

From: [Mishaan, Jessica](#)
To: [Frances Workman](#)
Subject: Public Records Request
Date: Monday, January 7, 2019 3:13:28 PM
Attachments: [2019-01-07 London response to Workman w docs.pdf](#)

Dear Ms. Workman,

Please find the attached response to your public records request.

Thank you,

Jessica Mishaan | Paralegal

Office of the Attorney General | General Counsel and Administrative Law Division

109 State Street Montpelier, VT 05609-1001

p (802) 828-5500

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STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT
05609-1001

January 7, 2019

Frances F. Workman, Paralegal
Shlansky Law Group, LLP
360 Main Street
Vergennes, VT 05491

Re: Public Records Request

Dear Ms. Workman:

I write to further respond to your public records act request dated December 20, 2018. Attached please find approximately 65 pages in response to your request.

Please note that the Attorney General's Office (AGO) is not the custodian of records of other agencies, including the Department for Children and Families (DCF). We understand you have submitted similar requests to DCF and the Department of Public Safety. Below please find responses to each of your eleven requests of the AGO.

1. All Public Records reflecting the provision of legal services to the DCF by the AG, including any seconding, shared services, or representation agreements, and any organizational charts or job descriptions reflecting services provided, and supervision of such staff or services.

Response: Attached please find: (1) an organizational chart reflecting the Agency of Human Services (AHS) Division of the AGO; (2) recent job descriptions of Assistant Attorney General positions within the DCF Unit of the AHS Division; (3) a draft AGO manual describing the structure of the AGO generally, including the AHS Division. (Please note the manual is out of date but provides general information that may be responsive to your request.)

In addition, and if helpful to you, potentially responsive information is publicly available through various sources, including the AGO website at: <https://ago.vermont.gov/human-services/> and legislative reports related to state

legal services generally and DCF processes specifically at:
<https://legislature.vermont.gov/reports-and-research/>.

We do not understand your request to call for each record reflecting attorney-client advice provided by the AGO to DCF, or for representation agreements in each case in which the AGO has represented DCF. If we have misunderstood your request, please let us know and we will follow up with a cost estimate for further processing this portion of your request.

2. All Public Records reflecting the analysis undertaken by the AG, or any AG employees providing services to the DCF, to assess or assure the compliance of the “substantiation” process conducted under 33 V.S.A. Ch. 49-53, and the DCF’s Family Services Division’s Policies, with United States federal and State constitutional protections afforded to individuals accused of child abuse or neglect, including due process protections.

Response: Potentially responsive records are publicly available at: <https://legislature.vermont.gov/committee/document/2018/18/Bill/4173496> (see documents of AAG Kate Lucier). In addition, AAGs provide attorney-client advice to DCF on a case-by-case basis, including cases involving individuals who have been substantiated for child abuse or neglect and matters in which DCF or DCF employees are named in a lawsuit. Due to the number of such cases handled by AAGs, the volume of these records is substantial. In addition, information contained in many of the records at issue is likely to be exempt from public disclosure pursuant to 1 V.S.A. § 317(c)(1) (information in cases initiated by DCF is otherwise confidential by law, see 33 V.S.A. §§ 4919, 4921, 5110) and § 317(c)(3) (attorney-client privilege).

We do not understand your request to call for each case involving the statutory process for the substantiation for child abuse or neglect, nor do we understand your request to call for each record reflecting attorney-client advice by an AAG to DCF in such cases. If we have misunderstood your request, please let us know and we will follow up with a cost estimate for further processing this portion of your request.

3. All Public Records reflecting the analysis undertaken by the AG, or any AG employees providing services to the DCF, to assess or assure the compliance of the “substantiation” process conducted under 33 V.S.A. Ch. 49-53, and the DCF’s Family Services Division’s Policies, with *Sheldon v. Ruggiero*, 2018 VT 125 (Vt. Nov. 9, 2018).

Response: See above-noted record in response to 2. In addition, as noted above, AAGs provide attorney-client advice to DCF on a case-by-case basis, including cases involving individuals who have been substantiated for child abuse or neglect and matters in which DCF or DCF employees are named in a lawsuit. Due to the number of such cases handled by AAGs, the volume of these records is substantial. In addition, information contained in many of the records at issue is likely to be exempt from public disclosure pursuant to 1 V.S.A. § 317(c)(1) (information in cases

initiated by DCF is otherwise confidential by law, see 33 V.S.A. §§ 4919, 4921, 5110) and § 317(c)(3) (attorney-client privilege).

We do not understand your request to call for each case involving the statutory process for the substantiation for child abuse or neglect, nor do we understand your request to call for each record reflecting attorney-client advice by an AAG to DCF in such cases. If we have misunderstood your request, please let us know and we will follow up with a cost estimate for further processing this portion of your request.

4. All Public Records reflecting the procedure used by the AG, or any AG employees providing services to the DCF, to provide information and Public Records to any “Administrative Reviewer” as part of the “substantiation” process conducted under 33 V.S.A. Ch. 49-53, and the DCF’s Family Services Division’s Policies, including any rules or procedures to avoid ex parte contact or extra-record information.

Response: The AGO does not have records responsive to this portion of your request.

5. All Public Records reflecting the guidance provided by the AG, or any AG employees providing services to the DCF, to any “Administrative Reviewer” as part of the “substantiation” process conducted under 33 V.S.A. Ch. 49-53, and the DCF’s Family Services Division’s Policies, reflecting the legal standard(s) to be applied to the “substantiation” review analysis.

Response: The AGO does not have records responsive to this portion of your request.

6. All Public Records reflecting all settlements, consent agreements, or agreements to pay money, modify conduct, or provide a remedy, that have been entered into by the DCF. The foregoing shall exclude matters directly relating to employment of the DCF’s employees but shall not exclude any employment-related matters relating to allegations of misconduct by current or former employees of the DCF.

Response: This portion of your request appears to seek records related to the settlement of any case filed against DCF, with the exception of certain employment-related matters. If we have misunderstood this portion of your request, please let us know. We hope the following information is helpful context for you regarding the scope of this portion of your request and we ask that you clarify and narrow this portion of your request as outlined below.

Since 2012, the AGO has defended DCF in approximately 31 administrative cases and 53 superior or federal court matters. (We understand your request is not time limited but are providing information going back to 2012 for purposes of context.) Potentially responsive documents in these 84 matters resides in the casefile associated with each matter. The volume of potentially responsive casefiles is significant – we estimate that processing this portion of your request will require

review of approximately 120 bankers' boxes of materials, or potentially over 400,000 pages of paper or electronic materials. The costs associated with this review, even charged at the lowest rate under the Secretary of State's fee schedule, would be significant.

If you would like a more detailed cost estimate based on the above understanding of this portion of your request, please let us know. If we have misunderstood this portion of your request, please let us know. We ask that you narrow this portion of your request to a reasonable date range and clarify the types of settlements or cases you are seeking. Following receipt of the above information, we are happy to provide a more detailed cost estimate and to otherwise discuss reasonable searches to facilitate processing this portion of your request.

7. All Public Records reflecting any notice of intent to sue, demand for money, or requirements for compliance with law, including any reflecting alleged civil or criminal law misconduct or failure to abide the law, including the standard of due care, received by the AG or DCF (or the DCF's supervising Agency of Human Services) in regard to the acts or omissions of the DCF, its employees or its contractors. The foregoing shall exclude matters directly relating to employment of the DCF's employees but shall not exclude any employment-related matters relating to allegations of misconduct by current or former employees of the DCF.

Response: See response to 6 above.

8. All Public Records reflecting any awareness by the AG of the DCF's noncompliance with any law, regulation, or the DCF's own Regulations or Policies, including any Public Records reflecting any action or response taken to address such noncompliance(s).

Response: To the extent civil and administrative litigation filed against DCF is responsive to this portion of your request, see responses to 6 and 7 above. To the extent you seek records reflecting personnel matters involving DCF employees, the AGO is not the custodian of such records.

9. All Public Records reflecting any awareness by the DCF of any false or misleading representation by the DCF or any of its employees, attorneys (including any AG employees providing services to the DCF), or agents to any court or tribunal, including Public Records reflecting any action or response taken to address such false or misleading representation.

Response: To the extent civil and administrative litigation filed against DCF is responsive to this portion of your request, see responses to 6 and 7 above. To the extent you seek records reflecting personnel matters involving DCF employees, the AGO is not the custodian of such records.

10. All Public Records reflecting the organization and structure established for maintaining compliance with laws and due process by the DCF, including in-

house counsel, inspectors general, ombudsmen, external counsel, audits, and other protective and review measures. The foregoing specifically includes organizational charts reflecting counsel or others providing services within or to the DCF (including any AG employees providing services to the DCF), and protective measures to assure accurate investigation of reports of child abuse or neglect and to avoid erroneous or improper separations of families.

Response: See attached records as well as response to 1 above.

11. All Public Records reflecting the AG's organization, staff, and structures established for investigation of violations of civil rights by agencies and employees of the State of Vermont generally, and the DCF and Vermont State Police particularly, including without limitation any organizational charts or job descriptions reflecting such responsibilities.

Response: The Vermont Human Rights Commission is charged with enforcement of civil rights laws against agencies and employees of the State of Vermont. More information is available at: <https://hrc.vermont.gov/>. The AGO does not have records responsive to this portion of your request.

The AGO will wait to hear from you regarding the information requested from you above before further processing your request. We hope the above information is helpful to you.

Sincerely,

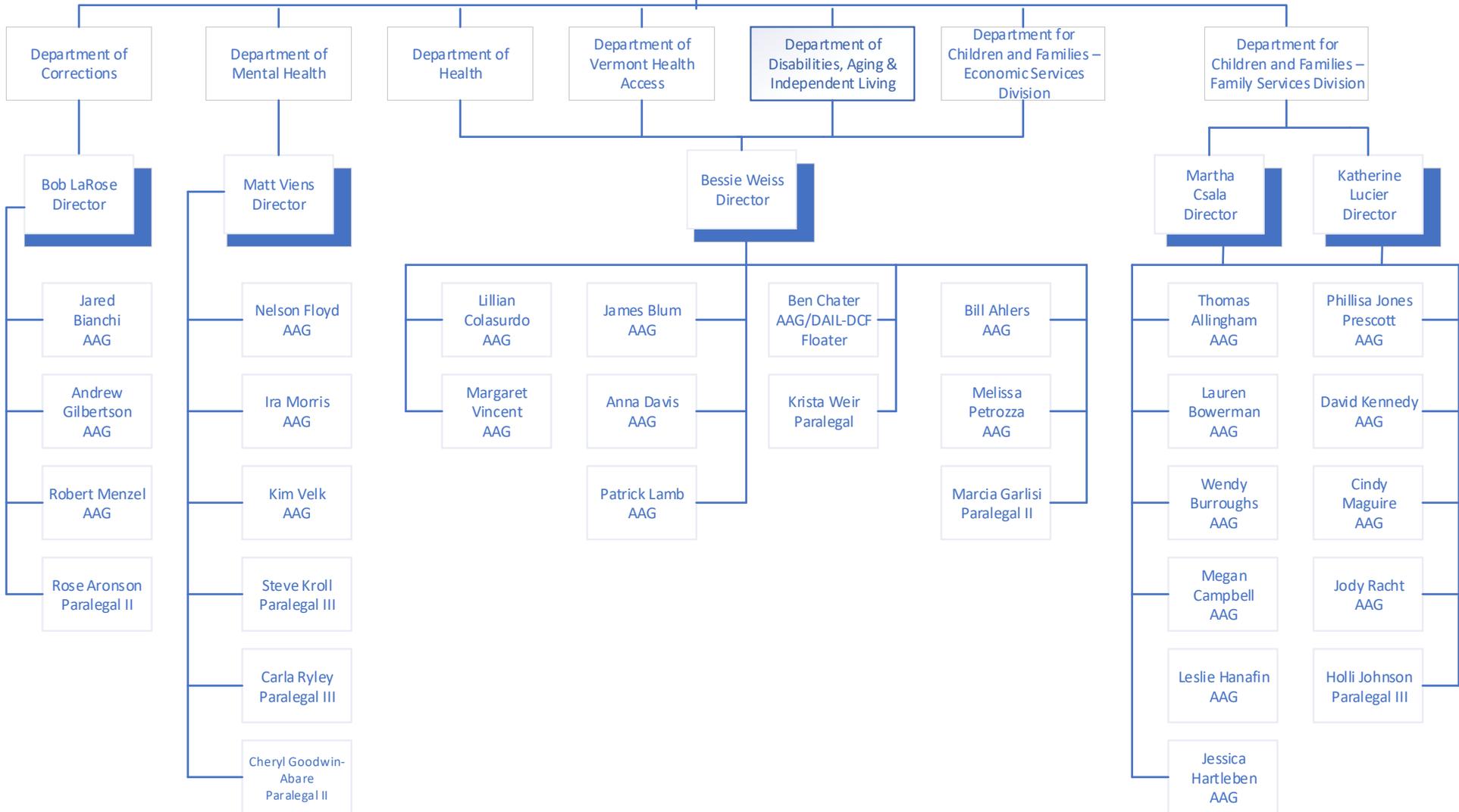
/s/ Sarah E.B. London
Sarah London
Assistant Attorney General

Office of the Attorney General
Human Services
Organization Chart

TJ Donovan
Attorney General

Joshua Diamond
Deputy Attorney General

Kristin Clouser
Chief, Human Services



Assistant Attorney General Position
**Agency of Human Services/Department for Children and Families (DCF)-Family Services
Division**

JOB DESCRIPTION: a full-time AAG position is open to represent the DCF-Family Services Division primarily in the Family Services Division's central Vermont districts including coverage of cases generated in Lamoille, Orange and Washington counties. The duties of the position include the following:

- Litigation of termination of parental rights and other juvenile court hearings in the Superior Court—Family Division of Vermont;*
- Representing DCF before the Human Services Board and Vermont Superior, Probate and Supreme Courts;*
- Providing general counsel guidance to DCF employees on litigation, policy interpretation, and other matters as required;*
- Representing DCF in administrative hearings at Woodside Juvenile Rehabilitation Center;*
- Training DCF employees and contractors on various legal topics;*
- Other legal work as requested by supervising attorney, including litigation in districts other those of primary assignment;*
- Work with other AG and DCF divisions as required; and*
- Travel to DCF district offices and Superior Courts across the state.*

At least 5 years of experience in administrative, juvenile, family, civil and/or criminal matters. Preference will be given to applicants with relevant litigation experience, especially if in Vermont courts. Candidate must be willing to travel and work independently but within the structure of a government legal team. Self-reliance, minimal IT skills and knowledge of state and federal child protection law, regulations and policies are a must. Candidates must be a member in good standing of the Vermont bar, or eligible to waive in, with excellent oral and written communication skills.

This assistant attorney general position is an exempt full-time position. Salary and benefits will be based upon qualifications and experience in accordance with the Attorney Pay Plan.

This position will remain open until filled. Please respond by sending your statement of interest and resume to Kate Lucier, Assistant Attorney General, HC 2 North, 280 State Drive, Waterbury, Vermont 05671-2080 or katherine.lucier@vermont.gov.

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Assistant Attorney General Position
Agency of Human Services/Department for Children and Families (DCF)-Family Services Division

JOB DESCRIPTION: a full-time AAG position is open to represent the DCF-Family Services Division primarily in the Family Services Division's North East Kingdom districts including coverage of cases generated in Caledonia, Essex and Orleans counties. The duties of the position include the following:

- Litigation of termination of parental rights and other juvenile court hearings in the Superior Court—Family Division of Vermont;*
- Representation of DCF before the Human Services Board and Vermont Superior, Probate and Supreme Courts;*
- Providing general counsel guidance to DCF employees on litigation, policy interpretation, and other matters as required;*
- On occasion, representation of DCF in administrative hearings at Woodside Juvenile Rehabilitation Center;*
- Participation in training of DCF employees and contractors on various legal topics;*
- Other legal work as requested by supervising attorney, including litigation in districts other those of primary assignment;*
- Work with other AG and DCF divisions as required; and*
- Travel to DCF district offices and Superior Courts across the state.*

At least 3 years of experience in administrative, juvenile, family, civil and/or criminal matters is strongly preferred. Preference will be given to applicants with litigation experience, especially if in Vermont courts. Candidate must be willing to travel and work independently but within the structure of a government legal team. Self-reliance, minimal IT skills, and the ability to gain knowledge of state and federal child protection law, regulations and policies are a must. Candidates must be a member in good standing of the Vermont bar, or eligible to waive in, with excellent oral and written communication skills.

This assistant attorney general position is an exempt full-time position. Salary and benefits will be based upon qualifications and experience in accordance with the Attorney Pay Plan.

This position will remain open until filled. Please respond by sending your statement of interest and resume to Kate Lucier, Assistant Attorney General, HC 2 North, 280 State Drive, Waterbury, Vermont 05671-2080 or katherine.lucier@vermont.gov.

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Draft 6/14/05

STATE OF VERMONT

OFFICE OF THE ATTORNEY GENERAL

GUIDE FOR ASSISTANT ATTORNEYS GENERAL

Updated: July 1, 2005

**Wallace Malley
Deputy Attorney General**

**William Griffin
Chief Assistant Attorney General**

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ATTACHMENTS: Office Organizational Charts

INTRODUCTION

This guide provides an overview of the Office of Attorney General and its responsibilities, organization, operation, and personnel policies applicable to Assistant Attorneys General (“AAG’s”) and Special Assistant Attorneys General (SpAAG’s), where applicable. (In general, any guidance directed toward AAG’s applies equally to SpAAGs.) Though oriented primarily toward AAG’s occupying “exempt” employment positions, the guide provides useful background information for all staff, particularly on such topics as the Office’s statutory authority, its mission and its organizational structure. This guide is not an exclusive index to all the duties, workings and policies of the Office. Each Division will have its own procedures and policies unique to its own mission, as established by directive and practice. Policy memos, issued from time to time as circumstances arise, should be retained with an AAG’s own personal copy of this manual for future reference.

The provisions of this guide are limited and modified by any inconsistent law or contract provision. For example, the insurance and other employment benefits summarized in this manual are governed by the statutes, contracts and plan documents that describe those benefits in detail. **The provisions of this guide are intended to provide assistance to staff attorneys and to facilitate the efficient operation of the office only and do not in any way create any private cause of action or legal rights.** From time to time the Attorney

General, in his/her discretion, may suspend or modify any provision in this guide. As exempt employees, all AAGs and Special AAGs serve strictly at the will of the Attorney General. Nothing in this guide negates or modifies this at-will status.

AUTHORITY OF THE OFFICE OF THE ATTORNEY GENERAL

The Attorney General for the State of Vermont is vested with broad authority and powers to protect the state's citizens and the integrity of their governmental operations. Responsibilities of the Attorney General as the state's chief legal counsel are set forth at 3 V.S.A. Chapter 7 and include:

§152. Scope of authority

The attorney general may represent the state in all civil and criminal matters as at common law and as allowed by statute. The attorney general shall also have the same authority throughout the state as a state's attorney.

§153. General powers

(a) The attorney general shall have the general supervision of criminal prosecutions, shall consult with and advise the state's attorneys in matters relating to the duties of their office, and shall assist them by attending the grand jury in the examination of any cause or in the preparation of indictments and informations when, in his judgment, the interests of the state require it.

§ 157. Appearance for state

The attorney general shall appear for the state in the preparation and trial of all prosecutions for homicide and civil or criminal causes in which the state is a party or is interested when, in his judgment, the interests of the state so require.

§ 158. Attendance at sessions of general assembly

When required by either branch of the general assembly, the attorney general shall attend its sessions and advise and assist in the preparation of legislative business and documents.

§ 159. Opinions; state matters and actions

The attorney general shall advise the elective and appointed state officers on questions of law relating to their official duties and shall furnish a written opinion on such matters, when so requested. He shall have general supervision of matters and actions in favor of the state and of those instituted by or against state officers wherein interests of the state are involved and may settle such matters and actions as the interests of the state require.

The Attorney General is also obligated, under 3 V.S.A. §1102(b), to defend, or to authorize outside representation, for state personnel in civil litigation against them where

the Attorney General determines that the alleged act or omission occurred within the scope of the employee's official duties....

In such a case, the Attorney General may independently authorize settlement of any claim for damages against the state. 12 V.S.A. §5603.

The Attorney General enjoys exclusive authority, unless otherwise specified by statute, to represent the State of Vermont or to retain outside counsel for the purpose of representing the state in civil litigation. The Attorney General, as an independently elected official, is responsible for determining the public interest in any state matter subject to litigation. 3 V.S.A. §157. The Attorney General is also recognized at common law as an officer acting in the public's interest:

It is true that at common law the duty of the Attorney General was to represent the King, he [or she] being the embodiment of the state. But under the democratic form of government now prevailing, the people are the King, so the Attorney General's duties are to that sovereign, rather than to the machinery of government.

Commonwealth ex rel. Hancock v. Paxton, et al., 516 S.W.2d 865, 867 (1974).

AAGs should recognize that, even in the context of government practice, agencies and agency officials are our clients. It is our policy to try to reach consensus with our agency clients, where appropriate, in the course of litigation or other legal matters. In those rare, but occasional, circumstances where the position of a state agency is at variance with the public interest as determined by the Attorney General, the Office will proceed on behalf of the public interest.

OFFICE STRUCTURE

Under 3 V.S.A. §153(b), the Attorney General may appoint a Deputy Attorney General,

remove him [or her] at pleasure, and be responsible for his [or her] acts. Such deputy shall perform such duties as the attorney general shall direct, and in the absence or disability of the attorney general perform the duties of the attorney general

The Attorney General is further authorized, under 3 V.S.A. §153(c), to:

appoint such assistant attorneys general and special assistant attorneys general as may be necessary for the proper and efficient performance of his department, and with the approval of the governor, fix their pay, remove them at pleasure and be responsible for their acts.

The Deputy and Assistant Attorneys General are entrusted with carrying out the significant responsibilities of the Office. Because they hold positions of public trust and represent the Attorney General, the Deputy and Assistant Attorneys General are expected to conduct themselves with the highest degree of professionalism, judgment and discretion.

The Office is structured around an Executive Department (a.k.a. the "Front Office") and five major divisions: the Criminal Division, the Human Services Division, the Civil Division, the General Counsel and Administrative Law ("GCAL") Division and the Public Protection Division. In charge of each Division is an Assistant Attorney General designated as the Division Chief who is directly responsible to the Attorney General. Assistant Attorneys General assigned to the divisions are directly responsible to their respective Division Chiefs.

General Office Administration

Office policy and administration is directed by the Attorney General through the Deputy Attorney General and Chief Assistant Attorney General, together with the Division Chiefs. Overall budget and financial administration is handled by the Office's **Business Manager** and the Chief Assistant Attorney General. Personnel administration and the coordination and supervision of secretarial and administrative support services are the responsibilities of the **Personnel Officer / Office Manager**. General management over the training, use and upgrades

regarding computer and technology services are handled by the **Technology Manager**.

The **Deputy Attorney General** serves as the Chief Operations Officer responsible to the Attorney General for: overall organization and operation of the office; development and implementation of policy and priorities; general supervision and control of litigation and settlement negotiations; personnel and business administration, together with any and all administrative, legislative and litigation responsibilities as the Attorney General may direct.

The **Chief Assistant Attorney General** serves as general Chief of Staff, chief counsel and budget administrator for the Office and, by designation of the Attorney General, represents the Office in the absence of the Attorney General and the Deputy Attorney General. The Chief Assistant serves as legal counsel to the Attorney General, the Deputy Attorney General and Division Chiefs, advisor on all matters relating to the performance and operation of the Office, and counsel-at-large to state agencies, boards, and to the legislative and executive branches of government. The Chief Assistant also acts as Division Chief for the GCAL Division.

The **Division Chiefs** are directly answerable to the Attorney General. They are responsible for carrying out policy and achieving office priorities; providing advice and counsel to the Attorney General on matters falling within the jurisdiction of their Divisions; and directing the general, personnel and administrative functions of their divisions. Division Chiefs are also responsible for

caseload management and direction of investigation, case resolution and litigation as to all matters within the jurisdiction of their respective divisions.

There are also several unit directors who bear significant general managerial responsibilities for their respective units and who report directly to their division chiefs. For example, the **Medicaid Fraud and Residential Abuse Unit Director** reports to the Criminal Division Chief. The **Civil Rights Unit Director** and the **Antitrust Unit Director** both report to the Chief of Public Protection, while the **Department of Children and Families (DCF) Unit Director**, the **Corrections Unit Director** and the **Mental Health Unit Director** report to the Chief of the Human Services Division. The **Waterbury Civil Litigation Unit Director** reports to the Chief of the Civil Division. Finally, the **Transportation Unit Director** reports to the **GCAL Director**, who in turn reports to the Chief Assistant Attorney General.

A **Special Litigator** is attached to the Front Office and is directly answerable to the Attorney General. This attorney undertakes litigation and special assignments potentially relating to any of the broad functions of the Office. This person may be lead counsel or co-counsel in cases from any division and is responsible for necessary coordination with the appropriate Division Chief and division staff according to his or her particular assignment. Priority setting among conflicting work demands on the Special Litigator will be resolved by the Deputy Attorney General, when necessary.

Description of Divisions

The **Criminal Division** has statewide jurisdiction and is generally responsible for criminal law enforcement, particularly in the areas of homicides, economic crimes, public corruption, child sexual abuse, drug law enforcement and criminal appeals. Investigation or prosecution may be commenced upon the Office's own initiative or at the request of a State's Attorney or other police or law enforcement offices. The Criminal Division includes the Medicaid Fraud and Residential Abuse Unit ("MCFRAU") and the Appellate Unit. MCFRAU specializes in the detection, investigation and criminal prosecution of health care industry fraud against the state and abuse of patients and residents at various institutions. The Appellate Unit handles criminal appeals arising from cases brought by this Office and by State's Attorneys. The Criminal Division also coordinates with the Public Protection Division and the Special Litigator on the investigation and prosecution of environmental crimes and consumer frauds.

The **Human Services Division**, posted at the Waterbury State Office Complex, serves as general and litigation counsel to the State Agency of Human Services and its departments. This Division handles legal work primarily for the Departments of Children and Families; Aging and Independent Living; Health; Corrections;; and the Office of Child Support. The Division handles administrative hearings and state and federal litigation involving issues of: federal and state grants; entitlement, welfare and medical assistance programs; mental health commitments and discharge, social services, juvenile justice, corrections and public

health programs. The staff of the Human Services Division are employees of the Agency of Human Services. They report to the Chief of the Human Services Division and are under the supervision of the Attorney General.

The **Civil Division** acts as civil trial counsel to the State's executive officers and agencies. It also provides counsel to such parties on matters related to litigation. Responsibilities include civil trials and appellate practice before the state and federal courts. This Division acts as liaison and co-counsel with the State's liability insurer. It also defends the Legislative and Judicial Branches in litigation when appropriate and when conflict rules permit. Although headquartered in the Montpelier office, the Civil Division also maintains a **Waterbury Civil Litigation Unit** (WCLU), located in the state office complex in Waterbury. This unit specializes in cases asserting significant monetary damages claims against departments and state employees located in Waterbury.

The **Public Protection Division** is responsible for enforcement of the state's environmental, consumer protection, antitrust and civil rights laws. Performing a variety of general counsel, trial counsel and enforcement duties for the Agency of Natural Resource and the Environmental Board, the Public Protection Division represents the state in actions on toxic waste, solid waste violations of water and air quality standards, and non-compliance with land use regulation including, but not limited to Act 250. The Division coordinates with the Criminal Division and Special Litigator on the investigation and prosecution of environmental crime and criminal consumer fraud. The Division's Consumer Fraud

and Antitrust Units are charged with investigation and prosecution of unfair and deceptive trade practices, antitrust violations, fraudulent charitable solicitations and mail, telemarketing and internet fraud. The Division's Civil Rights Unit investigates and reports on complaints of discrimination in private-sector employment and retaliation in workers' compensation matters, as well as complaints of illegal drug testing and polygraphing and violations of the state "Hate Crimes" statute that might require injunctive relief.

The General Counsel and Administrative Law Division (GCAL) provides general legal services to a broad mix of agencies and departments. The Division's clients include the Agency of Transportation and the departments of Tax, Banking/Insurance/Securities/Health Care, Buildings and General Services, Liquor Control, the Secretary of State and the State Treasurer. The Division prosecutes administrative charges filed with the Medical Practices Board, and represents state agencies at the Labor Relations Board. The GCAL Director reports to the Chief Assistant, who is the Division Chief for this division.

GENERAL CONSIDERATIONS FOR CIVIL AND CRIMINAL LITIGATION ON BEHALF OF THE STATE

CIVIL MATTERS

Commencement

The general rule is that no Assistant Attorney General may initiate legal proceedings or civil litigation (including cross-claims or counter-claims) without the

advice and consent of the Division Chief and the Deputy Attorney General. The Deputy Attorney General, in consultation with the appropriate Division Chief, may authorize categories of non-criminal and routine legal proceedings (as, for example, professional licensing complaints) without prior review. Notwithstanding the foregoing, whenever proposed litigation involves significant issues of law or fact, or may potentially strain relations between the Office and a client agency, board or commission, the assigned Assistant Attorney General must obtain prior review and approval by the Deputy Attorney General or Chief Assistant Attorney General. In emergency situations, such as a need for a TRO, *ex parte* attachment or abatement of imminent public hazard, if the Division Chief or another attorney in higher authority is not available, litigation may be initiated according to the best judgment of the Assistant Attorney General.

Settlements

No civil enforcement action may be settled without prior authorization of the Division Chief. In addition to other approvals, settlements of damage claims against the state must be authorized in advance by the Chief Assistant or Deputy Attorney General. Parameters of settlement authority should be worked out in advance of negotiation.

Civil Enforcement Referrals

Regulatory enforcement matters referred to the Office by state agencies are to be treated as law enforcement matters falling within the primary jurisdiction and discretion of the Attorney General. The Attorney General will normally defer and rely upon well-founded opinions and expertise of client agencies regarding the appropriate injunctive relief or remedial action necessary for protection of the public health, safety and welfare. Assistant Attorneys General must realistically tailor any demand for remedial or injunctive relief according to the quality of the expertise or proofs offered by the client agency.

It is imperative that Assistant Attorneys General responsible for agency representation maintain close and informed relationships with agency staff charged with administrative enforcement. Standards for enforcement priorities, and the quality of evidence necessary for court action should be mutually understood and agreed upon between this Office and the client agency. This Office will, in any event, allocate its limited attorney and litigation resources on a "worst-first" basis, *i.e.*, those matters involving a criminal violation, demonstrated hazard or threat to the public health and safety, and other cases of significant import for, and impact upon, the benefit of the public, will be handled first.

Civil Penalties

After discussion and advice from the interested client agency, the demand for, and extent of, civil monetary penalties to be sought are ultimately for the

determination of the Attorney General. Assistant Attorneys General faced with strong disagreements by client agencies as to the nature and extent of civil penalties should consult with their divisions chiefs and may offer their client agencies an opportunity to present their position directly to the Attorney General (Deputy or Chief Assistant).

Employment Discrimination Claims

Notice of an employment discrimination claim against a state agency is usually lodged by the Human Rights Commission. Assistant Attorneys General should seek to resolve meritorious complaints as soon as practicable after notice. Where the claim cannot be so resolved, the Human Rights Commission will commence an administrative investigation requiring access to the agency's personnel files and staff. This Office will advise the agency to cooperate fully in the investigation as required by law.

Upon receipt of notice of a discrimination claim, the Assistant Attorney General primarily responsible for representing the agency will, with the advice of the Division Chief, evaluate the merits of the complaint. If it appears that a valid claim has been advanced, the Assistant Attorney General will recommend an appropriate settlement strategy to the agency. In the event that an agency does not fully cooperate in the investigative stage, or if the agency unreasonably rejects reasonable settlement efforts, the Chief Assistant or Deputy Attorney General will be notified. All reasonable efforts will be made, consistent with ethical

considerations, to mediate any disagreements between our Office and the agency. If no resolution can be achieved, and with consent of the Deputy Attorney General or Chief Assistant, the agency may be notified that a potential conflict exists and that the agency may retain outside counsel at its own expense. This Office also reserves the right in appropriate cases, and consistent with its statutory authority, to resolve and settle such claims, and to deny authorization to retain outside counsel, where the agency has unreasonably withheld its consent.

Polygraphs

No polygraph examination shall be employed in a civil or regulatory matter without prior approval of the Division Chief. Polygraph examinations of a state defendant or respondent, actual or targeted, should not be offered or agreed upon unless and until evidence sufficient to prove the charge is already established and all applicable provisions of state law have been complied with. Special attention should be given to the Polygraph Protection Act, 21 V.S.A. Chapter 5, Subchapter 5A.

CRIMINAL MATTERS

Commencement

No Assistant Attorney General may initiate grand jury or criminal inquest proceedings, secure warrants or commence criminal prosecution, without the advice and consent of the Criminal Division Chief.

Settlements

No Assistant Attorney General may enter into plea discussions or negotiations, or enter into a plea agreement, without the advice and consent of the Criminal Division Chief and, in some instances, prior approval of the Attorney General or Deputy Attorney General, where the Criminal Justice Division Chief deems it necessary. Parameters of plea agreement authority should be worked out in advance of negotiation.

Agency Referrals

Assistant Attorneys General should be sensitive to agency complaints, as well as information and the activities of persons dealing with agencies, that might indicate violations of criminal law. All Assistant Attorneys General should be familiar with the provisions of 13 V.S.A. § 3016 dealing with false, fictitious or fraudulent information submitted to state agencies. Potential violations can arise in applications or procedures for permits, licenses, contracts, grants, billings, vouchers, invoices, etc. Suspected violations should be referred to the Criminal Division. Pending advice from that Division, further agency contact with the suspect should be *discreetly* curtailed.

Complaints alleging criminal activity by a state employee should also be forwarded to the Criminal Division. Assistant Attorneys General should avoid giving any advice to state employees about any such allegations.

Investigations

Criminal investigations into an agency's operations or personnel can lead to friction between the agency and this Office. Assistant Attorneys General posted as agency counsel shall not advise agency staff interested in such an investigation, except as directed by the Attorney General or Deputy Attorney General.

Caveat: Agency employees may perceive an Assistant Attorney General as “their” attorney for all employment, and even non-employment, legal issues. Assistant Attorneys General may be contacted by agency employees for advice on possible criminal liability for misconduct arising in and out of the course of their employment. As soon as it appears that an employee is seeking advice on criminal culpability for past or current activities, Assistant Attorneys General will immediately refer the employee to the Defender General, 3 V.S.A. §1104, or to private counsel and report the incident to the Division Chief.

Licensing Board Referrals

Assistant Attorneys General should also be sensitive to Board matters which may also involve a criminal violation. Many professional misconduct complaints include allegations of drug abuse, patient abuse or exploitation, or fraud. Absent an emergency, such matters should be discussed with the local law enforcement agencies, or the Criminal Division, before filing administrative charges against a licensee.

PARALLEL PROCEEDINGS

Contemporaneous civil and criminal proceedings against the same defendant arising from the same incident are generally disfavored. However, in situations where a criminal investigation or prosecution is pending or anticipated, and injunctive and other relief is necessary to protect the public health, safety or environment from harm, the appropriate civil action can be maintained to the extent that the criminal matter is not thereby jeopardized and applicable rules of professional responsibility are adhered to. Such civil actions will normally turn on evidence obtained independently of the criminal process, and will not involve Fifth Amendment issues.

RECURRENT QUESTIONS

Assistant Attorneys General should be familiar with the basic elements of the following:

- 1 V.S.A. Chapter 5 - Common Law; General Rights - including open meetings and public access to records.
- 3 V.S.A. Chapter 7 - Attorney General.
- 13 V.S.A. §3016 - False Claims against the State.

Questions about election laws, local government issues and complaints against licensed professionals can be referred to the Secretary of State's Office or the appropriate licensing board. Our GCAL Director also has a good working knowledge of many of these issues. Callers with questions on municipal law issues should be referred to the town or city attorney with the explanation that "the

Attorney General’s Office is not authorized by statute to advise persons on local government issues.” Inquiries on private legal problems or disputes should be referred to private counsel with the explanation to the citizen that “the Attorney General’s Office is not authorized by statute to respond or offer advice to private persons on private legal questions.”

VICTIMS OF CRIME AND CIVIL COMPLAINANTS

An Assistant Attorney General assigned to a criminal matter should strive to keep victims advised of all significant developments during prosecution and appeal. Complainants with a continuing interest, or personal stake, in a civil matter may be advised as to general progress in the case, subject to limitations as necessary to the security and effectiveness of ongoing investigation or litigation. Remember that anything disclosed on one day may be publicized the next.

CONSTITUTIONAL CLAIMS

No affirmative or defensive claims based on the Vermont Constitution may be pled in any litigation without prior authorization from the Civil Division Chief or, if unavailable, the Chief Assistant or Deputy Attorney General. Because of the potentially broad impact any state constitutional law decision can have on state regulatory and law enforcement responsibilities, the Civil Division Chief acts as a clearinghouse for state constitutional claims arising in litigation, and is responsible

for promoting uniformity and consistency in the state's posture on state constitutional issues.

Note that the Office now has an “Appellate Project” to insure that positions taken in civil and criminal matters are consistent office-wide and that written and oral advocacy, particularly in appellate matters, adhere to the highest standards of professionalism. Any legal arguments, constitutional or otherwise, that may have a bearing on positions taken in other parts of the office should be cleared with the appropriate member of the Appellate Project.

CLIENT RELATIONS

Communications with Clients:

It is imperative that Assistant Attorneys General keep their client agencies and staff informed of actions taken in pending or anticipated civil litigation. Any significant action, *particularly* in settlement negotiations, shall be shared with the client agency. Objectives and parameters of authority shall be established and confirmed as a case develops and in advance of negotiation. Absent specific oral or written confirmation from the client agency, and if the Division Chief is not available, Assistant Attorneys General may, in an emergency situation, proceed in the public interest according to their best judgment.

Confirming positions with the client agency fosters not only good communications with the client, but will also serve to keep faith between the Assistant Attorney General, opposing counsel and the Court. Always confirm the objective with the client, and confirm any change in position thereafter. At each critical state of the proceeding, tell the client agency what the Office is doing towards achieving the stated objective.

The Attorney General's Office has the ultimate authority to decide what the State's legal position in a settlement will be. However, it is the Office's policy to reach consensus with the client whenever possible. In addition, where the State's self-insurance program is implicated, the Director of Risk Management is also a client and must similarly be consulted.

Assistant Attorneys General should review applicable provisions of the Vermont Rules of Professional Conduct pertaining to interactions with clients. Of particular significance is the "Scope" section of the Preamble to the Rules, which states as follows:

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in the private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intra-governmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. They also may have authority to represent the "public interest" in

circumstances where a private lawyer would not be authorized to do so. These rules do not abrogate any such authority.

Inter-Agency Conflicts:

Executive Branch agencies represented by the Office may occasionally take conflicting or inconsistent positions in actual or threatened litigation. When dealing with legal issues in which two or more Executive Branch agencies are interested, Assistant Attorneys General should be cognizant and sensitive to potential or real differences between the agencies. Assistant Attorneys General posted within agency offices should be particularly sensitive to such situations. These may involve disagreements on statutory interpretation or competing leadership roles on policy decisions. Because there is only one overall Executive Branch client, such disputes are not normally “conflicts of interest” in the ethical sense.

Inter-agency conflict over issues of law can, if necessary, be ultimately arbitrated by the Attorney General. Assistant Attorneys General representing different agencies in such a conflict should, with any necessary assistance from their Division Chiefs, work together to resolve questions of law according to established standards of statutory construction and legal interpretation. If reconciliation efforts fail, the Deputy Attorney General or Chief Assistant Attorney General is available to intervene.

Inter-agency disputes over leadership roles or a lack of necessary inter-agency coordination, should be, and usually are, resolved within the Executive Branch. Assistant Attorneys General should lend their efforts to facilitate inter-agency coordination or the designation of a lead agency as necessary for litigation. Assistant Attorneys General must also avoid a prolonged engagement as referee, mediator or coordinator between agencies.

Necessary preparation for successful litigation cannot be indefinitely postponed pending resolution of squabbling between agencies. Thus, if issues of leadership or coordination are not resolved between the agencies after reasonable time and effort from this Office, it may be necessary, with the advice and counsel of the Division Chief, and prior approval by the Deputy or Chief Assistant Attorney General, to unilaterally designate a single agency to lead and be responsible for gathering all data required for litigation from other agencies. The Deputy Attorney General or Chief Assistant Attorney General is available to intervene.

CAVEAT: Assistant Attorneys General should not directly contact the Governor's Office concerning such conflicts without approval of the Attorney General, Deputy or Chief Assistant Attorney General.

Conflicts with Independent Boards:

Conflicts between an Executive Branch agency and a quasi-independent board or commission can present a more difficult situation. Because the

independent board or commission may not fall under the direct control of the Executive Branch, disputes between these Boards, or between Boards and other governmental entities may defy resolution and even lead to litigation. When irreconcilable differences occur, the Office may represent one of the parties consistent with the public interest as determined by the Attorney General. In the event of conflict of interest, the Attorney General may authorize employment of outside counsel.

CONFLICTS OF INTEREST AND ETHICS IN GENERAL

Beyond mere inter-agency disputes, the Office of Attorney General may be confronted with situations presenting a real or potential conflict of interest. The Office cannot typically represent opposing points of view in a lawsuit nor can the Office advise or represent an adjudicative agency in a proceeding in which the state is interested as a party.

Because the Attorney General represents state interests in law enforcement and public protection, Assistant Attorneys General may not ordinarily appear in litigation in opposition to a State's Attorney's Office. In the event of a conflict, retention of outside counsel may be authorized by the Attorney General.

While the Attorney General is the statutory counsel-at-large to state government, the Attorney General is also charged with prosecuting before some of the regulatory commissions and licensing boards on behalf of the state and public. As a general rule, the Office will not act as hearing officer for administrative law

panels. Similarly, the Office does not advise independent or adjudicative boards in administrative litigation or appeals when the state is a party.

To avoid potential conflicts, no Assistant Attorney General may advise, or represent in litigation, a Board or Commission without prior approval from the Deputy or Chief Assistant Attorney General.

In general, Assistant Attorneys General should be familiar with the Rules of Professional Responsibility and be vigilant about potential conflicts of interest and other ethical issues. Questions on ethics should be posed to the Chief Assistant Attorney General, who will consult with an office's **Advisory Committee on Ethics** as needs so require. All staff attorneys are strongly urged to attend periodic office CLEs on ethics issues.

FORMAL OPINIONS

In recent years, we have refrained from issuing a large number of formal opinions. From time to time, it may be necessary for the Attorney General to issue a formal legal opinion. Formal legal opinions are circulated widely and represent the official legal position of the Attorney General on a given issue. Formal legal opinions will ordinarily issue only to elective and appointed executive branch

officials on matters regarding performance of their official duties, and to legislators only upon inquiry relating to legislative business.

Requests for formal legal opinions shall be addressed in writing to the Attorney General, Deputy Attorney General or Chief Assistant Attorney General. Such requests will be logged in and routed to the appropriate Division for assignment by the Division Chief. Once directed to the Division Chief, a proposed opinion should be available within 30 days for the review, comment or approval of the Attorney General.

No formal legal opinion shall issue without prior approval of the Attorney General. As a general rule, the Office will not issue a formal legal opinion when:

- The particular issue is likely to be the subject of litigation.
- The same or similar issue is pending decision in a Vermont Court, the U.S. District Court for Vermont, the Second Circuit Court of Appeals or the U.S. Supreme Court. (In such a case, less formal, general advice may still be appropriate.)
- The inquiry is based on a purely hypothetical or theoretical state of facts.
- The request is from, or on behalf of, municipal officers on an issue of municipal law (town officers should be referred to local municipal counsel).

All formal, and some informal, opinions are published on the office's website.

Formal Opinion Format

The formal opinion is not an adversarial brief. Both sides of the question must be examined and analyzed. All formal legal opinions shall issue in the following form:

- State the question, including facts given.
- State that it is assumed the facts are as submitted.
- State the answer.
- Text of the opinion.
- Repeat the conclusion.
- Qualify as circumstances warrant. (Writers should include the qualifier that AG Opinions are only opinions, and do not create, negate or affect legal rights or entitlements.)

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While the Attorney General is the statutory counsel-at-large to state government, the Attorney General is also charged with prosecuting before some of the regulatory commissions and licensing boards on behalf of the state and public. As a general rule, the Office will not act as hearing officer for administrative law panels. Similarly, the Office does not advise independent or adjudicative boards in administrative litigation or appeals when the state is a party.

To avoid potential conflicts, no Assistant Attorney General may advise, or represent in litigation, a Board or Commission without prior approval from the Deputy or Chief Assistant Attorney General.

In general, Assistant Attorneys General should be familiar with the Rules of Professional Responsibility and be vigilant about potential conflicts of interest and other ethical issues. Questions on ethics should be posed to the Chief Assistant Attorney General, who will consult with an office's **Advisory Committee on Ethics** as needs so require. All staff attorneys are strongly urged to attend periodic office CLEs on ethics issues.

ETHICS AND PRIVILEGES

The application of the attorney-client privilege in the context of governmental practice is more complicated than in private practice. Assistant Attorneys General should familiarize themselves with the applicable rules of professional conduct and privilege. To the extent that a traditional rule of privilege applies, one should be aware that that legal advice may often be published at the option of the client

agency or staff. Remember, also, that advice considered confidential by one official or administration may be released at the option of a successor. Thus, advice considered confidential today may be publicized tomorrow.

Assistant Attorneys General with questions on confidentiality or publicity should consult with their Division Chiefs. (Also note the “Recurrent Questions” section, infra, especially with reference to the Access to Public Records Law, 1 V.S.A. sec. 315 *et seq.*)

RULE 11 PRACTICE AND ETHICAL COMPLAINTS

No complaints for Rule 11 sanctions should be filed against an opposing attorney without the recommendation of the Division Chief and prior approval of the Chief Assistant or Deputy Attorney General.

The decision to file a professional conduct complaint against an attorney is a personal decision that should be guided by Rule 8.3 of the Vermont Rules of Professional Conduct. (“A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness . . . shall inform the appropriate professional authority.”)

Notwithstanding the supposed confidentiality of the process, any Assistant Attorney General who is the subject of a professional conduct complaint should not assume that the lodging of a complaint against him/her will remain confidential. Since a complaint against an AAG is often viewed, at least by the public, as a

complaint against the Attorney General, AAGs are strongly encouraged to notify their supervisor and the Deputy Attorney General whenever a professional conduct complaint has been filed against him/her.

LEGISLATION AND LEGISLATIVE APPEARANCES

The General Assembly is a client to whom we are statutorily obligated to offer legal advice on proposed legislation. Bills initiated directly by members of the General Assembly are usually researched and prepared by the Legislative Council. New legislation sought by the Executive Branch, or by the Office of Attorney General, is often prepared by Assistant Attorneys General.

No new legislation may be proposed by an Assistant Attorney General without prior approval by the Attorney General or Deputy Attorney General.

Comments on Legislation

Legislators, lobbyists and interest groups will often solicit Assistant Attorneys General informally for their reactions or “input” on proposed bills. Friendly conversations or informal “constructive criticism” can later be misinterpreted or distorted. Thus, Assistant Attorneys General should refrain from commenting, either formally or informally, on legislation without first having obtained permission from the AG, the Deputy or the Chief Assistant. As a general matter, no comment or statement should be offered on any legislation sponsored by an agency-client without prior notice to and approval by the agency. It the Assistant Attorney

General's responsibility to determine if an agency-client has a specific stake in a particular bill. When in doubt, take the issue under advisement and tell the inquiring party that you will respond, if possible.

Assistant Attorneys General may offer comments on legislation in their personal capacities as citizens, provided that such comments are so qualified and appropriate actions are taken to avoid violations, if any, of applicable Rules of Professional Responsibility. Because such comments, even in a personal capacity, are sometimes wrongly interpreted as comments by the Attorney General, it is strongly recommended that the Deputy Attorney General or Chief Assistant Attorney General be notified in advance of such comments or testimony.

Agency Representation

As the legislative session progresses, Assistant Attorneys General are often asked by their client agencies to advocate the agency's position on legislation pending in committee. Legislative committees will frequently ask the Office for opinions on statutory construction and constitutional issues. On bills presenting an issue of civil or criminal law enforcement, committees will normally ask for the Attorney General's position on the proposed legislation. Assistant Attorneys General must not commit this Office to a position on a particular piece of legislation without prior approval from the Attorney General, the Deputy or Chief Assistant.

Keep in mind the distinction between testifying about the technical and legal aspects of a bill versus endorsement of a bill as a matter of public policy by the Office of Attorney General. This distinction may be less than obvious to the

committee requesting the testimony unless it is specifically spelled out during introductory remarks, such as:

I am Nedgar Feldge. I am an Assistant Attorney General and am appearing today on behalf of the Department of Environmental Conservation. I will explain the workings of H.177, which would classify certain waters in the State of Vermont. Because the bill focuses on technical aspects surrounding water purity, and does not present law enforcement issues, the Attorney General takes no formal position on H.177....

Advise the Office on law enforcement issues as they arise. The General Assembly relies upon the Office of Attorney General to enforce its civil and criminal laws. Most regulatory legislation includes a provision for referring complaints of non-compliance to the Office for appropriate court action. Legislative changes to existing public policy will also include proposed modifications to existing civil or criminal sanctions. It is imperative that the Attorney General be kept advised of proposed new, or modified, law enforcement responsibilities.

Do not advocate, or "lobby," for a bill without prior approval from the Attorney General. It is the sole prerogative of the Attorney General to identify those bills that will receive the endorsement of the Office as to policy and substance. The necessities of the legislative process may require the Attorney General's focused attention on a limited number of bills in a given session. There may be circumstances when it is entirely appropriate for Assistant Attorneys General to advocate on behalf of a wide variety of bills important to client agencies or to the Office. If so, simply secure the advice and consent of the Attorney General, Deputy Attorney General or Chief Assistant Attorney General prior to such efforts.

Keep informed and keep others informed. Several Assistant Attorneys General may be requested to testify at different times by different committees about the same piece of legislation. It is therefore imperative that Assistant Attorneys General, and the Attorney General, be kept up-to-date on the latest information and positions presented to the various committees on a given bill. For this purpose, the Deputy Attorney General keeps a master legislative file on all major legislative issues that the Office is following.

All substantive communications and contacts with legislators, *e.g.*, legal inquiries, opinions, requests to testify and testimony, etc., should be briefly summarized by email to the Deputy Attorney General. **Any and all legislative appearances must also be entered and briefly described in the legislative appearances log in the Shared Drive (S Drive / Legislature / Legislative Appearances.doc) of the Office's word-processing system.** The Deputy Attorney General or Chief Assistant Attorney General should be advised about any requested appearance before a legislative committee prior to the appearance.

Prior to any appearance before a legislative committee, Assistant Attorneys General shall review the legislative appearances log to determine if anyone else in the office has testified on the same matter. If so, the Assistant Attorney General should contact these other staff members and ascertain the nature of the testimony and issues involved. Any questions or uncertainty as to what position the Office should be taking on a given bill should be raised with the Deputy Attorney General or the Chief Assistant.

REGULATIONS AND REGULATORY APPEARANCES

The same considerations for legislation and legislative appearances apply to Assistant Attorneys General involved in the promulgation of regulations under the Administrative Procedures Act. For example, when an Assistant Attorney General appears before the Legislative Committee on Administrative Rules (LCAR), she/he should follow the same procedures as if testifying before any other legislative committee.

CONTACTS WITH GENERAL PUBLIC AND MEDIA

It is the policy of the Office to respond to inquiries by the public or press. Premature or unwarranted comment or disclosure of certain matters in the Office may jeopardize a case or unfairly harm the reputation of an interested party. There are also occasions when a public statement from one Division can adversely affect a pending investigation by another Division. *Check before you speak.*

Assistant Attorneys General are not to give statements or opinions concerning Office matters to the media or general public without prior approval from the Attorney General or Deputy Attorney General, except as follows:

1. Assistant Attorneys General may explain the State's position on cases in which they are participating, provided the position is already documented and on record through pleadings, briefs, oral argument, etc., prepared by the attorney. Read and be familiar with the Vermont Rules of Professional Conduct, Rule 3.6 (Trial Publicity) and realize it is no excuse that the rule is honored in the breach by your adversary.

2. Assistant Attorneys General may explain and clarify opinions which they have prepared after they have been issued.
3. Assistant Attorneys General may explain and clarify court decisions resulting from cases in which they have participated.
4. Assistant Attorneys General may inform the media when cases will be heard or when a decision may be issued.

Assistant Attorneys General invited to appear on any radio or television show may make general statements concerning Office policies and concerns, provided that those policies and concerns fall within the normal purview of that attorney's responsibility. Prior approval of any scheduled radio, television, or newspaper interview must be obtained from the Attorney General or Deputy Attorney General. (A limited number of staff has obtained standing permission to make radio and / or televisions appearances on certain topics because of the nature of their job responsibilities.) After any radio or television appearance, a *brief* summary of topics discussed should be submitted to the Deputy Attorney General.

Acknowledging Investigations to the Media:

As a general proposition, investigations are more easily managed when they can be conducted without frequent comment by the media. Practical considerations often make this ideal unattainable.

Unless otherwise authorized by the Division Chief or Front Office, an Assistant Attorney General may not announce that a criminal investigation is underway.

Receipt of non-criminal complaints may be acknowledged. Due, however, to the inflammatory nature of the word “Investigation” (a.k.a., the “I-word”), and its potentially prejudicial impact on the subject[s] of an investigation, Assistant Attorneys General should not, without approval of the Division Chief or the Front Office, indicate that the Office is conducting an “investigation.” In most instances, it suffices to indicate to inquiring reporters that the matter is “under review” or that the Office is “following up” on the matter. In some circumstances, there may be applicable confidentiality statutes that may further circumscribe the extent of public comments that can be made. Assistant Attorneys General are also cautioned to be aware of the trial publicity provisions of the Rules of Professional Conduct. (*E.g.*, Rules 3.6 and 3.8.)

Typically, Assistants may be asked when a given investigation or review might be completed. As a general rule, it is best not to give any specific date or deadline. Oftentimes, these deadline estimates prove unrealistic. It is best not to create any false expectations by the press or the public.

Remember that all public statements from the Office are attributed to the Attorney General. As such, decisions on public pronouncements are within the sole prerogative of the Attorney General.

Questions on responding to media inquiries should be directed to the Division Chief, or to the Deputy or Chief Assistant Attorney General.

Negotiated Settlements and the Press:

Limitations on, or prior agreements about, publicity are not negotiable as part of any settlement of any enforcement action. Occasionally, parties negotiating settlements with this Office will, as part of the settlement, seek assurance relating to press coverage or limitation on public statements. Prior agreements on public statements are not negotiable by the Office of Attorney General and are rarely in the public interest. Moreover, in those rare instances where such limitations or agreements may arguably advance the public interest, experience dictates that efforts to establish limitations are usually unworkable. Thus, public statements are not on the bargaining table.

Ethical consideration as set forth in the Vermont Rules of Professional Conduct (e.g., Rule 3.6 Trial Publicity and Rule 3.8 Special Responsibilities of a Prosecutor) will govern all public statements.

Other Media Concerns – The “No Surprises” Rule

_____ Given the high visibility of the Office and the public relations problems that can ensue when the Attorney General is caught unawares by a probing question from a reporter, all staff are encouraged to bring to the attention of the AG, the

Deputy or the Chief Assistant any miscellaneous matters that could potentially become controversial or embarrassing to the Office or its staff. Examples include, but are not limited to, the following: being cited for Driving Under the Influence or other crimes or offenses that might be of interest to the media; being involved in outside litigation that might be reported publicly; having a major personal or financial connection to an entity that is involved in litigation with the office; and being the subject of a professional conduct complaint.

The purpose of this provision is simply to avoid surprises and to allow the Office the opportunity to address potential problems or to plan responses to expected inquiries before they become public controversies.

COMPUTER RESOURCES

The Attorney General's Office is bound by the Electronic Communications and Internet Use Policy issued by the Department of Human Resources. Take a few moments to review it on the Department's website (Policy and Procedures Manual, Policy Number 11.7, effective July 1, 1999, attached). The following are a few of the computer rules we should keep in mind.

Viruses

Viruses often arrive as attachments, and most particularly in the form of executable attachments such as jokes, images or inspirational messages. When in

doubt, please check with our Technology Manager before opening or forwarding an attachment. If you receive an email with attachment from someone you do not know, or are suspicious about its origin, do not open it. Simply double delete it.

Privacy

There is no expectation of personal privacy in what we send, receive or retain on our office computers. As the Personnel Department policy states, when we visit an Internet site, we leave tracks. When we send or receive email, the message can usually be recreated, even after it has been "deleted." The AG's Office does not monitor computer use on any regular basis, but from time to time we might have to review and disclose computer files. For example, we might have to respond to discovery in a lawsuit or to an "access to public records" request. Or, it may become necessary to search computer files in order to investigate a misconduct complaint.

Prohibited Uses

One "prohibited use" that may not be obvious to everyone is lobbying. We cannot use government computers do our own individual lobbying on candidates or issues. Since any lobbying message sent from the AG's Office identifies us as the source, any such messages could come back to haunt us.

Permitted Uses

As the Human Resource Department's Internet Use Policy states, personal use of office computers must not interfere with an employee's job performance.

Examples of permitted uses include the occasional use of an Office computer to visit an appropriate Internet site after-hours or during the noon-hour, or taking a few moments to read and respond to personal email during work hours. Personal use is subject to the guidelines in the Personnel policy (*e.g.*, no junk mail, business activity, lobbying, indecency, harassment or other disruptive use).

Downloading Software

Obtain prior approval from the Technology Manager before downloading any software onto an Office computer.

Questions

If the question is technical, check with the Technology Manager. If you have questions about what is or is not an acceptable personal use, check with your supervisor.

HUMAN RESOURCES

Our lawyers come from varied backgrounds. Many were recruited from private practice, government administration, legal aid, defender and prosecutor offices. Many have been practicing law for more than a decade; several have served in a variety of the Office's major divisions.

Do not hesitate to seek legal advice from another Assistant Attorneys General in a different division. The Office has a tradition of oral history. What

appears to be a novel legal or factual issue may well have been addressed in some earlier, albeit near forgotten, case or controversy.

We have hand an office **briefbank** for several years. It can be easily found under “My Computer” in your WORD directory. In furtherance of the theme of learning from each other, each Assistant Attorney General should make it his or her priority to send a copy of any important legal documents, briefs and memoranda to the office briefbank. The value of the briefbank is directly dependent on the extent to which everyone is using it. Remember that there are over 50 other Offices of Attorney General throughout the United States and its territories. The National Association Of Attorneys General also acts as liaison in most of our practice fields, such as environmental law, constitutional law, bankruptcy, criminal justice, civil rights, health care, antitrust, tobacco and consumer protection. Often, a few telephone calls to other offices or organizations can lead to a public attorney somewhere in the country who has handled a similar issue under similar circumstances.

PERSONNEL POLICIES

Hours

The general norm for attorneys is a nine-hour workday, including an hour for lunch. Though some variations will be inevitable, normal office hours are 8:15 a.m. to 5:15 p.m. Assistant Attorneys General are expected routinely to work more than a forty-hour week as necessary for the effective and professional performance of the

Office. Assistant Attorneys General must obtain the approval of their Division Chiefs for changes in their work schedules. Merit-based bonuses, base pay increase and promotional opportunity will reflect, in part, an individual's "overtime" efforts.

Compensatory Time

As salaried professionals, Assistant Attorneys General are *not* entitled to compensatory time off for work on weekends and nights, but will receive compensatory time-off credit for work on state holidays.

Annual Leave

1. Assistant Attorneys General will be credited with annual leave at the rate of 1.67 days per month (20 days per year) during each year of employment. However, vacation days accumulated in prior employment may *not* be carried over to the Attorney General's Office. Assistants working on a part-time schedule will earn annual leave on a pro-rated basis. For example, a person working half-time would accumulate .835 days per month (10 days per year).

2. Unused annual leave days may be accrued and carried over from year to year, up to a maximum of 45 days. On separation from the Office, up to 20 days of accrued annual leave will be compensable. Again, part-time Assistant Attorneys General may accrue and carry over annual leave on a pro-rated basis. For example, a person working half-time may accrue and carry over annual leave up to a maximum of 22.5 days from year to year. Upon separation from office, that half-

time employee could be compensated for up to a maximum of 10 days accrued annual leave.

3. For all annual leave taken, Assistant Attorneys General must clear leave requests with the Division Chief or, in the absence of the Division Chief, the Chief Assistant Attorney General. Application for more than two days consecutive leave must be submitted in advance.

4. Annual leave must be reported on appropriate forms in order to track used and accumulated leave time.

Sick Leave:

In case of accident, illness, medical or surgical treatment and recovery therefrom, pregnancy or complications thereof, childbirth, etc., an employee shall be granted necessary leave subject to the following limitations:

1. Assistant Attorneys General will be credited with sick leave at the same rate as Annual Leave. Sick leave is accruable without limit. Persons previously employed by the State may carry over any accrued sick leave. On separation from the Office, accrued sick leave will *not* be compensable.

2. In case of disability continuing after exhaustion of sick leave, Assistant Attorneys General may request permission to use any accrued Annual Leave or may request a leave of absence without pay, or both, subject to approval and such terms and conditions as may be imposed by the Attorney General to assure efficient

operation of the Office, and consistent with the Family and Parental Leave Policy set forth below.

3. Sick leave must be reported, on applicable forms, in order to track used and accumulated leave time.

Family Leave and Parental Leave:

Assistant Attorneys General shall be granted Parental Leave during the employee's pregnancy and following the birth of the employee's child or within a year following the initial placement of a child 16 years of age or younger with the employee for the purpose of adoption or foster care. Family Leave shall be granted for the serious illness of the employee or the employee's child, stepchild, or ward of the employee who lives with the employee who lives with the employee, foster child, parent, spouse or parent of the employee's spouse.

A "serious illness" is an accident, disease or physical or mental condition that: poses an imminent danger of death; or requires in-patient care in a hospital, hospice, or residential care facility; or requires continuing treatment by a health care provider or under a health care provider's direction.

Family and Parental Leave are granted subject to the following conditions:

1. An Assistant Attorney General may take up to twelve calendar weeks of Family and Parental Leave in any twelve-month period. The relevant twelve months is a rolling period consisting of the twelve months counting backward from

the date leave is used. Leave need not be used all at once, and may be taken intermittently.

2. Upon birth or adoption of a child, or in case of disability continuing after exhaustion of sick leave or Parental Leave (whichever is longer), an additional leave of absence without pay (total of all leave not to exceed six months) may be requested, subject to approval and such terms and conditions as may be imposed by the Attorney General to assure efficient operation of the Office.

3. An employee may use accrued sick leave or annual leave, or both, as Family or Parental Leave, consistent with the leave policy stated in this guide. Family Leave and Parental Leave are otherwise uncompensated.

4. All benefits shall continue during the period of Parental or Family Leave. During the basic twelve weeks of leave, contributions to the cost of such benefits shall continue on the same basis as they were paid immediately prior to the leave. During any additional period of uncompensated leave that may be granted under this policy, the employee shall assume the cost of the benefits for the period of leave. Seniority, annual and sick leave shall continue to accrue for the entire period of Family or Parental Leave.

5. An employee shall give reasonable **written** notice of his or her intent to take Family or Parental Leave, including the expected duration of the leave, to the extent that the need for the leave and its duration are reasonably foreseeable.

Compassionate Leave

Upon the illness or death of an close family member, Assistant Attorneys General may take up to five days of Compassionate Leave. Such leave may be uncompensated or may be deducted from accrued annual or sick leave at the option of the Assistant Attorney General. Where the reason for the leave is the death of a family member, Compassionate Leave may be taken in addition to leave taken for Family Leave purposes. Where the reason for the leave is the illness of a family member, but the illness does not qualify as a “serious illness” as defined in this policy, Compassionate Leave will not count as time taken for Family Leave.

Personal Leave / Military Leave

A fulltime Assistant Attorney General who does not use more than 4 hours of sick leave in any calendar quarter will be credited with 1.25 personal leave days.

Personnel leave days can *not* be carried over from year to year (except for the 1.25 days earned in the last quarter of a year) and are *not* compensable on separation from the office.

Paid military leave is authorized up to 11 working days per year provided military orders accompany the leave request.

Administrative Leave

Leave without pay may be granted to any Assistant Attorney General at the discretion of the Attorney General if the leave is not detrimental to the Office.

Administrative leaves of absence without pay may be granted, for example:

1. To enable an Assistant Attorney General to recover from an illness or injury when annual or accumulated sick leave has expired; or

2. To enable an Assistant Attorney General to spend necessary and extended time with immediate family members due to serious illness or injury within the immediate family, or other family emergency, rather than exhaust annual or sick leave; or

3. To extend leave time after the maximum Family and Parental Leave has expired; or

4. For any other extraordinary circumstance with the concurrence of the Division

Chief. 5. Requests for administrative leave should be made in writing as much in advance of the requested leave period as possible.

Holidays

Assistant Attorney General may take the same paid holidays as are available to classified employees, subject to demands of the Office.

Part-time Positions and Job Sharing

Certain positions in the office may be amenable for job sharing. Others may be set aside as part-time positions as demands for legal work dictate.

1. Assistant Attorneys General holding permanent part-time or shared positions and the Attorney General shall agree upon a work plan, salary, benefits and regular definite hours with the concurrence of the Division Chief.

2. The general rule is that Assistant Attorneys General holding permanent part-time or shared positions may *not* perform outside legal work except that of a

personal, non-compensated nature, or to fulfill appropriate voluntary *pro bono* services as discussed below. Exceptions to this rule will be rare, if at all.

Private Practice, Pro Bono Service and Outside Activities

Assistant Attorneys General shall not engage in any employment, activity or enterprise which is or may be inconsistent, incompatible, or in conflict with Office duties, policy or client relationships. Assistant Attorneys General should be cognizant of the fact that, even when acting in a purely "personal" capacity and regardless of disclaimer, their activities are likely to reflect on, or be identified with, the Office of Attorney General. No private or volunteer practice of law may be performed without prior approval of the Deputy or Chief Assistant Attorney General – the general expectation being that professional time should be committed to legal tasks, or additional cases, for the benefit or interest of the public and State of Vermont in consideration for the annual salary paid.

Requests for approval to practice law outside the office – for free or for fees – are rarely granted. Exceptions are sometimes made for part-time Assistants, depending on the circumstances. Outside legal work during normal business hours has a natural tendency to conflict with office duties -- especially as the demands on the Office have increased in recent years. Our primary duty is to serve the public and the public agencies that we represent. Our support staff and other public resources - the office computers, libraries, phones, etc. -- are dedicated to our public practice.

Also, given the broad scope of our office practice, the practice of law by an Assistant Attorney General outside the Office would create many ethical and practical problems. *See, e.g.,* Rule 1.7 and 1.11 of the Vermont Rules of Professional Conduct. An Assistant Attorney General could not represent a corporation, organization or interest group that is an adversary to state agencies or state interests. For example, an Assistant Attorney General could not represent a telemarketing company that is under investigation by the Consumer Fraud Unit, a prisoner's rights organization that is suing the corrections commissioner, an advocacy group that is challenging a state statute or a citizen who is disputing a state agency decision.

The Office does encourage "talks, demonstrations and appearances consistent with, and beneficial to, the public interest and the mission of and obligations of the office." *See* Personal Appearances Section below. Examples of these activities would include appearances at most public forums (e.g. "Environmental Law in the New Millennium"), CLE programs open to all lawyers, seminars for Government lawyers (e.g. NAAG programs) and more focused events intended to help Vermont businesses or individuals comply with Vermont laws (e.g. a lemon law seminar for auto dealers). These activities are acceptable because they fall within our job descriptions as government lawyers and within the public expectation of what we should be doing as public employees.

Some activities that might present a problem if pursued in Vermont might be harmless if done elsewhere. For example, if an Assistant Attorney General

provided training to Vermont public defenders or legal aid lawyers on matters potentially related to legal actions against the State, there would be an appearance problem. If the audience was from another state, there would be less of an issue. If an Assistant Attorney General accepted a fee to address an association of Vermont employers -- a group subject to the employment and workplace laws that we enforce -- there would be a problem (both because the fee might be misinterpreted and because the association members have presumably paid their dues as Vermont taxpayers). Accepting a fee to address an out-of-state employers group, on one's own personal time, would present less of an issue. (This assumes no Vermont connection and no negative connotations.)

From time to time the Office has approved requests from Assistant Attorney Generals who wish to teach academic courses. Subject to review and approval by the Division Chief and the Attorney General, annual leave may be used to teach an academic course during office hours with the understanding that the needs of the office and our clients is our first priority. If a course is conducted on weekends or in the evening, it should not conflict with Office work.

All Assistant Attorneys General should acquaint themselves with the provisions of Rule 6.1 or the Vermont Rule of Professional Conduct, which states that a lawyer "should render at least 50 hours of *pro bono publico* legal services per year." A majority of these hours should assist persons of limited means or organizations (including governmental and private organizations) in matters that are designed primarily to address the needs of persons of limited means.

For many of the same reasons outlined above regarding outside practice, Assistant Attorneys General must assure that their *pro bono* activities do not conflict with, or create appearances of conflict with, state service. This is not always easy to do, but there are several available options. To lessen the likelihood of conflicts, for example, staff attorneys may wish to consider donating extra time to the Office's Civil Rights Unit or Consumer Protection Unit, especially in matters relating to persons of limited means. Attorneys may also want to explore participation in outside *pro bono* options (such as Vermont Legal Aid's Law Line) that do not involve representing individual clients before state courts, boards, or commissions. The Vermont Bar Association posts on its website a list of available *pro bono* activities statewide.

Questions regarding appropriate *pro bono* services can be directed to Division Chiefs or the Deputy or Chief Assistant Attorney General.

Personal Appearances

Assistant Attorneys General shall not solicit, receive or agree to receive any compensation, gift, reward or gratuity from any non-government source for any matter or proceeding connected with or related to the duties of the Office, except as set forth below or as otherwise authorized by law:

1. Modest token or commemorative gifts (paperweights, mugs, etc.) are permitted.

2. Expenses for meals, lodging and travel paid in consideration for appearances by Assistant Attorney General at training programs, conferences and seminars are permitted. Generally, subject to standard expense rates, the Office will reimburse expenses incurred by Assistant Attorneys General -- not paid by a host -- in connection with training programs, conferences and appearances consistent with, and beneficial to, the public interest and to the mission and obligations of the Office. (Prior permission must be obtained for such appearances at distant, out-of-state locations or for period of time extending beyond a few days.)
3. Compensation paid in consideration for teaching or writing, performed after office hours, or on personal or annual leave time, is permitted.

CAVEAT: Assistant Attorneys General shall not disclose confidential or privileged information gained by reason of official position except as authorized or required by law, nor shall such information otherwise be used for personal benefit or gain.

Discrimination / Harassment

Discrimination or harassment based on race, color, religion, national origin, gender, sexual orientation, ancestry, place of birth, age or disability will not be tolerated and is subject to disciplinary action. Complaints should be brought to the attention of the Division Chief, or another supervising or more senior attorney. Any

complaints of discrimination should also be reported to the Chief Assistant or Deputy Attorney General.

Sexual harassment is both unprofessional and illegal, and will not be tolerated. Any unwelcome sexual advance, or sexually offensive conduct or comment directed at another staff member should be brought to the attention of the Division Chief, or another supervising or more senior attorney. Any complaints of sexual harassment should be reported to the Chief Assistant or Deputy Attorney General. All complaints will be promptly acted on, and such action as is necessary to avoid further problems will be taken. Disciplinary action can range from warning to dismissal.

Insurance, Retirement and Other Benefits

Assistant Attorneys General are eligible to apply for many of the insurance and retirement benefits available to classified employees. It is recommended that each Assistant Attorney General read the most up-to-date explanatory documents for each benefit and apply for the desired benefits. The benefits documents are available from our Personnel Officer/Office Manager.

The health and insurance benefits are subject to change as the governing statutes, contracts and plan documents are amended. As of January 2001 the insurance and retirement benefits included:

1. Health Insurance Benefits - **Health insurance coverage is not automatic.** You must act to join a health plan; *i.e.*, sign up during the

- time period allowed (currently the first 60 days of employment). A choice of group plans, including major medical benefits, is available to employees and dependents.
2. Life Insurance - **Life insurance coverage is not automatic.** Term insurance to twice the value of the nearest thousand dollars below the employee's annual salary may be purchased. You must act to join the life plan; *i.e.*, sign up during the time periods allowed (currently no later than the first 60 days of service).
 3. Dental Plan - The Plan pays for certain preventative care and part of the cost of other dental care for the employee and dependents. The State pays the cost of the Plan. There is no sign-up and no payroll deduction.
 4. Retirement System. The Retirement System offers a choice of plans to exempt employees (including Assistant Attorneys General): defined benefit or defined contribution. You must act to exercise your choice. Contact our Personnel Officer/Office Manager for information.
 5. Deferred Compensation Plan - A tax deferred retirement savings plan is administered by the Vermont State Employees Retirement System. Enrollment is *not* automatic. Contact the State Treasurer's Office, 133 State Street, Montpelier, Vermont 05602, Tel. No. (802) 828-2305 for details.
 6. Other Benefits: There are numerous other benefits that can be described by the Personnel Officer / Office Manager.

Travel Expenses

Expenses for necessary mileage, travel, meals and lodging are reimbursable at standard state rates. Note that meal expenses are paid as incurred – not on a per diem basis. In-state lunch are usually not covered, unless special permission is obtained, as, for example, when an Assistant is living away from home during a multi-day trial. All out-of-state travel must be recommended by the Division Chief and approved in advance by the Deputy or Chief Assistant.

Continuing Legal Education / Professional Dues

Subject to budget constraints at either the AG's Office or one's employing agency or department, up to \$170 per year is normally available to each Assistant Attorney General to cover or defray the cost of CLE, **or** to pay dues to organizations (like the VBA) that sponsor accredited CLE programs. CLE costs beyond these allowances are the responsibility of the individual.

All staff are expected to contribute to the organization and presentation of in-house CLE programs. An individual's performance of these duties, or lack thereof, will be considered in periodic performance evaluations (see below).

PERFORMANCE EVALUATIONS

Assistant Attorneys General will be evaluated at the end of their first six months in service and, generally, every two years thereafter. Performance subject

to evaluation includes legal and practical skills, judgment commensurate with experience, attorney-client relations, contributions to the welfare of the office and personal effort. Acceptable levels of performance require Assistant Attorneys General to “consistently meet,” “frequently exceed,” or “consistently and substantially exceed” position requirements.

The Assistant Attorney General completes parts I through VI of the evaluation form. The Supervisor completes part VII, meets with the AAG and discusses performance (including any adjustments in the AAG's evaluation) and the Supervisor and AAG collaborate on Part VIII - Action Plan. A copy of the evaluation form is attached.

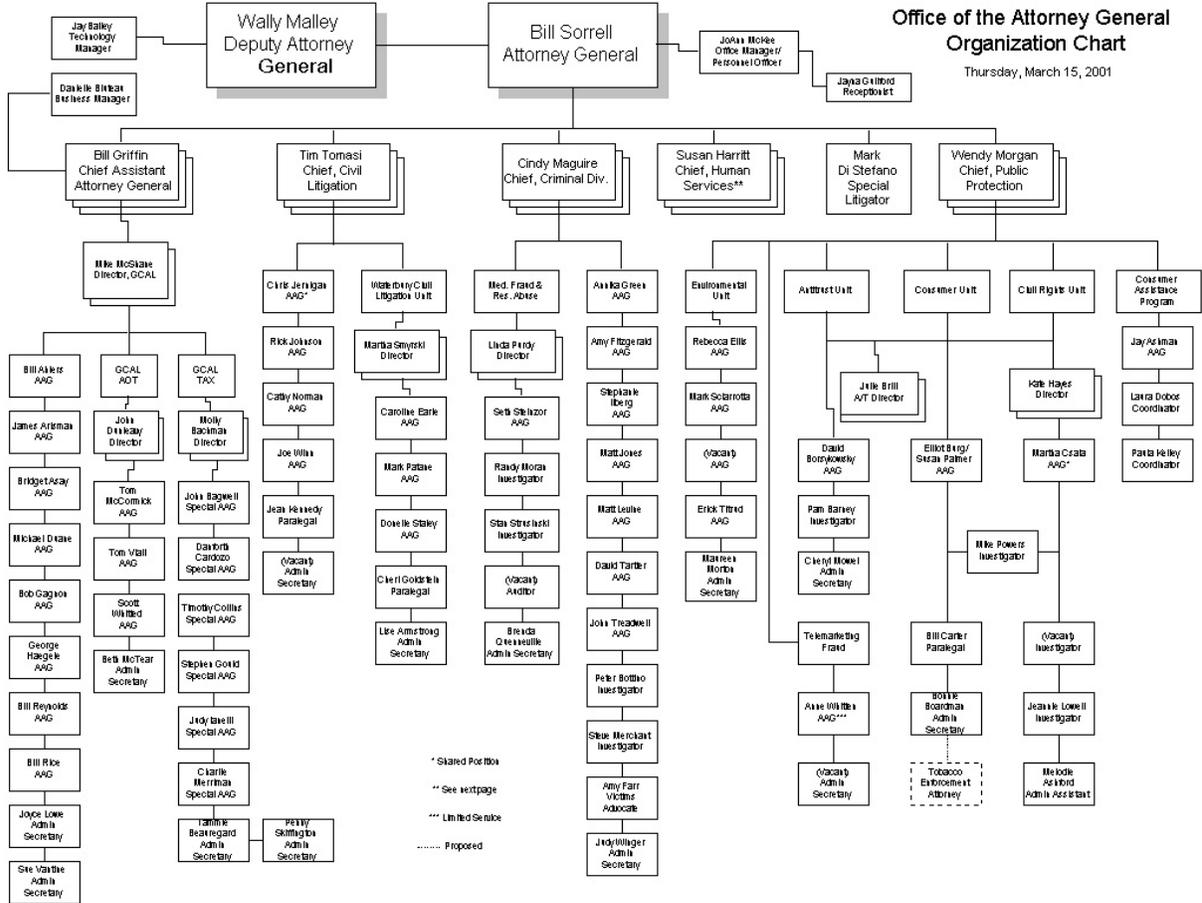
PAY PLAN

It is the policy of the Office of Attorney General to compensate Assistant Attorneys General competitively (subject to budget restraints) on the basis of experience, expertise, responsibility and meritorious performance. The Exempt Attorney Pay Plan attached to this Guide is intended to accomplish this purpose. Promotions to higher staff levels are based on expertise, responsibility and performance. Years of experience are a threshold requirement. Performance is the primary consideration for promotions.

(Attachments = evaluation form, current pay plan (text, 2001 numbers),
organization chart)

Office of the Attorney General Organization Chart

Thursday, March 15, 2001



* Shared Position
 ** See next page
 *** Limited Service
 Proposed

Bill Sorrell
Attorney General

Office of the Attorney General
Human Services
Organization Chart

Thursday, March 15, 2001

Susan Harritt
Chief, Human Services

Wendy Burroughs
Assistant Attorney
General

