The Practitioner's Toolbox: California Attorney General Opinions

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One of the great pleasures of writing for the HLB Monthly Digest is the opportunity to share an interesting development (or in this case, an interesting area of the law) with our community. As a former Deputy Attorney General, I know firsthand that advisory opinions published by the California Attorney General's Office are an often overlooked yet important aspect of California jurisprudence.

Enacted in 1945, Government Code section 12519 requires the Attorney General to provide formal written opinions on questions of law to designated state and local public officials, as well as government agencies. The section of the California Attorney General's Office tasked with drafting the opinions is the appropriately named, "Opinion Unit." The Opinion Unit is not focused on a particular area of the law, but rather researches and drafts opinions on legal questions ranging from criminal law to redistricting to healthcare, and nearly everything in between. Both pending questions and prior opinions are made publicly available online.[1] Although the opinions are intended to provide specific guidance to state agencies and designated public officials, the opinions related to healthcare can likewise provide useful guidance to healthcare providers and their counsel.

Below we will examine two recent examples in the healthcare context, and then review the level of deference courts give to Attorney General Opinions.

California's homelessness crisis deepened during the COVID-19 pandemic, which prompted creative solutions to provide care to this vulnerable population. In February of this year, the Honorable Thomas J. Umberg, State Senator, received an opinion from the Attorney General as to whether a declaration of a shelter crisis under Government Code section 8698, or a state of emergency under Government Code section 8625, creates or defines a "scene of emergency" for the purposes of the Good Samaritan law found in Health and Safety Code section 1799.102. The rationale is that medical professionals would like to volunteer to provide medical services to people without homes, but are understandably concerned with how it may affect issues such as insurance coverage and liability. Thus, Senator Umberg questioned whether the Good Samaritan law may provide practitioners with some protection. The Attorney General issued a nine-page opinion that examined both statutes and case law, and ultimately opined that "such declarations do not, in and of themselves, categorically create or define a scene of an emergency."[2]

Notably, the opinion contrasted the immunity provided under the Good Samaritan law with the immunity for medical professionals found in the Emergency Services Act.[3] The Emergency Services Act was used during the pandemic to protect medical providers from liability when acting at the direction of state and local officials during the Governor's declaration of emergency.[4] The Opinion makes the distinction that the Emergency Service Act does not require the care to be provided at the scene of an emergency for immunity to apply, just the declaration of an emergency; whereas, the Good Samaritan law provides protection for rendering care to individuals who are "in need of immediate medical attention." In other words, according to the Attorney General's Office, for the Good Samaritan law to apply there must be an immediate need for medical care.

The Attorney General has also issued opinions relevant to my practice area, the Medical Staff bar. In April 2020, the Medical Board of California obtained an opinion on the meaning of the term "effective date," as used in Business and Professions Code section 805. Section 805 requires an "805 report" to be filed with the relevant licensing agency "within 15 days after the effective date" that a peer review body takes certain actions for a medical disciplinary cause or reason.[5] Those actions include: denial or rejection of a licentiate's application for membership or staff privileges; termination or revocation of a licentiate's membership, staff privileges, or employment; or the imposition of restrictions (including voluntary restrictions) on

staff privileges, membership, or employment for a cumulative total of 30-days or more in a 12-month period. [6] A failure to file an 805 report can result in significant fines, up to $100,000 per violation. [7] As a result, the definition of "effective date" is very important.[8]

The Attorney General opined that "'effective date' for these purposes means the date on which the triggering decision becomes final, which will generally be following the conclusion of the licentiate's appeal of the peer review body's decision." [9] In the past, due to the ambiguity some facilities have failed to *timely* file 805 reports and were often a few days to several months late depending on the definition they applied. Although 805 reports were ultimately filed, the Medical Board nonetheless took action against those facilities. This Attorney General Opinion defining the "effective date" is helpful to assist facilities in understanding when they must file a timely report.

These are two of a myriad of examples in the healthcare context, and the opinions provide guidance on relevant topics. However, they are *opinions* and do not have the force or effect of law. They are entitled to "great weight," and courts acknowledge that affected members of the public will rely on the opinions contained therein, however they are not binding on the judiciary.[10] For example, in *City of Long Beach v. Department of Industrial Relations*, the California Supreme Court declined to accept the Attorney General's opinion because it "seem[ed] inconclusive for our purposes," however it reiterated that such opinions were entitled to "considerable weight" but were not binding on the courts. [11]

In practice, the detailed analyses can provide practitioners and legal counsel with potential defenses or a roadmap for potential challenges. Importantly, while the final opinions are made publicly available on the Department of Justice website, the request and any related documents are not. A Public Records Act request is required to obtain those documents which may provide additional context to support a defense or challenge. Legal counsel can assist in evaluating what options are most appropriate for a particular situation.

Ultimately, the Attorney General Opinions are an often overlooked but important tool in the practitioner's proverbial toolbox. When viewed in relation to relevant caselaw, statutes, and regulations, the opinions may provide clients with important insight into their legal obligations or these opinions can be strategically used as persuasive authority depending on the context and circumstances.

If you have any questions, please reach out to attorneys at Hooper, Lundy, and Bookman. Please contact Matt Lahana in San Diego, Emily Brinkman in San Francisco, or any other member of our Hooper, Lundy & Bookman team.

[1] The official website for reviewing the opinions is here.

[2] 105 Ops.Cal.Atty.Gen. 7 (Feb. 3, 2022), available here.

[3] *See* Gov. Code § 8659, subd. (a) [providing immunity to "any physician or surgeon (whether licensed in this state or any other state), hospital, pharmacist, respiratory care practitioner, nurse, or dentist who renders services during . . . a state of emergency . . . at the express or implied request of any responsible state or local official or agency . . . ."].

[4] Peabody, Jr. & Brinkman, *States Acting to Limit Legal Liability of Healthcare Providers, Physicians and Healthcare Professionals for Care Provided During COVID-19 Pandemic* (May 11, 2020), available here.

[5] *See* Bus. & Prof. Code, § 805, subd. (b).

[6] *Ibid.*

[7] Bus. & Prof. Code, § 805, subd. (k)-(l).

[8] For clarity, summary suspensions taken to prevent imminent harm to patients or staff that remain in effect for a period in excess of 14-days are reportable and must be filed within 15-days following the imposition of summary suspension. (Bus. & Prof. Code, § 805, subd. (e).)

[9] 103 Ops.Cal.Atty.Gen. 27 (April 17, 2020), available here.

[10] *Natkin v. California Unemployment Ins. Appeals Bd.* (2013) 219 Cal.App.4th 997, 1006-1007.

[11] *City of Long Beach v. Dep't of Ind. Relations* (2004) 34 Cal.4th 942, 952.

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