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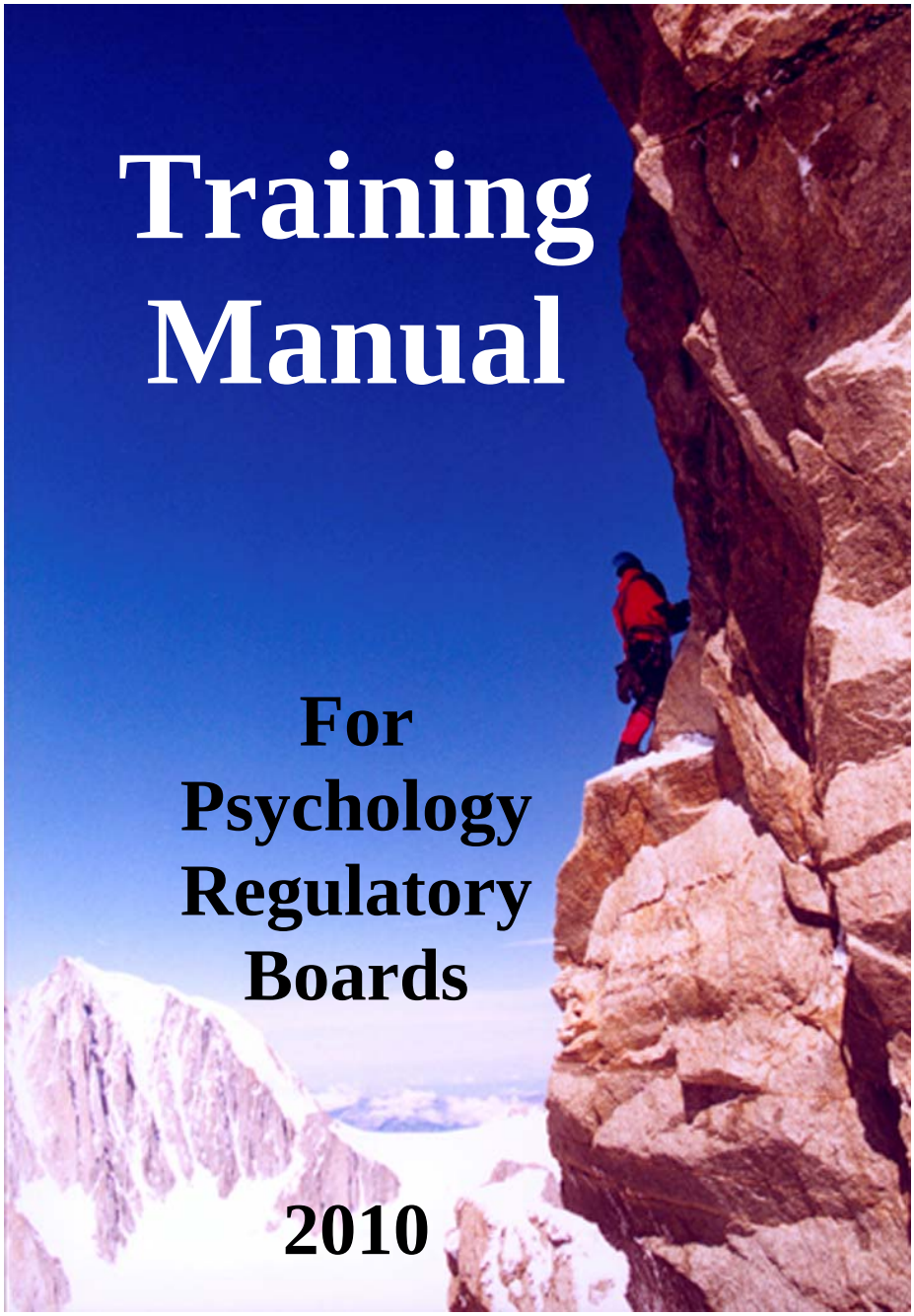
Association of State & Provincial Psychology Boards



Training Manual

For Psychology Regulatory Boards

2010

TRAINING MANUAL FOR PSYCHOLOGY REGULATORY BOARDS

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INTRODUCTION

By and large the people who serve the public as members of professional regulatory boards give millions of hours a year of under compensated service to the citizens of the states and provinces of the United States and Canada. Board members, and those who serve as staff to professional regulatory boards, are some of the most dedicated and least appreciated individuals in both countries.

At the same time, from the outset most board members are ill prepared for their jobs as professional regulators. Many have served admirably as members and officers of professional associations whose purposes and goals are quite different from those of regulatory boards. Professional associations exist for a number of reasons, but their primary purposes are the promotion of a profession and its individual members. A professional regulatory board, while typically made up of a majority of professionals, exists to protect the public. Understanding and appreciating this difference is of primary importance to success as a regulator.

Professional regulation involves much in the way of legislation and litigation and most board members are not trained in the law. Some struggle with the litigiousness of rule making and adjudication, the two primary functions of any regulatory board. Input from local counsel is essential to understanding the role board members play since statutes and rules vary from jurisdiction to jurisdiction.

This manual is designed to assist board members through the transition from novice board member to experienced professional regulator. This manual can be used to facilitate a workshop or retreat to train new and even experienced board members as they transition into this new role as professional regulator.

Organizing a Training Session

A successful training session for new and more experienced professional regulators must be comprehensive but streamlined as much as practical and possible. A full day should be allowed for the session, since this manual does not include many issues that may be specific to certain professions.

The training session should include the current board chair and chief staff officer or board administrator. Local legal counsel to the board should also be present and prepared to make several presentations on issues outlined in the manual.

While such a training session can be conducted off-site, the better approach may be to hold the session in the board's offices. After the introduction of the all participants, the board chair or administrator should introduce each member of the professional staff. Those staff members that have responsibility for important agency functions should be present to describe their responsibilities at the outset of the session. Particular attention should be paid to accurately describing the parameters of special programs, such as an alternative disciplinary program or a dispute resolution process. If possible, those persons should remain available during the day in case questions arise. A tour of the office should occur at some time during the session.

Someone other than the board's chair or administrator should be in charge of leading the training session and should begin her/his responsibilities at this point, starting with a review of any other written materials prepared for the training session.

Resources Professional Regulators Will Need

A good professional regulator has to learn a great deal about state/provincial government in a short period of time. Over the years significant standardization has occurred and there are a number of identifiable documents that every regulator needs to read regardless of the jurisdiction he/she serves. Those include:

1. U.S., Canadian Federal, State, Provincial Constitutions
2. The enabling statute that creates this board
3. The rules and regulations by which the board operates
4. The jurisdiction's Administrative Procedure Act (APA)
5. The jurisdiction's Open Meetings Law
6. The jurisdiction's Public Information Act
7. The jurisdiction's Ethics Law
8. Attorney General's Opinions; Executive Orders
9. Any other statute local counsel suggests adding to this manual

There are other resources that some boards will need depending on the size and scope of their responsibilities. Many of these documents are more pertinent to board administrators and staff than board members and typically involve personnel and/or employment matters.

Definitions

There are some words or terms that are used quite often when regulators discuss the tasks involved in regulating a profession. Some definitions might be helpful to new board members and staff persons. Those include:

Adjudication - A decision made by an administrative agency acting in a quasi-judicial capacity; the decision making process for an administrative agency.

Administrative Law -The body of law, both statutory and case law, that deals with the manner in which agencies operate.

Contested Case - A matter which an agency must deal with in a formal way, under the applicable provisions of the Administrative Procedure Act.

Jurisdiction - The legal authority by which an agency exerts its control over a licensee or a professional issue; a geographical and political entity such as a state, province or territory that is empowered to regulate professional activity to protect its citizens.

Responsibilities of Regulatory Board Members

1. First and foremost, professional regulatory board exists to serve the people of the jurisdiction and your focus as a board member is to assist in that goal.

2. An individual is a public official and a public servant when serving as a member of a regulatory board.

3. There are many ways in which a board works to achieve its goal of public protection. The first is setting appropriate policies and goals for your administrator(s) and staff. Board members set policies, they don't implement them. Be knowledgeable, be thoughtful, and have purpose when setting policies, then let your administrator(s) carry them out.

4. One of the primary responsibilities of a board member is to ensure that the agency is financially sound and its funds are lawfully and wisely spent. Oversee the expenditure of funds by reviewing finances for the board as a whole, not by personal review of every organizational voucher.

5. A strong board is an asset to the people that you serve. Support your administrator(s) and staff and see that their needs for education, training and staff development are met.

6. Let your board administrator be in charge and responsible for implementing the policies established by the board. Provide adequate compensation, direction, motivation and feedback.

7. Offer your own particular skills to the board and staff when necessary and appropriate. A properly functioning board works as a team.

8. Organize a plan for your board. Consider particular needs, goals, the expertise of various members and terms of office. Make your plan at least three years in length and don't worry about day-to-day activities. See and concentrate on the big picture.

9. Participate in board meetings and other board activities. Respond promptly to requests from the board chair or staff so that the board can discharge its duties in a timely and responsible manner.

10. Finally, don't lose sight of #1.

GENERAL RULES FOR BOARD MEMBERS

Appointments to Office

Board members are typically appointed to office by the executive branch of government, although other methods exist in some jurisdictions. Prospective board members should ascertain that they meet the statutory qualifications for appointment before accepting the appointment. It is very important that members continue to meet the requirements while serving in their official capacities. Failing to do so can result in challenges to official board actions and may result in liability. Once appointed, they should carry out any statutory mandates regarding the oath of office and filing of credentials.

Roles and Duties

The roles and duties of members of boards are typically defined in statutes and regulations. Members are expected to carry out these duties which typically include: assessing candidates' qualifications for certification and licensure, conducting hearings, adjudicating disciplinary matters, and adopting rules and regulations. These responsibilities are done with the goal of protecting public health, safety, and welfare. On occasion boards are required to cooperate with other state and federal agencies to enforce other laws and regulations.

Conflict of Interest

Board members are public officials and should conduct their public duties in a manner that avoids criticism and liability. Board members should not attempt to regulate economics of the profession through board activities. When acting as a board member, you should be both seen by others and comfortable within yourself that you can be impartial, reasonable and fair in your judgments and actions.

Much thought should be given to the advisability of being both a board member and an officer of a professional association at the same time, or a committee member of such association, if the association's activities could possibly influence decisions to be made as a board member. Participation simply as a member of an association should not be discouraged however. Remember, that problems are created most often by the appearance of impropriety rather than by actual misconduct.

Board members who perceive even a potential conflict of interest should act swiftly to resolve the conflict. This may mean resignation from an office or committee membership. In disciplinary matters before the board it may mean that a board member is recused, unless recusal would render adjudication impossible. Remember, sometimes it is only the appearance of impropriety that leads to serious problems.

Confidentiality

In the very beginning of a term, each board member should ascertain the types of information to which he/she is privy; i.e., what is confidential or privileged and what is public. Some documents and/or records of the agency are public and subject to public scrutiny.

However, it is best to avoid disclosure of the sensitive details contained in a licensee's file unless appropriately requested. Timing, as with many things, is an important issue. Consent orders may eventually become public documents, but may be confidential until they are executed. In many jurisdictions, investigatory files are completely confidential.

Some discussion should be held on the matter of the appropriateness of public comments by board members and staff. New board members should be cautioned about discussing board related business with licensees involved in the disciplinary process. If possible, some understanding should be reached regarding whose responsibility it is to communicate as the official spokesperson for the agency, particularly if the sources seeking comment are the media or individuals affiliated with the legislative process.

PAUSE YOUR DISCUSSIONS AND HAVE STAFF OR COUNSEL DISTRIBUTE COPIES OF YOUR JURISDICTION'S PUBLIC RECORDS LAW(S) AND HAVE THEM COMMENT ON THE FOLLOWING:

1. What board records are open to public inspection without notice? Are there any limitations that can or should be imposed?

2. What are the limitations on public inspection that are contained in statutes such as the Americans with Disabilities Act?

3. Do the copyright laws affect public inspection and/or copying? If so, what does the staff need to know?

4. Can the board charge for making copies of public documents? If so, are there limitations?

5. Who is (are) the official spokesperson(s) for the board?

6. What can board members discuss with other licensees or the press?

Notes:

CONDUCT OF BOARD MEETINGS

Every professional regulatory board holds meetings, but some meet much more often than others. Some suggestions regarding meetings may be helpful.

Notices

Many states and provinces have statutes that direct agencies to give public notice of the time and place that agency meetings are to be held. These legal mandates normally establish how the notice must be transmitted, and set out the necessary time frames. Agency staff should be responsible for knowing the applicable guidelines and complying with them.

PAUSE YOUR DISCUSSIONS AND HAVE STAFF OR COUNSEL DISTRIBUTE COPIES OF YOUR JURISDICTION'S OPEN MEETINGS LAWS AND COMMENT ON THE FOLLOWING:

1. What steps must be taken to advertise a board meeting? Are there exceptions to the general rule?

2. Who is allowed to attend board meetings? Are there any limitations on the attendance by media such as audio/visual recording devices?

3. Under what circumstances can a board meeting be closed to the public? Are these situations mandatory or can they be waived?

4. Are all disciplinary hearings open or closed meetings? And who decides, the agency or the respondent?

Quorum

Either statute or internal rules and regulations will establish the number of members that must be present for a board to conduct business. Usually a majority is required, but in some circumstances a lesser number may be legally sufficient. Minutes of the meetings should always reflect the presence of the appropriate number of members.

Responsibilities of the Chairperson

1. Recognize board members entitled to speak or propose motions. Note: some motions may be made while another member has the floor. Speaker must state the purpose of the interruption so the chair can rule on its validity.

2. Restate motions after they have been made, then open discussion. This ensures that everyone is clear about the action being debated and allows more time for the motion to be accurately recorded.

3. Close discussion and put motions to vote. Votes on undebatable motions should be called immediately. If any member objects to closing discussion on a debatable motion, a ⅔ vote is required in order to close a debate. Restate the motion exactly as it was made or amended before calling for a vote.

4. Announce the result of a vote immediately. A tie vote defeats a motion requiring a majority of those voting. The chair may vote to make or break a tie.

5. Avoid entering into any controversy or interfering with legitimate motions.

6. Maintain order and proper procedure, making necessary rulings promptly and clearly.

7. Expedite board business in every way compatible with the rights of board members. You can allow brief remarks on nondebatable motions, advise board members how to take action (proper motion or form of motion), or propose routine action without a formal vote ("If there is no objection, these minutes will stand approved as read. Hearing no objections, so ordered.").

8. Protect the board from frivolous motions intended to obstruct the board's business. You can refuse to entertain such motions. Never adopt such a course, however, merely to expedite business.

9. Guard the board's time by having them vote to adopt an agenda at the beginning of the meeting. Follow the agenda faithfully. Do not permit unauthorized interruptions by spectators.

PAUSE YOUR DISCUSSIONS AND CONSIDER HOW FORMAL YOUR BOARD MEETINGS SHOULD BE. ASK COUNSEL IF THERE ARE STATUTORY MANDATES RELATIVE TO THIS ISSUE.

Notes:

Principles of Parliamentary Procedure

Based on Robert's Rules of Order

1. Parliamentary procedure requires that all board members have equal rights; there be mutual respect among board members; and the rights of the minority to initiate motions, debate, and have their votes counted be protected, while at the same time the will of the majority governs.

2. Only one item may be under consideration at a time.

3. The majority vote decides the questions.

4. Any question which limits board members' rights of discussion or which changes the agreed order of business requires a ⅔ vote of the members present.

5. Any matter once decided cannot be brought up again at the same meeting, except by a motion to reconsider (see Motions, section 2 for procedure).

6. The simplest, clearest and most expeditious way is considered proper, so long as it does not violate the rights of board members.

Proposing and Disposing of a Motion

1. Gain floor by being recognized by chair.

2. State motion: "I move that...".

3. Motion is seconded by any member without gaining floor. (Second not required under Keesey's Modern Parliamentary Procedure)

4. Chair states motion (if proper) and opens it for discussion (if debatable).

5. During discussion the motion may be amended or disposed of by postponement (to a time certain or indefinitely), referred to a committee, or tabled.

6. The chair puts the motion to a vote when there is no further discussion.

7. The chair announces the outcome of the vote.

Motions

1. Motion To Take From Table: Requires second, majority vote, not debatable, not amendable.

   A. Purpose: To bring up for consideration an issue that has been laid on the table.

   B. Effect Of Adoption: Puts motion before board again in exactly the same condition as when laid on table.

2. Motion to Reconsider: Requires second, majority vote, debatable, not amendable.

   A. Purpose: To set aside a previous vote and reconsider the question for adoption or rejection.

B. Restrictions: Used only if vote cannot be reversed with more simple procedures.

(a) Motion must be made by member who voted on the prevailing side.
(b) May not be made later than the next meeting after the vote to which it applies.
(c) If action has already been taken, vote cannot be reversed.
(d) Motion may be made when another member has the floor, but its consideration is the same for a main motion.

C. Effect Of Motion: Stops any action authorized by the original vote.

D. Effect Of Adoption: Sets aside original vote, puts matter back to where it was before that vote was taken.

3. Main Motion: Requires second, majority vote, amendable, debatable.

A. Purpose: To bring an issue up for consideration or action.

B. Effect Of Adoption: Action authorized.

4. Motion To Postpone Indefinitely: Requires second, majority vote, debatable, not amendable.

A. Purpose: To kill main motion without a formal vote; trial vote to test strength.

5. Motion To Amend A Motion: Requires second, majority vote, debatable, not amendable.

A. Purpose: to put motion in most acceptable form before voting on it, by striking out or inserting words or substituting one paragraph or motion for another.

B. Restrictions: An amendment to a pending amendment may be proposed, but not an amendment to the third degree.

(a) No idea already inserted by an amendment may be changed by a later amendment.
(b) No germane amendment is in order as long as it is not identical in effect to a no vote on the main motion.
(c) Not debatable if motion to which it applies is not debatable.

C. Effect Of Adoption: Changes the wording of the pending motion.

6. Motion To Refer To A Committee: Requires second, majority vote, debatable, amendable.

A. Purpose: To have a matter studied by a committee.

B. Form: Motion may include membership of committee and instructions to it, and may

be amended with respect to these matters.

C. Effect Of Adoption: Disposes of motion until committee reports back or is discharged by the board.

7. Motion To Postpone Definitely: Requires second, majority vote debatable, amendable.

A. Purpose: To put off action on a motion until a later time.

B. Form: Motion must specify time at which matter will be taken up again and may be amended in this regard.

C. Effect Of Adoption: Disposes of matter until time set.

8. Motion To Limit Debate Or Extend Limits: Requires second, ⅔ vote, not debatable, amendable.

A. Purpose: To regulate length of time a question may be discussed or length of time allotted to each speaker.

B. Form: Motion states limits and may be amended in this regard.

9. Motion On Previous Question: Requires second, ⅔ vote, not debatable, amendable.

A. Purpose: To have discussion ended immediately and a vote taken.

B. Form: May specify only the immediately pending question, of all pending questions.

C. Effect Of Adoption: Chair must immediately put question to a vote and allow no further discussion.

D. Note: This motion should not be confused with the call for the "question" which is only a suggestion that the board members are ready to vote, and may not be used to deprive any board member of the right to continue the discussion if desired.

10. Motion To Lay On The Table: Requires second, majority vote, not debatable, not amendable.

A. Purpose: To set a matter aside temporarily. May be moved after the previous question has been ordered.

B. Effect Of Adoption: Matter on table may be brought up again, but not later than the next meeting, by adoption of a main motion to take it off the table.

11. Motion Relating To Voting: Requires second, majority vote, not debatable, amendable.

A. Purpose: To provide a manner of voting (i.e., by ballot, voice, show of hands) order in which questions will be voted upon, appointment of tellers, etc.

12. Question Of Order: No second, decision of chair, not debatable, not amendable.

A. Purpose: To ask that a rule being violated be observed.

B. Form: Floor is gained, even while another is talking, by stating, "Chairperson, I rise to a point of order". Chairs ask member to state point, then rules whether point is well taken.

(a) If Point Accepted: Chair makes ruling.
(b) If Not Accepted: Chair overrules point of order.

13. Division Of Board: No second, no vote necessary, not debatable, not amendable.

A. Purpose: To secure a recount of a vote by a more accurate method than originally.

B. Form: Board member, without recognition, says, "I call for a division".

C. Effect Of Motion: Chair must retake vote by show of hands or written vote which can be counted.

14. Appeal Chair's Decision: Requires second, majority vote, debatable, not amendable.

A. Purpose: To overrule a decision made by the chair.

B. Form: "Chairperson, I appeal from the decision of the chair".

C. Restrictions: Must be made as soon as the decision is announced. Debatable if pending question is debatable. Can be laid on the table, which takes the pending question with it.

D. Effect Of Adoption: If less than majority sustain chair, decision is reversed.

15. Motion To Recess: Requires second, majority vote, not debatable, not amendable.

A. Purpose: To provide a short interruption of the meeting.

B. Amendable: As to length of recess.

C. Restrictions: Treated as a main motion if no other matter pending or if proposed recess is not to be taken immediately.

16. Motion To Adjourn: Requires second, majority vote, not debatable, not amendable.

A. Purpose: To end the meeting immediately.

B. Restrictions: Treated as a main motion if qualified in any way.

C. Effect Of Adoption: chair must adjourn meeting immediately, although necessary announcements may be made and a motion to fix a time for the next meeting may be entertained.

17. Motion To Fix Time For Next Meeting: Requires second, majority vote, not debatable, amendable.

A. Purpose: To set time for next meeting (either regular or special).

B. Restrictions: Treated as a main motion if no other question pending or if provision has already been made for another meeting on this day or the next.

Minutes

Many state/territorial/provincial codes require agencies to keep minutes of their meetings. This is a serious mandate and should not be taken lightly. Strict adherence to laws and regulations pertaining to minutes is absolutely necessary. Some states/territories/provinces may also have filing requirements for agency minutes. The form and content of minutes are usually flexible, however they should contain a concise summary of the meeting and business conducted. By all means, make sure that authorizations for travel, or the expenditure of funds, are properly noted in the minutes of the meetings that precede such travel and/or expenditures.

Emergency Meetings

Most state/provincial notice requirements make provisions for "emergency" meetings. The agency will probably be required to state the reason for the "emergency" meeting within the notice that will also be required. Such meetings should only be called when an emergency does exist and delayed action would cause serious problems.

PAUSE YOUR DISCUSSIONS AND ASK COUNSEL IF THERE ARE STATUTES OR CASE LAW WITHIN YOUR JURISDICTION THAT OUTLINE WHAT CAN OR CAN'T BE DONE IN AN "EMERGENCY" SITUATION.

Notes:

RULEMAKING

One of the primary responsibilities of the professional regulatory board is the promulgation

of rules to complement the enabling statute. Rulemaking can be laborious, but the process and the product are extremely important.

Virtually every statute that creates an agency to regulate any profession, allows the agency to adopt rules and regulations to carry out its statutory mandate. These rules and regulations are absolutely necessary because they provide for the manner in which the agency conducts business. Statutes never can be specific enough to delineate the many facets of professional life; rules and regulations provide the necessary framework. There is no such thing as inherent rule making authority; legislative delegation is required. Once authorized, the failure to make necessary rules may lead to problems. Athay v. State, Dept. of Business Regulation, 626 P.2d 956 (Utah 1981).

Definition

A "rule" or "regulation" basically means any agency statement that (a) implements, interprets, or prescribes law or policy, and (b) describes the procedure or practice requirements of an agency. The term does not include statements concerning only the internal management or organization of the agency, not affecting private rights or procedures.

Proper Promulgation

Almost every jurisdiction has an Administrative Procedures Act (APA). This statute typically dictates the steps that must be taken to adopt an agency rule. The requirements for rule making procedures vary across jurisdictions, but usually include:

(1) published notice;
(2) explanation or statement of purpose and effect;
(3) filing of the proposed rule;
(4) statutory authority by which the proposed rule is to be adopted;
(5) requests for comment and/or hearing and the procedures for submitting or obtaining same; and
(6) necessary deadlines.

The publication of adopted rules, proposed rules and repealed rules normally occurs in a jurisdictional official publication. Strict compliance with the mandates for promulgation of a rule is absolutely necessary. Fitzgerald v. Oregon Bd. of Optometry, 706 P.2d 586 (Or. App. 1985).

PAUSE YOUR DISCUSSIONS AND HAVE STAFF OR COUNSEL DISTRIBUTE THE RULE MAKING MANDATES OF YOUR JURISDICTION'S APA.

Notes:

Limitations on Rulemaking

While the legislature can delegate to an agency the authority to adopt rules and regulation,

there are limitations on the rulemaking authority. First, the scope and effect of rules must remain within statutory parameters. Any rule that exceeds or alters the authority contained in the statute is subject to be voided, if challenged. Dept. of Professional Reg. v. Sherman College, 682 So.2d 559 (Fla.App.1 Dist. 1995); Dioguardi v. Superior Court, 909 P.2d 481 (Ariz. App. 1995).

Most APA's contain a provision that allows rules to be challenged in the same manner that contested cases are adjudicated. Should such a challenge be made, a fact-finding hearing may be necessary with an order issued by either a hearing officer or the Board. Rules properly adopted and within legal parameters should be upheld. Marchetti v. Alabama Bd. of Examiners in Psychology, 494 So.2d. 448 (Ala.Civ.App. 1986); Pukin v. New York State Department of Health, 649 N.Y.S. 2d 191 (A.D.3 Dept. 1996); Billings v. Wyoming Bd of Outfitters, 2001 WY 81 (2001).

Legislative Oversight

Please note that all APA's have a mechanism that allows the legislature or legislative committee to oversee the promulgation of agency rules. Most APA's require an agency to deliver copies of proposed rules to this committee. Given the large number of rules that are proposed each month there is a real question as to how much oversight is actually exercised. However, regular review of proposed rules is a typical assignment for lobbyists for special interest groups. Those individuals usually call legislative attention to rules their employees oppose.

Emergency Rulemaking

An emergency rule is one that is necessitated by a impending need or an immediate danger. These rules are normally limited to state or provincial action that is deemed necessary to protect the public health, safety, or welfare. The agency must be able to document both the danger and the need to act on an emergency basis.

Under most APA's, an emergency rule can only be in effect for a set period of time, i.e., 90 to 120 days. At the end of this period of time, the rule normally cannot be renewed. During the time the emergency rule is in effect, the agency can pursue the usual methods of rulemaking. Emergency rulemaking should not be exercised unless absolutely necessary.

Notes:

NONCOMPLIANCE ISSUES

Alabama has a training manual for the state regulatory boards and commissions. That manual sets out a number of frequent noncompliance issues. The manual explains: "a review of

past legal compliance reports and sunset review reports, reveals that instances of noncompliance have a history of repeating." Department of Examiners of Public Accounts, Training Manual for Alabama Regulatory Boards and Commissions, 1st Ed. April 2002. The following is a list of the most common noncompliance issues set out in the manual:

Reasonable (advance) public notice of meetings was not given.

Improper use of executive session(s).

Meetings held by conference call.

Minutes of all meetings were not taken.

Minutes were not signed.

Minutes did not reflect individual votes.

Minutes were not approved.

Incorrect travel expense reimbursement.

Inadequate segregation of duties.

Inadequate documentation associated with receipts and/or disbursements.

Noncompliance with the Alabama Competitive Bid Law.

Charging fees not authorized by law (most frequent enlargement of law issue)

Failure to maintain a receipt log and failure to reconcile the receipt log to deposits.

Failure to deposit receipts in a timely manner.

Non-authorized purchases or purchases not allowed by law.

Inaccuracy of recorded leave accrual start dates of employees.

Improper accountability for annual, sick, personal and compensatory leave balances.

Failure to require a Social Security Number on licensee forms.
Inadequate procedures to insure that agency maintains documentation of each licensee's compliance with requirements necessary to do business in Alabama, including paying fees.

Failure to obtain and implement a State Records Commission-approved Records Disposition Authority.

Implementation of policies that are rules without complying with the Administrative Procedure Act.

Charging fees in excess of reasonable cost of copying public records.

Inadequate controls over property.

Noncompliance with submission of property inventory listings to the State Auditor's Office as required.

Failure to send annual reports to the Governor and/or other officials.

Failure to establish a recycling program

ADJUDICATION

The second major function of any administrative agency is adjudication. The subject matter as regards adjudication can vary and does not always involve disciplinary actions. On many occasions decisions that agencies make, if contested by an aggrieved party, become adjudicatory in nature. Denial of an application for initial licensure is a prime example. When this happens, the contested case provisions of most administrative procedure acts are triggered.

Contested Cases

In the administrative procedure acts of all jurisdictions, there are provisions that instruct the agency on how it must proceed to adjudicate an issue, whether it be the attainment of appropriate educational credentials or a license revocation. Typical provisions tell the agency what it must do in terms of notice, pleadings, and proceedings leading to a formal resolution of the issue at hand. The steps to be taken are in many ways similar to the manner in which an agency must promulgate its rules.

Assessing Candidates for Initial Licensure

The preliminary denial of a initial application for licensure can trigger the contested case provisions of an administrative procedures act. This will only happen, however, on rare occasions. At the same time, assessing candidates' qualifications for initial licensure is an important part of the life of a regulatory board and its members.

With some professions, the education, training and examinations required for initial licensure are so standardized that these functions are handled completely by staff persons. With smaller agencies in other professions where education and training is less standardized, some of these responsibilities lie with individual board members.

PAUSE YOUR DISCUSSIONS AT THIS POINT AND ASK STAFF TO DISCUSS THE QUALIFICATIONS FOR LICENSURE IN THE JURISDICTION AND THE WAY IN WHICH THOSE QUALIFICATIONS ARE ASSESSED.

Notes:

Each board member should satisfy himself/herself that the methods used to assess qualifications for initial licensure are rigorous enough to protect the public and at the same time altogether fair to the applicant. It should be noted that at this point in time, due to the passage of the Americans With Disabilities Act, there is an ongoing legal debate regarding the ability of boards to inquire into applicants past problems with alcohol, drugs and/or emotional or mental illness.

PAUSE YOUR DISCUSSIONS AND ASK COUNSEL TO PROVIDE THE PARTICIPANTS WITH THE LATEST ON THE AMERICANS WITH DISABILITIES ACT AND APPLICATIONS FOR AN INITIAL LICENSE.

Notes:

Informal Resolution of Complaints

Every administrative procedure act recognizes the fact that not every complaint or dispute involving a regulatory board requires the formal process that results in a hearing under the contested case provisions of the act. Consequently, each APA contains a method by which these matters can be settled informally.

In many ways the word informal is a poor one. Complaints settled informally still involve legal documents that outline rights and responsibilities and contain appropriate waivers. Some APA's refer to settlement by stipulation, consent order or similar words or phrases.

Most informal resolutions involve allegations of professional misconduct. However, some such resolutions involve applicants that are licensed on probation due to prior problems with drugs, alcohol or other chemical substances.

PAUSE YOUR DISCUSSIONS AND ASK COUNSEL TO DETAIL THE STEPS LEADING TO THE INFORMAL SETTLEMENT OF A COMPLAINT AND TO USE SAMPLES OF LEGAL DOCUMENTS TO ILLUSTRATE THESE COMMENTS:

Notes:

Disciplinary Actions for Alleged Professional Misconduct

While it is sad, it is also true that every year there are thousands of violations of state and provincial practice acts that lead to complaints and to disciplinary actions. Larger agencies typically employ trained investigators to investigate these complaints and work with agency attorneys to draft statements of charges and notice of hearings. In some jurisdictions with some agencies, formal hearings are heard by hearing officers who draft findings of fact, conclusions of law and recommended orders that are reviewed and either accepted or rejected by the boards themselves. In some jurisdictions, with some agencies, boards hear the cases themselves and utilize the services of a hearing officer to rule on evidentiary matters and other legal issues. And, in some jurisdictions, with some agencies, some boards hear cases and the presiding officer of the board actually serves as the hearing officer. Regardless of which model is used to adjudicate, a final order must be produced. The final order will include findings of fact, conclusions of law and a order either dismissing the case or imposing sanctions.

PAUSE YOUR DISCUSSIONS AND HAVE COUNSEL DISCUSS ANY NUANCES IN YOUR JURISDICTION'S STATUTE OR CASE LAW THAT AFFECT THE PRECEDING GENERAL INSTRUCTION. ASK COUNSEL TO COMMENT ON THE FOLLOWING ASPECTS OF THE DISCIPLINARY PROCESS AND TO ILLUSTRATE THOSE COMMENTS WITH SAMPLES OF RELEVANT LEGAL DOCUMENTS:

1. The manner in which cases are investigated.
2. The scope of pre-hearing discovery in your jurisdiction.
3. The procedure for notifying respondents and proceeding to hearing.
4. The burden of proof in disciplinary cases and any statute of limitations.
5. The way in which cases are tried including the roles of the prosecutor and the hearing officer.
6. The decision making process.
7. The contents and preparation of the final order.
8. Any other responsibilities of the agency including making orders public and providing an index.

Notes:

AGENCY AND THE EXECUTIVE BRANCH OF GOVERNMENT

A professional regulatory board is an agency that operates within the executive branch of government. It has a relationship with the legislative and judicial branches, but also with other agencies within the executive branch.

Relationship to Other Executive Agencies

Any professional regulatory board is only one of numerous state/provincial agencies; it has to operate in cooperation with certain other agencies. For example, the board's primary counsel will undoubtedly be the Attorney General. A good working relationship with the staff of that agency is critical.

The need to cooperate with other agencies can be said of several other agencies such as the State Auditor's Office, the Examiners of Public Accounts, the Secretary of State, and the Legislative Fiscal Office. Board members and staff should know and understand the inter-relationship between the agencies and strive toward a successful, collaborative relationship.

Attorney General: In many jurisdictions, an Assistant Attorney General will be assigned to represent the board. A good working relationship is crucial. Often important opinions on legal issues will be requested from the Attorney General; the content can be most critical.

Auditors: Virtually every jurisdiction will be audited at least annually by the appropriate state/provincial auditors or examiners of public accounts. Board members should closely supervise staff functions involving governmental funds.

Budgetary Process: There is considerable variance in how boards receive their annual funding. Some receive an annual appropriation from their state/provincial legislature; other boards have access to the funds generated from renewals, application fees, and exam fees.

Ethics Commission: Many jurisdictions have ethics laws that relate to the activities of board members and public employees. If such statutes, particularly those involving use of public monies and/or equipment are violated, reports must be made to the appropriate individuals or entities.

PAUSE YOUR DISCUSSIONS AND HAVE STAFF EXPLAIN THE BOARD'S RELATIONSHIP TO OTHER EXECUTIVE AGENCIES.

Notes:

THE AGENCY AND THE LEGISLATURE

Lawmaking

Most state/provincial legislatures are designed similarly to the United States Congress in a bicameral manner. The larger chamber in numerical terms, is typically called the House, while the smaller chamber is often referred to as the Senate. (The nomenclature will differ in Canadian jurisdictions.) While the rules of legislative operation vary from state to state, there are a number of commonalities which can be discussed.

A law or statute begins as a bill, introduced in either or both the House or Senate. In both chambers the procedures are likely to be identical. First the bill is read and sent to a committee. This is a very important step in the process. Assignment to the appropriate committee can insure a favorable report, whereas assignment to another committee may result in defeat. The committee room is where the bill must gain momentum or fall by the wayside. There it can be favorably reported and move on its way; it can be amended; it can be indefinitely postponed and thereby killed; and perhaps worst of all, it can languish and never be brought up for a vote.

When the bill is favorably reported from committee, it will be read for a second time and placed on the calendar of that chamber. If it has been reported in a form acceptable to its sponsors, they will attempt to move it toward a vote. This is not as simple as it sounds, and here the more technical legislative rules come into play. On the first day of the regular session of any legislature, hundreds, maybe a thousand bills are introduced, read and assigned to committees. A proportionate number of these bills will be reported from committee following their initial meetings.

Committees report to the Speaker or Lieutenant Governor in a particular order, normally the financial committees first, then the judiciary committees and on down the line. The bills are placed on the calendar in the same order in which they are reported. If the committee to which your bill was assigned reports tenth, even if it's unopposed in committee, it may take its place on the calendar behind a hundred other bills. You can imagine the effect of a week or two weeks' delay caused by requests for public hearings on the bill. Once it is placed that far down the calendar, its only hope is with the Rules Committee. That committee determines the priority of bills when the regular calendar is abandoned and a special order calendar adopted, and that calendar is likely to change every day according to the wishes of the hierarchy.

In any event, assuming the bill comes out of committee, takes its place on the calendar and proceeds to a vote, a number of other things can happen. Again, it can be passed or killed, amended or substituted, or carried over to languish and die. Assuming it passes, it will be transmitted to the other chamber and go through the same process. It will be read, sent to committee if reported favorably, then read again and placed on that chamber's calendar. If it is ultimately voted on and passed in the form it came over in, then it will go to the governor for his signature or veto. If it has been amended, it most probably will go to a conference committee composed of small groups of senators and representatives appointed by the Speaker or Lt. Governor. If the bill can be agreed upon by the conferees prior to the adjournment of the legislature sine die, then it will pass in the agreed upon version and go to the Governor for his signature or possible veto.

Most board members are terribly naive about legislative matters. They tend to think that because their particular bill is meritorious that it should pass without objection. They fail to understand that just because they care about a change in licensing law does not mean that anyone else will care, particularly a state, territorial or provincial legislator. Therein lies the key to successful passage of bills. Without a sponsor who is dedicated to working a bill through to final passage, the measure is probably doomed. Simply agreeing to sponsor a bill, for most legislators, means very little and you should understand that early on.

Most legislators do understand the word commitment, but alas, most board members do not. If involved in legislative activity, don't assume anything. If a legislator commits to vote for a bill in committee, don't assume she'll vote for it on the floor. Ask her and see. Get her full commitment or find out why she's not willing to give you that.

Whatever you do, don't ignore the leadership. A bill that matters to only a few people has very little chance generally, but if it matters to the Speaker or Lt. Governor, its chances improve measurably. Of course, the Governor must be considered also. In most states, he/she has veto power requiring an overriding vote of both chambers. The Governor also has the authority to attach executive amendments which could aid or destroy your efforts so his/her office should not be ignored.

PAUSE YOUR GENERAL DISCUSSIONS AND ASK STAFF TO REVIEW ANY KNOWN LEGISLATION YOUR BOARD WILL BE ASKED TO RESPOND TO IN THE IMMEDIATE FUTURE.

Notes:

Sunset Review

Sunset legislation is currently in existence in thirty-plus states of the United States. Statutes vary in form but almost all require automatic termination of state administrative boards and agencies unless the state legislature votes to continue their existence. Normally, a board is notified well in advance of its termination date and informed as to the review procedure. Moreover, it has happened that administrative agencies have not been notified in sufficient time to prepare adequately for sunset review. Consequently, all boards should immediately determine when their sunset review date is and begin to prepare for that review.

Perhaps the most important part of Sunset Review is understanding the legislature and the sunset review process. First, it is extremely political in nature as most legislators view sunset as a way of making points with the electorate by reducing state government. To be successful in

sunset review, board members have to become politically aware, if not politically active. To do this, they should determine who the Sunset Committee members are and in particular the chairperson or chairpersons of the committee. They should actively seek to determine what the Sunset Committee members are really searching for during the review process. Do they want to know how much money state boards are spending and whether their budgets are too large, or are they utilizing sunset review as an effort to gain some form of executive reorganization? The best source to utilize in obtaining this information is the Sunset Committee staff which is normally charged with the responsibility of compiling reports on all agencies reviewed by the Sunset Committee. The staff is extremely important and its determination may be critical to the success of your board. If a formal staff person is not assigned to a sunset committee for compiling such data, you might inquire with your state Examiners of Public Accounts. Almost certainly there will be an audit conducted prior to sunset review, and this may in some states be the staff assistance provided to the committee.

The audit is the key document in the sunset review process. It can make or break the efforts of the agency. Each board must be prepared to defend criticisms within the audit, criticisms which may be leveled by auditors who have little or no understanding of the professions they are reviewing. It is probable, and you should expect the sunset audit to draw critical conclusions, sometimes unsupported by logic or explanatory data.

Dealing with such a document is difficult, but even more difficult is obtaining it in sufficient time for rebuttal. The auditor's deadline relates only to the sunset hearing, not to any opportunity for rebuttal of illogical conclusions. You may find the newspaper has a copy before you do. Plan for such possibilities and insist on a chance to rebut the auditor's conclusions. Use any political muscle you can to force the audit into the open in sufficient time for you to prepare to respond.

To successfully survive the sunset process, boards must be prepared for their sunset review. In that regard, it is advisable that every board, far in advance of its review date, have a pre-sunset meeting and an extensive self-evaluation session.

Some points that boards should consider are:

1. Is the board in harmony with its state association and/or boards with overlapping jurisdiction? Some boards have been sunsetted because of internal dissension among the practicing professionals within the jurisdiction. And, while the board is clearly autonomous from the professional association, it is good to know where criticism will come from. Additionally, a board would be well advised to know in advance if problems exist with other regulated professions and their respective boards.

2. Each board should be prepared to report to the Sunset Committee about consumer complaints that it has received. It is very important that legislators understand the severity of problems with unauthorized and unqualified practitioners. A board might make itself some points for budget hearings in this regard if it can show that more enforcement is needed rather than a cutback.

3. A board should be prepared to explain questions relative to limiting competition and should be prepared to answer questions regarding application denials and the reasons for such. It should be prepared to explain the standards for licensure; any uniformity that it can point to with the neighboring states would be helpful. Additionally, each board should be prepared to explain any exemptions in the law and the pros and cons of such exemptions. Knowledge of the board's own practice act is imperative, and the board's spokespersons should be prepared to explain all of its rules and regulations and any prohibitions that it may have on advertising, corporate practice or the like. Information on any disciplinary actions which can be released should be released as evidence of the board's on-going efforts to protect the public. Be cautious in this regard lest you release something that is privileged information.

4. Each board must know its opposition. If allied professions have previously sought licensure status and been unsuccessful in that regard, they may view sunset as a way of accomplishing their goal in another manner. If there have been extensive conflicts with other professions, then the board should be prepared to defend the stand it took. A board would be well advised to consult with the staff of the sunset committee in advance of its hearing to determine if any witnesses are going to appear from out-of-state. It is not unlikely that some member of a consumer group or other individuals will be prepared to appear at a sunset hearing and speak against the continuation of the board.

5. The question of whether a board could/should be merged with another board is likely to come up. Those members present for sunset review should be able to explain what effect it would have on the quality of services if the board is merged with another board and what problems could arise.

6. Each board should be prepared to justify and explain its budget in detail. If its funds are separate and distinct from the state's General Fund, a justification should be ready. If the board is responsible for continuing education and is pursuing its implementation actively, this can be an important point to make during sunset review.

7. One potential point of concern is the question of equal employment opportunities. The board should have some facts and figures readily available on the number of minority applicants, the number licensed and the number refused, as well as, the reason for refusing these applicants.

8. The board should be prepared to explain and defend its application and exam procedures. If complaints have been received about the length of time required for processing and the number of individuals refused or having failed the exam, sufficient explanation should be prepared well in advance of the sunset hearing.

9. Spokespersons for the board should also be prepared to explain, and if necessary to defend, expenditures for out-of-state travel.
A few "Do's" and "Don'ts" might be of some help:

Things to DO in regard to your actual sunset hearing:

1. DO attend another board's sunset review hearing in advance of your board's review date and observe the sunset review process. The lessons learned by observing other boards in the process can be extremely helpful.

2. DO determine the review authority of the sunset committee and have the board's attorney review any requests for confidential information. He/She should also prepare a list of cases to substantiate your legal authority to regulate the profession.

3. DO compute the value of donated time and be prepared to report on whether or not a state supported super board could replace similar type boards.

4. DO create an office procedures manual if you have not already done so and have it available for the sunset committee staff and the committee.

5. DO document the work that you have done so that nothing is left to the imagination.

6. DO have a good attitude about sunset as it can be very helpful in increasing the effectiveness of the board.

A few things that you DON'T want to do in regard to a sunset hearing:

1. DON'T forget your sunshine law if one exists in your state. If you have to have a meeting to prepare for sunset review with other boards or with the sunset staff or with the state association, you may have to give notice to the public in advance of the hearing.

2. DON'T tell the sunset review committee that your profession is unique. Sunset committees no longer accept this rationale for non-conference to statutory mandates.

3. DON'T forget the Governor's office. In all but one state of the Union, the Governor has veto power over legislation and his/her office should not be ignored. Remember that a Governor can refuse to sign a continuation bill passed by the House and Senate and eliminate an agency in this manner.

Notes:

Legislative Questions

Sunset hearings in all jurisdictions are preceded by a lengthy audit. Invariably, questions are put to boards with instructions to answer same in accordance with published criteria and standards. A typical example is set out below.

FOR ESTABLISHED PROFESSIONS, THESE QUESTIONS MAY SEEM SUPERFLUOUS,

BUT THEY DO RAISE REGULATORY CONSCIOUSNESS.

1. Criteria And Standards:

A. A profession or occupation shall be regulated by the state only when:

(a) It can be demonstrated that the unregulated practice of the profession or occupation can clearly harm or endanger the health, safety or welfare of the public, and the potential for the harm is recognizable and not remote or speculative.
(b) The public can reasonably be expected to benefit from an assurance of initial continuing professional ability.
(c) The public cannot be effectively protected by other means.

B. After evaluating the criteria in subsection A of this section and considering governmental and societal costs and benefits, if the legislature finds that it is necessary to regulate a profession or occupation, the least restrictive method of regulation shall be imposed, consistent with the public interest and this section:

(a) If existing common law and statutory civil remedies and criminal sanctions are insufficient to reduce or eliminate existing harm, regulation should occur through enactment of stronger civil remedies and criminal sanctions.
(b) If a professional or occupational service involves a threat to the public and the service is performed primarily through business entities or facilities that are not regulated, the business entity or the facility should be regulated rather than its employee practitioners.
(c) If the threat to the public health, safety or welfare including economic welfare is relatively small, regulation should be through a system of registration.
(d) If the consumer may have a substantial interest in relying on the qualifications of the practitioner, regulation should be through a system of certification.
(e) If it is apparent that the public cannot be adequately protected by any other means, a system of licensure should be imposed.

C. Any of the issues set forth in subsections 1A and 1B of this section and section 2 below may be considered in terms of their application to professions and occupations generally.

2. Information Requested: Prior to review under this chapter and prior to consideration by the legislature of any bill which proposes to regulate a profession or occupation, the profession or occupation being reviewed or seeking regulation shall explain each of the following factors:

A. Why regulation is necessary including:

(a) The nature of the potential harm or threat to the public if the profession or

occupation is not regulated.

(b) Specific examples of the harm or threat identified in subsection (a).

(c) The extent to which consumers will benefit from a method of regulation which permits identification of competent practitioners, indicating typical employers, if any, of practitioner.

B. The extent to which practitioners are autonomous, as indicated by:

(a) The degree to which the profession or occupation requires the use of independent judgment, and the skill or experience required in making such judgment.

(b) The degree to which practitioners are supervised.

C. The efforts that have been made to address the concerns that give rise to the need for regulation including:

(a) Voluntary efforts, if any, by members of the profession or occupation to:
(1) Establish a code of ethics.
(2) Help resolve disputes between practitioners and consumers.

(b) Recourse to and the extent of use of existing law.

D. Why the alternatives to licensure specified in this subsection would not be adequate to protect the public interest:

(a) Stronger civil remedies or criminal sanctions.

(b) Regulation of the business or facility providing the service rather than the employee practitioners.

(c) Regulation of the program or service rather than the individual practitioners.

(d) Registration of all practitioners.

(e) Certification of practitioners.

(f) Other alternatives.

E. The benefit to the public if regulation is granted including:

(a) How regulation will result in reduction or elimination of the harms or threats identified under subsection A of this section.

(b) The extent to which the public can be confident that a practitioner is competent.
(1) Whether the registration, certification or licensure will carry an expiration date.
(2) Whether renewal will be asked only upon payment of a fee, or whether renewal will involve reexamination, peer review, or other enforcement.
(3) The standards of registration, certification, or licensure as compared with the standards of other jurisdictions.
(4) The nature and duration of the educational requirement, if any, including,

but not limited to, whether such educational program includes a substantial amount of supervised field experience; whether educational programs exist in this state; whether there will be an experience requirement; whether the experience must be acquired under a registered, certified, or licensed practitioner; whether there are alternative routes of entry or methods of satisfying the eligibility requirements and qualifications; whether all applicants will be required to pass an examination; and, if an examination is required, by whom it will be developed and how the costs of development will be met.

F. The form and powers of the regulatory entity including:

(a) Whether the regulatory entity is or would be a board composed of members of the profession or occupation and public members, or a state agency, or both, and if appropriate, their respective responsibilities in administering the system of registration, certification or licensure.
(b) The composition of the board, if any, and the number of public members, if any.
(c) The powers and duties of the board of state agency regarding examinations.
(d) The system for receiving complaints and taking disciplinary action against practitioners.

G. The extent to which regulation might harm the public including:

(a) Whether regulation will restrict entry into the profession or occupation:
(1) Whether the standards are the least restrictive necessary to insure safe and effective performance.
(2) Whether persons who are registered, certified or licensed in a jurisdiction which the board or agency believes has requirements that are substantially equivalent to those of this state will be eligible for endorsement or some form of reciprocity.
(b) Whether there are similar professions or occupations which should be included, or portions of the profession or occupation which should be excluded from regulation.

H. How the standards of the profession or occupation will be maintained:

(a) Whether effective quality assurance standards exist in the profession or occupation, such as legal requirements associated with specific programs that define or enforce standards, or a code of ethics.
(b) How the proposed form of regulation will assure quality:
(1) The extent to which a code of ethics, if any, will be adopted.
(2) The grounds for suspension, revocation, or refusal to renew registration, certification or licensure.

I. A profile of the practitioners in this state, including a list of associations,

organizations, and other groups representing the practitioners including an estimate of the number of practitions in each group.

J. The effect that registration, certification or licensure will have on the costs of the services to the public.

PAUSE YOUR GENERAL DISCUSSIONS AND DETERMINE WHAT PLANS YOUR BOARD NEEDS TO MAKE REGARDING SUNSET REVIEW.

Notes:

THE AGENCY AND THE JUDICIAL PROCESS

Litigation

Lawsuits are commonplace within the world of professional regulation. They can and are filed for a variety of reasons; i.e., admission to exams, to challenge actions taken by boards, to block disciplinary efforts, and so forth. Boards themselves are finding that oftentimes they must initiate litigation in order to effect their own purposes.

Just what is litigation? Basically it involves disputes which are properly resolvable by a court of law. There are different types of litigation. **This section of the manual is devoted to suits that are not appeals from agency decisions**. There are certain basic phases of a lawsuit that all board members should be acquainted with. The first phase can be referred to as the pleadings phase of the suit. A lawsuit begins with the filing of a complaint or petition which sets out the activity complained of, the grounds for relief, and the damages to which the person may be entitled. The person filing the lawsuit is normally referred to as the plaintiff, complainant, or petitioner. Those who must defend the suit are normally referred to as the defendants or respondents.

When the lawsuit is filed, an accompanying document called a summons is also prepared. That document, along with a copy of the complaint, is served on each individual who is named as a defendant. The summons gives notice to the defending party as to the plaintiff's name, the court in which the case has been filed, and most importantly, the date by which a responsive pleading is required. It is not unusual for a board member to be sued and consequently receive a summons and complaint. When and if this happens, contact counsel immediately because the time for responding begins to run from the date you are served.

The responsive pleadings are normally either a motion to dismiss and/or motion for summary judgment or an answer. Motions to dismiss or for summary judgment are pleadings which are designed to end the litigation without trial based on the law alone. An answer is exactly that. It is the defendant's response by which he admits or denies any wrongdoing and/or liability. There are a number of other documents which may be filed within the pleading phase

of the lawsuit, but are more technical than the intent of this manual.

The next phase of a lawsuit is the "discovery" phase. It is aptly named because each party to the lawsuit, during this phase, attempts to discover what the other's case actually is. This is a step forward from the old days when surprise at trial was the rule, rather than the exception. The rules of civil procedure, which have been enacted in most states now, are designed so that theoretically there are no surprises at the time of trial. This is done in an effort to more equitably serve the rights of the parties. During the discovery each side may utilize various techniques designed to uncover facts and expose weaknesses and strengths of the respective parties.

The two most important tools in discovery are written interrogatories and depositions. Written interrogatories are questions propounded to parties which they are required to answer under oath. This is the least expensive form of discovery, but can only be served on other parties. A deposition may be utilized with parties and other witnesses. A deposition is basically a question and answer session involving the prospective witness, counsel for both sides and a court reporter who takes the sworn testimony of the deponent. This discovery tool is used not only to discover the alleged facts of the case, but to preserve testimony which may be used at trial if the witness is unavailable and to observe the demeanor of the potential witness.

Should you ever have to answer interrogatories, you will be able to utilize the assistance of counsel in formulating responses. They are questions which must be answered truthfully, and the individual answering the question must so affirm or swear as to their truthfulness. A deposition can be a very effective tool for a litigant since it allows a party to assess the witness' ability to testify, and it provides a fertile ground for producing inconsistent statements that my prove to weaken that side's case. You should never let your deposition be taken without advising your attorney. It is a common ploy of many lawyers to initiate such a lawsuit against a party who will ultimately be dismissed from the case when other parties are added. In the meantime, the party filing the suit, prior to adding the additional parties, will already have noticed and taken the depositions of future parties who unknowingly submit to the deposition without the advice of their attorneys.

Discovery is the phase of the lawsuit which takes the longest period of time, and it can go on seemingly forever. It is expensive and time consuming, but it is an absolute necessity if a case is to be tried properly.

The next phase of litigation is the trial of the case itself. The party which filed the lawsuit has the burden of going forward with the evidence and proving its case by a preponderance of the evidence. Trials are basically of two types: jury trials and non-jury trials.

Compared to jury trials, non-jury trials are quick and relatively simple. The trial judge's responsibilities create the differences. In a jury trial, the judge must be very careful to shield the jury from inadmissible evidence. When a judge sits alone, he can simply disregard improper evidence; further, there is no necessity for written or oral jury charges. Everything has advantages and disadvantages though. So far as decision making goes, juries are much faster than judges, as cases can be taken under advisement for long periods of time.

A typical trial of either sort would begin with an opening statement from both plaintiff and defendant. This phase is for the purpose of advising the court or jury of what each side expects to prove from the evidence. This exchange is followed by the plaintiff's case in chief. Evidence is elicited through oral testimony and physical exhibits. Each side has, of course, the opportunity to cross-examine the other side's witnesses following its direct examination.

After the plaintiff rests, defense counsel will ordinarily move for a directed verdict. If the plaintiff has produced substantial evidence on each element of his claim, this motion will be denied and the defense will put on its case in the same manner as the plaintiff did. Following the close of the defendant's case, the plaintiff is normally allowed to call any rebuttal witness. The case then goes to the jury following the court's oral charge, or is taken under submission by the trial judge. When a decision is made, various motions may be filed and an appeal may be taken.

Appeals are costly, time consuming, and involve the transcription of the record, briefs and argument of counsel. Some appeals may be directly to the highest court of the jurisdiction, while others may lie to an intermediate court. The difference in trial and appeal is principally the manner of presentation of the case. On appeal, evidence is presented through the record made in trial court, and arguments by counsel are limited to written briefs and short oral arguments. Review by the appellate court is for the most part limited to alleged error at the trial stage, although occasionally other issues may be considered.

Cases can also remain on appeal for long periods of time, and swift decisions should not be expected. When a decision is made, the appellate court may affirm the lower court's decision, affirm in part and reverse in part, reverse for a new trial or reverse and render.

PAUSE YOUR DISCUSSIONS AND ASK COUNSEL TO COMMENT ON THE BOARD'S ROLE IN ANY CURRENT LITIGATION THAT INVOLVES THE AGENCY.

Appeals from Agency Decisions

Virtually any contested case can result in a decision adverse to a party that can be appealed to a court of general jurisdiction. These "appeals" are lawsuits, but they differ markedly from the other type of lawsuits discussed above.

Appeals of agency decisions are usually confined to the review of the record of the proceedings that resulted in the agency's decision. In most such appeals the reviewing court is bound to affirm if there is substantial evidence that the agency's decision was correct and not arbitrary or capricious. The reviewing court will also consider challenges to the fairness of the process the board used to reach its decision.

Many of the appeals from disciplinary cases involve the adjudication process and situations in which boards disagreed with recommendations made by hearing officers.

PAUSE YOUR DISCUSSIONS AND HAVE COUNSEL EXPLAIN THE BOARD'S AUTHORITY TO OVERRULE A HEARING OFFICER'S RECOMMENDATIONS AND THE PROPER WAY TO DO SO.

Notes:

Liability

There are several types of liability which board members should be aware of. First is the liability of the board itself for injunctive relief. Basically there are two types of injunctive relief: mandatory or prohibitory. These are remedies requiring defendants to do or refrain from doing particular acts. In some states, other proceedings may be called by other names, such as writ or mandamus or prohibition, but the results are similar in nature.

Injunctive type relief in state court is the least troublesome type of liability since it lies directly against the agency and rarely involves damages or attorney's fees. Other types of liability -- for actual damages, for misconduct or violation of an individual's civil rights -- are far more intimidating. Of particular concern are the far reaching aspects of 42 U.S.C. §1983, et seq., which assess attorney fees almost automatically against unsuccessful litigants even if only injunctive relief has been secured.

A board member who cannot bear the threat of litigation needs to resign immediately for his/her own well-being and that of the board. Threats of lawsuits are commonplace, even everyday events for many boards. The handful of suits that do occur are vexious and time consuming. But, liability is not common. There are many defenses to such actions, particularly if the lawsuit involves the exercise of the board's adjudicative function. In fact, when exercising this function there is significant case law that holds that board members are absolutely immune from liability. Hicks v. Georgia Board of Pharmacy, 553 F.Supp. 314 (N.D.Ga. 1982); Bettencourt v. Board of Reg. in Medicine, 904 F.2d 772 (1st Cir.1990); Watts v. Burkhart, 978 F.2d 269 (6th Cir. 1992); O'Neal v. Mississippi Board of Nursing, 113 F.3d 62 (5th Cir. 1996); and Wang v. New Hampshire Board of Registration in Medicine, 55 F.3d 698 (1st Cir. 1995). But see also: Lapides v. Board of Regents, 122 S.Ct. 1640 (2002); Edwards v. Gerstein, 237 SW 3d 580 (MO.banc 2007).

Most state governments have insurance protection that extends to members of professional regulatory boards. However, staff is responsible for compliance with the various regulations that make this coverage available. Make sure these regulations are followed to the letter. Many jurisdictions have statutes that also provide immunity from civil liability to members of non-profit corporations and "other such boards and commissions". If a lawsuit occurs these statute(s) should not be overlooked.

Board members and staff should also seek competent advice regarding matters related to use of state equipment and reimbursement for travel expenses. Statutes and rules regarding anything involving state monies should be followed to the letter.

PAUSE YOUR DISCUSSIONS AND ASK COUNSEL TO DISCUSS ANY THOUGHTS REGARDING BOARD MEMBER LIABILITY IN YOUR JURISDICTION.

Occasionally the threat of antitrust liability is raised. The U.S. courts have spoken to this issue on a number of occasions and the state action immunity doctrine has provided a significant umbrella of protection for agency members. Hoover v. Ronwin, 466 U.S. 558 (1982); Brazil v. Arkansas Bd. of Dental Examiners, 593 F.Supp. 1354 (D.C.Ark.1984); Leigh v. Board of Registration in Nursing, 506 N.E.2d (Miss. 1987); Hass v. Oregon State Bar, 883 F. 2d 1453 (9th Cir. 1989); Otworth v. The Florida Bar, 71 F. Supp. 2d 1209 (M..D.Fla. 1999); South Carolina State Bd. v. F.T.C., 455 F. 3rd 436 (4th Cir. 2006).

Of more concern is the agency's liability for violation of more recently passed laws such as the Americans With Disabilities Act (ADA), codified as 42 U.S.C. 12001, et. seq.. This law impacts the manner in which the board assesses initial and current fitness to practice. Doe v. State of Conn., Dept. of Health Services, 75 F. 3rd 81 (2nd Cir. 1996).

PAUSE YOUR DISCUSSIONS AND ASK STAFF AND COUNSEL TO DISCUSS COMPLIANCE ISSUES RELATIVE TO THE ADA.

Notes:

THE AGENCY AND THE PUBLIC

While the agency is accountable to the legislature each time sunset review occurs, it must be accountable to the public every day. As many critics of professional regulatory boards quickly point out, the purpose of such regulation is to protect the public, not the professions. Other critics say that it's just as important to protect the public from the regulatory boards.

Regardless of the point of view, legislatures have made regulatory agencies accountable in a number of ways. State statutes which typically apply to boards and their members, as well as other agencies and employees, may include a competitive bid law, an ethics act, a freedom of information act and a sunshine law. While discussed earlier, this manual would be incomplete without some formal acknowledgment of those laws that relate to the agency and the public.

Freedom of Information Acts (Open Records)

A number of jurisdictions may have what is commonly referred to as a Freedom of Information Act. The state/provincial act may predate the federal Freedom of Information Act or

may be patterned after it. That particular statute was passed in 1967 and amended in 1974. The Act is codified as part of the Federal Administrative Procedure Act, 5 U.S.C. 552. Its general purpose is to provide citizens access to public information on the federal level.

Of course, this handbook is for members of professional regulatory boards. In that regard, most state statutes include Freedom of Information Act. For more information on state FIOA laws, see Project, Government Information and the Rights of Citizens, 73 Mich.L.Rev. 971 (1975). For those U.S. jurisdictions which do not have a similar statute there is also precedent for common law rights of access to information held by state governments. City of St. Matthews v. Voice of St. Matthews, 519 S.W.2d 811. (KY App. 1974).

Sunshine Laws (Open Meetings)

This particular type of law which could well be described as an open meeting law, had been enacted in all fifty (50) states of the Union before Congress passed the Federal Government in the Sunshine Act, 5 U.S.C. 552(b). The concept embodied in such laws includes the concept that publicity is a helpful preventive for many of the more common ills of those who govern the public. Sunshine Acts open agency meetings to the public and the press. Violation of such acts, for whatever reason, innocent or not, can prove costly and may result in the invalidation of actions taken at such meetings. Polillo v. Deane, 379 A.2d 211 (N.J. 1977). Invalidation is not the only result. Two others which come to mind are adverse publicity and possible repercussions during sunset hearings. Cantrell v. State Board of Registration, 26 S.W. 3d 824, (Mo. App.W.D. 2000); Commonwealth MA v. Bd. Selectmen Town, No. 062167C (Ma.Super. Oct. 30, 2006).

In order to conduct your board meetings properly, be sure to consult with counsel and have counsel extract the relevant Sunshine law from your state code. Make sure that your Executive Secretary is aware of any notice requirements within this statute and the manner in which such notice must be given.

At the same time, do not ignore the exceptions found in the Sunshine Act. Invariably there will be exceptions to the general rule which will allow for deliberations behind closed doors. There are ten (10) such categories in the federal statute, and while state statutes will probably not contain so many exceptions, you can be assured that such categories as the character or good name of an individual will be included in many such acts. Careful scrutiny of the act may avoid nasty litigation for defamation, libel or slander.

THE AGENCY AND OTHER ORGANIZATIONS THAT INTERACT WITH PROFESSIONAL REGULATION

Association of State and Provincial Psychology Boards

The Association of State and Provincial Psychology Boards is the cumulative body of all state, territorial and provincial boards that regulate the practice of psychology in the U.S. and Canada. Currently, ASPPB has 64 state, territorial and provincial members. ASPPB creates the Examination for Professional Practice in Psychology (EPPP), which is used to assess candidates for licensure in most of the member jurisdictions. ASPPB also takes responsibility for maintaining the disciplinary data bank and for transferring EPPP scores among the jurisdictions. ASPPB holds two membership meetings, one in the fall and one in the early spring. Both meetings have educational components in which both plenary and small group sessions are devoted to licensure, discipline and other regulatory issues. ASPPB also produces many publications that it makes available not only to its own members, but to the public and other interested entities. ASPPB is located at 7177 Halcyon Summit Drive, Montgomery, Alabama 36117. Its web site can be found at http://asppb.org.

Citizen Advocacy Center

Citizen Advocacy Center (CAC) is a private non-profit organization that provides support and training for public members of professional regulatory boards. CAC also conducts research and sponsors educational conferences on public issues related to health care quality assurance. CAC's address is 1424 16th Street, N.W. #105, Washington, D.C., 20036.

Council on Licensure, Enforcement and Regulation

Council on Licensure, Enforcement and Regulation (CLEAR) is a non-profit organization that is involved in education and training for those involved in professional regulation. CLEAR sponsors a certification course for agency investigators and educational conferences on both the regional and national levels. CLEAR's address is 201 West Short Street, Lexington, Kentucky, 40509; (606) 231-1892.

Federation of Associations of Regulatory Boards

Federation of Associations of Regulatory Boards (FARB) is a non-profit organization made up of 12 associations of regulatory boards. FARB sponsors three educational conferences per year including the Annual Forum, Attorney Certification Course and Leadership Conference. Information about FARB can be located at www.farb.org.

National Organization for Competency Assurance

National Organization for Competency Assurance (NOCA) is a non-profit organization that provides educational opportunities for entities that certify various health care providers. NOCA can be reached at 1200 19th Street, N.W., Suite 300, Washington, D.C., 20036-2422; (202) 859-1165.