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## Nothing Could Be Finer?: The Role of Agency General Counsel in North and South Carolina

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# NOTHING COULD BE FINER?: THE ROLE OF AGENCY GENERAL COUNSEL IN NORTH AND SOUTH CAROLINA

*Elizabeth Chambliss\* & Dana Remus\*\**

Agencies can get away with a lot of shit. You make a decision and if no one calls you on it, it goes on for twenty years. In my old life [private practice], when you make a decision, the other person will immediately call you on it.<sup>1</sup>

## INTRODUCTION

There is amazingly little contemporary research on the counseling function of government agency lawyers. Most research on federal government lawyers focuses on the Department of Justice<sup>2</sup> (DOJ), the Attorney General<sup>3</sup> (AG), or the birth of the modern administrative state during the New Deal.<sup>4</sup> Much of this work focuses on the organization of

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\* Professor of Law and Director, NMRS Center on Professionalism, University of South Carolina School of Law. Thanks to Duncan Alford, Joe Looby, Laurel Terry, and the participants at the Fordham Law School colloquium *Lawyering in the Regulatory State* for helpful comments on this Article. For an overview of the colloquium, see Nancy J. Moore, *Foreword: Lawyering in the Regulatory State*, 84 FORDHAM L. REV. 1811 (2016).

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1. Interview with Agency Lawyer 2 (2015) [hereinafter I2] (transcript on file with authors). For an explanation of the interview process and the notation system used to identify sources, see *infra* note 15.

2. See, e.g., Michael Herz, *The Attorney Particular: Government Role of the Agency General Counsel*, in GOVERNMENT LAWYERS: THE FEDERAL BUREAUCRACY AND PRESIDENTIAL POLITICS 143, 143 (Cornell W. Clayton ed., 1995) (noting that “the Department of Justice monopolizes academic attention”); Jed Handelsman Shugerman, *The Creation of the Department of Justice: Professionalization Without Civil Rights or Civil Service*, 66 STAN. L. REV. 121 (2013) (reviewing the historical literature on the DOJ).

3. See Cornell W. Clayton, *Introduction: Politics and the Legal Bureaucracy*, in GOVERNMENT LAWYERS: THE FEDERAL BUREAUCRACY AND PRESIDENTIAL POLITICS, *supra* note 2, at 25 n.3 (reviewing the literature on the U.S. Attorney General’s office, and observing that most studies are historical or biographical in nature).

4. See, e.g., PETER H. IRONS, *THE NEW DEAL LAWYERS* (1982) (chronicling the influence of agency lawyers on national policy during the New Deal); Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 249–55 (1994) (discussing the role of lawyering in determining the fate of particular New Deal initiatives); Neal Devins, *Government Lawyers and the New Deal*, 96 COLUM. L. REV. 237, 258 (1996) (book review) (discussing the resistance of “talented New Deal lawyers” to Roosevelt’s 1933 reorganization of the Justice Department).

federal litigation authority.<sup>5</sup> At the state level, likewise, recent scholarship focuses on the litigation function of state attorneys general.<sup>6</sup> Meanwhile, we know very little about the agency counseling function or the role of agency counsel in shaping agency policy and practice.

The role of state agency general counsel is an important topic. State law, and state administrative law in particular, affects everyday life in countless ways. State agencies are principally responsible for education, land use, roads, occupational licensing, public health, social services, and the administration of many grant and benefit programs. Most people, including lawyers,<sup>7</sup> interact more with state agencies than federal agencies, and the structure and authority of state agencies varies.<sup>8</sup> Thus, state-level research may offer new insights into the administrative process and the role of lawyers in policymaking.<sup>9</sup>

The counseling function of state agency lawyers is especially important. Like corporate counsel, agency general counsel are positioned to provide day-to-day, front-end advice about a wide range of issues. In the absence of litigation, much of this advice is not reviewed. Agency counsels' interpretation of statutes and regulations may significantly shape formal law—or create an institutional precedent that affects the de facto implementation of state law for years to come. Agency counsel also have significant influence over the make-or-buy decision and the choice of private counsel for agency litigation.<sup>10</sup>

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5. See, e.g., Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 559 (2003) (arguing that a primary purpose behind the creation of the DOJ was “to eliminate the reliance on private lawyers in litigation”); David Freeman Engstrom, *Agencies As Litigation Gatekeepers*, 123 YALE L.J. 616 (2013) (evaluating arguments for vesting agencies with litigation gatekeeping authority).

6. See, e.g., Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. 2100 (2015) (examining state variations in the duty to defend); Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012) (examining the role of state attorneys general in aggregate litigation); Margaret H. Lemos & Kevin M. Quinn, *Litigating State Interests: Attorneys General As Amici*, 90 N.Y.U. L. REV. 1229 (2015) (examining the growing activism and ambitions of state attorneys general).

7. Arthur Earl Bonfield, *State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo*, 61 TEX. L. REV. 95, 100 (1982) (“[M]ost lawyers in this country . . . spend as much or more time dealing with state administrative processes as they do with the federal process.”).

8. See *infra* Part I.

9. See Abbe R. Gluck, *The States As Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1755 (2010) (“[M]ethodology is already moving across the systems, and [] state court developments may be changing the terms of the statutory interpretation debate in ways that may be far more productive than anything currently happening in the federal arena.”); see also Bonfield, *supra* note 7, at 95 (“Consideration of state law would stimulate important insights into the administrative process that cannot be obtained from federal materials alone.”).

10. See generally Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. (forthcoming 2016) (examining the increasing use of private lawyers and/or private financing for government litigation at the state and local levels, and analyzing the costs and benefits).

Yet because the work and structure of authority in each state agency is so different, agency general counsel tend to operate in a professional vacuum, with no immediate peer group among attorneys and many other potential sources of authority.<sup>11</sup> Michael Herz has referred to the position of agency general counsel as “the attorney particular”<sup>12</sup> and has argued that “no other government attorney sits at such a confluence of conflicting pressures.”<sup>13</sup> Thus, agency counsel have broad discretion, but little accountability or guidance.

This Article examines the role of agency general counsel in North and South Carolina. The two states offer a rich comparative context for research on agency general counsel. Though closely linked in both name and culture,<sup>14</sup> they have different executive structures and recent political histories, and the agency counseling function has evolved and is currently organized in different ways. These structural and political differences at the state level illuminate commonalities and differences at the agency level and provide an accessible starting point for broader state-level research.

Our account draws on interviews with current and former agency counsel, agency directors, and lawyers in the state Attorney General’s office,<sup>15</sup> as well as roundtable discussions among agency counsel on topics of common interest.<sup>16</sup> Part I examines the structural evolution of the agency general counsel position and the functional division between in-house agency counsel and the Attorney General’s office. Part II examines the characteristics and career paths of lawyers who serve as agency general counsel and identifies sources of authority in their roles. Part III outlines questions for future research.

## I. EVOLUTION OF THE AGENCY COUNSELING FUNCTION

One explanation for the lack of research on the agency counseling function is the unruliness of executive government and the relative lack of

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11. See Herz, *supra* note 2, at 143.

12. *Id.*

13. *Id.*

14. See, e.g., Sheet Music: Carolina in the Morning Song, held by Johns Hopkins University, the Lester S. Levy Collection of Sheet Music. North and South Carolina have sparred over which state the song is about, but lyricist Gus Kahn’s grandson, Andy Marx, tactfully claims that his grandfather “loved both Carolinas.” *Nothing Could Be Finer than to Be in Carolina*, AM. PUB. MEDIA (Mar. 22, 2013), <http://www.thestory.org/stories/2013-03/nothing-could-be-finer-be-carolina> [https://perma.cc/4G86-3LRS].

15. We conducted nineteen semi-structured interviews between August and December 2015. Most interviews were conducted in person and lasted about ninety minutes. To preserve confidentiality, we do not label respondents by state or position, but simply refer to them by number, I1 through I19. All pincites are to the transcripts of the interviews, which are on file with the authors.

16. We held four roundtables for agency general counsel and other senior agency lawyers between October 2014 and October 2015. The roundtables lasted two hours and ranged in size from eight to twenty-two participants. Because the initial roundtables preceded (and to some extent inspired) our research, we did not include them in our research design and do not quote participants directly; however, the discussions provided useful background for our research.

codification of many aspects of agency authority and practice. Even what constitutes an executive agency is a controversial topic.<sup>17</sup> At the federal level, “[n]o coherent pattern explains Congress’s decisions to locate some cessions of government authority within the executive and others with an independent agency.”<sup>18</sup> Paul Verkuil has characterized the process as one of “random selection.”<sup>19</sup> Efforts to centralize litigation authority in the DOJ have been, in broad terms, successful,<sup>20</sup> but also periodic, partial, and riddled with agency carve-outs.<sup>21</sup> Meanwhile, there is no pretense of centralization of the counseling function.<sup>22</sup> At the federal level, agency counseling is marked by “entrenched decentralization.”<sup>23</sup>

The situation in the states is equally messy. On the one hand, in both states there is evidence for a narrative about the rationalization<sup>24</sup> of executive government through the consolidation of an unwieldy assortment of hundreds of agencies, boards, and commissions—many under partial legislative control—into a limited number of cabinet and other executive agencies.<sup>25</sup> Over time, in both states, most executive agencies have come to employ specialized in-house counsel under the title “general counsel,” “chief counsel,” or something similar; currently, all but three executive agencies in North and South Carolina employ in-house general counsel.<sup>26</sup> Moreover, in both states, agency general counsel recently have initiated

17. See Clayton, *supra* note 3, at 25 n.2 (defining “executive agencies” as those “charged with carrying out the law,” rather than as a category defined by executive control).

18. Neal Devins, *Toward an Understanding of Legal Policy-Making at Independent Agencies*, in GOVERNMENT LAWYERS: THE FEDERAL BUREAUCRACY AND PRESIDENTIAL POLITICS, *supra* note 2, at 183.

19. Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 258.

20. See Herz, *supra* note 2, at 144–45 (stating that the 1870 effort to centralize litigation authority in the DOJ “never quite took hold” but was eventually accomplished by executive order in 1933 and later codified); see also 28 U.S.C. § 516 (1988) (“Except as otherwise authorized by law, the conduct of litigation in which the United States, and agency, or officer thereof is a party, or is interested, and securing of evidence therefor, is reserved to the officers of the Department of Justice, under the direction of the Attorney General.”); Exec. Order No. 6,166 (1933).

21. See Devins, *supra* note 18, at 186 (stating that “[t]he fragmentary quality of independent agency litigating authority is typical, not exceptional”).

22. Herz, *supra* note 2, at 147 (“The silence of both the executive order and the statute with regard to the counseling function by implication cemented its decentralization. No pretense of control by the attorney general was even made.”).

23. *Id.* at 150.

24. In sociology, “rationalization” refers to the replacement of traditions, values, and emotions as motivations for behavior with rational, calculated motivations. 1 MAX WEBER, *ECONOMY AND SOCIETY* 215 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1968). The development of government bureaucracies is an iconic example. 3WEBER, *supra*, at 1156; see also *Rationalization (sociology)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Rationalization\\_\(sociology\)](https://en.wikipedia.org/wiki/Rationalization_(sociology)) (last visited Mar. 27, 2016) [<https://perma.cc/ZFK3-97HX>].

25. Both states distinguish between cabinet agencies, in which the director is appointed by the governor, and other executive agencies, in which the director is elected or appointed by an independent commission or board. See *infra* APPENDIX A, B.

26. Altogether, there are forty-two executive agencies in the two states and thirty-nine employ in-house counsel. See *infra* APPENDIX A, B.

efforts to form professional networks—for instance by developing professional directories and best practice manuals and holding periodic roundtables to discuss questions of common interest.<sup>27</sup> Such efforts point to the increasing professionalization<sup>28</sup> of agency general counsel, similar to that of corporate counsel in the 1970s and 1980s<sup>29</sup> and law firm general counsel in the 1990s and 2000s.<sup>30</sup>

On the other hand, there is a lot of sausage-making. In both states, governors and attorneys general have used executive organization and reorganization as a political tool, creating and moving functions and positions—and papering over inconvenient incumbents—to achieve greater political control. In South Carolina, a so-called legislative state with a historically weak executive branch<sup>31</sup> and reliably Republican politics,<sup>32</sup> the Governor’s primary agenda has been to wrest governing authority from the legislature through the gradual consolidation of agencies under executive control and the concomitant expansion of in-house agency counseling. In North Carolina, partisan politics have played a more visible role,<sup>33</sup> with

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27. I2, *supra* note 1, at 21; Interview with Agency Lawyer 10, at 12 (2015) (transcript on file with authors); Interview with Agency Lawyer 16, at 6 (2015) [hereinafter I16] (transcript on file with authors).

28. See Elizabeth Chambliss, *The Professionalization of Law Firm In-House Counsel*, 84 N.C. L. REV. 1515, 1517–18 (2006) (using the term “professionalization” broadly to refer to “the process by which an occupational group becomes increasingly specialized, organized, and autonomous, developing distinct knowledge claims, titles, associations, and career tracks”); see also George Ritzer, *Professionalization, Bureaucratization and Rationalization: The Views of Max Weber*, 53 SOC. FORCES 627, 632 (1975) (noting that bureaucracies and professions develop through a similar process of rationalization).

29. See generally Mary C. Daly, *The Cultural, Ethical and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1059–66 (1997) (discussing the growth in the number of corporate counsel in the 1970s and 1980s and the expansion of their “regulatory counseling” function); Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479 (1989) (discussing the professionalization of corporate counsel).

30. See generally Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559 (2002) (tracking the emergence of the law firm general counsel position); Chambliss, *supra* note 28 (examining the professionalization of firm counsel).

31. Until 1865, the governor of South Carolina was elected by the legislature. 1 JAMES LOWELL UNDERWOOD, *THE CONSTITUTION OF SOUTH CAROLINA: THE RELATIONSHIP OF THE LEGISLATIVE, EXECUTIVE, AND JUDICIAL BRANCHES* 89 (1986). South Carolina was the last state to make the governorship a popularly elected position. Levona Page, *State Slowly Reversing Historical Tide*, STATE, June 15, 1993, at 12A.

32. MARTIN GUEVARA URBINA, *TWENTY-FIRST CENTURY DYNAMICS OF MULTICULTURALISM* 94 (2014) (referring to South Carolina as a “reliably Republican” state); see also Devins & Prakash, *supra* note 6, at 2105 & n.16 (distinguishing between “states with stable political coalitions (what we call red and blue states), [in which] voter preferences, attorney general priorities, and state law generally align” and “purple states,” which “frequently experience divided party control”).

33. See Richard Fausset, *North Carolina, in Political Flux, Battles for Its Identity*, N.Y. TIMES (Sept. 23, 2014), [http://www.nytimes.com/2014/09/23/us/north-carolina-in-political-flux-battles-for-its-identity.html?\\_r=0](http://www.nytimes.com/2014/09/23/us/north-carolina-in-political-flux-battles-for-its-identity.html?_r=0) (“The North Carolina of 2014, it seems, is neither red nor blue, but a shade of deep Dixie purple.”) [<http://perma.cc/N5RD-75X8>]. President Obama won the state in 2008, but two years later, Republicans won control of both houses of

governors and their political rivals struggling over agency policy and the control of agency counsel. Thus, in both states, the evolution of the agency counseling function simultaneously reflects a gradual process of bureaucratic rationalization and the idiosyncratic, sticky remnants of specific political contests.

#### A. Consolidation of Executive Agencies

In the late 1960s, North Carolina had over 200 independent agencies. Recognizing the resulting unruliness, the General Assembly undertook a reorganization of state government.<sup>34</sup> It proposed a constitutional amendment, approved by the general electorate on November 3, 1970, which called for the executive branch to be reduced to not more than twenty-five departments by the end of 1975.<sup>35</sup> This shift was effectuated through two rounds of legislation, in 1971 and 1973, which produced the current organization of Council of State and cabinet agencies.<sup>36</sup> Countless, though far more minor, alterations, reorganizations, and name changes have occurred since that time. As the 2013 North Carolina state manual explains: “Reorganization has become a predictable, on-going feature of state government’s executive branch since 1971. Department names have changed, missions and mandates have been altered and some agencies, such as the Office of State Controller, have been given autonomous status.”<sup>37</sup>

Currently, North Carolina has nineteen executive agencies.<sup>38</sup> Eight are cabinet agencies, whose directors are appointed by the Governor,<sup>39</sup> eight are Council of State agencies, whose directors are popularly elected,<sup>40</sup> and three are independent agencies.<sup>41</sup> All but one of the agencies has in-house general counsel.<sup>42</sup> In addition, over 400 boards and commissions operate

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the General Assembly for the first time in over a century, and in 2013, a Republican (Pat McCrory) took office as governor for the first time in twenty years. Many pockets of the state remain liberal, however, producing significant political tensions. Emblematic of the tension, Attorney General Roy Cooper, a Democrat, has already announced his plans to challenge Governor McCrory in the gubernatorial election of 2016. Karyn Bruggeman, *McCrory Unveils Reelection Campaign Team*, ATLANTIC (Jan. 7, 2016), <http://www.theatlantic.com/politics/archive/2016/01/mccrory-unveils-reelection-campaign-team/458961/> [<https://perma.cc/QWU4-JEZ9>].

34. OFFICE OF THE SEC’Y OF STATE, NORTH CAROLINA MANUAL 134 (2011–12).

35. *Id.* at 82, 85.

36. Executive Reorganization Act of 1971, N.C. GEN. STAT. § 143A (2014); Executive Reorganization Act of 1973, N.C. GEN. STAT. § 143B (2014).

37. OFFICE OF THE SEC’Y OF STATE, *supra* note 34, at 136.

38. *See infra* APPENDIX A.

39. N.C. GEN. STAT. § 143B-9.

40. N.C. CONST. Art. III, § 7, cl.1.

41. Members of the State Board of Elections are appointed by the Governor. OFFICE OF THE SEC’Y OF STATE, *supra* note 34, at 261. The Director of the Office of the State Controller is appointed by the Governor with the approval of the General Assembly. *Id.* at 258. The Office of Administrative Hearings is a quasi-judicial body whose head, the Chief Administrative Law Judge, is appointed by the Chief Justice of the North Carolina Supreme Court. N.C. GEN. STAT. § 7A-752.

42. *See infra* APPENDIX A. The remaining agency, the Office of the State Controller, relies exclusively on the Attorney General’s office for legal counsel. *Id.*

under these agencies' supervision, many of which have their own in-house counsel or part-time, private counsel on retainer.<sup>43</sup>

In South Carolina, executive control over state agencies came much later,<sup>44</sup> and the legislature has continued to “jealously guard[]”<sup>45</sup> its authority over some executive agencies. The first significant restructuring of state government occurred in 1993, with the replacement of seventy-five state agencies run by boards and commissions with seventeen new executive agencies under increased gubernatorial control.<sup>46</sup> Reported as “the most sweeping change in government”<sup>47</sup> since the adoption of the state constitution in 1895, the 1993 Act nevertheless left in place significant legislative control over the Budget and Control Board, the Department of Transportation, and twenty-nine other agencies and commissions.<sup>48</sup> Another significant reorganization occurred in 2014, with the creation of a new cabinet agency, the Department of Administration, to replace the Budget and Control Board<sup>49</sup> and the consolidation of numerous other boards and commissions under the Department of Administration's authority.<sup>50</sup> The 2014 legislation also expanded the requirements for legislative review of state agencies.<sup>51</sup>

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43. See NORTH CAROLINA BOARDS AND COMMISSIONS AND THEIR ATTORNEYS (2007, rev. 2015) (on file with the *Fordham Law Review*).

44. See Page, *supra* note 31, at 12A (noting that most other states restructured their governments fifteen to thirty years earlier).

45. Cindi Ross Scoppe, *S.C.'s Overhaul Completed Legislature Hands Over Key Powers to Governor*, STATE, June 15, 1993, at 1A (referring to the 1993 Act) (“Legislators jealously guarded their control over road construction and severely limited the governor’s power over law enforcement and environmental regulations. At no time did they seriously consider giving the chief executive any authority over education—the work of half the government.”).

46. State Government Restructuring Act of 1993, 1993 S.C. Acts 181. The 1993 Act authorized the governor to hire and fire the directors of eleven agencies and to hire the directors of two other agencies for fixed terms. The law also, for the first time, authorized the governor to remove “for any reason” board members in charge of most other agencies. See Cindi Ross Scoppe, *‘It’s History’: Campbell Signs Bill to Overhaul Government*, STATE, June 19, 1993, at 14A (“Under a blazing midmorning sun on the State House steps, Gov. Carroll Campbell signed legislation turning a third of the government over to himself and his successors.”).

47. Scoppe, *supra* note 46.

48. State Government Restructuring Act of 1993, 1993 S.C. Acts 181; see also Scoppe, *supra* note 45 (reporting that the restructuring “falls short of what the governor and his allies desired”).

49. South Carolina Restructuring Act of 2014, 2014 S.C. Acts 121. Two of the Budget and Control Board’s functions were transferred to the State Fiscal Accountability Authority—the issuance of bonds, and the issuance of grants and loans—but the remainder devolved to the Department of Administration. *Id.* § 2(A)(1)–(2).

50. See generally South Carolina Restructuring Act of 2014, 2014 S.C. Acts 121.

51. *Id.* § 2-2-20(A) (“Beginning January 1, 2015, each standing committee shall conduct oversight studies and investigations on all agencies within the standing committee’s subject matter jurisdiction at least once every seven years in accordance with a schedule adopted as provided in this chapter.”); see also Cindi Ross Scoppe, *Budget and Control Board Abolished, Now Comes the Hard Part for Legislators*, STATE (Feb. 8, 2014), <http://www.thestate.com/opinion/opn-columns-blogs/cindi-ross-scoppe/article13837355.html>

html (“The new law requires House and Senate committees to review every state agency at least once every seven years, [and] gives lawmakers new tools—chiefly subpoena power—to conduct those reviews . . . . Although many legislators found the idea of empowering the



Effective July 1, 2015, there are twenty-three executive agencies in South Carolina.<sup>52</sup> Sixteen are cabinet agencies, whose directors are appointed by the Governor with the advice and consent of the Senate.<sup>53</sup> The Department of Transportation also is considered a cabinet agency,<sup>54</sup> but remains under joint legislative control.<sup>55</sup> In addition, there are two agencies whose chief executives are popularly elected<sup>56</sup> and four independent agencies whose directors are appointed by a commission or board.<sup>57</sup> All but two executive agencies have in-house general counsel, and most employ more than one lawyer.<sup>58</sup> There are also hundreds of smaller executive boards and commissions,<sup>59</sup> many of which have their own in-house counsel or part-time, outside counsel.<sup>60</sup>

### B. Move to In-House Agency Counseling

In both states, the agency counseling function began within the Attorney General's office with the formal or informal assignment of lawyers to particular agencies. Over time and piecemeal, many larger agencies established in-house legal positions to handle recurring agency work, including certain types of litigation.

In South Carolina, this process was relatively linear and consistent with a rationalization narrative (albeit a very gradual one). In the late 1970s, the

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governor less objectionable when it was paired with more oversight tools for themselves, many failed to understand that exercising that power would require a great deal of work.”) [<http://perma.cc/PWX7-7NBS>].

52. See *infra* APPENDIX B.

53. S.C. CODE ANN. § 1-30-10 (2015); South Carolina Restructuring Act of 2014, 2014 S.C. Acts 121.

54. See *Cabinet Agencies*, SC OFF. OF THE GOVERNOR, <http://www.governor.sc.gov/Pages/Cabinet.aspx> (last visited Mar. 27, 2016) (listing cabinet agencies) [<http://perma.cc/44QQ-4CBT>].

55. The Department of Transportation (DOT) is jointly governed by a seven-member legislative commission and a Secretary of Transportation appointed by the Governor. S.C. CODE ANN. § 1-30-10 (B)(1)(iv) (2015). More than one interviewee referred to the DOT as a “two headed monster.” See Interview with Agency Lawyer 6 (2015) [hereinafter I6] (transcript on file with authors); Interview with Agency Lawyer 7 (2015) (transcript on file with authors).

56. The State Commissioner of Agriculture and State Superintendent of Education are popularly elected. See S.C. CODE ANN. § 1-30-10 (B)(1)(iii); see also S.C. CONST. Art. XI, § 2.

57. The independent agencies are the Department of Disabilities and Special Needs, the Department of Health and Environmental Control, the Department of Mental Health, and the Department of Natural Resources. Their governing commissions or boards, in turn, are made up of representatives from each of seven congressional districts, appointed by either the Governor or the legislature, plus one at-large member appointed by the Governor. SOUTH CAROLINA LEGISLATIVE MANUAL 480, 501, 532, 537–38, [http://www.scstatehouse.gov/man14/49\\_StGov.pdf](http://www.scstatehouse.gov/man14/49_StGov.pdf) [<http://perma.cc/S39K-P9MJ>].

58. List of State Agency Attorneys in South Carolina (Aug. 20, 2015) (on file with authors); see also *infra* APPENDIX B.

59. *Boards and Commissions*, S.C. OFF. GOVERNOR, <http://www.governor.sc.gov/ExecutiveOffice/Pages/BoardsandCommissions.aspx> (listing over 250 executive boards and commissions) [<https://perma.cc/G3FB-G4K4>].

60. List of State Agency Attorneys in South Carolina, *supra* note 58.

Attorney General's office did most of the legal work of state agencies;<sup>61</sup> however, several agencies had their "own"<sup>62</sup> lawyers, such as the Tax Commission, the Wildlife Commission, the Department of Health and Environmental Control, the Department of Mental Health, and the Department of Mental Retardation (as they were then called).<sup>63</sup> These lawyers were formally employed by the Attorney General's office and called "assistant attorneys general,"<sup>64</sup> but were, in fact, seconded to the agencies and worked out of the agencies' offices.<sup>65</sup>

Beginning in the early 1980s, the Attorney General sought funding to move various lawyers and groups of lawyers to the agencies' payrolls.<sup>66</sup> The first "big" movement of lawyers to the agencies was the movement of "all the condemnation lawyers" (those handling condemnation proceedings for the state) to the Department of Transportation under Attorney General Travis Medlock in 1983.<sup>67</sup> Medlock also moved "at least six" child support lawyers to the Department of Social Services, according to the memory of one long-time state official.<sup>68</sup> He attributes these moves to the demands of specialized agency business and the comparatively limited resources of the Attorney General's office. As he stated:

[I]t's a gradual evolution toward the agency because of specialization. Because assistant attorneys general, while we can do litigation for the agency, the day-to-day representation has evolved more toward their own in-house counsel . . . . [T]he Attorney General's office just doesn't have the resources on a day-to-day basis to advise big agencies [on their specific concerns].<sup>69</sup>

The growth of in-house counsel positions continued throughout the 1990s and 2000s, although they are somewhat difficult to track. The Attorney General's authority over executive agencies' hiring of attorneys<sup>70</sup> and engagement of attorneys on a fee basis<sup>71</sup> was codified in 2009, but

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61. Interview with Agency Lawyer 11, at 1 (2015) [hereinafter I11] (transcript on file with authors).

62. Interview with Agency Lawyer 12, at 2 (2015) [hereinafter I12] (transcript on file with authors).

63. *Id.* at 2–5.

64. *Id.* at 2.

65. I11, *supra* note 61, at 2.

66. These early moves were not codified but rather affected through the Attorney General's budget provisos. I12, *supra* note 62, at 1.

67. *Id.* at 3.

68. *Id.* at 5.

69. *Id.*

70. S.C. CODE ANN. § 1-7-160 (2009) ("A department or agency of state government may not hire a classified or temporary attorney as an employee except upon the written approval of the Attorney General and at compensation approved by him. All of these attorneys at all times are under the supervision and control of the Attorney General except as otherwise provided by law unless prior approval by the State Budget and Control Board is obtained. This section does not apply to an attorney hired by the General Assembly or the Judicial department.").

71. S.C. CODE ANN. § 1-7-170(A) ("A department or agency of state government may not engage on a fee basis an attorney at law except upon the written approval of the Attorney General and upon a fee as must be approved by him.").

authorization for specific positions—to the extent that they are codified—are buried within each agency’s enabling legislation<sup>72</sup> or in budget provisos.<sup>73</sup> In general, however, the evolution of the agency counseling function in South Carolina appears primarily to reflect the expansion and rationalization of the executive function.

In North Carolina, the process has been far less linear. Throughout the 1970s and 1980s, individual agencies created an increasing number of “agency legal specialist” positions to provide “in-house” expertise and advice.<sup>74</sup> The agencies did so on their own accord and without formal authorization from the Attorney General; at least some of these positions were funded through federal grants to the agencies.<sup>75</sup> By 1987, there were “almost as many legal positions outside of the direct control of the [A]ttorney [G]eneral as there were within his control,”<sup>76</sup> and only two state agencies—the Department of Cultural Resources and the Department of Labor—relied exclusively on the legal services of the Attorney General’s office.

In 1988, recognizing the inefficiency of this arrangement, the General Assembly requested that the Attorney General prepare “a plan for the consolidation of legal services provided to the various departments and agencies of State government.”<sup>77</sup> Through greater appropriations to the Attorney General’s office, many agency legal specialist positions were subsequently moved out of the agencies and centralized within the budgetary and hierarchical control of the Attorney General’s office.<sup>78</sup>

The resulting arrangement may have achieved its stated goal of facilitating “a more consistent application of legal policy,”<sup>79</sup> but it also

72. *See, e.g.*, Marine Resources Act, S.C. CODE ANN. § 50-5-50 (1976) (entitled “Prosecutions for violations of chapter” and codifying the authority of the Department of Natural Resources to employ special counsel).

The department may prosecute for violations of this chapter for the collection of revenues due this State from the fishing industries and permitting of bottoms and waters and may employ counsel having special knowledge of the fisheries laws, fisheries, and coastal conditions to conduct the prosecutions in the inferior courts and assist the solicitor in the circuit courts and appellate courts.

*Id.*

73. *See* I12, *supra* note 62, at 5; Interview with Agency Lawyer 17, at 3 (2015) [hereinafter I17] (transcript on file with authors).

74. ATT’Y GEN’S STAFF, REPORT TO THE 1989 GENERAL ASSEMBLY OF NORTH CAROLINA (1989).

75. Interview with Agency Lawyer 8, at 5 (2015) [hereinafter I8] (transcript on file with authors); *see also* Page, *supra* note 31, at 12A (quoting political science professor Donald Fowler) (“Governors of the 1960s and early 1970s got a stronger grip on power when spending programs in President Johnson’s Great Society funneled millions of federal dollars through their offices. “The institutional structure in terms of organization did not change, but the governors had power because of that money.”).

76. ATT’Y GEN’S STAFF, *supra* note 74.

77. The Honorable Lacy H. Thornburg, *Changes in the State’s Law Firm: The Powers, Duties and Operations of the Office of the Attorney General*, 12 CAMPBELL L. REV. 343, 367 (1990) (quoting S.B. 26, 1989 Sess., Reg. Sess. (N.C. 1989)).

78. Interview with Agency Lawyer 3, at 1 (2015) [hereinafter I3] (transcript on file with authors).

79. Thornburg, *supra* note 77, at 367.

opened the door to political tension. As then-Attorney General Lacy Thornburg described, when the Attorney General and the agency directors are from different political parties, the Attorney General's duty to represent all state officers and agencies can "provide[] for a tenuous relationship with the agency-client."<sup>80</sup> Since that time, there has been a consistent "creep" of legal specialist positions back to the agencies<sup>81</sup> and a gradual formalization of the in-house general counsel position. By the early 2000s, all executive agencies had created in-house general counsel positions, and some had acquired large general counsel staffs.<sup>82</sup>

### *C. Functional Division Between Agency Counsel and the Attorney General*

The core function of the agency general counsel is to advise the agency.<sup>83</sup> "The agency counsel is indeed a counselor, not a litigator."<sup>84</sup> Embedded within their clients, agency general counsel develop specialized expertise and institutional knowledge, which they use in advising on law, process, and policy. The litigation function remains with the Attorney General, who, in both states, is statutorily empowered to litigate on behalf of all state entities.<sup>85</sup>

Naturally, there is some overlap between the two functions. In both states, specialized carve-outs grant some agencies and commissions authority to litigate some types of matters on their own behalf.<sup>86</sup> Agency general counsel also routinely collaborate with the lawyers at the Attorney General's office who represent them in court.<sup>87</sup> In addition, some agency litigation is handled by private counsel rather than by the Attorney General's office.<sup>88</sup> In South Carolina, tort claims against the agencies are covered by the Insurance Research Fund, which appoints outside counsel.<sup>89</sup> Both states also outsource litigation when an agency "need[s] help in very specialized area of the law or ha[s] a short term spike in legal needs like

80. *Id.* at 358.

81. I3, *supra* note 78, at 1, 2.

82. Interview with Agency Lawyer 13, at 1 (2015) [hereinafter I13] (transcript on file with authors); *see also infra* APPENDIX A.

83. Herz, *supra* note 2, at 148.

84. *Id.* at 143.

85. N.C. GEN. STAT. § 114-2(2) (2014); S.C. CODE ANN. § 1-7-40 (2009).

86. *See* NORTH CAROLINA BOARDS AND COMMISSIONS AND THEIR ATTORNEYS, *supra* note 43 (list of boards and commissions, noting those authorized to employ private counsel); OTHER AGENCY EMPLOYEES AUTHORIZED TO PROSECUTE CASES ON BEHALF OF THE STATE OF SOUTH CAROLINA (2015) (on file with the *Fordham Law Review*) (list of agency carve-outs in South Carolina by agency and type of approval).

87. *See* I13, *supra* note 82, at 1 (describing close working relationships); I8, *supra* note 75, at 10–11; *see also* Herz, *supra* note 2, at 149 ("Although [agency general counsel] generally do not have the lead role in litigation . . . they do participate.").

88. *See* Lemos, *supra* note 10 (discussing the privatization of government litigation).

89. S.C. CODE ANN. § 1-11-140 (2015) (authorizing the Insurance Reserve Fund to provide tort liability insurance to governmental entities). *See generally* INSURANCE RESERVE FUND, <http://www.irf.sc.gov/> (last visited Mar. 27, 2016) [<https://perma.cc/BC8F-ENXE>].

from a large scale lawsuit.”<sup>90</sup> Although, in both states, the retention of outside counsel requires approval by the Attorney General,<sup>91</sup> in practice, agency counsel may have significant influence over the selection of attorneys.<sup>92</sup>

Agency general counsel also seek advice and opinions from the Attorney General’s office independent of litigation. As one respondent explained: “Because of the nature of agency work, there are internal pressures to get stuff done, which can interfere with clear-eyed legal advice.”<sup>93</sup> Moreover, even when the path ahead is clear, “it can be useful to have advice coming from a third party who is not in the office; you can blame them when you explain to someone more powerful why you are not doing something they want you to do.”<sup>94</sup> As another respondent observed:

[A]lmost nobody in private practice ever reads an AG opinion, but I couldn’t get by without them in my job now . . . not because I don’t know what the good, what the right call is, but because I have no authority on which to show someone: this is why I am telling you what I am telling you and look, this other AG opinion says it too . . . . [T]hey are frankly cover sometimes for, you know, “why did you do this?” Well because this AG opinion says we can.<sup>95</sup>

The relationship between agency general counsel and the Attorney General’s office may be strained by partisan differences, however. In North Carolina, the frequency of agency counsel seeking guidance from the Attorney General has declined since the election of a Republican Governor and a Republican-dominated General Assembly.<sup>96</sup> According to one respondent:

I think that the general sense is that because the [Attorney General’s] office has been a Democratic office for so, so long . . . the Republican legislature, they’re uneasy with the idea that the AG’s office would be handling the defenses to these things that perhaps politically the individual AG might not be aligned with . . . [such as] the gay marriage deal [and the controversy over voter] photo ID.<sup>97</sup>

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90. Interview with Agency Lawyer 5, at 4 (2015) [hereinafter I5] (transcript on file with authors); *see also* I8, *supra* note 75, at 12.

91. S.C. CODE ANN. § 1-7-170 (2011); N.C. GEN. STAT. § 147-17(a) (2011) (“No department, officer, agency, institution, commission, bureau or other organized activity of the State which receives support in whole or in part from the State shall employ any counsel, except with the approval of the Governor. The Governor shall give his approval only if the Attorney General has advised [the Governor] that it is impracticable for the Attorney General to render the legal services.”). *But see* Martin v. Thornburg, 359 S.E.2d 472, 480 (N.C. 1987) (allowing the Governor to employ private counsel as he or she “may deem proper or necessary” without the attorney general’s approval).

92. *See* I2, *supra* note 1, at 13; I6, *supra* note 55, at 7; I17, *supra* note 73, at 12.

93. I5, *supra* note 90, at 4.

94. *Id.*; *see also* I2, *supra* note 1, at 12; I8, *supra* note 75, at 6, 10.

95. Interview with Agency Lawyer 19, at 14–15 (2015) [hereinafter I19] (transcript on file with authors).

96. I13, *supra* note 82, at 1.

97. Interview with Agency Lawyer 14, at 2 (2015) [hereinafter I14] (transcript on file with authors).

In 2014, the General Assembly amended the law regarding retention of private counsel.<sup>98</sup> Although not clear on its face, one respondent explained that its widely understood intent was to allow the General Assembly and the Governor to “cut the AG out of the process”:

The legislature didn’t trust the AG’s office to mount an adequate defense, and so they ultimately changed the law so they no longer have to seek the same type of approval if they want to hire a private counsel [and] they hired a whole cadre of lawyers, [and] the Governor’s office hired a smaller group of lawyers . . . . [T]he motivation [was] to cut the AG out of the process and allow themselves the liberty to buy peace of mind by buying private counsel.<sup>99</sup>

Thus far, partisan tensions have not trickled down to affect retention of private counsel by agencies, but some agency general counsel noted it as a possibility.<sup>100</sup> We return to this issue in our discussion of research questions below.

## II. THE ROLE OF AGENCY GENERAL COUNSEL

The most striking feature of the day-to-day role of agency general counsel is the extent to which it varies—by agency, by director, and by the professional orientation of the lawyer in the position. Although agency general counsel encounter some similar substantive issues—most notably human resource and Freedom of Information Act (FOIA) issues—the scope and substance of their day-to-day work depends significantly on the functions of the agency, the expectations of the agency director, and the institutional culture of the office. Respondents were unanimous in emphasizing this variation. As one said following a roundtable discussion, “[N]one of us seems to do the same job.”<sup>101</sup>

Respondents also emphasized their professional autonomy and lack of accountability. Several agency general counsel whom we interviewed were the first to hold the position and, as one said, “I was making it up as I went along.”<sup>102</sup> Even those in established positions report that “there is a lot of winging it”<sup>103</sup> and that the contours of the job depend on “one’s own philosophy and experience.”<sup>104</sup> As one respondent explained: “You kind of get this confidence of just being like, ‘we’re going with this, let’s go with that,’ and honestly? Nine times out of ten, there are going to be no

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98. Transparency in Private Attorney Contracts Act (TIPAC), N.C. GEN. STAT. §§ 114-9.2 to -9.8, -2.3(b) (2014). The statute requires a written determination that retention of private counsel is “both cost-effective and in the public interest.” *Id.* § 114-9.4.

99. I14, *supra* note 97, at 2.

100. I13, *supra* note 82, at 1.

101. Interview with Agency Lawyer 1, at 13 (2015) [hereinafter I1] (transcript on file with authors).

102. I5, *supra* note 90, at 2.

103. I2, *supra* note 1, at 6.

104. Interview with Agency Lawyer 9, at 14 (2015) [hereinafter I9] (transcript on file with authors).

consequences for your decision.”<sup>105</sup> Meanwhile, respondents come to the job from a wide variety of backgrounds and bring a variety of professional orientations and dispositions to the role. One might ask—we have asked ourselves—whether “agency counseling” is even a coherent topic.

Yet it is precisely their professional autonomy and the implications of different approaches that make the role of agency general counsel both theoretically and normatively interesting. Theoretically: How do agency counsel perceive and respond to the autonomy in their roles? What are the sources of—and constraints on—their authority? To what extent are we observing, or should we expect to observe, the formation of specialized professional networks among agency general counsel or increasing standardization of their titles and functions? Are there normative reasons for promoting a standardized approach to the agency counseling role? This part begins to examine such questions and lays a foundation for further research.

#### A. *Characteristics and Career Paths*

We first surveyed the public profiles of those currently serving as executive agency general counsel in the two states (n=39).<sup>106</sup> Women make up 41 percent of current agency counsel: 39 percent (seven of eighteen) in North Carolina and 43 percent (nine of twenty-one) in South Carolina. Most agency counsel graduated from a law school within their own state: 84 percent among those for whom we could find law school information.<sup>107</sup> About half began their legal careers in private practice (seventeen of thirty-four, with information about five people missing), and about a third (eleven of thirty-four) were in private practice immediately prior to becoming agency general counsel or presumptive agency general counsel.<sup>108</sup> Another third were promoted to the general counsel position from within the same agency, and a third came to the position from a different state agency or public sector job.<sup>109</sup> The average age of agency general counsel is forty-

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105. I2, *supra* note 1, at 16.

106. *See infra* APPENDIX A, B.

107. In North Carolina, fifteen of seventeen attorneys (one missing) graduated from North Carolina law schools (University of North Carolina, Wake Forest, North Carolina Central, and Campbell). The remaining two graduated from Wisconsin. In South Carolina, seventeen of twenty-one graduated from the University of South Carolina School of Law. The remaining four graduated from Cincinnati, Georgetown, Tennessee, and Widener.

108. In North Carolina, eight of sixteen attorneys (two missing) began their careers in private practice, and five of sixteen were in private practice immediately prior to becoming agency general counsel. In South Carolina, nine of eighteen (three missing) began their careers in private practice, and six of eighteen were in private practice immediately prior to becoming agency general counsel, interim general counsel, or, in one case, deputy general counsel with the expectation of promotion within the year.

109. In North Carolina, five of sixteen attorneys (two missing) were promoted to general counsel from within the same agency and six came from another agency. In South Carolina, six of eighteen were promoted to general counsel from within the same agency (not counting the two hired as presumptive general counsel), and five came from another agency or public sector job.

seven, based on the date of their undergraduate degree,<sup>110</sup> and the average tenure of those currently serving is about five years.<sup>111</sup> In 2015, the average salary of agency general counsel was \$103,211 in North Carolina and \$107,051 in South Carolina.<sup>112</sup>

### B. Attractions of the Position

A common stereotype about government lawyers is that they do not work as hard as private practitioners and always have their eye on the clock. One research assistant's response to the question of why lawyers enter state government was: "[T]hat's a short study: nine to five." Several respondents voiced a similar stereotype when comparing government lawyers to private practitioners. As one said:

Some government lawyers are just looking for the easiest way, the lazy way. Don't get me wrong—there are many unbelievably talented and inspiring lawyers in this line of work, but there are also those that couldn't find a job elsewhere, or retreated to this from private practice because they thought they wouldn't have to work as hard. Those people really piss me off. That is not why we come to work.<sup>113</sup>

Another remarked that government lawyers "don't buy new clothes" and are "not very social" compared to private practitioners.<sup>114</sup> "[M]aybe they don't want to fool with it and that's why they got into state, they don't seem as socially equipped."<sup>115</sup>

But although we encountered or heard about one or two agency general counsel who fit this description, it does not fit many of the lawyers in our sample. This is not to say that the generally shorter and more predictable hours are not appealing, especially to parents—particularly parents whose spouses are in private practice. As one respondent explained:

[A] lot of lawyers seem to be married to lawyers. One of you has the career that[] "hey, I can't do this, I can't pick up the kids, I've got to do this," and someone else has to be more stable, and so even our deputy director, his wife works at [a large law firm], so even for him . . . we joke around that he's one of us . . . [H]ere, you know, issues come up, but for the most part if you need to get your kids at five o'clock you can get your kids at five o'clock.<sup>116</sup>

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110. When possible, age was verified directly using Martindale Hubbell, the White Pages, and state employee databases. The average age of agency general counsel is forty-five in North Carolina and forty-nine in South Carolina.

111. The average tenure of those currently serving as agency general counsel is 4.5 years in North Carolina (sixteen of eighteen, with two missing) and five years in South Carolina (twenty of twenty-one, with one missing).

112. This accounts for the salaries of seventeen of eighteen agency counsel in North Carolina and nineteen of twenty-one in South Carolina.

113. I5, *supra* note 90, at 5.

114. I2, *supra* note 1, at 17.

115. *Id.*

116. I1, *supra* note 101, at 17; *see also* I2, *supra* note 1, at 16; I8, *supra* note 75, at 21; I17, *supra* note 73, at 2.



Several respondents also noted the mental relief of being off the clock at night and not having to bill hours or chase clients for business. As one said:

When I went home at night, except for what I would call a three-month crisis period, I didn't think about the job . . . I mean I worked long hours but when I got in the car to drive home, I'd left it all at the office. It's hard to do that in private practice.<sup>117</sup>

Another, explaining why he left private practice, said:

[When] I looked at the people ahead of me, the partners and how they would spend their days, it became less about the practice of law and more about the business of law. Lot of glad-handing, lot of rotary clubs, a lot of client development, a lot of chasing down clients to pay you, a lot of sort of editing and supervising what other attorneys were doing and not a lot of the fun stuff . . . [A]nd I hated billing hours . . . it's like going through the day with wet socks on. You never really forget that you have hours to bill no matter what else you are doing . . . I thought, you know, I'd rather be in an environment where the work, the substantive legal work is the focus and not all the peripheral things.<sup>118</sup>

One respondent summed it up as follows:

[I]n the private sector it is always about the money. In the public sector, not so much. It can be, but generally it is not about the money.<sup>119</sup>

On the clock, most respondents seem highly committed to and engaged in their work and to find it extremely satisfying. One respondent remarked: "I pinch myself on a regular basis."<sup>120</sup> For some respondents, professional satisfaction comes from a sense of vocation and identification with the agency's goals. As one respondent put it, "I love my client."

I love what this agency does, I believe in it, that was part of what I was lacking in [private practice]. I didn't like my client, you know? I mean, truly, I really didn't . . . I love my client now. I believe in what we do, I like what we do. I wasn't interested in going to just any state agency, it was this one in particular.<sup>121</sup>

A number of respondents also talked more generally about the satisfaction of big-picture thinking, of "solving problems"<sup>122</sup> and learning new things. One respondent said: "I'm not bored anymore, I'm learning new things all the time, I'm never dealing with the same subject twice, which was scary when I first came on."<sup>123</sup> Another said, "I'm forming new brain cells every day, and to be that excited . . . I just love to come to

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117. I9, *supra* note 104, at 8; *see also* I2, *supra* note 1, at 19.

118. I19, *supra* note 95, at 2; *see also* I6, *supra* note 55, at 1; Interview with Agency Lawyer 18, at 27 (2015) [hereinafter I18] (transcript on file with authors).

119. I18, *supra* note 118, at 28.

120. I17, *supra* note 73, at 15.

121. I2, *supra* note 1, at 3.

122. I6, *supra* note 55, at 23.

123. I2, *supra* note 1, at 15.

work.”<sup>124</sup> Another described it as a “macro” rather than “micro” approach to law:

Litigation practice had felt like the micro application of law—everything was a discrete dispute between this person and that person on a relatively small issue. It was satisfying, but then I got into government work where you had the macro application of law. Issues and disputes were bigger and they impacted a far larger number of people . . . . I mean, you had this group of people who understood their job but had very little perspective on how the law affected or circumscribed the ways in which they could do their job. My job was not just to give legal advice but to give legal perspectives on what it would take to make the program successful and effective. I was a counselor. I had to think about what could go wrong and bring to their attention potential problems that they might not be thinking about. What a rewarding experience.<sup>125</sup>

Finally, several respondents said that they like the focus on getting it “right” and getting to “do the right thing.” The following comments are illustrative:

[O]ne of the good things about my job is I get to do the right thing. And that is something you don’t always get to do as a lawyer, you have to sort of represent your client’s interests.<sup>126</sup>

[O]ne of my favorite things . . . [about] being a government lawyer was, the objective was to get it right . . . . [Y]ou can’t do that in private practice, and your objective is not to see, I don’t want to say how much you can bill in a case, but money is not an objective and that I guess from a legal standpoint, from a lawyer’s standpoint, was what I liked. Because I did have good clients who did want to, just, get it right, and that happened over and over again.<sup>127</sup>

In general, then, respondents paint a rosy picture of their positions, especially in comparison to private practice. This finding comports with broader comparative research on lawyer satisfaction.<sup>128</sup> As one respondent said:

[When I started my career,] I probably had more of a negative thought [about government lawyers], and then the more, the older I got, I was like, “[w]ow, those people are really smart, because they’ve got a good job that’s challenging that’s not stressful.” And it pays okay, you know, it’s not private practice, but it’s not that far from private practice that it’s

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124. 117, *supra* note 73, at 28.

125. 15, *supra* note 90, at 2–3.

126. 11, *supra* note 101, at 21.

127. 18, *supra* note 75, at 7–8.

128. See RONIT DINOVIETZ ET AL., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 50 (2004) (finding that lawyers in government and other public sector jobs report higher levels of satisfaction with their job setting and the substance of their work than lawyers in private practice); RONIT DINOVIETZ ET AL., AFTER THE JD II: SECOND RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 50 (2009) (same); Lawrence S. Krieger & Kennon M. Sheldon, *What Makes Lawyers Happy? A Data-Driven Prescription to Redefine Professional Success*, 83 G.W. L. REV. 554 (2015) (finding that lawyers in public service are happier than lawyers in private practice).

worth the stress and anxiety that comes with that, and so then it was like, “[w]ow, how do I get into that?” And, you know, people are very bright.<sup>129</sup>

### C. Sources of Authority

Respondents draw relatively little of their day-to-day authority from specialized legal knowledge. Although the move to “in-house” agency counseling suggests increasing specialization of the legal function,<sup>130</sup> most respondents describe themselves as generalists. As one said: “[T]he position was a real mix of work for me—intergovernmental work, lobbying economic interests, bringing a legal perspective to all sorts of things. Nothing was routine.”<sup>131</sup> Another said:

I’m just not doing as much actual practice of, traditional practice of law in that I have a case and I’m working on a case; it’s more just general advice. It’s kind of what I think . . . [being] a lawyer in a small town might be like, you’re getting questions about anything and everything, personnel issues, trademark issues, regulations, criminal stuff, contract issues. You’ve got to be a generalist.<sup>132</sup>

Many respondents were not legal specialists in the areas most relevant to the agency’s work before they were hired, and several said that did not turn out to be as important as they had expected. As one respondent explained:

Any lawyer coming to be general counsel of [this agency] will have to learn thirty to forty percent of this job brand new on the job. The only difference that I, or somebody else, will have is that for different lawyers with different experience levels, you’ll have to learn a different piece of it . . . . But that makes sense when you think about [it] . . . . [It is] like being general counsel of a medium-sized corporation and overlaying some politics and some state, some regulations that are unique to state government employees.<sup>133</sup>

Instead, respondents draw much of their authority from general legal training—particularly their training to evaluate clients’ decisions and practices in terms of formal rules. Consider the following comments about the importance of statutory and other formal language:

People think you have to have a [particular] background [to work here] . . . but you don’t. It’s really more you’ve got to understand how the law works and see it sometimes from the outside . . . . [For instance] you’re looking at a statute and you’re like, “you write people under this statute for a criminal thing, but that’s not what it says,” you know? Let’s look at it from how a judge or a jury would look at it, who know nothing about what you do.<sup>134</sup>

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129. 12, *supra* note 1, at 17.

130. 112, *supra* note 62, at 5.

131. 15, *supra* note 90, at 2.

132. 12, *supra* note 1, at 16.

133. 19, *supra* note 104, at 9.

134. 12, *supra* note 1, at 17.

Usually what it is, is we get a sense of the statutes as a whole and kind of a structural way our chapter deals with certain types of problems, and then if we have an issue that arises that is not addressed by statute and it's not addressed by some kind of AG's opinion in the past, or by a directive from our executive director, which are also documented and filed, we'll try to apply kind of the broader way that the statutes came to approach these particular problems . . . .<sup>135</sup>

A significant part of the day-to-day work of agency general counsel is reactive. As one respondent put it: “[My] job description changes every day I walk into the office.”<sup>136</sup> Much of what respondents do involves answering questions from the agency director, coworkers, or the public; and many are questions of first impression. Several respondents reported that learning to respond to such questions with authority is an important skill of the job:

We make it up as we go . . . and that is scary when you're coming out of private practice, because a lot of stuff [in private practice] is kind of black and white, more black and white than it is here. I mean, you start to look at stuff and you'll be like, how has this never come up before in thirty years of this agency . . . ? What do we do? Let's start with what we do, and then I go from there, and then I think, either that sounds crazy and we shouldn't do it that way, or tell me why you do it that way. You know, a lot of people know the law well, way more than I do, because . . . we touch a lot of different things.<sup>137</sup>

[N]ew questions were constantly arising and the statutes are never specific enough to answer every question. So, you know, you're formulating . . . . And the quantum of things that we don't have a definite answer on is so large compared to the very small subset that we actually know for certain under the law.<sup>138</sup>

I am not sure what juncture as an attorney, when somebody asks you a question you don't really have to struggle with what the right answer is . . . . Not just because you know a lot about your agency, but because you have had experiences before that prepared you to deal with situations that you know, you never thought you would encounter. It's very satisfying.<sup>139</sup>

Other aspects of the job are proactive: for instance, keeping up with rule changes, reviewing existing agency policies, and bringing customary agency practices in line with statutory and regulatory language. As one respondent explained: “[T]here is an essence of common law in these state agencies that is, ‘This is how we've always done it.’ And the courts defer

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135. I14, *supra* note 97, at 12.

136. Interview with Agency Lawyer 15, at 6 (2015) [hereinafter I15] (transcript on file with authors).

137. I2, *supra* note 1, at 6.

138. I14, *supra* note 97, at 10.

139. I19, *supra* note 95, at 19–20.

to that in some ways . . . . [But] if that conflicts with the statute obviously that's a problem."<sup>140</sup> Another respondent reported:

I am reviewing [our policies] for clarity; I am reviewing them to make sure that they are legally accurate . . . . For instance, if the FOIA policy says that you cannot release anything under FOIA if it's embarrassing—well, that is not the standard. That is absolutely not the standard, so that goes . . . . [Or] if something is quoted—a statute, for instance—inside of a policy, I want to make sure that it's the correct statute, or if they cite a series of three and it's actually supposed to be a series of four or five, I'll add the fourth and fifth statute.<sup>141</sup>

Thus, much of what agency counsel do can be described as legal process improvement—or the rationalization of the agency function<sup>142</sup>—based on general legal training. As one respondent described it: “It's legal, but it's also a lot of streamlining and running, helping to run the agency and coming up with ideas on how to make things better.”<sup>143</sup>

Most respondents seem relatively insulated from both hierarchical and political pressure. Despite sitting at the “confluence of conflicting pressures,” as Herz has described them,<sup>144</sup> the agency general counsel in our sample report surprisingly little conflict in their roles. Most respondents are either personal friends with, or happily independent of, the agency director. If anything, it is agency directors who seem dependent on agency counsel. As one respondent observed, “[T]he [general counsel] almost always knows more [than the director] because they don't turn over as often.”<sup>145</sup> Consider the following examples:

[T]he person that became the [agency director] was a personal friend . . . . [S]o mine was not a political appointment by any means; it was more of, come in and help him get his legal department established.<sup>146</sup>

As I was debating [how long to stay in this job], I knew [X] was going to be our next director and she came to me and said, “Will you stay, you know, I feel like I need you”. . . . I said that I would, and so she, I liked her before, but as she's worked up here I've gotten to know her more and she's become a good friend . . . .<sup>147</sup>

I pretty much completely define my own job . . . . I truly have enough work and stuff to do without trailing [the agency director] around all day. And I can see that would overtake my entire life if I were doing that. I like being independent. I let him know what I feel like he needs to know . . . . I really see my role, this is going to sound weird, as the counselor to the mafia boss, you know, I don't bother him unless I need

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140. 12, *supra* note 1, at 5.

141. 119, *supra* note 95, at 13.

142. *See supra* note 24.

143. 11, *supra* note 101, at 6.

144. *See Herz, supra* note 2, at 143.

145. 118, *supra* note 118, at 22.

146. 19, *supra* note 104, at 1.

147. 11, *supra* note 101, at 15.

to. My job is to make his job easier, my job is to keep things off, to keep things from coming to him.<sup>148</sup>

Likewise, most respondents draw a clear boundary between their role as advisor and the agency director's role—and accountability—as decision maker. As one said: “I don't give orders, I give advice. You are free to accept or reject everything I am telling you.”<sup>149</sup> Two others explained:

I counsel them, but I really don't ever make a final decision, and I don't feel that's my role, and maybe I'm wrong on that, but that's how I've gone into it, so, the buck doesn't stop with me, it's going to stop with the director.<sup>150</sup>

[The agency director and I do not] have disagreements because I'm her lawyer, I'm the lawyer for the agency. So I say to the director on particular issues, “This is the pro, this is the con, this is your decision” and let her make that decision.<sup>151</sup>

For some, this lack of accountability is an appeal of the job. One respondent said, “I don't stay up at night worrying I'm going to lose my law license anymore.”<sup>152</sup>

This is not to suggest that there is never pressure to support an expedient decision or to provide cover for the director's desired course of action. As one respondent said:

It's not unusual in government, at every level, for clients to want to say, “The lawyer said I could do it.” And many of them really don't care if it's legal or not, “if the lawyer said I could do it, I've got cover.” That really shouldn't be the lawyer's job, but uninformed or, people who don't have much of a backbone, will do that.<sup>153</sup>

Another said:

Sure, I disagree with [my bosses] every now and then, but . . . if they want something done, I'm here to try to get it done for them, that's the bottom line. And I can smile and laugh and say, “Well I think you're wrong, but I'll do what I can for you.”<sup>154</sup>

Further, while most respondents draw a clear boundary between advising and decision making, the scope of agency counsel's authority and accountability for decisions may expand significantly during a crisis, as the following comment suggests:

[It was] absolutely fascinating to be dropped into [a controversial case on the first day of the job]. And then all the other stuff, because they hadn't had an attorney on staff for three months . . . . [The director] was just so

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148. I2, *supra* note 1, at 8. Several respondents used the term “consigliere” to describe their relationship with the agency director. *See, e.g.*, I5, *supra* note 90, at 3; I8, *supra* note 75, at 21.

149. I19, *supra* note 95, at 15.

150. *Id.* at 12.

151. *Id.* at 3.

152. I2, *supra* note 1, at 16.

153. I18, *supra* note 118, at 21.

154. I15, *supra* note 136, at 14.

appreciative of having someone . . . who came to work every day and wasn't crazy and had a good work ethic and was prepared to do—and I did do—anything, I was like the vice principal of a school. You don't want to do it? I'll do it. You hate this report, I'll do it, it's got to be done, I'll do it. So I took on a tremendous number of duties that fall outside [the role of] general counsel . . .<sup>155</sup>

Even during crisis periods, however, none of our respondents reported significant hierarchical or political conflict. Instead, they discussed “crises” primarily in terms of workload: long hours, fast pace, and all hands on deck. The following comments are illustrative:

All I know is that I didn't have the luxury of thinking of myself as occupying a narrow legal position such that I should stay in my office until asked a question and then retreat to my office after each issue was resolved. The agency had issues and problems to address and we were all on the ground helping.<sup>156</sup>

I was in meetings anywhere from six to eight or eight-and-a-half hours a day and probably . . . 80 percent of the time I was making decisions and moving on, . . . 20 percent of the time I was listening, gathering information, and would then meet with the director and anybody else that he or I, either individually or collectively, thought should be in attendance . . . I think because of my unique situation and experience he delegated a lot more to me than most general counsels. I probably briefed him, if I took 20 percent of the decisions and issues to him, I probably briefed him on 30 percent that I made that I wanted him to know about . . . I don't remember us ever disagreeing on a legal issue.<sup>157</sup>

### III. RESEARCH QUESTIONS

What, then, to make of our sunny sample? Our account has emphasized the attractions and satisfactions of the agency general counsel position, with little emphasis on—or evidence of—personal, professional, or political conflict. This account, however, is based on a small sample from only two states, and it focuses primarily on the commonalities of agency counsels' day-to-day work versus the dynamics of particular agencies or events. This part discusses the limits of our account and identifies questions for future research.

#### A. *Limits of the Sample*

One question is whether our sample is representative of those currently serving as agency general counsel in our states. Although respondents' generally high levels of satisfaction and engagement are consistent with previous research on government lawyers, as noted above,<sup>158</sup> several respondents suggested that the position of agency general counsel is suited

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155. 117, *supra* note 73, at 6.

156. 15, *supra* note 90, at 3.

157. 19, *supra* note 104, at 5–6.

158. See *supra* note 128 and accompanying text.

to a limited tenure and that some people stay in it too long based on state retirement incentives. For instance, one respondent spoke critically of “lifers staring out the window waiting to hit that twenty-eighth year, playing solitaire.”<sup>159</sup> Another respondent previously served as general counsel in a different agency but left in part due to boredom. As she said:

[After fifteen years] I could do that job in my sleep . . . I started getting antsy . . . . [It] was a great job, wonderful people, [X] is one of the best bosses I’ve ever had in my life, but I was phoning it in. Absolutely phoning it in.<sup>160</sup>

Agency general counsel with longer tenures also may encounter more political conflict or grow increasingly frustrated with the political process. As one respondent remarked:

I will not retire in this job . . . I’m close enough to the throne now that I realize how political a lot of things get . . . . We get requests from politicians about any number of things. Honestly, it’s a lot of time that’s wasted feeding that beast, that frankly does not advance—it advances the agency and the agency’s mission in the sense that it doesn’t get us enemies in the state house who are going to slash our funding. But . . . it’s not going to help me review this contract any faster because I have to drop everything and answer some stupid question about some bill that I know will never pass in the first place. What do you think of this bill? I think it’s a stupid idea and I think it’s going to fail, and I think you are wasting my time . . . .<sup>161</sup>

We made no effort to control for length of tenure (or any other variable) in our interview sample. Ours is a “snowball” (or “reputational”) sample,<sup>162</sup> in which we asked the agency counsel we know to recommend participants for the study; then asked those participants for more names, and so on, until we felt we had enough data to present interesting preliminary findings.<sup>163</sup> The resulting sample underrepresents those with longer tenures in the position. Only two of the eleven respondents currently serving as agency general counsel have been in the position for more than five years, compared to eleven of thirty-six agency general counsel currently serving in the two states (three are missing).

In addition, we have relatively little information about what agency general counsel do after they leave their positions, and we did not interview lawyers working a rung below agency counsel (such as deputy general

159. I19, *supra* note 95, at 19.

160. I17, *supra* note 73, at 13.

161. I19, *supra* note 95, at 17.

162. See generally Leo A. Goodman, *Snowball Sampling*, 32 ANNALS OF MATHEMATICAL STAT. 148 (1961) (explaining snowball sampling); Charles Kadushin, *Power, Influence and Social Circles: A New Methodology for Studying Opinion Makers*, 33 AM. SOC. REV. 685, 694–96 (1968) (discussing the strengths and weaknesses of reputational sampling).

163. See Chambliss & Wilkins, *supra* note 30, at 561; Chambliss, *supra* note 28, at 1525 n.57 (describing the use of snowball sampling to study the emergence of law firm in-house counsel). Only two potential respondents turned us down, one by not responding to our email and another by canceling a scheduled interview that could not be rescheduled. Neither of these potential respondents had a long tenure in the agency general counsel position.



counsel or staff counsel), who may have differing perspectives on the agency counseling role and who may aspire to become agency general counsel. Both would make interesting questions for future research on agency counsel characteristics and careers.

### B. Evolution of the In-House Counseling Function

Another set of questions relates to the evolution of the in-house counseling function in state agencies. In private organizations, such as corporations and law firms, in-house lawyers have, over time, become more organized, more professionally specialized, and more powerful relative to organizational executives and outside lawyers. For instance, corporate in-house counsel—originally called “kept” counsel<sup>164</sup>—now have a 35,000-plus member professional association<sup>165</sup> and typically control the procurement and supervision of outside counsel.<sup>166</sup> Corporate in-house counsel are also subject to specialized ethics rules<sup>167</sup> and attorney-client privilege analysis.<sup>168</sup> Likewise, in large law firms, the role of in-house counsel evolved from a part-time, informal role played by a practicing partner into a structurally independent, full-time position,<sup>169</sup> with specialized professional networks<sup>170</sup> and specialized privilege case law.<sup>171</sup>

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164. Rosen, *supra* note 29, at 479 n.1 (tracing the development of the “corporate counsel” title from “kept” counsel in the 1920s, to “house” counsel in the 1930s, to “corporate” counsel beginning around 1945).

165. See *Who Belongs to ACC?*, ASS’N CORP. COUNS., <http://www.acc.com/membership/faqs.cfm> (last visited Mar. 27, 2016) [<https://perma.cc/YHH8-HSRH>].

166. See John Coates et al., *Hiring Teams, Firms and Lawyers: Evidence of the Evolving Relationships in the Corporate Legal Market*, 36 LAW & SOC. INQ. 999, 999 (2011) (surveying forty-four chief legal officers in S&P 500 corporations about the factors they consider when hiring outside counsel).

167. See MODEL RULES OF PROF’L CONDUCT r. 5.5(d) (AM. BAR ASS’N 1983) (allowing in-house lawyers to provide legal services outside of the jurisdiction in which they are licensed). In 2012, this rule was amended to include foreign lawyers.

168. Although the privilege technically applies to in-house counsel just as to outside counsel, courts tend to apply heightened scrutiny to communications to and from in-house counsel, cognizant that in-house counsel often perform nonlegal business functions. See, e.g., *Neuder v. Battelle Pac. Nw. Nat’l Lab.*, 194 F.R.D. 289, 295 (D.D.C. 2000) (“In cases that involve in-house counsel, it is necessary to apply the privilege cautiously and narrowly ‘lest the mere participation of an attorney be used to seal off disclosure.’”). Moreover, many foreign jurisdictions do not recognize the privilege for in-house counsel, creating difficult issues of waiver if a U.S. corporation produces communications to or from in-house counsel to a foreign court. See Andrew R. Nash, *In-House but Out in the Cold: A Comparison of the Attorney-Client Privilege in the United States and European Union*, 43 SAINT MARY’S L.J. 453, 477 (2012).

169. See Chambliss, *supra* note 28, at 1518–20 (reporting the results of a study of the evolution of the law firm in-house counsel position in forty-seven law firms).

170. *Id.* at 1520; Chambliss & Wilkins, *supra* note 30, at 559–60 (noting the role of insurers and law firm consultants in sponsoring specialized roundtables and conferences for law firm general counsel and firm counsels’ reference to membership on their resumes).

171. See Ronald C. Minkoff, *Law Firm In-House Privilege Revisited*, N.Y. LEGAL ETHICS REP. (Feb. 8, 2015), <http://www.newyorklegaethics.com/law-firm-in-house-privilege-revisited/> (summarizing the case law on law firm in-house privilege) [<https://perma.cc/QD J8-V8AX>].

Most commentators attribute the expansion of in-house counseling in the private sector to the growth and consolidation of client organizations and the increasing complexity of their regulatory environments.<sup>172</sup> Research on corporations, in particular, emphasizes the economic incentives that drive the allocation of legal work to inside versus outside counsel.<sup>173</sup> It is not clear whether the same forces apply to state agencies, which do not control their own budgets—or, for that matter, to other public and nonprofit employers. Research on the use of private lawyers for government litigation questions the economic efficiency of government make-or-buy decisions, which may be more likely to be driven by short-term budget concerns.<sup>174</sup>

That said, the evolution of in-house agency counseling in our states closely resembles the early development of in-house counseling in corporations and law firms, which points to the possibility of continued expansion and professional organization of the agency counsel role. For instance, we already see the emergence of nascent professional networks among agency general counsel in both states. Respondents report that “within North Carolina, they do have a little general counsel group” although “it’s not like the first Tuesday of the month, it’s kind of a random thing.”<sup>175</sup> The group is in the preliminary stages of drafting an agency general counsel handbook of generally applicable policies and frequently referenced information. In South Carolina, likewise, agency counsel recently have initiated periodic roundtables, reviving a practice that was established, then faltered, a number of years ago. A few respondents also participate in listservs, events, and networks geared toward their specific agencies.

The development of organized professional networks among state agency general counsel could promote the rationalization of agency policy and practice (“best practices”) by facilitating information sharing among agencies.<sup>176</sup> For instance, several respondents reported asking general counsel in other agencies for policy language on common issues—a practice that likely motivated the goal of drafting a manual in North Carolina. As one said, “We were trying to develop a workplace violence policy so I sent an email to [the] group and said, ‘Do any of you have a

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172. See Chambliss & Wilkins, *supra* note 30, at 560 (discussing the emergence of in-house counsel in large law firms in the 1990s and 2000s); Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 278 (1985); Rosen, *supra* note 29, at 484–90; David B. Wilkins, *Team of Rivals? Toward A New Model of the Corporate Attorney Client Relationship*, 78 FORDHAM L. REV. 2067, 2080–85 (2010) (discussing the expanding role of corporate in-house counsel in the 1980s and 1990s).

173. See, e.g., Wilkins, *supra* note 172, at 2085–91 (discussing the trend toward preferred provider relationships between corporations and outside law firms).

174. Lemos, *supra* note 10, manuscript at II.A (questioning whether outsourcing government litigation is efficient).

175. 116, *supra* note 27, at 6; see also 19, *supra* note 104, at 12.

176. See Page, *supra* note 31, at 12A (discussing the consolidation of South Carolina executive agencies in 1993). “Often these types of reform initiatives help jump-start modernizing and professionalizing the entire government.” *Id.* (quoting Professor James Conant of the University of Oklahoma).

workplace violence policy?”<sup>177</sup> A few respondents also make efforts to proactively share information with other agency counsel, although they report that this practice is rare. One said:

I'm probably one of the more social ones . . . . [F]or example a case came out yesterday, and I emailed it out to a bunch of them and was like, “Hey there’s this new case on FOIA, if you’re interested.” They don’t ever do that to me . . . [although] they always write back and say “thanks for sharing it.” But I would think that’s something we should all be doing.<sup>178</sup>

The development of organized networks among agency general counsel could also promote the development of shared professional norms and enhance agency counsels’ authority. Law firm general counsel report benefitting from opportunities to discuss common issues and challenges with their peers at other firms.<sup>179</sup> Firm counsel also report that appeals to community standards—that is, “how other firms do it”—help them to lead partners “to the right answer” on contested issues.<sup>180</sup> Interagency networks may be especially important given the absence of institutional memory in many state agencies. As one respondent said, “One of the real flaws in government . . . is a profound failure of knowledge transfer, and in large measure it’s due to high turnover.”<sup>181</sup> Another said, “It’s like being an archeologist . . . there’s zero history.”<sup>182</sup>

Whether to expect the further development of organized networks among agency general counsel remains an open question, however. As discussed above, the structure and culture of state agencies vary enormously, as does the substantive work of agency general counsel. Agency general counsel may have less in common than corporate or law firm general counsel and fewer incentives to make the effort to network with lawyers from other agencies or states.<sup>183</sup> As one respondent reported:

[W]e do have national conferences and so forth but . . . that’s not my bag. I’m just a little worker bee . . . . [Y]ou get into those big organizations and then they want you to plan the next conference and plan the panel discussion, and organize the next. I don’t have time to do that. I’ve got all I can say grace over here.<sup>184</sup>

Likewise, most respondents view bar associations as unresponsive to the interests of government lawyers, and public employers do not pay bar dues.

177. 116, *supra* note 27, at 6; *see also* 19, *supra* note 104, at 12.

178. 12, *supra* note 1, at 17.

179. *See* Elizabeth Chambliss, *New Sources of Managerial Authority in Large Law Firms*, 22 *GEO. J. LEGAL ETHICS* 63, 84–85 (2009) (discussing the benefits of law firm in-house counsel networks for exchanging information and raising firm counsels’ awareness of ethical and regulatory issues).

180. *Id.* (quoting a full-time general counsel at a 450-lawyer law firm).

181. 118, *supra* note 118, at 25.

182. 12, *supra* note 1, at 8.

183. Herz has reported that efforts to build networks among federal agency counsel have faltered due to the “entrenched decentralization of the counsels [and] the absence of any coordination of their work.” Herz, *supra* note 2, at 150 (discussing the Federal Legal Council, created by an Executive Order in 1979).

184. 16, *supra* note 55, at 17.

Thus, most respondents do not participate in bar-sponsored networks and events. The following comment is typical:

As a government lawyer, I always felt excluded, I guess. The bar association[s] want you to join and it costs money . . . There are a few people in state government who pay the money to join the bar association or to join the different groups, but I think for the most part people just don't join. Because the bar association[s] . . . [are] not focused on government lawyers to begin with.<sup>185</sup>

Thus, the professional development of agency counsel and the viability of interagency networks are important questions for future research. Comparative research in other states could help to extend our analysis. Future research should also investigate the relative importance of significant events—such as legal and political contests, or environmental crises—versus general bureaucratic expansion in the evolution of agency counseling. Most existing research on agency counseling is based on case studies of conflicts or crises involving individual agencies.<sup>186</sup> Within legal scholarship, the primary question has been: Who is the client in cases of conflict?<sup>187</sup> Our account, by contrast, has focused on the commonalities of agency general counsels' day-to-day work. Comparing the developments that grow out of conflicts and crises versus day-to-day work could inform both legal scholarship and agency practice.

### C. *Implications of Partisan and Institutional Politics*

A final set of questions relates to the role of partisan and institutional politics. Above, we noted the apparent role of North Carolina politics in locating and shaping the agency counseling function. Respondents observed that when, as is currently the case, the Governor and Attorney General are from different political parties, executive agencies may work to distance themselves from the Attorney General's office, either by formally moving more lawyers in-house or by outsourcing work to private counsel. But while respondents who commented on this were speaking of partisan politics, institutional politics—the inevitable and continuous jockeying for

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185. 116, *supra* note 27, at 10–11.

186. *See, e.g.*, Herz, *supra* note 2, at 150 (drawing upon a case study of the Environmental Protection Agency); Devins, *supra* note 18, at 189–90 (drawing upon case studies of the Equal Employment Opportunity Commission and the Federal Communications Commission).

187. *See, e.g.*, Jeffrey Rosenthal, *Who Is the Client of the Government Lawyer?*, in *ETHICAL STANDARDS IN THE PUBLIC SECTOR: A GUIDE FOR GOVERNMENT LAWYERS, CLIENTS AND PUBLIC OFFICIALS* 13 (Patricia E. Salkin ed., 1999); *see also* Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 1004 (1991) (“Unlike private practitioners, the government lawyer has at least four possible clients: (1) the agency official, (2) the agency itself, (3) the government, and (4) ‘the people,’ sometimes termed ‘the public interest.’”); Geoffrey P. Miller, *Government Lawyers’ Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1293–94 (1987) (using a hypothetical fact pattern to illustrate “the proper identification of the interest” served by federal agency attorneys).

power over resources and decision making—may play an equally significant role. Consider the following comments:

I want to get out from under the thumb of the legislature, and you can't work at a state agency and not have to pay attention to what those clowns are up to . . . .<sup>188</sup>

I got on the wrong side of the General Assembly . . . . You guys sit over here in this ivory tower of the state house, and you dictate from on high, you don't want to know how it's going to impact nine-tenths of the people you're about to pass this legislation for because you've got one person you're thinking about: yourself.<sup>189</sup>

Often, it is difficult to disentangle partisan and institutional politics. Agency general counsel may feel less frustrated by, and therefore feel less need to wrest control away from, a legislature controlled by their own political party. One respondent observed this possible entanglement by reference to the relationship between an agency and the Attorney General's office:

[T]he statutes for the Attorney General make it clear that the Attorney General has a role in representing the state in certain public interest things, and the Attorney General interprets that to say his office gets to decide whether to join with the Attorney General of New York, and New Hampshire, and Vermont in doing this or that, and not the agency, but there were a few issues particularly with our agency that we were on different sides of, and a lot of that was political but some was philosophical. In my mind it was political in the sense that there was a difference in parties and constituencies, but it was also philosophical in "is this the secretary of the department's decision?" or, "is this the AG's decision?"<sup>190</sup>

Future research should probe the relationship between partisan and institutional politics in this context and their combined influence on the role of the agency general counsel.

Relatedly, future research should consider whether agency general counsel can play a role in limiting the influence of politics in agency decision making more broadly. The problem of agency capture has been a central focus of the academic literature on administrative law and a central challenge of the regulatory state.<sup>191</sup> And yet, there has been very little focus on the actual or potential role of agency general counsel in

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188. I19, *supra* note 95, at 17–18.

189. I17, *supra* note 73, at 13–14.

190. I9, *supra* note 104, at 10.

191. See, e.g., STEVEN CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT (2008); ELIZABETH FISHER, RISK REGULATION AND ADMINISTRATIVE CONSTITUTIONALISM 30 (2007); Steven Croley, *Beyond Capture: Towards a New Theory of Regulation*, in HANDBOOK ON THE POLITICS OF REGULATION 50–69 (D. Levi Faur ed., 2011); Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 580 (2011). See generally Sidney Shapiro, Liz Fischer & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463 (2012).

constraining the discretion of agencies and therefore the threat of agency capture. Our limited sample has shown that agency general counsel play a central role in creating, implementing, and administering the internal structures and processes of agency decision making and are positioned to provide day-to-day, front-end advice about a wide range of issues. They are ideally situated, if they so choose, to play a disciplining role in agency decision making.

#### CONCLUSION

Our account highlights a number of reasons that state agency general counsel—and, by extension, state government lawyers generally—deserve scholarly attention. State agencies affect our everyday life in innumerable ways, and agency general counsel play a central and often unreviewable role in guiding agency decision making and, at least sometimes, shaping agency policy. In light of this, we have taken a first step in addressing the scholarly silence on the topic by: describing the structural and functional evolution of the agency general counsel position in North and South Carolina; examining the characteristics and career paths of agency general counsel and the sources of their authority; and outlining questions for future research. We have barely scratched the surface of possible issues for inquiry, but we hope to have laid a useful foundation for future work.

APPENDIX A  
NORTH CAROLINA

*Departments of State Government  
Sections 143A, 143B, effective July 1, 2015*

<b>Council of State Agencies</b>	<b>FY 2015</b>	<b>Number of Employees</b>	<b>Number of Lawyers</b>	<b>General Counsel Title</b>
DEPARTMENT OF THE SECRETARY OF STATE	\$11,676,506	197	18	General Counsel
DEPARTMENT OF STATE AUDITOR	\$11,733,689			General Counsel
DEPARTMENT OF STATE TREASURER	\$9,734,913	317	7	General Counsel
DEPARTMENT OF PUBLIC INSTRUCTION	\$266,733,848	815	4	General Counsel
DEPARTMENT OF JUSTICE	\$50,584,602	839	240	Special Counsel
DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES	\$113,940,604	1,909	2	General Counsel
DEPARTMENT OF LABOR	\$15,945,674	383	2	General Counsel
DEPARTMENT OF INSURANCE	\$38,296,364	407	5	General Counsel
<b>Cabinet Agencies</b>	<b>FY 2015</b>	<b>Number of Employees</b>	<b>Number of Lawyers</b>	<b>General Counsel Title</b>
DEPARTMENT OF CULTURAL RESOURCES	\$64,231,047	664	1	General Counsel
DEPARTMENT OF HEALTH AND HUMAN SERVICES	\$5,019,926,206	15,994		General Counsel
DEPARTMENT OF REVENUE	\$80,539,222	12,888	11	General Counsel
DEPARTMENT OF PUBLIC SAFETY	\$1,758,773,164	22,892	8	General Counsel
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES	\$162,279,549	2,796	9	General Counsel
DEPARTMENT OF TRANSPORTATION	\$1,918,676,424	11,246	45	General Counsel
DEPARTMENT OF ADMINISTRATION	\$65,932,950	577	3	General Counsel
DEPARTMENT OF COMMERCE	\$47,261,954	1,671	77	General Counsel
<b>Independent Agencies</b>	<b>FY 2015</b>	<b>Number of Employees</b>	<b>Number of Lawyers</b>	<b>General Counsel Title</b>
STATE BOARD OF ELECTIONS	\$6,620,578	67	9	General Counsel
OFFICE OF THE STATE CONTROLLER	\$22,205,229			General Counsel

OFFICE OF ADMINISTRATIVE HEARINGS	\$4,992,437	42	6	None
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APPENDIX B  
SOUTH CAROLINA

*Departments of State Government  
Section 1-30-10(A), effective July 1, 2015*

<b>Cabinet Agencies</b>	<b>FY 2015</b>	<b>Number of Employees</b>	<b>Number of Lawyers</b>	<b>General Counsel Title</b>
DEPARTMENT OF ADMINISTRATION	\$275,555,699	798	3	General Counsel
DEPARTMENT OF ALCOHOL AND OTHER DRUG ABUSE SERVICES	\$43,274,207	33	0	None
DEPARTMENT OF COMMERCE	\$90,541,825	98	2	Chief Legal Counsel
DEPARTMENT OF CORRECTIONS	\$450,019,148	6,218	6	General Counsel
DEPARTMENT OF EMPLOYMENT AND WORKFORCE	\$210,382,955	1,034	6	General Counsel
DEPARTMENT OF HEALTH AND HUMAN SERVICES	\$7,021,815,752	1,059	6	General Counsel
DEPARTMENT OF INSURANCE	\$18,679,783	94	6	Deputy Director and General Counsel
DEPARTMENT OF JUVENILE JUSTICE	\$123,343,016	1,491	3	General Counsel and Senior Advisor to the Director
DEPARTMENT OF LABOR, LICENSING AND REGULATION	\$41,047,872	403	21	General Counsel
DEPARTMENT OF MOTOR VEHICLES	\$87,967,596	1,292	3	General Counsel
DEPARTMENT OF PARKS, RECREATION AND TOURISM	\$93,843,747	376	1	General Counsel
DEPARTMENT OF PROBATION, PAROLE AND PARDONS	\$57,564,812	745	4	General Counsel
DEPARTMENT OF PUBLIC SAFETY	\$161,431,719	1,521	3	General Counsel
DEPARTMENT OF REVENUE	\$82,493,980	785	13	General Counsel
DEPARTMENT OF SOCIAL SERVICES	\$692,184,042	3,785	9	General Counsel

DEPARTMENT OF TRANSPORTATION	\$1,627,325,119	5,190	5	Chief Counsel
SOUTH CAROLINA LAW ENFORCEMENT DIVISION (SLED)	\$96,789,476	604	1	General Counsel
<b>Other Governing Authority Section 1-30-10(B)</b>	<b>FY 2015</b>	<b>Number of Employees</b>	<b>Number of Lawyers</b>	<b>General Counsel Title</b>
DEPARTMENT OF AGRICULTURE	\$15,904,433	138	0	None
DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS	\$670,887,551	2,122	1	General Counsel
DEPARTMENT OF EDUCATION	\$4,196,076,102	1,152	5	Deputy Superintendent for the Legal Division
DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL	\$593,900,859	3,486	18	General Counsel
DEPARTMENT OF MENTAL HEALTH	\$435,803,832	4,629	5	General Counsel
DEPARTMENT OF NATURAL RESOURCES	\$98,216,134	765	3	Chief Counsel