

**THE LITIGATION SECTION'S
RULES OF ENGAGEMENT
FOR REPRESENTATION OF STATE OFFICIALS AND
STATE EMPLOYEES
SUED IN THEIR INDIVIDUAL CAPACITIES.**

This internal policy of the Litigation Section covers representation of State officials and employees by Assistant Attorneys General or by private counsel furnished by an appointing authority or other governmental unit of State government in civil proceedings in which State officers, agents and employees are sued, subpoenaed, or charged in their individual capacities.

Under the procedures set forth below, a State employee (hereby defined to include present and former State agents, officials and employees) may be provided representation in civil matters in which they are sued, subpoenaed, or charged in their individual capacity when the actions for which representation is requested reasonably appears to have been performed within the scope of the employee's employment as determined by the Attorney General and the Attorney General determines that providing representation would otherwise be in the interest of the State of Oklahoma.

Personal representation of State employees is necessary only when they are sued in an individual capacity for damages. When an employee is sued in his or her individual capacity, he or she is the personal target of the lawsuit. The plaintiff seeks recovery from the personal assets of the employee. State employee sued in their individual capacities may have a right of indemnification. When a government employee is sued in an official capacity, the real defendant is the State. Should relief be awarded, it would be against the resources of the State of Oklahoma. The Attorney General represents State officials sued in their official capacities for declaratory, injunctive or other forms of relief.

NOTIFICATION:

When a State employee believes he is entitled to representation by the Attorney General or an agency attorney in a proceeding, he must submit immediately (but not more than 15 days after service of summons or actual notice of litigation) to the Attorney General, the employee's immediate supervisor and the head of the appointing authority a written request for representation together with all paper work, pleadings or other information that may have been served, mailed or otherwise

provided to the employee. Unless the State employee's appointing authority concludes that representation is clearly unwarranted, the appointing authority will submit, within five (5) working days, to the Litigation Section a statement containing its findings as to whether the State employee was acting within the scope of his employment and its recommendation for or against providing representation. The statement should be accompanied by all available factual information. In emergency situations, the Litigation Section may initiate conditional representation after a telephone request from the appropriate official of the appointing authority. In such cases, the written request and appropriate documentation must be subsequently provided.

SCOPE OF EMPLOYMENT:

Upon receipt of the individual's request for counsel, the Litigation Section will determine whether the State employee's actions reasonably appear to have been performed within the scope of his employment and whether providing representation would be in the interest of the State of Oklahoma and in compliance with Title 74, Section 20f and Title 51, Section 162.

In circumstances where considerations of professional ethics prohibit direct review of the facts by attorneys of the Litigation Section (e.g., because of the possible existence of inter-defendant conflicts), the Litigation Section may delegate the fact-finding aspects of this function to other components of the Office of the Attorney General or to a private attorney.

ATTORNEY/CLIENT PRIVILEGE:

Attorneys, who are employed by any component of the Office of the Attorney General and who participate in any process utilized in determining whether the State should provide representation to a State employee should not undertake a full and traditional attorney-client relationship with the State employee during the investigation to determine representation. During this investigation stage the employee should be informed that no attorney-client privilege exists and will not exist until such time as representation is authorized by the Attorney General.

If representation is authorized, Assistant Attorneys General or assigned attorneys who represent a State employees in their individual capacities will undertake a full and traditional attorney-client relationship with the State employee with respect to the attorney-client privilege. Any adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Office of the Attorney General, other than attorneys responsible for representation of the State

employee, unless such disclosure is authorized by the State employee. Such adverse information shall continue to be fully protected whether or not representation is provided, and even though representation may be denied or discontinued. The extent, if any, to which attorneys employed by an appointing authority other than the Office of the Attorney General undertake a full and traditional attorney-client relationship with the State employee with respect to the attorney-client privilege, either for purposes of determining whether representation should be provided or to assist Assistant Attorneys General in representing the State employee, shall be determined by the appointing authority employing the attorneys.

CRIMINAL PROCEEDINGS:

Generally, representation by the Office of the Attorney General is not available to State employees in criminal proceedings.

POSSIBILITY OF CRIMINAL PROCEEDINGS:

Where representation is sought and where there may appear to exist the possibility of a criminal investigation or indictment relating to the same subject matter, the assigned attorney shall contact an official in the one of the Criminal units of the Office of the Attorney General or other prosecutorial authority within the State to determine whether the State employee is either a subject of a criminal investigation or a defendant in a criminal case.

A State employee is considered to be the subject of an investigation if, in addition to being circumstantially implicated by having the appropriate responsibilities at the appropriate time, there is some evidence of his specific participation in a crime.

The assigned attorney shall not disclose any privileged information to the prosecutorial entity at any time during any contacts with prosecutorial entities.

If a prosecuting entity indicates that the State employee is not the subject of a criminal investigation concerning the act or acts for which he seeks representation, then representation may be provided if otherwise permissible. Similarly, if the prosecuting division indicates that there is an ongoing investigation, but into a matter unrelated to that for which representation has been requested, then representation may be provided.

If the prosecuting units of the Office of the Attorney General indicate that the State employee is the subject of a criminal investigation concerning the act or acts for which he seeks representation, the Litigation Section shall inform the State employee

that no representation will be provided in any related civil proceeding. In such a case, however, the appointing authority, if authorized by law, may provide a private attorney to the State employee at the expense of the appointing authority, provided no decision has yet been made to seek an indictment or file an information against the State employee.

REPRESENTATION BY THE OFFICE OF THE ATTORNEY GENERAL:

In any case where it is determined that the Office of the Attorney General may represent a State employee, the State employee should be notified of his right to retain private counsel at his own expense. If the State employee elects representation by the Office of the Attorney General, the State employee and his appointing authority should be informed:

- (1) That in actions where the State, any appointing authority, or any officer thereof in his official capacity is also named as a defendant, the Office of the Attorney General is required by law to represent the State and such appointing authority or officer and will assert all appropriate legal positions and defenses on behalf of such appointing authority, officer and the State of Oklahoma;
- (2) That the Office of the Attorney General will not assert any legal position or defense on behalf of any State employee sued in his individual capacity which is deemed not to be in the interest of the State of Oklahoma or which violates any policy of the Office of the Attorney General;
- (3) Where appropriate, that neither the Office of the Attorney General nor any appointing authority of the State of Oklahoma is obligated to pay or to indemnify the State employee for any judgment for money damages which may be rendered against such employee; but that, where authorized, the State employee may file suit in state district court for indemnification from his appointing authority upon the entry of an adverse verdict, judgment, or other monetary award;
- (4) That any appeal from an adverse ruling or judgment against the State employee may only be taken upon the discretionary approval of the Office of the Attorney General, but the State employee may pursue an appeal at his own expense whenever the Office of the Attorney General declines to authorize an appeal and private counsel is not provided at State's expense; and

- (5) That while no conflict appears to exist at the time representation is tendered which would preclude making all arguments necessary to the adequate defense of the State employee, if such conflict should arise in the future, the State employee will be promptly advised and steps will be taken to resolve the conflict, and
- (6) That personal or individual counter claims, cross-claims or other affirmative causes of action that the individual may desire to bring will not be presented by the assigned attorney, but that such claims may be prosecuted by private counsel at the expense of the State employee.

DENIAL OF REPRESENTATION:

If a determination to not provide representation is made, the Litigation Section shall inform the appointing authority and/or the State employee of the determination.

CONFLICTS OF INTEREST:

If conflicts exist between the legal and factual positions of various State employees and make it inappropriate for a single attorney with the Office of the Attorney General to represent them all, the State employees may be separated into as many compatible groups as is necessary to resolve the conflict problem and each group may be provided with separate representation. Representation of compatible groups shall be properly screened by each attorney. Circumstances may make it advisable that representation may be referred back to the employee's agency for representation by agency counsel or by private representation at the expense of the referring agency.

APPEALS:

Whenever the Office of the Attorney General declines to authorize further appellate review or the attorney assigned to represent a State employee becomes aware that the representation of the State employee could involve the assertion of a position that conflicts with the interests of the State of Oklahoma, the attorney shall fully advise the State employee of the decision not to appeal or the nature, extent, and potential consequences of the conflict. The attorney shall also determine, after consultation with his supervisor (and, if appropriate, with the litigating agency) whether the assertion of the position or appellate review is necessary to the adequate representation of the State employee and

- (1) If it is determined that the assertion of the position or appeal is not necessary

to the adequate representation of the State employee, and if the State employee knowingly agrees to forego appeal or to waive the assertion of that position, governmental representation may be provided or continued; or

- (2) If the State employee does not consent to forego appeal or waive the assertion of the position, or if it is determined that an appeal or assertion of the position is necessary to the adequate representation of the employee, an Assistant Attorney General may not provide or continue to provide the representation; and
- (3) In appropriate cases, a private attorney may be provided at the expense of the appointing authority.

CONTINUATION OF REPRESENTATION:

Once undertaken, representation of a State employee will continue until either all appropriate proceedings, including applicable appellate procedures, have ended, or until any of the bases for declining or withdrawing from representation set forth in this section is found to exist, including without limitation the basis that representation is not in the interest of the State of Oklahoma. If representation is discontinued for any reason, the assigned attorney on the case will seek to withdraw but will take all reasonable steps to avoid prejudice to the State employee.

SETTLEMENT:

The Office of the Attorney General may settle or compromise a personal damages claim against a State employee, at any time, provided the alleged conduct giving rise to the personal damages claim was within the scope of that State employee's employment and that such settlement or compromise is in the best interests of the State of Oklahoma as determined by the Attorney General or his designee.

UNAVAILABILITY OF REPRESENTATION:

Representation is not available to a State employee whenever:

- (1) The conduct with regard to which the State employee desires representation does not reasonably appear to have been performed within the scope of his employment; or
- (2) The State employee does not cooperate in the representation, or
- (3) The State employee was not acting in good faith, or

- (4) It is otherwise determined by the Office of the Attorney General that it is not in the interest of the State of Oklahoma to provide representation to the State employee.

INDEMNIFICATION

An appointing authority may indemnify a State employee upon the filing by the employee of an action in district court for the indemnification from any verdict, judgment, or other monetary award which is rendered against that employee, provided that the conduct giving rise to the verdict, judgment, or award was taken within the scope of that State employee's employment and that such indemnification is in the best interests of the State of Oklahoma, as determined by the Attorney General.