



PERFORMANCE AUDIT REPORT

**Reviewing the Attorney General's Expenditures
For Water Rights Litigation and
Procedures For Selecting Attorneys**

Executive Summary *with Conclusion and Recommendations*

A Report to the Legislative Post Audit Committee
By the Legislative Division of Post Audit
State of Kansas
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Legislative Post Audit Committee

Legislative Division of Post Audit

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Reviewing the Attorney General's Expenditures for Water Rights Litigation and Procedures for Selecting Attorneys

EXECUTIVE SUMMARY

LEGISLATIVE DIVISION OF POST AUDIT

Question 1: How Much Money Has the Attorney General's Office Spent To Date on Water Rights Litigation With the State of Colorado, and Have Those Payments Covered the Full Cost of the Litigation?

In fiscal years 1984 through 1997, the Attorney General's Office page 3
spent more than \$12 million on the *Kansas v. Colorado* lawsuit. *Payments to attorneys and water experts who are not State employees have accounted for 87% of the money spent. Outside experts have been paid more than \$5.9 million, and outside attorneys have been paid more than \$4.5 million. Experts include hydrologists, computer modeling experts, historians, economists, and specialists in crop requirements. The available cost data don't include salary costs of State employees who've done work related to the lawsuit. We estimated those costs exceeded \$100,000 for the past two years combined and could be several times that over the life of the lawsuit.*

Much of the lawsuit was funded through supplemental appropriations because of the difficulty in predicting costs in advance. page 6
Because of the extremely technical nature of the lawsuit and difficulties in predicting lawsuit activities and developments a year in advance, in recent years the Governor and Legislature have decided to fund significant portions of the cost through the supplemental appropriation process, when more accurate lawsuit budget projections were available. To pay bills when they came due, the Attorney General's Office has spent about \$1.6 million that was originally in accounts other than the one designated for water rights litigation moneys, but much of that money was replaced after the Office received supplemental appropriations.

The Attorney General's Office estimates it could take up to four years and \$3 million to finish the lawsuit with Colorado, excluding post-judgment monitoring costs. page 9
The costs for monitoring Colorado's compliance with the Supreme Court's eventual decision in this case will depend on the Court's ruling as to how Colorado's future compliance is to be determined. Any moneys received from Colorado as a result of the lawsuit are to be distributed according to a complex formula enacted by the 1996 Legislature. The Attorney General will ask the Legislature to decide whether to file a similar lawsuit against Nebraska over waters in the Republican River, which could cost as much as \$20 million. Litigation over the Missouri River is also possible but isn't being planned.

The 98% increase in the Attorney General's budget from fiscal year 1995 to 1998 was caused mostly by increases in federal grant programs for victims. page 11
Of the increase, 68% came from federal grant funds. The federally mandated Medicaid Fraud and Abuse Division, which also is funded mostly by federal dollars, accounted for 10% of the increase. Costs related to the water rights litigation account for only 6% of the increase.

**Question 2: What Contractual Agreements Has
The Attorney General's Office Made With Private Attorneys?**

Most of the Attorney General's contracts with private attorneys were awarded because conflicts of interest prevented the Office from handling particular cases. page 13
About 42% of the cases were contracted out because the Attorney General's staff has a conflict of interest and couldn't represent one of the parties. About 31% were contracted to take advantage of an attorney's or firm's expertise. Occasionally an agency head or agency counsel will request a specific private attorney; the Attorney General typically honors those requests.

The Attorney General's Office uses a standard contract for nearly all the cases involving outside counsel. Most have fixed fees and a maximum amount that can be paid under the contract. The standard rate of pay is \$85 per hour. The contracts clearly specify what out-of-pocket expenses can be charged to the State. The contracts also state that outside counsel must get approval from the Attorney General's Office to hire experts for the case. We noted that about one-third of the contracts we looked at were amended one or more times to increase the maximum payable.

The Attorney General's contract with law firms representing Kansas in the tobacco litigation could become moot if Congress approves a national settlement with the tobacco companies. The three firms—two national law firms and a local law firm—took the contract on a contingency basis. That contract requires the national firms to pay all up-front expenses and gives the three firms a combined 25% maximum of any amount recovered on the State's behalf.

The Attorney General has a new billing review system that should help ensure the State pays outside counsel only for reasonable costs. page 15
New billing guidelines were adopted for fiscal year 1998. Under these guidelines, for example, a firm will be paid for only one attorney attending a deposition and won't be paid for basic legal research. Outside attorneys electronically submit their bills to Examen, Inc., a California billing review firm. The Office will determine next Spring whether the guidelines save money for the State.

There's little consistency in the contractual arrangements State agencies make with outside attorneys. page 17
In their contracts with outside attorneys, State agencies use a wide variety of provisions, depending on their legal needs. Other agencies' contracts for outside counsel vary as to the reasons outside counsel is hired, the rate of pay, whether the contract includes a cap, whether a primary attorney is specified, and whether the outside attorney is allowed to hire experts. We didn't see anything to indicate that the rates or other contractual provisions contained in the Attorney General's contracts were out of line.

**Question 3: Does the Attorney General's Office
Follow Adequate Procedures
To Prevent Potential Conflicts of Interest When it
Hires Private Attorneys and Law Firms?**

The Office has no written procedures for awarding contracts; page 19
the Attorney General selects which outside counsel to contract with
based on the recommendations of the deputy. *The Senior Deputy*
Attorney General recommends an attorney or firm based on factors
including whether the attorney or firm has successfully worked with the
Attorney General's Office in the past, has skill in an area particularly
relevant to the case, and whether the quality of the work is known by
someone in the Office.

We looked specifically at the selection process for attorneys for the
water rights litigation and for the tobacco lawsuit. The first lead attorney on
Kansas v. Colorado was chosen after a search within Kansas by the
Attorney General's Office and outside the State by the chief engineering
firm for the case. His successor had been assisting with the case and was
the obvious choice because of the successor's experience and strong
credentials. For the tobacco lawsuit, the Attorney General held preliminary
discussions with three Kansas firms. The Office hired a firm from Missis-
sippi and a firm from South Carolina as joint national counsel and the
Attorney General's former law firm as local counsel.

We didn't find any violations of the State's conflict-of-interest page 22
laws for cases contracted to outside counsel. *Kansas conflict-of-*
interest laws prohibit State offices and employees from contracting on the
State's behalf with firms they or their immediate family members own or
have a substantial interest in. According to forms they submit annually to
the Commission on Governmental Standards and Conduct, neither the
Attorney General nor her Senior Deputy owns or has a substantial interest
in any private law firm.

Some contracts were awarded to former associates and to cam-
campaign contributors. One contract was awarded to the Attorney General's
former law firm, and five were awarded to former staff members of the
Attorney General's Office, for appropriate reasons. About two-thirds of the
firms that received contracts had contributed to the Attorney General's
1994 campaign. Half of those firms also had contributed to her opponent,
and many more firms and attorneys made contributions than were
awarded contracts.

For cases that need to be contracted, some State agencies page 23
have adopted procedures that can help minimize the appearance of
favoritism and increase the pool of interested and qualified attorneys.
Several agencies maintain lists of qualified attorneys that are interested in
being considered for outside contracts. Some have adopted approaches
to contracting that allow the work to be rotated among interested attorneys.

For specialized cases, other agencies generally follow the page 24
same practices as the Attorney General's Office in selecting outside
counsel. *Officials from other agencies said that they, like the Attorney*
General and her staff, identify qualified outside counsel for cases requiring

special expertise by talking with colleagues, law schools, and other professionals in the field and then hire based on interviews and professional judgment.

The Attorney General's Office could do more, for major cases, to ensure that it identifies and considers a broad pool of qualified firms and that it documents the rationale for selecting outside counsel. Although it appeared that for the water rights case and for the tobacco litigation that the Office made efforts to identify or advertise for, interview, compare, and select firms staff thought could do the best job for the State, it has no systematic procedures for doing so.

Conclusion: When people think of conflicts of interest in awarding State contracts, they tend to include such things as awarding contracts to friends, business associates, or political contributors. While such contract awards don't fall under the definition of conflict of interest contained in State law, they can create at least the appearance of favoritism. page 25

Given the nature of many professions, it would be difficult for any elected official to avoid making contracts with individuals or firms they've worked with in the past, or who've made contributions to their campaigns. The current Attorney General's Office is no exception. A significant number of the contracts the Attorney General has awarded went to former associates or campaign contributors. On the other hand, we also found that contracts weren't awarded only to campaign contributors, and that a large number of attorneys who'd made campaign contributions hadn't gotten any State contracts.

Unless and until State laws are changed in this area, such situations will continue, and it will be up to each elected official to demonstrate that such State contracts weren't awarded on the basis of patronage or favoritism. By establishing reasonable procedures related to such things as identifying qualified attorneys or firms, evaluating those firms' qualifications, and documenting their rationale for selecting outside counsel, the Attorney General's Office could take a large step in this direction.

Recommendations: A brief summary of the report's recommendations, together with a summary of applicable comments from the Attorney General's Office, is presented below. page 26

We recommended that the Attorney General's Office establish reasonable procedures to ensure that its contracting process is as open as possible, and that all attorneys who are interested in and qualified to handle legal work for the Office have an equal chance of being considered. Specifically, we recommended the Office consider periodically announcing that firms interested in contracting with the Office should submit their qualifications for consideration. The Office should establish some objective criteria for evaluating the qualifications of those attorneys and firms, and should maintain a list of those who officials deem qualified. In addition, the Office should document the rationale for selecting the firm chosen for each State contract. Finally, the Office should require all professional staff to complete annual statements of

substantial interest, to ensure it can verify it's complying with statutory conflict-of-interest requirements.

The Attorney General disagreed with our recommendations. She stated that the selection procedures we recommend would establish an expensive bureaucratic process that would benefit attorneys seeking State business, rather than benefitting the State and its clients. In addition, she stated that the staff members of her office who are required to file statements of substantial interest do so.

Appendix A: *Amounts Paid to Outside Attorneys and Experts, Fiscal Years 1991-1997* page 27

Appendix B: *Major Participants in Kansas v. Colorado* page 28

Appendix C: *Moneys Used on Kansas v. Colorado That Were Originally Budgeted for Other Purposes* page 30

Appendix D: *Contracts Approved, 1/1/95 through 6/30/97* page 31

Appendix E: *Agency Response* page 34

This audit was conducted by Cindy Lash, Jill Shelley, and Alice Alexander. If you need any additional information about the audit's findings, please contact Ms. Lash at the Division's offices. Our address is: Legislative Division of Post Audit, 800 SW Jackson Street, Suite 1200, Topeka, Kansas 66612. You also may call (785) 296-3792, or contact us via the Internet at: LPA@mail.ksleg.state.ks.us.

