



Montana Department of
LABOR & INDUSTRY
Business Standards Division

Professional & Occupational Licensing: Overview of the Licensing Program and Governance Structure

PREFACE

This manual is an effort to provide Professional & Occupational Licensing board members under the umbrella of the Montana Department of Labor & Industry, Business Standards Division, a resource to perform their regulatory duties. It is not intended nor should it be relied upon as legal advice or guidance for applicants, licensees, complainants, or the general public.

In this manual, depending on the context, the term “agency” is used interchangeably to refer to a board, the division, or both. The terms “profession” or “occupation” may be used together or singly and when used singly are inclusive of both “profession and occupation.”

Some parts of the manual contain advanced information that may be difficult for new board members to comprehend until they have served on the board for a length of time. The manual will supplement other training opportunities. Board members may return to this manual as their experience broadens and use it as a common reference in seeking clarification and guidance from staff.

Parts of the manual are based on materials prepared and published by the Council on Licensure, Enforcement and Regulation (CLEAR). CLEAR was formed by state regulatory officials in 1980 to promote communication among states on regulatory policy and to support state officials in receiving the training and resources necessary to professionally administer occupational professional licensure. Today its membership includes regulatory boards, colleges, organizations, vendors, and other stakeholders from across the international regulatory community. The organization is in service to any entity or individual involved in the licensure, nonvoluntary certification, or registration of the hundreds of regulated occupations and professions.

With Montana-specific adaptations, this manual discusses commonalities and best practices of licensing agencies. As a comparative study, it will help board members learn their roles as regulators and inspire excellence in professional and occupational regulation for the citizens of Montana.

The Montana Department of Labor & Industry and the Business Standards Division thanks CLEAR for permission to use this resource.

Contents

HISTORY AND PURPOSE OF PROFESSIONAL AND OCCUPATIONAL LICENSING...	4
EXECUTIVE BRANCH APPOINTEES.....	5
ADMINISTRATIVELY ATTACHED AGENCY	5
UNDERSTANDING LICENSING LAWSⁱⁱ	8
MONTANA ADMINISTRATIVE PROCEDURE ACT	10
LEGISLATIVE OVERSIGHT	11
ADMINISTRATIVE RULEMAKING^{iv}	13
ANTITRUST LIABILITY - ACTIVE SUPERVISION	17
PUBLIC PARTICIPATION.....	19
PUBLIC RECORDS.....	20
RIGHT TO KNOW VERSUS RIGHT TO PRIVACY	22
OPEN MEETINGS.....	23
DISCIPLINARY PROCESS^v	28
FINANCIAL ROLES AND RESPONSIBILITIES	32
CONTINUING EDUCATION^{vi}	35
EXAMINATIONS^{vii}	38
GUIDING PRINCIPLES FOR BOARD MEMBERS.....	42
GUIDELINES FOR BOARD MEMBER CONDUCT.....	46
GUIDELINES FOR EFFICIENT MEETINGS	49
BOARD SELF-ASSESSMENT CHECKLIST^{viii}	51
IMPORTANT LINKS	53
BIBLIOGRAPHY.....	55

HISTORY AND PURPOSE OF PROFESSIONAL AND OCCUPATIONAL LICENSING

Modern day licensure has its roots in workers' guilds, which can be traced back to the tenth century in England. The first modern effort to regulate occupations and professions was Virginia's medical practice act in 1639. In the late 1800s, state licensure activity began in earnest, and by 1900, most states had licensed attorneys, dentists, pharmacists, physicians, and teachers. Between 1900 and 1960, most states also licensed an additional twenty occupations and professions including accountants, nurses, real estate brokers, barbers, hairdressers, chiropractors, and funeral directors.

Occupational licensing is an exercise of the state's inherent police power to protect the health, safety, and welfare of its citizens. Generally accepted and constitutionally sound reasons for requiring a license to practice a profession include:

- unqualified practice poses a serious risk to a consumer's life, health, safety, or economic well-being;
- such risks are likely to occur;
- the public cannot accurately judge a practitioner's qualifications; and
- benefits to the public clearly outweigh potential harmful effects of licensure (such as a decrease in the supply of practitioners).

In general, the absence of these factors indicates that licensure is not justified, or that some alternative form of regulation such as registration or certification may be appropriate.

Proponents of licensure argue that the purpose of licensure is to raise standards of practice, ensure quality service, promote continuing professional education and competence, and establish and enforce generally accepted standards of ethical and competent conduct.

Critics of licensure argue that licensure restricts entry into the profession, decreases competition and innovation, and results in higher costs of services to consumers. Furthermore, while licensure and entry-level training requirements may promote a minimum level of competency at the time of initial licensure, critics say licensing boards have done little to ensure that practitioners maintain competency and have not aggressively stripped incompetent and fraudulent practitioners of their licenses.

In the 1970s, several trends contributed to creating a small revolution in occupational and professional regulation:

- Increased legislative oversight through sunset reviews to evaluate the continued need for regulation and resulting legislative decisions to repeal or "sunset" the board and its enabling act.
- The rise of a consumer movement that turned issues once thought to be strictly in the purview of the professions into public policy questions. Licensing boards traditionally comprised exclusively of members of the regulated profession now have one or more public or consumer members in recognition that total self-regulation by the professions may not produce the best public policy.
- Reorganization of state governments by grouping agencies into broad functional areas under umbrella agencies and eliminating administrative duties previously handled by each board. Nearly three-quarters of states—including Montana—have central agencies that perform administrative functions for a group of licensure boards.

In 2015, the U.S. Supreme Court in *North Carolina Board of Dental Examiners v. FTC* issued a landmark decision involving professional licensing boards that brings into sharp focus potential antitrust liability, a subject addressed in more detail later in this manual. Today, some estimates are that over 800 occupations and professions require a license in at least one state. In the last decade, regulators have come under increasing pressure to recognize the impacts regulation has on competition, the labor market, and economic growth and to scale back or reform their regulatory programs.

Throughout this manual, this theme of “right touch” regulation –protecting the public without unnecessarily interfering with the right to pursue a profession. We hope you apply the principles in this manual to achieve a proper and enduring balance between safety and commerce.

EXECUTIVE BRANCH APPOINTEES

Agency heads, members of boards, commissions, and councils who serve at the pleasure of the Governor are expected to support the executive branch policies, including:

- The Governor's budget.
- Legislation by request of the Governor.
- Legislation by request of executive branch agencies and approved by the Governor for introduction.
- Other bills on which the Governor or other agencies have taken a position –either in opposition or support.
- The Governor's veto messages.

Communicating with the Governor's Office

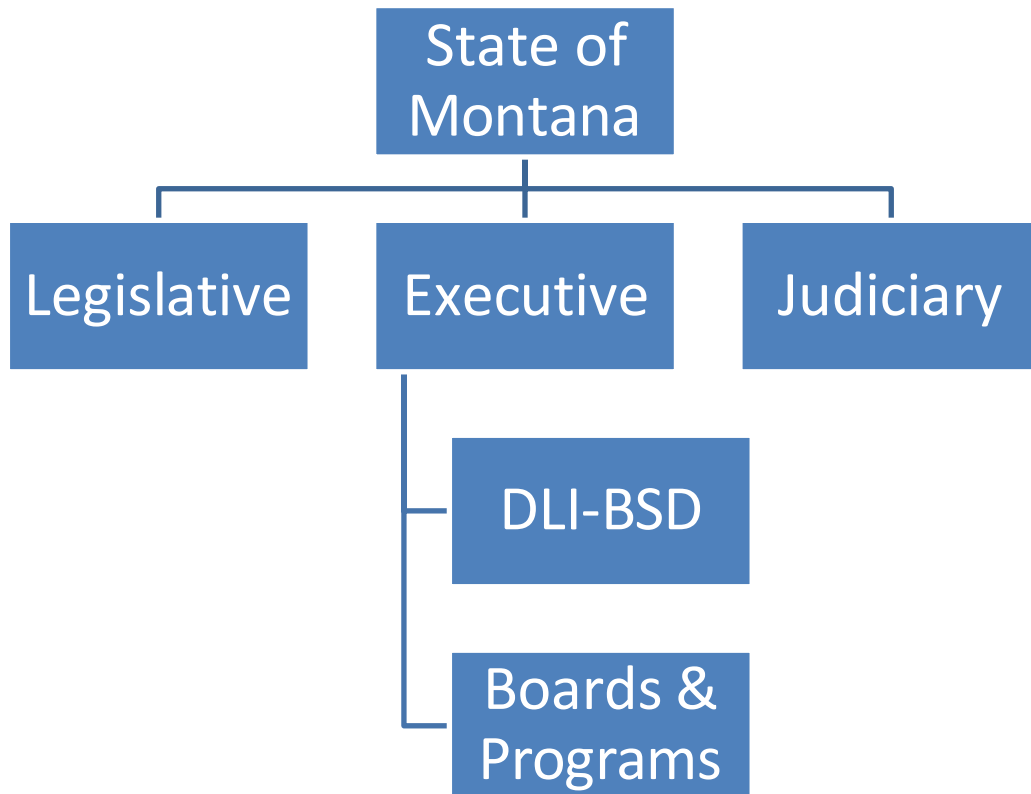
The Commissioner of the department represents the board in communications with the Governor. § 2-15-121, MCA.

Communicating with Foreign Governments

The department and board members may not communicate with foreign governments or sovereign nations, including tribal sovereign nations, without approval or assistance from the Governor's office.

ADMINISTRATIVELY ATTACHED AGENCY

The professional and occupational licensing function in the state of Montana is organized under the executive branch of the state government and administratively attached to the



Relative Duties of the Boards and the Department

The statutes creating the professional and occupational licensing boards and defining their membership are set forth at Montana Code Annotated [Title 2, chapter 15](#). The statutes governing the department and its administration of these boards are set forth at Montana Code Annotated [Title 37, chapter 1](#).

The board sets and enforces standards.

In Montana, because board members are part-time volunteers and the population of licensees is relatively small, the division as the “umbrella agency” has broad administrative duties. This “administratively attached” relationship allows the board to focus on its primary mission: to set and enforce qualifications for licensure and standards of conduct for licensees.

It is essential to the effective and efficient operation of the system for each the board and the department to maintain their legislatively mandated roles and cooperate where those roles appear to have overlap.

Summary of Board Duties

When professional and occupational licensing boards in the Business Standards Division set and enforce standards for entry into the profession and regarding the conduct of licensees, they are exercising quasi-judicial, quasi-legislative, and policymaking functions.

The board must apply these standards “equally and fairly,” and in a manner that does not

“restrain trade or competition unless necessary to protect public health and safety.” § 37-1-131, MCA.

With two notable exceptions, the boards exercise their authority to set and enforce standards independently of the department. The first is whenever the board initiates a program expansion, it must consult with the department to ensure the board has adequate money and appropriation authority. § 37-1-131, MCA.

The second is if the department identifies—typically through legal counsel advising the board—that the action is inconsistent with executive branch policy, contrary to law, an unreasonable restriction of trade or commerce, or subjects the state or board to liability for equitable relief or monetary damages.

Quasi-Legislative and Quasi-Judicial Defined

A board (or the department in administering a program without a board) is said to function either in a “quasi-legislative” or a “quasi-judicial” manner. An agency acts in a “quasi-legislative” manner when it makes rules, sets fees, or takes other actions connected with or essential to the proper exercise of a quasi-legislative function. See, § 2-15-102(11), MCA.¹

An agency acts in a “quasi-judicial” manner when it exercises judgment and discretion to decide controversies, including but not limited to:

- interpret, apply, and enforce existing rules and laws;
- grant or deny privileges, rights, or benefits;
- issue, suspend, or revoke licenses, permits, or certificates;
- determine rights and interests of adverse parties;
- evaluate and pass on facts;
- order action or abatement of action;
- adopt procedural rules;
- hold hearings; and
- act as necessary to perform a quasi-judicial function.

See, § 2-15-102(10), MCA.

Summary of Department Duties

The department’s administrative support spans the administrative services required by a board, including fiscal, clerical, recordkeeping, contracting, information technology, investigative, and legal services. In addition, the department processes routine applications, approves continuing education, and performs other functions appropriately delegated to it by a board.

¹ Professional and Occupational Licensing boards act in a “quasi-judicial” manner, but are not created as “quasi-judicial” boards under § 2-15-124, MCA.

Standardization of policies, procedures and forms, expedite services, and reduce costs.

Standardization

In providing these services, the department is statutorily mandated to standardize policies, procedures, and forms affecting boards to streamline

processes, expedite services, reduce costs and waste, and facilitate computerization. § 37-1-105, MCA.

Governor's Biennial Report

As required by § 37-1-106, MCA, the department prepares a biennial report to the Governor and the Office of Budget and Program Planning that summarizes board activities, goals and objectives, detailed fiscal information, licensing and disciplinary statistics, and other information deemed relevant. A copy of the report of FY 2015-2016 may be viewed online at <http://dli.mt.gov/Portals/57/Publications/dli-bsd-pol001.pdf>.

Joint Meetings of Boards

Every two years, the department may convene a joint meeting of boards having issues or joint concern or related jurisdiction and report to the designated interim committee. § 37-1-107, MCA.

UNDERSTANDING LICENSING LAWSⁱⁱ

Now that you have an historical context of professional licensing, and where it sits in the governmental structure, we will turn to the mechanics of professional licensing laws.

Enabling Legislation

Licensing statutes are classified as “enabling” acts passed by a legislature to empower an executive branch agency to act within the general guidelines set forth in the statute. Typically, this includes authority for the agency to provide the details necessary to implement the enabling act through administrative rulemaking.

For example, enabling statutes may authorize a board to sanction a licensee for engaging in “unprofessional conduct,” but rather than define “unprofessional conduct,” the legislature may authorize the board to define in rule what specific conduct constitutes “unprofessional conduct.” This delegation of legislative authority recognizes the legislature lacks the expertise to provide such a level of detail or be responsive to new developments within a profession.

Practice Act or Title Act

The “practice act” of a profession or occupation defines the scope of practice, defining what behavior or activity requires a license. Some, but not all “practice acts” also include title protection, meaning, that it is unlawful to use the title without holding a license.

Statutory Interpretation

While reading a statute, keep in mind the law's general purpose and the structure of the act. Generally, the statute or even the entire act must be read as a whole rather than section by section. Also, note important distinctions that occur in the law, such as whether a board "may" perform a discretionary act or "shall" perform it as required.

Be aware that formal interpretations of the board's practice or title act may exist from one or more of the following sources:

- formal and informal attorney general opinions;
- pertinent court decisions; and
- a law's legislative history.

If vague or ambiguous language exists in your statute or regulations, consult with the executive officer or legal counsel to help clarify through legislation or rulemaking. Having clearly written laws and rules will aid compliance and enforcement if they are understandable by the public, the licensees, staff members, board members, administrative law judges, and the courts. Additionally, under the holding of *North Carolina Dental Board*, any action the board takes to restrain trade must be "clearly articulated" (and actively supervised by a state actor).

Common Features of Licensing Laws

Definitions: Defines key words such as "board," "director," "license."

Board Structure: Outlines the number of board members, their duties, terms, and compensation.

Licensing Requirements: Sets out minimum qualifications such as education, experience, or examination required to become licensed.

Scope of Practice Definition: Describes the types and extent of practice that licensees may lawfully perform.

Administrative Provisions: Covers application procedures, fees, renewals, permits, etc.

Examinations: Defines type of examination or examination topics the board requires.

Reciprocity: Lists conditions under which persons from out of state may be licensed.

Continuing Education: Sets minimum number of hours for post-licensing training required for continued licensure.

Grounds for Disciplinary Action: Gives circumstances under which a licensee's practice may be limited or a licensee may be barred from practice, such as conviction of a felony related to the applicant's profession or unprofessional, unsafe, or unethical conduct.

Penalties for Violating the Law: Defines administrative sanctions a board may impose and criminal or civil penalties a judge may impose.

Licensure of Business Premises: Requires licensure and sometimes inspection of premises

where licensee is engaged in the practice, such as mortuary or cosmetology salon.

Professional or Occupational Schools: Requires accreditation or approval of the educational program offered, such as nursing or cosmetology.

MONTANA ADMINISTRATIVE PROCEDURE ACT

In addition to the enabling legislation (which for the department and its board is found at Title 37), all executive branch agencies are governed by the Montana Administrative Procedure Act (MAPA), Title 2, chapter 4 of the Montana Code Annotated. MAPA's most relevant provisions dictate how an agency adopts and publishes rules, conducts contested case hearings, and how a contested case hearing is appealed to district court, a process known as "judicial review." Again, we will cover more information about each of these areas in this manual. For now, also understand the purpose of MAPA is to:

- (a) generally give notice to the public of governmental action and to provide for public participation in that action;
- (b) establish general uniformity and due process safeguards in agency rulemaking, legislative review of rules, and contested case proceedings (disciplinary proceedings are conducted as "contested case proceedings," see Disciplinary Process, below);
- (c) establish standards for judicial review of agency rules and final agency decisions; and
- (d) provide the executive and judicial branches of government with statutory directives.

LEGISLATIVE PROCESS

Governor Approval of Board Positions on Proposed Legislation

The Governor formulates and administers the policies of the executive branch, including budget policies and priorities. The Governor's responsibility extends to positions taken by executive branch agencies before the legislature. Like departments, boards are agencies of the executive branch, and are accountable to the Governor as Chief Executive Officer of the executive branch of Montana state government.

It is important to coordinate legislation within the executive branch to guarantee consistency of policy, prevent conflict in laws, and keep board members informed of the Governor's policy, budget, and legislative goals. This coordination requires departments and boards to obtain approval from the Governor before taking positions on legislation.

Generally, boards become involved in supporting bills to correct program defects, fix statutory problems or ambiguities, resolve conflicts in the laws they administer, or generally make consensual improvements to services. Less frequently, boards or commissions become involved in bills of a more substantive or controversial nature. When a conflict arises among executive branch agencies at a policy or priority level regarding legislation within the executive branch of state government, the Governor is empowered to resolve the conflict and make a final decision.

Board members are accountable to uphold the policies of the Governor expressed by Legislature.

Position on Bills Taken at Public Meeting

Before a board may take a position on a bill, it must provide proper public notice, allow opportunity for public participation, and take its position by passing a motion. Because of the rapid legislative process, if an actual bill draft does not yet exist, but could come up for a hearing with short notice, the board can vote to authorize positions “in concept.”

Once the board passes a motion, it must request the department to seek the Governor’s approval. The request must explain why the legislation is important and how it impacts the board. If the Governor’s position is not known, the Commissioner or designee will convey the request to the Governor’s Office.

Board Member Testimony

If the department conveys approval of the board’s position as consistent with the Governor’s position, the board then decides which members, if any, should appear to testify on the legislation. Always, but particularly where board members adopt conceptual positions, if individual members testify, they should be sure they understand the board’s position so that legislators and the public do not receive conflicting messages, and fellow board members are not caught by surprise. Board members should give only testimony that is factual and technical and within the confines of the board’s motion.

Testifying as an Individual

There may be times when a member of a board does not agree with a position on legislation taken by a majority of the members. In such instances, a board member can appear on his or her own time to testify on his or her own behalf. When testifying as a private citizen, the board member is not entitled to compensation or travel reimbursement from the state.

In all cases, when testifying, a board member should expressly state whether he or she is appearing as a private citizen or on behalf of the board or commission.

Lobbyist Disclosure Laws

Board appointees are exempt from the lobbyist disclosure laws, when acting in their official capacity. However, board staff members, (like other state employees) are subject to the lobbyist reporting requirements when they engage in activities in support of or in opposition to legislation.

Reimbursement for Testifying

If approved to testify at the legislature in the performance of board duties, the board member is entitled to compensation and reimbursement for travel expenses. § 2-15-124, MCA.

LEGISLATIVE OVERSIGHT

In addition to passing “enabling acts” and delegating quasi-legislative authority to executive branch agencies, and approving the budget and authorizing the expenditure of monies (see Financial section) the legislative branch exercises additional oversight as follows:

- Review an agency’s proposed rules (addressed in more detail under Administrative Rulemaking and Active Supervision);

- Review agency performance and compliance with enabling act through audits and appearances before interim legislative committees; and
- Review whether a licensing program should cease (and infrequently, whether a licensing program should begin), referred to as “sunset” and “sunrise” reviews.

Interim Committee Meetings

Interim legislative committees meet in between the regular biennial legislative sessions several times through the year. The Department of Labor & Industry and administratively attached boards are assigned to the Economic Affairs Interim Committee. Typically, only management from the department is requested to address the committee.

Auditsⁱⁱⁱ

The Legislative Audit Division conducts two types of audits that regularly impact the division and the boards and programs: financial-compliance audits and performance audits.

Financial-compliance audits have recently been performed biennially on roughly a third of the boards and programs in the division. The primary objective of such audits is to ascertain that:

1. Activities are in accordance with the requirements of applicable laws and regulations and are only for the furtherance of authorized programs.
2. The agency accounts properly for all financial activity arising from its activities.
3. The assets belonging to an agency or in its custody are adequately safeguarded, controlled, and used in an efficient manner.
4. Reports and financial information provided by the agency to the Governor, the legislature, and central control agencies disclose fully the nature and scope of the activities conducted, and provide a proper basis for evaluating the agency's operations.
5. Make recommendations to improve internal control, compliance, management and/or efficiency and economy of government operations.
6. Determine the status of implementation of prior audit recommendations. Each audit's objectives may not include all those described here. Financial-compliance audits also identify and report instances and areas where agency economy and efficiency of operations or programs can be improved. Areas of concern identified in financial-compliance audits may be followed up by performance audit staff in conjunction with financial-compliance audits.

Performance audits are reviews and analyses of the agency or boards to determine whether the performance of the agency or boards are:

1. achieving the intended results;
2. being conducted efficiently and economically; and
3. in compliance with related laws and regulations.

These reviews result in recommendations that are presented to the standing Legislative Audit Committee. Depending on the nature of the audit, the board or management of the division may be requested to appear to address the committee. Visit the website of the [Legislative Audit Division](#) for more information about the processes these audits follow.

Sunset Reviews

The Montana Legislature has the discretion to conduct a periodic agency evaluation under the provisions of §§ 2-8-101 through -122, MCA and prescribes a procedure for creating new licensing boards and reviewing existing ones at §§ 2-8-401 through -405, MCA.

If directed to respond to a “sunset” audit, the board appears before the Economic Affairs Interim Committee, or “EAIC,” to answer the following statutorily mandated questions so the committee can determine whether a board or program continues to be needed to protect public health, safety, or welfare or the common good:

- does the improper practice of the profession or occupation pose a physical, financial, or emotional threat to public health, safety, or welfare and is there evidence of harm from improper practice; and
- does the practice of the profession or occupation require specific training or skills that make evaluation of competency difficult for consumers.

You will recall these same factors being mentioned in the section *History and Purpose of Professional Licensing*. These questions will be discussed in further detail in the section on *Antitrust Liability* later in this manual.

The committee may as a separate matter assess the financial solvency of the board or program and the impact on consumers and on licensees if higher fees are projected for the next biennium.

Based on its review, the committee may decide to:

- repeal the board or program if the board or program is no longer needed for public health, safety, or welfare or the common good; or
- combine a board that is no longer needed for public health safety, or welfare with other licensing boards if the board:
 - is expected to have higher fees than if the board operates in combination with another board with similar interests;
 - has fewer than 200 licensees; or
 - has no or a limited number of complaints each year.

The committee may request board members to appear and testify and answer committee questions as needed. The division will assist in providing information to board members and will assist the board to produce a written report to the committee, if requested. It is generally not enough to assert in a conclusory manner that the board “is needed to protect health, safety, and welfare,” but rather, to explain why and how specific regulations protect against specific harms to consumers or the public and the legitimacy of the risk of those harms.

ADMINISTRATIVE RULEMAKING^{iv}

The structure and format of rules are governed by MAPA (Title 2, Chapter 4, MCA), the Attorney General's Model Rules, and the Secretary of State's General Provisions (Title 1 of the Administrative Rules of Montana).

The Secretary of State (SOS) oversees the publication of all rulemaking notices in the Montana Administrative Register (MAR) and the publication of the adopted final rules in the Administrative Rules of Montana (ARM). A flow chart of the process may be found under [Adoption of an Administrative Rule](#), on the SOS website.

The Administrative Rule Review Committee and in some cases, the Economic Affairs Interim Committee, are authorized to review the department and board rules for compliance with MAPA. For more information about legislative rule review process, please visit [Interim Committee Rule Review Authority](#) on the legislature's website.

Definition of "Rule"

A rule is generally any statement of general applicability that implements, interprets, or prescribes law or policy; or defines the organization or the procedure and practice requirements of an agency. A rule may:

- establish a requirement;
- set a standard;
- establish a fee or rate;
- provide a set procedure;
- tell how a law will be implemented;
- give guidance for compliance with a law;
- describe the structure of an organization; or
- instruct members of the public how they must deal with or practice before an agency.

Adoption of Private Association Professional Standards

Many professional associations have adopted their own internal standards and guidelines on conduct of their members or other matters of interest. Often these standards may be a useful guide to a board or department in developing its official substantive rules governing that profession or occupation. But rules, standards, or guidelines of professional bodies or associations are NOT official rules and have no independent legal authority. They can only be used if they are adopted by the board or department through proper rulemaking procedures.

Types of Rules

Three kinds of rules are generally recognized:

1. Procedural Rules—set out the agency's organization procedures through which information may be obtained and establish the rules of practice before the agency;
2. Substantive Rules—set out the law, and/or provide any details and standards directed by the legislature; and
3. Interpretive Rules—interpret legal standards or phrases.

Authority and Statement of Reasons to Issue Rules

When the express or implied terms of a statute grant an agency the authority to adopt, amend, or repeal a rule, the rule must be both consistent and not in conflict with the statute and reasonably necessary to carry out the purpose of the statute. See, § 2-4-305, MCA.

When Is a Rule Needed?

In some instances, enabling statutes mandate both procedural and substantive rules. In other instances, interpretive rules may be required. Occasionally, the public will petition to have a rule issued or will even propose a rule. The agency may use informal conferences or appoint committees of experts or interested persons to obtain viewpoints and advice about prospective rulemaking. See § 2-4-304, MCA. Such committees are advisory only.

The rulemaking process can be costly. The boards and the department should carefully articulate why the rule necessary and what about the current circumstances and timing of the proposal are making it necessary.

Regular Procedures for Adopting Rules

To be legally binding, proposed rules or changes in rules must be adopted according to the proper procedures. In general, procedures require:

1. written public notice of intent to adopt or change the rule and publication of the proposed rule or change;
2. opportunity for the public to submit written comments on the proposed rule and/or to appear at a public hearing;
3. consideration of the comments in an open meeting; and
4. publication of final rule.

Notice and Publication

A board must give adequate notice of proposed rules, except in emergency situations. Notice allows all interested persons to learn of the proposal and to comment if they so desire. Generally, notice is given in the official state register publication (in Montana, the Montana Administrative Register) and in other publications likely to reach those interested, such as the board's websites. Time requirements for the length of publication of the notice are set by statute and must be followed to ensure the legal enactment of rules.

The notice will contain the following information:

1. the proposed rule language;
2. citations to the statutes that authorize the rule and the statutes that are being implemented by the rule;
3. a statement explaining why the proposed rule is reasonably necessary;
4. a statement of whether the proposed rule has a "significant and direct impact" on Montana small businesses;
5. a request for comments, notice of the date comments must be received, and an explanation of where and how comments should be submitted, whether in writing or at a hearing;
6. other information required by law, including notice reasonable accommodations for persons with disabilities, how to obtain electronic copies of the rule notice, applicability of bill sponsor notification if rule is a result of new legislation, and how to be placed on the interested parties list to receive future rule notices;

7. if new, increased, or decreased fees are contemplated, the number of persons affected by the proposal and the cumulative dollar amount; and
8. certification by the appropriate officials—in our case, the department’s rule reviewer and the Commissioner.

Public Comment–Written Comment

The agency must give all interested parties a reasonable opportunity to submit data, views, or arguments concerning a proposed rule and carefully consider such submissions. The department will maintain all comments received and make them available for public inspection.

Hearing Process

In most cases, the agency schedules a hearing prior to adopting changes to its rules. MAPA requires a hearing if the proposed rule is of “significant interest” to the public. If the agency has not scheduled a hearing, the agency may be petitioned by certain entities and required to hold a hearing.

If proposed rulemaking is highly technical or controversial, a board may choose to hold public hearings before drafting a rule. These discussions often occur during regular board meetings, but may preferably occur at specially convened meetings to avoid derailing the regular business of the board. The board would hold another hearing after publication of the proposed draft of rulemaking.

Consideration of Comments

After consideration of the views presented in the comments or at a hearing, the board or department is ready to take final action on its proposed rule(s). At this point it may choose to:

- adopt the rule as originally proposed;
- withdraw the proposed rule;
- make minor changes in the rule; or
- make major changes in the rule.

If major changes are made, the board may be required or may choose to treat the revised rule as a new proposed rule and repeat the entire rulemaking process.

Publication

When the board proceeds to adopt the rule, it must publish an adoption notice and a summary of comments with the board’s responses.

Rulemaking Summary

Rulemaking procedures are designed to ensure fairness in agency proceedings. As a board member, having to anticipate possible administrative and/or judicial review of your actions (including but not limited to antitrust liability), you should make every effort to comply with all procedural due process requirements for rulemaking and follow the advice of your

counsel.

The rulemaking process can be costly, so it is additionally important to clearly articulate why the rule is necessary under the particular time and circumstances.

Declaratory Rulings

Although infrequently used, a declaratory ruling may be issued by an agency declaring whether the agency's statute, rule, or order is applicable to a specific situation or activity. See, § 2-4-501, MCA. A party may seek a declaratory ruling from the agency when doubt exists as to how a statute or rule administered by an agency affects the party's legal rights.

The declaratory ruling process is as follows:

- Petitioner files petition for declaratory ruling with the agency or administratively attached board;
- Petition is published in the interpretation section of the Montana Administrative Register;
- Agency or board addresses petition by issuing a ruling or refusing to issue a ruling;
- Declaratory ruling is published in the interpretation section of the Montana Administrative Register.

If the agency denies a petition for declaratory ruling, a copy of the order denying the petition must be mailed to all persons named in the petition and must include a statement of the grounds for denial.

If the agency issues a declaratory ruling, this ruling is binding between the agency and petitioner concerning the set of facts presented in the petition. A declaratory ruling or notice of refusal to issue a ruling is a final agency decision subject to judicial review in the same manner as decisions or orders in contested cases.

ANTITRUST LIABILITY - ACTIVE SUPERVISION

As discussed earlier in this manual, a board's regulatory authority to restrain competition by requiring licensure is rooted in constitutionally sound police powers aimed at protecting public health, safety, and welfare. Equally sound is the principle of federal antitrust law that protects against unreasonable restraints on competition. Until the decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S.Ct. 1101 (2015), licensing boards presumed that their anticompetitive actions, taken under clearly authorized statutes, were immune from federal antitrust lawsuits. See, *Parker v. Brown*, 317 S.Ct. 341 (1943). This immunity, known as "state actor immunity," meant that the board could stand in the shoes of the state to request dismissal of a lawsuit alleging Sherman Act or similar federal antitrust violations against the board and its individual members.

In *NC Dental*, the court rejected the idea that boards composed of a controlling number of "active market participants" are "state actors." "Active market participants" are members of the profession in the same field as licensees regulated by that board. The court held that to have immunity from antitrust lawsuits, in addition to acting under clearly authorized statutes, such boards must be "actively supervised." The court's reasoning "stems from the recognition that '[w]here a private party is engaging in anticompetitive activity, there is a real

danger that he is acting to further his own interests, rather than the governmental interests of the State.” *NC Dental*, 135 S.Ct. at 112 (internal citations omitted).

Responses to the *NC Dental* decision among stakeholders in the professional and occupational licensing board community have varied widely. Some have called for the reduction in the number of active market participants serving on boards—an unsatisfactory approach that fails to recognize the subject-matter expertise licensees bring to bear on important regulatory decisions affecting their professions. A few states have created mandatory review of all board decisions—an unnecessary and overly burdensome response. On the opposite end of the spectrum, some have argued that no state supervisor review should occur. However, without state supervision and state actor immunity, the board and the state must defend the merits of an antitrust lawsuit and incur significant costs. Further, if such a case moves forward and if antitrust liability is established, the board may be ordered to pay treble damages and the prevailing party’s attorney fees.

In Montana, the 2017 legislature enacted §§ 37-1-121 and -122, MCA, which provides a middle-of-the road approach. The law requires active state supervision for only those actions (defined to include a policy, rule, or other decision of the board) identified by the department or by the board as potentially restraining trade, and thereby provides for state actor immunity for those decisions.

A short summary of the process in Montana is:

- A board may request active supervision if it believes an issue merits review.
- The department will give written notice to a board if it believes that an action could unreasonably restrain competition.
- Once written notice is given, a board has at least 30 days to gather information to submit for consideration.
- The legislature’s Economic Affairs Interim Committee (EAIC) will also receive the initial written notice to the board and may take public comment.
- The Commissioner will meet with a board to discuss the issue.
- The Commissioner may take public comment and hold a public hearing.
- After gathering input, the Commissioner must approve, modify, or disapprove the board action in writing.
- If the EAIC disagrees with the Commissioner’s decision, it may suspend the Commissioner’s decision.

The Commissioner will obtain necessary information to evaluate the substantive merits of the board action under review. The information-gathering obligations of the Commissioner depend in part upon the scope of work previously conducted by the board, which may include information demonstrating the board has:

- weighed the benefits of the action against any anti-competitive effects;
- determined how strong the need for the action is; and
- identified the potential intended and unintended consequences of the action on market competition.

Additional findings by the board that indicate consumer protection is more likely necessary include that the action:

- protects the safety, health, or welfare of the general public;
- protects consumers against health and safety risks that are serious and/or irreversible, particularly if these risks are hard for typical consumers to either discern or understand;
- protects consumers in situations in which one bad decision can have serious financial, health, or safety consequences where the market may not work quickly enough to solve the problem; or
- protects against other important externalities, such as high costs, scarcity, or degradation or depletion of resources.

If an action does not accomplish one of these goals, the action is likely not necessary and may not survive antitrust law requirements and active supervision review. The board's regulatory action should be the least restrictive alternative that a board can take, while still protecting the public from the harm that the regulation targets.

The laws on unreasonable restraint of trade are not new: The Sherman Act was passed into law in 1890. The 2011 Montana Legislature added language to § 37-1-131, MCA, to reiterate that board action must not "restrain trade or competition unless necessary to protect public health and safety." Subsequently, *NC Dental* elevated the issue to the forefront of the licensing board community. Numerous commentaries about the case can help board members and staff members better understand how the board decision-making process must consider the impact on the public, consumers, and new licensees' access to entry in their professions.

Board members should carefully read at least two of these commentaries: "[FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants](#)" (October 2015), and "[Responding to the North Carolina Dental Decision: A Primer for State Regulatory Board Counsel and Board Supervisors.](#)" A. Wickelgren (January 2017), both attached and available online. Additional information from the FTC on [Antitrust Laws](#) is available online. If you have questions regarding antitrust liability, please contact your board counsel.

PUBLIC PARTICIPATION

As referenced in MAPA, the "Right of Participation" is found at Article II, section 8 of the Montana Constitution, as follows:

The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of the agencies prior to the final decision as may be provided by law.

This constitutional right is implemented in part by Montana Code Annotated Title 2, chapter 3, part 1 "Notice and Opportunity Be Heard" and part 2 "Open Meetings."

The legislature finds and declares that public boards, commissions, councils, and other public agencies in this state exist to aid in the conduct of the peoples' business. It is the intent of this part that actions and deliberations of all public agencies shall be conducted openly. The people of the state do not

wish to abdicate their sovereignty to the agencies which serve them. Toward these ends, the provisions of the part shall be liberally construed.

Section 2-3-201, MCA.

The right is fundamental to conducting “the people’s business” and it applies not just to proposed rulemaking, but to everything the board does except for select investigative and adjudicative proceedings.

The public participation laws require the board and division to:

- develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public, § 2-3-103(1), MCA;
- ensure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public, § 2-3-103(1), MCA; and
- allow a method of affording interested persons reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to making a final decision that is of significant interest to the public, § 2-3-111, MCA.

Significant Interest to the Public

Borrowing a definition from MAPA, "significant interest to the public" means agency actions regarding matters that the agency knows to be of widespread citizen interest. These matters include issues involving a substantial fiscal impact to or controversy involving a class or group of individuals. MCA § 2-4-102(12)(a). Again, this definition excludes “contested cases.” *Id.*

Limited Exceptions

The law recognizes the following exceptions to providing public notice and comment in conducting board business:

1. emergencies affecting health, welfare, or safety;
2. an agency decision that must be made to maintain or protect the interests of the agency, such as filing a lawsuit or becoming a party to an administrative proceeding (e.g., screening panel decisions); or
3. a decision involving no more than a ministerial act. See, § 2-3-112, MCA.

PUBLIC RECORDS

“Public record” means public information that is:

- fixed in any medium;
- retrievable in usable form for future reference; and
- designated for retention by the state records committee, judicial branch, legislative branch, or local government records committee. See, § 2-6-1002, MCA.

"Public information" means information that is:

- prepared, owned, used, or retained by any public agency;
- relating to the transaction of official business;

- regardless of form;
- except for confidential information that must be protected against public disclosure under applicable law. See, § 2-6-1002, MCA.

With the noted exceptions, every person has a right to examine and obtain a copy of any public information. The public agency may charge reasonable costs for copying and producing public information.

The following are examples public records:

- agendas and open session minutes;
- financial records;
- board or agency-generated handouts to board or committee members for use in public session;
- handouts or written comments provided to the board;
- public board books (but NOT executive session books);
- reports, white papers, or other documents prepared by or requested by the board;
- e-mails.

Depending on the facts, the department may object to the release of information on the basis that it is not a “public record.”

- board member notes;
- board member “ideas, thoughts, drafts”;
- staff research materials, notes, or unfinished reports.

If requested to produce the above-listed documents, depending on the facts, the division may object to their release on the basis that they are not “public records.”

In order for records not to be considered a “public record,” they must meet the following test:

- not distributed or introduced for discussion;
- not used as the basis of any minutes;
- for personal use of the author only; and
- subject to destruction at the discretion of the author.

However, because a court may overrule the department’s objection, staff and board members who create such records are cautioned to exclude information that they would not want to see publicly disseminated.

Litigation-Related Discovery

“Discovery” is the process where the parties in litigation produce documents and information to each other, typically through depositions or written questions called “interrogatories.” If your board is named in a lawsuit, you may receive a notice from department legal staff called a “litigation hold.” As the litigation hold will explain, you must continue to preserve and not destroy any documentation in your possession that relates to

the issue in the lawsuit.

While information in your possession may not meet the definition of a “public record,” discussed above, it may be required to be produced in discovery if relevant to the issues in the lawsuit and not objected to by counsel.

If you are served with any summons, lawsuit, notice of a deposition or other discovery, contact the department’s legal staff immediately.

E-mails

The content of the e-mail information will determine whether it is a public record subject to the Secretary of State’s retention records. For helpful guidance in this area, please refer to the [State of Montana E-Mail Guidelines](#), published by the Montana State Records Committee.

Board Member Recordkeeping

If you take notes, and they meet the first three parts of the test above, you may decide whether to maintain your notes or destroy them. You are responsible to maintain the security and confidentiality of any notes you make and decide to keep. Again, although they should not be considered to be “public records,” they may be subject to discovery.

You should establish a personal schedule to destroy notes and board books or other board-related information from your electronic devices on a regular basis, following accepted security and information practices. The board office will maintain the official copy of all public records as recommended by the applicable [records retention schedule of the Secretary of State](#).

RIGHT TO KNOW VERSUS RIGHT TO PRIVACY

In addition to the Right of Participation, the Right to Know and the Right to Privacy are two key constitutional provisions that boards and board staff deal with regularly in both the production of public records and the determination of whether to open or close public meetings:

Mont. Const. Art. II, Section 9. Right to know.

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Mont. Const. Art. II, Section 10. Right of privacy.

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Balancing Test

Montana courts have developed a “balancing test” to determine when information should be disclosed to the public or maintained, in full or part, as confidential information. The test requires weighing or balancing the demands of individual privacy against the merits of public disclosure and determining whether there is:

- an actual expectation of privacy, and
- whether that expectation is reasonable.

The reasonableness of the expectation is usually affected by the attributes of the individual, i.e., whether the person is a patient, a minor, or a victim of sexual crime, in which cases the information is maintained as confidential. When the person holds a position of public trust, such as a police officer or an elected official, the balancing test will likely weigh in favor of disclosure.

In the production of documents, as much of the document that can be produced must be produced, with only the confidential portions redacted.

A person may be awarded costs and attorney fees if they prevail in a lawsuit against the agency to enforce their Right to Know. § 2-3-201 MCA. In the vast majority of cases, the balancing test will weigh in favor of disclosure. Legal counsel assist staff and board members in making the determination.

The balancing test is codified at §2-3-203(3), MCA in relation to closing an open meeting, discussed in further detail in the following section.

OPEN MEETINGS

Quorum

A “quorum” is a majority of the members of a board, panel, or committee of a board and is the number of board members required to do the board’s business. § 37-1-131, MCA.

A quorum that will “hear, discuss, or act upon” a matter under the board’s jurisdiction is a “meeting” subject to the Open Meeting Law. § 2-3-202, MCA. A quorum may be formed whether the board members meet in person, on the telephone, or via e-mail. *Id.* The definition of a “meeting” is important, because once a “meeting” exists, several obligations arise:

- (1) it generally must be open to the public (see exceptions below);
- (2) notice of the meeting and the items the board will discuss must be made public;
- (3) the board must have a public comment segment on the agenda and otherwise afford reasonable opportunity to submit information on matters of significant interest; and
- (4) minutes must be taken of the meeting.

A quorum of the board should not gather at an unannounced meeting or gathering. Board members should not discuss board business outside of noticed meetings. If the board meets for dinner or other gathering in conjunction with a board meeting, such gathering should be announced during the board meeting.

Vacancies & Recusals – Impact on Quorum

Unless a board statute or rule specifies otherwise, general parliamentary principles control the definition of a quorum in the cases of vacancies and recusals.

When there is a vacancy, a quorum will consist of a majority of the members that remain qualified. The qualified members are the “constituent membership” of the board referred to in § 2-3-202, MCA.

The fact that a board member recuses himself or herself, as appropriate, does not have an impact on quorum. The quorum is established by the number of members present, not by the number voting.

Depending on the interest at stake, such as one of significant interest to the public, it may be advisable to table a decision when a greater number of board members may weigh in. In contrast, the interest of an individual waiting for a board decision to begin employment should be acted upon, even with a smaller number of board members making the decision.

What Meetings Must Be Open

With limited exception pertaining to closing a meeting discussed below, all meetings of a board, a panel of the board, or committee of the board must be open to the public. § 2-3-203(1), MCA. The rule extends to “meetings of associations that are composed of public or governmental bodies referred to in subsection (1) and that regulate the rights, duties, or privileges of any individual . . . “ § 2-3-203(2), MCA.

When Can a Meeting Be Closed?

Individual Right of Privacy Outweighs Public’s Right to Know

The presiding officer of any meeting may close the meeting during the time the discussion relates to a matter of individual privacy and then if and only if the presiding officer determines that the demands of individual privacy clearly exceed the merits of public disclosure. § 2-3-303(3), MCA.

The right of individual privacy may be waived by the individual about whom the discussion pertains and, in that event, the meeting must be open.

Portions of full board meetings may be held in closed or “executive” session to discuss matters in which persons have a reasonable expectation of privacy, for example, applicants who have relevant chemical dependency or mental health diagnosis. Only that portion of the meeting necessary to discuss the private matters may be closed.

Convening in Executive Session

If an agenda item involves privacy interest or interests, the chair must do the balancing test provided by § 2-3-203(3), MCA and decide whether to close that portion –and only that portion–of the discussion that pertains to the privacy interest. The chair is advised to have consulted with legal counsel prior to the meeting in anticipation of this issue and make the determination on the record.

The presiding officer will read the following or similar statement for the record:

It is my determination that the following matter relates to a matter of individual privacy, and that the demands of privacy clearly exceed the merits of public disclosure. The law requires the individual(s) about whom the

discussion pertains may waive the right of individual privacy. If the privacy rights are waived, the meeting will be open to the public.

If the individual is not present, the record should reflect that because the individual to whom the discussion pertains is not present, the right to privacy may not be waived and the meeting will be closed.

If the individual is present, the chair or designee must ask on the record whether the individual wishes to waive his or her right to privacy and conduct the meeting accordingly.

If more than one individual has a privacy interest in the discussion, both must agree to waive their privacy interests if the meeting is to be held in open session. If one or both indicates they wish to assert their privacy interest, the meeting must be closed.

The public will be asked to leave and the meeting room door closed whenever a portion of the meeting is closed.

Litigation Strategy

In addition to closing a meeting when the individual right of privacy outweighs the public right to know, a meeting may be held in executive session to discuss strategy in litigation, unless both parties to the litigation are public entities. See, § 2-3-203(4), MCA.

Notice of Meeting

To effectuate the right of participation, the public must be given adequate notice of a meeting and access to attend the meeting. The department accomplishes this through agendas that are published on the statewide calendar and on the Business Standards Division website no less than 48 hours before the meeting takes place, but usually two weeks in advance. All agenda items must come through staff to ensure that agenda topics are properly and timely noticed to the public and are drafted with specificity to allow anyone reading the agenda to make a fully informed decision as to whether to attend.

Staff members send notice of the meeting directly to individual persons having business on the agenda and send copies of agendas to the interested persons list for the board. Boards should make attempts to actively cultivate the interested persons list to include persons or organizations who may be interested in board issues. There is no such thing as “too much” notice—in most cases boards are making final decisions on matters that have repeatedly appeared on board agendas.

Opportunity for Public Comment

At each board meeting, the public must be given an opportunity to comment on agenda items, as provided by § 2-3-103, MCA.

Additionally, the agenda for a board meeting must include an item allowing public comment on any public matter that is *not* on the agenda of the meeting and that is within the jurisdiction of the board. This “public comment” opportunity usually occurs at the beginning of each meeting.

The best practice during the comment period is that members listen, but not normally respond beyond asking limited questions. The board may not act on any matter discussed unless that matter already happens to be on the agenda for the meeting. If the comment addresses issues that are on the agenda, the board should deliberate and act, if it chooses to act, at the designated time or place on the agenda. If the matter is not on the agenda, any discussion or decision the board in its discretion has on the matter must only occur when the board has had time to seek more information and deliberate the issue at a future meeting which has been properly noticed to the public.

Public Comment During the Meeting

Recall that the public participation statutes required adoption of procedures to afford “interested persons reasonable opportunity to submit data, views, or arguments, orally or in written form, prior to making a final decision that is of significant interest to the public. § 2-3-111 (1), MCA. During a public meeting, as compared to public comment during a hearing where the entire purpose is to gather public comment, the presiding officer has discretion to allow—or disallow audience participation. If opportunity has been afforded prior to the meeting such as acceptance of written comments, or previous meetings have included public comment about the issue, or especially when coupled with the interests of hearing other board business, the presiding officer may decline to allow comment. However, the chair should allow comment if the issue is new or there are people in the audience who would like to make comment who have not commented previously.

Presiding Officer’s Duties

With any public comment during a meeting, the presiding officer has the discretion to set time limits and maintain decorum. Such constricts should be enforced consistently with all speakers. The presiding officer must further allow agenda changes only by motion at the beginning of the meeting, announce each item, and follow the approved agenda. Unavoidable circumstances may arise where it is necessary to “skip over” an item for good cause. In these circumstances, the presiding officer should explain this to the audience and make sure to go back and address the item.

Each time the meeting convenes in public session, the presiding officer should ask if all attendees have signed the attendance sheet, which, in addition to cultivating an interested persons list, may also be useful in the event persons claim they did not have notice or opportunity to comment on a matter. The presiding officer should further periodically check to ensure that telephone or video conferencing systems are properly functioning to allow participation by remote attendees.

Exception for Contested Cases

A “public matter” does not include contested case and other adjudicative proceedings. MAPA defines “contested case” to include “licensing.” § 2-4-102(4), MCA. Therefore, disciplinary or licensing contested cases are not matters of significant public interest for which public comment is permitted. The reason for this is because the board, in exercising quasi-judicial authority, makes its decision based on the record established in the particular case, and as a matter of law may not consider information outside of that record.

Public Comment Outside of the Meeting

Staff and board members are reminded that telephone calls (as documented in the course of business) and documents, whether received via mail, fax, e-mail, or hand-delivery, constitute “public comment.” On a case-by-case basis, staff will ensure the availability of such “public comment” upon request by any interested party and further decide whether to include such information in the board book, or to send to the board, individual committee members, or only the presiding officer.

Minutes

The division maintains the recording of all board meetings as the official minutes required by § 2-3-212, MCA, and generally makes all open session portions available on the board’s website within 2 -3 business days of the meeting. Requests for closed session recordings/minutes are handled by the board attorney on a case-by-case basis.

In addition to the recording, § 2-3-212, MCA requires the board to keep a written memorialization of the minutes. The division incorporates all board motions into written minutes with time stamps corresponding to the recordings, and similarly publishes open and closed written minutes in the manner of the recordings.

Violations and Enforcement

Board or board subcommittee members who gather or use e-mail or other method to communicate about board business outside of a noticed meeting risk violating the open meeting law. Even if no actual decision is reached, the argument can be made that necessary discussion that later led to a decision was made in an illegally conducted meeting.

Board members frequently receive e-mail communications from staff; however, board members should strictly refrain from “replying to all” no matter what the topic involves. As discussed below, e-mail communications are deemed to be “documents” that are subject to disclosure under the Right to Know and can easily find their way onto the front page of the newspaper.

Decision-making authority only occurs when a board makes a group decision in a legally constituted meeting under the principles previously mentioned. Board decisions that follow public participation principles, even if unpopular, will withstand scrutiny. However, board decisions that have been reached without following the public participation laws and that prejudice a person’s rights may be set aside by a district court under §§ 2-3-114, -213, MCA. Additionally, boards determined to have violated the open meeting law and public notice provisions are subject to paying plaintiffs’ legal fees and court costs. § 2-3-221, MCA.

When a board deliberates about an issue, it is important that all the members hear the same discussion at the same time during a publicly noticed meeting. E-mail discussions eliminate this opportunity and undermine the public’s right to observe the deliberations of the board and to have an opportunity to participate.

The board will not debate substantive issues or make decisions about substantive issues by e-mail. This policy does not prevent board members from using e-mail to provide

information to staff and board members, or for procedural issues, such as setting meeting dates or meeting content.

DISCIPLINARY PROCESS^v

Discipline, also referred to as “enforcement,” or “compliance,” is a top priority for occupational and professional licensing boards. It is also costly. Since regulation is enacted to protect the public's health, safety and welfare, boards are obligated to aggressively find and discipline incompetent and fraudulent practitioners. To remain effective, boards must prioritize and focus on cases that present actual harm or higher risk of harm over those where no or little risk of harm exists.

The goal of regulation is compliance.

Ultimately, the goal of regulation should be compliance with the standards established by the board. Filing a complaint or pursuing formal disciplinary charges is not always necessary to achieve compliance, especially for minor administrative violations. The following process is designed to help prioritize the complaints a board receives.

Steps in the Enforcement Process

The enforcement process consists of seven steps:

1. Intake–Receive and acknowledge complaint, set up file, and initiate complaint tracking.
2. Assessment–Screen complaint, determine jurisdiction, determine the type of response appropriate for the complaint.
3. Investigation–Conduct an appropriate level of investigation and produce a summary of details.
4. Review–Determine the disposition of investigated complaints: close those without merit; determine level of action to be taken for those with merit.
5. Formal and Informal Resolution–(1) Informal resolution by stipulated agreement or (2) formal resolution by hearing before a hearing officer.
6. Final Orders–Determine facts, legal conclusions, and sanctions in appropriate cases, and inform interested persons of final outcome.
7. Compliance–Follow up on all final orders to assure the orders are being obeyed.

Each state uses a somewhat different investigative and hearing process. Across the states, investigations are conducted by investigators working for single or multi-boards, investigators working by geographic districts, or investigations conducted by assistant attorneys general. In Montana, investigators, compliance staff, and the special assistant attorneys general conduct coordinated investigations.

Some states use a special committee of the board to conduct hearings and refer its findings to the rest of the board for final determination of guilt and sanctioning. Other states use an administrative law judge to conduct the hearing and refer findings to the boards for sanctioning. Montana follows the latter practice: a “hearings officer” from the independent Office of Administrative Hearings from the Department of Labor & Industry conducts the

hearing and makes recommendations on findings and sanctions for the “adjudication panel” of the board to make the final decision.

More information about the [complaint process](#), including forms can be found on our website.

Separation of Functions

In Montana, the boards have two panels that deal with compliance issues: the screening panel and the adjudication panel. The board or your board chair will appoint you to one of these panels.

The screening panel reviews investigative information and determines whether there is reasonable cause to believe that a violation of board law or rule exists. The adjudication panel reviews the established record in the case and issues a final order establishing a sanction.

The staff attorneys have assignments based on a classification similar to the board panels. One attorney, “board counsel,” represents the board and adjudication panel. A different attorney represents the screening panel. This attorney is referred to as the “department counsel,” or “prosecuting counsel” because his or her function is to prosecute disciplinary cases on behalf of the department. Division staff are likewise split: The executive officer and licensing staff are not involved in the processing or investigation of complaints. These functions are handled exclusively by compliance specialists and investigators under the supervision of department counsel.

The separation of these functions is important because a professional and occupational licensing agency is vested with all three of legislative, executive, and judicial powers. In other words, a board has the power to define misconduct, investigate and prosecute violations of the misconduct, and finally judge the guilt or innocence of the charges and determine the sanction.

With such power combined in a single agency, it is necessary to ensure that the power to investigate and prosecute is separated from the power to make the final decision and to have that decision made by an unbiased, neutral decision-maker.

Enforcement Terminology and Definitions

Respondent–The licensee, license applicant, or unlicensed person against whom the division has received a complaint or is processing information for possible “prosecution,” or bringing formal charges.

Investigation–The gathering of facts and information surrounding the allegations listed in a complaint, lasting anywhere from a few days to several months, depending on the case.

Dismiss–The complaint is dismissed but may be considered by the board in the future if another complaint of a similar nature is filed against the respondent.

Letter of Warning–A private, informal letter (not disclosed to the public or complainant) informing the respondent that repeated conduct as that alleged in the complaint at issue may lead to disciplinary action by the board.

Reasonable Cause–A finding by the screening panel that enough evidence exists to believe that a violation(s) of the statutes and rules governing the practice has occurred, authorizing issuance of a notice of proposed board action.

Notice of Proposed Board Action–A legal document setting forth factual assertions, conclusions of law and notification of the respondent of the right to request a hearing. Also referred to as bringing “formal charges,” or instituting “formal proceedings.” The notice is the beginning of a “contested case.”

Proposed Stipulation–A tentative settlement agreement between the department and the respondent that is presented to the adjudication panel for consideration.

Consent Order–A formal agreement of the parties, made under the sanction of the court or an administrative agency, in which some step (such as ceasing an activity, correcting a practice, or paying a fine) will be taken to resolve a complaint. Similar to a “stipulation” or “stipulated agreement.”

Hearing–A departmental administrative proceeding with an appointed hearing examiner.

Final Order–A legal document signed by the chairperson of the adjudication panel indicating that the panel has accepted the stipulation to settle the case, or has adopted the proposed order of the hearing examiner.

Final Order of Default–A legal document issued by the adjudication panel to a respondent for failure to respond to the notice or request a hearing. This order may be entered with or without prior notification to the respondent.

Types of Disciplinary Sanctions

A wide range of disciplinary sanctions is available in Montana. Board members must be familiar with the sanctions available in Montana at § 37-1-312, MCA:

Sanctions – stay – costs – stipulations. (1) Upon a decision that a licensee or license applicant has violated this part or is unable to practice with reasonable skill and safety due to a physical or mental condition or upon stipulation of the parties as provided in subsection (3), the board *may* issue an order providing for one or any combination of the following sanctions:

- (a) revocation of the license;
- (b) suspension of the license for a fixed or indefinite term;
- (c) restriction or limitation of the practice;
- (d) satisfactory completion of a specific program of remedial education or treatment;
- (e) monitoring of the practice by a supervisor approved by the disciplining authority;
- (f) censure or reprimand, either public or private;
- (g) compliance with conditions of probation for a designated period of time;

(h) payment of a fine not to exceed \$1,000 for each violation. Fines must be deposited in the state general fund.

(i) denial of a license application;

(j) refund of costs and fees billed to and collected from a consumer.

(2) A sanction may be totally or partly stayed by the board. To determine which sanctions are appropriate, the board *shall first consider the sanctions that are necessary to protect or compensate the public*. Only after the determination has been made may the board consider and include in the order any requirements designed to *rehabilitate* the licensee or license applicant.

.....

[Emphasis added]. As discussed in the introduction of this section, even when there is evidence of a violation of a board law or rule, it is not always necessary or advisable to pursue formal disciplinary action. This is why in (1) of the statute above, the language above states that the board (specifically the adjudication panel of the board) “may” order a sanction. In (2), the board’s sanctions must primarily be based on what is “necessary to protect or compensate the public” and secondarily on rehabilitation of the licensee or license applicant.

Unlicensed Practice Complaints

The disciplinary sanctions above are solely intended for licensees or license applicants. For a person who is practicing a profession that requires a license, the process and remedy is different.

A board may file a civil lawsuit called an “injunctive action” in the district court where the conduct is occurring to obtain a court order to “enjoin” or stop the person from engaging in the practice of the occupation or profession regulated by the board until the person obtains a license to practice (that is, if the person is qualified to get a license).

Before filing an injunctive action, the board must conduct a full and impartial investigation into the facts. Sometimes, the board will direct staff upon receipt of a complaint of unlicensed practice, to send a letter informing the person of the licensure requirement and the consequences for continuing to practice. This may be the end of the matter unless the department receives another complaint that the person is continuing to practice without a license. If any unlicensed complaint alleges actual harm, the division and the board should take the necessary steps to file an injunctive action.

A person who has been enjoined and who violates the injunction is punishable for contempt of court. § 37-1-136(3), MCA.

In addition to injunctive relief, the board may refer the matter for prosecution to a county attorney because the law defines unlicensed practice as a misdemeanor criminal offense. In practice, despite referrals of this nature, this type of a prosecution is extremely rare. Additionally, the Boards of Electrical, Plumbing, and Realty Regulation have authority to pursue MAPA contested proceedings and impose monetary sanctions and cost recovery for unlicensed practice. § 37-1-332, MCA.

Characteristics of a Strong Enforcement Process

Although jurisdictions have differences in carrying out their enforcement programs, a strong enforcement process will include:

1. Publication of the board's existence and role in handling consumer complaints. Options include:
 - toll-free complaint lines;
 - information brochure with wide distribution;
 - notices about where and how to file complaints posted in all licensed professionals' offices;
 - public service TV and radio ads;
 - speeches by board members to community associations;
 - coordination of publicity/consumer information with in-state consumer groups; and
 - including complaint filing information in statute and/or rules.
2. A well-organized complaint handling process with clear guidelines on how to log complaints, who receives notification of the complaint, and within what time.
3. Appropriate time periods for investigation and review. These time periods should be specified in the state's administrative procedures act, the board's practice act, or both.
4. Due process by separating investigations and prosecutions from hearings and final decision-making. No board or staff member should participate in more than one of these in any related case in the enforcement process.
5. Specification of the reasons for which boards can take disciplinary actions, such as unprofessional conduct and unethical behavior in the practice act. To the extent possible, define each of these terms in the board's regulations in terms of concrete behavior.
6. Guidelines for charges and sanctions which include both maximum and minimums for charging and sanction decisions. Such guidelines should always allow for deviations if written explanation is made of aggravating or mitigating circumstances.

FINANCIAL ROLES AND RESPONSIBILITIES

As directed by the enabling legislation, the department manages the financial and administrative affairs of the boards, as follows:

- hire and supervise staff;
- direct and supervise budgeting, recordkeeping, and reporting;
- set fees applicable to all boards and programs commensurate with costs;

- collect and deposit revenue;
- assess to boards and programs their equitable share of administrative costs; and
- establish policies and procedures to set fees for administrative services which are commensurate with the cost of the services provided.

Fiscal Solvency

The department is statutorily mandated to ensure that a board maintains fiscal solvency. If board spending exceeds appropriation or if the board has a severe cash balance shortfall, (“unable to operate in a cost-effective manner”) the department may:

The department is responsible to ensure the board maintains fiscal solvency.

- suspend board services except for renewal of licenses;
- provide notice to the Economic Affairs Interim Committee;
- review the need for the board or propose legislation to revise the board's operations to achieve fiscal solvency; or
- increase revenue by a one-time charge to licensees.

See, § 37-1-101, MCA.

The department carefully monitors the fiscal solvency of the board and may recommend an increase in licensing fees to avoid the more drastic measures just described.

The Statewide Accounting, Budgeting, and Human Resources System (SABHRS) maintained by the Department of Administration, is the database which tracks revenues and expenditures. Division staff generate SABHRS financial reports and present them at board meetings.

The main information to look for in SABHRS reports is the current revenue and expenses, the cash balance, and the financial projection for the balance of the fiscal year.

Many board costs are subject to external factors such as legislative appropriations, departmental operations, number of applicants entering the profession, number of complaints filed against licensees, or litigation filed against the board. The department and the board together should identify areas where the discretionary spending can be streamlined without compromising the board’s public safety mission.

Setting Fees

Consistent with the “administratively attached” model, the board’s fiscal duties are limited to paying to the department the board's pro rata share of the assessed costs of the department as provided at § 37-1-131, MCA and setting fees for initial licensing, reciprocity, renewals, applications, inspections, audits, endorsements, and examinations. § 37-1-134, MCA. The board or program must set fees to provide the amount of money usually needed for the operation of the board based on the revenues and expenses incurred in the prior five

licensing renewal years. *Id.* Thus, in setting fees, the board or program heavily relies on the information provided by the department.

Special Revenue Fund and General Fund Distinguished

A very important distinction to understand is that unlike most state government, which is generally funded by tax revenue and placed in the state “general fund,” boards are funded by the application, licensing, and other administrative fees paid by licensees and license applicants. Fee-generated revenue of this nature must be deposited and accounted for in a special revenue fund. The general fund may be appropriated for a variety of uses, whereas the special revenue funds are limited to fund the special activity, in this case, professional and occupation licensing.

Cash Balance Limitations

The department monitors a board’s cash balance to ensure that it does not exceed two times the board’s annual appropriation level. § 37-1-101, MCA. If this occurs, the department may recommend the board “abate” or reduce licensing fees through the administrative rule process. An abatement will often have a dramatic effect on the five-year revenue and expense history.

Variations in Cash Balance and Expenses

While monitoring the fiscal solvency of the board through the fiscal year, remember that most boards will see substantial revenue increases during and immediately after the licensee renewal period. Some boards will also see increased revenue when the license application volume increases before and after student graduation.

Similarly, some expenses of the board vary widely throughout the fiscal year while others remain relatively constant. For example, expenses for contracted services will remain constant or increase by set percentages because that cost is established by contract between the state and vendor. In contrast, “board direct” costs are billed to a specific board for variable things such as staff time involved in implementing new rules of the board, legal expenses for litigation, or a contested case hearing in a disciplinary case.

Basic Financial Terminology and Definitions

Appropriation–Not to be confused with cash, appropriation is spending authority granted by the legislature to disburse amounts from a program for a specific purpose for a specific time period. Appropriations for state agency programs are usually included in the general appropriations act, House Bill 2. HB 2 is the budget approved by the legislature on a biennial basis.

Biennium–The state government operates on a fiscal year (FY) calendar from July 1 to June 30 of the following year. The “biennium” is two fiscal years beginning on July 1 following the biennial legislative session. The legislature appropriates funds for a two-year biennium.

Cash–The amount of money in a board/program’s state special revenue account used to pay the board/program’s expenses. A board’s cash balance may not exceed two times the board’s annual appropriation level. § 37-1-134, MCA.

Direct Costs–The costs that are directly related to a board/program’s activities, i.e. support staff’s personal services, travel, per diem, postage, dues, etc.

Full-Time Equivalent or FTE –Full-Time position or the equivalent of one person working full-time for the entire year.

Indirect Costs–The board/programs share of expenses of the department, division, and bureau. These costs are based on a percentage of personal service costs.

Operating Expenses–A broad category of expenditures (first level of detail) that includes general administrative costs. Operating costs including everything but salaries, benefits, and major equipment.

Personal Services–Expenditures for salaries, benefits, per diem, and overtime for employees.

Revenue–The money a board or program collects from authorized fees or fines. All revenues are deposited into the individual board or program state special fund. Money collected for fines is deposited in the general fund, unless otherwise stated by statute.

Vacancy Savings–The difference between the budget for salaries and benefits and the amount actually expended. Vacancy savings occur because of vacant positions or lower salaries due to turnover and retirement. The legislature sometimes projects a level of vacancy savings and does not include the projected amount in agency budgets. During the 2013 biennium, 6% was excluded from agency budget as a projection of vacancy savings.

CONTINUING EDUCATION^{vi}

Overview

The maintenance of professional competency is a major concern for state regulators. With the rapid advances in technology and knowledge, professionals may find themselves falling behind in their chosen field of practice soon after they leave school unless they continue professional development activities to maintain their competency.

Continuing education is one way of ensuring continued competency.

State regulators generally apply two methods of assessing competency: reexamination and continuing education. Periodic reexamination as a condition for re-licensure is a topic of strong debate and opposition within professions and, to a lesser degree, by state regulators.

Private certifying agencies and professional associations have taken the lead in developing other methods for assessing continuing competency. These methods include self-assessment materials with follow-up readings for deficient skills or knowledge areas; peer review; periodic examination for proficiency; simulation exercises; on-site job performance assessments; and practice audits.

Although continuing education is a mandatory provision for many professions, there is continued debate over the effectiveness of mandatory continuing education. At any given time, state legislatures across the country may be found to be both implementing and dismantling mandatory continuing education requirements at the same time. The general trend is to retain CE for most professions.

Verifying mandatory CE compliance at renewal time can create a backlog in the re-licensure process. One successful approach to reduce this problem is to require reporting of CE six months prior to expiration of the license. Verification is completed in advance, without delaying issuance of the new license. A second approach utilizes a sampling mechanism, which occurs after renewal is completed. With this method, the licensee submits an affidavit of compliance with renewal documentation and fees. A random sample group must then provide evidence to support the affidavit upon request of the board. This latter approach is an effective way to deal with large numbers of licensees.

Montana Practice: Audit of CE After Renewal

In Montana, a board has the discretion to require continuing education, as long as any mandated CE meets criteria intended to reduce or eliminate additional burdens on licensees subject to the requirement. A board “may require licensees to participate in flexible, cost-efficient, effective, and geographically accessible continuing education.” § 37-1-306, MCA.

Unlike other jurisdictions that require submission of the continuing education as a prerequisite for renewal, in Montana, the board “may not audit or require proof of continuing education or continued state, regional, or national certification requirements as a precondition for renewing the license, certification, or registration.” § 37-1-306, MCA (2017). Rather, the renewal form asks the licensee to acknowledge that he or she understands the CE requirements, provides notice of the potential compliance audit, and that failure to comply with the audit may result in disciplinary action or administrative suspension of the license. § 37-1-321, MCA (2017).

The board may then conduct a random audit of up to 50% of all licensees to request documentary verification of the required continuing education or certification. *Id.* The division recommends that boards select a percentage to audit equivalent to a statistically relevant sample of the licensee population and then adjust that percentage annually (or biennially) depending on the compliance rate from the latest audit.

Exception to Audit Rule: Renewal of Expired License

There is one important exception to the “no proof of CE to renew a license” rule. The department *must* require a licensee to submit proof of having successfully completed mandatory continuing education if the licensee is reactivating an expired license. See, § 37-1-306, MCA (2017).

Availability of Continuing Education Programs

Continuing education has become a multi-million-dollar industry. Consequently, programs are available through a wide variety of sources. Providers include, but are not limited to:

- national, state, regional and local professional associations and societies
- federal and state agencies

- publishing houses
- universities
- employers
- private consultants
- peer groups
- trade associations
- manufacturers/suppliers
- national corporations
- research organizations
- private educational entrepreneurs

Availability of CE programs is directly affected by the criteria for approval of programs and providers. These criteria vary from state to state and board to board.

Criteria for Continuing Education Providers and Course Content

Mandatory continuing education for continued licensure will only be as effective as the program content and mechanisms established to verify compliance. To identify quality programs that accomplish the fundamental purpose of CE and enhance the professional's level of competence, the board should prescribe:

- 1) the qualifications of instructors;
- 2) the instructor/participant ratio;
- 3) the educational level of material;
- 4) the program objective;
- 5) the content of the program;
- 6) a method for evaluating the program;
- 7) standards for verification of participation, e.g., participant rosters and certificates of completion; and
- 8) for self-study programs, and correspondence courses, an acceptable method of verification of completion, e.g., open book examinations and tests.

Approval of continuing education based on the above standards is a time-consuming and costly endeavor, but necessary if the board is to make its continuing education mandates meaningful in the context of promoting continued competency. Some boards delegate the approval of courses to external sources. For example, if the standards of a professional association or other private organization comply with those set forth by the board, the board may approve any continuing education sponsored by that entity. While this may streamline the approval of continuing education content for the board, it still leaves the question of how the board evaluates and verifies that the course meets the board's requirements.

Online Courses

With advances in technology, alternatives to personal attendance at seminars and training sessions have been accepted. Correspondence courses and online courses with examinations to verify completion are an increasingly acceptable means of obtaining CE. Caps on the percentage of the total CE available outside of a live presentation have largely disappeared for boards who feel comfortable that the courses otherwise meet the established standards for proving them as reliable.

EXAMINATIONS^{vii}

Purpose and Types of Licensure Examinations

Professional examinations help determine if individuals are minimally competent for a license in their profession of choice. Some exams are given prior to graduation, while others require graduation status to qualify for the examination.

National examinations are usually written examinations, but the format for examinations is determined and developed by the profession and the examination provider.

Practical examinations are used by some boards and require the testing of the candidate in a clinical or practical environment, using clinical or hands-on skills.

Oral examinations usually require the candidate to answer developed questions orally before a specified panel of professionals. These examinations may be required even when a national or practical examination has been taken.

State examinations test in appropriate areas determined by the board and are generally administered by the state or state agency. State examinations are not always recognized by other states for licensure. A state examination may be required instead of a clinical examination in some states.

Jurisprudence examinations are examinations given to candidates for licensure regarding the laws and rules of that profession in that state. Jurisprudence examinations can be oral or written. Jurisprudence examinations are specific to the state of licensure and do not apply to any other state.

Board Responsibility for Examination

One of the last hurdles most licensure candidates must face is the successful completion of an examination. Whether the examination lasts one hour or several days, many candidates view this phase of licensure as a matter of "life and death." For this reason, when candidates fail their examination and do not become licensed, their first inclination is to blame the examination, not their own inability.

A board and its members have the ultimate responsibility for defending the examination. Regardless of whether the examination is purchased from a nationally recognized testing service or created by the board itself, the board must be able to convince the candidates—and perhaps a court—that the examination truly measures those components necessary to ensure the health, safety, and welfare of the public.

The examination is not intended to restrict entry into the profession. Rather, passage of an examination (and other licensure qualifications) provides assurances to the board and the public that an individual is minimally competent at the time of initial licensure.

Entry qualifications are minimum qualifications.

To create or even purchase an appropriate exam, adequate time, money and staff are required. Without these, the examination may be haphazardly thrown together and thus not defensible in a court of law. Give due consideration to the following:

- No examination should be put together in a matter of few weeks. Exam development requires considerable planning even before the first item is written. In general, each item appearing on an examination takes between 2-4 hours to plan, write, review, and produce.
- The final product should be the collective thoughts of more than just the board. Several committees should exist for the planning and development stages; per diem and travel expenses should be considered. Other expenses include printing, site rental, machine scoring, and, if required, evaluators. Each of these expenses should be carefully considered and budgeted.
- Board staff may be available to assist you in developing an exam, but, if your board does not have the assistance of a staff psychometrician, you should consider hiring one as a consultant. As a professional, you are the content expert, but you are not necessarily trained in how to create examinations.

An examination is referred to in terms of its “validity” and “reliability,” qualities that a court will assess if the examination is challenged by a license applicant. These terms imply that an examination measures what it is intended to measure (the knowledge, skills, and abilities required of an entry-level minimally competent licensee) and that the examination provides consistent results (items answered correctly are not a matter of luck or chance).

Examinations must meet validity and reliability standards.

The following steps focus on ensuring a valid and reliable examination. Even if the board purchases an examination, it should ensure that the vendor substantially follows these steps.

Job Analysis

A job analysis is one of the most critical factors in the development of a valid and reliable examination. Simply stated, a job analysis describes what a person does on the job. In conjunction with knowing what a person does on the job, the analysis will also provide information as to the tasks/KSAs required for competency. This activity is preliminary to the actual creation of the examination since the results of a job analysis will determine what components should be included in the examination.

When a job analysis is conducted, the individual performing this task should not only look at those activities performed, but should also review the frequency, criticality, and potential for harm if activities are done incorrectly. A board member can provide the initial input to the

tasks or activities viewed as being relevant to the profession, but other members of the professional community, especially those individuals who have been recently licensed, should also provide input. Once the final survey document is prepared for the job analysis, it must be completed by a representative sample of professionals. The number of questionnaires which should be distributed will depend upon the number of licensees as well as the differences in activities performed by licensees in various settings (i.e., hospitals vs. doctor's office vs. health maintenance organizations, etc.)

Test Specifications

Once the job analysis has been completed and the tasks/KSAs required of an entry-level, minimally competent licensee have been determined, test specifications or blueprint for the examination must be completed. The specifications will provide the board and the candidates with an understanding of what will be included in the examination. Although the actual items may vary from one administration to another, the general content should not vary since each exam should be based on the same set of test specifications. Following test specifications will increase confidence in both the consistency of the examination and its defensibility to a legal challenge.

Test Development

Before writing questions, the type of examination which best measures the predetermined tasks/KSAs must be determined (i.e. multiple choice, true-false, oral, simulation or practical).

Time, money, and staffing required for each of the different types of formats must be considered. For instance, an essay question may be easy to write, but it requires more time for a candidate to respond to and involves more time for fair and impartial grading.

After selecting the examination format or formats, the most difficult task remains in writing relevant and meaningful questions, i.e., those that deal with actual situations a licensee will encounter on the job. Questions should focus on whether an individual can analyze a situation, diagnose a problem, or evaluate results, not just whether they know that a certain fact exists. It is necessary to create 2-4 times the number of items required for an examination since some items will be eliminated during the reviews and extra items should be retained in an item bank.

If an oral or practical examination is selected, specific criteria for evaluating candidates' responses, and specific questions or activities required of each candidate must be established. One of the major weaknesses in oral and practical examinations is that one candidate receives one set of questions and another candidate receives another set of questions, calling into question how to evaluate both candidates when different criteria have been used. Thus, in the more subjective types of examinations, the same set of questions/activities must be asked of every candidate; the criteria for evaluating candidate responses must be pre-established; and at least two independent, well-trained examiners are needed to evaluate each candidate. Because of the additional time and expense required to administer and score oral and practical exams, multiple choice or true-false questions which can be machine-scored should be utilized whenever feasible. Machine scoring of items reduces grader bias, time, and errors.

Passing Score

Prior to administering the examination, it is necessary to determine the passing score or "cut" score. The purpose of licensure examinations is not to select the top candidates, but rather to ensure that only the minimally competent candidates are licensed. A passing score procedure is employed prior to the actual administration of the examination and is based upon the opinions of a group of 7-10 licensed individuals who individually evaluate the items included in the examination.

There are three frequently used passing score procedures: Angoff, Nedelsky, and Ebel. Although these three procedures involve differences in how the passing score is determined, the basic premise is the same: each member of the committee individually evaluates the items to determine the probability of a minimally competent candidate answering the question correctly. The individual probabilities are then averaged to determine the final passing score.

Test Administration

Administration of an examination is just as important as the development of the examination, since a poorly administered exam can destroy the reliability and validity of a well-constructed examination.

If a board administers a nationally prepared examination, the testing organization should have prepared standardized instructions and procedures to follow. If the board administers its own examination, the same type of standardized instructions and procedures must be developed and adhered to for every administration. If one site follows one set of procedures and another site follows another set, the board will be unable justify and substantiate the scores received by candidates in the two locations. Some the key points to remember in developing procedures:

- 1) Monitors/proctors must be well-trained so that they know what their responsibilities are during the administration.
- 2) Positive identification of candidates must be required before they enter the examination room.
- 3) Candidates must not be permitted to sit with their friends; either use preassigned seating or assign candidates to seats as they enter the examination room.
- 4) Storage of the examination must be secure before, during, and after the administration.
- 5) Verification of the number of examinations must be done before and after examination.

Security of examinations is paramount. Because candidates view success on the examination as essential to their livelihood, there is always the possibility of cheating or removal of examination material from the site. Best practices ensure sufficient staff available to constantly monitor candidates and that examination booklets are never publicly accessible.

Post-Test Analyses

Following the administration of the examination, it is necessary to review individual items as well as the overall results to verify that the questions asked, and the keyed answers are

correct. Either a hand or computer item analysis should be computed to determine the percentage of candidates answering each item correctly. If more than 75-80% of the candidates answer incorrectly, the item should be reviewed to ensure that it is appropriate for the profession, worded correctly, and keyed correctly. If an item has flaws, it must be rekeyed, multiple-keyed, or deleted. Results should not be distributed until an item analysis has been completed and the test reviewed since it is easier to make changes to scores before rather than after candidates have received their results.

Purchasing an Examination

The steps described above for creating and administering licensure examinations are equally important when you purchase an examination. Prior to agreeing to purchase an examination, review the job analysis, test specifications, test items, procedures used to determine the passing score, and even the procedures used to administer the examination. Also, make certain that the proposed contractual arrangements are consistent with what the board wants, not just what the testing organization wants.

Should a candidate claim an unfair examination, familiarity with these concepts will assist the board to defend both the examination and the board's use of it.

For more specific checklists to follow regarding test preparation, test construction, test administration, and post-test analysis, please refer to the CLEAR resources.

<http://www.clearhq.org/resources/manual.pdf>.

GUIDING PRINCIPLES FOR BOARD MEMBERS

A professional and occupational licensing board member has responsibilities respecting several groups:

1. *To the general public.* The duty owed is not to an individual consumer, but to the general public at large. Consumers expect that licensees will be qualified to perform properly and safely. They expect a fair method of settling disputes that may arise with a licensed practitioner. They have a right to know what's going on within the board.
2. *To potential licensees.* A person who wishes to earn his or her living in an occupation should not be kept out unreasonably. That person should have easy access to all information about entering the profession, including testing or transferring a license to or from another state.
3. *To other board members.* A board member is responsible to listen to and consider the view and contributions of fellow board members. Your responsibility to other board members extends to helping the board operate most effectively and efficiently and will help the board make better decisions.
4. *To staff.* A board member is responsible to handle only the issues that the board has been empowered by law to address, and to draw a clear distinction between the functions of the board and those of the administratively attached agency.

Serving the Public Interest

Professional and occupational licensing boards serve the public interest. Serving the public interest means looking at issues from the point of view of their impact on the consumers of the service, rather than from the point of view of the licensed profession or occupation.

It means examining the board's procedures and decisions to ensure that they encourage openness and accountability, increase the public's safety, and do not restrict choices

Serving the public interest means seeing issues through the consumer's perspective, not the licensee's perspective.

available to consumers. It also means being aware of the dangers of over-regulating a profession, and the impact of licensing on the practitioners' fees. Useful consumer information about the profession and how consumers can lodge complaints and seek restitution should be published in brochures and in other state publications, as appropriate.

Board members should keep the following consumer rights in mind when making board decisions.

1. *The right to safety.* To be protected against the marketing of products and services which are hazardous to health or life.
2. *The right to be informed.* To be protected against fraudulent, deceitful, or grossly misleading information, advertising, labeling, or other practices, and to be given the facts needed to make informed choices.
3. *The right to choose.* To have available a variety of products and services at competitive prices.
4. *The right to be heard.* To be assured that consumer interests will receive full and sympathetic consideration in making government policy, both through laws passed by legislatures and through regulations passed by administrative agencies.
5. *The right to education.* To have available programs and information that help consumers make better marketplace decisions.
6. *The right to redress.* To work with established mechanisms to have problems corrected, and to receive compensation for poor service or for products which do not function properly.

Remember that sanctioning a licensee is usually insufficient to resolve a consumer's problem. Some boards have the authority to award restitution to consumers. In Montana, the restitution authority is limited to a refund of fees billed to and collected from a consumer. Beyond this, a board may only suggest alternative avenues that may provide an aggrieved consumer satisfactory resolution, including: consumer protection offices of state or local governmental entities, legal aid offices for consumers with low income, legal action through small claims court or other private suit, or reports to law enforcement. In Montana, the compliance staff may include these suggestions in correspondence to consumers where appropriate.

Professional or Trade Associations, Associations of Regulatory Boards, and Certification Bodies

For most regulated professions and occupations, there are one or more private professional trade associations that exist to promote the financial and economic interests of its members, by engaging in such activities as governmental lobbying and providing continuing education opportunities. While the goals of the board and a professional or trade association may at times appear to overlap, it is important for the members of regulatory boards to remember their unwavering role to serve the public interest may conflict with the interests of the profession and its individual members. It is for this reason that board members are prohibited during their tenure on the board from serving in trade association positions of leadership or influence with that association. Such relationships present the potential for conflict of interest and may adversely impact the public perception regarding the ability of the board members to carry out their board-related duties in accordance with the public health, safety, and welfare mission.

Board members may not serve in leadership or influential positions in a related trade association.

It is important to distinguish trade associations from associations of state boards. For example, the Board of Public Accountants is a member of the National Association of State Boards of Accountancy, which advocates the public interest mission of the Board of Public Accountants. Some, but not all of the associations of state boards provide such services as national examinations, model acts, curriculum approval, and governmental lobbying. In contrast, the trade association counterpart of NASBA is the Association of International Certified Professional Accountants. Additional distinctions must be made, particularly in the health care context, of national certifying bodies. To add to the confusion is that the use of the terms “association” and “national” can be used by both trade associations and the associations of regulatory boards.

Board members should ensure they are familiar with the variety of certifying bodies, national associations, and trade associations, and their functions.

What Are the Requirements for Service on Licensing Boards?

Separate from statutory requirements or other requirements determined by the executive branch, the following are characteristics of effective board members:

1. *A demonstrated interest in public service.* Common sense and willingness to ask whether the policies, procedures, and decisions made serve the public interest.
2. *A commitment to attendance and participation.* Consistent attendance is essential to keeping informed, making good decisions, and supporting staff and the mission. An individual who accepts an appointment to a board, then does not regularly attend or actively participate does a disservice to the board and to the public interest.
3. *Assertiveness.* Respect your own rights and needs as well as those of others. A responsible board member who is not sure about something or perceives the board straying from its mission asks for clarification and speaks out.
4. *A willingness to become informed about the board structure and resources.* Find out how the department and its sub-units work in relation to your board.

How Can a Board Member Effectively Participate in Board Work?

Effective board members have these characteristics in common:

1. able to work with a group to make decisions;
2. understand and follow democratic processes;
3. willing to devote time and effort to the work of the board;
4. work to find alternative solutions to problems whenever necessary;
5. engage in active, clear, and responsible communication;
6. recognize that the goal of the board is the service and protection of the public;
7. aware that statute grants authority to the board—not to any member individually—and may only be exercised in open meeting or executive session by vote of a majority of board members;
8. avoid becoming involved in the daily functions of staff;
9. delay making judgments until adequate evidence is in and has been fully discussed; and
10. do not let personal feelings toward others affect their decisions.

Public Members of Licensing Boards

All board members have as their primary goal to protect the health, safety, and well-being of the public. A public member has the additional responsibility of being especially sensitive to consumer welfare.

Nearly every state's law mandating public members on boards states that a public member shall have no association or relationship with the profession or with a member of the regulated profession. (Note: there is no law in Montana to this effect, however, it is a preferred practice.) Public members are not expected to be, indeed are not supposed to be, technically expert or experienced in the licensed occupation.

Public members, because they are not subject matter experts in the profession, usually do not express opinions as to whether the standard of care has been met in an enforcement case. Rather, the public member must think in terms of the consumer's perspective and give voice to those possible concerns.

Public members advocate the consumer's perspective.

The public member serves to remind the professional board members of the public interest as opposed to the special interest of professional associations or of the professional board member's individual economic interest.

There are possible advantages and disadvantages of public members on boards.

Possible advantages:

1. Reduces the potential for board decisions which favor the industry over the public.

2. Reduces the potential for decisions which illegitimately favor one faction of an industry over another.
3. Institutionalizes public participation in government decision-making.
4. Decreases public suspicion and thereby augments public confidence and trust in government.
5. Expands the range of skills, talent, training, and perspectives available for higher quality and more creative board action.
6. Raises the level of board discussion to include reexamination of the unscrutinized "givens" in any industry.
7. Reduces the barriers for "the average citizen" to address the board.
8. Lends credibility to board decisions and advocacy.

Possible disadvantages:

1. Public members may be intimidated by industry members' experience in the field.
2. Public members may impede board activity if technical issues are not understood by lay members.
3. Split public/profession votes or conflict may be viewed by the licensees as board weakness, and adversely impact the board's deterrent effect.
4. There may be fewer motives for board participation because professional self-interest motives may be lacking.

GUIDELINES FOR BOARD MEMBER CONDUCT

Be Prepared for Meetings

Attendance. The board should schedule its meetings one year in advance with each member having his or her own schedule available in order to avoid scheduling board meetings with vacations or other events that may conflict.

Board members must notify staff as far in advance as possible when it is unavoidable that they will not be able to attend a scheduled meeting. Valuable time and resources are lost when a meeting cannot be held for lack of a quorum discovered on the day of the meeting.

Certain boards have statutory requirements for board member attendance requiring dismissal of the member if a certain number of meetings are missed.

Read all materials before the meeting. Whenever the board or a panel of the board deliberates on an application or a complaint, the chair should ensure that the record reflects that each member has reviewed the materials. Members who have not read the materials must recuse themselves from participating in the discussion or decision. If the recusal results in the lack of a quorum, the chair will either call a recess to allow the member to read the materials or will continue the discussion to a future date. Taking such remedial action is costly to the board and to persons who travel to attend the meeting. At a minimum, such unpreparedness is unfair to the individual waiting for a decision and threatens the public interest.

Become familiar with the board's laws and rules. All authority of the board comes from the laws and legally adopted rules. The laws and rules are available in hardcopy from your board's executive officer, online via Business Standard Division's links on each board's home page or directly on the homepages of the Montana Legislature (statutes) and the Montana Secretary of State (rules).

When making a motion or other action, a board member may be required to cite to the authority in law or rule that supports the action. Board members should expect the licensees they regulate to be familiar with and comply with the laws and rules and should hold themselves to an equal, if not higher expectation.

Confidentiality

Staff will take steps to redact personal information such as birth dates, social security numbers, medical information, or examination scores from board materials. Other material such as a complaint allegation or response to a complaint is confidential. Board and staff members must neither confirm nor deny the existence of a complaint.

Staff will send materials to board members using the most technologically secure method available. Board members must take additional precautions to ensure security of confidential information and avoid deliberate or inadvertent disclosure. For example, do not dispose of board meeting materials in your household or business garbage can. Return all materials to the board staff after a meeting so that confidential materials can be disposed of securely.

Board members must not discuss confidential board business outside of a scheduled board meeting and should immediately report any attempted contacts regarding confidential matters from licensees, applicants, attorneys, or reporters regarding confidential matters to board staff.

Even when a matter is not confidential, but pending before the board, such as a contested case proceeding, the board member should not discuss the matter with the party, just as a judge would not discuss the matter with only one of the parties.

Comments about rulemaking or other policy matters pending before the board should be filtered through a public agenda.

Conflicts of Interest

If you have a personal, business, financial, or family relationship with a licensee, applicant, complainant, or other person with business before the board, you must recuse yourself. If recusing yourself will result in the loss of a quorum, notify the attorney handling the matter and the attorney will advise you on what action you should take to avoid any perceived or actual conflict of interest.

Board members should remember that they are seen as representatives of the board when they appear at industry or professional gatherings. They must not appear to speak for the board unless specifically authorized by the department or board to do so.

Impartiality and Fairness

Do not take a position on a board issue until all the facts, laws, and arguments have been presented and the matter is discussed thoroughly with the full board or panel in a meeting.

Avoid Violations of Public Participation & Open Meetings Laws

Do not meet or confer with other board members about board business, except at noticed board or committee meetings. Doing so violates the open meeting laws. This includes meeting in person or conferring on the phone, by e-mail, or other electronic means.

Board staff must give the public an opportunity to attend the public portions of all meetings. This is accomplished by publicly noticing the meeting. All e-mails regarding board business, even if through your employment or private home, are considered public information and subject to disclosure upon a request for public information or discovery in litigation.

All inquiries regarding matters within the board's jurisdiction should be directed to the board office so that they can be brought to the attention of the board at a publicly noticed meeting.

Board members are prohibited from conducting private meetings outside of full board meetings. This means they cannot participate as other parties in the dispute. Board members cannot discuss the details of a disciplinary action with the subject of the complaint or with any other members of the public other than board members, except at a board meeting in the presence of legal counsel.

Acting Within the Scope & Authority of a Board Member

As noted throughout this manual, a board member's authority is defined by statute and rule. Court decisions, attorney general opinions, and legal counsel interpretation further define this authority.

Failure to act within the scope and authority of the statutes and rules applicable to board members may result in liability to the board or individual board members. Failure of a board member to act within this outlined scope and authority may result in the state declining to defend the board or an individual member of the board. See, § 2-9-102, MCA (agency liable for torts of [agency officials] acting within scope of duties).

A board member may incur personal liability.

Board members must know their duties, review their laws and rules, and follow advice of legal counsel.

Board Member Compensation & Travel Claims

See publication, *Introduction to Board Membership*.

Board Member Contact Information

See publication, *Introduction to Board Membership*.

Removal for Cause

In Montana, a member may be removed from the board by the Governor for neglect of duty, incompetence, or unprofessional or dishonorable conduct.

The Business Standards Division Administrator maintains ongoing communication with the Governor's Appointments Advisor regarding the performance and conduct of board members.

GUIDELINES FOR EFFICIENT MEETINGS

The benefits of conducting an efficient meeting include conserving board and staff member time, and projecting an image of competency to licensees, members of the public, and other agencies. Conducting an efficient meeting allows the board to address issues in the given occupation or profession in a timely fashion and increases public confidence in the board.

General Pointers to Increase Meeting Productivity

1. Hold regularly scheduled meetings, as listed in the governing statute, rules, or policies. Schedule specific dates, times, and locations a year in advance.
2. Properly notice meetings and afford public comment.
3. Handle only issues that the board has been empowered to address, drawing a clear distinction between the functions of the board and those of the administratively attached agency.
4. It is important in setting agenda items that the board only include matters over which it has jurisdiction.
5. Follow a timed agenda and agree to go beyond time limits only by formal motion.
6. Use issue sheets created by staff to summarize discussion points.
7. Use "ground" rules that incorporate responsible communication, i.e., tactful, open, and honest discussion where all participate as equals.
8. Use white boards or projectors to focus discussion as necessary.

Agenda items should include only those issues the board has power to address.

Committees

Meetings of committees, subcommittees, or "working sessions" (i.e., a special meeting called to address a particular item) comprised of a quorum of board members are subject to the same agenda, notice, public comment, and minute requirements as the regular board. Such groups can save time and provide an opportunity for careful study of an issue prior to the formal board meeting where the final decision will be made.

Committees issue recommendations to the board, but do not make the decisions. Written committee reports distributed in advance of the board meetings are the most effective.

Presiding Officer of the Board Meeting

Business Standards Division boards are generally required by statute to elect officers, including a presiding officer annually. The presiding officer (also known as the “chair” or “president” of the board) is responsible to ensure that all legal requirements to conduct the meeting are met. Best practices will have board leadership positions rotate, as long as boards have members who are willing and capable to take such positions.

Prior to a scheduled meeting, the presiding officer will work with staff to review and finalize the agenda to include:

- resolution of unfinished business;
- new business from board members or constituents;
- adequate time to address items;
- logical and efficient order of business;
- consideration of how to address tentative privacy or other compelling interests which may necessitate closure of the meeting; and
- any other issues that will allow the meeting to be productive within statutory and constitutional requirements.

Based on a standardized agenda, the board chair will conduct the meeting using a modified form of parliamentary procedure. The goal of the chair is to maintain an orderly flow of addressing board business and include sufficient identification of the issues, board member participation, and either a consensus or formation of clear motions for the record when formal motions are required.

Progression of the Meeting

Beginning of Meeting

- Start on time with roll call and establish quorum.
- Introduce board members, staff, and guests.
- Solicit corrections to written minutes from previous meetings.
- Review the agenda, revising the order if necessary.
- Provide opportunity for public comment to address matters within the jurisdiction of the board but that are not on the agenda of the meeting.
- Establish any necessary time limits for large number of persons wishing to address the board.

During Meeting

- Follow the agenda order.
- Maintain decorum and an orderly and timely progression of board business.
- Focus on the issue as stated on the agenda.
- Establish action items that answer who, what, and when.

- Hear reports of officers, directors, or standing committees, if any.
- Hear reports of special committees, if any.
- Hear specific cases or action items requiring discussion, deliberation, and a vote.
- Offer opportunity for public comment prior to voting for each item that is of significant interest to the public.
- Address unfinished items carried over from a previous meeting or agenda items that were previously postponed to the next meeting.
- Address new items of business or move to take from the table any item that is on the table.
- Allow adequate time for program or guest speaker, if applicable.

End of Meeting

- Request that staff review and summarize for the minutes the meeting's progress, decisions, and assignments.
- Make general announcements.
- Announce next meeting date.
- Adjourn the meeting.

BOARD SELF-ASSESSMENT CHECKLIST^{viii}

Regulatory boards should periodically conduct evaluations on how efficiently they operate to protect, promote, and respond to the public interest and meet legislative review mandates. The following is an example of areas for evaluation:

1. Is there a need for regulation?
 - a. When did regulation of the profession or occupation begin? Why? Does the need still exist?
 - b. Are the rules and regulations promulgated by the board consistent with the statute?
 - c. Is the implementation—guidelines, procedures, etc.—consistent with the rules and regulations?

2. Does my board promote and protect the public interest?
 - a. Are there contacts with consumer groups?
 - b. Are there mechanisms to provide consumer input into decision-making?
 - c. Are due process protections provided to applicants, licensees, and the public?
 - d. Is my board making itself known to, and open to, the public? Do any non-board members attend meetings? Who are they?
 - e. How are board meetings, activities, and decisions publicized?
 - f. Is there an annual report? What is it like? Is it something the average citizen could read and understand? Does the report summarize board activities in a way that would permit the reader to judge how well the board is doing its job, or where it is placing its emphasis?
 - g. Are there minutes of all meetings? How are they circulated or made available outside the board? When are they circulated?

3. Is the board involved in consumer education?
 - a. Are consumers informed of their rights?
 - b. Are consumers informed of where they can go for help when their rights have been violated?

4. Does my board provide protection against deceptive practices, negligence, and incompetence?
 - a. Are consumers informed of the types of deceptive practices that can occur?
 - b. Are records of complaints kept to indicate patterns of abuse?
 - c. What actions does my board take to discipline licensees, e.g., ordering work redone, revoking licenses?

5. Does my board engage in practices that limit competition?
 - a. Does the licensing process restrict entry into the profession or occupation?
 - b. Is there a ban on advertising which may prohibit sellers of service from competing?
 - c. Are minimum or suggested fee schedules established?
 - d. Are there any other unnecessary or unjustified restrictions?

6. How effective are the program functions of my board?
 - a. Are these functions desirable or necessary (testing, licensing, complaint handling, holding hearings, rulemaking)?
 - b. Is the board working to maintain high standards within the licensed occupation?
 - c. Is the board able to show what it has done about complaints received from the public?

7. Is my board operating efficiently?
 - a. Is the interaction and sharing of responsibilities between the board and the appropriate agencies optimally divided and carried out?
 - b. Are activities of the board itself being run in the most efficient manner?
 - c. Do meetings start on time?
 - d. Do members consistently get to meetings on time?
 - e. Do members consistently attend and notify the chairman if they are not coming or will be late?
 - f. What is an operating quorum?
 - g. Are minutes of the previous meeting distributed promptly?
 - h. Is much time spent in routine administrative items that should be taken care of by staff?
 - i. Is correspondence summarized, or read word-for-word?
 - j. Are responses to applicant letters (including the standard reply explaining the procedure for licensing) helpful, relevant, and written in simple language that really gives the needed information and guidance?
 - k. Do meetings operate on an agenda, and do all members know what the agenda is?
 - l. Do people leave before the meeting is over?
 - m. Do meetings run too long?
 - n. Could there be time limits set for items?
 - o. Is the board meeting at a time most convenient for the members?

- p. Could the meeting time be changed?
 - q. Does the board need to meet more often or less often?
 - r. Does the board conduct orientation for all new members and integrate new members as quickly as possible?
 - s. Does the board engage in long-range planning?
 - t. Does the board review its administrative rules annually?
8. Is my board carrying out its public participation obligations?
- a. Do board members act for the board without full authority to do so?
 - b. Do board members discuss board business outside of a noticed meeting, such as at a lunch or dinner gathering?
 - c. Does the board provide an ADA-accessible meeting room?
9. Is my board engaging in responsible communication?
- a. Are members encouraged and allowed to participate in the discussion?
 - b. Does the board confine its discussions to board issues?
 - c. Do members always include the agency's administrator as a resource for all important issues and as a liaison for communication with the governor's office?
 - d. Do board members address questions candidly and respectfully and disagree with grace and tact?
 - e. Does the board follow a business-like system of parliamentary procedure?

IMPORTANT LINKS

Montana laws (also known as statutes) are passed by the state legislature and published as the *Montana Code Annotated* by the Montana Legislative Services Division and are available at http://leg.mt.gov/bills/mca_toc/index.htm.

Montana rules (also known as regulations) passed by executive branch agencies are published by the Montana Secretary of State as the *Administrative Rules of Montana* and are available at <http://sos.mt.gov/ARM/index.asp>.

Links to relevant statutes and rules, meeting agendas and minutes, and other information pertaining to an individual board may be found on the Business Standards Division home page <http://bsd.dli.mt.gov/> and clicking on the license type.

Licensee Lookup may be accessed through the Business Standards Division home page above.

Montana eCalendar may be accessed through the Business Standards Division home page above.

Telephone numbers for board staff and administrators at <http://mt.gov/govt/statedir/agency/default.mcp.x>.

State of Montana Employee E-mail Contact at pubdir.mt.gov.

Council on Licensure, Enforcement and Regulation at <http://www.clearhq.org/>. Please contact staff for username and password to gain access to member materials.

Federation of Associations of Regulatory Boards at <http://www.farb.org/>. Please contact staff for username and password to gain access to member materials.

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ⁱ CLEAR, etc., etc.

ⁱⁱ This section has been adapted from the Board Orientation Training Manual Published by the Washington Department of Licensing.

ⁱⁱⁱ This section is taken from the homepage of the Montana Legislature, "About the Legislative Audit Division" <http://leg.mt.gov/css/Audit/About%20Us/aboutus.asp> January 4, 2018.

^{iv} Resources for the Administrative Rulemaking Portion include:

RULEMAKING MANUAL FOR OCCUPATIONAL LICENSING BOARDS (1978), prepared by the National Association of Attorneys General, Committee on the Office of Attorney General

A BOARD MEMBER'S TRAINING MANUAL, prepared and published by the National Association of Boards of Pharmacy

^v Resources for the Enforcement Process Section include:

Antitrust, Competition Policy and State Professional Regulation: A Manual for Regulators, Kim Zeitlin, et. Al. (CLEAR/Council of State Governments; Lexington, KY.) 1985.

The Law of Professional Licensing and Certification, Randolph Reaves (Publications for Professionals; Charlotte, N.C.) 1984.

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^{vi} Power and Conflict in Continuing Professional Education, Milton R.

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^{vii} Resources for the Examination Section include:

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viii This checklist is reprinted in part from *Effective Consumer Representation: An Orientation Manual for Board Members* published for the Consumer Council of Maryland. The checklist was adapted from the *Orientation Manual for Members of Boards, Commissions and Committees* published by the California Dept. of Consumer Affairs.