

Attorney General of New Mexico

P.O. Drawer 1508 Santa Fe, New Mexico 87504

505-827-6000
Fax 505-827-5826

HAL STRATTON
Attorney General

November 8, 1989

OPINION
OF
HAL STRATTON
Attorney General

Opinion No. 89-30

BY: Jaima Marie Jackson
Assistant Attorney General

TO: James B. Grant, Chairman
Board of Trustees
Miners' Colfax Medical Center
Raton, New Mexico 87740

John Gasparich, Director
State of New Mexico
Department of Finance and Administration
Budget Division
424 State Capitol Building
Santa Fe, New Mexico 87503

QUESTION:

(1) Are Miners' Trust Fund revenues subject to appropriation by the state legislature?

(2) Does the State Budget Division of the Department of Finance and Administration have the authority to approve budget increases from Miners' Trust Fund revenues if the cumulative effect of such increases exceeds the initial Miners' Trust Fund appropriation in the General Appropriation Act of 1988, Laws 1988, ch. 13, §4, by more than \$231,500?

(3) Does the State Budget Division have the authority to deny a budget increase, which has been approved by the Miners' Hospital Board of Trustees, and which is intended to provide for the care of resident miners with occupation-related illnesses?

(4) Does the language of the General Appropriation Act of 1988 restrict the authority of the board of trustees of Miners' Hospital as mandated by general legislation as set forth in Section 23-3-3 NMSA, (1978)?

(5) Does the language of the General Appropriation Act of 1988 restrict the institution's access to its trust funds as authorized by general legislation set forth in Section 23-1-2 NMSA (1978)?

(6) Would enforcement of the language of the General Appropriation Act of 1988 require cy-pres construction of the trust created by the Ferguson Act, the Enabling Act and the New Mexico Constitution? If so, is such cy-pres construction necessary or proper?

ANSWERS:

(1) Yes.

(2) No.

(3) Yes, if the increase would exceed the amount appropriated by the legislature and is not otherwise authorized by statute.

(4) No.

(5) Yes. Such restriction is proper.

(6) No.

INTRODUCTION:

This matter concerns a trust authorized pursuant to the terms of two federal statutes, the Ferguson Act, 30 Stat. 484 (1898), and the New Mexico-Arizona Enabling Act, 36 Stat. 537 (1910), each of which granted fifty thousand acres of land to the State of New Mexico for the purpose of establishing a "miners' hospital for disabled miners." The statutes authorized the sale and lease of the trust lands in contemplation that the proceeds would create an accumulating trust fund to support the miners' hospital.

The questions asked concern the construction of the trust, the central issue being whether the trust by its terms permits legislative appropriation of Miners' Trust Fund revenues.

The Ferguson Act provides that proceeds received from the sale of trust lands are to be placed in separate funds to "be used only as the legislative assembly of said territory may direct, and only for the use of the institutions or purposes for which the respective grants of land are made." Ferguson Act, Ch. 489, §10, 30 Stat. 484, 486. The New Mexico Enabling Act provides that

all lands hereby granted, including those which, having been heretofore granted to the

said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trust as the lands producing the same.

New Mexico Enabling Act, ch. 310, §10, 36 Stat. 557, 563 (1910). The Enabling Act also states that disposition of the lands or money derived from their disposition for purposes other than that for which the lands were granted is a breach of trust. Id.

New Mexico accepted the lands granted by Congress under N.M. Const. art. XIV, §2 and pledged that the lands would be used exclusively for the purposes for which they were granted. The constitution provides that the lands are the property of the state:

All lands belonging to the territory of New Mexico, and all lands granted, transferred or confirmed to the state by congress, and all lands hereafter acquired, are declared to be public lands of the state to be held or disposed of as may be provided by law for the purposes for which they have been or may be granted, donated or otherwise acquired.

N.M. Const. art. XIII, §1. In addition, New Mexico's Constitution confirmed the Miners' Hospital and other specified entities as state institutions and provided that "[e]ach of said institutions shall be under such control and management as may be provided by law." Id. N.M. Const. art. XIV, §1, §3.

Aside from specifying that the lands and their proceeds are to be held in trust for a miners' hospital, nothing in the state constitution, Ferguson Act, or Enabling Act requires the state to disburse the miners' trust funds in any particular manner. Nonetheless, appropriation is the lawful mechanism by which the legislature may set apart a named sum of money in the treasury for payment of a particular obligation. Consequently, we conclude that the funds are subject to legislative appropriation because, although set apart for certain purposes designated by the terms of the grants, the legislature is required under the directive of the

Ferguson Act to provide a method by¹ which the funds may be made available for such specific purposes.

ANALYSIS:

1) The first question asks whether the state legislature may appropriate revenues from the trust established for the miners' hospital (hereinafter "Miners' Trust Fund"). Because the state constitution, Ferguson Act and Enabling Act clearly establish the trust lands as public lands, it follows that revenues from the lands retain the character of public money. In accepting the lands and promising to apply trust income to the specified purpose, the state is subject to state law applicable to public money. Under Section 6-10-3 NMSA 1978 (1988 Repl.), all public money must be paid into the state treasury.² Section 19-1-17 NMSA 1978 (1985 Repl. Pamp.) provides for the creation of certain funds "to the credit of which, in the respective proportions to which they are by law entitled, all moneys derived from state lands shall be deposited by the commissioner of public lands with the state treasurer." Among the funds established under Section 19-1-17 are income and permanent funds for the Miners' Hospital. The state constitution governs withdrawal of state funds deposited in the treasury:³

-
- 1 Our analysis of the legislature's authority to appropriate trust fund revenues does not address the question of legislative power to appropriate revenues such as gifts or other gratuities donated to the hospital by private sources or the federal government. Such income is characterized as "non-state money" and is not subject to the legislature's appropriation authority. State ex Rel. Seago v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974); See also, Section 6-10-54 NMSA 1978 (1988 Repl. Pamp.); AG Op. No. 80-40 (language of general appropriations act which attempted to control the expenditure of federal funds received by the state auditor had no effect); AG Op. No. 75-10 (N.M. Const. art. IV, § 30 is not applicable to the administration of federal or non-state funds by an agency).
 - 2 This statute does not apply to non-trust fund revenues ("non-state money") which, pursuant to Section 6-10-54 NMSA 1978 (1988 Repl. Pamp.) may be deposited into certain depository institutions by the various educational, charitable and penal institutions of the state.
 - 3 We distinguish those funds which are not subject to appropriation because they have been placed in custodial accounts to

Except interest and other payments on the public debt, money shall be paid out of the treasury only upon appropriations made by the legislature. No money shall be paid therefrom except upon warrant drawn by the proper officer. Every law making an appropriation shall distinctly specify the sum appropriated and the object to which it is to be applied.

N.M. Const. art IV, §30.

We conclude, therefore, that Miners' Trust Fund revenues are subject to legislative appropriation.

2) The second question asks whether the State Budget Division of the Department of Finance and Administration (hereinafter "DFA") may approve budget increases from the Miner's Trust Fund revenues in excess of the amount appropriated in the General Appropriation Act of 1988. This question implicitly asks whether the Miners' Hospital Board of Trustees may supplant the legislature's budgetary determination by obtaining an increase from DFA. We have established the legislature's authority to appropriate trust fund revenues, so the authority of DFA is likewise determinable from the language of the appropriation.

The Act appropriates \$7,059,600 for the Miners' Hospital. Almost all of the appropriation comes from "other state funds," which are defined in the Act as "(1) unencumbered balances in the state agency accounts...; and (2) all revenue available to state agencies from sources other than the general fund, internal service funds, interagency transfers and federal funds." Laws

be spent per agreement with the federal government. For example, N.M. Const. art. IV, §30 does not apply to federal funds deposited into suspense accounts. See 1967 AG Op. No. 67-7 (when funds are deposited in suspense accounts, the State Treasurer acts as escrow holder and the money never becomes state funds); accord 1961-62 AG Op. No. 62-88. In some states the legislature may appropriate federal funds available to the state pursuant to statutory requirement that all federal funds be deposited in the state's general fund. See Shapp v. Sloan, 391 A.2d 595 (Pa. 1978), U.S. app. dismissed sub. nom. Thornburgh v. Casey, 445 U.S. 942 (1979). However, because New Mexico law provides for the deposit of federal funds into suspense accounts, the state does not require that all federal funds be appropriated. See e.g. Section 6-10-3 NMSA 1978 (1988 Repl. Pamp.).

1988, ch. 13, §2(E), p.75 (hereinafter "Act"). Also, the amounts in the base appropriation for personal services and employee benefits are made contingent upon the hospital submitting a plan to the legislative finance committee and the DFA by June 30, 1988 which "implements the intent of the legislature" that \$473,100 be reduced from these services and benefits and that the full-time equivalent authorization be reduced by twenty-eight units. In addition to the initial appropriation, the Act states that:

The state budget division of the department of finance and administration may approve increases in the budget of miners' hospital in an amount not to exceed two hundred thirty-one thousand five hundred dollars (\$231,500) from miner's trust fund revenues. Two hundred thirty-one thousand five hundred dollars (\$231,500) of miners' trust fund revenues are hereby appropriated.

Id. §4, p. 189. We have not found any authority for DFA to grant increases beyond the permissive language of the additional appropriation of \$231,500. The agency is compelled to observe the legislature's budget limits for the period covered by the appropriations act.⁴ See State ex. rel. Lee v. Hartman, 69 N.M. 419,

4 Although DFA may approve a budget increase of any amount pursuant to Section 3 of the Act, that provision only governs increases where the institution in question has revenue from sources other than its trust fund. The Act provides:

Except as otherwise provided in §4, the state budget division of the department of finance and administration may approve increases in budgets of state agencies whose revenues from federal funds, internal service funds/interagency transfers or other state funds exceed amounts specified in the General Appropriations Act of 1988. Such other state funds are hereby appropriated. In approving such budget increases, the director of the state budget division shall advise the legislature through its officers and appropriations committee, in writing, of the conditions under which the increases are approved and the expenditures authorized together with justification for the approval.

426, 367 P.2d 918, 923 (1961) (appropriation is a statement of the maximum amount which may be spent). See also Carson Reclamation Dist. v. Vigil, 31 N.M. 402, 246 P. 907 (1926) (finding that, in case where no legislative appropriation was made, state auditor was not under any statutory or legal duty enforceable by mandamus to draw warrant from income fund deriving from Congressional land grant and impressed with a trust, even for purposes consistent with the trust). Accordingly, we conclude that DFA may not approve budget increases from Trust Fund Revenues in excess of the amount appropriated in the General Appropriation Act of 1988.

3) The third question, stated almost as the reverse of the second question, asks whether the State Budget Division may deny a budget increase approved by the Miners' Hospital Board of Trustees, when the budget increase is intended to provide for the care of resident miners with occupation-related illnesses. Again, this question concerns the issue of the Board of Trustees' authority vis-a-vis the legislature. Although the Board is naturally free to lobby the legislature as regards the health care needs of miners, once the appropriations bill becomes law, DFA's authority stems from the legislative determination. In this instance, DFA must deny a requested budget increase that exceeds the amount appropriated in the General Appropriations Act. The Act states that:

The state budget division of the department of finance and administration may approve increases in the budget of miners' hospital in an amount not to exceed two hundred thirty-one thousand five hundred dollars (\$231,500) from miners' trust fund revenues. Two hundred thirty-one thousand five hundred dollars (\$231,500) of miners' trust fund revenues are hereby appropriated. In approving such budget increases, the director of the state budget division shall advise the legislature through its officers and appropriate committees, in writing, of the conditions under which the increases are approved and the expenditures authorized together with justification for the approval.

5 Laws 1988, ch. 13, §2(e), p.75. Such provisions do not violate the delegation doctrine. See State ex Rel. Seago v. Kirkpatrick, 86 N.M. 359, 524 P.2d 975 (1974) in which the court reviewed a similar contingency

We have not been provided with any facts which would demonstrate that DFA has arbitrarily denied a requested budget increase based on policy reasons or that DFA has abused its discretion with respect to any particular request. Based, then, on DFA's authority to approve budget adjustment requests only up to the amount of the contingency appropriation of \$231,500, budget requests beyond that amount may be denied, despite the Board's claim that the request is for "care of resident miners." Section 23-1-5 NMSA 1978 addresses permissible expenditures of appropriated money by state institutions. It states, in pertinent part, that

it shall be unlawful for any trustee, superintendent, warden or other officer of any of the educational, penal, charitable or other institutions of this state, who, under the laws, has authority or may be vested with authority to purchase supplies, employ servants or assistants, contract indebtedness, or to do any act contemplating the expenditure of public moneys, to contract any indebtedness in behalf of such institutions or ostensibly against the state on account of such institutions in excess of the appropriations made for maintenance and support thereof; but in respect to the penitentiary, the asylum for the insane, the reform school, the institute for the blind, the miners' hospital and the deaf and dumb asylum, if the specific appropriations therefore shall have become exhausted, food and clothing for the inmates thereof may be purchased on the credit of the state.

Except to the extent indicated in this provision, therefore, the Board of Trustees has no authority to spend amounts in excess of what is properly appropriated for the Miners' Hospital. Nothing in the statute, however, prevents the Board from seeking deficit supplement legislation to cover shortfalls, nor is the Board denied the recourse of resorting to private, non-state funds.

4) The fourth question probes deeper into the question of the relative authority of the legislature and the Board of Trustees. It asks whether the appropriations made for the hospital in

clause containing the identical condition subsequent regarding written notification to the legislature and requiring justification for adjustments made. The court upheld this provision against gubernatorial veto.

the General Appropriation Act of 1988 affect the authority of the Board of Trustees under Section 23-3-3 NMSA 1978, given the fact that language in the appropriation limits the amount of money available to the Board of Trustees and imposes conditions on the spending of amounts appropriated. Section 23-3-3 provides:

The board is a body corporate under the name of the board of trustees of the miners' hospital of New Mexico and has the power to sue and be sued, contract, acquire land by purchase or donation and to do all other things necessary to carry out its duties. The board shall supervise and control all functions of the operation and management of the miners' hospital of New Mexico.

The New Mexico Constitution prohibits the legislature from amending general legislation via appropriations measures: "General appropriations bills shall embrace nothing but appropriations for the expenses of the executive, legislative and judiciary departments ... and other expenses required by existing laws." N.M. Const. art. IV, §16.

New Mexico courts have long construed this provision as prohibiting the inclusion of general legislation unrelated to providing for government expenses in appropriations bills. See State ex rel. Coll v. Caruthers, 107 N.M. 439, 445, 759 P.2d 1380, 1386 (1988) ("The General Appropriations Act may not be used as a vehicle by which to nullify general legislation."); State ex rel. Whittier v. Safford, 28 N.M. 531, 534-35, 214 P. 759, 760 (1923); State ex. rel. Lucero v. Marron, 17 N.M. 304, 314, 128 P. 485, 488 (1912). Consequently, under its appropriation authority, the legislature may not interfere with the powers of the Board to manage the day-to-day operation of the hospital nor may it authorize general legislation unrelated to providing for expenses.

The only language at issue in the Act is that regarding the amounts in the Miners' Hospital base appropriation for personal services and employee benefits. Those amounts are subject to a condition precedent that requires the hospital to submit a plan to the legislative finance committee and DFA by June 30, 1988 which "implements the intent of the legislature" that \$473,100 be reduced from these services and benefits and that the full-time equivalent authorization be reduced by twenty-eight units.

We first examine the bill's condition precedent according to the rule that the legislature cannot attach conditions to appropriations which go beyond oversight and intrude on the executive managerial functions involved in administering amounts appropriated. The New Mexico Supreme Court has applied this rule to uphold

a line-item veto of language in the 1988 General Appropriation Act that prohibited the use of \$4,000 for rental of parking spaces:

In restricting the expenditure of funds appropriated to the office of district attorney, the legislature performs not merely an appropriation oversight function, but it attempts to make detailed, minuscule, inconsequential executive management decisions. In this instance, the legislature should have limited itself to addressing matters of "significant financial impact" such as those we specifically approved in Sego, 86 N.M. at 367, 524 P.2d at 983. ... Such intrusion is inappropriate under our constitutional form of government and comes into conflict with the separation of powers doctrine.

State ex rel. Coll v. Carruthers, 107 N.M. 439, 443, 759 P.2d 1380, 1384 (1988). See also Anderson v. Lamm, 195 Colo. 437, 579 P.2d 620, 623-624 (1978) (en banc) (holding that the legislature could not control the use of money after it was appropriated by imposing specific staffing and resource allocation decisions on an agency). The conditions applicable here do limit the number of employees that the hospital may hire and also limit employee benefits. Nonetheless, the legislature does not control specific staffing or benefits decisions that properly belong to the Board. For example, the Board need only reduce its FTE by 28 units; it is not directed to choose between nurses and secretaries in making its day-to-day staffing and management decisions.

The condition also appears to involve a matter of significant financial impact because it involves close to a half of million dollars and 28 FTE's. Were the legislature forced to cut appropriations in future years based on declining hospital admissions or trust fund revenues, then this condition is reasonable as part of a legislative plan to effect an orderly transition rather than an immediate and drastic scale-back. The legislature "has the power to affix reasonable provisions, conditions or limitations upon appropriations and upon the expenditure of the funds appropriated." State ex. rel. Coll v. Carruthers, 107 N.M. at 444, 759 P.2d at 1385 (1988) (veto of conditional appropriation regarding computer equipment stricken on the basis that it constituted a reasonable condition that did not inject the legislature into the executive function). Reasonable limitations include provisions for spending, accounting for, and raising the money appropriated. These kinds of limitations are acceptable because they are "germane" to the appropriation and "directly connected with it," State ex rel. Lucero v. Marron, 17 N.M. at 316, 128 P. at 489 (1912), or are "necessarily connected with and related to" the

subject of the appropriation. State ex rel. Whittier v. Safford, 28 N.M. at 534, 214 P. at 760 (1923). Certainly a provision that effectively reduces staffing at the hospital may constitute a reasonable limitation which takes into account the projected needs and growth of the institution.

The conditions placed by the legislature in the General Appropriation Bill of 1988 made for personal services and employee benefits are valid because they are reasonably related to the amounts appropriated. The provisions do not attempt to control the details of how those amounts are expended after the appropriation is made. Thus we find that the language of the Act does not violate Article IV, Section 16 of the New Mexico Constitution.

The conditions imposed by the General Appropriation Act of 1988 must also be analyzed in light of the limitations on the legislature's ability to affect or create general legislation through appropriations measures.

A condition or limitation, even if arguably related to an appropriation, will not be upheld if it is intended to affect funds which are not appropriated under the bill or if it is intended to remain in effect beyond the period covered by the bill. For example, State ex rel. Delgado v. Sargent, 18 N.M. 131, 134 P. 218 (1913), concerned an appropriations bill for disposition of money in an insurance fund administered by the state insurance department. The bill required all receipts of the department, including surplus money in the insurance fund, to be paid to the state salary fund. The New Mexico Supreme Court found the provision unconstitutional because it was intended as general legislation of a permanent character. The Court reached the conclusion because the restriction imposed by the provision would have continued indefinitely. See also AG Op. No. 89-26 (finding that provisions of the appropriations act which purport to amend general legislation are improper and without effect); AG Op. No. 67-49 (A provision in an appropriations bill will be upheld, even if it affects existing general legislation, provided it is logically connected to the subject of the appropriation and is limited to the fiscal period covered by the bill); AG Op. No. 88-58.

We find that the restrictions on the appropriation of the Miner's Hospital Trust Fund revenues contained in the 1988 appropriations bill are consistent with the rule that legislative conditions on appropriations be limited to the fiscal period covered by the bill. Also, the bill does not create, repeal, or affect general legislation; it merely provides funding to the

hospital. Therefore, we believe that the General Appropriation Act of 1988 does not conflict with Section 23-3-3 NMSA 1978.⁶

5) Our response to the fifth question is based on the same reasoning used in responding to the first and fourth questions. Question five asks if it is proper for the legislature, in the General Appropriation Act in 1988, to restrict the availability of trust funds to the hospital authorized under Section 23-1-2 NMSA 1978. While the authority of the legislature to appropriate trust fund revenues is not absolute, the plain language of Section 23-1-2, which authorizes state institutions "to expend the funds derived from the sale and lease of their lands, or so much thereof as may be necessary which are placed to the credit of the respective institutions, for buildings, equipment and other permanent improvements" does not abrogate such authority. Section 23-1-2 simply states the obvious -- that after the legislature appropriates, the Board of Trustees may expend.

Even though the General Appropriation Act of 1988 effectively puts a cap on the amount of trust fund revenues which may be used for the specified purposes, such a restriction is essential to trust management. Under general trust law a trust fund corpus is generally preserved against invasion by the beneficiaries so as to insure adequate and recurring income for yearly use. See e.g. State v. Llewellyn, 23 N.M. 43, 167 P. 414 (proceeds of sale of

6 Our opinion does not address the implicit issue regarding the relative powers of the Board of Trustees and the legislature as regards Miners' Hospital. While Section 23-3-3 NMSA 1978 expressly recognizes certain statutory powers reserved to the board, such power is not absolute. While the board may undertake all actions in the best interest of their institution in the accomplishment of their purposes or objects, as already stated, the legislature clearly has the power to appropriate trust fund revenues. While the Board may resort to non-state funds if the yearly trust fund income is exhausted, full and complete reports of all such income must be made to the Governor, who in turn must transmit these reports to the legislature. N.M. Const. art. V, §9. However, the fact the legislature obtains these reports in the proper performance of its legislative functions does not confer on the legislature the power to appropriate and thereby limit or control the use or disbursement of the funds. The matter of expenditure of disbursement rests with the boards, subject to applicable law. State ex rel. Segov v. Kirkpatrick, 86 N.M. at 370, 524 P.2d at 987 (1974).

lands granted to the State by the Enabling Act, for certain specified purposes, and the natural products of such lands, with certain named exceptions, were intended by Congress to constitute permanent funds, with only the interest being available for current use).

Additionally, the legislature is empowered to limit spending of appropriated funds which will "have a significant financial impact upon or require significant future appropriations of State funds." State ex rel. Sego v. Kirkpatrick, 86 N.M. at 367, 524 P.2d at 983. The bill's directive to reduce the FTE and employee benefits, as well as \$231,500 the cap on budget increases, are reasonably calculated to reduce perceived overstaffing and preserve the limited income of the fund.

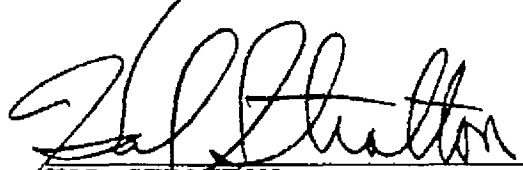
Again, because the state has the authority to appropriate these revenues and the limitation on the use of trust funds does not extend beyond the period covered by the bill, the appropriation does not, without more, amount to a repeal or amendment of the general legislation. Cf. State ex rel. Coll v. Carruthers, 107 N.M. at 445, 759 P.2d at 1386 (upholding governor's veto of funding provisions in appropriations bill which directly conflicted with similar funding provision in existing legislation). Thus, we conclude that the restriction is proper and does not conflict Section 23-1-2 NMSA 1978.

6) The final question asks whether enforcement of the General Appropriations Act of 1988 as it pertains to the Miners' Hospital requires cy-pres construction of the trust created by the Ferguson Act, the Enabling Act and the New Mexico Constitution. The doctrine of cy-pres is applied as follows:


If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.

Restatement (Second) of Trusts §399 (1959). "Impracticable" is used in the sense that although it might be possible to carry out the particular purpose of the settlor, it would not accomplish the general charitable intention of the settlor because of the change in circumstances after creation of the trust or otherwise. Id. §399, comment q.

The settlor of the trust created by the Ferguson Act, the Enabling Act and the New Mexico Constitution is the United States and the purpose of the trust is to operate a miners' hospital for disabled miners. Application of the doctrine of cy-pres would be called for only if it became impossible, impracticable or illegal for the state to implement this purpose. Enforcement of the provisions of the General Appropriation Act of 1988 would not require cy-pres construction of the trust, unless it rendered the hospital in its current form inoperable and the state could show that it was impossible or impracticable to use the trust fund for a miners' hospital in the state. There has been no such showing that those circumstances exist.



HAL STRATTON
Attorney General



JAIME MARIE JACKSON
Assistant Attorney General