

# Investigation and Prosecution Legal Issues

## Investigations:

System Proposal	Legal Issue Level of Concern			Legal Issue Notes
<b>Current System – Independent Investigation Teams (IIT)</b>	WAPA KLG AGO			
<b>Separate Agency in Executive Branch</b> (similar to Department of Social and Health Services, Washington State Patrol, Health Care Authority, etc.)	KLG	WAPA AGO		<ul style="list-style-type: none"> <li>WAPA: concern that a separate agency would usurp the authority of the Sheriff if the jurisdiction is exclusive rather than concurrent</li> <li>KLK: the legislature can create exclusive jurisdiction</li> <li>AGO: constitutionality of an investigation may not hinge on whether the investigator is named in the constitution, but rather whether the investigator is properly authorized to act on behalf of the state and whether the investigation is consistent with the 4<sup>th</sup> and 5<sup>th</sup> amendments.</li> </ul>
<b>Separate Agency NOT in Executive Branch</b>	WAPA	AGO	KLG	<ul style="list-style-type: none"> <li>WAPA: concern that a separate agency would usurp the authority of the Sheriff if the jurisdiction is exclusive rather than concurrent. Greater concerns with non-executive branch agency</li> <li>KLK: No clear authority on point</li> <li>AGO: Greater concerns with non-executive branch agency</li> </ul>
<b>Division within Attorney General’s (AG) Office</b>	KLG		WAPA AGO	<ul style="list-style-type: none"> <li>WAPA: concern that a separate agency would usurp the authority of the Sheriff if the jurisdiction is exclusive rather than concurrent</li> <li>WAPA: concern of potential conflicts arising from prosecution and investigation being housed in same agency                             <ul style="list-style-type: none"> <li>Others believe this concern can be addressed</li> </ul> </li> <li>AGO: Limited statutory authority: no original criminal jurisdiction, no commissioned peace officers</li> </ul>
<b>Division within Auditor’s Office</b>	WAPA KLG		AGO	<ul style="list-style-type: none"> <li>WAPA: concern that the Washington Constitution does not authorize the auditor to conduct criminal investigations</li> <li>Constitution confers authority only for financial matters. See <a href="#">State ex rel. Graham v. San Juan County, 102 Wn.2d 311, 686 P.2d 1073</a> (1984)</li> <li>WAPA concern that assigning this task to the auditor would usurp the authority of the Sheriff</li> <li>AGO did not examine this question</li> </ul>
<b>Division within Washington State Patrol</b>	WAPA	AGO KLG		<ul style="list-style-type: none"> <li>WAPA concern that this would usurp the authority of the Sheriff if the WSP were given exclusive rather than concurrent jurisdiction</li> </ul>

## Prosecutions:

System Proposal	Legal Issue Level of Concern			Legal Issue Notes
<b>Current System</b> – County Prosecuting Attorney has decision-making authority	<b>WAPA</b> <b>KLK</b> <b>AGO</b>			<ul style="list-style-type: none"> <li>WAPA states this is consistent with Washington Constitution</li> <li>KLK finds the PA does not have sole jurisdiction now and AG may sometimes overrule PA</li> </ul>
<b>Separate Agency</b> – Agency outside Prosecuting Attorney or Attorney General	<b>WAPA</b>	<b>AGO</b>	<b>KLK</b>	<ul style="list-style-type: none"> <li>WAPA: concern that this would intrude upon the core functions of the county prosecuting attorney and cannot be accomplished without a constitutional amendment</li> <li>KLK: there are many agencies that do prosecution of cases using the AG now</li> <li>AGO: Greater concerns with non-executive branch agency.</li> <li>AGO: Concern is whether prosecutors are or can be properly authorized.</li> </ul>
<b>Attorney General</b> – Transfer of primary prosecutorial decision-making authority to AG	<b>KLK</b>		<b>WAPA</b> <b>AGO</b>	<ul style="list-style-type: none"> <li>WAPA: concern that this would intrude upon the core functions of the county prosecuting attorney if the Attorney General’s authority is exclusive and cannot be accomplished without a constitutional amendment</li> <li>AGO: This could possibly be challenged as taking away a core function of prosecutors but whether a court would agree is inconclusive.</li> </ul>
<b>Attorney General</b> – Concurrent jurisdiction with county Prosecuting Attorney	<b>WAPA</b> <b>KLK</b> <b>AGO</b>			<ul style="list-style-type: none"> <li>WAPA: Consistent with Washington Constitution under limited circumstances – prosecuting attorney consent or Governor request when prosecuting attorney refuses to act</li> <li>WAPA: concern that any expansion beyond the two circumstances mentioned above would intrude upon the core functions of the county prosecuting attorney <ul style="list-style-type: none"> <li>This view is not universally shared</li> </ul> </li> <li>AGO: Currently, a prosecution may be concurrent at the request of the prosecuting attorney or the Governor. But these limits don’t appear constitutionally required</li> </ul>
<b>Special Prosecutor</b> – Designated by Legislature on individual cases or all cases	<b>WAPA</b>	<b>AGO</b>	<b>KLK</b>	<ul style="list-style-type: none"> <li>WAPA concern that this would intrude upon the core functions of the county prosecuting attorney and cannot be accomplished without a constitutional amendment</li> <li>KLK has not examined this issue</li> <li>AGO: If Legislature lack power to create an agency with criminal prosecutorial authority, then it would presumably also lack power to appoint an unelected special prosecutor</li> </ul>

<b>Special Prosecutor –</b> Designated by Governor on individual cases	<b>KLG</b>	<b>AGO</b>	<b>WAPA</b>	<ul style="list-style-type: none"> <li>• WAPA concern that this would intrude upon the core functions of the county prosecuting attorney and those of the attorney general and cannot be accomplished without a constitutional amendment</li> <li>• AGO: If this was delegated to someone who already possesses the constitutional power to prosecute (county prosecutor or the AG) then presumably, the GOV would have the power to appoint a special prosecutor and his or her constitutional authority</li> <li>• AGO: yellow only because the legality of this is untested in the courts</li> </ul>
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**Key:**

- No legal or constitutional issues impacting this structure
- Potential legal or constitutional issues that may impact this structure
- Potential legal or constitutional issues, potentially more significant issues than yellow
- Legal or constitutional issues making this structure unadvisable

**AGO** = Attorney General

**KLG** = K&L Gates

**WAPA** = Washington Association of Prosecuting Attorneys