

# THE EVOLVING ROLE OF THE STATE SOLICITOR: TOWARD THE FEDERAL MODEL?

James R. Layton\*

## I. INTRODUCTION

Appointing a state solicitor<sup>1</sup> enables an attorney general to turn for appellate advice to a specialist, who, like the Solicitor General of the United States, is “responsible both for determining what position the [state] will take on many important questions of [state and] federal law and often for choosing the specific cases in which to advance that position.”<sup>2</sup>

---

\* State Solicitor, Office of the Attorney General of Missouri. J.D., J. Reuben Clark Law School, Brigham Young University. The views expressed in this article are those of the author and not of the Attorney General of Missouri.

1. A few states use the “solicitor general” title; others do not use “solicitor” in the title at all, preferring “appellate chief” or some other title that fits into their established hierarchies. There are a few states in which the “solicitor” or “solicitor general” is not an appellate specialist, but has responsibility for civil litigation at all levels. I use “Solicitor General” to refer only to the Solicitor General of the United States. I use “state solicitor” or “solicitor” to refer to any single official with office-wide responsibility for, and specialization in, civil (and, in some states, criminal) appeals, regardless of the title a particular state may use. I also distinguish the positions with my choice of pronouns. All of the Solicitors General of the United States have been men; hence, for them, I use “he.” About a third of the state solicitors are women; for them I use “she.” The more prominent role of women in the state offices is, in fact, reflected in appearances before the United States Supreme Court. In response to a 1997 Washington Post report that during the 1996 term, only 14% of those arguing before the Court were women, the National Association of Attorneys General analyzed state representation:

During the 1996 term, State Attorney General offices argued 25 cases. Eleven of those arguments were made by women. This means that 44% of state attorneys who argued before the Court were women--well above the 14% figure. Indeed, if you take out the state attorneys, only 17 of the 175 attorneys who argued before the Court this Term were women, a paltry 10%.

5 Sup. Ct. Reporter 1, at 5 (NAAG Sept. 12, 1997).

2. Seth P. Waxman, *Does the Solicitor General Matter?* 53 Stan. L. Rev. 1115, 1117 (2001).

Whether that solicitor is authorized to act unilaterally, or only in conjunction with the attorney general, placing a single person over all civil (and perhaps also over all criminal) appeals yields a broader and more comprehensive vision of the ways in which the state's strategies on appeal can affect the development of the law. State solicitors are, in fact, already playing a key role in areas of the law such as federalism, where "it has been the States, and the [Supreme] Court itself," rather than the Solicitor General, "that have been trying to move the law."<sup>3</sup>

Since 1987, the number of states with solicitors has grown from eight to twenty-four.<sup>4</sup> The attorney general of California has recently announced, but not yet filled a solicitor position, while attorneys general in other states are considering whether to create the position.<sup>5</sup> In thirteen states, the solicitors have supervisory responsibility over even the criminal appeals unit, which gives them a breadth (though perhaps not a depth) of authority comparable to that of the Solicitor General.<sup>6</sup> Each state solicitor superintends hundreds of cases, rather than the thousands overseen by the Solicitor General.<sup>7</sup> But at least in conjunction with the state attorneys general, they, like the Solicitor General, have "the authority to decline to pursue cases solely because doing so would not promote the orderly development of the law."<sup>8</sup> Despite the similarities between the state solicitors' work and that of the Solicitor General, however, there are important differences in their roles and their authority.

---

3. *Id.* at 1121.

4. For organizational information from 1987-88, see *State Attorneys General: Powers and Responsibilities* 348-379 (Lynn M. Ross ed., BNA 1990). Current organizations are summarized in Table 1. The information in Table 1 and other information in this article about the structure and responsibility of the offices of the states' attorneys general comes from three sources: the author's conferences and conversations with attorneys general and their assistants over the last seven years, notes of which are on file with the author; responses to a questionnaire circulated by the author among the states in April 2001, and now on file with the author; and responses to questions circulated among the states in 1996 by the National Association of Attorneys General (NAAG), copies of which are on file with the author.

5. California Department of Justice Examination Announcement (closing date Nov. 16, 2001), and questionnaire responses on file with the author.

6. *Id.*

7. Waxman, *supra* n. 2, at 1117.

8. *Id.*

Focusing only on the states that have established a solicitor position, I contrast in this article the roles of the state solicitor and that of the Solicitor General. I begin by reviewing the history of state solicitors, and continue by analyzing the responsibilities typically assigned to solicitors by state attorneys general, considering the manner in which solicitors supervise appellate work, and evaluating solicitors' ability to influence the development of the law. I conclude that the last is an area in which they face challenges notably different from those facing the Solicitor General, but that they are nonetheless positioned to become a potent force for change.

## II. HISTORY

Today we think of a solicitor general as one dedicated to work in the appellate courts, where he devotes his time to the analysis and resolution of the sort of constitutional issues that seldom arise in private practice. But the titles "solicitor" and "solicitor general" are older than the concept of a government appellate specialist. Before there was a Solicitor General, there were solicitors in the federal government,<sup>9</sup> and with and without the accompanying "general," the title "solicitor" has a long history of use in the states.<sup>10</sup> But many of these state solicitors occupied generalist positions of the sort that we might now call county or district attorneys. For example, locally based solicitors, among them Hugo (later Justice) Black,<sup>11</sup> once handled criminal prosecutions in Alabama.

A few decades after responsibility for litigation involving the United States was concentrated in the Department of Justice

---

9. See Seth P. Waxman, Speech, *Presenting the Case of the United States As It Should Be: The Solicitor General in Historical Context* at nn. 62-66 and accompanying text (address to the Supreme Court Historical Society, June 1, 1998) (available at <<http://www.usdoj.gov/aboutosg/sgarticle.html>>).

10. See e.g. *McCreary v. State*, 27 Ark. 425 (1872) ("solicitor general"); *In re Disbarment of Cowdery*, 10 P. 47 (Cal. 1886) ("solicitor general"); *Burns v. State*, 61 Ga. 192 (1878) ("solicitor"); *Bartlett v. Willis*, 3 Mass. 86 (1807) ("solicitor general"); *State v. Pike*, 15 N.H. 83 (1844) ("solicitor"); *State v. Twitty*, 9 N.C. 248 (1822) ("solicitor"); *State v. Butz*, 9 S.C. 156 (1877) ("solicitor"); *State v. Steele*, 9 Tenn. 394 (1830) ("solicitor general").

11. Roger K. Newman, *Hugo Black: A Biography* 35-46 (Pantheon Books 1994). See *Wray v. State*, 72 So. 556 (Ala. 1916).

and the office of Solicitor General was established, states started to experiment with their own versions of the position. Perhaps the first was New York, which established its position by statute in 1909;<sup>12</sup> its solicitor begins consistently to appear on behalf of the state in appellate decisions from the 1930s.<sup>13</sup> The Michigan solicitor general began to appear in reported decisions in the 1940s.<sup>14</sup> Although a Tennessee solicitor general had appeared in reported decisions in the mid-1800s, the position seems to have vanished for a time, reappearing in 1932, and beginning to appear more consistently only in the 1950s.<sup>15</sup> The solicitor general of Minnesota, whose position was created by statute in 1955,<sup>16</sup> began appearing in that same year.<sup>17</sup> Solicitors general began appearing for Iowa<sup>18</sup> and Oregon<sup>19</sup> in the 1960s, while Colorado created its solicitor general position by statute in 1973.<sup>20</sup>

The scope of the role filled by the earliest state solicitors is not readily apparent from the cases in which they appeared. Certainly their names do not appear on enough reported decisions to suggest that appellate work was their full-time job. And in fact, until recent years, many attorneys general did not have enough civil appellate work to justify the creation of such a position, even though as discussed below, most long ago developed appellate groups to handle criminal matters. Thus these solicitors undoubtedly had a role broader than that of chief civil appellate attorney, just as the Solicitor General once did.<sup>21</sup> Some, like the Colorado solicitor, were perhaps responsible for

---

12. N.Y. Exec. Laws § 61 (McKinney 1993).

13. *E.g.* *N.Y. v. Coe Mfg. Co.*, 172 A. 198 (N.J. Ct. Err. & App. 1934); *Bush Terminal Co. v. N.Y.*, 273 N.Y.S. 331 (1934); *In re St. Bd. of Mediation*, 298 N.Y.S. 934 (1937).

14. *E.g.* *City of Highland Park v. Oakland County Drain Commr.*, 2 N.W.2d 79 (Mich. 1942).

15. *See E. Tenn. & W.N.C. Motor Transp. Co. v. Carden*, 50 S.W.2d 230 (Tenn. 1931); *Tex. Gas Transmission v. Atkins*, 327 S.W.2d 305 (Tenn. 1959).

16. 1955 Minn. Laws 477 (now codified at Minn. Stat. Ann. § 8.12 (West 1997)).

17. *See e.g. Thomas v. Ramberg*, 73 N.W.2d 195, 196 (Minn. 1955).

18. *See e.g. Holland v. State*, 115 N.W.2d 161, 162 (Iowa 1962); *Selzer v. Synhorst*, 113 N.W.2d 724, 725 (Iowa 1962).

19. *See e.g. Hadlock v. Cupp*, 457 P.2d 666 (Or. App. 1969); *State v. Tanzer*, 458 P.2d 706 (Or. App. 1969).

20. Colo. Rev. Stat. Ann. § 24-31-202 (West 2001).

21. Waxman, *supra* n. 9, at nn. 67-94 and accompanying text.

representing state agencies generally, instead of being responsible specifically for appellate matters.<sup>22</sup>

Whatever the state solicitor's initial role, however, we do know that so long as attorney generals' staffs were small, it was possible for them to know about and supervise appeals informally. That is still true in a few states. But in most, the need for centralized and specialized supervision over appeals has grown beyond the point at which informal mechanisms will suffice.<sup>23</sup> And the need is not the result of numbers alone. Issues on appeal have become ever more complex—the result, in part, of the states' interaction with more federal statutes, regulations, programs, and precedents. There is an increasing monetary risk, as well, for states face the same growth in the size of verdicts that we see in private civil litigation.<sup>24</sup> The recent development of state solicitors whose work more closely parallels that of the Solicitor General was, then, prompted by the increase in appellate workload, the increased complexity of the cases on appeal, and the increasing risk of loss.

But for many attorneys general, the reasons for appointing a state solicitor can be boiled down to a desire to ensure quality and consistency, for the growth of their staffs has inevitably brought with it more appellate-management problems. Remembering his experience as a justice on the state supreme court, an attorney general in Texas named the state's first solicitor shortly after taking office. He explained, "We need to make sure that the state speaks with one voice and one work product,"<sup>25</sup> and continued by pointing out that using appellate specialists for all of the state's appeals was likely to improve the quality of the state's briefs and arguments.<sup>26</sup> This goal is surely shared by the twenty-three other attorneys general who have appointed state solicitors.

---

22. See Colo. Rev. Stat. Ann. § 24-31-203(5) (West 2001).

23. Questionnaire responses on file with the author.

24. A particularly dramatic example of that risk developed last year, when one state's appeal of a \$17.76 million judgment was disallowed because the notice of appeal was tardy. *Beckman v. State of Wash., Dept. of Soc. and Health Serv.*, 11 P.3d 313 (Wash. App. 2000).

25. Janet Elliott, *New AG Takes Back Hopwood, Creates Appellate Division*, Tex. Law. 1, 18 (Jan. 4, 1999).

26. *Id.*

### III. RESPONSIBILITIES OF SOLICITORS

The Attorney General of the United States has delegated to the Solicitor General almost complete control over appeals involving the federal government in civil and criminal cases, and the Solicitor General exercises that control in different ways depending on the importance of the matter at issue, and the level at which the case is being heard. For matters in the federal courts of appeals, the Solicitor General approves or disapproves of appeals by the United States.<sup>27</sup> Otherwise, all but the most exceptional appeals are assigned to the litigating divisions of the Department of Justice or to the various United States Attorneys.<sup>28</sup> He and his assistants participate in the occasional court of appeals case, but they take the lead in all matters before the Supreme Court.<sup>29</sup> With regard to independent agencies, the Solicitor General's authority has been the subject of some controversy.<sup>30</sup> But even if he lacks absolute authority and thus is prevented from controlling all agency litigation, his relationship with the Supreme Court appears to give him practical control over the ability of independent agencies to proceed there without his support.

By contrast, most state attorneys general, whether they have delegated the supervision of appellate work to a solicitor or not, still handle civil appeals in the diffuse fashion used by the Department of Justice before the advent of the Solicitor General's appellate role.<sup>31</sup> Assistant attorneys general who represent the state in civil trials typically keep those cases on appeal. The same supervisors who review and approve work at the trial court continue in that role as the matter proceeds through the appellate courts. To the extent that there is any effort

---

27. *United States Attorneys' Manual* §§ 2-1.000-2-3.110 <[http://www.usdoj.gov/usao/eousa/foia.reading\\_room/usam/index.htm](http://www.usdoj.gov/usao/eousa/foia.reading_room/usam/index.htm)>.

28. *Id.* at §§ 2-3.100, 2-3.220, 2-3.221.

29. *Id.* at § 2-1.000.

30. See e.g. Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 Cal. L. Rev. 255 (1994).

31. It bears noting, however, that the Department still uses the diffuse approach to the extent that some federal-government appeals are handled by U.S. Attorneys, and not by members of the Solicitor General's staff or by appellate units in the Department's various divisions. See *United States Attorney's Manual*, *supra* n. 27, at § 2-3.100.

at office-wide quality or substantive coordination, it appears only at the executive level.<sup>32</sup> This not only deprives those working on civil cases of ready access to dedicated appellate experts, it also leaves them without the support of a person who focuses on educating lawyers about the nuances of the appellate rules, who monitors and consistently works to improve the quality of briefs and arguments, who identifies and addresses conflicts between positions being taken by attorneys from different divisions or representing different state officials or agencies, and who approves the positions taken by the state's lawyers in the appellate courts.

Although at least some education and coordination functions are performed at the state level, it is typically the criminal appeals chief who does the job in states that have no solicitor.<sup>33</sup> The reason is simple. Most attorneys general have only limited prosecutorial authority, but they do have complete responsibility for felony, and perhaps other criminal, appeals.<sup>34</sup> Thus the assistant attorneys general working on criminal cases are typically appellate lawyers, not prosecutors, and as a result, they are organized, in well over half of the states, into discrete appellate units that are closely supervised by experienced appellate specialists.<sup>35</sup>

On the civil side, the attorneys general typically have general jurisdiction instead of a narrow appellate focus.<sup>36</sup> Thus they must have sufficient staff not just to handle civil appeals, but also to handle civil matters before trial courts and administrative tribunals. It is impossible, in all but the smallest state attorney general's office, to assign all civil matters to a single division in which one division chief can supervise all appeals. Instead, attorneys general typically group assistant attorneys general into divisions, each with responsibility for a particular category of cases or for cases involving a particular group of state agencies or officials.<sup>37</sup> Because the state solicitor's

---

32. Questionnaire responses on file with the author.

33. *Id.*

34. *Id.*; see e.g. Mo. Rev. Stat. § 27.050 (2000).

35. Questionnaire responses on file with the author.

36. *Id.*; see e.g. Mo. Rev. Stat. §§ 27.050, 27.060 (2000).

37. *State Attorneys General*, *supra* n. 4, at 352-79.

task is to supervise lawyers in each of those groups, her job is inherently more complex than that of supervising criminal appeals.

But supervising civil appeals is more complex not only because of the number of assistant attorneys general handling civil cases and their assignment to separate divisions, but also because of the state's role on appeal. The government has only a limited ability to appeal in criminal cases, so the issue of whether to appeal seldom arises in the criminal context. That decision is critical to the state's work in civil cases, however, and it multiplies the complexity of civil appellate work, as does the diversity of the subject matter. The civil docket of a state attorney general ranges from torts to child support to contracts to constitutional law in all its variations.<sup>38</sup> The variety of issues presented by criminal appeals, though considerable, pales in comparison.

In addition, supervision of civil appeals is more complex because they are so frequently complicated by politics. Though a criminal chief may have to face the wrath of an elected prosecutor whose verdict he declines to support, both the chief and the prosecutor ultimately represent the state. But on the civil side, the attorney general represents many clients whose individual views of the public interest may differ dramatically, and who, like the attorney general himself, all have their own political constituencies. A criminal chief may occasionally defend the constitutionality of a statute, and will thus represent the legislature. On the civil side, however, the office of the attorney general frequently defends (or declines to defend) the legislative will, often on issues that are closely fought among those on whom the attorney general must depend for appropriations. A criminal chief is usually opposing the public defender or a private member of the professional criminal defense bar, while on the civil side, an assistant attorney general may well be facing a legislator as counsel for the opposing party. In short, the political stakes are often high in civil cases.

When considering how to deal more effectively with the growth in the number of civil appeals, and their attendant risks,

---

38. *Id.* at 76-83, 121-325.

complexity, and political peril, attorneys general could follow the model they use in handling criminal appeals. They could create a separate civil appeals division, leaving just the trial work to the civil litigation divisions, much as criminal trial work is left to local prosecutors. But very few have adopted that approach.<sup>39</sup> Instead, nearly all of those who have chosen to appoint state solicitors have adopted aspects of the Solicitor General model: general supervision of appeals by the solicitor, with the actual handling of appeals divided among attorneys in the solicitor's office, who are responsible for a few appeals, and attorneys in various other divisions who handle the rest.<sup>40</sup>

Despite the large number of civil appeals to be supervised, attorneys general often give their solicitors additional assignments. For example, a number of solicitors are responsible for drafting formal opinions of the attorney general,<sup>41</sup> or for playing a major role in attorney training.<sup>42</sup> Most are responsible for determining whether to write or to join briefs *amici curiae*.<sup>43</sup> One state solicitor even supervises the law library,<sup>44</sup> and two serve on the faculty of the law school at the state university.<sup>45</sup> Though broad in scope, such duties are of course logically assigned to one learned in the law<sup>46</sup> who sees the work of, and considers legal issues that arise throughout, the entire office.

Assigning them such additional duties is also logical because solicitors are typically part of the attorney general's senior staff, sharing administrative responsibility for the office,<sup>47</sup> though perhaps not having the sort of line rank that briefly made Solicitor General Robert Bork a notable Acting Attorney

---

39. Questionnaire responses on file with author; *see also* Table 1.

40. Questionnaire responses on file with author; *see also* Table 1.

41. *Id.*; *see also* Waxman, *supra* n. 9, at n. 87 (noting that the Solicitor General was once responsible for opinions as well).

42. Questionnaire responses on file with the author.

43. *Id.*

44. *Id.*

45. *Id.*; *see also* Tom Warner, *Office of the Florida Solicitor General: The Greatest Job for a Lawyer in Florida*, Fla. B. J. 32 (July/Aug. 2001).

46. The Solicitor General, whose office is of course the model for those of the state solicitors, has always been required to be "learned in the law." 28 U.S.C. § 505 (West 2001).

47. Questionnaire responses on file with the author.

General. The factors leading to the placement of the solicitor so near the attorney general include the immediate political ramifications of many appeals, and the solicitor's need to invoke the attorney general's authority when overruling division-level decisions that appear to be focused more on the parochial interests of particular state clients than on the interests of the state as a whole.<sup>48</sup> Moreover, unable to offer the unquestioned prestige that accompanies appointment as Solicitor General, attorneys general use the implicit authority and perceived prestige of working directly with the attorney general as a tool to attract good candidates to, or to retain good lawyers in, the position of state solicitor.<sup>49</sup>

Having the trust of and authority from their attorneys general, solicitors seldom restrict their work to supervising appeals. Like the Solicitor General, they often choose to argue the most important appeals themselves.<sup>50</sup> Unlike the Solicitor General, however, most state solicitors occasionally handle important cases at the trial level—usually those that appear from the outset to be destined for appeal.<sup>51</sup> No matter the stage at which they appear in court, though, state solicitors play a role much like that of the Solicitor General: They use their position to emphasize to the court before which they are appearing the importance of a particular case.

#### IV. SUPERVISING APPEALS

Perhaps the quality of the states' advocacy on appeal does not always matter, but it "often matters a great deal, particularly at the margins."<sup>52</sup> A principal goal of those attorneys general who have created state solicitor positions, then, is to improve the quality of advocacy, not just in order to be more persuasive in specific cases, or even in order to improve the quality of appellate advocacy overall, but also in order to have a greater influence on the development of the law. Thus, in their

---

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Waxman, *supra* n. 2, at 1117.

supervisory role, state solicitors (1) superintend particular appeals, (2) work to improve the appellate writing and oral advocacy skills of the attorney general's staff, and (3) guide the attorney general toward cases in which his perspective is likely to improve the law. As the discussion to follow in this section demonstrates, the first task in some respects parallels the work of the Solicitor General, and the second is analogous to one undertaken by other parts of the Department of Justice. The third task, which is perhaps more philosophic than practical, is addressed in Part V below.

### A. *Specific Appeals*

In the Department of Justice, appeals are generally handled by appellate specialists. The same is true in the criminal divisions of the offices of state attorneys general. But as discussed above, even in states with a strong solicitor, this is not the case for most civil appeals. Solicitors often operate with only one or two assistants, enabling them to handle just a small portion of the state's appellate work.<sup>53</sup> In fact, there are only a few states in which all civil appeals are handled by attorneys who normally report to the solicitor.<sup>54</sup> Thus, the solicitor supervises most of the state's appellate work from a distance, because it is handled by attorneys scattered throughout the state government. In that sense, the solicitors perform a role that parallels a little-noticed part of the Solicitor General's work: considering whether to appeal from decisions adverse to the state.<sup>55</sup>

Perhaps the single most important part of the supervisory work done by most state solicitors is the review of appellate briefs. In many states they review essentially all briefs filed on behalf of the state; in others they may not review briefs filed with the intermediate appellate courts, or they may exclude from

---

53. Questionnaire responses on file with the author.

54. *Id.*

55. "Lawyers on the Solicitor [General]'s team prefer to talk about the cases they present to the Supreme Court, but they spend half their time sifting through proposed appeals from trial-court rulings against the government." Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* 6 (Alfred A. Knopf 1987).

review briefs in a class of appeals, such as those arising in child-support enforcement actions.<sup>56</sup> However many briefs are involved, all solicitors struggle to get drafts in time for effective review, and although they might like in every case to undertake a detailed edit, they too often have an opportunity only to look for glaring mistakes.<sup>57</sup> Whenever they become involved, however, they try to improve the state's brief without intruding unduly into the work of the lawyers primarily responsible for writing it. The Ohio solicitor, for example, describes his role in reviewing briefs as one of influence: "Sometimes I just give general appellate advice or perhaps review and comment on a draft. Most of the time, my edits or comments trump those of others in the office, but I rule more by persuasion than by force."<sup>58</sup> The same is true in most states.<sup>59</sup>

Like the Solicitor General, state solicitors typically require that trial attorneys promptly notify them when a court enters an appealable decision adverse to the state, and when appeals are taken against the state by others.<sup>60</sup> The role of the solicitor at that point varies. In many states, the solicitor has the authority to approve or refuse an appeal.<sup>61</sup> In others, the solicitor's role is merely advisory, and a solicitor who believes an appeal should not be taken must still persuade the attorney general to overrule the appeal decision already made by the supervisory attorney in another division.<sup>62</sup> Once the decision to proceed is made, the

---

56. Questionnaire responses on file with the author.

57. *Id.*

58. *Id.*

59. At least in part that results from two strong traditions in the offices of most attorneys general: independent responsibility and collaborative effort. The creation of solicitors' positions in offices with strong histories of independence has not always been easy. The transition has been most successful where the appointee, as the Ohio solicitor points out, adheres closely to the latter tradition. *See* Questionnaire responses on file with the author.

60. Questionnaire responses on file with the author. It is important to note that promptness often requires more rapid action by state solicitors than by their federal counterpart. States may not have rules like Fed. R. App. P. 4(a)(1)(b), which extends the appeals period for the government.

61. Questionnaire responses on file with the author.

62. *Id.*

solicitor may also designate, or at least have a role in designating, the attorneys who will handle the appeal.<sup>63</sup>

Solicitors often maintain docketing systems to monitor the progress of pending appeals.<sup>64</sup> Because their responsibilities include maintaining good relations with the courts, they try to limit government-caused delays in appeals, perhaps by requiring approval before an assistant attorney general may seek an extension of time. Courts may even cooperate with solicitors in that effort. For example, one district of the Missouri Court of Appeals requires the criminal appeals chief or an appellate supervisor to co-sign any extension request. Also, solicitors usually control post-decision litigation, including motions for rehearing and motions, applications, or petitions to have the matter heard by a higher court.<sup>65</sup> Again, they will in many cases not only have authority to decide whether to proceed, but will also review the document before it is filed.

### *B. Advocacy Training*

Before oral argument, solicitors arrange for and often participate in a moot court.<sup>66</sup> Depending on the nature of the case, the expertise of the arguing attorney, or the level of the court, the format varies from formal questioning in actual appellate courtrooms to informal roundtable discussions.<sup>67</sup> In some states the mock argument requirement is not imposed for appeals being heard by intermediate appellate courts, but in others, a mock argument can be held before an appeal at any level.<sup>68</sup>

---

63. *Id.*

64. *Id.*

65. *Id.*

66. This was of course standard practice in many offices before the position of solicitor was created. But the arrival of a solicitor often brings three changes: the practice is more institutionalized, reaching even experienced lawyers who otherwise might deem such efforts unnecessary; preparation may be taken even more seriously because the involvement of the solicitor brings to practice arguments the official sanction of the attorney general; and the panels more often involve a significant number of attorneys from other divisions, most of whom, like appellate judges, will be unfamiliar with the subject matter of the appeal. *See* Questionnaire responses on file with the author.

67. *Id.*

68. *Id.*

In addition to case-specific efforts, however, solicitors undertake broader educational efforts to improve appellate advocacy over the long term.<sup>69</sup> Some solicitors have responsibility for all or part of an office's formal continuing legal education program.<sup>70</sup> Some have developed handbooks, charts, and other written materials that address practice issues ranging from citation format to colors of covers.<sup>71</sup> Some collect and make available to their staffs style manuals and other writing tools like usage dictionaries, which one might not otherwise expect to see on the desks of assistant attorneys general.<sup>72</sup>

I know from my own experience that simply by discharging their duties, solicitors also become the repository of specialized appellate knowledge and so become a principal connection between the office of the attorney general and the appellate courts. They frequently observe appellate arguments, gathering information about the performance of assistant attorneys general and other state lawyers, and about the courts before which they appear. They acquire knowledge not just of the written rules, but also of the unwritten rules developed in the offices of appellate-court clerks. They become acquainted with those on the courts' staffs who can and will best answer questions about judicial procedures. Through the assistant attorneys general who handle appeals, they get the immediate feedback that comes from frequently filing documents of many types, including the sorts of writ petitions rarely seen by private practitioners, with each appellate court. Given the number and diversity of the appeals in which each state appears, solicitors quickly become among their states' foremost experts on the quirks and qualities of the appellate courts, much as the Solicitor General is one of the foremost experts on the Supreme Court.

Solicitors often ask appellate judges for comments on the quality of written and oral advocacy by assistant attorneys general.<sup>73</sup> But their communication with appellate judges is not

---

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

one-way; they may also provide valuable assistance to the courts in refining rules and procedures.<sup>74</sup> The states are the most frequently appearing parties before nearly all state appellate courts,<sup>75</sup> and they are also among the most frequent litigants in most of the federal courts of appeals.<sup>76</sup> A state solicitor's involvement in hundreds of appeals each year makes her one of a court's best sources for comments from the bar about appellate practice.

## V. THE DEVELOPMENT OF THE LAW

The Solicitor General guides the development of the law through both his involvement in appeals involving the United States and his filing of briefs *amici curiae*. His influence in that sphere derives from three sources: (1) the respect given to his office because of its long history of high-quality, law-based advocacy; (2) his authority to determine what the United States will do on appeal, including whether to pursue appeals after adverse decisions and whether to confess error after favorable ones; and (3) his exercise of that authority in ways that demonstrate not just a knowledge of what courts might do, but a certain independence from mere political pressures and a determination to help the members of the court to understand in each case what they ought to do. The judicious use of that independence enabled the office of Solicitor General to reach a

---

74. *Id.*

75. Though appearances by the state are not generally compiled, statistical reports show that appeals of the sort handled by the states dominate appellate court dockets. See e.g. Arizona Judicial Branch Research and Statistics Unit, *Annual Case Activity Summary, Fiscal Year 1999* <<http://supreme.state.az.us/stats/statewide/fy99case.pdf>>; Administrative Office of the Illinois Courts, *Supreme Court Caseload Statistics* <[http://www.state.il.us/court/Administrative/Caseload\\_AC.shtml](http://www.state.il.us/court/Administrative/Caseload_AC.shtml)> and *Appellate Court Caseload Statistics* <[http://www.state.il.us/court/Administrative/Caseload\\_AC.shtml](http://www.state.il.us/court/Administrative/Caseload_AC.shtml)>.

76. See Administrative Office of the United States Courts, *Judicial Business of the United States Courts*, Table B-7: *U.S. Courts of Appeals—Nature of Suit or Offense in Cases Arising from the U.S. District Courts, by Circuit during the Twelve-Month Period Ending September 30, 2000* <<http://www.uscourts.gov/judbus2000/appendices/b07sep00.pdf>>. The table shows that of 46,487 appeals to the federal courts of appeals during fiscal 2000, 12,298 were non-federal prisoner cases, nearly all of which are defended by the states. The states also appear in a myriad other civil cases, but those are not categorized in a fashion that permits them to be broken out from the non-state, non-federal cases.

point by the 1960s when former Solicitor General Francis Biddle could declare, with a great deal of accuracy, that the “Solicitor General has no master to serve except his country.”<sup>77</sup> Even those who claim that the Solicitor General’s independence has ebbed since Biddle’s day<sup>78</sup> would nonetheless agree that he stands apart from—and probably above—any other lawyer representing the federal government. This is the sort of role that the state solicitors eventually hope to fill for the states.

### A. *History and Quality of Advocacy*

State solicitors cannot yet equal the history of the Solicitor General’s office, and neither can they match the quality of its advocacy. Their offices have simply not been in place long enough to have gained much of a reputation among the appellate courts. And they all face the significant challenge of building a good reputation when their work product consists largely of last-minute improvements to work done in the first instance by trial attorneys from many divisions. As state solicitors continue their efforts to improve the appellate skills of those they supervise, however, their reputations for high-quality appellate work should also improve.

### B. *Powers to Refuse to Appeal and to Confess Error*

Even a state solicitor who presides over a group of highly competent civil appellate specialists is in quite a different position with regard to the second source of the Solicitor General’s authority: the powers to refuse to appeal an adverse decision and to confess error in a favorable one. The difference is not that the attorneys for the states cannot refuse to appeal or to confess error; in fact, they can and do.<sup>79</sup> It is that the decision

---

77. Francis Biddle, *In Brief Authority* 98 (Doubleday 1962).

78. Actions of Solicitors General during the Reagan administration prompted considerable debate over whether the Solicitor General had retained adequate independence from the Attorney General and the White House. *E.g.* Caplan, *supra* n. 55; Rebecca Salokar, *The Solicitor General: The Politics of Law* (Temple U. Press 1992).

79. *E.g.* *Becker v. Montgomery*, 121 S. Ct. 1801 (2001). Ironically, the Supreme Court appointed Jeffrey Sutton, formerly attorney general Montgomery’s state solicitor, to represent the petitioner. *See Becker v. Montgomery*, 121 S. Ct. 898 (2001).

to do so ultimately resides not with the solicitor, but with the state attorney general.<sup>80</sup> As the attorney general's unquestioned subordinate, the solicitor typically lacks the Solicitor General's authority to decide whether to appeal or to confess error. Instead, she either has authority only to recommend such decisions to the attorney general, or to make them in important cases only in consultation with the attorney general.<sup>81</sup>

State attorneys general are much more involved than the Attorney General of the United States in individual cases and appeals, a much smaller proportion of the cases their offices handle have the potential for having an impact on the law, and they are closer, geographically and personally, to those actually handling and supervising trials and appeals. Thus it is usually still the attorney general, not the state solicitor, who exercises the authority to supervise appeals in ways that demonstrate independence. In using that authority, the state attorney general necessarily represents a broader set of interests than does the Solicitor General. Chief Justice Deborah Poritz of the Delaware Supreme Court, herself a former attorney general, recently explained that a state attorney general has three, sometimes competing, roles: lawyer for the state; lawyer for a state agency or official; and officer of the court.<sup>82</sup> Those roles are shared by the Attorney General of the United States, the Solicitor General, and every government lawyer handling civil cases. But as Justice Poritz pointed out, for the state attorneys general, you then add politics.<sup>83</sup>

### *C. Political Influence*

Politics affect the attorney general—and through him, the solicitor—in two respects. First, he is concerned with the perception of his actions by, and their impact on, his constituency. With the occasional exception of an incumbent who is leaving political life, an attorney general is always

---

80. Questionnaire responses on file with the author.

81. *Id.*

82. Deborah Poritz, Speech, Summer Meeting of the National Association of Attorneys General (Burlington, Vt., June 22, 2001). (Notes of her remarks are on file with the author.)

83. *Id.*

looking toward the next election, making plans either to run for re-election or to campaign for another office. If he hopes to retain his position or to reach another, he cannot afford often to ignore the popular will. In addition, he must be concerned about the manner in which he interacts with other elected officials, both executive and legislative, whose appropriation authority to a great extent dictates whether he can undertake initiatives that interest him personally and politically.<sup>84</sup>

One situation in which the attorney general's concern with politics intersects his other roles occurs when the constitutionality of a state statute is at issue. Seth Waxman has spoken of "the heavy thumb Solicitors General ordinarily place on the scale in favor of defending every Act of Congress in every case, no matter how weak."<sup>85</sup> By tradition or for political expediency, but most often, I suspect, because of elected politicians' respect for democratic institutions, state attorneys general often place much more than a thumb on that side of the scale. Thus they may on occasion take a case all the way to the Supreme Court over the objection of the state official who is nominally the party defendant.

State solicitors, who typically serve at the pleasure of the attorney general,<sup>86</sup> remain subject to the policies that the attorneys general adopt, and are handicapped by, or benefit from, the reputations their attorneys general acquire. But it would be wrong to suppose that they are mere pawns. Attorneys general consistently appoint as state solicitors those on whom

---

84. He may also lack authority to represent some agencies, at least in some categories of cases or in some courts. In that respect, state attorneys general are like the Solicitor General, whose legal authority to dictate appellate strategy to independent agencies is unclear. *See supra* n. 30 and accompanying text. But the state attorneys general also lack the sort of persuasive authority that the Solicitor General has acquired. Thus although a federal agency proceeding without the apparent support of the Solicitor General carries a red flag of warning to the Supreme Court and the public, the absence of express endorsement by a state attorney general (or his state solicitor) may not be noted.

85. Waxman, *supra* n. 2, at 1121 n. 26.

86. State solicitors exist by statute in just four states: Colorado (Colo. Rev. Stat. § 24-31-202 (2001)); Michigan (Mich. Comp. Laws Ann. § 14.28 (West 2001)); Minnesota (Minn. Stat. Ann. § 8.12 (West 2001)); and New York (N.Y. Exec. Laws § 61 (McKinney 2001)). Even there, they are appointed by and serve at the pleasure of the attorney general. No state solicitor has the kind of notoriety and accompanying political protection that the Senate confirmation process confers on the Solicitor General.

they can rely not for political guidance, but for reasoned legal advice pertinent to appeals. Over time, state solicitors should, then, counteract the political pressures often felt by attorneys general when they make appellate decisions. As they succeed in doing so, they and the attorneys general who rely on them will earn additional influence with the courts.

#### *D. Persistence and Progress*

How quickly state solicitors will evolve into advocates having more in common with the Solicitor General will depend, in part, on the abilities, successes, and tenure of those appointed to these positions. To date, most state solicitors are recruited from outside the political realm and remain there.<sup>87</sup> Some even have the sort of background seen in the Solicitor General's office, such as editing a law review at a highly ranked law school, or clerking for a judge on one of the federal courts of appeals or for a justice of the Supreme Court.<sup>88</sup> So far, however, their tenure remains limited. State solicitors, like the Solicitor General, typically leave office as frequently as attorneys general do.<sup>89</sup> And because they usually act alone, without the institutional support that the Solicitor General can draw from the career appellate lawyers in his office, they do not benefit from the same sort of institutional credibility. It remains to be seen how many will stay in office long enough, or establish groups of assistants expert enough, to gain a reputation that in any respect resembles that of the Solicitor General.

---

87. There have been a few notable exceptions. A former Ohio solicitor was an unsuccessful candidate for Attorney General of Ohio in 1998. The current solicitor general of Florida has announced his candidacy for attorney general. But solicitors are more likely to aspire to be judges. Among the judges who served as state solicitors are Chief Justice Mary J. Mullarky of the Colorado Supreme Court, Justice Mick Gillete of the Oregon Supreme Court, and Judge Victoria A. Graffeo of the New York Court of Appeals.

88. See *e.g.* Elliott, *supra* n. 25 (noting that first Texas solicitor clerked for United States Supreme Court Justice Clarence Thomas and for Judge Edith Jones of the Fifth Circuit).

89. The most notable exception is the solicitor general of Tennessee. But the attorney general of Tennessee is appointed by the state's supreme court for an eight-year term, Tenn. Const. art. 6, §5, which has generally resulted in much less change in the senior staff in that office than in others.

The state solicitors are nonetheless determined, individually and as a group, to gain such a reputation and then to use it to promote the orderly development of the law. Their determination and the willingness of the attorneys general to permit them that role are both evident in the solicitors' work on briefs *amici curiae*. States, nearly always in briefs drafted by state solicitors or their deputies, appear as *amici* dozens of times each term in support of petitions for certiorari, and in more than a third of the cases that the Supreme Court considers on the merits.<sup>90</sup> They understand the importance of that work, and are making a coordinated effort to improve the quality of their *amicus* briefs, not just in writing style, but also in substance.

Equally important is their growing effort to identify private appeals in which they might participate as *amici* before state appellate courts. This effort demonstrates two key aspects of the solicitor's role that give hope for increased influence in the future. First, many of the cases in which the state solicitors are filing briefs are cases in which no single state agency has a particular interest. These are cases in which the state would not be likely to participate unless led by a solicitor who takes an expansive view of both the law and her responsibilities. Second, it is in those briefs that the solicitors demonstrate their ability to provide the sort of briefing—characterized by a broad vision, a consideration of long-term consequences, and a dedication to the rule of law—that make the Solicitor General's briefs so valuable to the Supreme Court. As the state solicitors demonstrate that they can provide meaningful assistance to the state courts, they begin to hope that the courts will call on them for assistance with difficult issues of state law, just as the Supreme Court turns to the Solicitor General for help in understanding difficult issues of federal law.

## VI. CONCLUSION

Giving state solicitors the opportunity to develop reputations for excellence and independence like that of the

---

90. Data compiled by the National Association of Attorneys General, on file with the author.

Solicitor General is not necessarily comfortable for state attorneys general, who are accustomed to working independently, and who expect to allow political considerations to color at least some of their legal decisions. But ultimately, the states will benefit from the growing prestige and influence of the state solicitors, just as the United States benefits from the influence of the Solicitor General. Appellate courts, too, will benefit from their growing reliance upon the influence and authority of state solicitors, who, like the Solicitor General, are dedicated to the rational development of the law.

TABLE 1

State	<i>Civil appeals: Role of Solicitor, Appellate Chief, or Unit</i>					<i>Solicitor also supervises criminal appeals</i>
	<i>Handles</i>		<i>Supervises</i>		<i>No such person/unit</i>	
	<i>Some</i>	<i>All</i>	<i>Some</i>	<i>All</i>		
AL	X		X			
AK					X	
AZ	X			X		X
AR					X	
CA					X	
CO				X		X
CT					X	
DE					X	
DC		X				
FL				X		X
GA					X	
HI	X			X		
ID					X	
IL				X		X
IN					X	
IA			X			
KS				X		X
KY					X	
LA					X	
ME					X	
MD	X			X		
MA					X	
MI				X		
MN	X		X			
MS					X	
MO	X			X		
MT					X	

State	<i>Civil appeals: Role of Solicitor, Appellate Chief, or Unit</i>					<i>Solicitor also supervises criminal appeals</i>
	<i>Handles</i>		<i>Supervises</i>		<i>No such person/unit</i>	
	<i>Some</i>	<i>All</i>	<i>Some</i>	<i>All</i>		
NE					X	
NV					X	
NH					X	
NJ	X			X		
NM					X	
NY	X			X		X
NC					X	
ND					X	
OH	X			X		X
OK					X	
OR		X		X		X
PA	X			X		
RI					X	
SC					X	
SD		X		X		X
TN	X			X		X
TX	X			X		X
UT	X		X			
VT	X			X		
VA				X		X
WA	X			X		X
WV					X	
WI					X	
WY					X	

