

AG Opinion 02-003

October 25, 2002

ISSUE: Whether the Utah Constitution permits executive branch agencies to employ in-house legal counsel from sources other than through the Office of the Attorney General.

BACKGROUND: State executive branch agencies which are subject to [Article VII § 16](#) of the Utah Constitution, employ attorneys, hired without Attorney General approval, paid with agency funds, to perform legal advisor duties. These attorneys do not work under the supervision and control of the Attorney General. In some cases agencies have redefined or renamed positions in an attempt to avoid legal ramifications. The Office of Legislative Research and General Counsel has issued a formal legal opinion finding that these practices violate [Utah Code § 67-5-5](#). *Memorandum Formal Legal Opinion 01-001*, attached at Appendix 1.

CONCLUSION: Agencies subject to [Article VII § 16](#) of the Utah Constitution violate the Constitution when they hire in-house legal counsel directly, bypassing the Attorney General, regardless of the official position or title given to the legal advisor, if the attorney provides legal advice to the Agency or its officers and staff.

DISCUSSION:

1. Methodology

Courts have developed well established rules for Constitutional interpretation. The Utah Supreme Court has explained that parties wishing to interpret constitutional language should use textual and historical evidence, sister state law, and policy arguments, including sociological materials to arrive at a proper interpretation. *Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, (Utah 1993). This Opinion relies on textual and historical evidence and Utah Supreme Court decisions.

2. Constitutional text

Article VII of the Utah Constitution contains three sections pertinent to the analysis of legal counsel for the executive branch.

a. The Office of Attorney General, like the other Executive Branch Officers is constitutionally established in [Article VII § 1](#). “The elective constitutional officers of the Executive Department shall consist of Governor, Lieutenant Governor, State Auditor, State Treasurer, and Attorney General. Each officer shall ... perform such duties as are prescribed by this Constitution and as provided by statute.”

b. The Constitution prescribes the duties of the Attorney General in [Article VII § 16](#). “The Attorney General shall be the legal adviser of the state officers, except as otherwise provided by this Constitution, and shall perform such other duties as provided by law.”

c. In 1992, [Article VII § 5\(4\)](#) of the Constitution was amended to allow the governor to appoint his own counsel. “The Governor may appoint legal counsel to advise the Governor.”

3. Supreme Court interpretation

The Utah Supreme Court has had occasions to analyze and interpret some of these textual provisions. In *Hansen v. Utah State Retirement Board*, 652 P.2d 1332 (Utah 1982) the Court concluded that “ the constitutional authority of the Attorney General is to act as legal adviser to the constitutional executive officers referred to in [Article VII](#), i.e., the Governor, Lt. Governor, Auditor, Treasurer, ... the departments over which they have direct supervisory control, and to the other state executive offices referred to in [Article VII](#), insofar as the officers of those offices act within the scope of the duties of such offices.” The Hansen decision ruled that agencies not subject to [Article VII § 16](#) could constitutionally employ legal advisers other than the Attorney General.

The Court in *Hansen* explained how to determine whether an agency is subject to the dictates of [Article VII § 16](#). Essentially, constitutionally created agencies or agencies created as independent entities by the Legislature, which administer no public moneys, and are not under the direct supervision or control of an executive department agency or officer, are exempt from the limitation of [Article VII § 16](#). *Hansen* held that executive department agencies and entities within any executive department agency are not independent, and are thus under the direct supervisory control of an [Article VII](#) officer. *Hansen*, 652 P.2d at 1338.

The Utah Supreme Court reaffirmed *Hansen’s* holding in *U. T. F. C. v Wilkinson*, 723 P.2d 406, 415 (Utah 1986). The court explained that legislative intent controls when determining whether an entity is independent or part of the Executive Branch. If the legislature creates an entity as an executive department agency, or a sub-entity within an executive department agency, it is under the direct supervisory control of an [Article VII](#) officer, and is subject to § 16 ’s authority. Only if the Legislature defines the agencies as an independent entity does it escape the jurisdiction of [Article VII § 16](#).

4. Plain meaning and historical evidence

a. The meaning of “legal adviser”.

The debates of the original framers of the Utah Constitution reveal that they understood the term “legal adviser” to mean all duties encompassed in the practice of law. They described the duties of the Attorney General to include “all of the legal business” of the state. “The duties of the attorney general, Mr. Chairman, would be as suggested, to advise the State officers, attend to all business, criminal or otherwise...” In occasional cases, he might be invited to “go

out into a county to assist in the prosecution of some important matter.” In addition, “If there are any civil cases to which the State would be a party, it would be his duty to bring them or defend them,” *Official Report of the Proceedings and Debates of the Constitutional Convention for the State of Utah*, Vol. II, p. 1027 (15 April 1895).

The term “legal adviser” is generally synonymous with the word “lawyer” or “attorney” as “one who gives legal advice and assistance to clients and represents them in court or in other legal matters.” *The American Heritage Dictionary, 4th Ed. Houghton Mifflin, 2000*. See also *Webster’s Revised Unabridged Dictionary, MICRA, Inc. 19983*, “one whose profession is to conduct lawsuits for clients, or to advise as to prosecution or defense of lawsuits, or as to legal rights and obligation in other matters.”

This understanding of the term “legal adviser” is commonly accepted. In all three cases in which the Utah Supreme Court has addressed the issue of legal adviser, all parties understood the term “legal adviser” to mean a lawyer performing legal services for the state agency. See *Briefs for Hansen v. Legal Services*, 429 P.2d 979 (Utah 1967), *Hansen v. Utah State Retirement Board*, *supra*, and *UTFC v. Wilkinson*, *supra*, in *Supreme Court of Utah Abstracts and Briefs*; Vol. 792, No. 10784; Vol. 1313, No. 860097; and Vol. 1052, No. 16560 respectively. Additionally, during the Legislature’s 1992 floor debate concerning a proposed amendment which would have made the Attorney General the “chief” legal adviser – a debate which revolved around how to remedy the then existing problem of in-house counsel employed by executive department agencies, both sides of the debate characterized lawyers carrying out legal business for executive departments as legal advisers under [§ 16](#). See *Floor Debates S. J. R. No. 8, 49th Leg. State Senate Audio Log, Tape 14, 28 January 1992*).

Given the plain meaning and historical understanding of the term “legal adviser” as encompassing the practice of law, the Utah Supreme Court’s definition of the practice of law can properly inform this discussion.

The practice of law, although difficult to define precisely, is generally acknowledged to involve the rendering of services that require the knowledge and application of legal principles to serve the interests of another with his consent. It not only consists of performing legal services in the courts of justice throughout the various stages of a matter, but in a larger sense involves counseling, advising, and assisting others in connection with their legal rights, duties, and liabilities. It also includes the preparation of contracts and other legal instruments by which legal rights and duties are fixed.

Utah State Bar v. Summerhays & Hayden, Public Adjusters, 905 P.2d 867 (Utah 1995). See also *Nelson v. Smith*, 154 P.2d 634 (Utah 1944), “the practice of law, though impossible of exact definition, involves the carrying on of the calling of an attorney usually for gain,” and involves “the rendering of legal services or the giving of legal advice to another.”

b. 1992 Amendment creating governor’s counsel position.

This amendment resulted in a limitation on the Attorney General's role as legal counsel for the governor, consistent with [Article VII § 16's](#) "except as provided by this constitution" language. The amendment does not, however, limit the constitutional duty of the Attorney General to act as legal adviser to the departments over which the governor has supervisory control.

The history of the 1992 amendment bears out this conclusion. The amendment has its genesis in the Constitutional Revision Commission (C.R.C.), which originally studied three alternatives: 1) allowing state agencies to hire in-house counsel with the Attorney General handling all litigation; 2) allowing the governor to appoint counsel for the governor independent of the Office of the Attorney General; and 3) creating a separate category of attorneys under the control of the governor to act as in-house counsel to the governor and state agencies, with the Attorney General handling all litigation. The C.R.C. adopted option two, and specifically rejected the other options which would have allowed agencies to hire in-house counsel, or would have made the governor responsible for executive branch legal advisers. *Report of the Constitutional Revision Commission 1991*, p. 12.

The C.R.C. was particularly concerned with the potential that the proposed legal adviser for the governor might infringe on the Attorney General's traditional legal adviser duties. *Minutes of the Constitutional Revision Commission, 12 July 1991*, p. 3. When the C.R.C. submitted the proposed language of the amendment to the legislature, it included a statement of intent making clear that "it is the intent of the Legislature that the governor be empowered to appoint legal counsel to advise him on various legal matters. It is intended that such legal counsel serve only to advise the governor." *Minutes and Materials of the Constitutional Revision Commission, 19 December 1991*. Floor comments from the sponsor of the legislation, Senator Hillyard, made clear that the governor's counsel was to be a single lawyer who advises only the governor. *Floor Debates S. J. R. No. 8, 49th Leg. State Senate Audio Log, Tape 14, 28 January 1992*.

The Voter Information Pamphlet which explained the proposed constitutional amendment to the electorate read: "Proposition No. 3 authorizes the Governor to appoint legal counsel solely to advise the Governor." *Utah Voter Information Pamphlet General Election Nov. 3, 1992*, p. 19 (September 25, 1992). The pamphlet made clear that the duties of the Attorney General would not otherwise be affected:

This revision allows the Governor to appoint his own legal counsel to advise him. This would provide easier and more immediate access to legal advice when needed without having to wait for more formal opinions from the Attorney General. But it would not empower this legal counsel to supersede the Attorney General's legal advice. The Attorney General would still be the preeminent legal advisor for the Executive Branch." *Id.* at 21 (bold type in original).

5. Summary

The Constitution makes the Attorney General the legal adviser for all [Article VII](#) officers, and for the agencies and entities under their supervision and control, unless the Constitution exempts them from the requirements of [§ 16](#). The Constitution exempts the governor from [§ 16](#) by allowing the appointment of a single attorney solely to advise the governor. The Constitution however does not exempt any agency, or entity subject to the supervision and control of [Article VII](#) officers, from the requirements of [§ 16](#). Nor does the exemption for the governor's counsel allow the creation of a pool of in-house attorneys, under the control of the governor or his counsel, to serve as legal advisers to executive branch agencies.

The framers of the Utah Constitution understood the term "legal adviser" to mean an attorney who conducts the legal business of the state, its agencies or executive branch officer. The duties of the legal adviser include all the acts normally performed by an attorney, including counseling and advising a client in connection with legal rights, duties and liabilities.

Therefore, any executive branch agency or sub-entity subject to [Article VII § 16](#) seeking and receiving legal advice from an attorney not provided, supervised and controlled by the Attorney General is in violation of the Constitution.

DATED this 25th day of October, 2002.

Mark L. Shurtleff
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