

PROSPECTIVE GUIDANCE BY STATE ATTORNEYS GENERAL

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ROLES OF THE ATTORNEYS GENERAL

- Prosecute antitrust violations
- Prosecute health care providers for violations of licensing laws
- Protect the integrity of charitable trusts
- Represent State agencies
 - advise
 - defend

PROSPECTIVE GUIDANCE

- Whom do the Attorneys General advise?
- What form may the advice take?
- What are the constraints?
- What are some examples of advice recently given?

Whom do the AG's Advise?

- The Governor
- The Legislature
- State Agencies
- Political Subdivisions
- Private Parties

What form may advice take?

Formal :

- Opinion of the Attorney General
 - required by constitution
 - published and indexed
 - process available only to state and local officials
 - on a significant legal question

What form may advice take?

Formal :

- Report of the Attorney General
 - self initiated
 - by statute
 - at the request of the Legislature
 - at the request of the Governor
 - on a significant issue

What form may advice take?

Formal:

- Guidelines

- National Association of Attorneys General

- Adopted by vote of the members

- State Guidelines

- Massachusetts guidelines on hospital mergers

What form may advice take?

Formal:

- Advice of Counsel
 - confidential
 - not subject to public document requests (FOIA equivalent)
 - process available only to state and local officials

What form may advice take?

Formal:

- Antitrust Business Review Letters
 - Very few States issue
 - Maryland and Ohio have active programs modeled after DOJ procedure
 - Minnesota and Virginia issued letters in the past
 - Florida issues antitrust no action letters under Florida Health Care Community Antitrust Guidance Act

What form may advice take?

Formal:

- Board Review Program

- In the 1980's the Maryland Antitrust Division reviewed the regulations and policies of state licensing boards to assure their compliance with the antitrust laws and published Board Review Reports.
- Since the 1990's Antitrust Division attorneys have worked with board counsel on specific issues with potential anticompetitive effects.

What form may advice take?

Informal:

- Many States give non-binding, informal advice to private parties
 - upon request on a case-by-case basis
 - few States have established mechanisms
- Many States educate the public on antitrust
 - distribute brochures
 - conduct seminars

Are there constraints?

- Attorneys General are not authorized by statute or constitution to give advisory opinions to private parties.
- Many offices lack the resources to respond formally to every inquiry.
- Many offices lack the procedures (e.g. no authority to issue regulations that would govern process) to give formal advice.

Recent Advice: Reports

- Office of the Arizona Attorney General, Update on Prescription Drug Prices (September 2002)
- Office of the Massachusetts Attorney General, Report to the Legislature on the Springfield Health Care Market (September 12, 2001)
- Office of the Washington Attorney General Report to the State Legislature, The Role of Antitrust Immunity in the Washington State Health Care Market (December 15, 1995)

Recent Advice: Opinions

- Tex. Atty. Gen. Op. JC-0447 (12/27/01)
(May a hospital may contract exclusively with a single medical insurance provider?)
 - “Generally, it is beyond the purview of the opinion process to construe contracts or scrutinize particular contractual arrangements, especially those between private entities, and to determine whether they satisfy specific statutory criteria, or are otherwise legally permissible.”

Recent Advice: Opinions

- Ark. Op. Atty Gen. No. 2001-167 (7/19/01) (Does Arkansas Staffing Assn. Plan to establish a credit-reporting program violate Arkansas antitrust law?)
 - “Although the Attorney General is required to provide opinions on certain matters of state law to members of the General Assembly and various state officials...I am prohibited from engaging in the private practice of law. Consequently, I suggest the association seek advice from private counsel or the United States Department of Justice.”

Recent Advice: “Informal Opinion”

- Letter from Assistant Deputy Attorney General of South Carolina to Mayor Salley, Salley, S.C. (11/18/96) (Does an ordinance forbidding anyone other than the Town of Salley to sell “chitlins (fried, boiled or raw) on the day of [the annual festival called] the Chitlin Strut” violate antitrust laws?)

Recent Advice: No-Action Letter

- Florida Office of the Attorney General Antitrust No-Action Letter, No. NAL-98-01 (7/2/98) (Proposed dental care provider networks to be operated in connection with discounted fee-for-service dental program and employer self-funded dental managed care plans on balance will not have substantially adverse effect on competition in any relevant market)

Recent Advice: No-Action Letter

- Florida Office of the Attorney General Antitrust No-Action Letter No. NAL 97-01 (4/23/97) (Dental Society's proposed survey, report and exchange of fee-related information fall within the safety zones established by FTC and DOJ Statements of Antitrust Enforcement Policy in Health Care and under a rule of reason analysis would not violate antitrust laws)

Recent Advice: Business Review Letter

- Letter from Doreen Johnson, Assistant Attorney General of Ohio to Michael M. Briley, Esq. And C. Philip Baither, III, Esq. (6/26/98) re: proposed joint venture between Medical College of Ohio at Toledo and St. Vincent Mercy Medical Center with respect to academic and clinical pediatrics.

Recent Advice: Business Review Letter

- Letter from Ellen Cooper and Katharine Ebersberger, Assistant Attorneys General of Maryland to Guy W. Warfield, Esq. (6/19/95) re: proposed formation of network of eleven hospital-based home health care agencies, a durable medical equipment company and a home infusion company to provide statewide coverage of home care services

CONCLUSION

- Although most States prohibit advising private parties, Attorneys General perceive a mission to educate the public.
- To the extent State Attorneys General offer formal prospective advice, procedures are underutilized.