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## CHAPTER 2

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### Funding Mechanism for Board Representation Is Inflexible and Will Not Cover Increased Costs

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Statutes require the Attorney General to provide professional licensing boards and commissions (boards) with legal representation, both in contested cases and by providing legal advice. The Office has assigned two staff attorneys to provide board representation, and most of the 30 boards analyzed in this chapter use the services of these two attorneys. However, some boards use other Attorney General staff and a few have opted to contract with private attorneys. All 30 boards pay for Attorney General representation, whether they make use of it or not.

To pay for representation, the Legislature established a fund that receives half the interest earned on each board's licensing revenue. The boards' combined demands for legal services are increasing beyond what the two attorneys can provide, yet too little revenue flows into the fund to cover the cost of additional representation. The Attorney General has taken some steps to alleviate the workload, but other alternatives, including possible statutory changes, need to be explored. Alternatives range from restricting the use of limited staff resources to leveraging more funding for legal services.

#### Statutes Require Attorney General Representation of Boards

***Attorneys provide boards with two types of legal services.***

Several statutes require the Attorney General to provide legal services, both advisory and prosecutorial, to professional licensing boards. W.S. 16-3-102(c) in the Wyoming

**Advisory representation** includes reviewing contracts and proposed rule changes, writing Attorney General opinions, defending boards when they are sued, and appellate work.

**Prosecutorial services** include assisting with pleadings, conducting investigations, drafting the charging documents, and prosecuting disciplinary cases before boards.

***Wyoming  
Administrative  
Procedure Act  
requires the Attorney  
General to represent  
licensing boards.***

Administrative Procedure Act requires the Attorney General to furnish assistance to all state agencies on the preparation of rules. W.S. 16-3-112(c) allows a board to request assistance from the Attorney General when a contested case arises. In addition, W.S. 9-1-608(b) provides that no board may hire an attorney to represent the state without written appointment by the Attorney General. Since boards issue or renew approximately 20,000 licenses per year and their members may not be experts in the law, they need legal advice when carrying out functions such as investigating complaints and suspending and revoking licenses.

**Boards serve both the public and license holders**

The state's interest in representing boards relates largely to consumer protection, and stems from a desire to protect the public from unscrupulous and unqualified practitioners. In numerous sections, Title 33 directs boards to enforce the standards of their professions. Thus, consumers can turn to boards with questions and an expectation that appropriate action will be taken with regard to complaints.

***Wyoming Supreme  
Court has held that a  
professional license  
is a protected  
property right.***

The state also has an interest in the rights of license holders. The Wyoming Supreme Court has held that professional licenses are a crucial means of making a living, and that a license is a protected property right with substantial private interest. Consequently, the state seeks to ensure that license holders receive fair treatment in any board action against them, such as suspensions and revocations.

**Attorney General Has Modified the Way  
Boards Get Legal Representation**

For many years, responsibility for representing boards was spread among numerous attorneys in the Office; they had other priorities and often saw this work as a secondary assignment. In 1996, the Office assigned two attorneys to perform that work exclusively, and the Legislature established a statutory funding mechanism to pay for them out of the interest generated on boards' accounts. The two attorneys shared the workload, providing a range of legal services to most of the boards.

**Office assigns one attorney to prosecute, and the other to advise.**

Two Wyoming Supreme Court decisions in 2001 changed the way the Office provides legal representation. The decisions focused on the necessity of providing impartial representation for licensing boards, both in practice and appearance. Although its practices were not questioned, the Office reinforced the “ethical wall” between functions by assigning one attorney to prosecute cases and the other to advise boards. Further, to preclude interaction between the two, they were assigned to separate divisions, with different supervisors and offices.

### **Boards Receive Legal Representation, But Not Just From the Attorney General's Office**

**Thirty boards are entitled to receive Attorney General services, but fewer do.**

Thirty occupations and professions have boards that pay for and receive, or are entitled to receive, legal representation from the Attorney General's Office. W.S. 33-1-201 and 202 require these boards to pay half the interest generated on their individual enterprise (operating) accounts into a fund dedicated to the costs of representation. However, some of the boards do not use the Attorney General services that could be available to them. In addition, the Attorney General's Office is not the only provider of legal representation to the 30 boards. (*See Appendix B, Title 33 Board and Commission Legal Representation*)

- Twenty-four of the 30 boards pay into the fund and receive representation from two full-time attorneys in the Office whose salaries are paid out of the fund.
- One other board uses Attorney General staff for advisory representation, but also contracts with a private sector attorney for prosecutorial legal services.
- Three boards pay into the fund and receive Attorney General representation, but from three different attorneys in the Office whose primary assignments are to represent larger agencies. The fund pays part of one of these salaries.
- Two boards are not, for the most part, served by the Attorney General's Office, although they pay into the

fund and by virtue of that fact, could presumably call upon the Attorney General for full representation. These two boards contract with private attorneys for legal services and pay for them independently.

## **Boards Have Legal Representation Regardless of Ability to Pay**

Under this funding arrangement, the amounts of interest the 30 boards pay into the fund vary widely, depending on factors such as membership size and frequency and cost of re-licensing. By statute, each board sets its own license fee amounts and boards cannot charge their members more than it costs to operate. Since the fund's inception in 1996, the interest contributions from individual boards have ranged from \$1,625 to \$138,282. *(See Appendix C, Board Contributions)*

### ***A few boards under-write most of the costs of Attorney General representation.***

A benefit of this funding mechanism is that boards receive the legal representation they need without regard to the amount each has paid into the fund. For example, when a contested case arises, the Office attorney assigned to prosecute cases can set aside disproportionate resources to address the matter, regardless of the size of the board's past contributions to the fund.

However, payment into the fund and consumption of legal services are not necessarily proportional. Just a few boards under-write most of the costs of representation. For example, since the fund's inception, four boards with large memberships have contributed 42 percent of the revenue flowing into the fund. By contrast, ten small boards paid in less than \$10,000 apiece, or 7 percent of the total, during that period.

## **Sharing the Cost of Representation Benefits Small Boards**

Since the funding mechanism ensures adequate representation regardless of the amount contributed, the present arrangement works to the smaller boards' advantage. Based on the amounts they have paid into the fund, most small boards could afford very little legal representation if they were required to pay by the

hour. For example, we estimate that at a rate of \$45 per hour for in-house (Attorney General) legal counsel, six of the boards paying into the fund could have purchased an average of less than two hours of legal service per month. This small amount of representation might not suffice if a contested case arose.

***More boards would contract with outside counsel, but Attorney General wants to keep contracting at a minimum.***

Although the current funding mechanism helps ensure that the boards' representation needs are a priority for the Attorney General's Office, some boards chafe at the limitations the system imposes. Some that have sufficient funding want to contract with outside counsel, rather than use the two board attorneys. For economy and effectiveness reasons, the Attorney General's Office believes it is important to keep such contracts to a minimum, even though a change in this policy might ease the workloads of the two attorneys.

### **Office Lacks Data on Use of Attorney Time by Each Board**

***No records to show which boards use the most legal services.***

Neither the Attorney General's Office nor the boards themselves keep time records to show which boards make heaviest use of legal services. The Office states that a few boards absorb the vast majority of the two attorneys' time. However, it does not keep attorney time records by board, believing that from an accounting perspective, that would be unnecessary since the funding comes from one source. As a result, it cannot supply precise information about which boards use the most services and what the trends in use have been.

Since information on attorney time expended per board was not available, the Office gathered other data from the boards, such as the number of suspensions and revocations assisted with and the number of meetings attended. These numbers give only a general indication of which boards take the most attorney effort, and the Office reports weaknesses in consistency among board reports, so we made limited use of the information.

## **Heavy Workloads Lead to Request for More Staff**

***Governor denied FY '03-'04 request for more board attorneys.***

The Attorney General's Office and other executive branch officials report that overall, the boards' demands for legal services are steadily increasing. The Office points to a rise in the number of letters of advice written, contested cases staffed, and contract and rule reviews performed in 2001. The Office requested two additional positions in its FY '03-'04 budget request, but the Governor denied the request. The Attorney General has described the attorneys' present workload as "excessive and unworkable." The Office's strategic plan says it will continue to pursue additional positions to meet the representation needs of the licensing boards.

## **Payment Mechanism Does Not Cover All Costs at Present, and May Not Support Growth in Those Costs It Does Cover**

More boards pay into the fund than use the services of the two attorneys, which means the fund is not covering the full cost of providing representation to boards. At present, three of the 30 boards hire private counsel and make few or no demands on the two staff attorneys. Another three boards receive part-time representation from three different assistant attorneys general; only part of one of those salaries is charged to the fund.

***Even with some boards funding their own legal costs, the fund is barely keeping up with the draw on it.***

If the costs of services for all 30 boards were attributed to the fund, the income stream would be insufficient to cover total costs. Similarly, if all boards turned to the two attorneys assigned to this work for legal representation, the resulting workload would be overwhelming.

Currently, the fund is barely keeping pace with the draw on it. The Department of Administration and Information (A&I) administers the fund; it transfers money to the Attorney General's budget to cover salary and benefit costs of the two attorneys, partial costs for a third, and certain other support costs.

***Annual interest earnings have ranged from \$112,912 to \$145,488; costs, from \$120,364 to \$153,242.***

In its six years of existence, the most interest earnings the fund has generated in one year is \$145,488 and the least is \$112,912. However, in recent years (FY '98 - '01), annual charges to the fund have ranged from \$120,364 to \$153,242. Thus, the fund's income stream has not always been sufficient to cover expenditures, and its cash balance, which was \$102,469 at the end of FY '02, has been slowly decreasing.<sup>1</sup>

According to A&I officials, the fund will fall short of covering estimated costs of these attorneys in FY '03. With the steep decline in interest rates experienced during 2001 and 2002, even previous earning levels may not be sustained. In addition, any future increased salary, benefit, and support costs for the two attorneys will further draw down the fund's balance.

### **Recommendation: The Legislature and Attorney General's Office should explore alternatives for funding the boards' legal representation.**

The statutory funding mechanism that pools half of the boards' interest to pay for legal representation was not necessarily developed with an eye to its ongoing ability to cover expanding costs. Nevertheless, it has been successful for several reasons: not all costs of legal representation have been charged to it, not all boards that pay for Attorney General services use them, interest rates have produced adequate returns, and the two attorneys have been able to manage heavy caseloads.

***Attorney General could research options and make recommendations.***

Currently, however, several of these circumstances are changing. With declining interest rates, increasing demand for services, and no statutory means of generating more money to pay for additional staff, the system is facing new pressures. In light of changing conditions, the Legislature needs to assess the long-term adequacy of the funding mechanism. To assist in that effort, it can request the Attorney General's Office to bring forward research and recommendations on various options.

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<sup>1</sup> Should a shortfall occur, the executive branch can, with the Governor's approval, transfer funds through the "B-11" process.

Some possibilities are discussed below.

### **Some Alternatives Call for Management Changes**

***Attorney General is already taking steps to improve board expertise and ration use of legal services.***

One approach would involve some rationing by the Office of the boards' use of legal services, coupled with a directed effort to improve board expertise. Both are underway: the two attorneys no longer routinely attend board meetings and instead, encourage the boards to submit lists of concerns and issues for attorney review prior to meetings, or to phone in questions that come up during meetings. Also, the Office is working to increase board expertise by offering member training sessions and developing a manual for use in conducting investigations. Further management initiatives may be possible.

Alternatively, the Attorney General could allow more boards that can afford it to contract for outside counsel at their own expense. This would have the advantage of reducing the workloads of the two attorneys, although we expect the Office would need additional staff to supervise and coordinate these contractors in order to maintain consistency and integrity in the state's legal position. Under this scenario, all boards currently paying into the fund for legal representation would continue to do so.

### **Fundamental Changes Require Statutory Amendment**

***Legislature could increase interest percentage earmarked for legal representation.***

To generate increased funding for additional staff, the Legislature could raise the percentage of funding earmarked for the boards' legal representation. To do this, the Legislature could amend the professions and occupations statute (Title 33) to increase the 50 percent to a higher figure. However, this would decrease the boards' operating income and also might be only a stopgap measure, should interest rates remain low and the demand for services continue to increase. The Legislature could also designate new sources of funding for additional positions.

Another option would be to abandon the current system and institute an "enterprise model" of charging each board directly for the Attorney General legal services it uses. While this approach has intuitive appeal, the Legislature would need to amend the Wyoming Administrative Procedure Act (Title 16) so boards could be treated differently than agencies in this regard.



***Options requiring boards to pay for the legal services they use may prompt them forego seeking preventive advice.***

Also, numerous current and former executive branch officials note that under such a system, boards might be unduly concerned with costs and might choose to forego needed legal advice at the early stages of a problem. This creates potential for subsequent and larger legal difficulties if problems are not caught early, and illustrates the “preventive aspect” of providing adequate representation, which is difficult to quantify.

A variation on this approach would involve hiring attorneys as at-will-employee-contractors and billing the cost of their services to the individual boards. However, the Attorney General cautions that private sector attorneys may lack critically important expertise in administrative law. Also, this and the previous approach may be premature since data does not exist to show the frequency with which some small boards with little revenue may require a large number of hours of representation. The Office recently began requiring the two attorneys representing boards to track their time, and presumably will begin building a database of that information.

***Funding board representation from the General Fund would give the Legislature control over costs.***

Finally, some states deposit licensing fees directly into the General Fund, and appropriate General Funds to the boards for their operations. The theory behind this approach is that licensing boards exist to protect the public, and General Funds are appropriately used for that purpose. While the Legislature may not wish to move fully in this direction, it could consider depositing the 50 percent of interest earned on boards' accounts into the General Fund and then appropriating funding for board representation to the Attorney General's Office. This approach has the advantage of giving the Legislature more direct knowledge of and control over the cost of the boards' representation.

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