, 83 percent of the 318 cases closed during 1968 were civil cases; 68 percent of all cases closed were at the trial court level; and 73 percent were cases in which the Attorney General represented an administrative agency or officer.

Although the overwhelming majority of cases on the Attorney General's litigation docket are trial level civil matters, the office also carries on an extremely active criminal practice. In addition to the criminal appeals and post-conviction remedies in the state supreme court, the Attorney General's staff must handle a mounting number of habeas corpus proceedings commenced in the federal

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[42] WIS. STAT. § 14.53(1) (1967).

[43] In 1968 the Attorney General was the attorney of record in 38% of all reported cases decided by the Wisconsin Supreme Court. No other private or public law office in the state approaches that level of participation in supreme court litigation.

courts by state prisoners.[44] A total of 55 criminal appeals and habeas corpus proceedings were completed in 1968. This is more than in any previous year and over three times the typical criminal case load of ten years or more ago.[45]

### 2. LEGAL ADVICE

Other than litigation, the principal legal function of the Attorney General's office is to provide legal advice for other state departments, the Governor, the legislature, and local district attorneys and corporation counsels. Legal advice may take any one of three forms: a formal written opinion, an informal written opinion, or an oral opinon. Formal opinions are always signed by the Attorney General and are published annually in bound volumes, *The Opinions of the Attorney General.* Informal opinions may be signed by the Attorney General, his deputy, or by the assistant attorney general who prepared the opinion, depending upon the current office practice and perhaps upon the subject matter or nature of the advice. Informal opinions are not published, although they may be released to the public. The legal research and at least the initial draft of the opinion are, in any case, almost always done by an assistant attorney general. Oral advice may be given to the client by the Attorney General, the deputy, or most often, an assistant attorney general.

The number of informal written opinions issued by the Attorney General far exceeds the number of formal opinions. In 1968 there were 473 informal opinions issued as compared with only 63 formal opinions. These figures, however, do not reflect the relative importance of the two kinds of opinions in terms of the time devoted to preparing them. For although the formal opinions made up only 12 percent of the total number of opinions issued by the office, their preparation occupied 38 percent of the staff time devoted to opinion drafting. Formal opinions tend to be longer (an average of four pages in 1968, as compared with an average of less than two pages for an informal opinion) and to deal with more important and complex issues than informal opinions.

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[44] Although habeas corpus proceedings are technically civil, they almost always involve the same kinds of issues as criminal cases and are handled by the criminal law experts on the staff.

[45] This quantitative measurement, of course, obscures the fact that some cases are far more complex and require far more staff time than others. The criminal cases are almost all appellate cases or habeas corpus proceedings requiring many hours of preparation and brief writing. The criminal trial court matters are almost always time consuming and complex. The majority of the Department of Industry, Labor & Human Relations cases, being relatively routine trial court level review and enforcement actions, require far less time. The office had only begun installation of a time keeping system in 1968, however, so that accurate information about the allocation of staff time is not available.

Providing oral legal advice and guidance for the Attorney General's clients is a major responsibility of many assistant attorneys general. In 1968 the assistant attorneys general spent more time giving oral advice and consulting with clients than in preparing either formal or informal opinions. They spent about 13 percent of their time giving oral advice or consulting with clients, eight percent drafting informal opinions, and five percent drafting formal opinions. Thus, half of the time devoted to providing legal advice was spent in orally advising or consulting with clients.

The clients for whom the Attorney General provides legal advice fall into six categories: (1) the Governor's office; (2) the legislature and its committees; (3) state departments headed by elected officials; (4) state departments headed by appointees of the Governor; (5) state departments headed by the appointees of independent boards or commissions; and (6) district attorneys and county corporation counsels. Of these, the Governor's office receives by a large margin the least number of written opinions and the district attorneys and corporation counsels the most. The second most frequent recipients of Attorney General's written legal opinions are the state departments headed by the appointees of independent boards or commissions, followed by the departments headed by the Governor's appointees. The elected department heads and the legislature and its committees each account for less than one-tenth of the Attorney General's written opinion volume.

It is far more difficult to quantify the oral legal advice provided clients by the Attorney General and his staff. For reasons which include geographic separation and the independence of fellow lawyers, there is little oral advice provided to district attorneys and county corporation counsels. The exception to this is the unique working relationship between the district attorneys and the assistant attorney general in charge of criminal appeals, which includes frequent telephone consultation regarding criminal prosecutions. This exception is due in part to the role of the Attorney General's office in handling all criminal appeals and in part to the stature and personality of the assistant attorney general involved.

Because of the lack of adequate records regarding the use of time by the Attorney General's staff, it is difficult to generalize about the oral advice provided for the other categories of clients. The frequency of this kind of contact with the Governor's office and the legislature is probably determined in part by the political affiliation of the Attorney General on the one hand, and the Governor and the legislative leadership on the other. However, because the advice and counsel includes that of assistant attorneys general who are of different political persuasions and have a high degree of freedom in the allocation of their time, even this generalization is risky. Moreover, the files indicate that the most distant relationships between the Attorney General's office and the legislature and

the Governor have sometimes been when the same party controlled all three institutions.[46]

In general, it is fair to conclude that there is substantially more informal advice and consultation by the Attorney General and his staff with the state departments than with the legislature and the Governor's office. The Attorney General's basic responsibility is to advise his public clients about their official duties. The heads of state departments, having to operate within the scope of delegated powers, are more often concerned about a legal definition of their duties than are the Governor or the legislature. The state departments thus have more need for and create a greater demand for legal advice and counsel of all kinds than the Governor or the legislature. State departments are also far larger than the Governor's office or the legislature. The Governor's office employs only 17 people, while the legislative branch consists of 133 legislators and 196 employees. In contrast, the Department of Health and Social Services employs almost 8,000 people,[47] and the University of Wisconsin on all its campuses almost 14,000.[48] A substantial majority of all the employees of the State of Wisconsin work in departments headed by appointees of independent boards or commissions.

### 3. OTHER CORRESPONDENCE

During the three year period from January 1, 1966, through December 31, 1968, the Wisconsin Attorney General's office annually received an average of 4,100 pieces of incoming correspondence which was classified as "new matter." "New matter" at that time included all incoming correspondence which did not pertain to a pending case or other active matter already in the office and which appeared to require an answer. This category included requests for official opinions which, during the same period, averaged approximately 500 each year. The office, therefore, handled approximately 3,600 items of incoming correspondence in addition to opinion requests.

The nonopinion correspondence is truly a "mixed bag," including requests for advice, legal and otherwise, from citizens of the state; requests for information; complaints about other state agencies;

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[46] The only way to measure the frequency of the use of the Attorney General's office by the Governor and the Legislature for legal advice is to review the informal letters and memoranda passing between the respective offices. In 1968, when the Governor and both houses were Republican and the Attorney General a Democrat, there were 16 letters and memoranda from the Attorney General and his staff to the Governor's office and 51 to the legislature and its committees. In 1952 when the Governor, the Attorney General and the Legislature were all Republican, there were only 8 communications to the Governor and 28 to the legislature and its committees.

[47] WIS. BLUE BOOK 466 (1968).

[48] *Id.* at 438.

and requests for assistance, political advice, and social commentary. It also includes "consumer protection" mail. Attorneys general in recent years have been in the forefront in their respective states in preparing and promoting consumer protection programs; Wisconsin is no exception. The Attorney General commenced an ambitious consumer protection program in 1965, and by 1968, complaints were being received at the rate of 750 a year,[49] thus accounting for about 20 percent of the miscellaneous new matter.

Most of the remaining new matter is better known in the office as "citizens' mail." Citizens' mail includes complaints, comments, and requests for information and advice from private citizens. In 1902, 31 of 78 published "opinions" were written to private citizens. The published opinions for 1912 contain 12 such letters; four were published in 1932. The disappearance from the published reports after 1932 of letters replying to citizens' requests for advice does not mean that such letters are no longer written. The almost universal reaction of an incumbent Attorney General is to attempt to reply in a manner calculated to make the recipient as pleased with his treatment as possible, without creating an undue burden on the staff of the office. Most of the mail, therefore, is answered courteously and promptly. The assistant attorneys general devote about six percent of their time to handling citizens' mail. In addition, in 1968, six or seven law students each spent about 10 hours a week during the school year and 20 hours a week during the summer answering citizens' mail. Such work is, therefore a not insignificant part of the workload of the office.

## IV. THE ATTORNEY GENERAL'S ROLE IN STATE GOVERNMENT

The Attorney General of Wisconsin is the chief legal officer for the entire state government. Like his counterparts in most other states, and unlike the United States Attorney General, he is more than simply the chief legal officer for the executive branch, performing that same role for the legislature, the other elected constitutional officers, and the independent state agencies. Moreover, he is himself an elected official responsible directly to the electorate which put him in office.

The Attorney General's role as the state's chief legal oficer is based upon his two basic statutory functions: litigation and legal advice. In fulfilling those two functions, the Attorney General actively participates in the formulation of state public policy in a wide variety of areas. In part because of his status as an elected public official, he also uses his functional roles to represent the public interest as he sees it, sometimes in opposition to other state administrative agencies. Finally, as an elected official responsive to the voters, he will sometimes act on behalf of individuals in their dealings with government agencies.

[49] WIS. DEP'T OF JUSTICE, CONSUMER PROTECTION REPORT 22 (1969).

### A. *The Litigation Function*

The Attorney General and his staff handle virtually all litigation involving the state or its agencies.[50] However, only a very small percentage of the cases on the Attorney General's litigation docket are actions started on his initiative. A substantial majority of the cases in which the Attorney General and his staff are involved are routine actions for judicial review of administrative decisions. Many more are actions commenced by the Attorney General at the request of another government official, or actions in which the Attorney General is defending the state or its agencies in litigation commenced by someone else.

On the surface, these facts would suggest that the Attorney General in his role as litigator has little effect on the public policy of the state. In fact, however, the Attorney General as litigator can substantially influence public policy. This ability stems from his influence as a lawyer over the conduct of the litigation he handles on behalf of his clients, his discretion in accepting cases for litigation, and his authoriy to initiate litigation on behalf of the state or its citizens.

#### 1. THE ATTORNEY GENERAL AS TRIAL COUNSEL

Lawyers, public or private, can play an important role in decisions respecting the initiation and conduct of litigation involving their clients. The lawyer's advice often controls the decision whether or not to commence a law suit. During the course of the litigation the lawyer's decisions and advice regarding tactics and strategy are crucial. Settlement or other termination of the litigation is also usually predicated on the lawyer's advice. Private lawyers and public lawyers such as the Attorney General play similar roles in this regard. In this way the Attorney General can exercise considerable influence in the formulation of public policy in his capacity as attorney for state agency litigants.

The Attorney General's ability to influence public policy in representing clients in litigation is subject to limitations, however. He, like the private lawyer, represents a client who makes the ultimate decisions respecting the disposition of the litigation. It is the client who decides whether or not to settle the matter, and who

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[50] WIS. STAT. § 20.918 (1967) prohibits the employment of an attorney by any state agency without the approval of the Governor. The Attorney General has consistently said that no attorney except those on the Attorney General's staff and those appointed pursuant to *id.* § 14.13 may represent the state or its agencies in court. 52 OP. WIS. ATT'Y GEN. 394, 402 (1963) and Letter from Atty. Gen. Bronson C. La Follette to Registration Board of Architects and Engineers, March 22, 1966. The only exceptions to those rules are those specifically provided for by law. The only significant exception is handling of unemployment compensation litigation by attorneys employed in the Department of Industry, Labor & Human Relations.

decides major questions of strategy and tactics along the way. The lawyer's role is to advise, and his ability to influence decisions depends upon the weight accorded his advice. In this respect the Attorney General may often be less able to influence his client than the typical private attorney. The private attorney represents his client because his client chose him from among the many lawyers available. The Attorney General represents his clients not because they chose him, but because he was elected to his office and the law requires his clients to be represented by him. The Attorney General, by virtue of the prestige of his office and his election, or by virtue of his skill and ability, may be quite successful in having his advice followed by his clients. Nevertheless, the fact remains that he is imposed upon his clients rather than being chosen by them.[51]

Because the Attorney General represents the state and its agencies in virtually all litigation, he may often have a decisive voice in establishing state policy simply by declining to represent the agency or officer asking him to initiate or defend litigation. The courts have cast some doubt on the Attorney General's right to exercise discretion in this respect. It has been suggested that when an appropriate request for representation is made, the Attorney General has a mandatory duty to respond.[52] To date, however, the issue has not been squarely presented to the Wisconsin Supreme Court.

The Attorney General has, in fact, refused to represent state agencies and officers requesting representation in litigation. Refusal has been based upon three different grounds: (1) the determination that there is a conflict between two or more state agencies requiring the Attorney General to choose to represent one, (2) the agency's failure to follow the Attorney General's advice with respect to the matter being litigated, or (3) the conclusion that, because of his views of the merits of the case, the Attorney General cannot in good conscience represent the agency in court. In each

[51] The Attorney General's ability as an individual to influence his clients' decisions is subject to a second limitation. Almost all of the litigation in which he is the statutory counsel for the litigant is in fact handled by an assistant attorney general. The advice and counsel that plays such an important part in the litigant's decisionmaking is that of the assistant rather than the Attorney General. Moreover, the assistant attorney general is employed under a civil service merit system and for that reason may be less likely than a political appointee to advise the client as the Attorney General would. The Attorney General may of course assume personal responsibility for the litigation. He may also, while leaving the case in the assistant's hands, exercise close supervision over the conduct of the litigation. With almost 1200 pending cases on his docket, however, the percentage of cases in which the Attorney General can follow either course is small.

[52] State v. Coubal, 248 Wis. 247, 259, 21 N.W.2d 381, 386 (1946); Emery v. State, 101 Wis. 627, 646, 78 N.W. 145, 151 (1899). *See also* First Fed. S. & L. Ass'n v. Loomis, 97 F.2d 831 (1938).

of these cases it seems quite proper and necessary for the Attorney General to conclude that he should not represent the state or the agency.

In a case of the first kind, where there is a conflict between two or more state agencies, it is arguable that the Attorney General could solve the conflict problem by assigning a different assistant attorney general to represent each of the contending agencies. The Attorney General, by avoiding personal involvement in the case, could provide competent representation from his staff for each agency and avoid the additional expense to the state of employing outside counsel. The problem with this approach, however, is that the Attorney General himself is required by statute to provide legal representation.[53] He may delegate to his assistants the duty of appearing in court and handling the litigation,[54] but the ultimate responsibility for the conduct of the litigation is the Attorney General's. The conflict of interest thus appears to be unavoidable, and the Attorney General's staff, under existing law, may represent only one of two conflicting interests in litigation.

A somewhat more difficult question is raised when the Attorney General refuses to represent a statutory client because the client has failed to follow his advice with respect to the matter in litigation. In private practice there is, of course, no rule requiring an attorney to abandon a client when the client becomes involved in litigation because he failed to follow his lawyer's advice. The private attorney, however, is not likely to find his own opinion cited in an opponent's brief during the litigation. The Attorney General's opinion, on the other hand, will almost certainly be public information and may be published in the *Opinions of the Attorney General.* Attorney General's opinions have traditionally been considered authority suitable for citation and are often cited in opinions of the supreme court. It would be extremely awkward for an Attorney General to argue a legal position in the face of his own published opinion to the contrary. An example of just this kind of situation can be seen in litigation, currently pending, involving a challenge by the members of certain Indian tribes to attempts by the State Department of Natural Resources to enforce state fish and game laws against tribe members hunting or fishing on reservations.[55] Because the Attorney General had issued an opinion contrary to the department's practices[56] which the department declined to follow, the Attorney General did not represent the department in the litigation.

Another more difficult question is involved where the Attorney

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[53] WIS. STAT. § 14.53(1), (2) (1967).
[54] *Id.* § 14.52.
[55] Great Lakes Intertribal Council v. Voigt, Civ. No. 68-C-95 (W.D. Wis., filed June 11, 1968).
[56] 56 OP. WIS. ATT'Y GEN. 11 (1967).

General refuses to represent a state agency because he disagrees with the agency's position on the merits. When an Attorney General refuses to represent a client on this ground, he is, in effect, saying that a request for his services in litigation is directed to his discretion, and he need not comply if he does not believe the state's position is legitimate. At the federal level it seems well-established that this is the appropriate role for the Attorney General to play. Cummings and McFarland, in their book, *Federal Justice*, make the following observation:

> The attorney general and the officers of the Department of Justice are charged with no such single duty as requires merely interpretation, prosecution, or defense at the behest of public administrators. In the words of the Supreme Court, they have the *duty*—not merely the power—of examining the "scope and propriety" of administrative action and of "sifting out" what is pertinent and lawful before asking the courts to adjudge. Moreover, says the nation's highest tribunal, the wide scope and variety of these questions "show the wisdom of requiring the chief law officer of the government to exercise a sound discretion."[57]

All lawyers are required by the canons of ethics to evaluate the merits of a claim before bringing the matter to litigation. Canon 30 of the *Canons of Professional Ethics* provides that a lawyer's "appearance in court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination."[58] To require that an Attorney General litigate a case at the request of one of his statutory clients, regardless of his views of the merits, seems hardly tolerable. The Attorney General of Wisconsin can and does exercise discretion with respect to initiating litigation at the request of other state officers. However, the actual impact of that discretion, while important, should not be overemphasized. There are two major factors which limit the ability of an Attorney General to establish state policy by refusing to represent a client in litigation.

First, the vast majority of cases are handled as a matter of course, with little concern for the merits of the case. The many cases where the Attorney General is called upon to defend the workmen's compensation decisions of the Department of Industry, Labor, and Human Relations, for example, are almost always handled as a

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[57] H. CUMMINGS & C. MCFARLAND, FEDERAL JUSTICE 510 (1937), citing F.T.C. v. Clair Co., 274 U.S. 160, 174 (1927).

[58] ABA CANONS OF PROFESSIONAL ETHICS No. 30. The *Code of Professional Responsibility of the American Bar Association* (1969) was made the standard of ethical conduct for Wisconsin lawyers by the Wisconsin Supreme Court on December 16, 1969, effective January 1, 1970. 43 Wis. 2d xiv (1969). Disciplinary Rule (DR) 7-103(A) provides as follows:

> A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

43 Wis. 2d at lxii.

matter of routine. The responsible assistant attorney general defends as best he can the position taken by the department, without concerning the Attorney General with questions about the merits. This is not to say that the routine will not be broken from time to time and a particular case called to the attention of the Attorney General, either by a member of his staff or someone outside the office. It may also be that those cases which do come to the Attorney General's attention are the important ones. Nevertheless, the number of such cases breaking out of the routine is small; moreover, the initial judgment that a given case is one that the Attorney General may choose not to handle is usually made by a career member of the civil service staff whose notions on the subject may be quite different from the Attorney General's.

Second, if the Attorney General declines to act in litigation, the Governor may appoint special counsel to act in his place.[59] Thus, the agency or officer involved may be able to litigate the matter with the benefit of counsel in spite of the Attorney General's position. In many cases the result is precisely that. The client is represented by special counsel appointed by the Governor and the litigation proceeds. In those cases, of course, the Attorney General's action has little impact on the policy of the state. The Governor, however, may not be willing for various reasons to appoint special counsel. If he does not do so, the agency or officer involved cannot be represented[60] and presumably will have to abandon its position. In such cases the Attorney General's refusal to accept the case has a decisive influence on state policy with respect to the subject matter of the litigation.

An example of the potential impact on public policy of an Attorney General's refusal to act at the request of a client occurred in 1967. The Governor requested the Attorney General to obtain an injunction to halt or limit picketing in the Milwaukee suburb of Wauwatosa conducted by members of the N.A.A.C.P. Youth Council to protest the membership of public officials in the Eagles Club. The Attorney General declined to seek the injunction on the grounds that there were insufficient legal grounds for the injunction and instead sought successfully to negotiate a solution to the problem.[61] In this case the Governor could have appointed special counsel to act instead of the Attorney General to attempt to obtain the injunction. The fact that he did not, in spite of the Attorney General's refusal to initiate litigation, meant that the Attorney General's decision with respect to the legal merits of the controversy was the decisive factor in establishing state policy respecting the picketing.

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59 WIS. STAT. § 14.13 (1967).

60 *See* note 50, *supra.*

61 Letter from Attorney General Bronson La Follette to Governor Warren Knowles, Sept. 1, 1966.

### 2. LITIGATION INITIATIVE

The Attorney General, where authorized by statute, may commence legal action on behalf of the state without the direction or request of a client agency or officer. In such instances the Attorney General may, on his own initiative and in his discretion, establish the public policy of the state. Without the inherent or "common law" power to initiate litigation which most of his counterparts in other states possess,[62] the Attorney General of Wisconsin must find his authority to take such action in the statutes. By virtue of statutory delegation, however, the Attorney General has the authority to represent the public interest on his own initiative in a broad spectrum of cases involving important areas of public concern.[63]

Anti-trust litigation has been far and away the most significant of the Attorney General's initiative activities. In 1893 Wisconsin enacted legislation providing that "every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal."[64] This language, taken directly from Section 1 of the federal Sherman Act of 1890, has ever since been the heart of the Wisconsin anti-trust law. The Attorney General, since 1893, has been involved in the enforcement of this provision. With the exception of a spurt of activity under Attorney General Morgan in 1921-23, however, there was little action in the anti-trust field until 1947 when the legislature created an anti-trust division within the Attorney General's office. Since 1947 there has always been at least one assistant attorney general assigned to anti-trust work, and for most of this period Wisconsin has been one of the leaders among the states in the enforcement of anti-trust laws.[65] The cases prosecuted under the state law since 1947 range all the way from actions against funeral directors[66] to milk distributors[67] to organized baseball.[68]

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[62] *See* note 20, *supra.*

[63] *See* discussion contained in note 29, *supra.*

[64] Ch. 219, § 1, [1893] Wis. Laws 294. The basic statute today is WIS. STAT. § 133.01 (1967).

[65] *See* Comment, *Anti-Trust Law in Wisconsin*, 1951 WIS. L. REV. 657.

[66] State v. National Funeral Directors Ass'n, Inc., Case No. 323-037 (Cir. Ct., Milwaukee County, Nov. 29, 1967).

[67] State v. Golden Guernsey Dairy Co-op, 257 Wis. 254, 43 N.W.2d 31 (1950).

[68] State v. Milwaukee Braves, Inc., 31 Wis. 2d 699, 144 N.W.2d 1 (1966), *cert. denied*, 385 U.S. 990, *rehearing denied*, 385 U.S. 1044 (1967).

The Attorney General may also initiate action against anti-competitive activities through the administrative process. The State Department of Agriculture has powers similar to those of the Federal Trade Commission to issue general or special orders prohibiting unfair trade practices and unfair methods of competition. This delegation of power includes the authority to prohibit such anti-competitive activities as price fixing. A particular violation, therefore, may come within the scope of the state anti-trust law and the jurisdiction of the Department of Agriculture at the

The Wisconsin Attorney General has played an increasingly important role in protecting the consumer from fraudulent and unfair market practices. The agency primarily responsible for consumer protection in Wisconsin has been the State Department of Agriculture. In recent years, however, the Attorney General has taken an active part in the protection of consumers. Prior to the 1969 session of the legislature, his authority for doing so emanated from three sources: (1) his power to initiate special order proceedings against unfair trade practices before the Department of Agriculture; (2) his authority to bring actions to revoke corporate charters and to enjoin a corporation from doing business for violation of the Department of Agriculture's general or special orders; and (3) his authority to seek injunctions against public nuisances.[69] With the passage in the 1969 session of legislation authorizing the Attorney General and the district attorney to apply directly to the courts for injunctions against false or misleading sales practices, the Attorney General's role in consumer protection should expand even more.[70]

The Attorney General's role in consumer protection, however, will probably continue to be one of promoting voluntary settlement of disputes and voluntary discontinuance of unfair trade practices with only rare resort to litigation. The litigation authority is a necessary tool to achieve voluntary compliance, but the pattern in Wisconsin and elsewhere is that it is seldom necessary to actually litigate a consumer matter.[71]

In addition to the statutes giving the Attorney General the power to initiate action to deal with anti-trust violations and consumer protection, some 40 other statutes authorize direct court action under the auspices of the Attorney General. The authority granted by these statutes has been seldom used, and in many cases, is not very significant. In some instances, however, the Attorney General's largely dormant powers might be exercised with significant effects upon public policy. His powers relating to charitable solicitations, the enforcement of charitable trusts, gambling, prostitution, and liquor law violations embody great potential for the protection of the public and for law enforcement. But perhaps the most important of all the Attorney General's initiative powers is his power to seek injunctions against public nuisance.[72]

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same time. If the Attorney General complains of an unfair trade practice or unfair competition, the Department is required to hold a hearing on his complaint. The Attorney General may, therefore, choose to proceed administratively rather than through the courts in combatting certain kinds of anti-competitive activity.

69 WIS. DEP'T OF JUSTICE, *supra* note 49, at 20-22.

70 Ch. 425, § 3, [1969] Wis. Laws —, *creating* WIS. STAT. § 100.20(6) (7 WEST WIS. LEGIS. SERV. 2042 [1970]).

71 WIS. DEP'T OF JUSTICE, *supra* note 49, at 23, 218, 223, 226.

72 WIS. STAT. § 280.02 (1967).

Using his authority to abate public nuisances the Attorney General can, for example, play an important role in the protection of the environment. The Attorney General's traditional role in environmental protection has been to seek court enforcement of pollution abatement orders issued by administrative agencies. In this role the Attorney General operates in the same capacity as he does in the representation of any other state agency in court—as an attorney representing a client. The client agency takes the initiative and the Attorney General's role is solely responsive. In addition, however, the Attorney General's authority to abate public nuisance allows him to initiate litigation directed at the abatement of environmental pollution.

The Wisconsin court has defined a nuisance to include any "condition or activity which unduly interferes with the use of land or of a public place. . . . Conduct which interferes with the use of a public place or with the activities of an entire community is called a public nuisance."[73] A nuisance under this definition includes an activity or condition which pollutes the air or water. If the pollution affects a public drinking water supply, or public recreational waters, or the air over an entire community, it would be a public nuisance and would thus be within the Attorney General's authority to abate. Under this authority, the Attorney General in effect has concurrent jurisdiction with the state Department of Natural Resources to act against air and water pollution.[74]

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[73] Schiro v. Oriental Realty Co., 272 Wis. 537, 546, 76 N.W.2d 355, 359 (1956); Hartung v. Milwaukee County, 2 Wis. 2d 269, 284, 86 N.W.2d 475, 484 (1957). *See also* Costa v. Fond du Lac, 24 Wis. 2d 409, 129 N.W.2d 217 (1964); Briggson v. Viroqua, 264 Wis. 47, 58 N.W.2d 546 (1953).

[74] Stearns v. State Comm. on Water Pollution, 274 Wis. 101, 79 N.W. 2d 241 (1956). The suggestion to the contrary in Carmichael, *Forty Years of Water Pollution Control in Wisconsin: A Case Study*, 1967 WIS. L. REV. 350, 379 n. 129 (1967) does not seem to be supported by the cases. Moreover, there is a good argument that such concurrent jurisdiction may be highly beneficial. Some pollution problems may be more susceptible to the administrative procedure while others should be taken directly to court through a nuisance action. In addition, a little competition and a bit of looking over the shoulder in this area might not be at all out of place. For a similar argument in relation to the participation by an attorney general and a regulatory agency in consumer protection see, Note, *Developments in the Law, Deceptive Advertising*, 80 HARV. L. REV. 1005, 1134 (1967).

The Attorney General and his staff have another important role to play in the protection of the environment. Legislation enacted in 1967 requires the Attorney General to designate an assistant attorney general as "public intervenor." The act provides that the "Public intervenor may, on his own initiative . . . intervene in [proceedings under chs. 30, 31, and 144 WIS. STAT.] for the protection of 'public rights' in water and other natural resources . . . ." Ch. 75, § 25(9), [1967] Wis. Laws 168-69. Under this authority the Attorney General, through the public intervenor, may participate in any proceeding involving navigable waters, dam and bridge construction, or water or air pollution as a representative of the public interest. The public intervenor may also command the resources of other appropriate state agencies and employees as witnesses or for assistance in preparing his case. The public intervenor law gives the Attorney General all the

The Attorney General's authority to seek judicial abatement of public nuisances has potential importance beyond the area of environmental protection. A public nuisance is any "open, continuous, and intentional violation of the law" including an administrative rule or order.[75] Activities enjoined as public nuisances have included the illegal use of property for the sale of intoxicants,[76] theater bank-night lotteries,[77] the illegal practice of optometry,[78] and price discrimination in the sale of gasoline.[79] In a case now on appeal to the Wisconsin Supreme Court, the Attorney General is seeking to enjoin as a public nuisance the practice of charging more than the 12 percent interest rate allowed under the usury law for purchases made on the so-called "revolving charge account" plans.[80]

It requires only a little imagination to see the potential use an Attorney General might make of his broad authority to seek abatement of public nuisances. The Attorney General, in effect, has concurrent jurisdiction with state regulatory and licensing agencies to enforce the laws and regulations under which they operate. Any person acting under an improperly granted license or in excess of his authority as a licensee is probably engaging in activity constituting a public nuisance. Any public utility operating in violation of the laws or regulations governing the utility may be conducting a public nuisance. Open, continuous, and intentional violation of the criminal law is also a public nuisance. This might include not only bawdyhouses and gambling dens, but loan sharking, extortion, and other patterns of illegal activity as well. The potential for dealing with some of the activities or organized crime is apparent.

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authority necessary to fully represent the public interest in any proceeding coming within the scope of the law.

The public intervenor law does not authorize the Attorney General nor the public intervenor to initiate proceedings under chs. 30, 31, or 144 WISCONSIN STATUTES. Such proceedings are ordinarily initiated by the Department of Natural Resources. The Department may, however, be required to hold a hearing "relating to alleged or potential environment pollution upon the verified complaint of six or more citizens. . . ." If such a complaint is filed, the public intervenor may participate as a representative of the public interest. Thus the Attorney General or the public intervenor with the cooperation of any five additional citizens of the state may initiate a pollution hearing and represent the public interest at that hearing when it is held.

75 State v. Texaco, 14 Wis. 2d 625, 639, 111 N.W.2d 918, 925 (1961).

76 State *ex rel* Att'y Gen. v. Thekan, 184 Wis. 42, 198 N.W. 729 (1924).

77 State *ex rel* Cowie v. La Crosse Theaters Co., 232 Wis. 153, 286 N.W. 707 (1939).

78 State *ex rel.* Abbott v. House of Vision, 259 Wis. 87, 47 N.W.2d 321 (1951).

79 State v. Texaco, 14 Wis. 2d 625, 111 N.W.2d 918 (1961).

80 State v. J.C. Penney, Case No. 125-287 (Cir. Ct. Dane County, Nov. 13, 1969), *appeal docketed*, No. 325 (Aug. term 1969, Wis. Sup. Ct., Dec. 1969).

The Attorney General's authority to seek abatement of public nuisances holds promise as a tool for dealing with some kinds of criminal activity. The most obvious gap in the Attorney General's authority to initiate litigation, however, is his lack of general statutory authority to prosecute violations of the criminal law.[81] In this and other areas where the Attorney General is without statutory authority to initiate litigation, he has another approach available: he may obtain ad hoc authorization from the Governor or either house of the legislature to initiate on behalf of the state any action in which the state or the people of the state may be interested.[82] By obtaining the proper authorization, therefore, the Attorney General may prosecute any crime, at any time, in any place within the state. Attorneys general have made good use of this procedure on several occasions in the past. In the last decade, for example, the Attorney General has initiated a broad scale investigation of illegal activities in the Milwaukee area which led to 40 prosecutions by the Attorney General's staff and special counsel, and a grand jury investigation into illegal gambling activities in Kenosha which resulted in numerous prosecutions. In each of these proceedings the Attorney General requested and received authorization from the Governor to initiate the investigation and to prosecute the resulting cases.

Another class of cases where the Attorney General has requested and received authorization to commence litigation is a treble damage action under the federal anti-trust law. In these cases, as well as in the criminal proceedings where the Attorney General has obtained authorization to take action, the process has been initiated by the Attorney General. He and his staff investigate potential litigation and present the facts to the Governor with the request that the action be authorized. Seldom, if ever, has such a request been refused.[83] As a practical matter it is difficult for a Governor to refuse a well substantiated request urged upon him by the Attorney General and his staff. It is particularly difficult when the possibility exists that a refusal could lead to a subsequent request for legislative authorization for the same action.

The Wisconsin Attorney General has been delegated the authority by the legislature to initiate litigation in a broad range of cases to protect the public interest. His delegated authority probably gives him the ability to initiate litigation in almost any civil

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[81] *See* discussion at note 26, *supra.*

[82] WIS. STAT. § 14.53(1) (1967).

[83] Of the eleven anti-trust treble damage actions commenced by the Attorney General in the history of the State of Wisconsin, seven were begun in the 1967-69 biennium. All of these actions were authorized by a Republican Governor at the request of a Democratic Attorney General. No request by the Attorney General was refused. *See* PROGRAM BUDGET REQUESTS OF THE DEPARTMENT OF JUSTICE FOR THE 1969-71 BIENNIUM, at 10 (Sept. 1968).

case in which his English predecessors or his counterparts in other states possessed of inherent authority or "common law powers" may act.[84] His power to call upon the Governor or one house of the legislature for ad hoc authorization to "prosecute or defend [any action], civil or criminal, in which the state or the people thereof may be in anywise interested" enables him to call upon the full powers of the judiciary for the protection of the public interest.

The Attorney General of Wisconsin has only sparingly exercised his authority to initiate litigation on behalf of the state and its citizens.[85] The infrequency of such litigation does not appear to be due to the lack of authority to act, but probably to a shortage of staff. In part it is probably due to a failure to establish explicit priorities, with a tendency instead to respond to the demand for services on the part of other state agencies. The staff problem has, to some extent, been alleviated. Although only three lawyers were added to the Attorney General's staff between 1960 and 1965, since 1965 the number of assistant attorneys general positions on the staff has increased by 18, from 25 in 1965 to 43 in 1970. Given continued adequate growth of staff, the chief remaining need is for the establishment and the enforcement of firm priorities for the employment of staff time. The only way to prevent the using up of available manpower in processing the demands of client agencies is to make a firm commitment of resources to initiating litigation in the public interest and to stick to that commitment.

### *B. The Legal Advice Function*

The Attorney General's statutory obligation to provide legal ad-

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[84] The extent of the so called "common law powers" of an attorney general is unclear. These powers presumably include all of the powers possessed by the Attorney General of England. Toepfer, *supra* note 20, at 206, and Sheppard, *supra* note 20, at 1. According to the incumbent Attorney General of England, his powers on the civil side make him "the protector not only of charities but of the public interest generally. . . . He has for long been the proper person to take legal proceedings when the interests of the public are endangered or acts tending to public injury are done without authority." Jones, *supra* note 12, at 52.

Attorney General Sheppard of Texas has attempted to list the most important of these common law powers. Sheppard, *supra* note 20, at 12-17. The list includes public nuisance abatement, enforcement of public charitable trusts, escheat matters, quo warranto, and others, most of which appear in the statutes regarding the Attorney General of Wisconsin.

[85] The Attorney General's docket at the end of 1968 included only 91 civil cases initiated by the Attorney General as compared with 818 in which the Attorney General represented another state agency. Sixty-eight of the 91 cases were relatively routine escheat matters which are started by notification to the Attorney General of the pendency of probate proceedings in which the state might have an interest. Thus, only 23 civil actions or 2.5% of the cases on the civil docket were cases actually initiated by the Attorney General. Yet this total may be something of a high water mark since the 13 pending anti-trust and trade practice cases were probably the largest number of such cases on the docket at any one time in history.

vice for a large number of public clients gives him the opportunity to play several different roles in state government. He may act as a legal counselor for his public clients; he acts to a very significant extent as a lawmaker; he often uses his legal adviser's position to mediate disputes between state agencies; and, he acts as an unofficial "ombudsman" on behalf of individual citizens dealing with government.

### 1. THE ATTORNEY GENERAL AS LEGAL COUNSELOR

An attorney in private practice may spend a substantial portion of his time helping his clients devise ways to lawfully achieve their goals or to take advantage of legal benefits of which the client might not be aware. Attorneys work closely with their clients to give them the benefit of legal counsel while decisons are being made, rather than after. Common examples of this kind of legal counseling are estate planning, business organization, and business financing. The role of the lawyer in this context is to give his client every opportunity afforded by the law to succeed in achieving the goals set by the client.

An Attorney General and his staff may play a similar role in the Attorney General's capacity as legal adviser to state departments and agencies. At the outset, however, it is important to note that there are two diametrically opposed views regarding the appropriateness of an Attorney General serving as legal counsel for the officials it is his duty to advise. One view is that the Attorney General is a quasi-judicial officer whose duty is to act as an impartial expounder of the law rather than as a lawyer advising a client. This view was expressed by United States Attorney General Caleb Cushing in an 1854 opinion which is to this day one of the most comprehensive reviews of the duties of his office:

> The Attorney General is not a counsel giving advice to the Government as a client, but a public officer acting judicially, under all the solemn responsibilities of conscience and of legal obligation.[86]

The opposing view is that the Attorney General and other government lawyers ought to work closely with their clients, giving them the benefit of legal counsel during the formative stages of decision making. Public administrators, no less than businessmen and other private citizens, need legal advice from an attorney who is concerned with helping his client accomplish his objectives. From the point of view of the public administrator, government lawyers, including the Attorney General's staff, should be "man-

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[86] C. CUSHING, OFFICE AND DUTIES OF THE ATTORNEY GENERAL, H.R. Doc. XI, No. 95, and S. EXEC. Doc. VIII, No. 55, 33d Cong., 1 Sess. (1854), cited in H. CUSHING & C. MCFARLAND, *supra* note 57, at 150 n. 33.

agement aids with auxiliary staff status, rather than quasi-judicial entities."[87]

Most of the unwritten legal advice given to state agencies by the Attorney General's office is from an assistant attorney general. In many cases a state official will seek direct, informal consultation with the Attorney General or his deputy, but quantitatively the advice obtained from 40 career assistants is far more significant than that obtained from the Attorney General and his deputy who must spend a great percentage of their time on administrative and political matters. The most relevant factors in assessing the nature of legal counsel available to state agencies from the Attorney General's office, therefore, are the availability and attitudes of the career assistant attorneys general involved.

Forty assistant attorneys general spend, on the average, 13 percent of their time conferring with and advising state agency clients.[88] This amounts to the full time equivalent of just over five lawyers to provide legal advice for 41 separate state agencies, many of which are of a size equivalent to a substantial corporation. Moreover, because of the need to operate within a statutory grant of power, and because of the nature of their duties which effect the legal rights and interests of countless numbers of people, state agencies are prolific generators of legal problems. Consequently, because of sheer workload, it is difficult for the Attorney General's staff to provide the kind of day-to-day legal counseling public administrators desire.

The volume of work alone, however, need not prevent the Attorney General and his staff from giving legal advice oriented toward the policy objectives of the agency. Many agencies have their own house counsel and turn to the Attorney General only rarely for legal advice. Others, even without house counsel, manage to handle their own affairs with only infrequent contact with the Attorney General's office. These agencies use the Attorney General's staff much as a private corporation uses the law firm it has on retainer—only for litigation or particularly specialized or complex legal problems. The private law firm normally brings to this relationship the kind of single minded devotion to a client's cause that would satisfy any public administrator. If the Attorney General's staff responds differently, it cannot be attributed entirely to lack of manpower but must also be a question of attitude.

Whether or not a government lawyer, particularly one employed in a central independent legal office such as that of the Attorney

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[87] Pfiffner, *The Role of the Lawyer in Public Administration*, 20 S. CAL. L. REV. 37 (1946).

[88] This and subsequent information is taken from responses to a questionnaire given to each Wisconsin assistant attorney general in 1969 relating to their activities during 1968. *See* discussion in text at III-B.

General, subscribes to the theory that he acts in a quasi-judicial capacity when advising clients, he is likely to view his job as different from that of a private lawyer. He does not serve just one master. If the lawyer is an assistant attorney general, he has at least three: the client agency, the Attorney General, and the public. In some respects this may amount almost to a built-in conflict of interest, particularly when the actions of the agency may adversely affect the interests of a large segment of the public.[89] How does the lawyer advise his public client? Does he assist the agency in devising ways to extend its authority to the utmost permitted by law—or does he, having regard for the broad public interest, put a limiting legal construction on his client's authority? Is he a part of the agency's management team, or is he an independent, quasi-judicial restraining influence?[90]

Agencies relying upon the Wisconsin Attorney General's staff for legal counsel find that the counsel available represents most points of view on the spectrum from the most hardened, quasi-judicial nay-sayer to the most ardent member of the agency's management team. In this office, staffed by career civil servants, the Attorney General of the moment may influence the availability and attitude of legal counsel, but it is more likely to be determined by the staff members. If an assistant attorney general wishes to make himself more available for legal counseling, he will find ways to do so; if he does not care to be available, he can avoid it.

Attitudes among assistant attorneys general with respect to their role in legal counseling vary widely. In response to a questionnaire, seven of 23 assistant attorneys general who responded agreed with the following description of their role as legal adviser: "My chief responsibility as an independent lawyer is to insure that the rule of law governs the actions of state agencies." Six more respondents expressed in their own words a similar view of their role. Seven respondents agreed with this statement: "My chief responsibility is to assist the agency in findng legal methods by

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[89] For a discussion of the conflict felt by a lawyer in the United States Department of Justice who had to choose between his conception of the public interest and what the law required on the one hand, and his loyalty to the Attorney General on the other, *see* Greenberg, *Revolt at Justice*, THE WASHINGTON MONTHLY, Dec. 1969, at 32.

[90] Jack B. Weinstein, now a United States district judge and formerly County Attorney for Nassau County, New York, as well as a law professor, stated the problem a little differently:

> The bothersome problems of a government attorney are not so much the legal-technical problems of what can be done, or how to do it, but what should be done. As Edmund Burke put it in his Plea to Parliament on Behalf of the American Colonies in 1775, "the question with me is . . . not so much what a lawyer tells me I may do, but what humanity, reason, and justice tell me I ought to do."

Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 MAINE L. REV. 155, 158 (1966).

which it can achieve its policy goals." Three additional responses expressed a point of view similar to this second statement. In all, 13 of the 23 respondents adopted or leaned toward the position that their chief responsibility in advising state agencies was to keep the agency's activities within legal bounds, while 10 of 23 saw their job as being more importantly to help the agency implement its policy.

It is difficult to dispute the proposition that public administrators should have the benefit of legal advice to assist them in making policy decisions. The Superintendent of Public Instruction considering his department's position regarding school dress codes, the Secretary of the Department of Natural Resources contemplating his department's land acquisition policy, and the President of a State University formulating policy regarding student discipline should have legal advice at the time their decisions are made. It is perhaps less clear that the lawyers providing this advice ought to be as totally oriented toward implementing the department's policy objectives as a private lawyer might be. There is validity to the notion that public lawyers ought to have a broader public interest in mind when advising their public clients. However that may be, given the attitudes toward legal counseling expressed by the majority of the assistant attorneys general, and the scarcity of time they have available for legal counseling, it is not surprising that state administrators are persistent in their efforts to acquire staff attorneys within their operating agencies.[91]

Attorneys General have traditionally resisted attempts by administrators to add staff attorneys on the grounds that legal services for state agencies ought to be centralized in the Attorney General's office.[92] The chief arguments made in support of this position are that centralization permits more efficient use of a lawyer's time because he will always be engaged in "lawyer's work" and not doing other nonlegal work for the administrative agency; that a staff lawyer dependent for promotions and merit increases upon the administrator he advises cannot give truly independent legal advice; and that a lawyer's work ought to be supervised by a lawyer who can evaluate his performance better than a nonlawyer.[93] The weight of these arguments may be conceded, however, without conceding the basic proposition that all legal services ought to be centralized in the Attorney General's office.

Surely there are small state departments and agencies that do not generate enough legal work to justify the employment of a staff

[91] The extent to which this persistence has paid off is reflected by the fact that there are more attorneys employed by the State outside the Attorney General's office than within it. WIS. DEP'T OF ADMIN., PERSONNEL MANAGEMENT SURVEY: CLASSIFICATION OF ATTORNEY POSITION AND ESTABLISHMENT OF ATTORNEY SALARY SCHEDULE (June 1967).

[92] *See* PROGRAM BUDGET REQUESTS, *supra* note 83.

[93] *Id.* at 8.

attorney. All legal services for such organizations ought to be provided by the Attorney General. Many departments, however, can demonstrate a clear need for ongoing legal advice as an integral part of the decisionmaking process. This kind of legal advice typically is not being provided by the Attorney General and his staff and it probably should not be. The role of the Attorney General's office in providing legal advice ought to be much like that of a private law firm retained by a private corporation. Such a law firm can provide legal advice which is likely to be more independent and objective than the advice the corporation might get from its house counsel. The private corporation, if it is large enough to warrant it, nevertheless does employ house counsel. It is difficult to see why larger state departments and agencies, if they can meet the burden of economic justification, ought to be denied the same benefit.

### 2. THE ATTORNEY GENERAL AS LAWMAKER

The opinions of the Attorney General of Wisconsin are probably not legally binding on the recipient of the opinion. The same is true of the opinions of the Attorney General of England, the U.S. Attorney General, and nearly all other state attorneys general.[94] Opinions of the Attorney General are ordinarily considered to be advisory only, and the government agency being so advised is legally no more required to follow the advice than is a private client the advice of his lawyer. In practice, however, if a state agency requests and receives an Attorney General's opinion, there is a high probability that the opinion will be followed.

There are several reasons for the tendency to follow an Attorney General's opinion. First, and perhaps most important, it is likely that the agency's principal motivation is to do what the law requires, and it is this motivation that causes the request for an opinion in the first place. When the agency receives an apparently well-researched and well-reasoned opinion advising a course of action, that course is likely to be followed.

Second, an experienced and resourceful agency head is likely to have a fairly good idea what the answer to his legal question will be before he asks it. This is particularly true of those agencies which have developed a close "legal counsel" relationship

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[94] Larson, *The Importance and Value of Attorney General Opinions*, 41 IOWA L. REV. 351, 361 (1956). The obligation of members of the executive branch in the federal government to follow an attorney general's opinion is not entirely clear. The President has sometimes issued an executive order requiring compliance with attorney generals' opinions. *See* H. CUMMINGS & C. MCFARLAND, *supra* note 57, at 517-18.

It has also been argued in the United States that to require an executive officer to abide by an attorney general's opinion is bad policy because it interferes with the rightful discretion of the recipient of the opinion. Toepfer, *supra* note 20, at 215-16.

with the Attorney General's staff as described in the preceding section. Even without such an advantage, however, it is possible for an agency head to take preliminary soundings, and often, if the soundings indicate an opinion contrary to his perception of the agency's best interest, he will simply not request the opinion.

Third, administrators often feel the need to be "protected" by an Attorney General's opinion, particularly if there is some indication that some contemplated action might lead to controversy. Typical examples of this felt need for the protection of an opinion are questions concerning the legality of an expenditure or the merits of a financial claim against the state. Whether or not an administrator is, in fact, protected from legal responsibility if he acts in accordance with an Attorney General's opinion is debatable.[95] In any event, the protection which the administrator seeks from an Attorney General's opinion may be more from public criticism than from legal liability. Whatever the motivations and whatever the legal effect of an opinion, however, the important point here is that an ageny requesting an opinion is likely to follow its advice.[96]

Given the tendency of the state agency to follow an Attorney General's requested opinion, the opinion is often the final word on the law governing the matter. In many, if not most cases where an Attorney General's opinion is obtained, the issue is unlikely to be litigated. This is particularly true where the issue involved is a dispute between, or affects rights and obligations between, two or more state agencies. In many cases, even though the opinion affects the interests of private parties, there is no effective recourse to the courts because of the nature of the issue, the motivation of the parties involved, and, perhaps most importantly, the expense of contesting an opinion in litigation.[97]

Once published, Attorney Generals' opinions may become a source of "law" extending beyond the particular issue or parties in-

[95] Following an opinion may provide a good faith defense when that is relevant. But the recipient of the opinion probably must be prepared to defend the legality of his actions if they are later challenged. Larson, *supra* note 94, at 361-62; Toepfer, *supra* note 20, at 216-17.

[96] If the opinion involves the duties of someone other than the public entity requesting the opinion, it is less likely that it will be followed. Where, for example, the State Bar requested an opinion concerning the duties of the Dept. of Natural Resources, the opinion was ignored by the Dept. 56 OP. WIS. ATT'Y GEN. 11 (1967). The general rule that an Attorney General will only provide an opinion regarding the official duties of the requesting officer thus seems wise.

[97] For example, the proponents of aid to private parochial schools devoted considerable time and expense to their effort to gain the Attorney General's approval of a proposal for paying the salaries of public school teachers teaching certain classes in parochial schools. When the Attorney General's opinion was contrary, however, the issue was not litigated in spite of its substantial financial effect. *See* 55 OP. WIS. ATT'Y GEN. 124 (1966).

volved in the original request. Annotated statutes, treatises, and other legal source materials cite Attorney Generals' opinions and, in fact, Attorney Generals' opinions may be the only available authority interpreting seldom litigated statutory or constitutional provisions. Moreover, a long standing Attorney General's interpretation will be accorded great weight by the courts if the issue is subsequently litigated.[98] Therefore, an Attorney General's opinion may be the authoritative pronouncement of the law with respect to a particular fact situation or a dispute involving a small number of people interested in a given case, and it may also be the law with respect to other related issues involving entirely different parties.

Since about 1942, the published *Opinions of the Attorney General* have included only a portion of the written opinions actually issued by the office. A distinction is made between what are now called "informal" opinions, which are not published, and "formal" opinions which are. There is no indication of record that any criteria have ever been established to determine which opinion will be formal and which informal. The practice has been that those opinions considered by the Attorney General, his deputy, or other staff members to whom this decision is delegated, to be important, are published as formal opinions. The importance depends upon such factors as the interest of the bar, the press, and the general public in the subject matter of the opinion, and the likelihood that the opinion will be useful to the bar as a legal resource. Since the practice is to release published opinions to the press as soon as they have been received by the addressee, the decision to publish or not publish may also be determined by the need for confidentiality in giving the legal advice contained in the opinion.

Published opinions are subjected to much more scrutiny and review than unpublished opinions. Various schemes have been devised to assure effective review by the Attorney General and his staff prior to publication. This usually involves circulation of a draft of the opinion to the entire staff for comments. Attorneys General from time to time have also established review panels consisting of selected members of the staff to perform this function. In any event, the published opinion is subjected to a more or less rigorous review procedure which, since it involves attorneys busy with

[98] Larson, *supra* note 94, at 363-65; Toepfer, *supra* note 20, at 219. The rationale for giving weight to attorney generals' opinions is the doctrine of "practical construction." This argument is particularly strong if the opinion has not been disturbed by subsequent sessions of the legislature. *See, e.g.*, Union Free High School Dist. (Montfort) v. Union Free High School Dist. (Cobb), 216 Wis. 102, 106, 256 N.W. 788, 790 (1934). *See also* Wisconsin Valley Imp. Co. v. Public Serv. Comm'n, 9 Wis. 2d 606, 616-17, 101 N.W.2d 798, 803 (1960); State *ex rel.* West Allis v. Dieringer, 275 Wis. 208, 219-20, 81 N.W.2d 533, 539-40 (1956); Harrington v. Smith, 28 Wis. 43, 69 (1871).

other matters, can sometimes take a long time. The decision not to publish an opinion may, because of this, be based upon the need for a prompt opinion.

The process by which an informal opinion is prepared is not significantly different from the process by which a private law firm prepares an opinion letter for a client. Although there may often be considerable consultation among staff members regarding an informal opinion, it is basically the product of a single staff member's research and writing. An informal opinion does not receive the scrutiny of other members of the staff nor, in some cases, of the Attorney General or his deputy that a formal opinion does. Quite often, although the practices have varied from one Attorney General to another, informal opinions may be signed by the assistant attorney general who researched and drafted the letter rather than by the Attorney General.

The way in which an informal opinion is prepared and issued seems to work satisfactorily. Because it is not published, and because it is generally treated as informal legal advice rather than a pronouncement of the law for this and subsequent cases, there is little reason to treat the preparation of an informal opinion of the Attorney General in a very different way than the preparation of a legal opinion by a private law firm.[99] A formal opinion, however, is another matter. The importance and widespread impact of a formal opinion requires careful consideration of the way in which it is prepared and published.

The extensive staff review to which a formal opinion is subjected results generally in a legally sound opinion. The scrutiny of experienced lawyers helps to assure accuracy and quality. One ingredient that is present in judicial and legislative lawmaking, however, is missing in the procedure for preparing an Attorney General's opinion: there is no formalized means for obtaining information and argument from interested persons outside the Attorney General's office.

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[99] This is not to say that informal or even oral opinions may not have the effect of establishing the law. Consider, for example, the following quotation from an "Information Bulletin" sent by the Office of the Commissioner of Banking to all Wisconsin credit unions:

> A verbal opinion from the office of the Attorney General provides that credit unions may *not* accept or charge a fee in connection with the granting of any loan, including FHA Table I Home Improvement Loans. The latter, even though the FHA regulations permit a service or investigation fee.

COMMISSIONER OF BANKING, INFORMATION BULL. NO. 1-70 (1970). It is probably safe to assume that this communication established the law with respect to the issue for all credit unions. Nevertheless, oral and informal opinions being more easily withdrawn and modified, usually having a more limited impact, and usually issued in circumstances where there is a need for a quick response, should probably continue to be issued after only informal review and consultation.

The procedure culminating in a formal Attorney General's opinion is initiated by a request for an opinion from the legislature, the governor, the head of a state department, a district attorney, or a county corporation counsel. The request includes a more or less definitive statement of the facts relating to the issue and, in some cases, a discussion of the legal research and the conclusions reached by the agency requesting the opinion. Often this information, supplemented by legal research by the Attorney General's staff and perhaps by further factual information received from the agency requesting the opinion, encompasses all of the information upon which the opinion is based.

Persons who will be affected by an Attorney General's opinion will sometimes attempt to influence the outcome by submitting legal briefs or presenting oral argument. Attorneys General have tended neither to encourage nor discourage such attempts. The traditional position has been that briefs are accepted from anyone interested, but no attempt is made to solicit such assistance or to inform interested persons of the opinion request.[100]

Because there is no systematic solicitation of advice or notification of interested persons, the information and advice that is received tends to come from sources having the most direct interest in the subject matter of the opinion. In the case of an opinion request from a regulatory agency, for example, representatives of the regulated industry will usually be aware of the request and are often ready and anxious to supply briefs and information on the subject.[101] Seldom, if ever, will arguments be advanced on behalf of the general public or unorganized segments of the public who may also be quite directly affected by the opinion. On other issues of public importance, the organized interest groups will always have the advantage in getting their views before the Attorney General for consideration.

One method of counteracting the potentially disproportionate influence of special interests in the preparation of Attorney General's opinions is to try to keep the process of preparing an opinion an entirely internal matter and refuse to accept information or argument from any one outside the office. As a practical matter, however, this approach is not very promising. The Attorney General must turn to some source for the facts necessary to reach a

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100 *See* 31 OP. WIS. ATT'Y GEN. 60 (1942) for a discussion of the use of written briefs from interested attorneys in the preparation of that opinion. An example of a more recent opinion in which voluminous briefs and arguments were presented is 55 OP. WIS. ATT'Y GEN. 124 (1966). For a discussion of the use of outside arguments in the preparation of opinions of the United States Attorney General, see H. CUMMINGS & C. MCFARLAND, *supra* note 57, at 90-91.

101 This was the case, for example, in the preparation of 55 OP. WIS. ATT'Y GEN. 217 (1966) regarding licensing of a temporary help agency as an employment agency.

conclusion. The relevant facts include information regarding the potential impact of the opinion upon those affected, as well as information about the factual context of the question. Traditionally, these facts are provided by the public official requesting the opinion. His presentation of the facts, however, may be influenced by his own possibly narrow view of the matter. In many cases it is important that the assistant attorney general drafting the opinion be given the opportunity to search elsewhere for relevant information. The problem is to insure that the information he gets is as accurate and complete as possible.

Another way of dealing with this problem is simply to improve upon the present system by trying to seek out people interested in, or affected by, the opinion and soliciting any information and advice they might have. This practice is followed to a limited extent now, and if it were encouraged and perhaps systematized, it should result in better informed opinion writing. The sources of information, however, would still be limited to those selected by the opinion drafter and those who knew of the opinion request and asserted themselves. This may include representatives of all relevant points of view, but, given the limitations of time and interest on the part of the opinion drafter, it also may not.

An Attorney General's opinion is in many respects like a rule adopted by an administrative agency. The Wisconsin Administrative Procedure Act requires that a hearing preceded by notice published in the administrative register, transmitted to interested legislators, and given "by such steps as (the agency) deems necessary to . . . persons who are likely to have an interest in the proposed rule making" be held before a proposed rule becomes final.[102] Perhaps the public should be given a similar opportunity to participate in the formulation of an Attorney General's opinion which may have at least as much of an impact upon the public interest as an administrative rule.

Public participation need not necessarily be through a formal hearing process. The Attorney General might publish and distribute a copy of the opinion request in much the same way a proposed rule is promulgated and invite written comments rather than holding a public hearing. Such a procedure would not include the adversary aspects of a public hearing, but that is probably not a necessary part of the formulation of a legal opinion. The fact questions involved in writing an opinion are not usually of the kind where cross-examination would be helpful. It would, however, help to insure a better and more balanced presentation of facts and argument than the present system. Giving public notice and the opportunity to be heard may also be subject to the objection that it would unduly delay the preparation of an opinion. Given the de-

102 WIS. STAT. §§ 227.02, .021 (1967).

liberate pace of formal opinion preparation under the present system, however, it is unlikely that public notice would have any significant effect in this respect.[103] What small additional delay there might be is not a very high price to pay for the added assurance of more complete and balanced information upon which to base an important Attorney General's opinion.

The Attorney General, functioning as the chief legal adviser for state government and as a sort of appellate legal adviser for county government[104] can have a decisive influence on public policy at both levels.[105] Because of this it is important that his opinions be based on full and accurate information. But there is an additional and perhaps even more important element in the opinion process. Almost every opinion includes an explicit or implicit political or social policy judgment. The opinion request is usually generated by concern on the part of a public official about whether he or some other public entity can or must take certain action. Can a county adopt an open housing ordinance;[106] must the State Department of Health and Social Services provide certain funds for county welfare programs;[107] can the State Department of Natural Resources regulate hunting or fishing on Indian Reservations;[108] must the state provide free public education for mentally retarded children?[109]

The "deep political dimension"[110] of questions of this kind is apparent. In answering such questions an Attorney General must consider not only statutes and legal precedent but the political and social impact of his opinion as well. An Attorney General knows that his opinion, no matter what its substance, will often have important social and political consequences which he, as a political being,[111] cannot ignore—nor should he. Concern for the social and

103 Formal opinions take on the average from two and one-half to three months in preparation.

104 The Attorney General's rules regarding opinion requests from district attorneys and corporate counsel require that the question be researched and a conclusion reached by the person requesting the opinion before it is submitted to the attorney general.

105 The Attorney General does not officially advise city or village attorneys. However, from time to time advice is given unofficially. The Attorney General's opinion when requested and given under these circumstances is usually intended to settle the matter and does.

106 56 OP. WIS. ATT'Y GEN. 219 (1967).

107 57 OP. WIS. ATT'Y GEN. 4 (1968).

108 56 OP. WIS. ATT'Y GEN. 11 (1967).

109 56 OP. WIS. ATT'Y GEN. 82 (1967).

110 Weinstein, *supra* note 90, at 158.

111 An attorney general is a political being whether he is appointed or elected. The Attorney General of England says: "The Attorney General [of England], when he is acting in political matters is a political animal entitled to engage in contention politics." Jones, *supra* note 12, at 50. One cannot deny the political nature of the activities of the United States Attorney General, nor that he, too, is a "political animal."

Attorneys general have sometimes sought to avoid the political con-

political consequences of an Attorney General's opinion as much as for the social and political consequences of a judicial opinion ought to be a part of decisionmaking and opinion writing. This, in fact, is the principal role of the Attorney General and his politically appointed deputy in the opinion writing process. After the opinion is drafted by an assistant attorney general and reviewed by all or part of the permanent civil service staff, it is reviewed by the Attorney General and the deputy. Although this review is in part to evaluate and improve the quality of the research and writing, it is primarily to consider the opinion from the standpoint of its probable social and political impact.

The political aspect of the opinion writing process ought not to be concealed or ignored. Were it not for this aspect, the office might, after all, be manned entirely by career civil service lawyers. But it is not appropriate for an Attorney General to base his opinion solely upon political or social criteria. Like a judicial opinion writer, he must stay within the limits set by law and precedent. That is not to say that an Attorney General faced with two equally supportable legal conclusions may not choose the one he considers politically or socially desirable. Of course he can—and should. He may also, if he is so inclined, adopt a position which strains against a legal limitation or stretches a legal concept. But he should always be sure that his opinion also has a sound legal basis. In this respect he is greatly aided in Wisconsin by the staff of career lawyers to whom he can turn for informal judgments from most points of view on the political spectrum. The combination of an elected Attorney General and a career civil service staff thus combine the social and political sensitivity of an elected official with the insulation from political pressures of a civil service system. Properly used, this system may be uniquely able to produce opinions which are legally sound and politically sensitive.

### 3. THE ATTORNEY GENERAL AS MEDIATOR

The Attorney General as attorney for state departments and legal adviser for district attorneys and county corporation counsels is often called upon to help settle disputes between his clients. Sometimes a dispute is settled by a written opinion. In 1968, for example, the Attorney General wrote formal opinions involving disputes between the State Personnel Board and the Department of Administration concerning procedures for resolving state employee grievances;[112] between a county corporation counsel and the Department of Health and Social Services over the formula for cal-

sequences of a difficult question by not answering it, usually saying that it is a matter for a court to decide. *See, e.g.*, 53 OP. WIS. ATT'Y GEN. 187, 195 (1964); 50 OP. WIS. ATT'Y GEN. 132, 139 (1961). Such a response does not give the client the advice he is entitled to; the client should get his lawyer's best judgment on a legal question.

[112] 57 OP. WIS. ATT'Y GEN. 37 (1968).

culating state reimbursement of county welfare expenditures;[113] between the Department of Industry, Labor and Human Relations and the Board of Architects and Engineers over the determination of the competency of architects and engineers;[114] and between the Council on Aging and the Department of Health and Social Services over the legal relationship between the two agencies after the Governmental Reorganization Act of 1967.[115] The Attorney General or members of his staff are also called upon to help settle similar disputes by informal conferences and sometimes an informal opinion. The Attorney General might become involved at the request of the parties to the dispute or upon his own initiative or the initiative of an assistant attorney general.

The Attorney General's participation in this kind of dispute settlement is the natural outgrowth of his status as legal adviser to all state agencies. Because his opinions are only advisory, however, there is no assurance that he will be able to finally determine any such dispute.

There have been suggestions that the dispute settlement role of the United States Attorney General be formalized by statute and his decisions made binding. The Commission on Organization of the Executive Branch of the Government (The Second Hoover Commission) made the following recommendation in 1955:

> Congress should create a procedure permitting any department, agency, or regulatory body to refer differences of interpretation of applicable law to the Attorney General, assisted by the Office of Legal Counsel, for resolution. Adoption of this procedure jointly by departments, agencies, and regulatory bodies which are parties to such difference of interpretation or dispute shall be voluntary, but when employed, the decision of the Attorney General shall be binding on all parties involved.[116]

This recommendation was not adopted by Congress and was strongly criticized by Commissioner Chet Hollifield, principally on the grounds that the Attorney General would be deciding questions that ought to be left to the courts and to the elected and appointed policymakers. He summed up his criticism by quoting Attorney General Black's 1857 statement: "The duty of the Attorney General is to advise, not to decide."[117]

Commissioner Hollifield and Attorney General Black were certainly right in pointing out that the Attorney General's duty is to advise. The proposal that the Attorney General be given the

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[113] *Id.* at 4.
[114] *Id.* at 15.
[115] *Id.* at 91.
[116] COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF GOVERNMENT, LEGAL SERVICES AND PROCEDURES, REPORT TO THE CONGRESS (March 1955).
[117] *Id.* at 105.

power to decide disputes between government agencies is of doubtful merit. The judiciary and the policymakers should make these kinds of decisions. That is not to say, however, that the Attorney General does not have a role in settling disputes between government agencies; it is to say that his role ought to be what it is—mediator rather than judge or arbitrator.

The extent to which an Attorney General is successful in this role depends upon the attitudes of the parties and his skill as a mediator rather than the legal force of his opinion. Nevertheless, it is difficult for a state agency to defy an Attorney General's opinion, and the potential use of a published opinion as a last resort can have a substantial effect on the willingness of the parties to accept an informal settlement. Moreover, in most cases, the agencies involved are anxious to reach an amicable solution and are quite satisfied to abide by the Attorney General's opinion if it will settle the dispute.

### 4. THE ATTORNEY GENERAL AS OMBUDSMAN

A matter of increasing concern for both citizen and scholar is the growing complexity and impersonality of the government bureaucracy. Many have looked with interest at the Scandinavian Ombudsman as a model for a system to help solve the problems of the citizen dealing with a seemingly impenetrable bureaucracy. In the absence of an ombudsman many citizens of Wisconsin turn to the Attorney General as their last resort in seeking protection of their rights.

An ombudsman, as the office was developed in the Scandanavian countries, has three essential characteristics:

> (1) The Ombudsman is an independent and non-partisan officer of the legislature, usually provided for in the constitution, who supervises the administration;
>
> (2) he deals with specific complaints from the public against administrative injustice and maladministration; and
>
> (3) he has the power to investigate, criticize and publicize, but not to reverse, administrative action.[118]

The ombudsman has been defined as "an individual, generally elected or nominated by the legislature, who, upon receiving a complaint from a citizen alleging government abuse, investigates and intervenes on behalf of the citizen with the governmental authority concerned."[119]

The Attorney General in many respects plays the ombudsman's role, but he does not share all of the characteristics of an ombuds-

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[118] D. ROWAT, THE OMBUDSMAN xxiv (2d ed. 1968).

[119] Tibbles, *The Ombudsman: Who Needs Him?*, 47 J. URBAN L. 1, 2 (1969).

man. Although he is an independent, elected, constitutional officer, he is not specifically authorized by the legislature to perform the ombudsman's role. He has only limited investigative powers with respect to the activities of state agencies, but he does sometimes exercise what powers he has to attempt to resolve citizen complaints against government agencies. He does have a platform from which to publicize and criticize agency practices and his statements usually command considerable respect from the public and cannot be disregarded by the legislature or the state agency involved. More importantly, however, he is the legal adviser for all state agencies. He may tell them privately and publicly what their duties are and whether or not they are performing them properly.

The correspondence files of the Attorney General's office abound with letters from citizens seeking help in dealing with state agencies. This is not unique to Wisconsin. In 1967, the Attorney General of Massachusetts created a Citizens Aid Bureau to help the "alienated citizen." Former Attorney General Richardson described its function as follows:

> The Bureau's function is to answer questions and complaints about state government. Wherever possible the questions are answered by the Bureau itself. Complaints are handled by investigation and informal conferences with the government agency involved. If the citizen's problem requires the services of a lawyer, he is referred to the appropriate bar association or legal aid society. Since its formation, the Bureau has handled over 250 requests per week. In addition, the Bureau cooperates closely with governmental agencies in considering ways to improve services to the citizen.[120]

The Bureau, in other words, performs many of the functions of an ombudsman.

The Attorney General's office in Kentucky has a long standing practice of giving opinions to private citizens.[121] A regulation adopted by the Attorney General to govern the issuing of such opinions authorizes opinions "concerning the official acts and conduct of office of public officials provided the legal question involves an actual, current fact situation, and is broad enough to be of interest to the general public, the bar, or other officials in similar positions."[122] A citizen of Kentucky who believes that a public official is transgressing the law may, under this provision, arm himself with an Attorney General's opinion.[123]

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120 Richardson, *The Office of Attorney General: Continuity and Change*, 53 MASS. L.Q. 5, 21 (1968).

121 KY. REV. STAT. § 15.025(4) (1962) authorizes the Attorney General to give his legal opinion when "the question presented is of such public interest that an attorney general's opinion on the subject is deemed desirable."

122 KY. ADMIN. REG., DEP'T OF LAW reg. 2 (1962).

123 *See generally The Office of Attorney General in Kentucky*, 51 KY. L.J. S-1 (Special Issue 1963).

The Wisconsin Attorney General, in a less formal way, has from time to time employed devices similar to those used by the Attorneys General of both Massachusetts and Kentucky to assist citizens in coping with government agencies. For example, between 1962 and 1968 the Attorney General wrote at least 30 letters to private citizens explaining their rights under the laws of Wisconsin relating to open meetings of public bodies and open public records.[124] In almost every case the citizen had been denied admission to a meeting or denied access to records contrary to his legal rights. Presumably the citizen, fortified by the Attorney General's opinion, was, in most instances, subsequently granted the right he sought. In these cases the Attorney General, through the opinion process, was performing the ombudsman's function of asserting the citizens' rights against a government agency.

Other citizen complaints about their treatment by state agencies are handled in various ways. Most such complaints, if handled in true ombudsman fashion, would require substantial factual investigation. Without the staff or the clear statutory authority to carry on such investigations, the Attorney General's role in matters of this sort is much like that of a Congressman asked to intervene with a federal agency. A letter of inquiry is written with a copy to the constituent, and whether or not the letter inspires action on the part of the agency, the matter is seldom pursued. A particularly persistent citizen or a particularly serious problem may cause the Attorney General to pursue the matter further. To do so, however, raises two questions about the Attorney General's assumption of the ombudsman's role. First, the Attorney General has no specific statutory authority for this activity. Second, the agency is the Attorney General's client and may call upon the Attorney General for legal advice and representation with respect to the very matter under inquiry.

There is, of course, no statute authorizing the Attorney General to act as ombudsman. Nor is he given any general power to investigate the affairs of other state agencies. The law does, however, authorize the Attorney General to investigate crimes that are state-wide in nature, importance, or influence.[125] On the seemingly reasonable theory that crimes committed by state employees are crimes of state-wide importance, the Attorney General has conducted investigations of such things as expense account padding by a state employee and selling drivers' licenses without examinations. In view of the scope of the crime of "misconduct in office," which includes intentional failure to perform a known ministerial duty and knowingly acting in excess of lawful authority,[126] almost

[124] The author has obtained copies of 30 such letters. There probably were a few more.

[125] WIS. STAT. § 14.526(1) (1967).

[126] WIS. STAT. § 946.12 (1967).

any investigation could be justified on this ground. In fact, however, the authority is seldom exercised in this fashion, and without specific statutory authorization, it is unlikely that the Attorney General will very often conduct extensive investigations of official conduct.

An even more definite inhibition affecting the Attorney General's performance of an ombudsman function is the knowledge that he is the attorney for the department and may be called upon to advise and defend the department head. Many letters from citizens requesting assistance in dealing with a state department are answered by pointing out this statutory duty. However, while this may limit the Attorney General's usefulness in the ombudsman role, it does not prevent him from attempting to help. Like many lawyers in private practice, he may call his client's attention to the possibility of legal difficulty if a particular course of action is pursued or suggest that a customer's complaint ought to be settled. Moreover, the official conduct causing the problem may not be known to the department head or the implications may not be understood. In such a case it seems proper for an attorney to call the matter to his client's attention. Finally, an Attorney General's relationship with the department heads he represents is not the same as a lawyer's relationship with private clients. An Attorney General and the members of his staff have a public responsibility which requires a different attitude toward a client's questioned conduct. They probably have an affirmative duty to ferret out and expose improper conduct on the part of public clients.

At best, however, the Attorney General's duty to represent the public agencies he is investigating in an ombudsman role makes this a difficult role for him to perform. Nevertheless, the Attorney General is the de facto ombudsman to whom many turn as a last resort when unsatisfied in their dealings with state agencies.

## V. CONCLUSION

The Attorney General of Wisconsin, as the lawyer responsible for almost all the state's litigation and the chief legal adviser to the legislature, the Governor, and all of the state departments, is in the mainstream of state government. He and his staff participate as advisers in many of the most important executive and legislative decisions. In addition, the Attorney General is empowered to act on his own initiative in some of the most important areas of concern to state government. There can be no doubt that the Attorney General today must be considered one of the two or three most important and influential figures in state government.[127]

[127] While the importance of the office of Attorney General has grown, that of the other two administrative offices created by the Constitution has waned. One measure is salary. In 1849 the Secretary of State received a salary of $1,200 a year plus fees, the Treasurer and the Attorney General

In performing the duties of his office, the Attorney General and his staff play several distinct roles in state government. Some of these roles are appropriately handled by a central legal office headed by an elected political partisan, but some are not. The state's litigation is best taken care of by the Attorney General and his staff. In this respect the Attorney General's office is analagous to a law firm on retainer to a large corporation. Typically the corporate law firm, rather than corporate house counsel, handles litigation on behalf of the corporation. The power to initiate litigation in such areas as anti-trust, consumer protection, and public nuisance also seems appropriately located in the office of Attorney General. The decisions respecting litigation in these areas involve or ought to involve predominantly legal judgments best made by a legal office. A relatively stable staff of career lawyers headed by an elected official responsive to the electorate may be a particularly effective structure for decisionmaking of this kind.[128]

The Attorney General and his staff are not well cast in their role as legal advisers to state departments and agencies. It is impossible for the staff to devote the time necessary to provide effective legal advice to assist public administrators in making decisions which include evaluation of legal issues. Moreover, the attitudes with which members of the Attorney General's staff approach the job of advising clients precludes the kind of "management team" legal counselling that an administrator wants and needs. Finally, it is doubtful that legal counselling can be effective when the adviser is imposed upon the client by law rather than by the client's choice.

The role of quasi-judicial "lawmaker" is much more appropriately located in the office of Attorney General. This role requires the exercise of sound legal judgment coupled with a sensitivity to the political and social needs of the people of the state. Here again, as in the role of litigation initiator, the combination of a career staff and an elected Attorney General may be peculiarly effective. From time to time Attorney General's opinions have been criticized for being too conservative or not sufficiently responsive to the needs of the people.[129] To some degree this criticism is no doubt deserved. The staff does tend to be traditional and conservative in the advice it gives. This, after all, is the way most lawyers advise their clients. The elected Attorney General, however, can and

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$800. Today the salaries are $20,000 for the Attorney General and $13,500 for the Secretary of State and Treasurer.

128 The 1947 legislation creating a permanent anti-trust division in the Attorney General's office had much to do with the relatively consistent performance of the office in that area. *See* Comment, *supra* note 65. The establishment of a permanent consumer protection unit seems to be having the same effect in providing continuity in this area.

129 *See, e.g.*, Waite, *The Dilemma of Water Recreation and A Suggested Solution*, 1958 WIS. L. REV. 542, 597.

often does override this tendency toward caution to open the way for his public clients to act more boldly.

The Attorney General's role as "mediator" is one that flows naturally from his duty to advise all state departments. The role might be better performed, however, if it were taken on more forcefully and self-consciously by the Attorney General and his staff. Internecine battles between state agencies certainly should be avoided, and the lawyers representing both parties are in excellent position to help avoid such conflict.

The "ombudsman" role is one which the Attorney General has had thrust upon him in the absence of any other agency equipped and motivated to take it on. People tend to look upon the Attorney General as the ultimate source of help in dealing with state and even local government. The Attorney General receives innumerable letters which begin, "I have tried everything else without success and I now must turn to you." As an elected official, the Attorney General is not likely to turn such pleas aside without an attempt to help. His status as an elected partisan, however is also the real obstacle to fully effective performance as an ombudsman. In much of what an ombudsman must do, even the slightest hint of partisanship is fatal.

The Attorney General's varied and important roles in state government make his an office of great potential. Much of the potential has been unrealized, however, in part because the staff has been almost totally occupied with the work generated by clients, making it extremely difficult for an Attorney General to take the initiative where he sees the need. With the sizeable additions in staff in recent years, it may now be possible for the Attorney General to develop more fully the potential of his office. But this will not happen automatically. Priorities must be established and adhered to which will permit the effective utilization of available manpower to assert the Attorney General's initiative powers. Without such firm priorities, the manpower will continue to be dissipated on less important matters. With firm priorities, an Attorney General can direct the considerable powers of his office toward the solution of society's more pressing problems.