

The OAH



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Official Newsletter of the Arizona Office of Administrative Hearings

Representation in ROC Disciplinary Proceedings

by Daniel G. Martin, Administrative Law Judge

Introduction

One of the first questions that confronts a contractor facing a Registrar of Contractors ("ROC") disciplinary proceeding is the question of representation. Contractors often choose to retain legal counsel in such proceedings, but many contractors choose to represent themselves. The following article provides a brief overview of who may represent a contractor in a disciplinary proceeding, and under what circumstances.

ROC Disciplinary Proceedings: A Brief Overview

When a complaint is filed with the ROC against a licensed contractor, the ROC initiates an investigation. If, after completion of its investigation, the ROC believes that grounds exist that may support the imposition of discipline against the contractor, the ROC will issue a Citation and Complaint against the contractor's license. The ROC may also issue a Citation and Complaint at the request of the complaining party. Generally, the Citation and Complaint will allege one or

more violations of Arizona Revised Statutes ("A.R.S.") § 32-1154(A), which sets forth the grounds upon which a contractor's license may be suspended or revoked.

If the ROC issues a Citation and Complaint against a contractor's license, the contractor is required to file a written answer within ten (10) days (an additional five (5) days are permitted if the answer is sent by mail). If the contractor fails to answer within the required time period, the ROC deems such failure an admission of the charges set forth in the complaint, and may take disciplinary action against the contractor's license without any further proceedings. Typically, however, a contractor against whom a Citation and Complaint has been issued files a written answer, and the case is thereafter referred for hearing to the Office of Administrative Hearings ("OAH").

ROC hearings are conducted before OAH Administrative Law Judges. ROC hearings are adversarial, and are conducted in a manner similar to judicial proceedings. Attendance is required, and all parties must be prepared to present evidence in support of their position.

If after hearing a contractor is found to have violated one or more provisions of A.R.S. § 32-1154(A) (or other statutory provisions, as applicable), the ROC may impose

Director's note: OAH is committed to fairness and making hearings accessible to all. The above article, originally written for and published in the January 2003 ROC Newsletter, is part of a series of informational articles to educate the public and parties who appear before us about the hearing process and how to better present their cases. The article may be found at OAH's website at www.azoah.com along with all previous articles published in the OAH Newsletter.

"Representation"

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The Office of Administrative Hearings (OAH) began operations on January 1, 1996. Administrative Hearings previously provided by regulatory agencies (except those specifically exempted) are now transferred to the OAH for independent proceedings. Our statutory mandate is to "ensure that the public receives fair and independent administrative hearings."

The process of unifying the administrative hearings function in OAH-style agencies began in 1945 with California. The current American states and cities, and Canadian

provinces, having adopted the model, with year of inception are: Alabama (1998); Alaska (2004); Arizona (1996); California (1961); City of Chicago (1997); Colorado (1976); Florida (1974); Georgia (1995); Iowa (1986); Kansas (1998); Louisiana (1996); Maine (1992); Maryland (1990); Massachusetts (1974); Michigan (1996); Minnesota (1976); Missouri (1965); New Jersey (1979); New York City (1979); North Carolina (1986); North Dakota (1991); Oregon (1999); South Carolina (1994); South Dakota (1994); Tennessee (1975); Texas (1991); Washington D.C. (1999); Washington (1981); Wisconsin (1978); Wyoming (1987); and Province of Quebec ().

Mission Statement:

We will contribute to the quality of life in the State of Arizona by fairly and impartially hearing the contested matters of our fellow citizens arising out of state regulation.

3rd Quarter Statistics At A Glance

Acceptance Rate:

ALJ findings of fact and conclusions of law were accepted in **93.13%** of all Administrative Law Judge Decisions acted upon by the agencies.* ALJ Decisions, including orders, were accepted without modification in **86.59%** of all Administrative Law Judge Decisions acted upon by the agencies. **67.04%** of all agency modification was of the order only (i.e. penalty assessed).

Appeals to Superior Court:

There were **28** appeals filed in Superior Court.

Rehearings:

The rehearing rate was **1.06%**, defined as rehearings scheduled (10) over hearings concluded (944).**

Completion Rate:

The completion rate was **107.8%**, defined as cases completed (2128) over new cases filed (1973).

Continuance:

The average length of a first time continuance based on a sample of cases (first hearing setting and first continuance both occurred in the 3rd quarter) was **48.02 days**. The frequency of continuance, defined as the number of continuances granted (209) over the total number of cases first scheduled (2031), expressed as a percent, was **10.29%**. The ratio of first settings (2029) to continued settings on the calendar (246) was **1 to 0.12**.

Dispositions:

Hearings conducted: **53.5%**; vacated prior to hearing: **43.8%**; hearings withdrawn by the agency: **2.7%**.

Contrary Recommendations and Agency Response:

18.46% of Administrative Law Judge Decisions were contrary to the original agency action where the agency took a position. Agency acceptance of contrary Administrative Law Judge Decisions was **83.53%**.

* 2.49% of Administrative Law Judge Decisions were certified as final by the OAH due to agency inaction or were rendered moot by settlement.

** Cases which were vacated or which settled on the day of hearing are not included.

“Representation”

(continued from page 1)

one or more disciplinary penalties against the contractor, up to and including revocation of the contractor’s license. Therefore, the manner in which a contractor chooses to represent himself, herself or itself at hearing can have significant ramifications, and is not a decision to be lightly or hastily made.

Who May Represent a Contractor in an ROC Disciplinary Proceeding?

Although the general rule is that only an attorney may represent a contrac-

tor in an ROC disciplinary proceeding before the OAH, there are a number of exceptions to this rule. The scope and extent of these exceptions depend on whether the licensee is an individual (sole proprietor) or a legal entity (corporation, limited liability company, general partnership, limited partnership or limited liability partnership); therefore, this article addresses each different type in turn.

Individual (Sole Proprietor)

If the licensee is an individual person (i.e., a sole proprietor or sole owner), then the only person who can represent the licensee at an ROC disciplinary hearing, other than an attorney, is the licensee himself. No other person may represent the licensee, including the licensee’s qualifying party or an employee of the licensee. The only time that a qualifying party will be permitted to represent a sole proprietor is when the qualifying party and the sole proprietor are the same person.

Corporation

If the licensee is a corporation, it may be represented at an ROC disciplinary hearing by a full-time officer or an employee (including the

qualifying party), provided that: (1) the corporation has specifically authorized such person to represent it in the particular matter; (2) such representation is not the person’s primary duty to the corporation, but is secondary or incidental to other duties relating to the management or operation of the corporation; and (3) the person is not receiving separate or additional compensation from the corporation (other than reimbursement for costs) for such representation.

A director of a corporation may not represent the corporation solely by virtue of his or her position as a director. The only time that a director may represent a corporation is when such director is also a full-time officer or an employee of the corporation.

Limited Liability Company

If the licensee is a limited liability company (LLC), it may be represented at an ROC disciplinary hearing by a member, manager, full-time officer or employee (including the qualifying party), subject to the rule described above for corporations, i.e., the member, manager, full-time officer or employee must be specifically authorized, the representation must be a secondary or incidental duty, and the member, manager, full-time officer or employee must not receive additional compensation from the limited liability company other than reimbursement for costs.

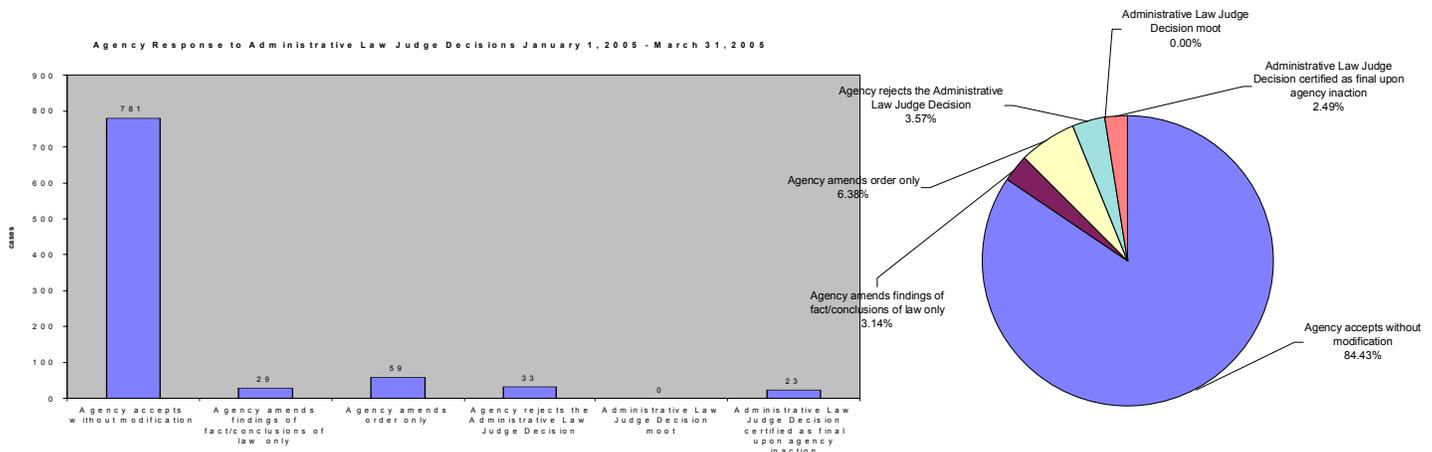
The terms “member” and “manager”, when used in reference to limited liability companies, are specialized terms defined by Arizona’s Limited Liability Company Act (the “Act”). A “member” is a person who has been admitted as a member in a limited liability company pursuant to the Act. A “manager” is a person in whom authority for management of the limited liability company is specifically vested by the limited liability company’s articles of organization.

General Partnership

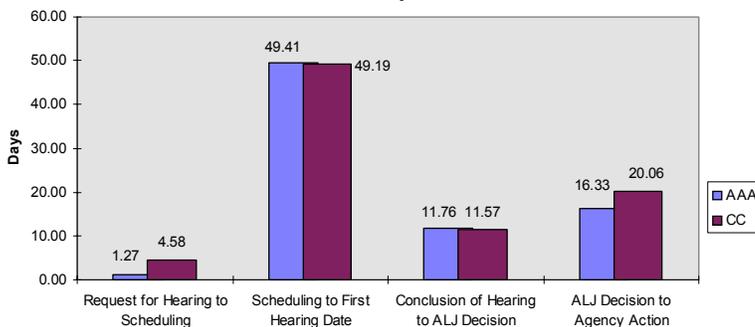
If the licensee is a general partnership (including a limited liability general partnership), it may be represented at an ROC disciplinary hearing by a partner or an employee (including the qualifying party), subject to the rule described above for corporations, i.e., the partner or employee must be specifically authorized, the representation must be a secondary or incidental duty, and the partner or employee must not receive additional compensation from the partnership other than reimbursement for costs.

Limited Partnership

If the licensee is a limited partnership (including a limited liability limited partnership), it may be represented at an ROC disciplinary hearing by a general partner or an employee (including the qualifying party), subject to the rule described above for corporations, i.e., the general partner or employee must be specifically authorized, the representation must be a secondary or incidental duty, and the general partner or employee must



Average Time Between Selected Events - Appealable Agency Actions v. Contested Cases*, January 1 - March 31, 2005



*Note: *Appealable Agency Actions* are agency actions taken before an opportunity for a hearing. A typical example would be the denial of a license. A party is entitled to a hearing before the OAH before the action becomes final. *Contested Cases* involve actions yet to be determined by an agency. An example would be proposed discipline on a professional license with the possibility of suspension or revocation. Parties are entitled to a hearing before the OAH prior to the agency acting.

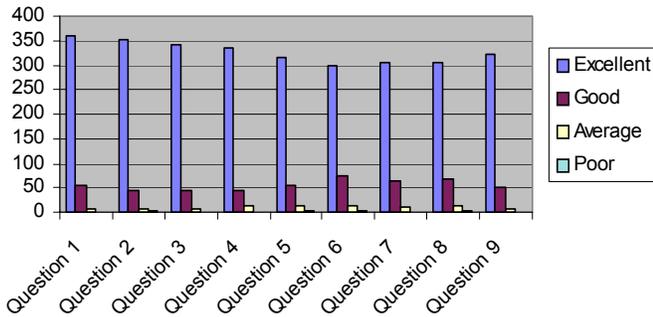
1973 Cases Filed January 1, 2005- March 31, 2005

	3rd Q	FY 2005		3rd Q	FY 2005		3rd Q	FY 2005
Accountancy	5	8	Economic Security	0	0	Parks	0	0
Acupuncture Board	0	0	Economic Security-CPS	35	150	Peace Ofc. Standards	4	13
Administration	3	9	Education (Board)	0	1	Physical Therapy	0	0
Admin. Parking	101	245	Education (Department)	0	5	Podiatry	0	0
Agriculture	1	2	Environ. Quality	52	123	Psychologist Examiners	1	2
Ag. Empl. Rel. Bd.	0	0	Fingerprinting	20	213	Public Safety - CW	4	9
AHCCCS	888	2880	Funeral	0	0	Public Safety - Trans	10	21
Alternative Fuel	0	0	Gaming	3	7	Public Safety - Adult CC	0	0
Appraisal	8	38	Health Services	75	279	Pvt. Post. Ed.	0	0
Arizona Trial Courts	0	0	Insurance	17	57	Racing	0	0
Arizona Retirement Sys.	7	11	Land	2	6	Radiation Regulatory	0	0
Attorney General	0	1	Liquor	20	44	Registrar of Contractors	510	1499
Arizona Works	0	0	Lottery	0	0	Real Estate	36	118
Athletic Board	0	0	Maricopa Cty. Housing	0	0	Revenue	17	60
Banking	15	35	Massage Therapy	0	4	School - Deaf & Blind	0	0
Behavioral Health Ex.	0	2	Medical Board	7	14	Secretary of State	3	12
Building/Fire Safety	22	54	Medical Radiologic	0	0	State Board of Education	0	0
Charter Schools	5	11	Naturopathic	1	1	Structural Pest Control	6	15
Chiropractic	1	6	Nursing	34	76	Technical Registration	2	3
Clean Elections	0	0	Nursing Care Admin.	3	9	Veterinary Board	0	0
Community Colleges	0	0	Occupation Therapy	0	0	Water Qual. App. Bd.	1	5
Cosmetology	7	10	Optometry	2	3	Water Resources	0	4
Dental	2	13	Osteopathic	0	0	Weights and Measures	43	115

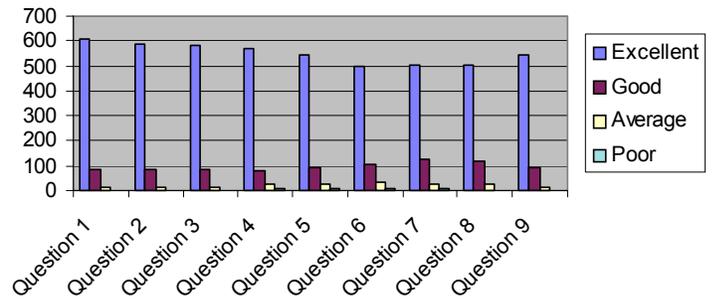
Evaluations of OAH Services

Note: The four major groups of those who responded are: represented private party; unrepresented private party; counsel for a private party; and counsel for the agency. The evaluations are filled out immediately after the hearing, and the evaluations are not disclosed to the ALJ involved. They are used by management to improve the OAH process and do not affect the decisions issued.

Unrepresented Responses 3rd Quarter



All Responses 3rd Quarter



Questions:

1. Attentiveness of ALJ
2. Effectiveness in explaining the hearing process
3. ALJ's use of clear and neutral language
4. Impartiality

5. Effectiveness in dealing with the issues of the case
6. Sufficient space
7. Freedom from distractions
8. Questions responded to promptly and completely
9. Treated courteously

not receive additional compensation from the partnership other than reimbursement for costs.

Authorization for Representation

The OAH does not ordinarily require representatives of legal entities to produce written proof of their authority to represent the entity at hearing. However, a person claiming to be so authorized may be required to swear to such authorization under oath.

Compliance with Hearing Procedures

One common question that arises in ROC disciplinary proceedings is that of the non-lawyer who asks how he or she can be expected to comply with the statutes, rules and procedures that govern hearings before the OAH. Although the OAH strives to make the hearing process as easy and straightforward as possible, certain rules do apply, and all participants in the hearing are expected to be familiar with and to follow those rules.

Parties to an ROC disciplinary proceeding should prepare themselves by thoroughly reviewing the ROC Citation and Complaint and other correspondence or documentation issued by the ROC, by

gathering evidence that supports their claim or defense, by arranging for the attendance of witnesses, either voluntarily or by subpoena, and by familiarizing themselves with the OAH's statutes and procedural rules by visiting the OAH personally or logging on to the OAH's website (www.azoah.com). Parties may also view streaming videos from the website designed to assist parties in preparing for hearing, or obtain a copy of the CD, "Preparing for Hearing," by contacting the OAH. Because ROC proceedings before the OAH are open to the public, parties may also attend and view hearings in separate cases in front of their assigned Administrative Law Judge in order to see firsthand how the hearing process works.

Conclusion

As can be seen from the above discussion, the question of who may represent a contractor at an ROC disciplinary proceeding depends on a number of factors. Contractors who are facing a disciplinary proceeding should give careful consideration to who they choose to represent them, and pay close attention to the legal requirements for representation to ensure that the person they choose to represent them at hearing will be able to do so.