

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General



ATTORNEY GENERAL
KARL A. RACINE

Legal Counsel Division

PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

MEMORANDUM

TO: Stephanie Litos
Assistant Deputy Attorney General
Civil Litigation Division

FROM: Brian K. Flowers *BKF*
Deputy Attorney General
Legal Counsel Division

DATE: August 27, 2021

SUBJECT: Legal Analysis – OAG Responsibility to Represent the D.C. Auditor
(AL-21-566)

You asked whether the Office of the Attorney General (“OAG”) is responsible for representing the Office of the District of Columbia Auditor (“ODCA”) in suits brought by entities outside the District government. We conclude that it is, because ODCA is a non-*sui juris* body that lacks express authority to represent itself.¹

We start with the question of whether ODCA is *sui juris* (*i.e.*, whether it can sue and be sued in its own name), relying on the Supreme Court’s reasoning in *Blackmar v. Guerre*.² “When Congress authorizes one of its agencies to be sued *eo nomine*” (in its own name), “it does so in explicit language, or impliedly because the agency is the offspring of such a suable entity.”³ That approach applies to District government entities too, as the D.C. Court of Appeals’ decision in *Braxton v. National Capital Housing Authority*⁴ establishes. Relying on *Blackmar*, and on the principle that “[a] noncorporate department or other body within a municipal corporation is not

¹ This memorandum does not address the separate, more complicated question of who represents ODCA in litigation with other District government bodies.

² 342 U.S. 512 (1952).

³ *Id.* at 515.

⁴ 396 A.2d 215 (D.C. 1978).

sui juris,”⁵ *Braxton* held that “bodies within the District of Columbia government are not suable as separate entities” absent clear evidence of intent to create a suable entity.⁶ Accordingly, executive bodies like the Armory Board, the Department of Consumer and Regulatory Affairs, and the Board of Police and Fire Surgeons are non *sui juris*.⁷ So are non-executive bodies like Advisory Neighborhood Commissions.⁸ Indeed, the only agencies that have been held to be *sui juris* under controlling precedent are entities with express statutory power to sue and be sued, such as the Water and Sewer Authority and the Board of Trustees for the University of the District of Columbia.⁹

ODCA is non-*sui juris*. It was established by section 455 of the District of Columbia Home Rule Act,¹⁰ and Congress empowered it to conduct annual audits of District government operations (though not of local courts).¹¹ But Congress did not give ODCA express authority to sue and be sued in its own name. Nor have we identified any language in ODCA’s statute indicating that Congress intended for ODCA to be *sui juris*.

ODCA’s status as non-*sui juris*, coupled with the fact that ODCA lacks express authority to represent itself, means that responsibility for representing it in litigation falls to OAG. By statute, OAG has “charge and control of all law business of the . . . District and all suits instituted by and against the government thereof,”¹² which includes “the power to control litigation and appeals.”¹³ In 1998, then-Corporation Counsel John Ferren explained this grant of authority in a memorandum to all agency heads. Judge Ferren wrote that the Corporation Counsel’s authority over litigation includes “exclusive authority to represent, and to approve any private representation of, the independent and subordinate agencies of the District government,” except when “a statute expressly authorizes an agency to represent itself or to obtain private representation, or where the power expressly granted the agency necessarily implies such authority.”¹⁴ In keeping with this approach, we have advised that this Office has authority over litigation involving non-*sui juris* (and some *sui juris*) District government entities.¹⁵ We have

⁵ *Id.* at 216 (italics added) (citing 3 MCQUILLIN MUNICIPAL CORPORATIONS § 12.40 (3d ed. 1973)).

⁶ *Id.* at 216.

⁷ See *Simmons v. Armory Board*, 656 A.2d 1155 (D.C. 1995); *Agbaraji v. Aldridge*, 836 A.2d 567 (D.C. 2003); *Ray v. Dist. of Columbia*, 535 A.2d 868 (D.C. 1987).

⁸ See *Kane v. District of Columbia*, 180 A.3d 1073 (D.C. 2018).

⁹ See, e.g., *Dingwall v. Water and Sewer Auth.*, 766 A.2d 974 (D.C. 2001), *aff’d en banc*, 800 A.2d 686 (D.C. 2002); *Manago v. Dist. of Columbia*, 934 A.2d 925 (D.C. 2007).

¹⁰ Approved Dec. 24, 1973 (87 Stat. 803; D.C. Official Code § 1-204.55).

¹¹ *Id.* § 1-204.55(b)-(d).

¹² D.C. Official Code § 1-301.81(a); see Memorandum from John M. Ferren, Corp. Counsel, to All Dist. Gov’t Agency Heads, Dec. 9, 1998 (“1998 Memorandum”), at 2 (noting that this authority is rooted in “[f]ederal statutes and orders with antecedents dating back to 1871”).

¹³ D.C. Official Code § 1-301.81(a).

¹⁴ 1998 Memorandum, *supra*, at 1; see, e.g., D.C. Official Code § 2-1831.05(b)(10) (authorizing the Chief Administrative Law Judge to “[r]etain outside counsel, other than the Attorney General, to represent the Office or any employee of the Office in his or her official capacity in actual or anticipated litigation”); *id.* § 6-206 (the D.C. Housing Authority “shall be represented by its General Counsel and other attorneys, as necessary, and, notwithstanding any other provision of law, shall not be subject to the oversight of the Corporation Counsel for the District government”).

¹⁵ See 1998 Memorandum, *supra*, at 12-16 (cataloguing agencies and assessing each agency’s authority to represent itself); Memorandum from John M. Ferren, Corp. Counsel, to John A. Fairman, Gen. Manager, Health and Hospital

also advised that entities given express authority to represent themselves may do so.¹⁶ But we have never, to our knowledge, said that a non-*sui juris* entity can represent itself in the absence of express statutory authority.

It makes no difference that ODCA sits in the legislative branch rather than the executive branch.¹⁷ We also represent non-executive District entities, as comparable precedent involving the federal Department of Justice (“DOJ”) illustrates.¹⁸ Opinions from DOJ’s Office of Legal Counsel (“OLC”) explain that “absent clear legislative directives to the contrary, [DOJ] has full plenary authority over all litigation, civil and criminal, to which the United States, its agencies, or departments, are parties.”¹⁹ That authority “extends to representation of governmental entities and officials outside the executive branch.”²⁰ For example, DOJ represents federal courts, as the District Court for the District of Columbia held in *Miller v. Johnson*.²¹ Likewise, our consistent view has been that this Office has the authority to represent the Superior Court and the Court of Appeals in litigation. By the same token, nothing prevents this Office from representing ODCA in litigation. We therefore conclude that responsibility for representing ODCA in litigation brought by entities outside the District government falls to this Office.

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Public Benefit Corp., Dec. 9, 1998, at 5 (Public Benefit Corp. generally lacks authority to represent itself even though it is *sui juris*).

¹⁶ See, e.g., Memorandum to Irvin B. Nathan, Att’y Gen., May 21, 2013, at 2 (2012 legislation concerning the State Board of Education, or “SBOE,” “gave SBOE the authority to hire staff, including its own legal counsel if it so chooses”).

¹⁷ See Memorandum to David C. Tseng and Barry Kreiswirth, Jan. 10, 2019, at 10 n.23 (“OAG has viewed the Auditor as part of the legislative branch”).

¹⁸ See, e.g., *Shifrin v. Wilson*, 412 F. Supp. 1282, 1304 (D.D.C. 1976), *reh’g denied*, 551 F.2d 95 (D.C. Cir. 1977) (the Attorney General for the District “stands in a position entirely comparable to” the federal Attorney General).

¹⁹ 6 Op. O.L.C. 47, 48 (1982).

²⁰ 12 Op. O.L.C. 18, 21 (1988).

²¹ 541 F. Supp. 1165, 1172 (D.D.C. 1982); see 12 Op. O.L.C. at 21 n.8 (collecting cases on DOJ representation of courts).