

**OFFICE OF THE
ATTORNEY GENERAL**

**NEVADA
BOARD AND COMMISSION
MANUAL**



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A MESSAGE FROM THE ATTORNEY GENERAL

The purpose of this manual is to provide an orientation to individuals who are appointed to serve on a state regulatory licensing board or commission. I believe it is important to help familiarize you with state government, the laws and other matters that relate to the functioning of boards and commissions and the guidelines under which board members should operate.

This manual is not intended to answer every question or address every matter that you may face as a board or commission member. It is intended to give you basic knowledge regarding operation of most boards and commissions. Based on your experience as a member of a board or commission, you may very well have comments or suggestions to improve the manual for future editions. This office welcomes your input.

As is made clear throughout the manual, boards and commissions do have a variety of resources available to them. For example, the State Budget Division may be able to provide assistance with regard to financial or budgetary matters. Board and commission members should never hesitate to rely on such resources or their legal counsel whenever the prospect presents itself. Additionally, please visit the Attorney General's website at <http://ag.nv.gov/> for additional manuals to assist you in your position.

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I. BOARD AND COMMISSION FUNCTIONS

As a member of a board or commission, you are part of the executive branch of Nevada's state government. In general, the function of the executive branch of government is to carry out or enforce laws enacted by the State Legislature that pertain to its particular jurisdiction. Jurisdiction means the power and authority. A board or commission only has the jurisdiction to determine issues over which it is given responsibility by statute. See *Moore v. Bd. of Trustees of Carson-Tahoe Hosp.*, 88 Nev. 207, 210, 495 P.2d 605 (1972).

In general, boards and commissions administer licensing examinations, issue licenses, and regulate activity within an area of law by enforcing the specific statutes and regulations governing that profession. The purpose of professional licensing is to protect the health, safety, and welfare of the public by assessing minimum educational and experience requirements for initial entry into a profession, and by enforcing laws and regulations to ensure continued competence and ethical behavior on the part of professional practitioners. Other regulatory bodies, such as the Nevada Tax Commission and Labor Commissioner, do not issue professional licenses. The purpose of those boards and commissions is to protect the public by enforcing the laws over which they specifically have jurisdiction.

Generally, the statutes and regulations which are enforced by boards and commissions are enacted by the State Legislature to protect the general public or some specific identifiable sector of the public. Therefore, as you conduct your duties as a member of a board or commission, it is important for you to remember that ***the primary purpose of your board or commission is to protect the public***, particularly in light of the fact that this purpose may sometimes be at odds with the interests of the industry or profession in which you earn your livelihood. Being a board member may often be a difficult job, and you may be called upon to make difficult decisions.

To better understand the purpose and function of your board or commission, you should be familiar with the statutes and regulations establishing your authority. Virtually every board and commission is governed by a specific chapter of the Nevada Revised Statutes (NRS). Typically, the statutes and regulations pertaining to a board or commission contain the following:

- A. Provisions identifying the purpose of the board or commission and establishing its general powers, membership selection, tenure, and operation. (These provisions are generally found at the beginning of your board's or commission's NRS Chapter.)
- B. Provisions defining the profession, business, trade or subject matter under the board's or commission's jurisdiction.
- C. If a professional licensing board, provisions governing the licensing and disciplinary functions of the board or commission.
- D. If a general regulatory body, provisions governing the authority and scope

of the board or commission to take action on the matters within its jurisdiction.

It is important to remember that, as a legislatively-created agency, the power of a board or commission is limited. It may **only** do that which is set forth in, or can be reasonably implied from, the pertinent statute and regulations.

For professional licensing boards and commissions, the combination of the NRS and Nevada Administrative Code (NAC) chapters governing the board or commission is commonly referred to as a “practice act.” Generally, in the NRS, the board or commission has the authority to adopt administrative regulations governing the profession. Such regulations may not conflict with the NRS and are added to the NAC after they are adopted by the board or commission and approved by the appropriate committee at the legislature. Like the NRS, the NAC is organized by numbered chapters. NAC Chapter numbers will correspond to the appropriate NRS Chapter number. For example, NRS Chapter 644 creates the Nevada State Board of Cosmetology. Accordingly, regulations regarding cosmetology are found in NAC Chapter 644. Regulations contained in the NAC apply with the same force of law as the statutes and, thus, must be followed.

II. THE ROLE OF THE BOARD OR COMMISSION MEMBER

- A. Board and commission members are normally appointed by the Governor, although in a few instances they may be appointed by another state official, such as the head of a state agency.

The primary function of a board or commission member is to ensure that the public health, safety, and welfare are protected. All decisions that are made by the board or commission must derive from that purpose, whether on a matter of registration, examination, licensure, competence, or alleged misconduct by a licensed professional. ***As you perform your duties as a board or commission member, you must remember that the interests of the profession and the professional are subordinate to the interests of the public.***

- A. If you are appointed to a board or commission, you will receive five items from the appointing official along with instructions for handling these items:
- A document, often called a Commission, declaring your appointment and your tenure;
 - An Oath of Office which you must sign before a notary and return to the **Governor's Office** for filing;
 - Information regarding financial disclosures which you must complete and file electronically with the **Secretary of State**, if you are entitled to annual compensation of \$6,000 or more from your board or commission appointment;
 - An Acknowledgment of Statutory Ethical Standards (ACK), which you must sign and return to the **Commission on Ethics***; and
 - A biographical questionnaire which you will be requested to complete and return to your board or commission staff, unless otherwise directed.

*Please note that by signing the ACK you are acknowledging that you have received, read, and understood the provisions of NRS Chapter 281A. The ACK must be signed and returned at the beginning of your term, and, to ensure that you are familiar with changes enacted during legislative sessions, every even-numbered year thereafter. For more information about the ACK, please contact the Nevada Commission on Ethics (NCOE) or visit the NCOE's website at <http://ethics.nv.gov/>.

B. Board and commission members have responsibilities to the following groups:

- The General Public.

The public has an expectation of fair dealing with the profession as a whole and trusts that the regulated individuals and/or entities will be qualified to perform properly and safely. It anticipates that a fair method will be utilized to investigate and resolve complaints filed by consumers regarding their dealings with the profession. Under the Open Meeting Law, the public has a right to be informed about the date, time, and location of board or commission meetings and to a justification for actions the board or commission takes.

- Potential Licensees or Other Regulated Individuals/Entities.

A person who wishes to earn his or her living in an occupation that requires licensure should not be kept out unreasonably. That person should also have easy access to all information about entering the profession, including testing, transferring a license to or from another state, and all other application requirements instituted by the board or commission.

- Other Board or Commission Members.

Each board or commission member has the responsibility to listen to other members and to consider their views and opinions. Each member should also voice his or her thoughts on the issues presented and within the jurisdiction of the board or commission.

C. Criteria for Board or Commission Membership:

The criteria for membership are generally contained in the NRS provision that creates the board or commission. In addition, most board and commission members must meet a six-month residency requirement. See NRS 232A.020(1).

The public members on a board or commission are there to ensure that the public interest is represented. Public members are not expected to be technically expert or experienced in the profession or subject area which they oversee. Furthermore, public members may not have a financial interest in any matter within the board or commission's jurisdiction. See NRS 232A.020(5).

Characteristics of an effective board or commission member:

- Demonstrated interest in public service.
- Common sense regarding policies and procedures, i.e., do the decisions of the board or commission seem sensible? If not, the board or commission member should ask for clarification.
- Willingness to ask questions.
- Commitment to attendance. Consistent attendance is essential to keep informed about what is going on and to give continuing direction and support. An individual who accepts appointment to a board or commission and does not take seriously the duty to be there regularly and actively does a disservice to the board or commission and to the public.
- Consideration. Respect each member's viewpoints and opinions and be courteous and fair to all persons appearing before the board or commission. Keep your facial expressions and other non-verbal cues neutral when hearing public comments or testimony in a hearing or other proceeding.
- Preparation. Reviewing your meeting packet prior to each meeting is essential to an effective board or commission meeting. Furthermore, it is important to be familiar with the statutes and regulations governing your profession or subject area. However, when preparing for disciplinary matters, it is imperative that you restrict your preparation and review solely to the materials presented to you in the meeting packet. Board or commission members may not conduct their own investigations regarding disciplinary cases pending before the board or commission. ***Engaging in your own investigation of a disciplinary matter outside of a board or commission meeting may violate the due process rights of the individual and result in your disqualification from participating and voting in the proceeding.***

Important reminders for all board or commission members:

- A board or commission member should not use his or her position outside of a board or commission meeting to represent that he or she has any decision-making powers, because decisions are made only by the board or commission as a whole.

- A board or commission member may only speak on behalf of the board or commission if delegated by the whole board or commission at a public meeting. Outside of a meeting, it is crucial that board or commission members ensure that they are clear to those with whom they are speaking that any thoughts or positions voiced are their own and not the board's or commission's. In other words, a board or commission member may be thought to have two different "hats." One hat is that of a board or commission member and the other is that of a private citizen. Unless authorized by the full board or commission, outside of a public meeting, the board or commission member must wear only his or her private citizen hat.
- All inquiries within the jurisdiction of the board or commission should be directed to the board or commission office so they can be answered by staff and/or brought to the attention of the board or commission at a duly-noticed public meeting. Nevada is a fairly small state, as a board or commission member, individuals from the public and/or the news media will likely contact you regarding standards of conduct for the profession and/or board or commission decisions, policies, or procedures. When this happens, you should **always** direct the person to the board or commission office. This minimizes the risk that you will provide misinformation, legal advice, and/or speak without authorization on behalf of the board or commission.
- Details of board or commission activity should not be disclosed by a board or commission member unless and until the matter is decided by the board or commission at a public meeting and becomes part of the public record. Some investigative procedures which may conclude in formal hearings or conferences may be confidential and not a part of the public records. Thus, any disclosure of such information should be made only after consultation with legal counsel to the board or commission.
- Board or commission members are prohibited from participation in *ex parte* discussions concerning quasi-judicial proceedings before the board or commission. This means they cannot participate in private discussions with one party in the absence of the other parties to the dispute. Any board or commission member who participates in an investigation is unable to sit on the board or commission in a decision-making capacity concerning the subject of the investigation.

D. Public Board or Commission Members.

Most boards or commission require appointment of a public member who is not a member of the occupation or profession that is being regulated.

Several strategies may be used to increase public member effectiveness. These strategies will help public members feel comfortable in their role, maintain a positive attitude, and ensure fulfillment of their public trust:

- Ask questions. As the public member, you are not expected to know everything the other members of the board or commission know about the particular subject or profession. When policy is discussed or decisions made, these are key moments for public members to ask questions to facilitate their learning.
- Sub-Committees. Boards or commissions may have sub-committees to facilitate the work of the board or commission. Sub-committees are created at a public meeting by the full board or commission to perform a designated function. Volunteering to serve on a sub-committee may enable a public member to develop expertise in important areas of the board or commission.
- Attitude. A public member's contribution is significant and important. His or her viewpoints are crucial to the effective functioning of the board or commission and will affect the deliberations and decisions rendered by the board or commission.
- Active Participation. A public member is encouraged to actively participate in board or commission meetings. This means that he or she should ask questions, share opinions, and otherwise contribute to the board or commission discussions at the meeting.

III. BOARD AND COMMISSION STRUCTURE AND OPERATION

A. General.

Boards and commissions are normally required by statute to meet a minimum number of times per year. Commonly, a board or commission must meet a minimum of four times per year. However, this requirement varies with the purpose and type of business conducted by the board or commission. Please review the statutes governing your board or commission for more information. As discussed more fully in the Open Meeting Law section, as well as the Open Meeting Law Manual, proper notice of such meetings must be given. See also NRS Chapter 241.

Each statute sets out quorum requirements for the board or commission. As required by the Open Meeting Law, a quorum must be present before the board or commission may hold meeting and conduct board or commission business. In most cases, the presence of the majority of the appointed board or commission members constitutes a quorum. For example, if the board or commission consists of seven members, a quorum is generally four members. Please review the statutes for your board or commission to determine the required quorum.

Although boards and commissions are generally not required to do so, they may establish sub-committees to research, review, and/or make recommendations on certain matters such as personnel, finance, and continuing education. Remember, though, that typically there is no statutory authority for a board or commission to delegate its responsibility for making fundamental decisions to a sub-committee. In other words, a licensing board generally may not delegate its disciplinary proceedings to a sub-committee of the board. If a question arises concerning whether a particular matter can be delegated to a sub-committee by the board as whole, legal counsel should be consulted. In addition, the formation of sub-committees as well as sub-committee meetings are subject to the Opening Meeting Law.

B. Board or Commission Meeting Locations.

First, the board or commission must announce the date, time, and place of the meeting¹ to the public well in advance. Members and interested persons who have requested notice must also receive notice of the board or commission meeting. See NRS Chapter 241 and Section IV of this manual.

¹ Note: All meetings which are subject to the Open Meeting Law must be held within the State of Nevada. See NRS Chapter 241.

When making meeting arrangements, it is recommended that a comfortable, noise-free room or space be scheduled for the meeting. The room size should be sufficient to easily accommodate the board or commission members, the board or commission's staff, and members of the public who will be present for the board or commission meeting. The room should have proper ventilation and temperature control. The room should have proper acoustics and no visual barriers. The president or chair of the meeting should have a seat that is easily seen and heard by everyone attending the meeting. In a large or more formal meeting, proper sound equipment should be utilized. Other matters of importance may include proximity to restroom facilities, the availability of restaurants or other meal opportunities, adequate parking facilities, elevators, access for disabled individuals, and audio- or video-conference capabilities.

Remember that the meeting must always be accessible to the general public. This means that meeting in a private home or other private location is not advised. Further, the meeting door must remain unlocked.

C. Board or Commission Staff.

Depending on the availability of resources, as well as statutory authority, a board or commission may have a staff of full- and/or part-time employees. It may therefore, be advisable to follow the State Administrative Manual (SAM) or to have a written personnel policy that clearly defines duties of each position and spells out the board or commission's policy with respect to matters such as leave, terminations, performance reviews, and other related matters. In doing so, it should be kept in mind that such policies which impose duties and responsibilities on employees will often impose reciprocal duties and obligations on the board or commission as an employer. In other words, do not promulgate employment policies unless you intend to follow them. If you do not follow established policies, you may be confronted with confused and disgruntled employees, or even with the possibility of a lawsuit. For questions and concerns regarding board or commission staff and/or employment responsibilities and obligations, please contact your board or commission's legal counsel.

D. Financial Management.

The board or commission's finances and budget must be managed competently, honestly, and in compliance with state law. If you have any uncertainty regarding how to proceed in the area of budget and finances, you should not hesitate to seek assistance from your legal counsel or the analyst within the Budget Division of the Department of Administration who is assigned to your board or commission.

Your board or commission may not be a state general fund agency, which means that the revenue supporting your board or commission is not appropriated by the legislature from the state's general fund but instead is derived from an alternate source, such as licensing fees. If your board or commission is not a state general fund agency, it is a non-general fund board or commission. Non-general fund boards or commissions must submit a quarterly report of revenues and expenditures to the Budget Division of the Department of Administration. At the end of each biennium, non-general fund boards or commissions must also submit an unaudited statement containing the same information to the Budget Division. In addition, non-general fund boards and commissions must have an independent audit conducted each fiscal year by a public accounting firm. This audit report must then be submitted to the Legislative Counsel Bureau auditor and the Budget Division.

As a board or commission member, you should have a basic knowledge of the state's general requirements and guidelines regarding financial and budgetary matters and be satisfied that your staff is complying with these requirements. In general, all expenditures and revenues must be recorded, and all monetary receipts deposited in accordance with the applicable statutory requirements. For example, some boards or commissions have statutes that require all money received by that board or commission be deposited in a Nevada bank. Further, the Office of the Attorney General advises that, absent a specific statute to the contrary, all fines received by a board or commission must be given to the State Treasurer for deposit to the state general fund. Every board and commission must also adhere to the financial and budget-related requirements set forth in the State Administrative Manual (SAM). The SAM is available at:

<http://budget.nv.gov/uploadedFiles/budgetnv.gov/content/Documents/State%20Administrative%20Manual.pdf>

If you have any questions or concerns about the finances and/or budget of your board or commission, please talk to your board or commission's administrator or executive director and/or your board or commission's legal counsel.

Each board or commission should have a defined set of written controls for handling cash. If your board or commission handles incoming cash (for example, licensing application or renewal fees), a written procedure should require that the cash or check received be processed immediately. If possible, two individuals should handle incoming revenue with one person opening the mail containing the cash and another person depositing it in the board or commission's account. Finally, a written record should be kept stating the amount received and its purpose. For example, a check sent to pay for a license application fee should be so indicated in the board or commission's written record. Petty cash funds

must be authorized by the State Board of Examiners and may not exceed \$500. See NRS 353.252.

Your board or commission must stay within the budget established by the board or commission and approved by the Budget Division. If during the biennium, the need arises to deviate from the budget in any manner whatsoever, permission must be given by the Budget Division or the Interim Finance Committee. The procedure involving submission of a written request must be followed to secure such permission. If you have further questions in this regard, please contact the Budget Division or your board or commission's legal counsel.

E. Licensing Examinations.

Boards or commissions may have the responsibility for administering a licensing examination which accurately measures the knowledge, skills, and abilities of applicants for licensure. This examination should be gauged to assess the applicant's ability to perform at a minimum level of competency so as to ensure that the public is not at risk when the applicant is admitted to the profession as a licensed practitioner. The examination should also not be unreasonably hard or difficult such that skilled and safe practitioners will not be able to pass the examination.

A good licensing examination measures an applicant's knowledge of essential aspects of the profession. Devising a good test is a sophisticated skill. Unfortunately, goodwill and knowledge of the field are not enough. Extensive study and experience are also crucial. Licensing examinations must be fair and straight-forward. Examinations should test the applicant's ability to safely practice within the profession and not his or her proficiency in English.

Boards or commissions should be sensitive to applicants who may have learning disabilities or for whom English is not their first language. In some fields, an applicant who does not read or speak English may be provided with an interpreter. In fact, some boards or commissions are required to offer licensing examinations in languages other than English by statute. For those applicants with learning disabilities, reasonable accommodations should be made to allow those applicants a fair opportunity to take and pass the licensing examination. For example, the applicant may be given more time to take the examination or questions might be read aloud and answers written down or recorded on tape. However, some professions may require proficiency in English as a necessary skill in safely performing the profession. Legal counsel should be consulted if there are questions in this area.

Boards and commission and their staff must also be sensitive to applicants who fail the licensing examination. Boards or commissions should inform applicants whether or not they passed the examination according to the board or commission's policy and procedure, and while ensuring that the applicant's examination score remain confidential. Allowing unsuccessful applicants to retake the licensing examination is generally a good idea and adds to the fairness of the testing process. How many times an applicant may sit for an examination may be addressed by the NRS/NAC. Legal counsel may also be consulted on this issue.

F. Licensing.

Most boards and commissions have developed policies regarding review and approval of applications for initial licensure. Some boards and commissions delegate to administrative staff the authority to issue a license in accordance with those policies. The staff then brings only an exception or questionable application to the board or commission for consideration. Other boards or commissions instead insist on board or commission member review of all applications.

Once it has been determined that applicants have met their prerequisites for licensure, the board or commission office then should print and issue the license to the applicant. The board or commission should keep a record of all licenses issued that includes, at a minimum, the licensee's name, the licensee's license number, the licensee's mailing address, and the licensee's telephone number. Please review the statutes and regulations governing your board or commission for more requirements about the licensing records that the board or commission must maintain. Applications for the renewal of a license generally follow the same procedures.

G. Travel, Per Diem, and Salary.

In general, board and commission members, as well as staff, are entitled to receive a per diem allowance and travel expenses when they are engaged in board or commission business. Most board and commission members are also entitled to receive a modest daily salary while engaged in board or commission business. Staff should be paid according to his or her employment agreement with the board or commission while traveling on board or commission business. Please review the statutes governing your particular board or commission for more information about this or contact your board or commission's legal counsel.

Board and commission members will generally be entitled to reimbursement for lodging, food, and travel expenses incurred in connection with meetings and other legitimate business of the board or commission, such as attendance at a national conference as a representative of the board or commission. Under state law, the reimbursement for these items must be as specified in the State Administrative Manual (SAM) and cannot be increased to cover actual expenses, if actual expenses do exceed the amount specified.

In order to obtain reimbursement for expenses, board and commission members must fill out a standard claim form and include all required receipts. Following the required procedures under state law will ensure that you will be fully and properly reimbursed for your expenses and avoid any ethical impropriety. The general rules applicable to travel and per diem reimbursements are found in the SAM.

H. Purchasing.

Your board or commission office will need equipment, supplies, and services. Equipment such as photocopying machines or computer systems and office supplies should typically be purchased through the Purchasing Division of the Department of Administration. If the board or commission wishes to acquire a specific type of product that is not available through the Purchasing Division, it may be possible to do so, but the Purchasing Division should be contacted beforehand.

I. Independent Contractor Agreements.

Boards and commissions often use services of independent contractors such as accountants, lobbyists, private attorneys, and other professionals. Before attempting to procure such services, your board or commission should review its governing statutes to determine whether it has the authority to retain independent contractors. Any questions should be directed to the board's legal counsel. Some boards and commissions are required by law to use the Office of the Attorney General, while others have the option of hiring private legal counsel.

There is a standard practice for obtaining the services of an independent contractor. The Board of Examiners' rules require that all contracts shall conform to the Model Contract Form Book published by the Office of the Attorney General. When a contract is negotiated by a board or commission, it must be submitted to the Budget Division and the Office of the Attorney General for approval by the Board of Examiners or its clerk.

J. Public Relations and Ethics.

Board and commission members are public officers under Nevada law and, therefore, must conduct themselves in accordance with the Nevada Ethics in Government Law set forth in NRS Chapter 281.

When you are first appointed to a board or commission, you must submit a financial disclosure statement to the Secretary of State if you are entitled to total annual compensation from your position of \$6,000 or more. You must also submit subsequent financial disclosure statements each year afterward during your tenure as a board or commission member. Details relating to financial disclosure requirements are contained in NRS Chapter 281. See NRS 281.559.

Ethics provisions prohibit board and commission members from soliciting or accepting anything of value if doing so might influence a reasonable person to depart from the faithful and impartial discharge of his or her public duties. Similarly, a board or commission member may not use his position in government, or information obtained by virtue of such position, to secure any unwarranted benefit including a benefit for himself or another person, or undertake any act that could be construed to only benefit the profession of which you are a member.

As a board or commission member, you must disclose any gift or loan, commitment to a private party, or significant pecuniary interest you have in any matter that is to be acted upon by your board or commission. You must make such a disclosure at the same time the matter is being considered. Disclosure must be made even if you abstain or do not participate in the vote or action. The fact that a board or commission member has an interest in a matter does not necessarily mean that he or she must abstain from voting or participating in the matter. See NRS 281A.420. Questions regarding disclosure and abstention should be addressed to the board or commission's legal counsel or to the Commission on Ethics, as time permits.

In states with a relatively small population, such as Nevada, situations may arise in which a member of a board or commission that has licensing authority may be reasonably well acquainted with an individual seeking a license from the board or commission. When this situation arises, the board or commission member should consult the board's legal counsel to consider how to approach the application.

Conflicts of interest and ethical questions involve a case-by-case inquiry. Depending on the circumstances, it may or may not be appropriate for the member to abstain from participating in the matter. It is likely that as a board or commission member, you will at some time be faced with

situations that involve ethical considerations and the related legal requirements. If this happens, it is appropriate to consult with the board's legal counsel without delay. Further, disclosure in all situations, whether or not you abstain from deciding the matter, should be standard practice.

Unfortunately, some citizens, members of the media, legislators, and other governmental bodies perceive boards and commissions as agencies that serve specific private interests rather than the public interest. This perception may be based on the fact that a board or commission usually consists of individuals who are engaged in the very business or profession under its jurisdiction. Always remember that as a board or commission member, that you represent a government entity that exists to serve and protect the public.

In addition, the board or commission consists of the full board or the full commission and any statements that you make to the public are only yours given as a private citizen unless and until the full board or full commission authorizes you to take a public position on an issue. This means that it is inappropriate and unethical for you to speak on any issue as a member of the board or commission, unless the full board or commission has voted on and approved you to do so. For example, a licensed psychologist who is also a member of the Board of Psychological Examiners may speak at a conference regarding the practice of psychology in his or her capacity as a licensed and experienced professional. However, he or she should not indicate that any statements made are on behalf of the Board or constitute the Board's position unless the Board has previously authorized him or her to do so at a duly-noticed, public meeting of the Board. If you have any questions about this, please contact your legal counsel.

As a result, with the exception of areas in which there is a special need for confidentiality, it is advisable for your board or commission to act in forthright manner with individuals and entities from the private sector, as well as other governmental agencies.

In order to comply with the Open Meeting Law and the Public Records Law, the board or commission must follow not only the letter but also the spirit of those laws. For example, a board or commission might consider furnishing copies of its meeting agendas to the news media, even though the Open Meeting Law does not require doing so unless requested.

Similarly, providing a prompt response to a request for information is important. If resources permit, the board or commission might even consider publishing a periodic newsletter reporting its current activities and other pertinent matters.

K. Executive Director and/or Executive Secretary.

Many boards and commissions have the authority and resources to hire a part- or full-time executive director or executive secretary. Usually the board or commission hires this individual to manage its office and to carry out its policies on a day-to-day basis. The executive director or executive secretary is a key representative of the board or commission.

On review of your governing statutes, you will generally find that many functions of your board or commission are not expressly delegated to the executive director or executive secretary. Yet, your board or commission may, as a practical matter, wish to have such functions performed by such person. If performing a particular function (for example, the issuance of licenses) is not expressly delegated by statute, it may, in some cases, be proper to delegate it to the executive director or executive secretary. However, to the extent that a function involves fundamental policy of the board or commission, requires exercise of judgment and discretion, or substantially affects an individual's legal rights, it should not be delegated to the executive director or executive secretary. If the executive director or executive secretary nevertheless improperly performs a function such as revoking a license, the board or commission may be subject to liability. For this reason, it is important to consult with legal counsel regarding proper delegation of board functions.

It is also important for a board or commission to give some direction to its executive director or executive secretary regarding areas of authority. Methods commonly used to give such direction are a written job description, administrative regulations, and board or commission policies.

Although the executive director or executive secretary is often crucially important to the smooth operation of a board or commission, it is the board or commission itself that is ultimately responsible for enforcing statutes and regulations under its jurisdiction and for setting policy. This is a point that may be easily forgotten, because the executive director or executive secretary is often a full-time employee, and the board or commission may only be required to meet four times a year. Thus, it is recommended that the board or commission select its executive director or executive secretary with care, and continually oversee his or her activities.

L. Legal Services.

Every board or commission should secure legal representation to ensure that the board or commission has a legal advisor available when needed.

Depending on a number of factors, including availability of resources and specific needs of the board or commission, arrangements should be made for legal representation. Some boards and commissions are required by statute to be represented by the Office of the Attorney General. If this is the case, the Attorney General will assign a specific deputy attorney general to advise and represent your board or commission. Keep in mind that the board is responsible for payment for the services of the deputy attorney general if the board or commission is a non-general fund agency. To the extent that resources permit and circumstances warrant, the deputy attorney general should attend board meetings. The deputy attorney general may also be utilized to prepare and present disciplinary cases before the board or commission and to represent the board or commission in litigation. In addition, the deputy attorney general may provide legal advice and guidance on a day-to-day basis as the need arises. You should encourage your executive director or executive secretary and other staff to seek legal assistance whenever appropriate.

Depending on the statutes pertaining to the board, you may have the option of retaining private legal counsel in lieu of, or in addition to, utilizing the Office of the Attorney General. If you have this option, you may choose to retain private counsel to perform any or all of the services described above.

One function that can be performed **only** by the Office of the Attorney General is rendering Attorney General Opinions. Although not binding on the courts, an Attorney General Opinion may be given more weight by a court than a legal opinion rendered by private counsel. See *Cannon v. Taylor*, 88 Nev. 89, 91, 493 P.2d 1313 (1972). Further, when a board or commission relies on an Attorney General Opinion in good faith, the board or commission is protected from liability for damages if the Opinion is later found to be incorrect. *Id.* All state agencies, including the head of any board or commission, may request an Attorney General Opinion from the Office of the Attorney General. NRS 228.150. Private citizens may not request Attorney General Opinions. *Id.* See also NRS 228.070; NRS 228.080.

IV. OPEN MEETING LAW

Nevada's Open Meeting Law, NRS Chapter 241, governs the meetings of all boards and commissions. The Office of the Attorney General publishes an Open Meeting Law Manual which is a good reference for board and commission members. This manual may be found on the Office of the Attorney General Website by clicking the following link:

http://ag.nv.gov/uploadedFiles/agnv.gov/Content/About/Governmental_Affairs/OML_Portal/omlmanual.pdf

The Open Meeting Law requires that all boards and commissions hold public meetings, post and mail adequate notice of meetings at least three working days in advance, record or transcribe both open and closed meeting sessions, take all action in open session, keep written minutes of each meeting and, with certain exceptions, allow public comment. The board or commission meeting notice should comply with statutory requirements and legal counsel should review it for accuracy and compliance with the Open Meeting Law before posting.

Meetings of the board or commission must be opened to the public. This means that the meeting room for the board or commission must be accessible and available to the public so that the public may attend the board or commission's meetings.

Written minutes must be kept for both open and closed sessions of the board or commission's meeting. Written minutes of the open sessions of the board or commission meeting must be available to the public for inspection within thirty (30) working days after the board or commission meeting. Written minutes of the closed session of the board or commission meeting must also be available for review by the Office of the Attorney General within thirty (30) working days after the board or commission meeting.² Further a recording or transcription must be made for both open and closed sessions of the board or commission's meeting. The recording or transcription of the closed session should be kept separate from the recording or transcription of the open session.

² Please note that closed meeting minutes may not always be deemed confidential. It may be appropriate, in some situations, for the closed session minutes to be available for public inspection at some future time.

Under the Open Meeting Law, a board or commission may **only** close its public meeting to consider the character, alleged misconduct, professional competence, or physical or mental health of a person³ or to prepare, revise, administer or grade examinations that are conducted by or on behalf of the board or commission, or to consider the appeal of the results of such examination. Pursuant to NRS 241.030, a person is entitled to written notice twenty-one (21) working days prior to the meeting if served by mail or five (5) working days if by personal service if the board or commission is going to consider his or her character, alleged misconduct, professional competence, or physical or mental health, and the board or commission must receive proof of service of the written notice upon the person. Such person may attend any portion of the meeting pertaining to him or her, whether open or closed, have an attorney or other representative present, and present written evidence, provide testimony and present witnesses. Further, the board or commission may only receive information during closed session—all action taken by the board or commission must still be taken in an open session. A person may waive the closure of the meeting and request that the meeting or relevant portion of the meeting be open to the public.

As a member of a board or commission, you should be aware that the Open Meeting Law applies any time a quorum (a majority of the membership of the board or commission) meets to discuss board or commission business, even in a casual or informal setting such as a meal or a golf tournament. If you engage in discussion and/or deliberation with other members about board or commission business without having followed the notice and other requirements of the Open Meeting Law, you may be in violation of the law. Please note that the Nevada Supreme Court has recognized that e-mail communications, in addition to face-to-face communications may violate the Open Meeting Law. Further, the Court has recognized that in some situations serial communications (where multiple gatherings or communications occur, none of which individually involves a quorum) may also violate the Open Meeting Law. Therefore, this Office recommends that board or commission members never discuss pending board or commission business with each other at any time outside of a duly-noticed public meeting.

Any violation of the Open Meeting Law can have serious consequences, including criminal prosecution, fines, or a court ruling declaring void all actions taken at the meeting where the violation occurred. See NRS 241.040. This applies to even small or seemingly minor violations of the Open Meeting Law.

³ For a licensing board or commission, this would generally involve disciplinary proceedings against licensees or decisions regarding a person's application for licensure. Such person must receive adequate notice that the board or commission will consider his or her alleged conduct and/or his or her application for licensure at the meeting and that the meeting may be closed. However, any deliberations or decisions involving an applicant or a licensee must occur in an open meeting.

Furthermore, individual board or commission members may also be assessed a civil penalty of \$500 for knowing violations of the Open Meeting Law. *Id.* Given the potential expense and inconvenience involved for not only the board or commission but also the private parties attending the tainted meeting, all board or commission members are urged to become familiar with and scrupulously follow the Open Meeting Law, as well as to seek the advice of legal counsel when the need arises in this area.

V. PUBLIC RECORDS LAW

Nevada's Public Records Law, NRS Chapter 239, requires that all board or commission records must be open to inspection and copying by the public unless otherwise made confidential by law. In some instances, there will be a specific statute that declares a record to be confidential. For example, in many cases, a consumer complaint filed against a licensee and the subsequent investigation are confidential unless and until the board or commission initiates disciplinary action against the licensee. In addition, personally identifying information such as social security numbers and financial information, i.e., credit card numbers or bank account numbers, are confidential and should be redacted from records before providing them to the public. See NRS 603A.040. Further, some statutes allow a board or commission to share a record or information with another licensing board or state agency in certain situations but not with the general public. See *generally* NRS 637.085; NRS 641.090; NRS 644.130. If a statute specifically states that a requested record is confidential, the board or commission may not disclose that record pursuant to a public records request. If your board or commission receives a subpoena or court order requesting that record be made available, please contact your legal counsel.

Board and commission members should use their common sense and be cautious about disclosing records that they receive that may contain personal or sensitive information. Please remember that board and commission members may sometimes require access to a record or other information that may not be available to the general public, and it is important that board and commission members handle those records appropriately. For example, a person's medical records may be admitted in a disciplinary proceeding against a licensee and viewed by board or commission members, but these records are still confidential by law and exempt from disclosure to the general public pursuant to NRS 622.310. It is a good approach to presume, at all time, that the public has access to the contents of board or commission files and records, and to treat the contents in a professional manner for that reason.

Destruction of official records is governed by state records retention schedules. Members of boards or commissions and staff should be familiar with the board's or commission's record retention schedule. These schedules set out a minimum time for preservation of official records in the custody of the board or commission, and provide a mechanism for preserving records with archival value. For more information, please contact the Department of Administration's State Library and Archives Division.

Once a board or commission ceases to exist, the Department of Administration's State Library and Archives Division must be contacted for proper disposal or transfer of official records.

VI. LEGISLATIVE PROCESS

A law or statute is legislation that has been passed by the legislature and signed by the governor. These laws are called the Nevada Revised Statutes (NRS). Most boards or commission have been created by such a law.⁴ The board or commission's regulations, in contrast, are formulated by the board or commission itself, not by the legislature. The board or commissions regulations are codified into the Nevada Administrative Code (NAC). The board or commission's authority to adopt regulations was, however, granted to it by statute. Most enabling statutes authorize the board or commission to formulate necessary rules and regulations within the limits of its governing statutes for proper conduct of the business or profession and as may be deemed necessary or proper to safeguard the interest of the public and to uphold or codify generally accepted standards of the profession.

A. Statutory Process

The statutory authority of boards and commissions is derived from the legislature. Similarly, the law that governs a profession, business, or trade (its substantive law) is also primarily determined by the legislature. Accordingly, if a board or commission wishes to amend its authority in a particular area or believes that the substantive law under its jurisdiction should be updated, clarified or otherwise changed, the board or commission may bring a bill to the State Legislature addressing those changes.

Boards and commissions are not permitted to submit bills directly to the legislature. Instead, the board or commission must submit its legislative proposal to the Governor in the form of a Bill Draft Request (BDR). As a rule, BDRs must be submitted to the Department of Administration in the late spring (approximately June 1) of the year preceding the legislative session, i.e. approximately June 1 of every even-numbered year. BDR forms may be obtained from the Department of Administration. The Governor then chooses and submits 100 BDRs to the legislature on or before September 1 in every even-numbered year. These 100 bills must be drafted and pre-filed before December 20th in every even-numbered year. If the BDR submitted by the board or commission is not selected by the Governor, the board or commission must then find an individual legislator to sponsor the bill on the board's or commission's behalf during the legislative session.

⁴ Some boards and commissions are created by the Nevada Constitution or by Executive Order.

The Nevada Legislature convenes in February of every odd-numbered year for 120 days. Once the legislative session has convened, BDRs are introduced, assigned a bill number, and referred to the legislative committee having jurisdiction over the subject matter. The committee may choose to hear the bill or it may not. If the committee holds a hearing on the bill, a board or commission should plan to have one or more representatives attend the committee hearings. If authorized by statute and if resources permit, a board or commission may be able to retain a lobbyist to speak on its behalf at committee hearings and represent it during the legislative session.

After a bill has had a hearing, the chair of the committee may place the bill on a work session at which time members of the committee will vote to pass the bill out of the committee with or without any amendments. The bill then goes to the floor of the house where it is originating for a second and third reading and final passage. If the bill is passed out of the house in which it originates from, it then moves to the other house where this process is repeated.

It is possible that an individual member may disagree with some aspect of the board's position regarding a matter before the legislature. This individual may even wish to make his position known to the legislature. For this reason as well as others, the board or commission should add the matter to the agenda of a public board or commission meeting, determine its position on the matter by discussion and a majority vote at the meeting, and then designate to one or more members the authority to speak on the board or commission's behalf regarding the matter. An individual board or commission member who may disagree with the position of the board or commission and/or who is not authorized by the full board or commission to speak on the matter may voice their disagreement only as private citizens and may not speak on behalf of the full board or commission, except as to state the position of the full board or commission.

The representative of the board or commission appearing before a legislative committee to provide testimony on a bill which concerns or impacts the board or commission should be fully prepared to articulate the reasons for or against the bill. If there is written documentation containing statistics or other information which supports a bill, such documentation should be made available to the committee members not less than twenty-four (24) hours before the bill is scheduled to be heard in the committee.

The committee hearing is the critical forum in which bills are considered. Bills must be passed through committee before the full legislature votes on them. Presentation of testimony and documentation to legislative committee is critical. It should not be assumed that legislators have specific knowledge about a bill's subject matter or a board's or

commission's area of jurisdiction. Consequently, the board's or commission's representative should be prepared to educate as well as persuade the legislative committee members. The representative should also be available to legislators for consultation.

It may be prudent to point out to the legislative committee potential negative aspects of a bill, particularly with respect to a controversial bill. Additionally, a board attempting to secure new legislation should never assume that need for the legislation will be obvious and, therefore, take it for granted that the bill will be passed. Consequently, your board or commission should be fully prepared to support its proposed legislation and anticipate possible criticisms. If it appears that the legislature may not accept the legislation, the board or commission may want to consider amending the bill to address the concerns of the legislators or others.

Aside from the board or commission's own proposed legislation, there may be legislative bills sponsored by others that affect its official activities or jurisdiction. Your board or commission may wish to take a position in favor or against such bills, taking into account each bill's potential effect on public health, safety, and welfare.

General information concerning the legislative process is available from the Legislative Counsel Bureau. In particular, a board or commission should consult the Legislative Counsel Bureau for information on how to track or monitor the progress of its bills and other relevant bills through the legislative process using the NELIS system. Tracking one's own bills is important, since it is not uncommon for bills to fail in the course of a session. It may be appropriate to appoint a member of the board or commission or another representative to undertake this responsibility.

B. Regulatory Process

One of the most important and time consuming tasks of any board or commission is drafting regulations and enacting those regulations. To understand this process, it is necessary first to understand the difference between a statute and a regulation. It is important also to understand that the regulation-making authority granted to the board or commission by the legislature is strictly limited in two ways. First, the board or commission's regulation must be consistent with the NRS. Second, the regulations must effectuate a provision of NRS. Consequently, the board or commission cannot regulate outside the scope of the underlying statutory authority in the NRS.

A board or commission must identify regulations needed to carry out the purpose of the NRS and then draft, fine-tune, and redraft proposed regulations. The process of developing regulations at the board or

commission level is painstaking and time-consuming. The process of government review of the board or commission's proposed regulations can be equally exhaustive.

The Nevada Legislature created the Administrative Procedure Act (APA), Chapter 233B of NRS, to establish minimum procedural requirements for the regulation-making process for all agencies of the executive department, except those expressly exempted from the chapter. Boards and commissions are subject to the APA.

A regulation will typically describe the organization, procedure, or licensure requirements of a board or commission. Regulations may also effectuate or interpret law or policy. Any action a board or commission intends to take that will address any of these issues will be subject to the APA.

A board or commission must hold at least one public workshop to discuss the general topics to be addressed in a regulation with interested persons. The workshops may be held before or after the language of the proposed rule has been drafted by the board or commission, but before a public hearing is held on the proposed regulation. The board or commission must provide written notice of the workshop not less than fifteen (15) days prior to the workshop. Such notice must be provided to every person on the board or commission's mailing list for receipt of notice of proposed regulations and such additional notice as will inform the general public and any business that may be affected by the proposed regulation.

Once a board or commission has determined the need for a proposed regulation and/or drafted proposed language, the proposed regulation must be submitted to the Legislative Counsel Bureau for drafting. A board or commission should be aware that the draft submitted to the legislative counsel may not be returned in the same form or language. It is wise for the board or commission to review the approved text returned by the legislative counsel to make sure the meaning or effect of the proposed rule has not been changed. Your board or commission should contact the legislative counsel to clear up any misunderstanding or confusion.

The board or commission must also hold at least one public hearing on the proposed regulation after the draft of the proposed regulation is returned to the board or commission by legislative counsel. Notice of the public hearing must be provided to the public using the form specified in NAC 233B.010. This form is titled and often referred to as the "Notice of Intent to Act Upon a Regulation." This Notice along with instructions for obtaining the full text of the proposed regulation must be sent to every person on the board or commission's mailing list for receipt of notice of proposed regulations and such additional notice as will inform the general

public and any affected business at least thirty (30) days prior to holding the public hearing. Details of notice requirements are contained in the APA. Before a board or commission takes action to consider an issue, publish a notice, or adopt a rule, legal counsel should be consulted.

The Nevada Constitution was amended by the passage of Ballot Question 5 in the 1996 general election to authorize legislative review of administrative regulations and rejection of regulations which exceed an agency's authority. Therefore, no adopted regulation is effective until it is affirmatively approved by the Legislative Commission or the Subcommittee to Review Regulations. The Legislative Commission, or the Subcommittee to Review Regulations if the regulation was referred to the Subcommittee, may suspend the filing of a permanent regulation after its adoption if it determines that: (1) in the case of a regulation purportedly required by federal law, the regulation is not required by federal law; (2) the regulation does not conform to statutory authority; or (3) the regulation does not conform to legislative intent. If the Legislative Commission, or the Subcommittee to Review Regulations, objects to a regulation on one of these grounds, the agency shall, within sixty (60) days, revise and return the regulation. Thereafter, the Commission, or the Subcommittee to Review Regulations, may withdraw its objection and the legislative counsel shall file the regulation with the Secretary of State and notify the agency of the filing. NR 233B.0675. If the Legislative Commission or Subcommittee objects to the revised regulation, notice of the objection will be provided to the agency, which must continue to revise the regulation and resubmit it within thirty (30) days after receipt until the objection is removed.

At the Legislative Commission or Subcommittee to Review Regulations meeting, many regulations are voted on and approved by the Commission or Subcommittee without issue as part of the "consent agenda" for the meeting. However, any legislator may pull a regulation from the consent agenda if the legislator believes a discussion on the regulation is necessary. The regulations that are approved as part of the consent agenda are generally effective that day and sent over to the Secretary of State for filing. The regulations that are pulled from the consent agenda are then discussed at the meeting. If the concerns of the legislator have been addressed at the meeting, the Commission or Subcommittee will vote to approve the regulation at the meeting. If not, the Commission or Subcommittee may vote to defer it to the next meeting of the Commission or Subcommittee or to reject the regulation. If the regulation is deferred, the board or commission should work with the legislator to redraft the regulation to address his or her concerns. If the regulation is rejected and the board or commission still wants to amend or repeal regulations, the board or commission must restart the process, including noticing and holding a new workshop, sending a new proposed regulation to legislative

counsel for drafting, and scheduling and holding a new public hearing.

If the regulation is regarding the standards for the issuance or renewal of licenses or permits of certain boards, see NRS 439B.225, the regulation must also be heard by the Legislative Committee on Healthcare before it can be adopted.

For additional and more detailed information about the rulemaking process, see Administrative Rulemaking—A Procedural Guide, published by the Office of the Attorney General. This manual is available at:

<http://ag.nv.gov/uploadedFiles/agnv.gov/Content/Publications/RulemakingManualComplete.pdf>

VII. INVESTIGATIONS, ADMINISTRATIVE HEARINGS, AND THE COURTS

A. Investigations and Disciplinary Procedures.

A board or commission generally has authority to investigate actions of persons who are licensed or otherwise permitted to engage in a particular profession, business, trade, or practice by the board or commission. If an investigation reveals a violation of the law that pertains to the jurisdiction of a board or commission, the board or commission also typically has authority to take administrative action against the licensee or, in the case of an unlicensed person, the person violating the law. In certain cases, a board or commission may have the power to revoke a licensee's license or otherwise limit the person's ability to practice in the profession, business, or trade.

Investigation and the possible resulting disciplinary action against a licensee or regulated individual or entity is an important area, since it involves the interests of the state in protecting the public from unsafe, incompetent, or unscrupulous participants in regulated or licensed activities compared with the individual's property interest in his or her professional license and/or the privilege of an individual in practicing his trade or profession and earning a livelihood without undue interference by the state.

Disciplinary procedures for licensing boards typically include these steps:

- Consumer complaint received or complaint received from another source, or board or commission initiated administrative complaint
- Investigation
- Report of Investigation

Once a report of the investigation is drafted, it should be reviewed by the board or commission's executive director or executive secretary, in conjunction with legal counsel, if necessary, to determine whether there is sufficient evidence to proceed to a hearing before the board or commission in the case.

Options if there is insufficient evidence to go to hearing:

- ✓ Dismiss case

If, after the conclusion of the investigation there is insufficient evidence to go to hearing, the file should be closed with notice sent to the complainant and licensee.

For many boards and commissions, a recommendation for dismissal must be brought by staff before the board or commission.

- ✓ Continue investigation

Options if sufficient evidence to go to hearing:

- ✓ Settlement agreement
- ✓ Formal disciplinary hearing

The interest in safeguarding public health, safety, and welfare is the primary purpose of a board or commission and the basis of its existence. It is imperative that boards and commissions vigorously enforce statutes and regulations governing conduct of licensees or regulated individuals and entities under their jurisdiction. At the same time, however, boards and commissions must be conscientious in following due process standards established for conducting investigations and taking administrative actions.

These standards are embodied in statutes, regulations, and state and federal constitutions, and are designed to protect the interest of the licensed or regulated party. The licensed or regulated party must be afforded due process by the board or commission before administrative action can be taken or discipline can be imposed.

In the area of investigations and regulatory actions, board and commission members should scrupulously follow statutes and regulations. Those who carry out investigations and administrative actions on behalf of boards and commissions should always work closely with legal counsel during all phases of the investigatory and administrative process.

Boards or commissions may vary by statute and/or procedure regarding who is responsible for conducting investigations. Some statutes provide that one or more members of the board or commission may conduct investigations and act as an “investigating board or commission member.” Others place this responsibility with trained board staff or investigators hired or retained by the board or commission.

Board or commission members who conduct investigations as “investigating board or commission members” must abstain from deciding the matter when it is later presented to the full board or commission for decision, though they may be asked to participate as witnesses. NRS 233B.122.

It is possible that you may inadvertently learn facts about a case before it is brought before the board or commission. This could occur, for example, if the person under investigation is a close friend, or if the person under investigation contacted you as a board or commission member, or if someone contacted you to complain about the conduct of the person under investigation. If this occurs, you should promptly consult legal counsel in order to determine whether this information should lead you to abstain from participating in the case. Further, any information about a

pending case that you learn inadvertently should be kept confidential and not shared with any other board or commission member or any other person aside from legal counsel.

It is possible that you may at some point need to file a complaint against a licensee or other person who may be violating the law over which your board or commission has jurisdiction. If that happens, please keep the fact that you have filed the complaint and any information you have obtained confidential from all other board or commission members and speak only about the matter to appropriate board or commission staff, investigators, and/or legal counsel until the matter is presented to the full board or commission. As the complainant, you will need to abstain from deciding the matter, but you may be called as a witness in the proceeding.

B. Administrative Hearings.

If a substantiated complaint is not resolved by a settlement agreement, it may proceed to a disciplinary hearing.

One of a board or commission member's more serious responsibilities is to conduct a disciplinary hearing which may impact a person's life and/or ability to practice in his or her profession.

To initiate a disciplinary hearing, an administrative complaint and notice of hearing is filed against the licensee. This complaint and notice of hearing contains allegations of both fact and law and provides a date and time for the hearing on the complaint. This case is then heard on the designated date and time by the board or commission or by hearing officers with the assistance of legal counsel. Generally one deputy attorney general will sit as board counsel and offer legal advice relating to procedure to the board or commission, while another deputy attorney general or private counsel prosecutes the matter. The board may consider witness testimony (including testimony made by the licensee or person named in the case), documentary evidence, and argument by both the attorney prosecuting the case and the licensee or counsel for the licensee. The board or commission then the votes on whether the allegations in the administrative complaint have been proven by the evidence presented. If the licensee is found guilty of any alleged violation, the board or commission will move from the guilt phase of the case to the penalty phase to determine the appropriate disciplinary action.

It is crucial that all board and commission members keep facial expressions and non-verbal communication neutral in a hearing. It is also crucial that all board and commission members listen carefully and thoughtfully weigh all testimony and evidence presented in a hearing.

All board and commission members should review NRS Chapters 233B, 622, and 622A with regard to the administrative hearing process, as well as the board or commission's governing NRS and NAC chapters. Legal counsel assigned to the board or commission can answer specific questions or inquiries regarding these statutes.

C. Evidence

Evidence makes clear the truth of fact, persuades a finder-of-fact of the existence of fact, or produces a just conviction of truth. It also is any species of proof legally presented at a hearing through witnesses, records, documents, exhibits, and tangible objects for the purpose of inducing belief in the mind of the finder-of-fact. The board or commission sits as the finder-of-fact in a hearing.

The word "evidence" includes all means by which any fact in dispute at a hearing is established or disproved. Any circumstance which affords an inference whether the matter alleged is true or false is evidence, and is commonly understood to be within the meaning of that term.

The object of evidence is to inform the finder-of-fact of the material facts which have bearing upon the issue in order that the truth may be elicited and that a fair determination of the controversy may be reached. The federal government and individual states have adopted rules of evidence to ensure that the truth be ascertained and proceedings justly determined.

Rules of evidence in Nevada are codified in Title 4 of NRS. Although rules of evidence are relaxed in administrative hearings, see NRS 233B.123, having some familiarity with them may help ensure that hearings are conducted fairly. The word evidence is comprehensive, and encompasses both testimony and physical evidence. Legal evidence is not limited to oral testimony of witnesses, but includes documentary evidence such as public records, private writings, photographs, books of account, objects, and other documents or tangible items.

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." See NRS 48.015.

Evidence is classified according to whether it is circumstantial or direct.

- Circumstantial evidence is evidence of a series of facts other than the fact at issue, which leads to a permissible inference concerning the existence of the fact at issue.
 - Example: An inspector testified that, on January 12th, he observed that John's beauty salon was open, his expired license was posted on the wall behind his workstation, a person was in his waiting room, and another person was giving John money. Even though the inspector did not actually see John perform any cosmetology services, this evidence, if believed, may permit an inference that John was performing cosmetology services on January 12th. If the allegations are that John's license expired on January 10th and he continued working on clients after that date, this evidence would be circumstantial evidence of that fact.
- Direct evidence is evidence which, if believed, proves the existence of the fact at issue without inference or presumption. It is evidence which comes from one who speaks directly of his or her own knowledge on the main or ultimate fact to be proven.
 - Example: Sally testifies that John cut her hair after the date when his licensee expired. If Sally's testimony is believed, it is direct evidence that John worked with an expired license.

An "offer of proof" is a method by which evidence that is objected to may be shown to the finder-of-fact in order to assist in the decision on the objection. An offer of proof also allows the proponent to preserve the item offered for the record on appeal, if the evidence is excluded.

"Judicial notice" is a substitute for formal proof of a matter by evidence. The phrase judicial notice refers to the method by which a finder-of-fact informs itself of a particular fact. The facts subject to judicial notice are facts in issue or facts from which they may be inferred. A judicially noticed fact must be:

- Generally known within the territorial jurisdiction of the board or commission; or
- Capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.

See NRS 47.130.

- Example: A ruling in a recent court case regarding the board or commission may be subject to judicial notice by the board or commission in a subsequent case. An amendment to a statute or regulation may also be subject to judicial notice by a board or commission.

Documentary and physical proof is usually regarded as prima facie evidence, that is, a fact presumed to be true unless disproved by evidence to the contrary.

Evidence in a hearing must be admitted before it can be relied upon by the finder-of-fact. Documentary evidence or other tangible types of evidence is often numbered (i.e., 1, 2, 3) or lettered (i.e., A, B, C) and referred to as an exhibit. Generally, the prosecutor's exhibits will be denoted by number, that is "State's Exhibit 1, State's Exhibit 2, State's Exhibit 3," and so on, and the licensee or respondent's exhibits will be denoted by letter, that is, "Respondent's Exhibit A, Respondent's Exhibit B, Respondent's Exhibit C," and so on. Before the members of the board or commission can view these exhibits, they must be admitted. This is accomplished by stating "State's Exhibit 1 is admitted" or "Respondent's Exhibit A is admitted." The record of the hearing should include true and correct copies of all exhibits admitted at the hearing and a list of all exhibits admitted by the parties by letter or number designation. The minutes of the hearing should also include this information.

Authentication or identification of evidence is required before it can be admitted in a hearing. This means that the proponent must satisfy the finder-of-fact that the evidence in question is what it claims to be. Generally, before asking that an exhibit be admitted, the proponent will elicit testimony from a witness regarding the exhibit to authenticate or identify it. A copy of an official record or report or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, is presumed to be authenticated if it is certified as correct by the custodian or other person authorized to make the certification.

D. Witnesses

The term "witness" refers to one who, by being present, personally sees or perceives a thing; a beholder, spectator, or eyewitness. It is one who testifies to what he or she has seen, heard, or otherwise observed.

A witness may not testify to a matter unless:

- Evidence is introduced sufficient to support a finding that he or she has personal knowledge of the matter; or
- He or she states his or her opinion or inference as an expert.
See NRS 50.025.

Before testifying, every witness shall be required to declare that he or she will testify truthfully, by oath or affirmation administered in a form calculated to awaken his or her conscience and impress his or her mind with the duty to do so. See NRS 50.035(1).

An affirmation or oath is sufficient when the witness is generally admonished to tell the truth. For example:

“You do solemnly affirm that the testimony you shall give in this issue (or matter) before the board (or commission) shall be the truth, the whole truth, and nothing but the truth.” Assent to this affirmation shall be made by the answer “I do.” See NRS 50.035(2).

Often, witnesses are instructed to raise their right hand when taking the affirmation or oath. After the oath or affirmation, the witness is often referred to as being “sworn” or “sworn in.” Generally, a witness may be sworn in by the board or commission chair, a court reporter, or board counsel.

If the witness is not testifying as an expert, his or her testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness; and (2) helpful to clear understanding of his or her testimony or the determination of a fact in issue. See NRS 50.265.

Testimony by experts is permitted in administrative hearings. If scientific, technical, or other specialized knowledge will assist the finder-of-fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training, or education, may testify to matters within the scope of such knowledge. See NRS 50.275. Also, the experience, technical competence and specialized knowledge of a board or commission member may be utilized in the evaluation of the evidence. NRS 233B.123(5).

Witnesses in administrative proceedings with communications disabilities and/or who are non-English speakers should be provided an interpreter. See NRS 50.050–NRS 50.054.

The board or commission sits as the finder-of-fact in its adjudicative capacity, and determining the credibility of witnesses is an essential function of the finder-of-fact. Often in a hearing, the board or commission will hear testimony from more than one witness, including the licensee or respondent, and often the testimony of these witnesses will conflict. For this reason, during the board or commission’s deliberation on the matter, a discussion of the credibility of the witnesses should always be included. Credibility is the quality that makes something worthy of belief.

The board or commission must carefully consider all the evidence and the credibility of that evidence, including witness testimony, it receives in a hearing. To do this, the individual board or commission members always

should consider clearly stating on the record what evidence and witness testimony he or she found credible and why and what evidence and witness testimony he or she did not find credible and why. It is crucial that both elements be included in this discussion. For example, it may be not enough to say, "I found John's testimony credible, and I did not find Sally's testimony credible." Instead, you might say, "I did not find Sally's testimony credible because she seemed unsure about the events that occurred. She also contradicted her testimony several times. I thought John's testimony was more credible because he did not change his story and what he said matched what was recorded on Respondent's Exhibit C."

It may sometimes feel uncomfortable to state aloud that you did not find a witness's testimony credible, particularly if the witness is still in the hearing room, but this is necessary to ensure that the board or commission's decision is strong and sound and easy to protect if it is later appealed.

When determining credibility of a witness's testimony, the following may prove helpful:

- Was the witness able to see or hear or know the things about which the witness testified?
- How well was the witness able to recall and describe those things?
- What was the witness's demeanor while testifying?
- Did the witness have an interest in the outcome of this case or any bias or prejudice concerning any party or any matter involved in the case?
- How reasonable was the witness's testimony considered in light of all the other evidence (including other testimony) in the case?
- Was the witness's testimony contradicted by what that witness has said or done at any other time or by the testimony of other witnesses or by other evidence?

Remember that, if the respondent or licensee (person being charged) addresses the board or commission or provides any statement to the board or commission, that statement is also witness testimony, and the respondent or licensee's testimony should be assessed for credibility by each board or commission member in the same way that witness testimony from any other source is assessed.

In determining credibility of a witness, remember that people tend to forget things, particularly as time passes, and a contradiction may be an innocent lapse of memory instead of an intentional falsehood. Also, keep in mind that two individuals may see or hear the same incident and remember it slightly differently. How you assess credibility of witnesses may also be affected by whether the contradictions you note are relating to important facts or small details.

The credibility of the evidence presented by each side does not necessarily depend on the number of witnesses testifying on one side or the other. All evidence received must be carefully considered and testimony from a smaller number of witnesses on one side may still be more credible than the testimony offered by a larger number of witnesses on the other.

Remember that in most hearing proceedings all board or commission members will be given the opportunity to ask each witness, including the respondent or licensee, questions about his or her testimony. Therefore, if questions occur to you while a witness is testifying, please write those down so that you can ask them during the appropriate time.

E. Findings of Fact and Conclusions of Law.

At the close of the hearing, the board or commission must issue a decision. This decision must include both findings of fact and conclusions of law, and it must be in writing or stated on the record. The findings of fact should be clear and should set forth the factual basis which supports the violations of law determined by the board or commission. Generally, the board or commission's decision is reduced to writing after the board or commission discusses and deliberates regarding the allegations in the Complaint and Notice of Hearing and takes a public vote. The written decision is then subsequently prepared by the board or commission's legal counsel. See NRS 233B.125.

F. Judicial Review.

If the board or commission's decision is adverse to the regulated party's interest, he or she may file a petition for judicial review with the district court within thirty (30) days after issuance of the order. Essentially, judicial review allows the party to "appeal" the board or commission's decision to the district court. The district court will give deference to the board or commission's findings of fact determinations as to the weight or credibility of evidence. Once rendered, the district court's decision can then be appealed by either party to the Supreme Court of Nevada. See NRS 233B.130–NRS 233B.150 for provisions relating to judicial review.

VIII. DUTIES OF PRESIDENT OR CHAIR

The president or chair of the board or commission is not the primary decision-maker. Instead, he or she is the group leader. A president or chair's duties include calling the meeting to order, leading and conducting the meeting, helping to ensure compliance with the Open Meeting Law, calling for recesses or breaks during the meeting, and determining if a quorum is present before calling the meeting to order.

The president or chair is the meeting leader. He or she calls out each agenda item before it is discussed and keeps the other board and commission members focused on the meeting agenda. During a meeting, the president or chair attempts to draw all board or commission members into the discussion, particularly when important issues are involved and/or the board or commission is deliberating in a hearing. The president or chair also generally has discretion to limit time for speakers during public comment and rules on the admission of exhibits or objections in a hearing.

The president or chair ensures that board or commission decisions are clearly and orderly made by asking for motions, asking for seconds to motions, prompting discussion on the motion, and calling for a vote upon the motion. The president or chair should also keep other board or commission members on task and does not allow them to stray from the topics specifically noted on the agenda.

The president or chair should help to encourage that a good record of the meeting is made. That means that he or she will prompt board or commission members to verbalize their thoughts in lieu of head nods or shakes or other non-verbal communication. The president or chair will also prompt speakers during public comment to identify himself or herself for the record. During a hearing, the president or chair should ensure that the board or commission's credibility of evidence determinations, findings of fact, conclusions of law, and penalty assessed be clearly and accurately stated on the record.

In order to control the prolific talker or takeover type of person who may sit as a member of a board or commission, the president or chair may find the following techniques helpful:

- Be firm in order to give others a chance to participate and contribute. Say "I appreciate your comments and would like to hear from others. I will ask for their viewpoints now."
- When a conflict occurs, suggest that conflicting ideas help to ensure that all viewpoints are presented and then help in resolving the conflict. Insist and state that the conflict is between ideas and not between persons.

- Keep the discussion on the subject. If persons stray from the subject or make inappropriate comments, be forthright and firm and rule them out of order. If necessary, remind them of the topic being discussed and insist that the discussion remain directly on that matter.

If ideas or problems are complicated and involved, the president or chair may:

- Suggest that the full board or commission create a sub-committee to study, discuss, and research the issue. The sub-committee can then develop recommendations to bring back to the full board or commission for further action. A sub-committee should be given a timeline during which to complete its tasks.
- Suggest that the board or commission schedule a panel discussion on the issue at a future meeting. This provides an opportunity for presentation by those on the panel of different points of view. It can be made up of four to six persons who are experts on the matter or who knowingly have different viewpoints. The president or chair can act as the moderator for the panel discussion and facilitate the presentations, allow for questions to panel members by board or commission members, and, if time permits, allow for questions to panel members from members of the public who may be present at the meeting.

A good president or chair should have the following characteristics:

- Punctual.
- Knowledge of basic parliamentary procedure.
- Leadership ability.
- Capability of being personable, yet at the same time being firm and orderly without endeavoring to be merely popular.
- Ability to handle critical and controversial issues.
- Control of his or her emotions and convictions.
- Impartiality while sitting as the president or chair with exercise of common sense and good judgment. The president or chair should keep facial expressions neutral and not appear to favor any one board or commission member or any one party in a hearing setting.
- Ability to not express ill will or negative thoughts about any other board or commission member openly.

- Prepared for the topics on the agenda.
- Knowledgeable about the statutes and regulations the board or commission is charged with enforcing.

IX. LIABILITY AND LITIGATION

A board or commission and/or its individual members may be subject to liability in a wide variety of situations ranging from a traffic accident in which a board or commission employee negligently injures a third person, to a landlord-tenant or contract dispute, to an investigation or disciplinary proceeding in which the licensee or regulated individual and/or entity alleges that the board or its representatives have violated his or her civil rights. Litigation against a board or commission and its members or employees is governed by NRS Chapter 41.

Actions not taken in good faith may subject a board or commission, and even individual members, to liability. As board or commission members, you should at all times attempt to maintain your objectivity.

In order for a member or employee of a board or commission to avoid personal liability and legal expenses as the result of one's action, the individual must act within the scope of his or her duties and in good faith. Initiating investigation of an individual without an adequate factual basis and/or without complying with statutory and legal procedural requirements on the basis of a personal grudge against the individual is a stark example of behavior that would be characterized as conduct in bad faith and outside the scope of one's duties.

If a board or commission member or a board or commission employee has acted in good faith and within the scope of his duties, but is nevertheless found liable in a lawsuit, he or she is entitled to be indemnified by the State. Additionally, if these criteria are met, the individual is entitled to receive legal representation from the State. In order to be entitled to indemnification and legal representation, the board member or employee must follow certain procedural requirements and cooperate with the State in his or her defense.

It is, of course, possible for a board member or employee to engage in negligent conduct while acting in good faith and in the course of his official duties. In this situation, as explained above, the member or employee may be immune from liability and legal expenses, and the State or the board or commission itself may be responsible for payment of monetary damages to the injured party. Thus, in order to protect the board or commission, all board or commission members and staff must act with "due care." In general, you should always strive to carry out your duties in a reasonable and diligent manner. When faced with novel or difficult matters, you should consult legal counsel or seek other appropriate assistance. Consulting legal counsel prior to taking a particular action is especially advisable in light of court decisions which have held that

reliance on the advice of legal counsel may, to some extent, insulate a board or commission from liability.

As a board or commission member, you need to be particularly aware of certain areas of potential liability. Boards and commissions are frequently the target of civil rights litigation. Civil rights claims often stem from disciplinary proceedings and typically consist of allegations that the board or commission, in taking disciplinary action, has in some way violated a licensee's or regulated individual or entity's right to a fair hearing.

An area of potential liability that can easily be overlooked by boards and commissions involves actions taken outside the scope of their authority and which are designed to limit competition in the profession or industry. These actions include decisions which focus on limiting competition within the profession rather than on protecting the public's health, safety, and welfare. Under some circumstance, such actions can expose boards or commissions to anti-trust liability.

No action may be brought against an occupational licensing board or commission which is based upon an investigation performed within the scope of the duties of the occupational licensing board or commission, unless bad faith and malicious intent are proven by the claimant. Persons who furnish information or assist an occupational licensing board or commissions as part of an investigation, or file a complaint of professional misconduct with the licensing board or commission against a person regulated by such a board or commission, or a person who has applied for licensure, are immune from liability, unless it is proven that he or she acted in bad faith or with malicious intent. See NRS 622A.150.