

How the Attorney General serves state agencies

Carolyn Thompson

Director of Government Affairs



The AG's Role is a statutory requirement

- State officers, boards and commissions are prohibited from employing their own attorneys
- Statute provides some exceptions
 - Retirement systems, Tax Commission, CLO, other law enforcement agencies, Department of Education, Pardon and Parole Board, etc.
- Boards with an exemption may still contract with the AG

74 OS 18C



20i Requirements

- State agencies and officials are required to contract with the AG's office for representation; *OR*
- Choose a private firm from a list of attorneys maintained by the AG
 - Agencies may choose someone else with the approval of the AG *only if* no firm on the list is capable; *OR*
 - If the AG is unable to represent the agency because the suit requires expertise, due to a conflict, or lacks sufficient personnel

74 OS 20i



20i Requirements

- AG provides representation to 90 agencies for 120 distinct functions
 - Assistant Attorney Generals (AAGs) provide the following services:
 - general counsel, litigation, judicial, prosecutorial, area-specific advising
- Contracts range from hourly to full-time
- Some attorneys are embedded with the agency based on need
- Annual report of agencies using outside counsel
 - Includes total spend as required by HB 3547 (2024)



General Counsel Services

- AAGs **ADVISE** on the requirements under the law
 - Open Meetings, Open Records, contracts, Administrative Procedures Act, employment law, etc.
- AAGs **DO NOT** make policy or determine outcomes
- Boards are empowered as the decision-making body by statute
- Counsel advises on how to implement the will of the board and the legal consequences of the board's actions



Litigation Representation

- Different division than Legal Counsel division
- AG represents any agency, board or commission that is sued unless they have a statutory exemption or request outside counsel through the 20i process
- AG also represents state officers and employees who are sued for official acts



Active Supervision

- Some licensing boards are controlled by individuals the board licenses
- Creates an incentive to limit competition from non-licensed providers
- SCOTUS requires an independent determination that the board's actions are consistent with the state regulatory scheme to avoid antitrust liability
- AG's office conducts these reviews

N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015)



Administrative Procedures Act (APA) Hearings

- A collection of statutes governing official actions by state agencies
 - a formal process to guide proceedings
 - allows decisions to be challenged by the public
- Prevents litigating every negative outcome in court
- “Individual proceeding”/hearing – formal process employed by an agency having jurisdiction to resolve issues of law or fact between parties and which results in the exercise of discretion of a judicial nature.

75 OS 250-323



APA Hearing Requirements

- Due Process
 - Notice of hearing
 - Opportunity to be heard (respond, right to counsel, and present evidence)
- Final Order
 - in writing, includes findings of fact and conclusions of law
- Party may request reconsideration for new evidence, point out errors
- Deliberations in executive session
- Party may then appeal to district court



AG's Role in APA Hearings

- Board Advisor
 - Educates the Board on its role as judge and decision maker
- Hearing Examiner
 - Administers the individual proceeding and provides a report to the Board
- Board Prosecutor
 - Represents the Board in a hearing before an administrative law judge, advises Board staff, assists with the investigation



Hearing Examiners or ALJ's

- Administrative Law Judges (ALJs) serve as an impartial judge on matters of licensure
- Hear evidence from both sides and make a recommendation to the Board or agency in the form of a proposed order
- Board/agency not required to adopt the proposed order
- Board/agency makes a decision and issues a final agency order
- ALJs are assigned to agencies to develop expertise



Preventing Conflicts

- Procedures exist if representing competing interests
- Internal memos govern sharing information
 - Prohibit representing attorneys from discussing any pending actions or sharing substantive information
 - Files and other documents are access-controlled



Example – Board license revocation

- We can ***advise*** when the Board conducts the hearing itself and decides whether to revoke
- We can ***administer*** a hearing and provide a report for the Board to use when deciding whether to revoke
- We can ***prosecute*** the hearing for the Board before an ALJ who decides whether to revoke



Questions?

