

1980

## Robert B. Hansen, Attorney General v. Utah State Retirement Board, Et al. : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc2](https://digitalcommons.law.byu.edu/uofu_sc2)

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

ROBERT B. HANSEN, WILLIAM GIBBS, BERNARD M. TANNER; Attorneys for Appellant; WILLIAM T. EVANS, ROBERT MOORE, MERLIN LYBBERT, FRANK V. NELSON, MARK A. MADSEN; Attorneys for Respondent

---

### Recommended Citation

Brief of Appellant, *Hansen v. Utah State Retirement Board*, No. 16851 (Utah Supreme Court, 1980).  
[https://digitalcommons.law.byu.edu/uofu\\_sc2/2089](https://digitalcommons.law.byu.edu/uofu_sc2/2089)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (1965 –) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT B. HANSEN,  
Attorney General,

Plaintiff-Appellant,

-v-

UTAH STATE RETIREMENT BOARD,  
et al.,

:

:

:

:

:

Case No. 16851  
16714  
16560

Defendants-Respondents. :

BRIEF OF APPELLANT

Appeal from the Decision of the Third Judicial  
District Court for Salt Lake County, State of Utah  
The Honorable Christine M. Durham, and  
The Honorable Homer F. Wilkinson

ROBERT B. HANSEN  
Attorney General

WILLIAM GIBBS  
BERNARD M. TANNER  
Assistant Attorneys General  
236 State Capitol  
Salt Lake City, Utah 84114  
Attorneys for Appellant

WILLIAM T. EVANS  
Assistant Attorney General  
25 So. Wolcott  
Salt Lake City, Utah 84112

ROBERT MOORE  
Attorney at Law  
10 Broadway Bldg., No. 400  
Salt Lake City, Utah 84101

MERLIN LYBBERT  
Attorney at Law  
701 Continental Bank Bldg.  
Salt Lake City, UTah 84101

FRANK V. NELSON  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114

MARK A. MADSEN  
Assistant Attorney General  
540 East 200 South  
Salt Lake City, Utah 84102

FILED

APR 10 1980

Clerk, Supreme Court, Utah

IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

ROBERT B. HANSEN,	)	
Attorney General,	:	
	)	
Plaintiff-Appellant,	:	
	)	
-v-	:	
	)	Case Nos. 16851, 16714, and
UTAH STATE RETIREMENT BOARD,	:	16560
<u>et al.</u> ,	)	
	:	
Defendants-Respondents.)	:	
	:	

---

BRIEF OF APPELLANT

---

APPEAL FROM THE DECISION OF THE THIRD JUDICIAL  
DISTRICT COURT FOR SALT LAKE COUNTY, STATE OF UTAH  
THE HONORABLE CHRISTINE M. DURHAM AND THE HONORABLE HOMER F.  
WILKINSON

---

WILLIAM T. EVANS  
Assistant Attorney General  
25 South Wolcott  
Salt Lake City, Utah 84112

ROBERT MOORE  
Attorney at Law  
10 Broadway Bldg., No. 400  
Salt Lake City, Utah 84101

MERLIN LYBBERT  
Attorney at Law  
701 Continental Bank Bldg.  
Salt Lake City, Utah 84101

FRANK V. NELSON  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114

MARK A. MADSEN  
Assistant Attorney General  
540 East 200 South  
Salt Lake City, Utah 84102

ROBERT B. HANSEN  
Attorney General

WILLIAM GIBBS  
BERNARD M. TANNER

Assistant Attorneys General  
236 State Capitol  
Salt Lake City, Utah 84114

Attorneys for Appellant

Attorneys for Respondents:

TABLE OF CONTENTS	PAGE
STATEMENT OF THE NATURE OF THE CASE -----	1
DISPOSITION IN THE LOWER COURT -----	2
RELIEF SOUGHT ON APPEAL-----	3
STATEMENT OF FACTS -----	4
ARGUMENT -----	8
POINT I	
UNDER THE DOCTRINE OF SEPARATION OF POWERS ADOPTED BY THE UTAH CONSTITUTION, ART. V, SECTION 1, THE OFFICE OF ATTORNEY GENERAL IS AN ELECTED OFFICE WITHIN THE EXECUTIVE BRANCH, HAVING BOTH COMMON- LAW POWERS AND DUTIES AND CONSTITUTIONAL DUTIES---	8
(A) COMMON-LAW DUTIES OF THE ATTORNEY GENERAL----	12
(B) THE ATTORNEY GENERAL MUST OPERATE WITHIN THIS SEPARATION OF POWERS IN HIS CONSTITUTIONAL AND ELECTED AUTHORITY, EVEN IN FACE OF SUBSEQUENT STATUTORY INROADS -----	13
POINT II	
THE PROVISIONS IN SECTION 49-9-3, U.C.A. (1953), AS AMENDED; SECTION 49-9-10, U.C.A. (1953), AS AMENDED; SECTION 53-31-46, U.C.A. (1953), AS AMENDED, AND SEC- TION 63-30-28, U.C.A. (1953), AS AMENDED, CONTRAVENE THE PROVISIONS OF ART. VII, SECTION 18, OF THE CON- STITUTION OF THE STATE OF UTAH, AND SECTION 67-5-1, U.C.A. (1953), AS AMENDED, WHICH MANDATE THAT THE AT- TORNEY GENERAL SHALL BE THE LEGAL ADVISER FOR STATE OFFICERS OR COMMISSIONS AND HAVE CHARGE OF ALL CIVIL LEGAL MATTERS-----	16

TABLE OF CONTENTS CONTINUED

PAGE

A. ART. VII, SECTION 18 OF THE CONSTITUTION OF THE STATE OF UTAH, AND SUBSEQUENT LEGISLA- TION ESTABLISH THE GENERAL DUTIES AND AUTHOR- ITIES OF THE ATTORNEY GENERAL-----	16
B. THE MOST RECENT PRONOUNCEMENT OF THE UTAH SUPREME COURT ON THIS POINT SUPPORTS THE INTERPRETATION THAT THE DIRECTOR OF FIN- ANCE IS A STATE OFFICER -----	18
C. THE STATE INSURANCE FUND IS NOT A LEGAL ENTITY, SEPARATE AND APART FROM THE DIRECTOR OF FINANCE -----	20
D. THE AUTHORIZATION BY THE LEGISLATURE TO EM- POWER AGENCIES TO PAY FOR LEGAL SERVICES DOES NOT CARRY WITH IT THE POWER TO APPOINT LEGAL COUNSEL -----	34
E. THE MANDATORY REPRESENTATION OF THE STATE IN- SURANCE FUND'S ADMINISTRATOR BY THE ATTORNEY GENERAL OR ONE OF HIS DESIGNEES DOES NOT VIOLATE THE EQUAL PROTECTION PROVISIONS OF THE UTAH CONSTITUTION AND THE UNITED STATES CONSTITUTION -----	36
ARGUMENT -----	39
POINT III	
LEGISLATURES HAVE ENACTED LAWS WHICH MAY BE CONTRARY TO CONSTITUTIONAL POWERS DELEGATED THE ATTORNEY GEN- ERAL OR COMMON-LAW POWERS -----	39
A. SPECIFIC STATUTES - THE UTAH RETIREMENT BOARD AND UTAH RETIREMENT FUND--	43
B. UTAH STATE INDUSTRIAL COMMISSION-----	46

## TABLE OF CONTENTS CONTINUED

PAGE

C. STATE INSURANCE FUND -----	32
D. UNIVERSITY OF UTAH FOR UNIVERSITY MEDICAL CENTER -----	55
E. UNIVERSITY OF UTAH FOR THE UNIVERSITY MEDICAL CENTER TRUST FUND; FIRST SECUR- ITY BANK OF UTAH, TRUSTEE -----	55
F. THE COURT SHOULD NARROWLY CONSTRUE THE ABOVE STATUTES SO AS TO BE CONSISTENT WITH THE CONSTITUTIONAL AND STATUTORY MANDATES TO THE ATTORNEY GENERAL DIS- CUSSED UNDER ARGUMENTS I AND II-----	58
G. THE COURT SHOULD HOLD THE STATUTES EM- POWERING THE RESPONDENTS TO APPOINT LEGAL COUNSEL UNCONSTITUTIONAL IF THEY CANNOT BE SO CONSTRUED -----	58

## CASES CITED

<u>Aetna Life Insurance Co. v. Industrial Commission,</u> 73 U. 366, 274 P. 139 -----	50, 51
<u>Ban S. Kariya Co. v. Industrial Commission of Utah,</u> 67 U. 301, 247 P. 490 (1926) -----	21, 22
<u>Chez v. Industrial Commission of Utah,</u> 90 U. 447, 62 P.2d 549 (1936) -----	20
<u>Darling Apartment Co. v. Springer,</u> 25 Del. Ch. 420, 22 A.2d 397, 403, 137 A.L.R. 803, 811 -----	12, 41, 42
<u>Evans v. Superior Court of San Francisco,</u> 14 Cal. 2d 563, 96 P.2d 107, app. dis., 309 U.S. 640, 84 L.Ed. 995, 60 S.Ct. 893 -----	41
<u>Fergus V. Russell,</u> 270 Ill. 304, 110 N.E. 130 -----	40

## TABLE OF CONTENTS CONTINUED

## PAGE

<u>Gronning v. Smart</u> , U. 561 P.2d 690 (1977)-----	20
<u>Hansen v. Barlow</u> , 23 U. 2d 47, 456 P.2d 177-----	12, 13
<u>Hansen v. Legal Services Committee of the Utah State Legislature</u> , 19 U. 2d 231, 429 P.2d 979 (1967)-----	18, 19, 20, 54, 55, 57, 58, 59
<u>Johnson v. Commonwealth</u> , 291 Ky. 829, 165 S.W. 2d 820 ---	40
<u>Johnson v. Jones</u> , 48 S.Dak. 397, 204 N.W. 897 -----	13
<u>Keenan v. Board of Chosen Freeholders of the County of Essex</u> , 101 N.J. Super. 495, 244 A.2d 705 -----	14
<u>Logan City v. Industrial Commission</u> , 85 U. 131, 38 P.2d 769 -----	52
<u>McCormick v. Thatcher</u> , 8 U. 294, 30 P. 1091 (1892)-----	30
<u>Olsen v. Public Service Commission</u> , 129 Mont. 106, 283 P.2d 594 (1955) -----	12
<u>State v. Allen</u> , 172 La. 350, 134 S. 246 -----	42
<u>State v. City of Kansas City, Kansas</u> , 186 Kans. 190, 350 P.2d 37 -----	9, 10, 13
<u>State of Florida v. Exxon Corp.</u> , 1976 5th Cir. 526 F.2d 266 -----	40
<u>State v. Public Service Commission</u> , 283 P.2d 594 (1955)-	15
<u>State Tax Commission v. Department of Finance</u> , U. 576 P.2d 1297 (1978) -----	20, 36, 37, 38, 39
<u>Texas Liquor Control Bd. v. Continental Distilling Co.</u> , 199 S.W. 2d 109 (Texas Civil App.) -----	44



## TABLE OF CONTENTS CONTINUED

## PAGE

Watson v. Caldwell, 158 Fla. 1, 27 S. 2d 524 ----- 40, 41,  
42

Woldberg v. Industrial Commission, 74 U. 309, 279  
P. 609 (1929) ----- 35

## STATUTES CITED

Section 35-1-1, U.C.A. (1953), as amended -----	53
Section 35-1-32, U.C.A. (1953), as amended -----	7, 46, 48, 49, 52
Section 35-1-68, U.C.A. (1953), as amended -----	54
Section 35-1-69, U.C.A. (1953), as amended -----	54
Section 35-3-1, U.C.A. (1953), as amended -----	17, 23, 33, 34, 52, 53, 54
Section 35-3-2, U.C.A. (1953), as amended -----	22
Section 35-3-20, U.C.A. (1953), as amended -----	36, 38
Section 35-4-1 through 35-4-26, U.C.A. (1953), as amended -----	50, 51
Section 35-4-11 (d), U.C.A. (1953), as amended -----	50, 52
Section 49-9-1, U.C.A. (1953), as amended -----	43
Section 49-9-4, U.C.A. (1953), as amended -----	43
Section 49-9-5, U.C.A. (1953), as amended -----	44
Section 63-2-1, U.C.A. (1953), as amended -----	32
Section 63-2-2, U.C.A. (1953), as amended -----	18, 32, 33
Section 63-30-28, U.C.A. (1953), as amended -----	6, 56, 57
Section 67-5-1, U.C.A. (1953), as amended -----	4, 7, 16, 24, 46, 47, 48
Section 67-5-3, U.C.A. (1953), as amended -----	49, 60
Section 67-5-5, U.C.A. (1953), as amended -----	5, 6, 7, 16, 17, 24, 45, 57



# TABLE OF CONTENTS CONTINUED

PAGE

## CONSTITUTIONAL PROVISIONS CITED

Utah Constitution, Art. V, Sec. 1 -----	8, 9
Utah Constitution, Art. VII, Sec. 18 -----	4, 7, 16, 17, 18, 24, 25, 26, 32, 34, 52, 57, 59
Utah Constitution, Art. VI, Sec. 32 -----	18, 33
Utah Constitution, Art. XIII, Sec. 11 -----	28
Utah Constitution, Art. XXIV, Secs. 1, 12-----	25

## OTHER AUTHORITIES CITED

Constitution Convention, Proceedings Vol II, pp. 1028- 1030, 1154 (1895) -----	30
The Federalist, No. VLVII, Vol. 1, p. 33 (Cent. L. Jed. 1916) -----	30

IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

ROBERT B. HANSEN,  
Attorney General,

Plaintiff-Appellant,

-v-

UTAH STATE RETIREMENT BOARD,  
and UTAH STATE RETIREMENT  
FUND; UTAH STATE INDUSTRIAL  
COMMISSION, and UTAH STATE  
INSURANCE FUND; and UNI-  
VERSITY OF UTAH, for and in  
behalf of the UNIVERSITY OF  
UTAH HOSPITAL for the UNI-  
VERSITY MEDICAL CENTER;  
UNIVERSITY MEDICAL CENTER  
TRUST FUND, FIRST SECURITY  
BANK OF UTAH, TRUSTEE,

Defendants-Respondents.

Case Nos. 16851, 16714, and  
16560

---

BRIEF OF APPELLANT

---

STATEMENT OF THE NATURE OF THE CASE

This appeal involves the interpretation of the constitutional and statutory powers of the Attorney General of the State of Utah to appoint independent legal counsel for State agencies. The State Legislature has enabled some State agencies and State funds to appoint their own independent counsel, but the Attorney General asserts that the Utah

Constitution and pertinent statutes implemented in accordance therewith provide that only the Attorney General has the power to appoint independent legal counsel for State agencies and funds. Legislative attempts to the contrary derogate and diminish the clear constitutional authority of the Attorney General.

The Attorney General appeals from adverse rulings, which, if allowed to stand, not only misinterpret the constitutional authority of this office, but also approve disturbing inequities, allowing some agencies and funds to enjoy advantages and capabilities not shared by all.

#### DISPOSITION IN LOWER COURT

On February 2, 1979, appellant filed this lawsuit in the District Court of the Third Judicial District, seeking a declaratory judgment and injunctive relief against all the named defendants: Utah State Retirement Board ("Retirement Board"); Utah State Retirement Fund ("Retirement Fund"); Utah State Industrial Commission ("Industrial Commission"), and Utah State Insurance Fund ("Insurance Fund"); University of Utah Hospital ("Hospital"), for the University Medical Center Trust Fund ("Medical Center Trust Fund"); First Security Bank of Utah ("Bank"), Trustee. The Complaint alleged that State agencies, State funds, and quasi-State agencies and funds, by appointing their own legal counsel, were acting in contravention of the constitutional and statutory authority of the Attorney General.

Further, that said respondents could only reimburse the Attorney General if they received Federal funds.

On February 20, 1979, respondents, Retirement Board and Retirement Fund, filed a Motion to Sever as to all respondents (R. 8, 9), which was denied on March 2, 1979, by Judge Sawaya (R. 21) in a Memorandum opinion.

On June 5, 1979, Judge Durham granted a Motion for Summary Judgment (R. 42) in favor of the Medical Center Trust Fund and respondent, Bank, Trustee. (R. 70)

In a Memorandum decision dated August 24, 1979, (R. 221), Judge Durham, treating a Motion to Dismiss filed by respondent, Insurance Fund, as a Motion for Summary Judgment, granted the same.

On December 14, 1979, Judge Homer F. Wilkinson granted a Motion for Summary Judgment in favor of respondents, Retirement Board and Retirement Fund (R. 306, 307). On December 31, 1979, Judge Wilkinson also granted a Motion for Summary Judgment in favor of respondent, Industrial Commission (R. 308, 309, 308A, 308B, and 308C).

#### RELIEF SOUGHT ON APPEAL

This is a consolidated appeal of the above three cases (16560, 16714, and 16851), occasioned by four separate Orders from the District Court by two different judges. Appellant seeks a reversal of the decisions of the Third Judicial District Court as to all respondents and the authority they assert to appoint their own legal counsel. Appellant

maintains said claimed authority is without merit and unconstitutional.

#### STATEMENT OF FACTS

On February 2, 1979, appellant, the Attorney General of the State of Utah, filed suit in the District Court of Salt Lake County, against the Utah State Retirement Board and Utah State Retirement Fund; the Utah State Industrial Commission; the Utah State Insurance Fund, and the University of Utah, for and in behalf of the University of Utah Hospital for the University Medical Center Trust Fund and the First Security Bank of Utah, trustee for the Medical Center Trust Fund.

The gravamen of the Complaint alleged that the agencies and the funds, by appointing their own legal counsel, were acting in contravention of the authority of the Attorney General. The authority of the Attorney General is provided for in Art. VII, Section 18 of the Utah Constitution, as follows:

"The Attorney General shall be the legal adviser of the State Officers, and shall perform such other duties as may be provided by law."

This authority is also provided for in Section 67-5-1, U.C.A. (1953), as amended, wherein it states the Attorney General shall:

"... prosecute or defend all causes to which the state or any officer, board or commission thereof in an official capacity is a party; and he shall have charge as attorney of all civil legal matters in which the state is in anywise interested."

Section 67-5-5, U.C.A. (1953), as amended, reads:

"Except where specifically authorized by the Utah Constitution, or statutes, no agency shall hire legal counsel, and the attorney general alone shall have the sole right to hire legal counsel for each such agency. Unless he hires such legal counsel from outside his office, the attorney general shall remain the sole legal counsel for that agency. If such outside counsel is hired for an agency, then that agency must report to the attorney general for his approval the full costs of this counsel and the attorney general shall pay the same."

In particular, the Complaint alleged that the Retirement Board was an independent State agency and that the Retirement Fund was a quasi-State agency fund. The Complaint further alleged that the Utah State Industrial Commission was a State agency, and that the Utah State Insurance Fund was a quasi-State agency fund created by the Legislature and under the authority of the Finance Commission.

It was further alleged that the University of Utah, for and in behalf of the University Medical Center, was a medical hospital and teaching college, authorized by the State Legislature and a State agency. It was further alleged that the University Medical Center Trust Fund, administered by First Security Bank as trustee to provide medical malpractice protection to physicians and other medical service individuals at the University Medical Center and funded, in part, from legislative appropriations, was a quasi-State agency fund. It was further alleged that the enactment of Senate Bill 172 in the 1979 General Session of the Utah Legislature was an unconstitutional delegation of power in contravention of the authority of the Attorney General. Senate Bill 172 was

codified in Section 63-30-28, U.C.A. (1953), as amended, and, in pertinent part, reads as follows:

"... Notwithstanding any law to the contrary, the trust agreement between the governmental entity and the trustee may authorize the trustee to employ counsel to defend actions against the entity and its employees and to protect and safeguard the assets of the trust, to provide for claims investigation and adjustment services, to employ expert witnesses and consultants, and to provide such other services and functions necessary and proper to carry out the purposes of the trust."

The Attorney General contended that the legislation (hereinafter specifically cited in the Argument), which established the State agencies or State quasi-agency funds to the extent they authorized said bodies to appoint, hire, or their agents to so appoint or hire, usurped the constitutional duties and functions of the Attorney General in acting as legal adviser to State officers and State agencies and State-quasi agencies.

Respondents Retirement Fund, Insurance Fund, and the Medical Center Trust Fund answered that they are independent trusts, receiving funds from others in addition to the State, and based on their origin of funds as well as general trust law, they are neither State agencies nor State quasi-agency funds and are not, therefore, subject to the Attorney General's constitutional authority to appoint legal counsel for State officers and State agencies; and that if they are in any way so controlled, Section 67-5-5, U.C.A. (1953), as amended, constitutes an



exception to said Attorney General's authority. Section 67-5-5, in pertinent part, states:

"Except where specifically authorized by the Utah Constitution, or statutes, no agency shall hire legal counsel... ."

Said respondents maintain that since they are each specifically governed by statutes which authorize them to have legal counsel, there is no violation of the Attorney General's authority under Art. VII, Section 18 of the Utah Constitution; Sections 35-1-32, 67-5-1, or 67-5-5, U.C.A. (1953), as amended.

Respondents, Hospital, Medical Center Trust Fund, and Bank filed a Motion for Summary Judgment. With regard to this Motion, Judge Christine Durham rendered two Orders: the first granted Summary Judgments in favor of the Hospital, for and on behalf of the Medical Center Trust Fund, and the second in favor of the Insurance Fund.

Appellant filed a Motion for Summary Judgment with supporting memorandum against the Retirement Board, the Retirement Fund, and the Industrial Commission. The Retirement Board and Retirement Fund filed Motions for Summary Judgment. The Industrial Commission had in July, 1979, previously filed a Motion for Summary Judgment. Judge Homer F. Wilkinson granted all three Motions for Summary Judgment in favor of respondents.

Subsequent to the Orders of Judge Durham and while the Motions before Judge Wilkinson were pending, appellant moved this Court to

consolidate all matters for this appeal, and the same was granted with the final portion of the record being put in place March 24, 1980. (R. 308A, 308B, 308C)

## ARGUMENT

### POINT I

UNDER THE DOCTRINE OF SEPARATION OF POWERS ADOPTED BY THE UTAH CONSTITUTION, ART. V, SECTION 1, THE OFFICE OF ATTORNEY GENERAL IS AN ELECTED OFFICE WITHIN THE EXECUTIVE BRANCH, HAVING BOTH COMMON-LAW POWERS AND DUTIES AND CONSTITUTIONAL DUTIES.

The Attorney General's authority is both as a member of the Executive Branch of government as well as an officer of court a part of the Judicial Branch of government. Therefore, the powers granted and inherent in his office should not be encroached upon by the Governor, the Executive Branch, or the Legislature.

Art. V, Section 1 of the Utah Constitution, provides:

"The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted."

The Attorney General, in acting as legal adviser for public officers, functions in an executive role. Some States appoint their Attorney Generals, and this is done by constitutional mandate. Others are elected, as is the case in Utah. The Attorney General also gives advice to the

judiciary, as he and his staff appear in the various courts of this State, and as officers of said courts, give legal advice and guidance. This concept is illustrated in State v. City of Kansas City, Kansas, 186 Kans. 190, 350 P.2d 37, in an action of quo warranto in a question as to whether the Attorney General could intervene in the Supreme Court and supersede the county attorney in an action. The Kansas Supreme Court, March 5, 1960, at page 42 of the opinion, says:

"... We conclude the Attorney General by his motion to intervene and supersede the county attorney exercised his powers and duties under the Constitution and appropriate statutes. This was as far as he could go as an executive officer and as an attorney and officer of this court. Since he is an officer of the judicial branch, under the separation of powers of the three branches of government, he was limited and restricted in his conduct before this court by the code of professional ethics ... to the same extent any other lawyer would be. If, therefore, the Attorney General considered the action unmeritorious, he not only had the authority, but he also had a duty to move for dismissal. We cannot think the framers of our State Constitution or the members of the Legislature ever intended that the Governor should have control over the judicial branch, or its officers, as is advocated... . Each of the three branches of our government should be zealous of its jurisdiction, and each should be vigilant to see that it does not encroach upon the jurisdiction of the other two... ." (Emphasis added.)

Art. V, Section 1 of the Utah Constitution, was not intended to create three completely autonomous bodies, but was intended to create three separate branches of government that make up the traditional structure in this country. Madison commented on the concept in The Federalist,

No. XLVII Vol. 1, p. 331 (Cent L. Jed 1916):

"... He /Montesquie/ did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free Constitution are subverted... ."

The purpose of an elected Attorney General is to give him some degree of autonomy as he functions as legal adviser to all State officers, agencies, quasi-State agencies; State agency funds and quasi-State agency funds. That autonomy must be in the office of the Attorney General. This was well illustrated by State v. City of Kansas City, supra, where it was attempted that the Attorney General would be ordered to do this or that at the bidding of the Governor, when, in his independent legal judgment and as legal adviser to the State, acting both for State officers as well as in the best interest of the people of the State, he may have to move forward with an action separate and distinct from that desired by, or even ordered by, the Governor.

On the Federal level and in many States, the Attorney General is appointed rather than elected. Appellant alleges, therefore, that our structure for separation of powers as it directly affects the office of the elected Attorney General in the State of Utah means that the framers of the Utah Constitution desired that the Attorney General function as a

separate legal adviser for the administration of State government within the Executive Branch but not subservient solely to the Executive Branch, acting as a separate constitutional office.

Each of the departments and divisions of State government has autonomy and importance. We ask: Why is the Attorney General an elected rather than an appointed officer within the Executive Branch? The reason is to enable the Attorney General to be answerable to the public and to respond to the public weal. His responsibility is ultimately to those who elect him, as is every elected officer of the Executive Branch. If they do not function as desired by the people of the State of Utah, then a change can be made in that constitutionally elected office just as that change can be made in any other elected official of the State government, starting at the level of Governor.

Under our separation of powers within the State of Utah, the Legislature cannot adversely affect the executive role of Governor, except as it does so within the confines of its own constitutionally delegated powers. The Legislature is elected and responsible to the public at large for its conduct. By the same token, the Legislature and its powers cannot be emasculated by the Executive Branch or merely function as a rubber stamp of the Governor but operates side-by-side in those separate roles--one creating law and the other having a responsibility of carrying those laws into effect through the executive structure of State government.

Likewise, the Judicial Branch has its autonomy, and it, likewise, serving as elected officials of the State, is ultimately responsible to the people.

(A) COMMON-LAW DUTIES OF THE ATTORNEY GENERAL

Hansen v. Barlow, 23 Utah 2d 47, 456 P.2d 177, again settled the question as to whether Utah accepts the doctrine that common-law powers and duties were in the office of the Attorney General. The Court stated at page 178:

"However, this Court has repeatedly held that the Attorney General has common-law powers and duties."

The Court quoting Olsen v. Public Service Commission, 129 Mont. 106, 283 P.2d 594 (1955), as a case relied upon, was due to the similarity between the Utah and Montana Constitutions on this subject. (Other States do not have common-law powers, such as Idaho and New Mexico.)

Both cases quoted a landmark decision in this field, Darling Apartment Co. v. Springer, 25 Del. Ch. 420, 22 A.2d 397, 403, 137 A.L.R. 803, 811, which says:

"The authorities substantially agree that in addition to those conferred upon it by statute, the office (the Attorney General) is clothed with all the powers and duties pertaining thereto at common law; and as chief law officer of the state, the Attorney General, in the absence of express legislative restriction to the contrary, may exercise all such power and authority as the public interests may from time-to-time require. In short, the Attorney General's powers are as broad as the common law unless restricted or modified by statute."



In Hansen v. Barlow, supra, case, the Court concludes:

"After consideration of our Constitution, statutes and decisions of sister courts, we are of the opinion that it is within the rights of the Attorney General, if not his duty, to bring suits to clarify the constitutionality of laws enacted by the Legislature if it deems it appropriate. He is in a much more informed, duty entrusted, and advantageous position to do so than the individual citizen and taxpayer."

Hansen v. Barlow, supra, was brought by the Attorney General to determine the rightness and constitutionality of legislative enactments, which encroach upon his constitutional and statutory authority. In Hansen v. Barlow, supra, both the questions of the Attorney General having common-law powers and having the right and duty to make this type of determination, are set at rest.

B. THE ATTORNEY GENERAL MUST OPERATE WITHIN THIS SEPARATION OF POWERS IN HIS CONSTITUTIONAL AND ELECTED AUTHORITY, EVEN IN FACE OF SUBSEQUENT STATUTORY INROADS.

Hansen v. Barlow, supra, well illustrates the necessity for the Attorney General, by virtue of his inherent authority, to initiate actions to determine whether legislative amendments are right or constitutional. The Attorney General further has a duty to intervene as illustrated by State v. City of Kansas City, Kansas, supra, and this responsibility is further illustrated by a South Dakota case where Judge Campbell, in Johnson v. Jones, 48 S.Dak. 397, 204 N.W. 897, says:

"Viewing all sections together, we believe the most liberal construction that could be placed upon the



authority granted by Section 5 of the original Act to 'employ attorneys' would be to hold that the board authorized to employ attorneys for mere routine matters requiring the services of an attorney, but not requiring the rendering of legal advice or opinions upon points of law, or matters of legal right or policy of the board, and we think that any such attorneys so employed would be under the supervision, control, and direction of the Attorney General as general legal adviser of the board... ."

There was a conflict between the allowance by statute of a board to have legal counsel and the Attorney General's power to appoint. The Court resolved the conflict reserving certain authority in the Attorney General and showing that there must be a limitation so as not to improperly encroach upon the general powers of the Attorney General, as legal adviser--not only for the board but for all State officers.

In Keenan v. Board of Chosen Freeholders of the County of Essex, 101 N.J. Super. 495, 244 A.2d 705, the Court said, at page 711:

"... The exclusive right of the Attorney General to represent the State agency ... was derived from that official common-law status as the legal representative of the sovereign and his historic identification with the public interest. Therefore, he exercises 'all such power and authority as the public interest may from time-to-time require' in the absence of 'express legislative restriction to the contrary.'"

In that case the Superior Court of New Jersey held that the County Superintendent of Elections, also a Commissioner of Registration as an

officer of State government, does not have the power to appoint legal counsel of his own choosing in contravention of the Attorney General and his common-law powers.

In State v. Public Service Commission, 283 P.2d 594 (1955), the Court held that the fact the Attorney General was the attorney for the State Public Service Commission did not affect his right or duty to institute proceedings to set aside telephone rates as fixed by the Commission. The Court held that the Attorney General has the power within his office, by virtue of this constitutional and common-law power, to proceed against public officers to require them to perform duties which they owe to the public in general and to set aside such action as shall be determined to be in excess of their authority, and to have them compelled to execute their authority in accordance with law.

If the Attorney General, as a constitutional office and as an elected official, does not have the reasonable autonomy to function within the office and under the common-law powers granted and within the framework of the separation of powers of the Utah Constitution, both the Legislature and the Executive Branch, through the Governor, could make inroads that would deeply violate these fundamental constitutional principles. The results could be adverse to the wishes of the electorate to whom the Attorney General and all other elected officials are responsible and would be violative of the constitutional grant of authority and the will of those who created the Constitution in the move from a territorial to a statehood status. This is additionally illustrated by Argument II.

## ARGUMENT

### POINT II

THE PROVISIONS IN SECTION 49-9-3, U.C.A. (1953), AS AMENDED; SECTION 49-9-10, U.C.A. (1953), AS AMENDED; SECTION 53-31-46, U.C.A. (1953), AS AMENDED, AND SECTION 63-30-28, U.C.A. (1953), AS AMENDED, CONTRAVENE THE PROVISIONS OF ART. VII, SECTION 18, OF THE CONSTITUTION OF THE STATE OF UTAH, AND SECTION 67-5-1, U.C.A. (1953), AS AMENDED, WHICH MANDATE THAT THE ATTORNEY GENERAL SHALL BE THE LEGAL ADVISER FOR STATE OFFICERS OR COMMISSIONS AND HAVE CHARGE OF ALL CIVIL LEGAL MATTERS.

A. ART. VII, SECTION 18 OF THE CONSTITUTION OF THE STATE OF UTAH, AND SUBSEQUENT LEGISLATION ESTABLISH THE GENERAL DUTIES AND AUTHORITIES OF THE ATTORNEY GENERAL.

Art. VII, Section 18 of the Utah Constitution, creates and prescribes the duties of the Attorney General. Section 18 provides:

"The attorney general shall be the legal adviser of the State officers and shall perform such other duties as may be provided by law."

Section 67-5-1, U.C.A. (1953), as amended, provides that the general duties of the Attorney General require him to:

"... prosecute or defend all causes to which the state or any officer, board or commission thereof in an official capacity is a party; and he shall have charge as attorney of all civil legal matters in which the state is in anywise interested."

Section 67-5-5, U.C.A. (1953), as amended, reads:

"Except where specifically authorized by the Utah Constitution, or statutes, no agency shall hire legal counsel, and the attorney general alone shall have the

sole right to hire legal counsel for each such agency. Unless he hires such legal counsel from outside his office, the attorney general shall remain the sole legal counsel for that agency. If such outside counsel is hired for an agency, then that agency must report to the attorney general for his approval the full costs of this counsel and the attorney general shall pay the same."

Each of the respondents claims statutory authority, separate from the Attorney General's Office, to hire or appoint independent legal counsel. Illustrative of this is the claim of the State Insurance Fund, Section 35-3-1, U.C.A. (1953), as amended, which reads, in pertinent part, as follows:

"In the conduct and administration of the business of said fund the commission of finance may appoint with the approval of the governor, a manager, and may employ accountants, inspectors, attorneys, physicians, investigators, clerks, stenographers, and such other experts and assistants as it deems advisable."

The above language is in direct conflict with the language of Art. VII, Section 18 of the Utah Constitution. Given this conflict between State statutes and the cited constitutional provisions, this Court must declare the statute unconstitutional should it conclude, as urged here, that the Director of the Department of Finance (Director of Finance shall herein refer to the Commission of Finance) is a State officer and administrator of the State Insurance Fund.

B. THE MOST RECENT PRONOUNCEMENT OF THE UTAH SUPREME COURT ON THIS POINT SUPPORTS THE

INTERPRETATION THAT THE DIRECTOR OF FINANCE  
IS A STATE OFFICER.

In Hansen v. Legal Services Committee of the Utah State Legislature, 19 Utah 2d 231, 429 P.2d 979 (1967), the Attorney General for the State of Utah, Phil L. Hansen, brought suit, challenging the constitutionality of the Legal Services Committee of the State Legislature. The question raised by the Attorney General was whether the State Legislature, by enactment of a statute, could hire its own independent legal adviser. The Court held that the legislators are State officers within the meaning of Art. XXIV, Section 12, of the Utah Constitution, for whom the Attorney General alone serves as legal adviser (Art. VII, Section 18). Hence, the Court struck down the statute which attempted to circumvent Art. VII, Section 18. Subsequently, the Legislature, in order to accomplish its purposes, was forced to amend the Utah Constitution. The amendment (Art. VI, Section 32), provides:

"The Legislature may appoint temporary or permanent nonmember employees for work during and between sessions, including independent legal counsel which shall provide and control all legal services for the Legislature except as the Legislature by law shall authorize performance thereof by the attorney general." (Emphasis added.)

The Department of Finance was first created in 1941 and placed under the supervision of a three-member commission. A 1963 amendment to Section 63-2-2, U.C.A. (1953), substituted the provisions for creation of the office of director of finance for provisions relating to the former

commission of finance.

The Court in Hansen perceived the Legislature's actions as an attempt to emasculate the powers and diminish the duties of the Attorney General. The Court noted in its opinion that, on at least eight previous occasions, similar attempts had been thwarted:

"Certain pressures tried to abolish the office of the Attorney General as a member of the Board of Examiners, by constitutional amendment at the election last year. The people turned down that attempt, along with seven others, by a thumping 70% vote because apparently they thought our Constitution borne by the seat of its framers in an unairconditioned building did a pretty good job which has served the commonwealth pretty well." (19 Utah 2d at 232, 429, P.2d at 980)

In reaching this conclusion, the Court emphasized the dangerous ramifications of a contrary ruling which would allow the Legislature to encroach upon the Attorney General's constitutional grant of powers.

The instant case highlights the continuing attempts to reduce the Attorney General's powers by allowing a State agency, State trust fund, a State director (or commission), or a quasi-State agency or fund, rather than the Legislature, to hire independent legal counsel. The question is the same; only the parties have changed. The quintessential issue still emerges as whether the constitutional grant of power to the Attorney General may be emasculated or diminished, allowing appointed or lesser-elected State officers to do the very things that the Legislature cannot do. Such an impermissible result was anticipated by Hansen, as the following observation aptly reveals:



"If the legislature, by fiat, could create its own legal adviser, then logic would say it could create 50 or more others for itself, each of which, of course, would have to have secretaries and other personnel. Such legislation could be extended to legal advisers for the Governor, State Auditor, Treasurer, Secretary of State and everyone else, in which event the office of Attorney General effectively could be emasculated and rendered impotent. We believe the framers of the Constitution had no such intention in mind under our tri-partite system of government." (19 Utah 2d at 233, 429 P.2d at 980) (Emphasis added.)

The Court's deliberate use of the open-ended phrase "and everyone else" is sufficiently broad to encompass the appointed and lesser-elected State officers, since such officers usually belong to the Executive Branch of which the Governor, Auditor, Treasurer, and Secretary of State are the chief officers. The former are agents of the latter.

C. THE STATE INSURANCE FUND IS NOT A LEGAL ENTITY,  
SEPARATE AND APART FROM THE DIRECTOR OF FINANCE.

The State Insurance Fund consists of private monies collected as premiums from employers to provide insurance coverage for employee injuries and diseases (which are work-related and covered by the Utah Workmen's Compensation Act, cite). On several occasions this Court has referred to the State Insurance Fund as being analogous to private insurers. State Tax Commission v. Department of Finance, Utah 576 P.2d 1297 (1978); Gronning v. Smart, Utah 561 P.2d 690 (1977); and Chez v. Industrial Commission of Utah, 90 Utah 447, 62 P.2d 549 (1936). A fundamental difference, however, between the State Insurance Fund and private insurance



enterprises is that the latter enjoys legal standing while the former does not. Private insurers are generally corporations or partnerships with legal standing, but the State Insurance fund per se, in a strict legal sense, is little more than an inanimate collection of funds.

The most authoritative source for the rule just cited is Ban S. Kariya Co. v. Industrial Commission of Utah, 67 Utah 301, 247 P. 490 (1926). In Ban S. Kariya Co., the Court was initially asked to review the action of the Industrial Commission in awarding compensation to the widow and surviving children of an employee who was accidentally killed while working on the job. The deceased's employer belonged to the State Insurance Fund. The employer later filed a Motion to Dismiss the Petition for Review. The defendant widow and minor children also interposed a Motion to Quash the Writ of Review. The widow and minor children argued, in part, that the State Insurance Fund did not possess legal capacity to petition for such a review. In granting the Motions to Dismiss and to Quash, the Court agreed that the State Insurance Fund was without legal standing and stated:

"The effort of the Legislature by the amendment of 1921 to give the state insurance fund the right to appear as a party to have an award of the Commission reviewed must be held to be nugatory and of no effect. We have endeavored to point out that the Legislature has in no way attempted to make, nor has it made, the state insurance fund an independent entity disassociated from the Industrial Commission. The fund is not given any of the powers usually provided or deemed necessary for the functioning of a body corporate.

the question is who shall appoint legal counsel to represent the Director of Finance in matters concerning its administrative actions and conduct while acting in his official capacity. Hence, regardless of the source or nature of its monies, the Insurance Fund only becomes a legal entity for purposes of representation when joined with its public administrator, the Director of Finance.

As was successfully argued by the Attorney General before the Utah Supreme Court in Hansen, Art. VII, Section 18 of the Utah Constitution, really contains two parts: the first makes the Attorney General "the legal adviser for State officers." The second part of Art. VII, Section 18 of the Utah Constitution, provides that he "... shall perform such other duties as may be provided by law." The Legislature, in Section 67-5-1, U.C.A. (1953), as amended, statutorily empowered the Attorney General to "prosecute or defend all causes to which the state or any officer, board or commission thereof in an official capacity is a party."

Section 67-5-5, U.C.A. (1953), as amended, vests in the Attorney General the sole right to hire legal counsel for State agencies, except for those cases in which another procedure is specifically authorized by statute.

Clear and substantial evidence exists to support the inclusion of the Director of Finance within the ranks of "State officers" for whom the Attorney General serves as legal adviser. It should be noted that the "State officers" referred to in Art. VII, Section 18 of the Utah Constitution, are not necessarily the elected executive, judicial, and legislative officials enumerated in Art. XXIV, Section 12 of the Utah Constitution. Art. XXIV, Section 12, provides:

"The State Officers to be voted for at the time of the adoption of this Constitution, shall be a Governor, Secretary of State, State Auditor, State Treasurer, Attorney General, Superintendent of Public Instruction, Members of the Senate and House of Representatives, three Supreme Judges, nine District Judges, and a Representative to Congress." (Emphasis added.)

Art. XXIV was designed and written to facilitate a smooth transition from a territorial to a State government. The transitional nature of Art. XXIV is unmistakably expressed in the language of Art. XXIV, Section 1 of the Utah Constitution, which states, in part:

"In order that no inconvenience may arise, by reason of the change from a Territorial to a State Government... ."

In other words, the specific purpose of Art. XXIV, Section 12, was to list those State officers "to be voted for at the time of the adoption of (the) Constitution," rather than to name the State

officers whom the Attorney General was to advise legally. Had the latter purpose been intended, Section 12 would have been more correctly worded as follows:

"The State officers to whom the Attorney General shall serve as legal adviser, shall be... ."

The implication that the "State officers" referred to in Article VII, Section 18, coincide with the "State officers to be voted for at the time of the adoption of the Constitution. Article XXIV, Section 12, first arose in Hansen. The painstaking distinctions made in this analysis of Art. VII, Section 18, were apparently not considered and were understandably not necessary in light of the question presented in Hansen. The core question on appeal there was whether State legislators were to be considered "State officers" within the meaning of Art. VII, Section 18. State legislators under even the strictest definitions would generally be classified as "State officers." Thus, the elected officials enumerated in Art. XXIV, Section 12, are "State officers" because of the nature and scope of their official duties, rather than because they happened to be included in that particular section of the Constitution. We further submit that the only fair and reasonable reading of the reference to Art. XXIV, Section 12, in Hansen, is that of a constitutional citation which supported the virtually self-evident conclusion that legislators are State officers.

The question then becomes whether the Constitution contemplates that the Attorney General should only serve as the legal adviser to the elected officials who were voted for at the time of the adoption of the Constitution, or whether its language is sufficiently broad to encompass subsequently elected and appointed State officials. At the time of the adoption of the State Constitution, it was wholly true that the Attorney General was only serving as legal adviser to the State officers who existed. Recognition of that fact, nevertheless, does not mean that the framers of the Constitution did not contemplate that the number of elected and appointed State officials, especially in the Executive Branch, would necessarily expand to keep pace with the advance of time and increase of population. Nor does it suggest that the framers ever anticipated that subsequently elected or appointed State officers would not be transacting business or exercising authority under the guise of power derived from the sovereignty of the State.

If the position is taken that the Utah Constitution, as presently worded, contemplates as State officers only those elected officials expressly mentioned in Art. XXIV, Section 12, then irrational and bothersome incongruities surface. For instance, since Art. XXIV, Section 12, has never been amended, we must presume that the Attorney General serves as the legal adviser to a position now defunct (representative to Congress). Even a more strained interpretation is the

conclusion that only three of the five current justices to the Utah Supreme Court could legally be advised by the Attorney General, and only nine of the current sitting district judges would be privy to the same benefit. The question must also be raised whether the 1912 amendment to the Utah Constitution, whereby the office of Superintendent of Public Instruction was made an appointive rather than an elective position, nullified the superintendent's right to receive legal advice from the Attorney General. And what about other appointive offices subsequently created by constitutional amendment, such as Art. XIII, Section 11, which authorizes the creation of the State Tax Commission. Could one in good conscience argue that officials who are constitutionally delegated the power "to administer and supervise the tax laws of the State" are not "State officers?" Moreover, how can the choice of words in Art. VII, Section 10, concerning the Governor's appointive power be harmonized with the State officer definition of Art. XXIV, Section 12, if appointed officials are excluded? The former provision states:

"The Governor shall nominate, and by and with consent of the Senate, appoint all State and district officers whose offices are established by this Constitution, or which may be created by law, and whose appointment or election is not otherwise provided for." (Emphasis added.)

Such examples are but a sampling of the inconsistencies that one must reconcile if he elects to assume the position that the Constitution contemplates the Attorney General will be the legal adviser only



to those "State officers" who were "voted for at the time of the adoption of the Constitution,"--a position taken by Judge Durham in the lower court. (On oral argument)

Additional persuasive evidence follows to support the argument that the Director of Finance is a "State officer" within the contemplation of the Utah Constitution. First, the Constitutional Convention considered the position of Attorney General and seemed to indicate that the primary duty would be advising State officers. The convention members also recognized that additional duties would be provided by the Legislature. Although the convention's central focus was on the Attorney General's salary, direct comments were made, indicating that the Attorney General would supervise "the legal business in behalf of the State." This same thought appears several times in a short dialogue on the floor between two delegates to the convention:

"MR. CHIDESTER: Yes, I presume it is, but I believe that this reaches further, if it is contemplated by this section that the attorney general shall conduct the legal business in behalf of the State, such as prosecuting and the like of that, he could not begin to do it for that sum. Was that the intention?

"MR. VARIAN: The duties of the Attorney General, Mr. Chairman, would be as suggested, to advise the State officers, attend to all business, criminal and otherwise, of the State in the Supreme Court. But in exceptional cases, he might be invited and might go out into a county to assist in the prosecution of some important matter. They generally do that, but they are not obliged to.

"MR. CHIDESTER: Under the present system, there is to be several deputies or assistant prosecuting attorneys, would he have to pay them himself?



"MR. VARIAN: No. I think the gentleman misapprehends it. There will be a system of county or district attorneys who will attend to all matters of the kind indicated in the nisi prius courts. The Attorney General simply takes the cases on appeal--briefs them, and argues them in the appellate court. If there are any civil cases to which the State would be a party, it would be his duty to bring them or defend them, as the case might be."  
(Proceedings of the Constitutional Convention, 1895, Vol. II, page 1028.) (Emphasis added.)

If, indeed, it were contemplated that the Attorney General should supervise all the legal business of the State, then this implies the inclusion of appointed and lesser elected officials who engage in State business as "State officers."

Second, in McCormick v. Thatcher, 8 Utah 294, 30 P.1091 (1892), the Court held that the members of the Board of Trustees of the State Agricultural College were State officers. The Court defined the elements of being an officer in terms of the duties and powers exercised. The Court's ruling lends support to the conclusion that the term "State officers" as used in Art. VII, Section 18, was intended to encompass all officials exercising the sovereign powers of the State.

Third, both the more comprehensive and the more restrictive definitions of "State officer" as stated in Words and Phrases would sustain the classification of the Director of Finance as a State officer. Two liberal constructions define "State officer" as follows:

"A 'state officer' is one created by the Legislature or established by the Constitution. Williams

v. Guerre, 162 So. 609, 182 La. 745. (Words and Phrases, page 76)

"In a sense, a 'state officer' is one whose jurisdiction, duties, and functions are coextensive with the State, and who receives his authority under State laws and performs some of the governmental functions of the State." Texas Liquor Control Bd. v. Continental Distilling Sales Co., Tex. Civ. App., 199 S.W. 2d 1009, 1012. (Words and Phrases, page 76)

In contrast, one of the narrowest definitions of "State officer" reads:

"The term 'state officers' may be construed as meaning only heads of the executive departments of the State elected by the people at large, such as Governor, Lieutenant Governor, State Treasurer, Secretary of State, Attorney General, and the like, that being its particular meaning, or given its more comprehensive sense, including every person whose duties appertain to the State at large, according to the legislative intention; that the exact sense in which the term is used in any particular law must often be determined by ordinary rules for judicial construction. Applying the rules that effects and consequences are to be regarded in construing a law, where the words thereof will admit of either of two reasonable meanings, the court held that in the law in question the words 'any of the state officers' should be restrained to heads of department having their official residence at the State Capitol, and expected to keep open office there during business hours, and generally speaking to be there themselves; that is, that the term was used by the lawmakers in its narrow and particular, instead of its broad and general, sense." State ex rel. Williams v. Samuelson, 111 N.W. 712-715, 131 Wis. 499, citing and approving State ex rel. Milwaukee Medical College v. Chittenden, 107 N.W. 506, 127 Wis. 468. Words and Phrases, page 79.

The Director of Finance's powers and duties are an exercise of governmental powers coextensive with the State. The Director further qualifies as a State officer under the more restrictive definition since he is the

head of the Department of Finance, which department has its official residence at the State Capitol and maintains an open office with regular hours.

It is urged upon this Court that the clear evidence is to the effect the Director of the Department of Finance be considered in his own right a "State officer" within the contemplation of the Utah Constitution. Also, the Director of Finance may still be found to be a "State officer" under Art. VII, Section 18, upon the theory that the Director is a direct agent of the Governor. The express provisions of Sections 63-2-1 and 63-2-2, Utah Code Ann. (1953), as amended, clearly enunciate the agency relationship between the Governor and the Department of Finance (or the director as the department's head). Utah Code Ann., Section 63-2-1 (1953), as amended, reads:

"Department of finance created--Construction of authorities and duties imposed.--There is created a department to be known as the department of finance attached to the office of the governor to assist the governor in the execution of his constitutional duties as the state's chief executive officer and which shall perform such duties and functions as may be prescribed by law... . and prescribing other budgetary functions under the constitutional authority of the state's chief executive to transact all executive business for the state, as differentiated from the examination of claims as may be exercised by the board of examiners."  
(Emphasis added.)

Section 63-2-2, Utah Code Ann. (1953), as amended, reads:

"Appointment of director of finance--Duties--Oath--Salary and expenses.--The administration of the department shall be under the supervision, direction and control of a director who shall be known as the director of finance. The director of finance shall be the state's chief fiscal officer; and ex officio, the state's budget officer, the state's personnel officer, the state's purchasing agent, and the state's accounting officer. The director of finance

shall be appointed by the governor by and with the consent of the Senate and shall serve at the will and pleasure of the governor... ."  
(Emphasis added.)

The unequivocal language of the statutes confirms that the Director of Finance is the Governor's primary agent in State fiscal matters. In fact, Section 63-2-2, Utah Code Ann. (1953), as amended, goes so far as to designate the Director of Finance as "the State's chief fiscal officer." Again the question is raised: Why should agents be allowed to do things that their principals are constitutionally prohibited from doing? The Governor may not hire his own independent legal counsel; the Utah Constitution mandates that the Attorney General shall serve as the Governor's legal adviser. What sense could there be in permitting the Governor's agent to circumvent a clear constitutional prohibition for the purpose of doing the very thing that the Governor himself cannot do. This "backdoor approach," aimed at usurping the Attorney General's constitutionally conferred power to appoint legal counsel, will certainly be perceived by the Court for what it really is. Hence, until such time as the Utah Constitution is amended to provide otherwise, "State officers," which include the Director of Finance and other State boards, commissions, departments and agencies (with the sole exception of the State Legislature (Art. VI, Section 32), must procure their legal advice and assistance under the supervision of the Attorney General. For these reasons, Section 35-3-1, Utah Code Ann. (1953), must be declared, in

part, unconstitutional, as being in contravention of Art. VII,  
Section 18 of the Utah Constitution.

D. THE AUTHORIZATION BY THE LEGISLATURE TO  
EMPOWER AGENCIES TO PAY FOR LEGAL SERVICES  
DOES NOT CARRY WITH IT THE POWER TO APPOINT  
LEGAL COUNSEL.

Because legislation authorizes that certain State agencies or government-related agencies are authorized to pay for legal services or accounting services from the funds of their agency, does not, therefore, mean they alone have the right or power to appoint said legal counsel for the agency or board where there is clear constitutional authority for the Attorney General to do so.

The present wording of the Utah statutes suggests the potential that the Attorney General's office could be in a conflict of interest with respect to its obligation to defend the Industrial Commission and State Insurance Fund (Department of Finance).

Admittedly, conflict of interest problems could arise in those situations in which the Attorney General's office represents the Industrial Commission on one side as administrator of the "Second Injury Fund" and the adverse interests of the State Insurance Fund on the other side. It should be noted, however, that this particular conflict of interest has not always existed, rather its origin may be traced back to a legislative amendment in 1941, whereby the Commission of Finance replaced the Industrial Commission as administrator of the State Insurance Fund. Although the existing conflict between the Industrial Commission



and the State Insurance Fund (Department of Finance) did not exist then, an apparent conflict of interest was attributed to the Industrial Commission for its allegedly adverse roles of adjudicating claims under the Workmen's Compensation Act and administering the State Insurance Fund. This was the precise issue in the case of Woldberg v. Industrial Commission, 74 Utah 309, 279 P.609 (1929), to which the Court responded:

"The Industrial Commission is no less an administrative body when making awards binding upon the State Insurance Fund than it is when making awards binding upon other insurance carriers. Nor is the commission disqualified because of interest from making awards against or in favor of the State Insurance Fund. The Commission is an arm of the State Government charged with the duty of administering the Workmen's Compensation Act. Its members have no financial interest in the fund. Their salaries are not paid out of it, and their compensation is neither increased nor diminished because of anything they may do or not do with respect to it. The authorities cited by applicant (33 C.J. 991, note 54, 1023; Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L.Ed 749, 50 A.L.R. 1243) have no application to the situation here." Woldberg, at page 611.

The alleged conflict of interest in Woldberg was with the Industrial Commission, whereas the conflict shifted to the Attorney General's Office in 1941 when the words "of Finance" were added to the word "Commission" (which previously referred to the Industrial Commission). The conflict arises because the Attorney General's office is statutorily required to defend both the Industrial Commission and the Commission of Finance.



(See Section 35-3-20, Utah Code Ann. (1953).)

It is respectfully submitted that this potential conflict of interest was not foreseen by the Legislature in 1941 when it amended Chapter 3 of Title 35.

Therefore, until the Legislature clears up this potential for conflict in the existing statutes, the Attorney General must, within the responsibility and bounds of his constitutional authority, act to appoint, as in the past, fair legal representation of conflicting interests or agencies with State government. The fact alone of potential for conflict of interest must not here control a decision which should be made on constitutional grounds and should be consistent with court determinations as to those powers of the Attorney General of the State of Utah, as is well expressed in the Hansen case, supra.

E. THE MANDATORY REPRESENTATION OF THE STATE INSURANCE FUND'S ADMINISTRATOR BY THE ATTORNEY GENERAL OR ONE OF HIS DESIGNEES DOES NOT VIOLATE THE EQUAL PROTECTION PROVISIONS OF THE UTAH CONSTITUTION AND THE UNITED STATES CONSTITUTION.

In State Tax Commission v. Department of Finance, 576 P.2d 1297 (1978), the State Tax Commission brought suit against the State Department of Finance as administrator of the State Insurance Fund, for its refusal to pay an additional percent tax on the total premiums received into the Fund, above and beyond the uncontested three- and one-fourth percent tax on premiums required of all companies providing Workmen's

Compensation Insurance in Utah. The Utah Supreme Court held in favor of the Department of Finance, ruling that no rational basis could be cited to distinguish between the State Insurance Fund and private insurers for the purpose of extracting an unequal or higher tax from the State Insurance Fund. The Court's decision appears to be sound and well founded. Indeed, the private monies which are paid into the State Insurance Fund are no different than the private monies paid to private insurers. Hence, no discernible basis exists to impose a higher tax on the publicly administered fund.

It is one thing, however, to say that no rational basis exists to distinguish between the State Insurance Fund and private insurers for tax purposes, and it is quite another thing to say that no rational basis exists to distinguish between the two for purposes of legal representation. Whereas, the fact that a fund of private monies is administered by a State officer or department may have little bearing on the validity of a tax levied against that private money, the fact of public administration may be decisive in determining the question of who shall appoint legal counsel for the administrator of the fund. The Court acknowledged in State Tax Commission that the State Insurance Fund is publicly administered. The Court stated:

"The only distinguishable feature is that the Fund is administered by a State agency, the cost therefor being paid from the premiums. This feature is not a rational basis to treat the Fund as a distinct classification."

We respectfully submit that the proper interpretation of the Court's language is circumscribed by the factual setting of that particular case. While the administration of the State Insurance Fund by the Department of Finance may serve as no basis for unequal tax classifications, it arguably serves as a very rational basis for compelling a State officer to be represented by the Attorney General in actions concerning his conduct while acting in his official capacity as administrator of the State Insurance Fund. Thus, the important factual differences between State Tax Commission and the instant case prevent the rules of law pronounced in State Tax Commission from being mechanically applied here.

If the Court elects to apply the holding of State Tax Commission in the instant case, and in effect states that no substantive difference exists between the State Insurance Fund and private insurers for any matter, the Court may later be haunted by the constitutional repercussions of such a decree. The basis for this bold prediction is as follows: It is inconsistent to say that the fact the State Insurance Fund is "publicly administered" is an insufficient basis for a reasonable classification between the Fund and private insurers, and then on the other hand, use the "publicly administered" argument to justify Section 35-3-20, Utah Code Ann. (1953), which allows the Director of Finance to have the Attorney General represent him in suits concerning his actions as administrator of the fund. If the State Insurance Fund, along with the actions of the State officer who administers the fund are to be considered

the same as private insurers, then the Fund should not be able to procure the services of the Attorney General--even if such services are paid for exclusively by the Fund--since private insurers may not hire or use the Attorney General's services for private matters unrelated to the public interest. The same reasoning extends to services rendered by the State Auditor, State Treasurer, or other State officials and employees who presently assist in the administration of the State Insurance Fund. To hold otherwise would be to sustain a "reverse" or "counter" unequal operation of the laws. The "publicly administered" argument cannot be a valid underpinning in one situation and then be unconstitutional in the other. Therefore, we submit that the rule of State Tax Commission is not controlling in the instant case, and further submit that the mandatory representation of the Director of Finance by the Attorney General in matters concerning his administration of the State Insurance Fund is both proper and constitutional, and, therefore, the ruling of the lower court, Judge Durham, should be reversed.

#### ARGUMENT

#### POINT III

LEGISLATURES HAVE ENACTED LAWS WHICH MAY BE CONTRARY  
TO CONSTITUTIONAL POWERS DELEGATED THE ATTORNEY GEN-  
ERAL OR COMMON-LAW POWERS.

The power of the Legislature to enact statutes affecting the

functions of the office of the Attorney General do not extend to stripping him of all powers and leaving his office an empty shell. Johnson v. Commonwealth, 291 Ky. 829 165 S.W. 2d 820. Neither the Legislature nor the courts can deprive the Attorney General of the authority which the State Constitution has granted him. People ex rel. Castle v. Daniels, 8 Ill. 2d 43, 132 N.E. 2d 507. The Legislature can abridge only such powers of the Attorney General as it may have added to those which were inherent in the office at common law, which powers themselves must remain inviolate as long as the constitutional grant continues. Fergus v. Russell, 270 Ill. 304, 110 N.E. 130.

A common provision in State Constitutions and statutes makes the Attorney General the legal adviser of various departments, officers, agencies, and specifies those which he serves as said legal adviser. Watson v. Caldwell, 158 Fla. 1, 27 S. 2d 524. Further, a statutory grant of power possessed by an Attorney General does not normally deprive him of other common-law powers. State of Florida v. Exxon Corp., 1976 5th Circuit, 526 F.2d 266. The question here was whether the Florida Attorney General had power to institute suit under Federal law without specific authorization of individual government entities which allegedly had sustained legal injuries. The Fifth Circuit Court held that, under Florida law, the Attorney General may institute all legal

proceedings necessary to protect the interests of the State.

Even in the absence of specific provisos, it has been held that the Attorney General may be tacitly recognized as the legal adviser or representative of State agencies. Darling Apartment Co. v. Springer, 25 Del. Ch. 420, 22 A.2d 397.

Other court rulings have held that a specific provision requiring the Attorney General to be the adviser or representative for State agencies and officers does not impose on him a duty to so serve if the agency is acting in a proprietary rather than a governmental capacity. Watson v. Caldwell, 158 Fla. 1, 27 So. 2d 524.

There is authority for the proposition that if a statute creating a State office or department and setting forth its powers and functions, expressly authorizes the hiring of an attorney, that in making that appointment, the department or State office acts validly unless it violates a prohibition of the State Constitution. Evans v. Superior Court of San Francisco, 14 Cal. 2d 563, 96 P.2d 107, app. dis., 309 U.S. 640, 84 L.Ed. 995, 60 S.Ct. 893, where a statute, authorizing a building and loan commissioner to employ special counsel to assist him in liquidating a building and loan association, was sustained.

There is also authority as previously cited in Watson v.



Caldwell, supra, that a specific grant of authority to a State commission or agency to sue or be sued, or to engage in litigation, has within it an implied authority for a said agency or commission to appoint and procure its own counsel. See also State v. Allen, 172 La. 350, 134 S. 246.

Contra to this position, it has been held that a Legislature has no power to give the State Insurance Department or the Superintendent of said Department power to conduct the liquidation in reference to insurance companies, which has been before that time a duty of the Attorney General under a Constitution providing that the executive department should consist of certain officers, including the Attorney General, and that they shall "perform such duties as may be prescribed by law." Fergus v. Russell, 270 Ill. 304, 110 N.E. 130.

In deciding the question of legislative authority to encroach on the powers and duties of the Attorney General, the language of the statute must be considered in the light of the office of the Attorney General at common law and the general understanding of the nature of this office in its role, including public policy that has occurred over a period of years. Darling Apartment Co. v. Springer, supra.

A. SPECIFIC STATUTES - THE UTAH RETIREMENT BOARD  
AND UTAH RETIREMENT FUND

The Utah State Retirement Board was established by authority of Senate Bill 94 passed March 14, 1963, effective July 1, 1963, Ch. 74, Laws of Utah 1963, and Ch. 49-9-1, U.C.A. (1953), as amended, providing:

"The retirement office shall be an independent state agency and not a division within any other department. It shall be subject to the usual legislative and executive department controls. The retirement office shall be housed at the seat of the Utah State government."

The designation that the Retirement Board be at the seat of State government rather than the State Capitol was the effect of the 1973 amendment. Section 49-9-4 (9) of this authorization reads:

"(9) To employ within the limitations of said budget such staff personnel and consultants as is deemed necessary to administer the retirement systems and funds assigned to the retirement office for administration. Such personnel may include actuaries, attorneys, medical examiners, investment counselors, accountants, and such clerical and other assistants as may be necessary to accomplish the purpose of the retirement office. Compensation of the director shall be established by the board."

The Retirement Board and the Retirement Fund that the Board administers are, by the words set forth in the authorization, State agencies or perhaps in contrast to constitutionally established rather than legislative established agencies, a quasi-State agency or fund.

The Retirement Board, respondent, denies the authority of the Attorney General to appoint or hire legal counsel for the Board or Fund and cites the statutory authority herein set forth as their authority to appoint their own attorneys and pay for them from the proceeds of the Fund.

The Board further maintains that the Fund is a "common trust fund" created by the Legislature, and that the Board exists as a "trustee of said fund." Many cases on this subject matter throughout the country draw a line between the legal work done and the proprietary or administrative work done. It is the assertion of the appellant that Section 49-9-5, U.C.A. (1953), as amended, is speaking about "ministerial duties" of accountants and attorneys, actuaries, medical examiners, investment counselors and clerks and assistants.

Texas Liquor Control Board v. Continental Distilling Co.,  
199 S.W. 2d 109 (Texas Civil App.), states:

"In a sense, a state officer is one whose jurisdiction, duties, and functions are co-extensive with the state and receives his authority under state laws and performs some of the governmental functions of the state."

Appellant urges upon the Court that it be interpreted necessarily the respondents, Retirement Board and Retirement Fund, may, according to their authorization, appoint such personnel as is required

for the in-house administrative or proprietary actions that are required. Appellant maintains that to the extent the Retirement Board and Retirement Fund purport to authorize said in-house attorneys to represent them legally and fulfill the actions that are the province of the Attorney General as established by Section 67-5-5, U.C.A. (1953), as amended, that said authorization is invalid and unconstitutional. We urge upon the Court that the Retirement Board and Retirement Fund, and the Director thereof, are part of State government, and that the Director is a State officer and an agent of the Executive Branch of the State government. As such, he may have for staff purposes such aides as he needs for the regular business of the agencies, but he may not appoint his own legal counsel to conduct the legal business of the State for the Board or the Fund in derogation of the constitutional and common-law power of the Attorney General.

The two considerations as to the source of funds:

- (a) source of funds for payment of legal services; and
- (b) the potential for conflict in the Attorney General's office in his being on two sides of an issue between the Retirement Fund and other State interests,

should not be determinative on the question of who appoints legal counsel. Any authority of the Retirement Board or Retirement Fund

to obtain the meaning thereof. Within the confines of Section 35-1-32, U.C.A. (1953), as amended, it should be clear that whatever the function of the "representative" who acts as a special prosecutor, it should be in addition to and not instead of the power and authority of the Attorney General by Constitution and statute.

Section 67-5-1, U.C.A. (1953), as amended, provides:

"... and prosecute or defend all causes to which the state or any officer, board or commission thereof in an official capacity as a party; and he shall have charge as attorney of all civil legal matters in which the state is in anywise interested."

To harmonize this provision setting forth the general duties of the Attorney General with the previously quoted Industrial Commission's authorization to appoint a special representative, the appellant urges that the only reasonable conclusion one may draw is, though the Commission may make a designation of a representative to act as a special prosecutor, that party must come from within the ranks of the Attorney General's office or the County Attorney's office in which the matter lies, and that in any event any legal matters of a civil nature to be handled through or on behalf of the Commission, must be done under the authority of the Attorney General's office as an overriding authority vested in the Attorney General as the State's legal officer.

At the present time, many of the attorneys working for the Utah Industrial Commission are denoted as "Special Assistant Attorneys General." These attorneys perform their functions on a state-wide basis. It is not disputed as a fact that the Industrial Commission pays its legal counsel, these "Special Assistant Attorneys General," further raising a question as to whether they should be paid directly by the Commission or through the Attorney General's office, and that the failure to so pay may be a violation of Section 67-5-3, U.C.A. (1953), as amended, which provides:

"The attorney general may assign his legal assistants to perform legal services for any agency of state government. He shall bill that agency for the legal services performed, if the agency so billed received federal matching funds to pay for the legal services rendered. No such inter-account billings are to be made by the attorney general if no federal matching funds are provided. As used in this act 'agency' means any department, division, agency, commission, board, council, committee, authority, institution, or other entity within the state government of Utah."

Section 35-1-32, U.C.A. (1953), as amended, deals with the Commission as it acts in its responsibility under the Workmen's Compensation Act. The appellant takes the position that to make meaningful the statutes that have been enacted in that regard, this Court would have to hold that Commission has the discretion to appoint but that appointment must be made with the concurrence and under the direct supervision



of the Attorney General of the State.

The Industrial Commission is an administrative body. Its duty is to administer the Workmen's Compensation law according to the case before it and award compensation as the law authorizes. Aetna Life Insurance Company v. Industrial Commission, 73 U. 366, 274 P. 139.

Another section of the statutes relating to the Industrial Commission deals with the unemployment compensation provisions covered in Sections 35-4-1 through 35-4-26, U.C.A. (1953), as amended. Section 35-4-11 (d), U.C.A. (1953), as amended, provides:

"The commission shall appoint on a nonpartisan merit basis, fix the compensation, and prescribe the duties and powers of such officers, accountants, attorneys, experts, and other personnel as may be necessary in the performance of its duties. The commission shall provide for a merit system covering all such persons, classify and fix the minimum standards for the personnel and formulate salary schedules for the service so classified, and the commission shall hold or provide for holding examinations to determine the technical and professional qualifications of applicants for positions in the commission, and provide for annual merit ratings of employees in the commission to ascertain whether such employees, or any of them, are maintaining the eligibility standards prescribed by the commission and those promulgated by the social security board... ."

The Commission, under an informal designation of "personnel merit system," is authorized by the Legislature in this provision as

it administers the Employment Security Act, to appoint and fix the compensation and delineate the powers and duties of its personnel. "Personnel" includes those "as may be necessary to the performance of its duties." Listed among those are accountants, attorneys and experts.

It is again urged by appellant that, as one reads the full paragraph of (d) and correlates it with the general delegation of power (Section 35-4-1, U.C.A. (1953), as amended), the only fair reading would be that the Commission, in fulfilling its responsibility to administer the Unemployment Compensation Act, would appoint such attorneys as may be necessary for the in-house work which may be required in claims, informal hearings, and formal hearings; but that any attorneys who were so appointed or involved in any "civil legal matters in which the State is in anywise interested," would of necessity have to be appointed by the Attorney General, and the same would be directed by the Attorney General and compensated through the Attorney General's office unless the Commission were reimbursed by Federal funds.

The Industrial Commission acts in an administrative role under administrative law as part of State government. Aetna Life Insurance Co. v. Industrial Commission, 73 U. 366, 274 P. 139. The Industrial Commission has no power to exercise judicial acts or functions.

Logan City v. Industrial Commission, 85 U. 131, 38 P.2d 769.

The director of the Utah Industrial Commission is a State officer, functioning to administer the Workmen's Compensation law, the State Insurance Fund, Unemployment Compensation; immigration, labor, and statistics; hospital and medical service for disabled minors, and the Occupational Safety and Health Act.

Art. VII, Section 18 of the Utah Constitution, does not state that the Attorney General may be the legal adviser for State officers--rather it specifically states that he shall be the "legal adviser" of the State officers. Therefore, in the face of this mandatory provision, appellant urges the Court to hold Section 35-1-32 and Section 35-4-11 (d), U.C.A. (1953), as amended, unconstitutional to the extent that they purport to be a discretionary authorization for the Industrial Commission to appoint its own attorneys to conduct all State legal business on behalf of the Commission, in opposition to the grant of authority, by Constitution and common law, of the Attorney General to so appoint.

#### C. STATE INSURANCE FUND

The Legislature, in the grant of authority to the Fund in Section 35-3-1, U.C.A. (1953), as amended, states:

"... In the conduct and administration of the business of said fund the commission of finance may appoint with the approval of the governor, a manager, and may employ accountants, inspectors, attorneys, physicians, investigators, clerks, stenographers, and such other experts and assistants as it deems advisable."

Respondent, the State Insurance Fund, is an entity that is equated to an insurance company, authorized by the Utah State Legislature to collect premiums from employers to provide insurance coverage for injuries and diseases of employees who are work-related and are covered by the Utah Workmen's Compensation Act, Sections 35-1-1, et seq., U.C.A. (1953), as amended. The Fund is administered by the Commissioner of Finance. Appellant, on this point, has set forth his position extensively in Argument II. The Commissioner of Finance is a State officer. The Director of the Insurance Fund is a State officer and his agent. Premiums paid by employers to the Fund constitute the source for payment of administration and benefits under the Fund. Employers voluntarily contribute their premiums in selecting the Fund as their insurance carrier. The Fund is only one in a competitive market of insurance funds.

The authority to employ attorneys is one of many of the staff positions for the Commission.

In the course of the business of administering the Fund, the Director of Finance has hired private counsel to represent the

Fund in hearings, administrative review procedures, in matters before the Supreme Court, and in disputed claims before the Industrial Commission involving defenses of the Fund that relate to the Commission's administration of what is called the "second injury fund." Sections 35-1-68 and 35-1-69, U.C.A. (1953), as amended.

In this Brief, as set forth in Argument II, we specifically use the State Insurance Fund as the illustration of the improper inroad by all respondents, through the Legislature, to limit the Attorney General's constitutional powers. Appellant incorporates Argument II herein as standing for the proposition that Section 35-3-1, U.C.A. (1953), as amended, is an improper legislative encroachment on the powers and duties of the Attorney General by this provision of the statute concerning the appointive power of the State Insurance Fund, unless the Court holds that said "appointive" power of the Commissioner of Finance is under the power of the Attorney General.

In Hansen v. Legal Services Committee of the Utah State Legislature, *supra*, this Court pointed out that there was a danger in allowing the Legislature to create its own legal adviser and that may well lead to an attempt by other State officers to appoint their own legal counsel, which could be in contravention of the constitutional grant of power to the Attorney General. This Court's deliberate use in

the Hansen case, 19 U.2d at page 233, of the open-ended phrase "and everyone else," refers to those other than the elected State officers and is sufficiently broad to encompass the appointed lesser officers acting for the State, including the Director of the Industrial Commission and the State Insurance Fund.

D. UNIVERSITY OF UTAH FOR UNIVERSITY MEDICAL CENTER

In respondent's, University of Utah, Memorandum in Support of the Motion for Summary Judgment (R. 43), it admits the University of Utah and the University of Utah Medical Center are State agencies. Therefore, paragraph two of Judge Durham's Order of June 5, 19759 (R. 70), is in error, as it grants no cause of action against appellant and in favor of the respondents. That Order should be reversed, in part, to conform to the evidence before the Court.

E. UNIVERSITY OF UTAH FOR THE UNIVERSITY MEDICAL CENTER; UNIVERSITY MEDICAL CENTER TRUST FUND; FIRST SECURITY BANK OF UTAH, TRUSTEE

The University of Utah, on behalf of the Medical Center, made an agreement with First Security Bank of Utah, Trustee, to have the Trustee administer a trust for the purpose of allowing the Medical Center to self-insure against malpractice and other casualty claims. To the extent that the Medical Center provides educational services to the University of Utah, it is funded by the State of Utah. The Medical Center is also funded from receipts received for patient care, including



Federal funds (Medicaid). (R. 43) Other than as the Trust relates to the Medical Center, as its self-insuring vehicle, and as the Medical Center relates to the University of Utah, and the University of Utah receives benefit from the Medical Center as a teaching entity of this State educational institution, there are no State funds place in the Trust. The Trust document (R. 60) authorizes the bank, as Trustee (with the approval of Hospital), to employ and pay for, from the Trust Fund, attorneys and others as "may be necessary and proper to the effective administration of the self-insurance program, consistent with applicable regulations, guidelines and directives of cognizant Federal agencies and pay from the Trust Fund all costs, expenses or other liabilities that may be incurred by the Trustee in connection therewith, except for liabilities proven to have been caused by any wilful misconduct of the Trustee." (R. 60)

Respondent alleges that when the lawsuit was filed, there may have been a question as to whether the trustee of a fund, designed to protect the University Hospital, could retain outside counsel, separate and apart from the Attorney General's office, but that any such question was resolved with the passage of Senate Bill 172 in the 1979 Legislative Session. (Section 63-30-28, U.C.A. (1953), as amended, effective May 8, 1979, is a portion of the Governmental Immunity Act, which portion authorized the purchase of self-insurance by governmental entities and established trust accounts for self-insurance.) Section 63-30-28,

(1953), as amended, reads, in part:

"... Notwithstanding any law to the contrary, the trust agreement between the governmental entity and the trustee may authorize the trustee to employ counsel to defend actions against the entity and its employees and to protect and safeguard the assets of the trust, to provide for claims investigation and adjustment services, to employ expert witnesses and consultants, and to provide such other services and functions necessary and proper to carry out the purposes of the trust."

Respondent alleges that the amendment authorizes the Trustee to retain counsel in its sole discretion, and that this authorization supercedes Section 67-5-5, U.C.A. (1953), as amended.

Appellant urges that Section 63-30-28, U.C.A. (1953), as amended, insofar as it is in opposition to Art. VII, Section 18 of the Utah Constitution, and Section 67-5-5, U.C.A. (1953), as amended, are unconstitutional. Appellant differs with respondent as to the legal interpretation and conclusions reached in Hansen v. Legal Services Committee, supra. Based on the lengthy argument in Argument II relative to the State Insurance Fund, and Argument III, subparagraph (D) herein, appellant maintains that, but for the contractual relationship between the Trust and the University of Utah and University of Utah Medical Center, which are clearly State agencies or entities, the Trust would not exist. Further, it is not the source of funds of the Trust that should determine the authority to appoint legal counsel. As stated in Argument II, it is the nature of the business to be done. In interpreting this recent amendment and giving meaning thereto, we must either resolve the conflict

between the Trust authority to appoint and the constitutional and common-law authority of the Attorney General to appoint legal counsel, or we must reject Senate Bill 172 as an unconstitutional inroad on the power of the Attorney General.

- F. THE COURT SHOULD NARROWLY CONSTRUE THE ABOVE STATUTES SO AS TO BE CONSISTENT WITH THE CONSTITUTIONAL AND STATUTORY MANDATES TO THE ATTORNEY GENERAL DISCUSSED UNDER ARGUMENTS I AND II.
- G. THE COURT SHOULD HOLD THE STATUTES EMPOWERING THE RESPONDENTS TO APPOINT LEGAL COUNSEL UNCONSTITUTIONAL IF THEY CANNOT BE SO CONSTRUED.

#### CONCLUSION

The Court should reverse, in part, the Order of Judge Durham, June 5, 1979, as the University of Utah and the University Medical Center are admittedly State agencies and are represented by the Attorney General.

The heart of the matter in the instant case is whether the Attorney General possesses the right to appoint independent legal counsel for all State officers with the exception of State legislators. The Utah Supreme Court in Hansen v. Legal Services Committee of Utah State Legislature, supra, firmly renounced the Legislature's attempt to diminish the duties or emasculate the powers conferred upon the Attorney General by the Utah Constitution. In light of the precedent established in Hansen, any State officer who desires to obtain power to appoint his own independent legal counsel, regardless of the sources or nature of funds used for compensation, must follow the same procedure later pursued by the Utah

State Legislature: constitutional amendment.

As was argued by the Attorney General before the Utah Supreme Court in Hansen, supra, Art. VII, Section 18 of the Utah Constitution, contains two parts: The first makes the Attorney General "the legal adviser for 'State Officers.'" The second empowers the Legislature to legislate on matters concerning the duties of the Attorney General other than as legal adviser for "State Officers." The Legislature may impose what authorized obligations it will on the Attorney General, but it may not replace him with someone else to perform his constitutional obligation to act as legal adviser to State officers.

Illustrative of the claims of respondents who are quasi-State agencies and State funds, see Argument II.

The Attorney General also has common-law powers that define his responsibilities to "perform such other duties as may be provided by law." (Art. VII, Section 18 of the Utah Constitution.)

The scope and nature of the state-wide governmental powers exercised by the Directors of these agencies and quasi-agency funds, qualify them in their own right to be considered as "State Officers," but they are also agents of the Governor (the Director of Finance being a primary agent) for whom the Attorney General serves as the uncontested legal adviser. It is urged that the Director of Finance and other respondents, as agents of the Governor, should not be able to hire independent legal counsel--even though authorized to do so pursuant to statute, since the

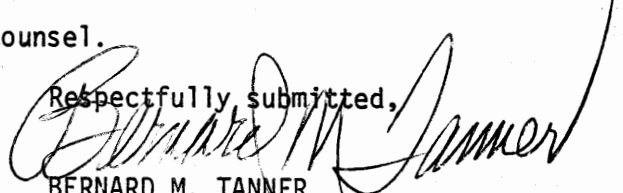
Governor as principal could not do the same. Thus, we submit that the listed statutes of Argument II are an improper legislative authorization in contravention of the constitutional mandate of the Attorney General.

Appellant respectfully requests this Court to reverse the lower court in all judgments finding for appellant against all respondents as follows:

1. That appellant is the sole legal counsel for said respondents and all State agencies, to the exclusion of any independent counsel, and that statutes which conflict with Art. VII, Section 18 of the Utah Constitution, and Section 67-5-3, U.C.A. (1953), as amended, and Section 67-5-5, U.C.A. (1953), as amended, are declared invalid and unconstitutional insofar as they grant authority to any State agency, political subdivision, or State Fund to hire its own independent legal counsel.

2. That all respondents may not pay independent legal counsel out of its funds for legal services performed; and granting appellant permanent injunction against said respondents from paying for legal services and hiring independent legal counsel.

Respectfully submitted,



BERNARD M. TANNER  
Assistant Attorney General

WILLIAM G. GIBBS  
Assistant Attorney General