

September 12, 1996

The Honorable Ron Schilling
District Court Judge
P. O. Box 896
Lewiston, ID 83501

**THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE**

Re: Idaho Certified Shorthand Reporters Board

Dear Judge Schilling:

This letter is in response to your September 6, 1996, inquiry regarding the investigative procedures of the Idaho Certified Shorthand Reporters Board (the "Board"). Your letter requests clarification of a potential conflict between the "investigation and hearing" procedure outlined in Idaho Code § 54-3113 and the "preliminary investigation" procedure referenced in Board Rule 500 (IDAPA 49.01.01.500). You have requested an opinion as to the propriety of the Board's methods "in responding to and processing a complaint against a certified shorthand reporter." The precise issue presented is whether the Board may conduct an informal investigation prior to a formal investigation or hearing which requires the Attorney General, or the Attorney General's designee, to sit as chairman of the hearing board?¹

The answer to your inquiry is that the statutory procedures of Idaho Code § 54-3113 and the preliminary investigation procedure provided by Board Rule 500 are not in conflict but, rather, refer to the same formal proceedings. Prior informal procedures are also available to the Board and are encouraged by state law.

I.

IDAHO CODE § 54-3113 PROCEDURAL REQUIREMENTS

Idaho Code § 54-3113 sets forth certain procedural requirements for the Board when pursuing administrative discipline against its licensees. The statute authorizes the Board, upon proper verified complaint, to conduct investigations and to hold hearings. "For the purposes of such investigation and hearing, the attorney general of the state of Idaho, or one (1) of his assistants designated by him, shall sit with the board with all of the powers as a member of the board and shall act as chairman of the hearing board." *Id.* The statute further provides that "each member of the board is empowered to administer oaths and affirmations, subpoena witnesses, and hear and receive evidence anywhere in

the state.” *Id.* The statute empowers the Board to hold hearings and, upon conclusion of the hearings, to render its decision regarding the discipline of the licensee. Finally, the statute provides that all hearings and proceedings shall be governed by the Idaho Administrative Procedure Act.

II.

BOARD RULE 500

Board Rule 500 provides rules for the revocation, suspension or reinstatement of certified shorthand reporters’ certificates. Under subsection .03, a preliminary investigation may begin upon the proper filing of a verified complaint. Board Rule 500.03.c provides that, “after a preliminary investigation has been initiated, the Attorney General or one of his assistants shall participate as a member and chairman of the board during the course of the investigation and any further proceedings.” Such preliminary investigation is conducted by a person appointed by the Board and a written report of the investigation is furnished to the Board. Board Rule 500.03.d. Upon receipt of the preliminary report, the Board may make one of three determinations: (1) that the matter should be closed for lack of reasonable cause, (2) the matter should be closed upon informal admonition to the reporter, or (3) that formal proceedings should be instituted. Board Rule 500.03.f.

III.

ANALYSIS

A. The Statute and Rule are not in Conflict

Board Rule 500 provides for the preliminary investigation after the filing of a verified complaint, the same verified complaint referenced in Idaho Code § 54-3113. Board Rule 500.03.a. The statute and rule are consistent in requiring an investigation to gain information for the Board to determine if cause exists for disciplinary action. The Board’s rule provides that a representative of the Attorney General’s Office “shall participate . . . during the course of the investigation and any further proceedings.” Board Rule 500.03.c. Thus, the “preliminary investigation” conducted by the Board pursuant to Board Rule 500.03 is the formal “investigation” referred to in Idaho Code § 54-3113. This conforms to the statutory mandate.

B. Informal Procedures are Available to the Board

Idaho Code § 54-3113 provides that the Attorney General will sit as the Board’s chair for “investigations and hearings.” However, the only investigations mentioned in

the code are those in which the Board is conducting formal proceedings. The statute does not enumerate any type of informal investigative actions, but does require compliance with the Idaho Administrative Procedure Act.

The Idaho Administrative Procedure Act (the “Act”) is codified as Idaho Code § 67-5201 *et seq.* Idaho Code § 67-5241 is titled “Informal Disposition,” and provides, in part, as follows:

(1) Unless prohibited by other provisions of law:

...

(c) informal disposition may be made of any contested case by negotiation, stipulation, agreed settlement, or consent order. Informal settlement of matters is to be encouraged;

...

(4) The agency may not abdicate its responsibility for any informal disposition of a contested case. Disposition of a contested case as provided in this section is a final agency action.

The unofficial comment to this section provides that the:

informal resolution of disputes is appropriate unless specifically precluded by other provisions of law

In one recurrent situation, the agency has the burden of initiating the contested case. For example, an agency is informed of a potential violation by a person subject to its jurisdiction and initiates an investigation. If the investigation determines there was no violation, the agency may decline to initiate a contested case. If the investigation provides evidence of possible violation, the agency may informally resolve the problem or may file a contested case. . . . The regulation of holders of professional licenses is an example of this category of adjudicatory actions.

The Attorney General’s Model Rules of Administrative Procedure are found at IDAPA 04.11.01.000 *et seq.*² Rule 100 provides that, “unless prohibited by statute, an agency may provide that informal proceedings may precede formal proceedings in the consideration of a . . . contested case.” Rule 101 provides guidance as to informal procedure by stating:

Statute authorizes and these rules encourage the use of informal proceedings to settle or determine contested cases. Unless prohibited by statute, the agency may provide for the use of informal procedure at any stage of a contested case. Informal procedure may include individual contacts by or with agency staff asking for information, advice or assistance from the agency staff, or proposing informal resolution of formal disputes under the law administered by the agency. Informal procedures may be conducted in writing, by telephone or television, or in person.³

Such informal proceedings are available to the Board since Idaho Code § 54-3113 does not specifically prohibit their use. Instead, this section requires compliance with the Administrative Procedure Act. The Act encourages, and specifically authorizes, informal proceedings. The Model Rules of the Attorney General's Office include in such proceedings contact with licensees by Board staff. Such informal investigations are not the type contemplated by Idaho Code § 54-3113. Thus, there is no requirement that the Attorney General participate in such proceedings. If the Board pursues formal investigations or hearings, including the preliminary investigation found in Board Rule 500, or in any case where the Board is administering oaths, subpoenaing witnesses or taking testimony and evidence, then the involvement of the Attorney General as chairman of the Board is mandated by statute.

IV.

CONCLUSION

The APA allows the Board to conduct informal disposition procedures prior to an investigation and determination by the Board as to reasonable cause for discipline of its licensees. These informal dispositions, and other similar proceedings under the Act, are made without the involvement of the Attorney General. However, when any formal investigations or proceedings (even those designated by rule as "preliminary") are conducted by the Board, the involvement of the Attorney General is mandated by Idaho Code § 54-3113.

V.

RECOMMENDATION

Due to the cumbersome nature of the statutory requirements, this office recommends an amendment to Idaho Code § 54-3113, and the rules of the Board, to eliminate the Attorney General's involvement in Board proceedings. No other regulatory board has such requirement. Thus, we suggest the Board seek legislative action to adjust this procedure.

I hope this satisfactorily answers your inquiry. If you have any questions regarding this, please do not hesitate to contact me.

Very truly yours,

KEVIN D. SATTERLEE
Deputy Attorney General
Contracts & Administrative Law Division

¹ It should be noted that the Attorney General is not a member of the Idaho Certified Shorthand Reporter's Board.

² Pursuant to Rule 001, the Attorney General's Model Rules apply to the Board since the Board has not affirmatively declined to adopt the rules.

³ Model Rules 102 and 103 further state that if the statute provides specifically for formal proceedings, the party to the contested case must be allowed access to the required formal proceedings following informal proceedings. Further, informal proceedings do not exhaust administrative remedies unless all parties agree to the contrary in writing.