SUNSET INFO

Alaska State Legislature

Senate

Committee on

Community & Regional Affairs

Pouch V
State Capitol
Juneau, Alaska 99811

Official Business

March 8, 1980

TO: Senator Arliss Sturgulewski
Representative Hugh Malone

FROM: Margo W. Waring & Paul Quesnel

RE: Sunset Free Conference Committee

Our previous memorandum on this subject (Feb. 29, 1980) conveyed to you the options and recommendations of Gerald Wilkerson, Legislative Audit. In this memorandum, we would like to present a fuller discussion of the issue of revision of the sunset process.

To establish a context for decisions about sunset revisions, a restatement of the policy approach of the sunset legislation may be appropriate. The significant difference between sunset and previously existing audit and review laws (as embodied in AS 24.20, Legislative Budget and Audit and AS 37.07 Executive Budget Act) is the provision for automatic termination of programs and agencies unless positive joint legislative action is taken. The philosophic assumption informing this approach is that needless government regulation over the private lives of individuals exists that creates a costly and needless burden. Hence, only positive action would save these agencies from automatic extinction. This bias of "guilty til proved innocent" is the key distinction between traditional audit and review mechanisms and the mechanism available in the sunset process.

Alaska's experience with sunset has not been atypical: few agencies have been allowed to terminate. A great deal of time, energy, and money has gone into reviewing boards and determining both their effectiveness and the adequacy of their enabling legislation. However, apparently, few legislators have felt a deep commitment to sunset, and several standing committees have found their time overwhelmed by the demands of the sunset process.

It is within this context that our instructions were given: to review the sunset process with a goal of a revision which would focus on those agencies/boards which require review, free regular committees from the burden of so tight a schedule, yet maintain the sunset process.

While the instructions are clear, the criteria used for judging any particular option are stringent: any number of alternatives would achieve the first two criteria; very few will meet the added criterion of

maintaining a process in which agencies/boards are automatically terminated unless positive action is taken by the legislature.

Discussion of Alternatives

1. The first alternative is the one suggested by Mr. Wilkerson (memorandum of February 29, 1980) in which legislators annually target agencies for sunset. While this option preserves the appearance of the existing sunset process, it should be noted that the power to annually target agencies/boards for sunset already exists under AS 24.20.271 relating to legislative audit. Passage of legislation which would enact this option would essentially duplicate existing authorities. Nothing more would be achieved than would be achieved by the simple repeal of sunset. Additionally, since bills would need to be signed by the Governor, possible veto could endanger this approach.

2. As mentioned in the memorandum of February 29, 1980, stretching out the existing schedule would meet the three criteria we were given, with the exception of focussing on agencies "in need" of sunset review. Even so, this option merits further discussion, as its implementation could be within the function of the Free Conference Committee itself. Legislative Legal Services informs us that the original intention behind placing the health boards in one group for sunset review was to achieve certain efficiences in approach and to provide for coordination in review, so that consolidations, cross references and other inter-disciplinary approaches could be undertaken by the legislature. However, the Free Conference could elect to extend the life of the health boards by varying lengths. For example, while the Psychology Board might be extended for one year, the Board of Nursing could be extended for six or eight years, effectively staggering reviews over a longer time period. Such action would achieve all three objectives: more frequent attention on those boards "in need" of review, less work for the standing committees, and retention of the sunset process.

3. If greater attention is paid to the concept of "less work" than to the other criteria, other options suggest themselves.

a) The sunset legislation allows for joint hearings on the agencies/boards. If joint hearings were held, less total legislative time would be spent; it would be easier for board members to participate, and the whole process would be less expensive. These benefits would be increased if boards were extended for greater periods of time, as suggested in 2 above.

b) Most states, in their sunset legislation, review only licensing/regulatory boards. If the Sunset Act were amended to eliminate the program agencies, then the work load would be reduced. In support of this concept, it should be remembered that program agencies can and are routinely reviewed and audited, that the executive budget process performs similar performance reviews and that the perceived burden of government regulation on the lives of citizens comes substantially from the public interest efforts of licensing and regulatory boards. Hence, if program agencies were to be removed from the sunset list, all three criteria would be observed, without great loss, as program agencies can and are routinely reviewed under traditional mechanisms.

Either or both of the options mentioned in 3(a) and (b) can be supported by the following argument. During the first cycle of sunset reviews, a great deal has been learned regarding the conduct of the process. In 1983, when the boards would again be sunsetted, review criteria will be easier to establish, the organization and scheduling of hearings should be easier, and, perhaps most significantly, there should be less to review as most of the boards will have undergone considerable revision of their practice acts.

4. There is a fourth alternative which would also meet the criteria given to us. This option does not necessarily involve changes in the sunset process or in the scheduling of boards for review. Instead, the legislature itself could establish an alternative process for the sunset reviews. A standing Sunset Committee (perhaps a Joint Committee) would be established. Staff would be hired for this committee. In favor of this option are several efficiences of effort. Although the same time and money would be spent as now, those efforts and funds could be more efficiently used. Staff would develop an expertise in the sunset process, hearings could be held over the interim, deadlines would be more easily met, and the public could be educated regarding the public interest goals of the boards, thus encouraging greater public participation in the sunset hearings. The theoretical loss involved in this option would be the expertise of existing standing committees.

This option could be combined with those detailed in 3(a) and (b) above.

After this memorandum was written, we received a copy of the "House Commerce Committee Interim Report, Sunset in Alaska, 1979-1980." On page 32 of that document a recommendation is made to establish a permanent committee on sunset. A copy of that page is attached to this memorandum.

Summary

There are several options which meet the criteria assigned to us for use in selecting optional revisions of the sunset process. Several of the options can be combined. Of importance in the consideration of these options is whether or not you wish to pursue an aggressive sunset review program. If so, the process selected should be well established and supported. On the other hand, you may consider that the primary value of sunset has already been achieved by the first sunset cycle: revisions to practice acts have been made, board performance has been improved, management adjustments have occurred, and some boards may have been terminated. In other words, we see this juncture as a further determination of the public interest and how that may be served.

Enclosure

RECOMMENDED CRITERIA FOR SELECTING PROGRAMS SUBJECT TO SUNSET REVIEW

1. Duplication of program's objectives.
2. Duplication of efforts.
3. Degree of public exposure.
4. Dollars spent.
5. Dollar impact on consumer and/or private industry.
6. Availability/success of complaint function.
7. Results of assessment of alternative methods to achieve program's objectives.
8. Questi n of who should provide the service - State government, local government, or private sector.
9. Age of program.
10. Number of positions in program.
11. Existence of recent legislative review.
12. Indication of program deficiencies through internal or external audits.
13. Source of funding.
14. Recent change in legislation affecting the responsibilities of the program.

Administration Of Justice

Human Rights Commission - Office Of The Governor

The Commission enforces Alaska's Human Rights Law by investigating citizen complaints and by issuing remedial orders after public hearing where cases are not settled voluntarily. The Commission also initiates investigations of alleged discriminatory practices on its own motion. Seven unsalaried Commissioners, appointed by the Governor and approved by the Legislature, administer the agency. Offices are

maintained in Anchorage, Barrow, Juneau and Fairbanks. Funding for FY'79 was $883,300 (20 positions), $838,200 for FY'78, and $748,700 for FY'77. Funding is 100% General Fund.

Police Standards Council - Office Of The Governor

The Council establishes the minimum employment, educational and training standards for all Alaska police officers. Responsibilities include establishing the minimum curriculum requirements for preparatory, in-service, and advanced courses of police training. The Council consists of nine members appointed by the Governor, representing State and municipal police administrators, municipal executives and the private sector. Funding for FY'79 was $98,400 (2 positions), $96,500 for FY'78 and $89,700 for FY'77. Funding is 100% General Fund.

Criminal Justice Planning Agency - Office Of The Governor

Agency provides supportive services to all Alaskan criminal justice agencies for inter-agency coordination, planning, research and evaluation. Specifically, Agency provides staff functions for maintenance of Governor's Commission on the Administration of Justice. Statewide planning and action requirements are mandated by the Federal Omnibus Crime Control and Safe Streets Act of 1968, as amended, for State receipt of LEAA funds. Agency administers the LEAA block grant program with funds awarded to the State by the Federal government. Funding for FY'79 was $2,824,500 (20 positions), $3,454,000 for FY'78, and $3,132,800 for FY'77. Approximately 86% of Agency's funding is Federal money.

Violent Crimes Compensation Board - Department Of Public Safety

The three member Board determines and issues pecuniary awards to victims or family members of the victim of a criminal act, without which the recipient's total well-being and economic independence would not be maintained. In so doing the Board holds hearings, issues orders and decisions; has full subpoena powers; promulgates, rescinds and amends regulations; develops standards for determination of compensation. Funding for FY'79 was $339,300 (2 positions), $323,600 for FY'78, and $186,100 for FY'77. Funding source is the General Fund.

Public Protection

Office Of Consumer Protection - Department Of Law

As a section in the Civil Division of the Department of Law, Consumer Protection investigates and prosecutes violations of the State's Consumer Protection Statutes. Services offered by its offices in Anchorage, Fairbanks, Juneau and Ketchikan include consumer complaint mediation, consumer fraud alerts, consumer and business education, referrals, monitoring of advertising, investigation of possible deceptive practices, civil and criminal litigation to eliminate unfair and deceptive practices, and to recover restitution for injured consumers as well as penalties and costs for the State. Funding for FY'79 was $434,400 (12 positions), $381,800 for FY'78, and $342,700 for FY'77. Funding is 100% General Fund.

Industrial Safety - Mechanical Inspection - Department of Labor

Through its staff of professional inspectors, this Section protects the public from physical and financial injuries from the unregulated use, operation and installation of inferior, hazardous boiler and pressure vessels, electrical installations, unsafe elevators, and substandard unsanitary plumbing construction. These responsibilities are met by its licensing and inspection functions. Funding for FY'79 was $478,800 (13 positions), $393,100 for FY'78, and $426,200 for FY'77. Approximately 47% of funding is estimated to be program receipts with the remainder General Fund money.

Worker Protection - Fisherman's Fund - Department of Labor

The Fund provides benefits to licensed fishers who are injured or become ill while engaged in commercial fishing activities on shore in Alaska or in the territorial waters of the State. Benefits include all medical and transportation expenses up to $2,500 for each injury. The Fund is administered under the supervision of the Commissioner of Labor with the assistance of the Fisherman's Fund Advisory and Appeals Council (5 members) serving in an advisory and appellate capacity. Funding for FY'79 was $346,300 (2 positions), $283,600 for FY'78, and $279,900 for FY'77. Fund is supported by 60% of the money derived by the State from each crewmember fishing license issued under AS 16.05.480 and an equal amount of money derived by State from each commercial fisherman issued a permit under AS 16.43.

Weights and Measures - Department of Commerce and Economic Development

This section inspects all commercial weighing and measuring devices and public utility meters; inspects packages or amounts of commodities offered for sale; enforces standards for mobile homes as homes arrive in the State; investigates alleged violations; issues and enforces regulation to carry out the Weights and Measures Act (AS 45.75). Funding for FY'79 was $636,600 (16 positions), $592,800 for FY'78, and $870,000 (28 positions) for FY'77. FY'77 is not comparable since some functions moved to the Department of Public Safety in FY'78. Funding is 100% General Fund.

Alaska Division of Emergency Services - Department of Military Affairs

Previously known as the Alaska Disaster Office, this program develops and maintains the capability, both private and public, to protect life and property and to assist in the recovery from natural disaster or nuclear attack. In an emergency or threat of disaster, the Division provides warning and responds to aid local authorities. Division administers State and Federal funds authorized for disaster relief and recovery programs. Funding for FY'79 was $855,500 (21 positions), $836,000 for FY'78, and $2,211,700 for FY'77. Federal money provides approximately 50% of funding.

Agricultural Inspections - Department of Natural Resources

The purpose of this section is to ensure through inspection that food products purchased from commercial outlets are of wholesome quality and truthfully labeled, to minimize animal-to-man transmissible diseases and to provide marketing expertise to improve local production. Division is headquartered in Palmer with branch offices in Juneau, Fairbanks and Kodiak. Funding for FY'79 was $992,600 (20 positions), $770,200 for FY'78, and $659,600 for FY'77. Federal funding provides for approximately 35% of total funding; remainder is General Fund.

Vehicle Weight Enforcement - Department of Public Safety

This section operates weigh stations, enforces highway size, weight and load limitations, inspects commercial vehicles and issues special oversize and overweight permits. The purpose of these activities is to prevent damage to the State highway system for overloaded vehicles and to protect the motoring public from dangers of unsafe commercial vehicles. Funding for FY'79 was $895,700 (25 positions), $487,100 for FY'78 and $444,400 for FY'77 (in FY'79, the Oversize, Overweight Special Permit Program was transferred to DOPS from DOTPF). Program receipts are estimated to provide 47% of funding for FY'79; remainder is General Fund.

General Government

Policy Development and Planning - Office of the Governor

The Division assists executive and legislative branches in identifying and translating goals and objectives into policies to guide State agencies in designing programs and services that meet Alaska's needs. Funding for FY'79 was $812,500 (18 positions), $731,200 for FY'78 and $1,231,800 for FY'77. Federal funding is approximately 31% of total funding; remainder is General Fund.

Growth Policy Council - Office of the Governor

This is a group of 11 citizens appointed by the Governor that involves the public in issues and recommends policy alternatives relating to growth and development in Alaska. The Council serves as the "Board of Directors" of the Alaska Public Forum which is a systematic process of citizen participation through which the public can make know its feelings on these issues to the AGPC, the executive and legislative branches, and to private groups and citizens. Funding for FY'79 was $326,500 (3 positions), $319,300 for FY'78 and $501,600 in FY'77. Funding is all General Fund.

Public Offices Commission - Office of the Governor

The Commission administers the campaign expenditure disclosure laws; promulgates and administers the regulations for lobbying and lobbyists and the conflict of interest law. In the areas of campaign disclosure and regulation of lobbying, the Commission receives complaints, conducts investigations, and recommends prosecution or other action to the Attorney General when it believes a violation has occurred. In the conflict of interest area the Commission reviews the conflict of interest statements and refers violations to the Attorney General. Funding for FY'79 was $316,500 (8 positions), $303,600 for FY'78, and $249,900 for FY'77. Funding is all General Fund.

Risk Management - Department of Administration

This section is responsible for combining the insurable exposures of all State agencies under a single program to obtain the most advantageous cost and most effective coverage. In addition to the placement of adequate insurance coverage at fair market cost with reliable underwriters, the section educates State agencies in proper loss control techniques to reduce losses and subsequently premiums. Funding for FY'79 was $173,600 (4 positions), $157,000 for

FY'78, and $5,705,500 for FY'77. The large decrease in funding after FY'77 is due to not funding possible liabilities. Thus if the State incurs a large liability, the program would probably need a special appropriation. Funding is General Fund.

Blue Book - Department of Education

The Alaskan Blue Book is the official directory of the State of Alaska. It is compiled, published and distributed biennially, and in the past, is updated in the interim. However, there was no FY'78 interim update. The book is distributed free of charge to all State, municipal and Federal agencies in the State and to all Alaskan schools, libraries, and members of the Legislature. Copies are sold to the general public for $5. Funding for FY'79 was $36,000 (1 position) and $27,000 for FY'77 (3,000 books were printed in FY'77). Funding is General Fund.

Attachment: A

Attachment A

ADMINISTRATION OF JUSTICE
BUDGET CATEGORY

Office of the Governor

- Public Defender
- Human Rights Commission
- Police Standards Council
- Criminal Justice Planning

Department of Law

- Prosecution

Department of Health and Social Services

- Adult Confinement
- Juvenile Confinement
  - Institutional Care
  - Foster Care
  - Major Medical and Guard Hire
  - McLaughlin Youth Center
- Probation and Parole
- Administration and Support

Department of Labor

- Worker Protection
  - Wage and Hour Administration
  - Administration of Workmen's Compensation

Department of Public Safety

- Crime Identification and Apprehension
  - Community Relations
  - Detachments and CIB
  - Narcotics Unit
  - Alaska State Troopers, Director's Office
- Office of the Commissioner

Department of Public Safety (cont'd)

Administration and Support

- Records and Identification
- Laboratory Services
- Central Communications
- Housing Program
- Research and Planning
- Training

Violent Crimes Compensation

Judicial Services - Alaska State Troopers

PUBLIC PROTECTION
BUDGET CATEGORY

Department of Administration

- State Records

Department of Law

- Office of Consumer Protection

Department of Labor

- Occupational Safety
  - General Administration
  - Compliance Inspection
  - Health Inspection
  - Training and Consultation
  - Planning and Standards
- Occupational Safety - Research Grants
- Industrial Safety - Mechanical Inspection
- Worker Protection - Second Injury Fund
- Worker Protection - Fisherman's Fund

Department of Commerce and Economic Development

- Consumer Protection
  - Weights and Measures
  - Banking, Securities and Corporations
    - Corporations
    - Financial Institutions
  - Insurance
    - Market Surveillance
    - License Surveillance
    - Financial Surveillance

Department of Military Affairs

Search and Rescue

Civil Air Patrol

Alaska Division of Emergency Services

Civil Defense Planning
Radiological Program
City Participation
Flood Control
Disaster Relief Act

Alaska National Guard

Office of Adjutant General
State Armories
Federal Armories
Army Training Support
Air Training Support
Organized Militia Benefits
Hitchhike - Alaska Military Academy

Department of Natural Resources

Agricultural Inspection

Plant Industry

Animal Industry

Seafood Industry

Department of Public Safety

Fire Safety

Driver Vehicle Services

Driver Services
Vehicle Services
Field Operations
Administration
Municipal Tax Unit

Traffic Safety Planning Agency

Vehicle Weight Enforcement

GENERAL GOVERNMENT
BUDGET CATEGORY

Office of the Governor

- Executive Office
- Special Projects Coordinator
- Contingency Fund
- Policy Development and Planning
- Growth Policy Council
- Budget and Management
- Executive Mansion
- Telecommunications
- Lieutenant Governor
- Elections
- Volunteer Action
- Public Offices Commission

Department of Administration

- Executive Administration
  - Office of Commissioner
  - Administrative Services
- Internal Audit
- Equal Employment Opportunity
- Personnel
- Accounting
  - Pre-Audit
  - Accounting Services
  - Payroll Accounting
  - Administration and Support

Department of Administration (cont'd)

General Services

Purchasing

Property Management

Central Mail and Switchboard

Archives

Leasing and Facilities

STATE
of ALASKA

MEMORANDUM

DIVISION OF OCCUPATIONAL LICENSING

TO: The Honorable Fred Brown, Chairman
House Commerce Committee
Alaska House of Representatives

DATE: February 7, 1979

FILE NO:

TELEPHONE NO:

SUBJECT:

FROM: Don Hostak, Director
Division of Occupational
Licensing

Travel Monies Budgeted for FY79 Board Travel:

Board	Allowed Monies	Used	Left
Real Estate	$11,783.76	$7,739.63	$4,044.13
A,E, & LS	9,095.30	4,982.22	4,113.08
Barbers	2,091.04	1,276.15	814.89
Chiropractors	2,369.36	1,958.80	410.56
Collection Agency	5,411.44	1,909.40	3,502.04
Dental	7,766.04	7,056.00	710.04
Dispensing Optician	1,517.72	1,197.58	320.14
Electrical	5,172.20	1,723.40	3,448.80
Guide Licensing	9,365.12	3,651.07	5,714.05
Hairdressing	4,102.76	1,852.21	2,250.55
Marine Pilots	3,131.64	1,367.66	1,763.98
Medical	6,291.20	4,266.00	2,025.20
Nursing	11,449.10	5,312.39	6,136.71
Nursing Home Admin.	3,074.78	1,773.61	1,301.17
Optometry	1,585.70	-0-	1,585.70
Pharmacy	4,990.12	2,581.05	2,409.07
Physical Therapy	1,588.88	435.16	1,153.72
Psychology	3,484.38	2,445.07	1,039.31
Public Accountancy	6,332.20	5,806.25	525.95
Veterinary	1,409.64	824.82	584.82
Welding	4,621.60	2,435.14	2,186.46
	$106,633.98	$60,593.61	$46,040.37

Travel Monies Budgeted for FY79 Out-Of-State Board Travel:

$ 10,731.80	$ 5,024.64	$ 5,707.16

STATE of ALASKA

MEMORANDUM

DIVISION OF OCCUPATIONAL LICENSING

TO: The Honorable Fred Brown, Chairman
House Commerce Committee
Alaska House of Representatives

DATE: February 7, 1979

FILE NO:

TELEPHONE NO:

SUBJECT:

FROM: Don Hostak, Director
Division of Occupational Licensing

Allowable Travel FY79 for Board Meetings:

Board	Allowed Travel	Used	Left
Real Estate	6 meetings	3	3
A,E, & LS	6 meetings	3	3
Barbers	2 meetings	1	1
Chiropractors	2 meetings	1	1
Collection Agency	4 meetings	2	2
Dental	5 meetings	4	1
Dispensing Optician	2 meetings	2	0
Electrical	5 meetings	2	3
Guide Licensing	3 meetings	2	1
Hairdressing	4 meetings	2	2
Marine Pilots	2 meetings	1	1
Medical	4 meetings	2	2
Nursing	4 meetings	3	1
Nursing Home Admin.	3 meetings	2	1
Optometry	1 meeting	0	1
Pharmacy	3 meetings	2	1
Physical Therapy	2 meetings	2	0
Psychology	4 meetings	2	2
Public Accountancy	4 meetings	3	1
Veterinary	2 meetings	2	0
Welding	4 meetings	3	1

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Allowable Out of State Travel for FY79:

Real Estate	2 trips	2	0
A,E, & LS	2 trips	0	2
Barber	0	0	0
Chiropractors	1 trip	0	1

Board	Allowed Travel	Used	Left
Collection Agency	0	0	0
Dental	1 trip	1	0
Dispensing Optician	0	0	0
Electrical	1 trip	0	1
Guide Licensing	0	0	0
Hairdressing	0	0	0
Marine Pilots	0	0	0
Medical	1 trip	0	1
Nursing	2 trips	0	2
Nursing Home Admin.	1 trip	1	0
Optometry	0	0	0
Pharmacy	1 trip	1	0
Physical Therapy	0	0	0
Psychology	1 trip	1	0
Public Accountancy	1 trip	1	0
Veterinary	0	0	0
Welding	0	0	0
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Board Requested Travel for FY80:

Real Estate:
6 Board Meetings
2 out-of-state trips - 2 people
4 in-state inspection trips
1 regulation hearing

A,E, & LS:
6 Board Meetings
6 out-of-state trips

Barbers:
2 Board Meetings

Chiropractors:
2 Board Meetings
1 out-of-state trip

Collection Agency:
3 Board Meetings
1 out-of-state trip

Dental:
5 Board Meetings
2 out-of-state trips
2 in-state inspection trips
1 regulation hearing

Dispensing Optician:
2 Board Meetings

Electrical:	4 Board Meetings 1 out-of-state trip 5 in-state inspections
Guide Licensing:	3 Board Meetings 2 disciplinary hearings 1 regulation hearing
Hairdressing:	4 Board Meetings 1 out-of-state trip - 2 people
Marine Pilots:	2 Board Meetings 6 in-state inspections 1 regulation hearing
Medical:	4 Board Meetings 1 out-of-state trip 2 regulation hearings
Nursing:	5 Board Meetings 6 out-of-state trips 10 in-state inspections
Nursing Home Admin.:	2 Board Meetings 1 out-of-state trip
Optometry:	2 Board Meetings
Pharmacy:	2 Board Meetings 1 out-of-state trip 5 in-state inspections 1 regulation hearing
Physical Therapy:	3 Board Meetings 1 out-of-state trip
Psychology:	5 Board Meetings 2 out-of-state trips 2 in-state trips to Juneau
Public Accountancy:	4 Board Meetings 2 out-of-state trips
Veterinary:	2 Board Meetings 1 out-of-state trip
Welding:	5 Board Meetings 1 out-of-state trip $2,000 for in-state travel

73 Board Meetings
31 Out-of-State trips
34 In-State trips + $2,000
7 Regulation Hearings
2 Disciplinary Hearings

02-0018 (Rev. 10/78)

STATE of ALASKA

MEMORANDUM

TO: All Occupational Licensing Boards

DATE: November 2, 1977

THRU: Sharon Andrew, Director
Division of Occupational Licensing

FILE NO.

TELEPHONE NO.

FROM: Avrum M. Gross
Attorney General

SUBJECT: Boards' Role in Investigation and Adjudication

By:
Bruce M. Botelho
Assistant Attorney General

Because of the limited resources of the Department of Law, it is impossible that attorneys attend all meetings of the State's 23 occupational licensing boards. In our absence this memorandum is designed to lend the boards some guidance in fulfilling their responsibilities with respect to complaints against practitioners.

INTRODUCTION

Generally speaking, state governments have assumed responsibility for licensure of occupations and professions in order to assure the public that practitioners are both competent and scrupulous. In Alaska, policing of the occupations has been divided between the Division of Occupational Licensing and the occupational licensing boards.

The Division of Occupational Licensing assumes day-to-day responsibility for processing of applications, fees and inquiries regarding the various professions. Furthermore, the division, through its enforcement section, investigates complaints against persons in violation of the occupational licensing statutes (found in Title 8 of the Alaska Statutes). Finally, the division, through the Commissioner of the Department of Commerce and Economic Development, has authority to seek enforcement of the licensing statutes either through cease and desist orders or court injunctions pursuant to AS 08.01.087.

The occupational licensing boards generally are responsible for reviewing the applications of all persons wishing to enter a profession in Alaska, to adopt regulations regarding the

standards of practice within the professions, and to hear cases presented to the boards by the Division of Occupational Licensing.

The Department of Law serves as counsel for both the Division of Occupational Licensing and for the licensing boards. The department specifically provides advice to the division and to the boards regarding their statutory authority and functions, helps draft and review proposed legislation and regulations and represents the division and boards in administrative proceedings and in court.

COMPLAINTS

Complaints about violations of the occupational licensing statutes usually come to a board's attention in two ways: (1) the division brings a complaint to the board for preliminary review; or (2) a member of the board has been contacted by some third party or has independently observed a violation of the law.

The immediate issue arises: how involved should the board become with the complaint? It is our position that the boards should refrain from becoming actively involved in investigations. Instead, investigations should be conducted by division staff. Thus, complaints received by an individual board member should be referred to the division. This does not preclude the division from approaching a board to inform it of the number and nature of outstanding complaints or investigations or from seeking guidance from a board as to whether particular conduct could constitute a violation of the licensing statute.

The reason for this limitation of board investigatory functions is the risk of undue bias that could violate a respondent's right to a fair and impartial hearing. The most recent U.S. Supreme Court decision in this regard is Withrow v. Larkin, 421 U.S. 35, 43 L.Ed.2d 712, 95 Sup. Ct. 1456 (1976), in which the Court was asked to uphold a decision of a three-judge U.S. District Court that enjoined a state medical board from temporarily suspending a license because the board had itself investigated the complaint and then separately held a revocation hearing based on the complaint! The Supreme Court reversed the District Court decision, holding that the processes utilized by the board did not in themselves contain an unacceptable risk of bias. However, the Court went to some length to emphasize two points:

1. That the board in question had utilized certain procedural safeguards (e.g., the doctor and his attorney were permitted to be present throughout the investigative proceeding), thus eliminating certain due process questions;

2. That there are risks of bias in administrative proceedings of this nature.

The Court concluded: "the mere exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impune the fairness of the board members at a later adversary hearing."

The Alaska Supreme Court has reached a similar result in interpreting Alaska's constitutional due process provisions. In In Re Cornelius, 527 P.2d 76 (Alaska 1974), the Alaska Supreme Court was asked to review a recommendation of the Board of Governors calling for the discipline of a member of the bar. The Alaska court summarily held that the combination of the investigative and judicial functions within an agency did not violate due process. It is noteworthy, however, that the trial committee of the board and the Board of Governors, which made the recommendation, are two separate entities within the State Bar Association. Different persons within the agency performed the separate investigative and judicial functions.

Thus, I believe that boards may become involved in investigations to the extent I have outlined above without fear of later court reversal. On the other hand, to allow a greater role except on a case-by-case basis (reviewed by a staff attorney) increases the risk of adverse court reaction to the board conduct in question.

AS 08.01.087 AUTHORITY

Once the division has investigated a complaint (whether it involves a practitioner in violation of the licensing statute or a person who is required to be licensed but is not), and it determines that a violation appears to have occurred or is about to occur, the division, on behalf of the Commissioner of the Department of Commerce and Economic Development, may seek (1) a cease and desist order stopping the person from committing a violation of the Act; (2) an injunction in superior court; (3) examination of license records; or (4) subpoena power to conduct further investigations.

In order to do any of these, however, the division must first contact the board involved by telephone or telegraph. The proposed action may take place if a majority of the board do not object within 10 days. As a practical matter the division will poll the board at the time of notification to determine whether a majority object to the proposed action.

The statute does not grant authority to the boards to issue cease and desist orders or injunctions. Nor can they direct the division to seek such relief. At most, they can recommend that the division review a complaint for possible action.

LICENSE DENIALS, SUSPENSIONS, AND REVOCATIONS

Statement of Issues

When a board, after reviewing an application for licensure, has determined that licensure should be denied, then the board issues a "Statement of Issues."

The statement of issues will generally be issued by the board without the assistance of the Department of Law. However, the board should set forth clearly and completely in the statement of issues all the reasons that the license is being denied. The board must set forth clearly and completely in its minutes and records the bases for its action. The Department of Law presents the state's case at hearing before the board.

Accusation

An accusation begins the process of determining whether a license that is currently valid should be suspended or revoked. In all cases, the accusation is filed by the division -- not by the board. The Department of Law drafts the accusation and presents the case to the board at hearing on behalf of the division.

The Hearing

Once either a statement of issues or an accusation has been filed, the person complained against (called "the Respondent") has 15 days to file a notice of defense and request a hearing. If the Respondent does not make such a filing, then at the board's next meeting the division will put on its evidence and the board will issue an order based on the evidence.

Normally, however, the Respondent requests a hearing. In that case, the hearing must be presided over by a hearing officer, either sitting alone or with the board members. The hearing officer is normally responsible for setting the time and place of hearing as well as the setting of any prehearing conferences. The board must make a determination, either before or after a notice of defense is filed, whether it wishes to delegate the hearing function to a hearing officer alone or whether it wishes to hear the case with the hearing officer. Some of the considerations in making such a decision are: the time involved (some cases have lasted several weeks), the location of the hearing and the complexity of the case. If a board chooses to hear the case, a majority of the board must hear it -- that means, hear all the evidence and testimony. A board member who believes he/she cannot render an impartial decision should disqualify himself/herself.

Paramount to all administrative proceedings is that the Respondent be accorded "due process." What lawyers usually refer to when they speak of "due process" is the right to a fair and impartial hearing. Though by no means exhaustive, the following are the most important elements of due process. Each board member who sits in a hearing has an obligation to protect these rights:

1. There must be adequate and timely notice of hearing and of every material step in the proceeding.

2. The purpose of the hearing and the issues involved must be stated clearly and simply in the notice and, where it is possible, the notice should contain a statement of the statute, rule or regulation involved and also the factual basis of the hearing or the charge involved.

3. The hearing must be before an impartial adjudicator.

4. There must be a full opportunity to be heard.

5. All parties must have the right to be represented by counsel or other representatives of their own choosing.

6. All parties have the right to bring witnesses to the hearing.

7. All parties are entitled to hear the whole testimony and the evidence produced against them and to know the claims or charges made against them; to confront and be

confronted by all parties and witnesses on the other side. There are exceptions of necessity, as discussed herein later.

8. All parties have the right to offer evidence and witnesses in their behalf and to rebut or explain testimony or evidence against them.

9. All parties have the right to cross-examine other parties and witnesses and to offer argument or explanation in support of their positions or contentions.

10. All parties have the right to have the power of subpoena exercised in their behalf, to bring in persons and records, according to the statutes, rules or regulations and court decisions governing subpoenas.

11. There must be substantial evidence, adequate to support pertinent and necessary findings of fact.

12. There must be a written decision setting forth findings of fact, conclusions of law or opinion, giving the reasons for the decision.

13. The conclusions or opinion in the decision must be governed by and based upon all the evidence adduced at the hearing. There must also be substantial evidence to support them.

14. The decision must be promptly served on all parties and their representatives.

15. If there is a right of administrative appeal from the decision, the notice of that right should be given with the decision.

16. Judicial review of the decision of the hearing officer or of a higher administrative tribunal must be afforded.

If a proposed decision is reached by a hearing officer sitting alone, then the board may:

(1) allow the proposed decision to become final;

(2) order reconsideration within 30 days, allowing

for additional evidence and argument;

(3) adopt the proposed decision, but reduce the proposed penalty; or

(4) decline to adopt the proposed decision and decide the case on the record (with or without taking additional evidence.

GENERAL REMARKS

Despite its limited resources, the Department of Law is committed to delivering quality service to each of its boards. The boards can assist the department towards this end in the following ways:

1. By limiting their opinion requests to issues vital to the exercise of their current functions. The requests should be through the Director of the Division of Occupational Licensing. It is important to note that each opinion request takes time away from the board attorney to prosecute revocation proceedings.

2. By refraining from contacting department attorneys for advice on particular cases or investigations outside of board members. When necessary, such contact should be initiated through the board chairperson.

I have attached copies of the instructions regarding occupational licensing matters which are contained in the Department of Law Manual in order to acquaint board members with our procedures.

RMB:md

cc: Bob Johnson, AGO Anchorage
Ivan Lawner, AGO Anchorage
Doug Hertz, AGO Fairbanks

INSTRUCTIONS FOR ADMINISTRATIVE PROCEEDINGS

All administrative adjudications under the Administrative Procedure Act, AS 44.62.010 et seq., (APA) are initiated through an accusation or a statement of issues. The APA does not apply to all administrative proceedings; AS 44.62.330 sets forth some of the agencies to which the APA applies. That section, as well as the specific agency statutes and regulations should be consulted to determine if the APA applies to a particular proceeding.

Accusation

An accusation begins the process of determining whether a right, authority, license or privilege should be revoked, suspended, limited, or conditioned. AS 44.62.360. A form of notice of defense must be served with the accusation. AS 44.62.380. If the respondent files a notice of defense within 15 days after service, he/she is entitled to a hearing on the merits. The accusation may be amended or supplemented at any time before the matter is submitted for decision pursuant to AS 44.62.400, and may be further amended after submission pursuant to AS 44.62.490.

The accompanying form of accusation follows the format of a complaint. Paragraph one sets forth briefly the nature of the proceeding, specifying the statutes relied on, the respondent and the relief sought. Paragraphs two and three set forth the operative facts. Paragraph four sets forth the statute violated. Paragraph five sets forth the consequences of the violation. In more complicated and lengthier accusations, refer to the form complaint and

instructions in these forms.

Statement of Issues

A statement of issues is used when an agency has denied a right, authority, license or privilege in the first instance or has refused to renew such right, authority, license or privilege. The statement of issues should take the same form as an accusation. A form notice of defense must be served with the statement of issues. AS 44.62.380. AS 44.62.370 implies that either the State or another party (possibly the respondent) may prepare a statement of issues. The Department of Law takes the position that, since it is the agency that denied the right, authority, license or privilege, it should prepare the statement.

The statement of issues will generally be issued by the agency without the assistance of the Department of Law. However, the client agency should be advised to set forth clearly and completely in the statement of issues all the reasons that the license, right, authority or privilege is being denied. The client agency should be further advised that it must set forth clearly and completely in its minutes and records the bases for its action.

The Department of Law will generally become involved if the agency action is contested. The attorney should first thoroughly review the statement of issues and the agency minutes and records to determine if an amended statement of issues should be prepared. Although the APA is not clear, the Department of Law takes the position that a statement of issues may be amended in the same manner as an

accusation pursuant to AS 44.62.400 and 490.

Once an administrative proceeding has been initiated by an accusation or statement of issues, the State attorney representing an agency should be particularly circumspect regarding his/her contacts with agency personnel who could hear the matter on appeal. Although the Alaska Supreme Court has ruled that counsel for an agency may advise the ultimate judges regarding procedural matters related to the case, the line of demarcation between compliance with due process and its violation is unclear.

The administrative hearing is presided over by a hearing officer, either sitting alone or with agency representatives. AS 44.62.450. The hearing officer is normally responsible for setting the time and place of hearing as well as the setting of any prehearing conferences.

AS 44.62.460 outlines the rules of evidence, which are generally much less strict than those applicable to court proceedings. However, since both parties are normally represented by attorneys and the hearing officer is also an attorney, the parties by stipulation may choose to use the civil rules.

Contempt Proceedings (Order to Show Cause)

If a party refuses to be sworn or examined or disrupts the administrative proceeding, the agency can seek a contempt order pursuant to AS 44.62.590. The papers should include a petition to the court, a certification by the agency (usually the hearing officer) of the facts necessitating court action and a form of order.

The law is uncertain regarding the procedure to be followed when a respondent challenges agency action.

AS 44.62.560(e) provides that the superior court may enjoin agency action in excess of constitutional or statutory authority at any stage of an agency proceeding. Appellate Rule 45 provides for appeals to superior court from district court and from administrative agencies.

District Court Civil Rule 31 provides for petition for review of any order or decision of a "magistrate court" or an administrative agency. The Department of Law takes the position that the rules supersede the statute. See, State v. Keep, 397 P.2d 973 (Alaska 1965).

Because such proceedings are often wasteful and result in undue delay of the administrative proceeding, attorneys should avail themselves of the doctrine of administrative primary jurisdiction. See, G & A Contractors, Inc. v. Alaska Greenhouses, Inc., 517 P.2d 1379 (Alaska 1974); and Alaska Public Utilities Commission v. Greater Anchorage Area Borough, 534 P.2d 549 (Alaska 1975). See also, Abbott Laboratories v. Gardener, 387 U.S. 136 (1967).

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Insert name and address of applicant]

Re: Notice of Denial of the Application
of [insert name of applicant] for
[identify license applied for]

You are hereby notified that on [insert date] the [insert name of agency] considered your application for [identify license applied for]. For the reasons set forth in the enclosed Statement of Issues, your application for [identify license applied for] was denied.

Notice of Defense and Request for Hearing.

The enclosed Statement of Issues was prepared pursuant to AS 44.62.370 and sets forth the findings of [insert name of agency]. This letter constitutes notice as required by AS 44.62.380 that you may request a hearing on the findings set forth in the Statement of Issues and the denial of your application for [identify license applied for].

Unless a written request for a hearing signed by you or on your behalf is delivered or mailed to [insert name of agency] within 15 days after receipt of the enclosed Statement of Issues, the denial of your application for [identify license applied for] is final and not reviewable by any court of law. The request for a hearing may be made by delivering or mailing the enclosed Notice of Defense form to [insert name of agency] in the enclosed envelope, postage prepaid. Mailing of the Notice of Defense signed by you or on your behalf and returned to [insert name of agency] within 15 days in the enclosed addressed envelope, postage prepaid, acknowledges receipt of the enclosed Statement of Issues and constitutes a notice of defense pursuant to AS 44.62.390.

Sincerely,

Sharon Andrew, Director
Division of Occupational
Licensing
Department of Commerce and
Economic Development

10/77

[Insert name of agency; e.g.,

STATE OF ALASKA

BOARD OF DENTAL EXAMINERS]

In the Matter of)
)
)
)
)
_____) No. _____

STATEMENT OF ISSUES

The State of Alaska Board of Dental Examiners, having considered the application of [insert name of applicant] for [identify license applied for] finds as follows:

1. The Board of Dental Examiners pursuant to [cite the statutory or regulatory basis for the agency action, e.g., AS 08.36.070] considered the application of [insert name of applicant] for [identify license applied for].

2. On or about [insert date and name of applicant] applied for [identify license applied for].

3. On or about [insert date, name of applicant and grounds for denial; e.g., was convicted of the crime of embezzlement. It is advisable in such cases to attach to the statement of issues a certified copy of the judgment of conviction].

4. The crime of embezzlement is evidence that [insert name of applicant] is not of good moral character as required by AS 08.36.110(2).

5. Pursuant to AS 08.36.110(2), the application of [insert name of applicant] for [identify license applied for] is denied.

DATED: _____.

[provide for signatures for board officers as appropriate]

[Insert name of agency; e.g.,

STATE OF ALASKA

BOARD OF DENTAL EXAMINERS]

In the Matter of)
)
)
)
_____) No. _____

NOTICE OF DEFENSE

The respondent named below, pursuant to AS 44.62.390, hereby gives notice of defense in this proceeding.

A hearing on the matters set forth in the Statement of Issues is hereby requested.

DATED: _____.

_____
RESPONDENT

ADDRESS: _____

_____

NOTE: This Notice of Defense must be signed by or on behalf of respondent, must set forth respondent's mailing address and must be filed with the [insert name of agency] within 15 days of receipt.

10/77

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Insert name and address of respondent]

Re: [Insert caption on accusation]

You are hereby notified that the enclosed Accusation has been filed with [insert name of agency]. [Insert name of agency] will conduct a hearing to decide the issues presented in the Accusation.

Notice of Defense and Request for Hearing.

The enclosed Accusation was prepared pursuant to AS 44.62.360 and sets forth the issues that will be decided by [insert name of agency]. This letter constitutes notice as required by AS 44.62.380 that you may request a hearing on the issues set forth in the Accusation.

Unless a written request for a hearing signed by you or on your behalf is delivered or mailed to [insert name of agency] within 15 days after receipt of the enclosed Accusation, [insert name of agency] pursuant to AS 44.62.530 will decide in your absence the issues presented in the Accusation. The request for a hearing may be made by delivering or mailing the enclosed Notice of Defense to [insert name of agency] in the enclosed envelope, postage prepaid. Mailing of the Notice of Defense signed by you or on your behalf and returned to [insert name of agency] within 15 days in the enclosed addressed envelope, postage prepaid, acknowledges receipt of the enclosed Accusation and constitutes a notice of defense pursuant to AS 44.62.390.

Sincerely,

Sharon Andrew, Director
Division of Occupational
Licensing
Department of Commerce and
Economic Development

[Insert name of agency; e.g.,

STATE OF ALASKA

BOARD OF DENTAL EXAMINERS]

In the Matter of)
)
)
)
)
_____) No. _____

ACCUSATION

Petitioner Sharon Andrew, Director of the Division of Occupational Licensing, Department of Commerce and Economic Development, State of Alaska, alleges:

1. This is a proceeding pursuant to [cite the statutory or regulatory basis for the proceeding, e.g., AS 08.36.070(5) and (7) and AS 44.62.330 et seq.] to [describe proposed action, e.g., revoke the license of the respondent to practice dentistry in the State of Alaska].

2. On or about [insert date] respondent was licensed to practice dentistry in the State of Alaska.

3. On or about [insert date] respondent [state grounds of revocation, e.g., was convicted of the crime of embezzlement. It is advisable in such cases to attach a certified copy of the judgment of conviction].

4. The crime of embezzlement is a crime involving moral turpitude for purposes of AS 08.36.310(2).

5. Pursuant to AS 08.36.310(2), respondent's license may be revoked for the reason that he has been convicted of a crime involving moral turpitude.

WHEREFORE, petitioner seeks:

1. To revoke respondent's license to practice dentistry in the State of Alaska.

2. To make such other findings and disposition of this proceeding as are just.

DATED: _____.

_____
Sharon Andrew, Director
Division of Occupational
Licensing
Department of Commerce and
Economic Development

(3177)

[Insert name of board, e.g.:

STATE OF ALASKA

BOARD OF DENTAL EXAMINERS]

In the Matter of)
)
)
)
_____) No. _____

DECISON

The Alaska Board of Dental Examiners, after hearing evidence in this proceeding submitted by petitioner and by respondent at a hearing held on [insert date(s)], enters the following decision:

FINDINGS OF FACT

1. Respondent was licensed to practice dentistry in the State of Alaska on or about [insert date].

2. Respondent was convicted of the crime of embezzlement on or about [insert date].

3. [Here insert the reason why the findings support the agency action taken--i.e., revocation, rather than suspension or reprimand].

DETERMINATION OF ISSUES

4. The crime of embezzlement is a crime involving moral turpitude for purposes of AS 08.36.310(2).

PENALTY

5. Respondent's license to practice dentistry in the State of Alaska is hereby revoked.

DATED: _____.

_____

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

M E M O R A N D U M

March 17, 1980

SUBJECT: Legislative oversight procedures

TO: Max DuBois, A.A.
House State Affairs Committee

FROM: David T. Walker
Co-Revisor of Statutes

The purpose of this memorandum is to identify procedural changes which would operate to modify the role of the standing committees in the sunset process. I would also like to take the opportunity to identify several areas within the existing statutory framework which would benfit from clarifying amendments.

I. Alternatives for Discussion

(1) Restrict oversight procedures to Title 8 boards and commissions;

NO (2) Create a permanent committee of the legislature charged with oversight responsibilities; this could function in the same manner as the Administrative Regulations Review Committee (this is the approach recommended by the House Commerce Committee in its interim report, Sunset in Alaska 1979-80 page 32);

(3) Eliminate the automatic termination features of the statutes and allow the Legislative Budget and Audit Committee to "target" all boards and commissions using the same procedures which now apply only to agency programs under AS 44.66.020 - 030. Oversight would then be restricted to those areas selected for review by the legislature.

II. Clarifying and Perfecting Amendments

(1) AS 44.66.010(a) uses the word "expire" when it should use "are terminated";

(2) The statute should address what the legislature wishes to happen when it does not comply with the AS 44.66.050(d) procedures or deadlines;

(3) Does the legislature intend for the boards, etc. identified in AS 44.66.010 to be effected by the one year wind-down period in the same way as the Title 8 boards? If so, I would recommend that the second sentence of AS 08.-03.020(a) be added to AS 44.66.010(b). Should the word "otherwise" be deleted from that sentence?

(4) If the legislature intends that the standing committees meet and conduct the oversight process during the interim, I would recommend that it express that in the oversight statutes.

DWT:ljb

4.

a. Are you satisfied w the support your Board gets from or & dept of Ins.

b. Are you satisfied w the amt. of $ your Board gets to do its business:
   1. # meetings
   2. ability to travel to different parts of state for public accessibility
   3. ability to participate in natl workshops & conventions
   4. for advertising meetings to solicit public input
      a. papers
      b. radio/TV PSA's
      c. notification to associations & public organizations which might have interest
      d.

c. Are you satisfied with the way your Bd gets & spend its money?
   a. does it decide how/where/# days given x amt of $ per fiscal year
   b. does it decide when/where meetings held
   c. may your Board travel out of state on state funds
      1. would you like it to have that flexibility?
      2.

d. do you think your Board should have the option of deciding priorities of travel/meetings? In other words, if your Bd thought it very important to send a member to a natl meeting & wanted to spend $ to do so rather than

hold one of its scheduled meetings (it's that important) do you think the board should be able to make that decision?

D. Are you satisfied with the way complaints are handled by or - the investigator?

1. does your board know of all complaints filed against nurses reported by the board?
   a. does the board know before or after the investigation known
   b. does your board know what disposition has been made of complaints?
   c. does your board make dispositions or does the investigator?
   d. how are complaints handled
   e. ~~should~~ do you ~~the~~ think the board should know of all complaints filed with it.
   f. should the board be the body to make disposition? (ie: to consumer protection, to peer review committee, to investigator for further information)
2. g. Should the board be involved in fee disputes? Or leave that to peer review &/or consumer protection.
   a. should fee disputes be recorded in a nurse's file (in case this is a repetative occurance which might prompt the board to issue a reprimand)

3 Does your board have a standardized method (statutory or regulatory) by which actions against a

a. under what circumstances is a ~~public~~:
   1) ~~reprimanded~~ license reprimanded
   2) license suspended
   3) ~~limited~~ license limited
   4) revoked (license)
b. has the dept. & bd. given your board assistance in:
   1) establishing guidelines for the above
   2) enforcing the above
c. how often since you become a board member has an action been taken against a license

4. do you think it would be helpful for a contact # for your board to be in the phone book (idea: / secretary for all 22 boards could take complaint calls, ~~direct~~ send complaint forms to callers, alert board member, etc.) (not an OL or Dept #)

E Are you satisfied with the way the dept of law gives assistance to your board
1. does a representative of the dept attend your meetings? Would you like a rep. to attend:
   a. as a matter of course
   b. on request
   c. when they want something
   d. never
2. does the dept answer your written or phone requests promptly?
3. does the dept. give you the information you need in a way that you understand?
4. do you feel (as a Board) that the dept law represents you well in hearings & court?
   a. Are you allowed to attend hearings & court proceedings?
   b. Are you allowed to read transcripts of hearing & court proceedings before rendering decisions?
5. does the dept of law ever bargain away your board's decision for a lesser penalty
   a. does your board have the ability to prevent this after the fact bargains
   b. does the dept's attorney counsel you about his/her intention to bargain away your decision or are you informed after it has been accomplished that that's what happened

Sec. 08.03.010. Termination, continuation and reestablishment of regulatory boards. (a) Boards listed in this subsection have a termination date of June 30, 1979:

(1) Board of Chiropractic Examiners (AS 08.20.010);
(2) Board of Dental Examiners (AS 08.36.010);
(3) State Medical Board (AS 08.64.010);
(4) Board of Nursing (AS 08.68.010);
(5) Board of Dispensing Opticians (AS 08.71.010);
(6) Board of Examiners in Optometry (AS 08.72.010);
(7) Board of Pharmacy (AS 08.80.010);
(8) Board of Veterinary Examiners (AS 08.98.010);
(9) Board of Psychologist and Psychological Associate Examiners (AS 08.86.010);
(10) Board of Nursing Home Administrators (AS 08.70.010);
(11) Physical Therapy Board (AS 08.84.010).

(b) Boards listed in this subsection have a termination date of June 30, 1980:

(1) Board of Public Accountancy (AS 08.04.010);
(2) Board of Barber Examiners (AS 08.12.010);
(3) Collection Agency Board (AS 08.24.011);
(4) Board of Hairdressing and Beauty Culture Examiners (AS 08.28.010);
(5) Board of Electrical Examiners (AS 08.40.010);
(6) State Board of Registration for Architects, Engineers and Land Surveyors (AS 08.48.011);
(7) Guide Licensing and Control Board (AS 08.54.010);
(8) Board of Marine Pilots (AS 08.62.010);
(9) Real Estate Commission (AS 08.88.011);
(10) Board of Welding Examiners (AS 08.99.010);
(11) Board of Governors of the Alaska Bar Association (AS 08.08.040).

(c) Upon termination, each board listed in (a) and (b) of this section shall continue in existence until June 30 of the next succeeding year for the purpose of concluding its affairs. During this period, termination does not reduce or otherwise limit the powers or authority of each board. One year after the date of termination, a board not continued shall cease all activities.

(d) The termination, dissolution, continuation or reestablishment of a regulatory board shall be governed by the legislative oversight procedures of AS 44.66.050.

(e) A board scheduled for termination under this chapter may be continued or reestablished by the legislature for a period not to exceed four years. (§ 2 ch 149 SLA 1977)

Chap

Article
1. Board of Public Acc
2. Certified Public Acc
3. Public Accountants
4. Regulation of Accou
5. Unlawful Acts and
6. Miscellaneous Provi
7. General Provisions

Arti

Section
10. Creation of board
20. Appointment and board
30. Removal and members
40. Term of office

Sec. 08.04.010. accountancy to b Accountancy. (§ 2

Am. Jur., ALR and C
10 Am. Jur., Certified ss 1 to 8.
Failure of accountan as affecting validity contract, 4 ALR 1087; 1226; 118 ALR 651.
Licensing and reg accountants, 27 ALR 1 ALR 1095.

Sec. 08.04.020. consists of seven shall be a resident shall be certified members in accord shall be public acc appointed who does the laws of this appointed who is (§ 2(2) ch 187 SLA

Effect of amendm amendment substituted for "five members" in deleted "a citizen of the preceding "n residen sentence, deleted "At

Title 8 Business and Professions

Title 7 Boroughs

Introduced: 3/1/79
Referred: Commerce and Finance

BY THE RULES COMMITTEE BY REQUEST OF THE LEGISLATIVE BUDGET AND AUDIT COMMITTEE

IN THE SENATE

SENATE BILL NO. 232

IN THE LEGISLATURE OF THE STATE OF ALASKA

ELEVENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act designating programs and activities for review and termination under AS 44.66; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 14.56.250 - 14.56.290 (relating to the responsibility and authority of the Department of Education, division of state libraries, to publish the Alaska Blue Book) are repealed.

* Sec. 2. The following laws relating to mechanical inspection functions of the Department of Labor are repealed:

(1) AS 18.60.220 - 18.60.395 (boiler and pressure vessel inspection);

(2) AS 18.60.600(a)(2), 18.60.600(b), and 18.60.610 - 18.60.650 (electrical wiring inspection);

(3) AS 18.60.715(b), 18.60.720(b), 18.60.725, 18.60.730 and 18.60.740(4) (plumbing code inspection);

(4) AS 18.60.800(b)(2) and 18.60.820 (elevator safety inspection).

* Sec. 3. AS 18.65.130 - 18.65.290 and AS 44.62.330(a)(34) (Police Standards Council) are repealed.

* Sec. 4. AS 18.80 and AS 39.50.200(9)(N) (State Commission on Human Rights) are repealed.

* Sec. 5. AS 23.35 (Fisherman's Fund) is repealed.

* Sec. 6. AS 28.05.011(8) (authority of the Department of Public Safety to operate motor vehicle weighing stations and to enforce size, weight and

load limitations) is repealed.

* Sec. 7. AS 44.19.870 - 44.19.881 (division of policy development and planning) are repealed.

* Sec. 8. AS 45.50.491 - 45.50.521 (consumer protection - Department of Law) are repealed.

* Sec. 9. AS 45.50.531(b) is amended to read:

(b) A person entitled to bring an action under this section may, [AFTER INVESTIGATION BY AND APPROVAL OF THE ATTORNEY GENERAL,] if the unlawful act or practice has caused similar injury to numerous other persons similarly situated and if he adequately represents the similarly situated persons, bring an action on behalf of himself and other similarly injured and situated persons to recover actual damages. [A PERSON PLANNING TO BRING AN ACTION UNDER THIS SUBSECTION SHALL FIRST SUBMIT TO THE ATTORNEY GENERAL A COPY OF HIS PROPOSED COMPLAINT, AND HE MAY NOT FILE THE COMPLAINT IN COURT WITHOUT THE ATTORNEY GENERAL'S APPROVAL.] In an action brough under this subsection, the court may in its discretion order, in addition to damages, injunctive or other equitable relief.

* Sec. 10. The responsibility of the Department of Law under AS 45.45 (regulation of motor vehicle repairs) is terminated.

* Sec. 11. AS 47.10.150, 47.10.160, and 47.10.180 - 47.10.220 (programs of the Department of Health and Social Services relating to the confinement of juveniles) are repealed.

* Sec. 12. The Alaska Growth Policy Council, established within the division of policy development and planning, Office of the Governor, by Administrative Order No. 26, under the authority of AS 44.19.880(c), is terminated.

* Sec. 13. A claim for an injury compensable under AS 23.35, repealed by this Act, may be paid by the commissioner of labor if claim for compensation

is made within one year of the effective date of this Act. A claim shall be paid in accordance with the provisions of AS 23.35 as the provisions read at the time of repeal. On July 1, 1981 the balance in the fishermen's fund (AS 23.35.060, repealed and AS 37.05.155(a)(6)) lapses into the general fund.

* Sec. 14. This Act takes effect July 1, 1980.

OCCUPATIONAL LICENSING

IN ALASKA:

A

Manual For Members of

State Licensing Boards

And The Division of Occupational Licensing

Prepared by the

Office of the Attorney General

Alaska Department of Law

1979

Acknowledgements

This Manual is adapted in part from publications prepared by the Committee on the Office of Attorney General under Grant No. 21-34-76-10 to the Educational Testing Service from the Employment and Training Administration, U.S. Department of Labor.

In addition, the following sources were of assistance in preparing this manual:

Alaska Department of Law, Drafting Manual for Administrative Regulations

California Office of Administrative Hearings,

Guidelines for Formal Contested Administrative Proceedings: A Handbook for Members of State Licensing Boards

Montana Legislative Council, Professional and Occupational Licensing Boards

[The views expressed in this manual do not necessarily reflect those of any of these organizations.]

TABLE OF CONTENTS

A. INTRODUCTION

1. Reasons for Licensing

Licensing of professions and occupations is simply regulation of vocations by the state. The state defines the qualifications of persons who are permitted to engage in a vocation and prohibits anyone who does not have the required qualifications from pursuing that vocation.

Licensing is an exercise of the state's police power to protect the public health, welfare, and safety by safeguarding the public from the activities of incompetent persons.

2. Development of Licensing

Modern regulation of professions and occupations is an outgrowth of medieval guilds of merchants, craftsmen, and the professions. Merchant guilds appeared first and developed into organizations designed to protect the merchant class. Municipal authorities not only passed ordinances to protect the public from the adulteration of goods, short-weight, and unfair prices upon recommendation of the guilds, but also legislated for the benefit of the guilds. Thus the guilds obtained legal sanction for restricting their membership and gained a monopolistic control over trade.

Occupational groups began to organize into national associations just prior to the Civil War. The American Medical Association was organized in 1847, and soon after organizations appeared representing pharmacists (1852), civil engineers (1852), architects (1857), dentists (1859), and veterinarians (1863). The groups appeared because of: (1) a desire for comradeship with others of the same background; (2) an interest in advancing the knowledge of the profession or perfecting the skill of the vocation by sharing the experiences and counsel of others; (3) a desire to discuss mutual problems, new discoveries, and new techniques; (4) a desire to set out codes of ethics which defined the relationship between professional persons; and (5) a desire to gain for the entire membership the compensation and status which the community could be induced to grant for particular services.

To protect their status, associations sponsored and urged licensing legislation which gave legal sanction to their codes of ethics and established a legal register of "qualified" practitioners. A demand for self government

also emerged. Members of the professions desired licensing boards controlled by fellow members who would more likely understand their problems. Almost invariably, the associations won the right to be represented on, and in many instances control of, the licensing boards.

The recent legislative trend nationwide has been to divorce the licensing boards from overt control of the associations. This has been accomplished through placement of "public" members on boards and deletion of statutory obligations on the appointing authority to consult with or draw from the associations.

"Sunset" legislation has been enacted in most states, including Alaska. Under such statutes, legislatures periodically review the activities of executive branch agencies, including licensing boards, to determine whether there is sufficient justification for their continued existence. The result of such review is often corrective legislation and, in some instances, abolition of the agency.

3. Characteristics of Licensing Boards

Licensing boards have two main duties: (1) to control entrance into the occupation, and (2) to support and enforce the standards of practice among licensed practitioners. To accomplish these objectives, the boards typically engage in the following activities:

1. Examination of the credentials of applicants and determination of whether their education, experience and moral fitness meet statutory or administrative requirements.

2. Boards ordinarily prepare (or select nationally recognized) examinations to test the academic and practical qualifications of applicants. They then administer and grade examinations to determine who have passed and who have failed.

3. In most states, the boards have discretionary power to grant licenses on the basis of reciprocity with other states.

4. Most boards issue regulations establishing standards of practice. They hold hearings on allegations of violations of conduct when reasonable evidence of violation exists. If necessary, the boards suspend or revoke licenses.

4. Occupational Licensing in Alaska

In Alaska, policing of the occupations has been divided between the Division of Occupational Licensing and the occupational licensing boards.

The Division of Occupational Licensing assumes day-to-day responsibility for processing of applications, fees and inquiries regarding the various professions. Furthermore, the division, through its enforcement section, investigates complaints against persons in violation of the occupational licensing statutes (found in Title 8 of the Alaska Statutes). Finally, the division, through the Commissioner of the Department of Commerce and Economic Development, has authority to seek enforcement of the licensing statutes either through cease and desist orders or court injunctions under AS 08.01.087.

The occupational licensing boards, much like their counterparts elsewhere, are generally responsible for reviewing the applications of all persons wishing to enter a profession in Alaska, to adopt regulations regarding the standards of practice within the professions, and to hear cases presented to the boards by the Division of Occupational Licensing.

The Department of Law serves as counsel for both the Division of Occupational Licensing and for the licensing boards. The department specifically provides advice to the division and to the boards regarding their statutory authority and functions, helps draft and review proposed legislation and regulations and represents the division and boards in administrative proceedings and in court.

PART I

RULEMAKING AUTHORITY:

THE PROMULGATION OF REGULATIONS

1.1 RULEMAKING AUTHORITY

1.1.1 Rulemaking: Introduction

The observations contained in this section should be read in conjunction with rather than in lieu of the Alaska Drafting Manual for Administrative Regulations.

While the Division of Occupational licensing has a regulations specialist available to assist boards in the promulgation of regulations, each board member should assume the responsibility to strictly observe the statutory requirements in the rulemaking process.

1.1.2 Basis of Authority

A board has only those powers that are given it by law; no board or agency may promulgate an administrative regulation unless it has expressly been given such powers by statute, or unless such powers are necessarily implied from its statutory duties. Rulemaking authority can only be delegated by specific statute.

In promulgating regulations, the board is exercising powers that have been delegated by the legislature and that are not inherently of the board. Under our scheme of government, the legislature was given the power to make laws or regulations, which were then carried out by the executive branch. As the regulatory functions of government increased, it became impossible for the legislature adequately to legislate all of the regulations that were needed. The practice of delegating some rulemaking authority evolved as a practical necessity, both because of the number of regulations required and because of the specialized subjects of regulation.

1.1.3 Scope of Authority

Generally, the legislature sets the state's policy and establishes standards to guide the board. The board may then, within the scope of these standards, promulgate regulations to effectuate the policies established by the legislature. The legislature must set policy and define the general legislative purposes before the board can make regulations. The rulemaking authority should be used sparingly. An agency should promulgate regulations only when there is

substantial evidence that regulations are necessary either to meet demonstrated problems or to comply with legislative mandates.

1.1.4 Limits on Authority

Within the permissible scope of rulemaking activities, there are limits on what a board may do. These may be summarized as follows:

(1) The board's action may not be arbitrary or unreasonable;

(2) The board may not make a regulation which deprives any person or persons of their constitutional rights;

(3) The board's actions must comply with statutory requirements concerning rulemaking procedures;

(4) The board may make only such regulations as are consistent with law. In some cases, very explicit statutory authority is required if an agency's action is to be valid, because some acts are considered to be exclusively the prerogative of the legislature.

1.1.5 Procedures Required

no regulation to which the rulemaking process applies is valid unless it is adopted in compliance with procedures set by statute. It is the board's responsibility to assure that its rules conform precisely to statutory requirements.

1.2. DEFINITION OF REGULATION

1.2.1 General Definition

A regulation is usually defined as each statement of a board that is of general applicability and that implements, interprets, or prescribes law or policy, or that describes the organization, procedure or practice of the agency. Regulations have the force and effect of law once they have been properly adopted.

In general, rulemaking is appropriate:

(1) When the legislature has delegated authority to a board to promulgate the particular regulations, or to promulgate regulations on that subject;

(2) When the regulation would regulate particular conduct in a general manner;

(3) When the regulation would apply to future situations.

(4) When the need to regulate particular conduct is demonstrated.

1.2.2 Mandatory and Discretionary Regulations

Mandatory regulations are those which the board is required by statute to promulgate. For example, a board may be required by statute to prescribe by regulations minimum educational and professional conduct for licensees. Another example would be a statute requiring a board to adopt regulations establishing standards for certain types of professional equipment. The statutes usually use the word "shall" in defining mandatory regulations.

Discretionary regulations are those which the agency may adopt, although it is not required to do so. These must be within the scope of the board's statutory authority. A typical statute authorizes a board to make such regulations as may be necessary to carry out the purposes of the statute.

1.2.3 Rules of Organization and Practice

A board may be required by law to adopt a regulation describing its organization, stating the general course and

method of its operations and the methods whereby the public may obtain information or make submissions or requests. The board may adopt such a regulation even if it is not required.

A board may be required by law to adopt regulations setting forth the nature and requirements of all formal and informal proceedings before it. These may include a description of all forms and instructions used by the agency.

1.2.4 Amendment of Prior Rule

The definition of a regulation includes action to amend or repeal a prior regulation. Such action is subject to the same rulemaking procedures as is an original regulation.

1.2.5 Exclusion from Definition

Certain documents or materials issued by a board would not normally be considered regulations, although they might contain official statements of agency policy. Examples are:

(1) Internal rules, which affect only employees of the board and do not affect the rights of the public;

(2) Official reports, such as those to the Governor or legislature;

(3) Declaratory rules issued by the board in response to requests for statements clarifying the effect of a regulation;

(4) Reprints of statutes relating to the agency;

(5) Informal material, such as news releases and informational booklets.

In each case, however, the board must exercise its discretion to decide whether the rulemaking process is required.

1.2.6 Relation to Statute

The statute granting rulemaking authority to the board should not itself be set forth as a rule. This is not only unnecessary, but it can cause confusion and error. It may, however, be necessary for the sake of clarity to incorporate portions of the statute into rules.

1.3. DRAFTING REQUIREMENTS

1.3.1 Requirements for Form and Style

All boards must comply with the uniform drafting style of the Drafting Manual for Administrative Regulations. This is necessary to ensure consistency in the regulations when they are codified and to ensure that they meet minimum standards of clarity and precision.

1.3.2 Specific Suggestions

Some suggestions on drafting regulations are:

(1) Check to make sure that any references to statutes are current, complete and accurate.

(2) While there is no requirement for maximum or minimum length, each regulation should encompass one subject only and each subject should be covered in a single regulation, to the extent possible;

(3) Be sure that the title of the regulation clearly expresses the subject concerned;

(4) Use the word "shall" when an action is mandatory and the word "may" when an action is discretionary;

(5) Divide regulations into sections and subsections at logical breaks in the subject matter, for more convenient reference.

1.3.3 Adoption by Reference

The board may adopt by reference all or part of a standard, or code which has been adopted by another state board or agency or by a federal agency. It may also adopt regulations which have been adopted by a professional organization or association. Such material is often referred to as "third-party standards."

Material adopted by reference must be clearly specified in the reference. The board must keep copies of the adopted material available for inspection. If part of the referenced material is to be deleted, the rule adopting the material must so specify.

Adoptions by reference must follow the same procedure as other rule-making, including giving adequate advance notice. The adoption of a third-party standard is required to refer to a specific version or edition of the standard, not merely to standards adopted by a specific board or agency. The version adopted by regulation does not change automatically if the third-party standard changes; if the board wishes to adopt the revised standard, normal rule-making procedures must be followed.

1.4 NOTICE

1.4.1 General Requirement

A board must give adequate advance notice of proposed regulations, except in emergency situations, as described in this manual. Notice is necessary to allow all interested persons to learn of the proposal and to prepare comments if they so desire. Notice should be given not only to persons who are directly affected by the regulation, but to the public at large. See AS 44.62.190(a)(10). Generally, notice should be given in such a manner as is reasonably calculated to reach interested persons.

1.4.2 Contents of Notice

The contents of the notice will depend on the issues involved and similar factors.

The notice must contain the following information, as a minimum:

(1) A concise statement of the substance of the proposed regulation and the major issues it involves;

(2) A statement of the statute or other authority under which the regulation is to be promulgated;

(3) A request for comments and an explanation of how comments should be submitted, whether in writing or at a hearing;

(4) Certification by the appropriate official.

The notice should also contain any other information that is required by statute or that the board feels would be helpful to the persons affected.

1.4.3 Notice of Hearing

If the board plans to hold an oral hearing, the notice must, in addition to the above, state the time and place of the hearing.

A board should hold an oral hearing if (i) there is general interest among those affected by the regulation in the subject matter of the regulation, or (ii) if the

regulation is a controversial one, or (iii) if those affected by the regulation would be better able by that method to provide the agency with information that is useful to it in deciding whether or not to finally adopt the proposed regulation, or (iv) if the agency feels it would benefit by an opportunity to explain the regulation to interested persons.

If it decides not to hold an oral hearing, the notice must contain a statement that those interested in the regulations may present their views to the agency in writing before a specified date.

1.5 CONDUCT OF HEARING

1.5.1 Conducting the Hearing

The board alone has the statutory authority to make regulations. The board may, however, delegate to a panel the responsibility for conducting a hearing. It may not delegate the responsibility for adopting regulations.

1.5.2 The Presiding Officer

The presiding officer, whether a hearing officer or a board member, has an important role in the hearing. It is the presiding officer's responsibility to ensure that the hearing is orderly, that all parties are treated fairly, and that it progresses in an expeditious manner.

Presiding officers usually have the power, pursuant to statute and regulation, to:

(1) Preside over the hearing;

(2) Take action necessary to maintain order;

(3) Rule on motions and procedural questions arising during the hearing;

(4) Call recesses or adjourn the hearing;

(5) Recognize speakers and allot time for their presentations;

(6) Question speakers;

(7) Grant extensions for any time requirements.

1.5.3 Standards of Conduct

To ensure a fair but efficient hearing, the presiding officer must enforce proper conduct on the part of all persons present. The presiding officer should recognize a person who is entitled to speak and refuse to allow any other person to speak until that person has been recognized. In case of disturbances, the presiding officer should ask the offending person to be quiet or to leave the hearing. If necessary, and after appropriate warning, the presiding officer may rule that a person has forfeited the right to

participate in the hearing, or may order a person removed from the room.

1.5.4 Examination of Witnesses

The presiding officer or any board member who is present may examine any witness, and may allow others to do so. Most hearings, however, would not involve the examination of witnesses.

A hearing is not an adversary proceeding or a determination of rights, but is informative by nature. Therefore, there is no right to crossexamination of witnesses, although the presiding officer may allow this. For the same reasons, witnesses are seldom placed under oath.

1.5.5 Evidence

The presiding officer should keep a list of all physical and documentary material offered in evidence. He/she should ascertain that each exhibit is marked by an identifying number.

The rules of evidence that govern a courtroom proceeding need not be followed, because the purpose of the hearing is not to determine rights, but to allow an adequate expression of opinion on an issue and to guide the board in its decision making. For example, reports and studies are appropriate kinds of information to be considered in rulemaking, although they might not be admissible as evidence in a court of law. The primary object of the hearing is to gather relevant information to help determine policy.

1.5.6 Record of Hearing

The presiding officer or his/her designee should keep a list of persons who testify at the hearing. This should show each person's name, address and affiliation, if any. It should also show whether the person testified in favor of or in opposition to the proposed regulation, and such other information as appropriate. All rulings of the presiding officer should also be made a matter of record. If the full board is not present at the hearing, the record should be given to them to aid in the regulation-making decision.

1.6 EMERGENCY RULES

1.6.1 Provision for Adoption

Boards are authorized by statute to adopt, amend, or repeal a rule in specific circumstances without complying with the procedures that are normally required. This can be done only in situations that involve an emergency, as defined by statute. These emergency situations permit the board to dispense with advance notice and a public hearing.

An emergency is defined by statute in reference to the public, not to the board. It usually must involve an imminent peril to the health, safety or welfare of the public. By statute, emergencies are rarely found to exist.

1.6.2 Effective Dates

Emergency regulations can go into effect immediately upon filing by the Lieutenant Governor. However, the board should allow as much notice as possible before putting an emergency regulation into effect. The amount of time will necessarily depend on the nature of the emergency.

The period for which an emergency regulation can remain in effect is limited by statute to 120 days.

1.7 ADOPTION AND FILING

1.7.1 Action by Agency

At the conclusion of the hearing, and after all procedural requirements for notice have been met, the board may take formal action on the regulation covered by the notice. The board may adopt, amend or repeal the proposed regulation.

A majority vote is usually necessary to adopt regulations and a quorum of the board must be present for the vote.

1.7.2 Legal Approval

The board must send the final regulations to the Department of Law, along with the written adoption order, a copy of the public notice, the publishers' affidavits of publication and any other relevant documents. After reviewing the substance of the regulations and the procedure followed in adopting them, in order to form an opinion as to their validity compliance with this manual, etc., the Department of Law will write an opinion on the final regulations. That department will send a copy of the opinion to the board and will forward the regulations, the opinion, and all other documents to the lieutenant governor.

1.7.3 New Order of Adoption

When a regulation is changed by the board in response to the Department of Law review, after the initial adoption order is signed, a new adoption order should be signed, to show that the adopting board has in fact adopted the final version.

1.7.4 Filing and Effective Date

Regulations properly submitted to the lieutenant governor are then filed by him/her. It is his/her practice to return to the adopting agency a copy of the adoption order showing his/her signature and the date and time of filing. A regulation becomes effective on the 30th day after it is filed, unless it is an emergency regulation, or unless the agency specifies a date more than 30 days from the filing date, or unless it is a regulation "prescribing the organization or procedure of an agency."

1.8 LEGISLATIVE AND JUDICIAL REVIEW

1.8.1 Legislative Review of Rules

In 1975, the Administrative Regulation Review Committee (ARRC) was established as a permanent interim committee of the legislature, to review regulations to determine whether legislative annulment is appropriate.

1.8.2 Declaratory Judgment by Courts

An action for declaratory judgment may be brought in court to determine the validity or the applicability of a regulation.

PART II

DISCIPLINARY PROCEEDINGS

2.1. THE DISCIPLINARY PROCESS

2.1.1 Use of Administrative Hearings

Boards often use formal administrative hearings to determine whether disciplinary action should be taken against persons whom they have licensed. The board may suspend or revoke a license or impose other sanctions. In other cases an applicant may request a hearing if a board has denied a license or issued a restricted license. Formal hearings invlove a contested case, in which the licensee challenges or contests the action taken by the board.

The board, in the course of the proceeding, hears the charges and the licensee's response. It then makes findings of fact and conclusion of law and reaches a decision on the basis of evidence presented at the hearing.

This part is concerned with disciplinary proceedings against a licensee. However, identical or substantially similar procedures may be followed when a board agrees to hear the complaint of an applicant who contests the board's action in refusing to issue a license.

2.1.2 Nature of Proceeding

A disciplinary proceeding, including the formal hearing, is usually less formal than is a judicial proceeding. Boards must, however, conduct such proceedings in accordance with considerations of fair play and constitutional requirements of due process. They must also observe any requirements set by law or regulation.

The purpose of this kind of proceeding is to determine contested issues of law and fact: whether the licensee did certain acts and, if he did, whether those acts violate statutes or regulations administered and enforced by the board; and to determine the appropriate disciplinary action.

2.1.3 Role of the Board

The board's responsibility in a disciplinary proceeding is to reach a decision and render a judgment. It is also responsible for conducting the hearing, unless it delegates this function to a hearing officer. The board, however, may not delegate its decision-making function to a hearing of-

fice., although the hearing officer may recommend a particular decision to the board.

While the courts have not clearly defined the degree to which a board may combine the duties of a prosecutor and a judge, such combination should be avoided; the board's primary role is that of decision-maker. Therefore it is Alaska practice to divorce boards from fact finding inquiries or investigation prior to the formal hearing.

2.1.4 Participants

There are usually two parties to a disciplinary proceeding: the state, which is bringing the charges, and the licensee, against whom they are brought. The state frequently brings charges as a result of a complaint by a private individual or other entity, but such person or entity is not an official party to the action.

The state is represented by a member of the Attorney General's office and is assisted by staff of the Division of Occupational Licensing.

The other party is the person who holds a license issued by the board and whose conduct is challenged. The licensee is frequently represented by an attorney at the hearing.

The licensing board hears the evidence and reaches a decision.

2.1.5 Jurisdiction of the Board

The board can conduct formal proceedings only against those persons over whom it has jurisdiction. Most boards have jurisdiction only over persons who hold licenses, certificates, registrations, or permits issued by the board.

The board must have jurisdiction over the subject matter of the complaint i.e., the complaint must be one which concerns a regulation of the board or a statute administered by it. A complaint about a licensee which does not concern his or her fitness, competence or qualifications to practice, as defined by statute and regulation, will usually not be within the board's jurisdiction.

2. INFORMAL DISPOSITION OF COMPLAINTS

2.2.1 Advantages of Informal Disposition

Not all complaints are resolved by formal proceedings. Many are settled informally by the Division of Occupational Licensing, which screens and investigates complaints about licensees, and the licensee. This approach is often desirable when the issues are relatively simple. It usually costs less than does a formal hearing, in terms of both time and money. It may be possible to dispose of some issues informally, thereby reducing the scope of the formal hearing, even if the entire complaint cannot be resolved in this manner.

2.2.2 Disposition by Correspondence

One method of disposing of a complaint informally is through correspondence. The division may write to the licensee explaining the nature of the complaint received. The licensee's subsequent response may explain the situation to the division's satisfaction, and the matter may be dropped.

In response to less serious complaints, the division may write to the licensee and suggest remedial action. The licensee may agree to these suggestions, and make further action by the division unnecessary.

2.2.3 Conference or Informal Hearing

Another informal approach is for the division to hold a conference with the licensee. The conference may result in a complete settlement, thereby making a formal hearing unnecessary. Alternatively, it may result in the settlement of some issues, so that the number of matters to be considered at a formal hearing are reduced. The conference is held prior to a formal hearing.

The conference may not be so informal that it amounts to a denial of the licensee's constitutional rights. The licensee must be given adequate notice of the conference, and of the issues to be discussed.

Because the conference is informal, witnesses are not placed under oath and no subpoenas are issued. Statements made at a conference may not be introduced at a formal hearing unless all parties consent. No transcript of the conference is made.

2.2.4 The Board's Role in Informal Hearings

A board should be careful not to become involved in informal proceedings, because a formal hearing may subsequently be held and the board would have to take action on the same case. The board may not be able to act impartially in the formal hearing if its members had been closely involved in an informal hearing or conference. For this reason, board members do not participate in informal hearings.

2.2.5 Consent Order

A consent order is an order involving some type of disciplinary action and is made by the State with the consent of the licensee. It requires the formal consent of the board. It is not the result of the board's deliberations, but represents the board's acceptance of an agreement reached between the State and the licensee. The order is issued by the board to carry out the parties' agreement. This agreement involves the licensee's assent to some form of discipline against the licensee. The agreement must be in writing. It must be signed by the licensee, the representative of the State and the board or someone authorized to sign for the board.

2.3 THE RIGHTS OF PARTIES

2.3.1 Right to Appear

Any person who is a party to a proceeding has the right to appear and be heard, either in person or by counsel. A party also has a right to notice; that is, to be given a statement of what accusations have been made. If, however, a party does not appear after proper notice has been given, the party may be considered to have waived these rights and the board may proceed with the hearing without the presence of the party.

2.3.2 Right to Present Evidence and to Cross-Examine

Every person who is a party to a proceeding has the right in a hearing:

(1) to present evidence on questions of fact, provided that such evidence is acceptable under the rules governing the hearing;

(2) to present arguments on issues of law and policy;

(3) to cross-examine witnesses.

2.3.3 Right to Counsel

The licensee against whom the proceeding is brought has a constitutional right to be accompanied and advised by counsel. He also has the right to be examined by his own counsel. There is no constitutional requirement, however, that the board pay for or appoint counsel for the respondent, even if he is indigent.

The filing of an answer, a motion or other appearance by an attorney constitutes his appearance on behalf of the licensee. The board must be notified in writing if the attorney withdraws from the proceeding.

2.3.4 Right to Copy of Testimony

Any person who gives evidence, whether as a party, in response to a subpoena, or as a witness, is entitled to procure a copy of any transcript of his testimony. The person requesting the copy can be required to pay for the transcript. The requesting party obtains the transcript from the

reporter; the board does not order the transcript unless it desires a copy.

2.3.5 Right to Judicial Review

A licensee has the right to ask the courts to review a decision of the board that is adverse to him.

2.4 INITIATING A DISCIPLINARY PROCEEDING

2.4.1 Initiating the Process

All administrative adjudications under the Administrative Procedure Act, AS 44.62.010 et seq., (APA) are initiated through an accusation or statement of issues.

An accusation begins the process of determining whether license should be revoked, suspended, limited, or conditioned. (See Appendix)

A statement of issues is used when a board has denied a license in the first instance or has refused to renew the license. (See Appendix)

The accusation and statement of issues serve to: initiate the disciplinary proceeding; give notice to the person complained against (the licensee) of the essential facts of the complaint; and define the issues to be contested at the hearing.

These documents are accompanied by a notice of certain procedural rights (See Appendix) as well as a "notice of defense" which the licensee returns if he/she intends to contest the proceeding. (See Appendix)

2.4.2 Need for Formal Adjudication

The possibility of informal disposition is usually pursued before proceeding to a formal hearing.

A decision to initiate formal adjudication usually results from one or more of the following conditions:

(1) the board or division believes that the complaint is sufficiently serious to require formal adjudication;

(2) the licensee fails to respond to the division's letter concerning a complaint and the division believes there are sufficient grounds to justify further action;

(3) the licensee's response to the division's letter or investigative demand does not convince the division that no action is necessary;

(4) an informal hearing or a conference is held, but fails to resolve all of the issues.

The board's hearing procedures are not well suited for adjudication of legitimate civil disputes between individuals which would more appropriately be settled in court. The board should not interject itself into private commercial disputes, or permit a complainant to use the threat of board action to force a licensee to settle a civil case.

2.4.3 Right to Hearing

The Constitution provides that no person can be deprived of life, liberty or property without due process of law. Most courts, including the United States Supreme Court, have interpreted this to require a formal hearing in proceedings which are held to determine a person's rights, duties or privileges.

A person may choose to waive his right to a hearing, either by non-appearance or by consent order or settlement.

2.4.4 When a Hearing is not Required

The exceptions to the requirement for a hearing can be summarized as follows:

(1) where Alaska law specifically provides that the board need not hold a hearing;

(2) where disciplinary action is based solely on the failure to file required reports, applications or other material in a timely manner, or on a failure to pay required fees or maintain required insurance.

2.4.5 Ex Parte Communications

Ex Parte is a legal term meaning by or for one party, or in the absence of another party. Generally, no board member or hearing officer may communicate with any party to a proceeding or his representative concerning any issue of fact or law involved in that proceeding, once notice of the proceeding has been served. This prohibition assumes that whatever a party has to say to the board member has a bearing on the case and should be available to all parties. The board or hearing officer may, however, communicate ex parte concerning procedural matters.

2.5 DESIGNATION OF HEARING OFFICERS

2.5.1 Use of Hearing Officers

All hearings are presided over by a hearing officer who is an attorney appointed by the Governor and who has generally engaged in the practice of law for at least five years.

The hearing officer may "sit alone", that is, hear the case alone and recommend a proposed decision to the board or the hearing officer may sit with the board as the presiding officer of the hearing.

The board must make a determination, either before or after a notice of defense is filed, whether it wishes to delegate the hearing function to a hearing officer alone or whether it wishes to hear the case with the hearing officer. (See Appendix) Some of the considerations in making such a decision are: the time involved (some cases have lasted several weeks), the location of the hearing and the complexity of the case.

2.5.2 Duties of the Hearing Officer

Although discussed in more detail below, the hearing officer is normally responsible for setting the time and place of hearing as well as scheduling prehearing conferences.

The hearing officer rules on motions, conducts the hearing and assists in the preparation of findings of fact and conclusions of law.

The hearing officer's paramount concern will be the making of the record of the proceeding.

2.6 PRELIMINARY ACTIONS

2.6.1 Pre-Hearing Conferences

The hearing officer may, at the request of a party or on his/her own initiative order a pre-hearing conference. Such a conference may also be held by agreement of the parties. The board is not present at the prehearing conference.

The purpose of such a conference is to consider any or all of the following actions:

(1) to reduce or simplify the issues to be adjudicated;

(2) to dispose of preliminary legal issues including ruling on pre-hearing motions;

(3) to stipulate issues that are not contested by the parties;

(4) for the parties to stipulate to the admission of certain evidence or admissions of fact which will avoid unnecessary proof;

(5) to identify documentary evidence or other physical evidence and to dispose of any questions by the parties about its authenticity;

(6) to identify witnesses;

(7) to amend the pleadings;

(8) other matters which might aid in the expeditious conduct of the hearing.

Written notice of the conference should be sent to all parties prior to the conference unless it was included in the notice of the hearing.

2.6.2 Stipulation

The parties may stipulate, or agree upon, certain issues or certain facts. Stipulated issues or facts are not required to be proved at the hearing.

It may be advisable to hold a formal hearing even if one is not required by law. A hearing typically involves a

meeting, with the parties present and able to give oral testimony. Even if the parties agree to submit the question to be adjudicated on a stipulation of agreed facts, the parties should be given an opportunity to present oral arguments in support of their positions.

2.7 MOTIONS

2.7.1 Use of Motions

A request to the board by a party for a particular action is normally made in the form of a motion. A motion may be made before, during, or after a hearing. All motions must be made at an appropriate time, according to the nature of the request.

2.7.2 Form of Motions

A motion made before or after the hearing is usually made in writing. Motions made at the commencement of or during the course of the hearing may be made orally. Motions are directed to the hearing officer.

The person making the motion must identify with particularity the action, ruling or order sought.

2.7.3 Answers to Motions

Any party may file a response or answer to a motion. Such an answer may be in support of or in opposition to a motion, and may be accompanied by an affidavit and memorandum.

2.7.4 Argument on Motions

Oral argument or the presentation of evidence on a motion may or may not be allowed at the hearing officer's discretion.

The propriety of allowing argument and presentation of evidence may depend on the importance of the motion. For example, the motion may be a simple one, such as a request that the hearing be held at a later date because of the illness of the licensee or his attorney. Such motions are usually allowed with liberality if they are made in a timely manner.

On the other hand, a motion may be complex and require the determination of contested issues of law or fact or be determinative of the result of the case. Argument or presentation of evidence would be appropriate in considering such complex motions. For example, a licensee may claim that the statute or regulation that he is charged with

violating is unenforceable because it was improperly adopted. The motion would request that the charges be dismissed. In considering such a motion the hearing officer or board may well desire the presentation of evidence or argument as the determination of the motion will also determine significant issues of law and policy and may determine the result of the case.

2.7.5 Disposition of Motions

The board or hearing officer must rule on all motions. Rulings should be made as promptly as possible.

In some situations, a hearing officer may not have authority to rule on a motion, but may need to refer the motion to the board. An example would be a motion to dismiss a proceeding and close the case.

2.8 SUBPOENAS

2.8.1 Types of Subpoenas

A subpoena is an order for a witness to be present at a proceeding or to present documents for the record. The purpose of the subpoena is to produce evidence which otherwise would not be available and which is needed for the determination of facts relevant to the case.

There are two types of subpoenas used in disciplinary proceedings: (a subpoena requiring a person to appear and give testimony; and (2) a subpoena duces tecum, which requires that a person produce books, records, correspondence, or other materials over which he has control.

2.8.2 Subpoena Authority

The board shall issue a subpoena when requested in writing by any party to a contested case.

Either side in a contested hearing may request that a subpoena be issued. It is generally required that the information called for by a subpoena must be reasonable in terms of the amount required and that it must relate to the matter under consideration. A subpoena duces tecum should show the reasonable scope and relevance of the documentary material sought.

2.8.2 Procedure for Issuing Subpoena

A party to whom the subpoena is directed is not given notice that it will be issued. The subpoena serves as its own notice. This is done to ensure that no evidence will be destroyed.

After the hearing begins the subpoena may be issued by a hearing officer, board member, or the entire board.

2.8.4 Response to Subpoena

The person to whom the subpoena is directed must comply with it unless he files a motion with the board to modify or quash the subpoena. Such a motion must be filed within a stated number of days after receipt, or at any time prior to the return date.

The board may decide to quash the subpoena if it finds that:

(1) the testimony required is not reasonably related to the subject matter of the hearing;

(2) the subpoena does not adequately describe the evidence required;

(3) the production of the evidence would impose difficulties that are not justified in light of its importance to the case, or would subject the witness to undue hardship;

(4) the material or testimony requested falls under a privilege afforded to the witness by statute, regulation, or constitutional guarantees.

2.8.5 Enforcement

If a person fails to comply with a subpoena, the board may apply to the Superior Court for an order to show cause why the person should not be required to comply. The court has power to order the witness to comply with the subpoena and to impose punishment for failure so to do.

2.9 CONDUCTING THE HEARING

2.9.1 The Presiding Officer

The hearing officer as presiding officer has an important role in the hearing. It is his responsibility to ensure that the hearing proceeds smoothly, and that all parties are treated fairly. Hearing officers have the power to:

(1) regulate the discovery process;

(2) hold conferences for the simplification or settlement of issues;

(3) issue subpoenas;

(4) place witnesses under oath;

(5) take action necessary to maintain order;

(6) rule on motions and procedural questions arising during the hearing;

(7) call recesses or adjourn the hearing;

(8) prescribe and enforce general rules of conduct and decorum;

(9) examine witnesses.

2.9.2 Standards of Conduct

To ensure a fair but efficient hearing, the hearing officer must enforce proper conduct on the part of persons present. He should recognize the person who is entitled to speak, and refuse to allow any person to speak until that person has been recognized. In case of disturbance, the hearing officer should ask the offending person to be quiet or to leave the hearing. If necessary, and after appropriate warning, he may rule that a person has forfeited his right to participate in the hearing or may certify the incident to the superior court for appropriate action.

2.9.3 Conduct of Board Members and Officers

Board members, hearing officers, and any other board

representatives should prepare for the hearing by reading in advance the notice of hearing, the answer (if any) and any other pleadings, motions, or briefs. They should attend all of the sessions necessary to conclude a hearing on a particular case. They shall be barred from voting on the final decision unless they were present throughout the hearing or have read the entire record including this the transcript, even though not present at the hearing. Board members should avoid any impression of prejudice against or favoritism toward any party, attorney or witness, and especially in questioning a witness.

2.9.4 Admission of Public

As a general rule, hearings should be open to the public unless there is a compelling reason that the particular hearing should be closed in accordance with AS 44.62.310.

2.9.5 Record of Proceeding

Alaska law requires that a formal record be made of a hearing.

The board and the hearing officer are responsible for ensuring that the proceeding is accurately recorded. It may employ a court reporter or a stenographer for this purpose, or it may make a tape recording. If a tape recorder is used, it should be checked carefully before the proceeding begins to ensure that it is working well.

2.10 ORDER OF PROCEEDINGS

2.10.1 Convening the Hearing

The hearing officer calls the session to order and identifies the case by name and number. He states for the record a brief summary of the subject of the hearing and cites the authority for holding it.

He should ask the parties to identify themselves and their counsel. All parties should be allowed to state for the record any objections they have to any of the prehearing proceedings, such as the service of notice, and to make any prehearing motions they have.

2.10.2 Oaths and Affirmations

As a general rule, all testimony is given under oath. Its purpose is to impress on the witness the seriousness of the occasion in order to assure that his testimony will be truthful.

If the witness objects to "swearing" or "taking an oath," the word "affirm" may be substituted.

If the witness' testimony is interrupted by a recess, it is not necessary to administer the oath again when the hearing reconvenes. He may, however, be reminded that he is still under oath.

2.10.3 Order of Proceedings

The customary order of the proceeding is as follows:

(1) the person presenting the evidence against the licensee makes an opening statment of what he intends to prove, and what action he wants the board to take;

(2) the licensee makes an opening statement, explaining why he believes that the charges against him are untrue;

(3) the person presenting evidence gives the case against him;

(4) the licensee cross-examines;

(5) the licensee presents evidence;

(6) the person who presented evidence against him cross-examines;

(7) the person presenting evidence against the licensee rebuts the latter's evidence;

(8) the licensee rebuts the evidence against him;

(9) both parties make closing statements.

This order may vary, however.

2.11 EVIDENCE

2.11.1 Purpose of Evidence

The purpose of evidence is to provide the facts necessary to reach a decision in a case. The board or hearing officer is not strictly bound by the rules of evidence which govern court proceedings, except that the evidence admitted must be of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.

Constitutional guarantees of due process give the licensee a right to a decision based on evidence presented at the hearing. This means that a board member in making up his mind must consider evidence presented at the hearing, and can consider only such evidence. A board member may not consider anything that he has heard or read about the case; he may consider only the evidence presented at the hearing.

2.11.2 Forms of Evidence

Evidence includes testimony, documents, reports, technical and scientific facts, and real evidence, such as direct physical illustration of a fact before the board. Evidence usually consists of:

(1) oral testimony given by witnesses at the hearing;

(2) documentary evidence, i.e., written or printed materials including public, business, or institutional records;

(3) visual, physical, and illustrative evidence;

(4) admissions, which are written or oral statements of a party made either before or during the hearing;

(5) facts offically noted.

2.11.3 Admissibility

In determining the admissibility of evidence, the presiding officer usually follows the rules governing evidence in Alaska courts. However, the board may admit some hearsay evidence, although this would not be admitted in a court. Hearsay is testimony by a witness as to a

statement made by another person who is not present at the time of the testimony. When the statement by the absent declarant is offered to prove the truth of the matter asserted, it is considered unreliable because the person who made the original statement was not under oath, because opposing parties do not have an opportunity to cross-examine that person, and because the truth of the statement depends on whether the declarant is believable. While hearsay and similar evidence that could not be admitted in a trial might be admitted in a hearing, the board may not take disciplinary action solely on the basis of such evidence.

A party to the proceeding should inform the presiding officer if he objects to the admission of any evidence. If the presiding officer sustains the objection, the evidence is immediately withdrawn from consideration. If not, the proceeding continues with the evidence admitted.

2.11.4 Rules of Privilege

The board must follow the rules of privilege in excluding certain evidence. Generally, these provide that communications to an attorney or physician may not be disclosed without the consent of the person who sought the professional's assistance.

A board also may not force a licensee to testify if he invokes the Fifth Amendment privilege against self-incrimination. Since the decision of the board must be based on evidence presented in the case, the licensee's refusal to testify must be looked upon as having presented no evidence in his own behalf. A board may not, however, draw any inference from a respondent's invocation of the Fifth Amendment privilege.

2.11.5 Exclusion of Evidence

Evidence which is irrelevant, immaterial, incomplete, inaccurate, unsubstantiated, or unduly repetitious should be excluded. Examples are:

(1) irrelevant evidence which does not relate to the issues, and has no bearing on their resolution;

(2) immaterial evidence which, though it may relate to the issues, has no bearing on their resolution, including reptitious evidence, which covers matters that have already been fully covered by other evidence, although some repeti-

tion can be allowed for emphasis;

(3) incomplete, inaccurate, or unsubstantiated evidence such as technical evidence submitted by an unqualified person.

2.11.6 Exhibits

The presiding officer should see that all documentary and physical evidence is marked for identification and that a list is kept that describes the exhibit and its identification. The list should note whether the exhibit was admitted as evidence. One copy of any document offered as evidence must be furnished to each of the parties during or prior to the hearing. The original is given to the hearing officer, unless he allows a copy to be substituted. Copies generally may be introduced into evidence in lieu of original documents unless a party challenges the copy's authenticity.

2.11.7 Official Notice

The board may take official notice of a matter, thereby making it part of the official record. Proof of a matter is not necessary if it has been officially noticed. Where a board's decision rests on official notice of a material fact not appearing in the evidence, a party is entitled to an opportunity to disprove or rebut that fact. Official notice is usually limited to facts which are generally known or which are readily determined by a source which is of unquestioned accuracy. A fact need not always be indisputable to be noticed, so long as parties have an opportunity to challange it. Official notice may also be taken of rules, official reports, decisions, standards, orders of records of the board or of other regulatory agencies or state or federal courts.

2.11.8 Evidentiary Terms

The following are legal definitions of certain evidentiary rules which are pertinent to the administrative process.

Burden of proof is defined as "...(1) either the necessity of establishing the existence of a certain fact or certain facts by evidence that preponderates to the legally required extent, or (2) the necessity which rests on the party at any particular time during a trial, to create a

prima facie case in his own favor, or to overthrow one when created against him."

Preponderance of the evidence is a term which "... simply means what it says, that the evidence on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed." In effect, in a Statement of Issues proceeding, the applicant must establish by a preponderance of the evidence that he is entitled to the agency action which he seeks; while in an Accusation proceeding the agency must establish by a preponderance of the evidence that the licensee in fact violated the subject law.

The agency presents its case first in Statement of Issues and Accusation cases, irrespective of the burden of proof. This is often referred to as the "burden of going forward."

A document which the hearing officer merely marks for identification only is made part of the record, but is not to be considered as evidence by the Board, and, therefore, cannot be used by the board for the purpose of making specific findings. It is thusly labeled primarily as a matter of convenience, so that any subsequent reference to it may be made by number. When a document is admitted into evidence by the hearing officer, it has the same force and effect as sworn oral testimony, unless a legal barrier, such as hearsay, affects its use. It is admitted into evidence when certain preliminary facts about the document are established.

Direct or positive evidence is legally defined as "... that which proves the fact in dispute, directly, without an inference or presumption, and which in itself, if true, conclusively establishes the fact...." This includes relevant evidence which was formerly defined as indirect or circumstantial.

2.12 THE BOARD'S DECISION

2.12.1 Making the Decision

The first task of the board is to perform its fact-finding function. It must determine the facts in issue solely on the basis of the evidence submitted at the hearing then prepare its findings of fact. It must then determine whether the facts in the case support the charges brought against the licensee. Last, it must determine whether the charges brought are a violation of the relevant law or regulation and it must prepare its conclusions of law.

If the board has delegated the hearing to a hearing officer, he prepares a report setting forth such findings and conclusions and submits the report to the board. The board may adopt such findings and conclusions in whole or in part. Generally, it may amend or revise the hearing officer's findings and conclusions only if it was present throughout the hearing or its members have read the transcript of the hearing or if it wishes to reduce the proposed penalty.

Where the board adopts the decision into the form DECISION found in the Appendix should be used. If the board rejects the proposed decision of the hearing officer, the board must file the NOTICE OF REJECTION OF PROPOSED DECISION found in the Appendix. The board must also determine whether it will hear the case or assign it to another hearing officer. The form notice should be modified accordingly.

2.12.2 Multiple Charges

In cases where multiple charges or issues are involved in an appeal, findings of fact and conclusions of law must be made on each charge.

2.12.3 Procedures for Decision

At the conclusion of the evidence-taking portion of the hearing, the board will retire into an executive session for the purpose of rendering a decision. Only board members who were present at the entire hearing, and the hearing officer who presided, will be permitted to attend, or participate in discussions in the executive session. Executive sessions should not be hurried, and an adequate opportunity will be provided for each board member to express his opinions and theories concerning the cause heard.

The first order of business in the executive session should be to determine whether the allegations raised by the pleadings are to be found true and correct; followed by a determination of the sanction, if any, to be imposed by the majority opinion of the board. No minority opinion will be filed.

Generally, the hearing officer who presided at the hearing, and conducts the executive session, will draft the decision for execution by the board. The manner of execution will be at the option of the board, but under no circumstances should board members who did not deliberate execute the decision. Oftentimes, the secretary of the board is authorized by the board to execute the decision in behalf of the board.

The vote of the board must be recorded and available for inspection to demonstrate that the findings and conclusions were adopted by the required majority.

2.12.4 Determining Sanctions

Once the board has completed its fact-finding function and decided that action should be taken against the licensee, it must determine what sanction or punishment is appropriate. The sanction must be based on the findings of fact and conclusions of law determined by the hearing.

The sanctions available to a board are generally determined by law. They may include: revocation or suspension of the license; probations; censure or reprimands; and fines.

2.13 RECONSIDERATION OF DECISION

2.13.1 Procedures

Alaska law provides for the board to reconsider a matter which it has decided.

Reconsideration may occur in three ways:

(1) A party who is dissatisfied with a decision of the board may file a motion requesting that the decision be reconsidered by the board.

(2) The board may order reconsideration on its own motion.

(3) A court to which the board's decision has been appealed may remand the case for reconsideration or rehearing.

All parties must be given notice of a reconsideration or rehearing and the same procedures must be followed as in the original proceeding. Appropriate forms for accepting or denying petitions for reconsideration are contained in the Appendix.

2.13.2 Basis for Reconsideration

The board should grant a motion for reconsideration or rehearing when it is satisfied that one or more of the following conditions are met:

(1) the motion and the record show a serious irregularity in the conduct of the proceeding, such as lack of proper notice that deprived the licensee of due process;

(2) there is newly-discovered evidence, which was not available to the licensee at the time of the hearing and which may be sufficient to reverse the board's action;

(3) the board's decision is contrary to the manifest weight of the evidence;

(4) there was good cause for the licensee's failure to appear or file papers which resulted in default by the licensee.

2.13.3 Enforcement of Decision

If the motion for reconsideration or rehearing is denied, the board's decision is final and binding. The licensee may proceed to seek judicial review of the decision. The board's decision, however, is enforceable unless the court orders a stay.

If a motion for reconsideration is granted, the decision of the board is not final and, therefore, is not implemented until a final decision is reached.

2.14 JUDICIAL REVIEW

2.14.1 Seeking Judicial Review

Judicial review of board actions normally cannot be sought until all administrative remedies have been exhausted; the licensee must use any administrative hearing procedures that are available before he can go to court.

The licensee has the right to seek judicial review if he is dissatisfied with the board's decision.

2.14.2 Effect of Review

The filing of a petition for judicial review does not, in itself, affect the board's decision. The board's decision is enforced unless the court orders a stay of that decision. The court may do this if good cause is shown.

The court may take various types of action on judicial review. It may affirm the board's action. It may modify the board's decision by changing parts of it. Or it may reverse the decision entirely. The court also may remand the case for further proceedings, in which case the board may be directed to reconsider all or some issues.

2.14.3 Scope of Review

The reviewing court generally will not substitute its judgment for that of the licensing board concerning questions of fact, but will accept the board's determination of these matters.

The reviewing court may overrule the board's decision when there has been a failure by the board to meet the requirements of law. The court also may overrule the board if the board has: violated the Constitution or statutes; exceeded its lawful authority; failed to follow lawful procedure; acted in a way that is clearly arbitrary or capricious; abused its discretion; or if the board's findings are not supported by the record.

2.14.4 Procedures for Review

The requirements for filing an appeal are set forth in the Alaska Rules of Appellate Procedure, specifically Appel-

late Rule 45. In certain circumstances, Alaska District Court Rule 31 also applies.

2.15 DISQUALIFICATION

2.15.1 Disqualification of Hearing Officer or Board Member

A hearing officer or board member should be disqualified because of bias or interest which makes him unable to conduct a fair and impartial hearing. Determination of bias involves many considerations. Generally, bias about issues of law or policy is not a ground for disqualification. Bias or prejudgment about issues of fact in a case, however, is a ground for disqualification, as is bias or prejudice for or against one party in a proceeding. Another ground for disqualification is personal interest, i.e., when the hearing officer or board member stands to gain or lose from the outcome of a proceeding.

2.15.2 Procedures for Disqualification

If, a hearing officer or board member determines that he or she is unable to conduct a hearing in an impartial manner, that person should disqualify himself/herself.

A party to the proceeding may also file an affidavit or motion with the board alleging that a hearing officer or board member is unable to conduct the hearing because of bias or other disqualification. The affidavit should state the grounds for disqualification as precisely as possible. It must be filed before the commencement of the hearing, or at the first opportunity after the party becomes aware of the facts upon which the claim of disqualification is based.

2.15.2 Action on Disqualification

If the request for disqualification concerns the agency member the issue shall be determined by the other members of the agency. If the request concerns the hearing officer, the issue shall be determined by the agency when the agency hears the case with the hearing officer, and by the hearing officer when he hears the case alone. No agency member may withdraw voluntarily or be disqualified if his disqualification would prevent the existence of a quorum qualified to act in the particular case.

2.16 THE CASE RECORD

2.16.1 Need for Record

A complete case record must be maintained for each formal hearing because there is a possibility of subsequent judicial action. The court usually will not rehear the evidence in a case, so it must rely on the division to furnish a complete record of everything that occurred during the hearing.

The record of the proceeding must be retained until the time for any appeal has expired, or until the appeal has been concluded. It is not usually transcribed unless a party to the proceeding so requests. The requesting party is required to pay the expense of such transcription.

2.16.2 The Case Record

The case record includes the following, plus other material that the board or hearing officer considers desirable to retain:

(1) all papers filed and served in the proceeding;

(2) all documents and other materials accepted as evidence at the hearing;

(3) statements of matters officially noticed;

(4) notices required by the statutes or rules, including notice of the hearing;

(5) affidavits of service or receipts for mailing of process or other evidence of service;

(6) stipulations, settlement agreements or consent orders if any;

(7) records of matters agreed upon at the prehearing conference;

(8) reports filed by the hearing officer;

(9) orders of the board and its final decision;

(10) actions taken subsequent to the decision, including requests for reconsideration and rehearing;

(11) a transcript of the proceedings, if one has been made, or the tape recording.

The Appendix contains the Supreme Court's instructions on preparation of the record on appeal. These instructions should be closely adhered to.

Once a designation of the record has been filed with the division an estimate of costs in preparing the record is sent by the division to the appellant (See Appendix). If payment is not forthcoming within 30 days, the division moves to dismiss the appeal.

PART III

FUNCTIONS OF THE DIVISION OF OCCUPATIONAL LICENSING

3.1 ROLE OF THE DIVISION IN THE PROMULGATION OF REGULATIONS

3.1.1 Drafting Regulations

When a board decides to promulgate regulations, it may prepare a draft on its own. Usually, however, the board requests the division to prepare a draft for the board's review. The division subsequently returns the draft to the board for its comments, revisions and approval.

3.1.2 Hearing Notification

Upon compilation of a satisfactory draft the division, on behalf of the board, prepares the appropriate notice, schedules the meeting place and provides other administrative services related to the adoption of regulation.

3.1.3 Post-hearing Procedures

Once comment has been received and reviewed, the division prepares a final version of the proposed regulation for board approval and adoption. The division readies the order for adoption, affidavit of notice of adoption and affidavits of publication. These documents are referred to the Department of law for review before submission to the lieutenant governor for filing.

3.2 ROLE OF THE DIVISION IN THE DISCIPLINARY PROCESS

3.2.1 Initial Complaint Procedures

Complaints about licensees are handled by the division in the manner generally set forth in Chapter II. Investigations are likewise conducted by the division in accordance with priorities set forth by the director of the division.

3.2.2 Initiation of Formal Proceedings

Whenever an accusation or statement of issues is generated on behalf of the division, it opens a litigation file. Accusations or statements of issues regarding guide licensing and control board matters are usually served by the Fish and Wildlife Protection Division. The Division of Occupational Licensing takes responsibility for serving all other statements of issues and accusations. All notices of defense accompanying these statements of issues and accusations, regardless of the board, are returnable to the director of the Division of Occupational Licensing.

Once the notice of defense has been returned, the Division sends a copy of the notice of defense to the attorney in the Department of Law handling the case (the attorney who drafted the accusations or was consulted on the statement of issues).

3.2.3 Appointment of Hearing Officers

At the same time, the Division requests the Governor to appoint a hearing officer. (See Appendix) This request is directed to the Office of the Governor but is carbon copied to the Department of Law.

Once an appointment has been made, the Division notifies counsel for the State and for the respondent. (See Appendix)

3.2.4 Delegation of Hearing Authority

The Division contacts the board before whom the matter is to be heard in order to make a determination whether that board wishes to sit with the hearing officer or to delegate

the hearing responsibility to a hearing officer sitting alone. In both cases, there should be a written record of the decision, normally in the minutes of the board. When, however, the board delegates the hearing function to a hearing officer sitting alone, a separate order in the case should be filed and transmitted to the parties. (See Appendix)

Once a hearing officer has been appointed, the Division should contact the hearing officer in writing, enclosing the accusation/statement of issues, notice of defense and any other orders filed by the agency. The Division should not attempt to duplicate the hearing officer's file with respect to the pleadings, motions, and other papers filed by counsel. Instead, all papers should be filed directly with the hearing officer.

3.2.5 Issuance of Subpoenas

On rare occasions, a party may wish to engage in discovery prior to the appointment of the hearing officer. This procedure is specifically allowed under the Alaska Administrative Procedure Act. In that instance, the party would normally petition the board for a subpoena. Accordingly, at the same time the board is deciding whether or not it will hear the case sitting with a hearing officer or will delegate the hearing function to a hearing officer sitting alone, the board should determine whether to grant the president or some other officer of the board authority to issue subpoenas duces tecum. (See Appendix) This resolution should be transmitted to the parties as well.

3.2.6 Filing of Proposed Decision

At the conclusion of the hearing, the hearing officer issues a proposed decision. The hearing officer is under a duty to file the proposed order with the Division (acting on behalf of the board) which in turn files it with the Office of the Lieutenant Governor and brings it to the attention of the appropriate board.

3.2.7 Preparation of the Record

Should the respondent appeal from the decision of the board, the Division has the responsibility of preparing the record. The record should be prepared substantially in accordance with the instructions found in the Appendix and in chapter II.15. In every case, the Division assesses the estimated cost of preparation of the record against the appellant. (See Appendix)

3.3. EMERGENCY POWERS

3.3.1 Cease and Desist Authority

Where the division has investigated a complaint (whether it involves a practitioner in violation of the licensing statute or a person who is required to be licensed but is not), and it determines that a violation appears to have occurred or is about to occur, the division, on behalf of the Commissioner of the Department of Commerce and Economic Development, may seek a cease and desist order stopping the person from committing a violation of the Act, or an injunction in superior court.

3.3.2 Procedural Requirements

Before the issuance of an order or application for injunctive relief, the division must first contact the board involved by telephone or telegraph. The proposed action may take place if a majority of the board do not object within 10 days. As a practical matter the division will poll the board at the time of notification to determine whether a majority object to the proposed action.

3.3.3 Nature of the Violation

The Commissioner will not normally invoke the emergency powers of AS 08.01.087 unless in his/her judgment the acts complained of pose a danger to the public health or safety.

3.3.4 Investigative Powers

AS 08.01.087 also authorizes the Commissioner to issue subpoenas and to examine the records of a licensee in aid of an investigation. The requirements set forth in sections 3.2.1 and 3.2.2 above must be satisfied before such action may be taken.

PART IV

FUNCTIONS OF THE DEPARTMENT OF LAW

4.1 FUNCTIONS OF THE DEPARTMENT OF LAW

4.1.1 General Duties

By statute the Attorney General is the legal advisor to the Governor and other state officers and is responsible for the administration of state legal services.

The Attorney General is also charged with responsibilities to represent the State in all civil actions in which the State is a party and to prosecute all cases involving violation of state law.

4.1.2 Legal Advice

The Department of Law renders advice in three forms:

(1) "opinions" (sometimes referred to as "formal opinions" or "official opinions") on matters which:

(a) are likely to result in litigation;

(b) are likely to cause significant public controversy;

(c) are of significant precedential importance; or,

(d) involve a significant commitment of human, financial, or natural resources, depending on the resolution of the issue;

(2) "memoranda of advice" (sometimes referred to as "informal opinions" or "unofficial opinions") on less important matters; and,

(3) "oral advice" on minor matters, that may be followed by a "memorandum of advice" where good judgment requires.

Requests for opinions made by boards must be made by the board president and must have the approval of the Commissioner or his designee before submission to the Department of Law. This ensures that frivolous or repetitious opinion requests are not submitted.

Oral legal advice is usually rendered by an assistant attorney general who may be in attendance at a regular or special meeting of a board. It is the policy of the depart-

ment not to send a representative to such meetings unless requested by the board and/or the director of the Division of Occupational Licensing to address issues involving questions of law.

4.1.3 Promulgation of Regulations

The Department of Law is available to work with the regulations specialist of the Division of Occupational Licensing in preliminary drafting of regulations. Normally, however, the department's role is limited to review of proposed regulations for legality of form and substance before adoption. If the department recommends changes, the department will later review the regulations to determine if the necessary alterations have been made. A written statement of approval by the Department of Law must accompany the regulations to permit them to be filed by the Lieutenant Governor.

4.1.4 Drafting of Legislation

The Department of Law is responsible for drafting all administration bills introduced in the legislature at the request of the Governor. Legislative proposals originating with the boards must be submitted to the Commissioner of the Department of Commerce and Economic Development for his approval prior to their submission to the Department of Law.

4.1.5 Representation of the Division

The Department of Law represents the Division of Occupational licensing in all disciplinary proceedings before the board. Similarly, in proceedings to determine whether a license was properly denied, the department represents the division and/or the board.

WHENEVER THE DEPARTMENT OF LAW APPEARS BEFORE A BOARD ON A CONTESTED MATTER IN AN ADVERSARY CAPACITY IT MAY NOT RENDER LEGAL ADVICE TO THE BOARD REGARDING HOW THE BOARD SHOULD DECIDE.

The board should seek legal guidance from the hearing officer appointed to serve as the presiding officer. This does not preclude the board from hearing argument from both parties (the state and the respondent) regarding issues of law or procedure so long as both parties are present and are afforded the opportunity to respond.

4.1.6 Representation of the Board

Whenever a board has rendered a decision challenged in court by a respondent or third party, the Department of Law assures the representation of the board. Similarly, whenever a board member or board is sued for conduct within the scope of its responsibility, the department will represent the member or the board.

4.1.7 Audits of board procedures

When complaints are received by the Department of Law regarding alleged unlawful practices of a board (e.g., conducting business without a quorum, arbitrary denial of a license), the department will initiate an investigation or request the Department of Commerce and Economic Development to do so.

Where violations of the law have occurred, the department will meet with the board to assist it in undertaking corrective measures.

Where a board or board member refuses to abide by the advice rendered by the department, the department generally will not represent that board or board member in any suit challenging the legality of the acts complained of. Failure to follow the advice of the Department of Law could lead to liability for damages or other relief. See AS 08.02.020.

[Insert name of agency; e.g.,

STATE OF ALASKA

BOARD OF DENTAL EXAMINERS]

In the Matter of)
)
)
) No. _____
_____)

STATEMENT OF ISSUES

The State of Alaska Board of Dental Examiners, having considered the application of [insert name of applicant] for [identify license applied for] finds as follows:

1. The Board of Dental Examiners pursuant to [cite the statutory or regulatory basis for the agency action, e.g., AS 08.36.070] considered the application of [insert name of applicant] for [identify license applied for].

2. On or about [insert date and name of applicant] applied for [identify license applied for].

3. On or about [insert date, name of applicant and grounds for denial; e.g., was convicted of the crime of embezzlement. It is advisable in such cases to attach to the statement of issues a certified copy of the judgment of conviction].

4. The crime of embezzlement is evidence that [insert name of applicant] is not of good moral character as required by AS 08.36.110(2).

5. Pursuant to AS 08.36.110(2), the application

of [insert name of applicant] for [identify license applied for] is denied.

DATED: _____

[provide for signatures for board officers as appropriate)

[Insert name of agency; e.g.,

STATE OF ALASKA

BOARD OF DENTAL EXAMINERS]

In the Matter)
)
)
)
_____) No. _____

ACCUSATION

Petitioner Don Hostak, Director of the Division of Occupational Licensing, Department of Commerce and Economic Development, State of Alaska, alleges:

1. This is a proceeding pursuant to [cite the statutory or regulatory basis for the proceeding, e.g., AS 08.36.070(5) and (7) and AS 44.62.330 et seq.] to [describe proposed action, e.g., revoke the license of the respondent to practice dentistry in the State of Alaska].

2. On or about [insert date] respondent was licensed to practice dentistry in the State of Alaska.

3. On or about [insert date] respondent [state grounds of revocation, e.g., was convicted of the crime of embezzlement. It is advisable in such cases to attach a certified copy of the judgment of conviction].

4. The crime of embezzlement is a crime involving moral turpitude for purposes of AS 08.36.310(2).

5. Purusant to AS 08.36.310(2), respondent's license may be revoked for the reason that he has been

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Insert name and address of respondent]

Re: [Insert caption on accusation]

You are hereby notified that the enclosed Accusation has been filed with [insert name of agency]. [Insert name of agency] will conduct a hearing to decide the issues presented in the Accusation.

Notice of Defense and Request for Hearing.

The enclosed Accusation was prepared pursuant to AS 44.62.360 and sets forth the issues that will be decided by [insert name of agency]. This letter constitutes notice as required by AS 44.62.380 that you may request a hearing on the issues set forth in the Accusation.

Unless a written request for a hearing signed by you or on your behalf is delivered or mailed to [insert name of agency] within 15 days after receipt of the enclosed Accusation, [insert name of agency] pursuant to AS 44.62.530 will decide in your absence the issues presented in the Accusation. The request for a hearing may be made by delivering or mailing the enclosed Notice of Defense to [insert name of agency] in the enclosed envelope, postage prepaid. Mailing of the Notice of Defense signed by you or on your behalf and returned to [insert name of agency] within 15 days in the enclosed addressed envelope, postage prepaid, acknowledges receipt of the enclosed Accusation and constitutes a notice of defense pursuant to AS 44.62.390.

Sincerely,

Don Hostak, Director
Division of Occupational
Licensing
Department of Commerce and
Economic Development

convicted of a crime involving moral turpitude.

WHEREFORE, petitioner seeks:

1. To revoke respondent's license to practice dentistry in the State of Alaska.

2. To make such other findings and disposition of this proceeding as are just.

DATED: _____.

_____
Don Hostak, Director
Division of Occupational
Licensing
Department of Commerce and
Economic Development

[Insert name of agency; e.g.,

STATE OF ALASKA

BOARD OF DENTAL EXAMINERS]

In the Matter of)
)
)
)
_____) No. _____

NOTICE OF DEFENSE

The respondent named below, pursuant to AS 44.62.-390, hereby gives notice of defense in this proceeding.

A hearing on the matters set forth in the Statement of Issues is hereby requested.

DATED: _____.

_____
RESPONDENT

ADDRESS: _____

_____

NOTE: This Notice of Defense must be signed by or on behalf of respondent, must set forth respondent's mailing address and must be filed with the [insert name of agency] within 15 days of receipt.

BEFORE THE ALASKA STATE BOARD OF

_____

In the Matter of)
)
)
)
Respondent.) File No. _____
_____)

DECISION

The attached proposed decision of the hearing officer is adopted by the _____(title of agency)_____ as its decision in the above-entitled matter. This decision shall become effective on _____, 19___.

DATED: _____.

_____
Title of Agency

By: _____

[Insert name of board, e.g.:

STATE OF ALASKA

BOARD OF DENTAL EXAMINERS]

In the Matter of)
)
)
) No. _____
_____)

DECISION

The Alaska Board of Dental Examiners, after hearing evidence in this proceeding submitted by petitioner and by respondent at a hearing held on [insert date(s)], enters the following decision:

FINDINGS OF FACT

1. Respondent was licensed to practice dentistry in the State of Alaska on or about [insert date].

2. Respondent was convicted of the crime of embezzlement on or about [insert date].

3. [Here insert the reason why the findings support the agency action taken -- i.e., revocation, rather than suspension or reprimand].

DETERMINATION OF ISSUES

4. The crime of embezzlement is a crime involving moral turpitude for purposes of AS 08.36.310(2).

PENALTY

5. Respondent's license to practice dentistry in the State of Alaska is hereby revoked.

DATED: _____

_____

BEFORE THE ALASKA STATE BOARD OF

_____

In the Matter of)
)
)
) File No. _____
_____)

NOTICE OF REJECTION OF PROPOSED DECISION

Attached is a copy of the proposed decision in the above-entitled matter submitted to the _____(Title of agency) _____. You are advised that the board considered, but did not adopt the proposed decision and that the board will itself decide the case.

You are advised that you may submit written argument to the board. Your right to argue on any matters that you feel should be argued is not limited, but you are advised that the board based its rejection of the proposed decision on its consideration of the (findings of fact/determination of issues/penalty or recommendations).

Any written argument that you may submit to the board in this matter should be received by the board at its office _____(address)_____, on or before _____, 19___.

DATED: _____.

Title of Agency

By: _____

BEFORE THE ALASKA STATE BOARD OF

_____

In the Matter of)
)
)
)
)
)
Respondent.)
_____) File No. _____

ORDER OF RECONSIDERATION

The petition of the above-named respondent for an order of reconsideration of the decision dated _____, 19___, having been fully considered;

IT IS ORDERED that the decision is vacated and the petition for reconsideration granted.

IT IS FURTHER ORDERED:

1. That this reconsideration be granted by the agency itself on all pertinent parts of the record;

2. Written argument may be filed with this agency on or before _____, 19____;

3. The agency itself will hear such additional evidence as may be offered by the parties on the following issues:

OR

1. The reconsideration shall be conducted by a hearing officer who shall reconsider the case and all pertinent parts of the record and the petition for reconsi-

deration and the oral or written argument as the hearing officer permits.

2. The hearing officer shall permit such additional evidence as is offered by the parties on the following issues:

TITLE OF AGENCY

By: _____ .

BEFORE THE ALASKA STATE BOARD OF

_____

In the Matter of)
)
)
)
)
)
Respondent.)
_____) File No. _____

ORDER DENYING PETITION FOR RECONSIDERATION

The petition of the above-named respondent for an order of reconsideration of the decision dated _____, 19___, having been filed and having been fully considered,

IT IS ORDERED that the petition is denied.

DATED: _____.

TITLE OF AGENCY

By: _____

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

Appellant,	)
v.	)
STATE OF ALASKA, BOARD OF	)
Appellee.	)

NOTICE TO APPELLANT

Pursuant to Appellate Rule 45(e)(2) you are hereby notified that the estimated costs of the Division to prepare the record on appeal in the above-entitled action is $. Receipt of that amount is condition precedent to the Division preparing and filing the record on appeal with the Superior Court.

The deposit may be filed with [name of court reporter and the address] or with this division, Pouch D, Juneau, Alaska 99811.

DATED this ____ day of _____, 19__ at Juneau, Alaska.

Don Hostak, Director
Division of Occupational Licensing

ATTORNEY GENERAL, STATE OF ALASKA
STATE CAPITOL
POUCH K, JUNEAU, ALASKA 99811
PHONE (907) 465-3600

INSTRUCTIONS TO ADMINISTRATIVE AGENCIES

ON APPELLATE PROCEDURE

Prepared and Distributed by

Clerk, Supreme Court
State of Alaska

March 1975

INSTRUCTIONS TO AGENCIES ON APPELLATE PROCEDURE

In order to facilitate the handling by the Superior Court of appeals and petitions for review, this memorandum of instructions has been prepared. There is presented here the detailed, step-by-step procedure to be followed by the clerks in handling such cases. The rule numbers which appear from time to time refer to the Rules of the Court and to the Alaska Statutes.

WHAT MAY BE APPEALED AS 44.62.560

An appeal may be taken to this court from a final administrative order.

1. NOTICE OF APPEAL

When an appeal is taken from a final judgment of an agency the first document that counsel will file is a Notice of Appeal with the Superior Court. Counsel will also provide the necessary copies along with an Attorneys of Record list for the Clerk of Superior Court. The court will then serve all parties with a copy of the Notice of Appeal.

When the Notice of Appeal is filed it will be automatically given the case file number which should be referenced

2. ATTORNEYS OF RECORD

After the court has mailed copies of the Notice to all parties, the parties wishing to join in the appeal are to file an entry of appearance within thirty (30) days, if they

fail to appear they will be defaulted.

At the end of the 30 day period an appellate conference will be held with only those who have filed their appearance. At this conference the designation of record for the appeal will be determined and any other special conditions.

3. DESIGNATION

After the conference the appellant will file a designation of record with the agency and serve a copy on all parties.

The agency will promptly advise counsel of the cost of preparation of the record. If the agency has not received the requested fees or corporate surety bond to equal the estimated cost within 20 days after notification, then the agency is to notify the court in writing of the amount due and when counsel was advised and copy all parties in the action.

The record on appeal is due 30 days after the fee has been submitted.

4. PREPARATION OF RECORD ON APPEAL

The clerk prepares the record by taking from the agency files those papers and documents referred to in the designation and they are placed in one or more separate files, depending on how voluminous the record will be. Documents should be in chronological order starting with the first instrument filed (generally the complaint or petition), each page should be numbered beginning with number 1 and going on page by page to the end of the record. Numbering may be done

in ink or with a rubber stamp numbering machine, at the lower right hand corner of each page. Papers should be fastened at the top of the folder with an acco fastener.

A typical record on appeal would probably include (but not be limited to) the following:

a. Petition or complaint

b. Answer

c. Motion for early hearing or Stay

d. Memorandum in support

e. Hearing notes on Motion

f. Motion for reconsideration

d. Administrative agency order

5. TRANSCRIPT

Included in the designation filed with the agency will be a request for transcript. If the evidence or proceedings in an action were electronically recorded, it is likely that counsel will request that a transcript of the same be included in the record on appeal. The transcript may consist of one or more separate volumes separately bound. It is not necessary to place these volumes in file folders, they should be forwarded to the court along with the rest of the record on appeal.

6. EXHIBITS

Exhibits designated for inclusion in the record should generally be placed in separate folders, envelopes or boxes, together with a document made up by the clerk

indicating the contents, such as : "Petitioner's Exhibits Nos. _____ to _____ inclusive".

7. TABLE OF CONTENTS-CERTIFICATE

Before the record is ready to be forwarded to the Superior Court, two more things must be done. First, the clerk should prepare a table of contents which should list each document contained in the record on appeal, with corresponding reference to the place that such document may be found, by file number and page number. This table of contents should be fastened to the top of the first page of the first file of the record on appeal so that it will be in the front of the folder. [Rule 9(f)(2)] (Example). Finally the clerk should add to the table of contents a certificate which shows the following:

a. The date upon which the preparation of the record was completed.

b. The date upon which notice of the completion of the record was given to counsel for each of the parties.

c. The names and addresses of counsel notified.

d. The manner in which the notice was given [Rule 9(f)(3)(4)]. (Example)

Upon completion of the record it should either be delivered to the Appeals Clerk or mailed by certified mail to the court.

8. DETERMINATION

The record from the agency will be held with the court until the determination by the court and upon decision

a copy will be mailed to the agency. The file will be held further for a 30 day period for Supreme Court appeal time to run. If no appeal is taken then the record will be transmitted back to the agency.

9. MISCELLANEOUS

a. SERVICE. Various papers that are filed with the clerk in connection with an appeal must be served on adverse parties and when filed, must be accompanied by proof of service. This subject is governed by Rule 39.

b. FILING FEES. Filing fees in connection with appeals and petitions for review are to be paid directly to the Clerk of the Trial Courts for the district. The fee is $50.00.

c. DESIGNATION. This document tells the agency what the attorney wants them to prepare as a record on appeal for the Superior Court. AS 44.62.560(c)(d).

d. EXTENSIONS OF TIME. When the agency finds that a record is of such size that it will be impossible for them to certify the record on or before the due date the agency should contact the appellant of the problem who then should apply to the court for an extension.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

POLAR AIRWAYS, INC., Appellant, v. ALASKA TRANSPORTATION COMMISSION, ALASKA AERONAUTICAL INDUSTRIES, INC Appellee.	Superior Court No. Agency File No.

RECORD ON APPEAL

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TRANSCRIPT

Proceedings Volume I

Proceedings Volume II

File No. 3

EXHIBITS

Petitioner's Exhibits No. 1 thru 10 inclusive

Respondent's Exhibits A thru J inclusive

- THE END -

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

POLAR AIRWAYS, INC., Appellant, v. ALASKA TRANSPORTATION COMMISSION, ALASKA AERONAUTICAL INDUSTRIES, INC., Appellee.	Superior Court No. Agency File No.

RECORD ON APPEAL

TABLE OF CONTENTS-EXHIBITS

File No. 3

PETITIONER'S EXHIBITS

No. 1	copies of receipts
No. 2	color photo of airplane No. 3
No. 3	Petition with 1,001 signatures

RESPONDENT'S EXHIBITS

No. A	color photo of two aircraft
No. B	receipts for hospital bills
No. C	account's ledger

- THE END -

[Insert name of agency; e.g.,

STATE OF ALASKA

BOARD OF DENTAL EXAMINERS]

In the Matter)
)
)
)
)
_____) No. _____

STATEMENT OF ISSUES

The State of Alaska Board of Dental Examiners, having considered the application of [insert name of applicant] for [identify license applied for] finds as follows:

1. The Board of Dental Examiners pursuant to [cite the statutory or regulatory basis for the agency action, e.g., AS 08.36.070] considered the application of [insert name of applicant] for [identify license applied for].

2. On or about [insert date and name of applicant] applied for [identify license applied for].

3. On or about [insert date, name of applicant and grounds for denial; e.g., was convicted of the crime of embezzlement. It is advisable in such cases to attach to the statement of issues a certified copy of the judgment of conviction].

4. The crime of embezzlement is evidence that [insert name of applicant] is not of good moral character as required by AS 08.36.110(2).

5. Pursuant to AS 08.36.110(2), the application of [insert name of applicant] for [identify license applied for] is denied.

DATED: _____.

[provide for signatures for board officers as appropriate]

BEFORE THE ALASKA STATE BOARD OF

_____

In the Matter of	)	
	)	
	)	
	)	
	)	
	)	
Respondent.	)	
_____	)	File No. _____

REQUEST FOR APPOINTMENT OF HEARING OFFICER

The Board of _____ requests the appointment of a hearing officer in the matter of the (statement of issues/accusation) against _____, respondent.

This matter should be heard in _____(location).

cc: Dept. of Law

BEFORE THE ALASKA STATE BOARD OF

_____

In the Matter of)
)
)
)
)
Respondent.)
_____) File No.

NOTICE OF HEARING

You are notified that a hearing will be held before the _____ (agency) at _____(address), _____(city), Alaska, on the _____ day of _____, 19___, at _____m. upon the charges made in the accusation served upon you. You may be present at the hearing, may be but need not be represented by counsel, may present any relevant evidence, and will be given full opportunity to cross-examine all witnesses testifying against you. You may have subpoenas issued to compel the attendance of witnesses and the production of books, documents or other things by applying to _____(agency).

ALASKA STATE BOARD OF

_____

By: _____
Hearing Officer

BEFORE THE ALASKA STATE BOARD OF

_____

In the Matter of)
)
)
)
Respondent.) File No.
)
_____)

RESOLUTION OF THE ALASKA BOARD OF

_____

The Board of _____ hereby authorizes its president to issue subpoenas and subpoenas duces tecum pursuant to AS 44.62.430 at the request of a party and in accordance with the rules of civil procedure and prior to the appointment of a hearing officer in any contested case.

DATED at _____, Alaska, this _____ day of _____, 1979.

_____

_____

_____

_____

BEFORE THE ALASKA STATE BOARD OF

_____

In the Matter of	)	
	)	
	)	
	)	
Respondent.	)	File No.
	)	
_____	)	

The Board of _____

PURSUANT TO AS 44.62.450(a) orders that the hearing in the above-captioned matter be presided over by a hearing officer hearing the case alone.

DATED at _____, Alaska, this _____ day of _____, 1978.

ALASKA STATE BOARD OF

_____

By: _____

BEFORE THE ALASKA BOARD OF

_____

In the Matter of)
)
)
)
)
)
Respondent.)
_____) File No. _____

NOTICE TO COUNSEL

_____ has been appointed by the Governor as hearing officer in the above captioned matter. All future correspondence and motion papers should be directed to the hearing officer at the following address:

_____

DATED at Juneau, Alaska, this _____ day of _____, 197__.

_____
Richard Long
Chief Investigator
Division of Occupational
Licensing

STATE OF ALASKA

THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE

AUDIT DIVISION
POUCH W—ALASKA OFFICE BUILDING

FINANCE DIVISION
POUCH WF—STATE CAPITOL

JUNEAU, ALASKA 99811

November 15, 1979

The Honorable Brad Bradley
P.O. Drawer 8-Q
Anchorage, AK 99508

Dear ~~Senator~~ Brad Bradley:

During the 1980 session, the Legislature will continue to be involved with "sunset" reviews of several occupational licensing boards and commissions. We will be deciding to continue, change or terminate these boards and commissions, as well as several related licensing statutes.

Several questions and issues will have to be addressed in reaching those decisions. Although many will be unique to individual boards, some will be common to all occupational licensing and regulation.

Enclosed is a booklet on occupational licensing prepared by the Council on State Governments. This short booklet is very helpful in defining several of the basic questions and issues which will be addressed in the coming session.

Sincerely,

Jim

Jim Duncan, Chairman
Legislative Budget & Audit
Committee

Enclosure

31-Q1LH

11/24

Forgive Chris,

Remind me to

read this before

Wapt sunset

B

The Council of State Governments

OCCUPATIONAL LICENSING: OCCUPATIONAL LICENSING:

OCCUPATIONAL LICENSING:

The Council of State Governments

The Council is a joint agency of all the state governments—created, supported, and directed by them. It conducts research on state programs and problems; maintains an information service available to state agencies, officials, and legislators; issues a variety of publications; assists in state-federal liaison; promotes regional and state-local cooperation; and provides staff for affiliated organizations.

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San Francisco, California 94108
(415) 986-3760

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Hall of the States, 444 North Capitol Street
Washington, D.C. 20001
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Occupational Licensing:
Questions a Legislator Should Ask

Benjamin Shimberg
Associate Director
Center for Occupational and Professional Assessment
Educational Testing Service
Princeton, New Jersey

and

Doug Roederer
Special Assistant
The Council of State Governments
Lexington, Kentucky

Editor
Ralph J. Marcelli

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THE COUNCIL OF STATE GOVERNMENTS
Lexington, Kentucky

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Contents

Foreword

In 1952 the Council of State Governments published *Occupational Licensing Legislation in the States.* That publication reported licensure of more than 70 occupations, trades, and professions—from abstractors to yacht salesmen. Today state government has a renewed interest in occupational and professional licensing as a result, in part, of the increasing number of requests for licensure.

The Council of State Governments is pleased to join with the Educational Testing Service (ETS) in publication of this guide. It is intended to assist state policymakers confronting decisions regarding the credentialing of various occupations and professions.

The material was prepared by Dr. Benjamin Shimberg, Associate Director, Center for Occupational and Professional Assessment, ETS, with assistance from Doug Roederer of the Council of State Governments' staff. The Council is indebted to the authors and a number of individuals who gave generously of their time in reviewing early drafts of this manuscript. They include Mrs. Karen Greene, Manpower Analyst, Employment and Training Administration, U.S. Department of Labor; Mrs. Ruth Herrink, Director, Virginia Department of Professional and Occupational Regulation; Ms. Corrine Larson, Director, and Dr. Colleen Coughlan, Supervisor of Special Studies, Health Manpower Program, Minnesota Department of Health; Dr. Raymond Salman, Director, Division of Professional Licensing Services, New York State Department of Education; Neil Duncliffe, Lexington Office, and Alec Sutherland, Midwestern Office, the Council of State Governments; Dr. Albert P. Maslow, Director, and Dr. Gordon Cook, Staff Associate, Center for Occupational and Professional Assessment, ETS.

A legislative handbook on occupational and professional regulation is currently in preparation under a grant from the Employment and Training Administration, U.S. Department of Labor, to the Educational Testing Service. The handbook will deal with a variety of regulatory issues in considerable detail and will present action options for consideration. The handbook is being developed cooperatively by Dr. Benjamin Shimberg and his associates at Educational Testing Service, with assistance from the Council of State Governments. It is expected that the handbook will be ready for distribution in the spring of 1979.

Herbert L. Wiltsee
Executive Director
The Council of State Governments

Lexington, Kentucky
March 1978

Introduction

Licensing is a process by which an agency of government grants permission to an individual to engage in a given occupation upon finding that the applicant has attained the minimal degree of competency required to ensure that the public health, safety, and welfare will be reasonably well protected.

Licensing makes it illegal for anyone who does not hold a valid license to engage in the occupation, profession, trade, etc. covered by the statute. Thus, the power to license can be used to deny individuals the legal opportunity to earn livelihoods in their chosen fields. This is an awesome power—one that must be exercised judiciously.

The public seems to have accepted licensing as a restriction that is needed to protect society from incompetents and charlatans. Proponents of licensing—especially trade and professional groups—maintain that licensing benefits the public by assuring consumers of high-quality goods and services.

Critics of licensing believe otherwise. Consumer groups are asking, "Who benefits most from licensing, the public or the group being regulated?" They cite studies funded by the U.S. Department of Labor, and other agencies, which show that licensing boards often use their powers to restrict the supply of practitioners. These restrictions, say consumers, eventually affect what they must pay for services. (Selected references relating to licensing and certification are at the end of the report.)

The Federal Trade Commission (FTC) has noted that many licensing boards prohibit price advertising and that a few also prohibit competitive bidding. The FTC recently proposed rules that would outlaw such restrictions. In the meantime, the U.S. Supreme Court has decided that it is unconstitutional for licensing boards to prohibit pharmacists from advertising the price of prescription drugs or lawyers the cost of certain services. The Antitrust Division of the U.S. Department of Justice has also initiated legal action against the State Board of Accountancy in Texas, charging that its rules against competitive bidding by accountants violate the federal antitrust laws.

Nevertheless, many new licensing laws continue to be enacted each year. At a recent session, one state legislature considered bills to license auctioneers, home improvement contractors, pet groomers, sex therapists, television repairmen, electrologists, data processors, appraisers, professional salespersons, and a dozen other groups. Faced by such an onslaught, how can legislators decide when

it would be in the public interest to license members of an occupation?* What questions should legislators ask? What alternative forms of regulation should be considered before licensure is granted?

This booklet attempts to put licensing into perspective by calling attention to a number of issues that should be considered:

- Deciding whether state governments should regulate an occupational group at all.
- Drafting the regulatory statute so that it is fair to practitioners and consumers alike.
- Establishing an administrative structure that promotes accountability and public confidence.

These issues are discussed in Chapter 1.

Chapter 2 provides a guide for questioning groups that are seeking regulation of an occupation. The questions may be posed in written form to give sponsors of the legislation ample opportunity to assemble the necessary data, or they can be put orally during the course of hearings on the legislation.

Chapter 3 describes efforts in three states—California, Minnesota, and Virginia—to bring about change in their regulatory structures. In each instance, names of key contacts are provided for those wishing more information.

*Throughout this report, the term occupation should be understood as including those who engage in an occupation, profession, trade, etc.

1. Guidelines for Occupational Regulation

The following guidelines for planning or reviewing a regulatory program grew out of a series of regional conferences convened in 1975 and 1976 for the purpose of identifying ways to improve occupational regulation.[1] Participants in the conferences included legislators, administrators of state licensing programs, attorneys general, and consumer officials. The problems, issues, and concerns voiced by participants and the solutions proposed provided the basic material from which the guidelines and accompanying text were developed.

Should State Government Regulate an Occupational Group?

Regulation should meet a public need.

Requests for licensure seldom come from an outraged public seeking to end some intolerable abuse. Usually they are made by occupational associations acting on behalf of practitioners.

Unfortunately, consumers are rarely on hand at legislative hearings when such regulatory proposals are under consideration. They should be, but in most areas they are poorly organized and lack the skills and resources to assemble and effectively present data which would show the likely impact of regulation on their pocketbooks. In a few states, legislatures have created consumer advocacy agencies to intercede on behalf of consumers before legislative committees and regulatory boards. The Consumer's Council in Massachusetts and the Office of the Public Advocate in New Jersey are two such agencies which show promise of providing consumers with at least a small voice in regulatory matters.

Proponents of licensure, be they the public or an occupational group, frequently argue that regulation is needed to protect the public health, safety, and welfare. Often, however, the occupational group is the major beneficiary of a licensure law. Licensed practitioners gain an exclusive right to deliver services. They may then ask the board, made up of fellow practitioners, to use its powers to restrict entry into the field by setting high education and experience requirements, giving difficult tests, and erecting barriers to keep out practitioners from other states. Thus, the licensed group may establish monopoly conditions which enable it to control the availability and cost of services and restrict competition by prohibiting advertising and competitive bidding. Such practices often operate to raise costs to consumers.

To determine whether an occupational group should be licensed, each proposed licensure program should be carefully scrutinized to determine the precise nature and seriousness of the need. There are many situations where the public needs to be protected from dangers posed by unqualified practitioners, but

not every service represents a threat to the public health, safety, and welfare if a practitioner is unqualified.

The overriding questions that a state must answer when evaluating the need for licensing are: (1) whether the unlicensed practice of an occupation poses a serious risk to the consumers' life, health, and safety or economic well-being; (2) whether potential users of the occupational service can be expected to possess the knowledge needed to properly evaluate the qualifications of those offering services; and (3) whether benefits to the public clearly outweigh any potential harmful effects such as a decrease in the availability of practitioners, higher costs of goods and services, and restrictions on optimum utilization of personnel.

Government should provide only the minimum level of regulation.

Even when an analysis of need shows that there are compelling reasons to regulate an occupation, it does not necessarily follow that licensure is the most appropriate mechanism for doing so. Licensure restricts the scope of practice so that it becomes illegal for unlicensed individuals to provide the services in question. That is why licensure should be used only as the remedy of last resort.

Before legislators agree to license persons in an occupation, other regulatory approaches short of licensure need to be explored. Among the alternatives to individual licensing are the enforcement or strengthening of existing statutes relating to deceptive or unfair trade practices. Another is the assignment of inspection or other supervisory authority to an existing agency, i.e., a department of health or department of licensing and registration. A third alternative is to license establishments rather than individuals. For example, restaurants are licensed, not the individuals who prepare and serve food.

If none of these approaches is considered adequate by a state, it may be necessary to consider ways to regulate individuals. However, the method of regulation and the degree to which it restricts practice should bear some relationship to the seriousness of the harm that is likely to result from the absence of regulation. Two approaches, less restrictive than licensing, are registration and certification.

Registration is an appropriate form of regulation when the threat to life, health, safety, and economic well-being is relatively small and when other forms of legal redress are available to the public. In its simplest form, registration requires that an individual file his or her name and address with a designated agency. There is usually no preentry screening by a regulatory board. Registration in this form does little more than provide a roster of practitioners. However, it is also possible to have a registration requirement in combination with minimum practice standards set by the agency. Thus, while registration would not be exclusionary, it would subject registrants to minimum standards and thereby provide some protection to the public.

Certification is a form of regulation which grants recognition to individuals who have met predetermined qualifications set by a state agency. Only those who

meet the qualifications may legally use the designated title. However, noncertified individuals may offer similar services to the public as long as they do not describe themselves as being "certified." Certification is especially appropriate when the public needs assistance in identifying competent practitioners, but where the risks to health and safety are not severe enough to warrant licensure.

There is considerable confusion surrounding the terms "registered" and "certified." Indeed, they are sometimes used interchangeably with licensure. For example, "registered nurses" are actually licensed nurses because it is illegal for anyone to practice nursing unless he or she has been granted a license by a state nursing board. Confusion is further compounded by the fact that many nongovernmental agencies, such as professional societies, offer "certification" to those who meet predetermined qualifications.

If nothing else, the confusion in terms reflects a search for alternatives to the more stringent remedy of occupational licensing. Examples of state experimentation with these alternatives are found in Chapter 3.

If an occupation is to be licensed, its scope of practice should be coordinated with existing statutes to avoid fragmentation and inefficiency in the delivery of services.

Occupational groups seeking mandatory licensing usually argue that it is necessary to have their scope of practice defined broadly in order to prevent unqualified persons from engaging in any aspect of the occupation. However, as technology expands and new occupational categories emerge, members of occupational groups often find that the existing broad scope of practice statements bring them into conflicts with already licensed occupational groups. Such conflicts may prevent them from functioning in areas where they are qualified by training to provide services.

Restrictions imposed by overly broad scope of practice statements stem, in part, from a failure to recognize that many groups within a system (such as the health delivery system) have overlapping functions. When such groups are granted mandatory licensure based on broad scope of practice statements, certain undesirable consequences, such as fragmentation of services, underutilization of manpower, and unnecessary proliferation of occupational categories, are likely to result.

A field becomes fragmented when many discrete specialty groups, each with its own scope of practice statement, obtain licensure. Fragmentation may be signaled when an already licensed group seeks to prevent an emerging group with a different occupational label from sharing the work.

Underutilization occurs when paraprofessionals, medical auxiliaries, or groups which combine parts of several already regulated occupations find that their utilization within the delivery system is impeded by jurisdictional conflicts

and by prohibitions against the delegation of functions. Such an uncoordinated delivery system forces employers to hire one of each kind of practitioner. The state policy focus should be on competence and efficiency and the avoidance of exclusive allocation of functions to certain named groups.

Proliferation or pressure to license new occupational categories sometimes happens when practice restrictions of one group prevent members of another group from providing services that the latter group is qualified to provide. For example, in some states psychologists have claimed that the provision of personal-social advisement services by counselors (with M.A. or Ph.D. degrees) constitutes an infringement on the Psychology Practice Act. The group prevented from practicing—in this case, counselors—is then likely to seek its own licensure law in order to gain statutory recognition that would legitimatize its activities.

Rather than license a new and discrete occupation, the legislature might consider alternatives such as narrowing the overly broad existing definition of scope of practice or including the new group within the definition of competent practitioners.

Licensure Laws Should Be Fair and Operate to Protect Practitioners and Consumers Alike

Requirements and evaluation procedures for entry into an occupation should be clearly related to safe and effective practice.

Regulatory laws are often exclusionary because they include requirements—such as age, years of formal education, citizenship, high license fees, and residency—which bear little or no relationship to effective performance on the job. Irrelevant requirements should be eliminated.

The completion of an approved training program and certain experience requirements are usually reasonable requirements. Yet even such requirements can become exclusionary if the time involved in training is excessive or if needless restrictions are imposed. For example, a requirement that an applicant's experience must have been acquired in a specific city or state would be difficult to justify as reasonable.

While most applicants for entry into a regulated occupation usually apply after completion of an approved program of training, the law should make allowances for those who may have acquired their competence outside the formal educational system—in the armed services, for example. It should also be recognized that for certain occupations no formal training programs presently exist. Drug and alcohol counselors, for example, often acquire their knowledge of chemical dependency through on-the-job training and experience. Ways must be found to evaluate such individuals, not in terms of their formal training, but in

terms of their demonstrated competence to perform the functions required by the job.

Indeed, all testing and evaluation procedures used in making licensing or certification decisions need to be scrutinized to be sure that they are fair to candidates and that they meet professional testing standards. Further, in those fields where employers are required by law to hire only individuals who are licensed or certified, the state boards or agencies which issue these credentials should be aware that they may be subject to the proposed "Uniform Guidelines on Employee Selection Procedures."[2] These uniform guidelines stipulate that evaluation procedures which affect employment decisions must not discriminate unfairly against members of minority groups, women, or other classes protected under Title VII of the Civil Rights Act of 1964. In addition, when the tests used in the licensing or certification process result in significant disparities in passing rates among various applicant groups, and there is a legal challenge, the board or agency which issued the license or certificate may be required to demonstrate that its procedures, including the test in question, meet the standards set forth in the uniform guidelines.

Every out-of-state licensee or applicant should have fair and reasonable access to the credentialing process.

When two states have a reciprocity arrangement, licensed practitioners from one state will be licensed by the other without further examination. However, where no such agreement exists, licensed applicants from other states may be required to undergo the entire licensing process—including written and performance examinations—regardless of their experience or qualifications. This can work a real hardship on qualified practitioners who have been out of school for many years because examinations used for initial entry tend to emphasize what is currently being taught in occupational training programs. With the passage of time, most professionals forget many of the theoretical concepts as well as specific occupational information that they learned while in school, especially if these are seldom used in their day-to-day practice. However, as they encounter new problems and situations in the course of their practice, they must acquire new knowledge and skills in order to meet these challenges successfully. Thus, the test used to screen recent graduates may not be the best or the most effective way to assess the competence of those who have been out in practice for a number of years.

Hardships can also be created by the examination process itself. In dentistry, for example, out-of-state licensees and applicants must supply their own patients for the clinical portion of the examination. The applicant must often literally walk the streets in search of individuals in need of specific types of dental work who are willing to have the work done during the course of the licensing examination. Such people are often hard to find.

Many people believe that licensure by endorsement is a more equitable procedure. Under such an arrangement, individuals who are already licensed in one state may submit their credentials for evaluation by the state to which they wish to migrate. Applicants who are as qualified as those practitioners in the state who were graduated at about the same time would be licensed without requiring them to take the initial application examination.

In order for such endorsement licensing to work, states need to adopt standards of entry that are roughly comparable to those of other states. One technique is to make use of national examinations, when such examinations are available. If an applicant has already passed an examination which is similar or equivalent to the examination given by his new state, the need for reexamination should be questioned. Any state agency that wishes to adopt standards substantially higher than those which prevail elsewhere should be required to demonstrate that these higher standards would clearly be in the public interest and not calculated to exclude qualified practitioners from entering the state.

Once granted, a credential should remain valid only for that period during which the holder can provide evidence of continued competency.

Regulatory agencies usually make a strenuous effort to ensure that applicants are initially competent, but they are often much less zealous in monitoring the competence of practitioners after they have been licensed. Thus, the public has no assurance that licensees have kept abreast of developments and can still provide high-quality services.

A number of strategies have been proposed for assuring continued competence. While many states have adopted mandatory continuing education as a condition of relicensure, there is no evidence available to indicate that mandatory continuing education assures competence. Indeed, consumer groups are asking whether the cost of such education, which ultimately must be borne by the public, will provide consumers with anyy added protection against incompetent practitioners.

The idea of reexamination as a condition of relicensure has been strongly resisted by licensees. However, a number of nongovernmental medical specialty certification boards have recently demonstrated that it is possible to develop written tests and performance measures which simulate important aspects of the physician's work. It remains to be seen whether periodic reexamination is a practical and cost-effective way of dealing with the problem of continued competency.

Peer professional evaluation—through direct observation or review of records—has been proposed as a procedure that might be used in place of or as a supplement to periodic reexamination. Unfortunately, doubts about the dependability of peer review procedures have been raised. Studies show that qualified experts often do not agree as to what constitutes acceptable

performance; neither do they apply standards uniformly. Clearly, more attention needs to be paid to defining "acceptable performance" and to training evaluators in the use of standards before peer review procedures are widely applied.

A vigorous enforcement and discipline policy for those found unfit to practice has also been proposed. This approach assumes (1) that most practitioners, acting in their own self-interest, make an effort to keep abreast of their fields; and (2) only a small minority, for a variety of reasons, fails to maintain its competence. Two such minorities are inactive and high-risk practitioners.

At present most inactive practitioners can preserve their right to practice by simply paying the renewal fee. By keeping their licenses in force, they are able to resume practice at any time even though they may have failed to maintain their competence. States should consider requiring that practitioners who have been inactive for a substantial period to demonstrate that they are still competent.

A system needs to be developed to identify high-risk practitioners against whom numerous complaints or malpractice actions are lodged. If there is evidence of negligence or incompetence following an investigation, such individuals should be subject to disciplinary action. Serious offenders could have their licenses suspended or revoked. Less serious offenders could be placed on probation, required to participate in relevant continuing education programs, or to work under supervision for a stated period.

This "enforcement" approach is selective as it is concerned only with those practitioners who are the subject of complaints. In this respect it is likely to be more cost-effective than a system which subjects all practitioners to rigid educational or evaluation procedures.

The Regulatory Structure and Board Composition Should Promote Accountability and Public Confidence

The public should be involved in the regulatory process.

For many years, trade and professional groups fostered the idea that only members of their own occupational group were qualified to make judgments about entrance standards, examination content, or disciplinary matters. This professional mystique argued that the public had no role to play in the regulatory process.

In recent years this view has been challenged. Consumers now argue that since regulation affects their vital interests, they have a right to share in the decisionmaking process. They point out that every day laymen legislators and jurors must make decisions in highly technical areas. They are able to do so by utilizing the testimony of experts to set forth the facts and clarify the issues.

There has been a growing movement to place public members on regulatory boards to ensure that there will be input from groups other than those representing the regulated occupation. Those who favor the idea believe that the

presence of public members will help to break up the in-group psychology that often prevails when all board members are practitioners. Ideally, public members will provide a point of view otherwise absent on a board composed solely of license holders.

Initial experience with public members often was not favorable because those appointed lacked the qualifications for effective service on a board. Recent experience suggests that public members can make significant contributions when they have backgrounds equipping them to deal with problems and issues likely to come before the board, a strong interest in serving, sufficient time to devote to board activities, and prior experience in community affairs so that they know how to get things done in the public arena.

While public members may not know much about the technical aspects of an occupation, they may nevertheless contribute to board deliberations by raising questions about such topics as the appropriateness of entrance requirements, board rules, tests, fees, and disciplinary procedures.

How many public members should be on a board? There is no simple answer, but if impact is the major criterion, one public member is probably too few, two would be the minimum, and three or four would increase the likelihood that the impact of public members would be felt, particularly if the board had from seven to 10 members. In California, the legislature has decreed that for certain boards a majority shall be public members. (See Chapter 3 for a case study of the California experience.)

Complaints should be investigated and resolved in a manner which is satisfactory and credible to the public.

Many regulatory agencies are perceived as overly protective of those whom they regulate. This has led consumers to question whether professionally dominated boards are willing to deal forcefully with their peers when complaints are received from the public. Consumers also express doubts that they will receive a fair hearing before boards composed solely of licensed practitioners.

To remedy the situation, a number of states have centralized complaint handling in independent agencies whose staffs are not beholden to the regulatory board or the occupational group. Where investigation reveals that a practitioner has been incompetent or has violated board rules, such agencies can initiate disciplinary action promptly without awaiting consent from the board.

The decision of an independent agency is more likely to satisfy the consumer as a fair decision than one rendered by the practitioner's peers. Unfortunately, disciplining an errant practitioner will seldom provide relief to the client who has suffered physical injury or financial loss. A number of states have established restitution funds to which all licensed attorneys and real estate brokers contribute. Such funds are used to reimburse clients for determinable losses caused by unscrupulous practitioners. This spares clients the necessity of seeking

relief in the courts, with all the attendant costs and long delays. However, the court route remains open should the client wish to use it.

Procedures for evaluating the qualifications of applicants and disciplinary proceedings against licencees should be conducted in a fair and expeditious manner.

The constitutional rights of applicants are not always safeguarded in the present system which makes the regulatory board virtually the sole judge of who shall and shall not be credentialed. For example, applicants who are rejected on the basis of qualifications or for failing an examination may be forced to take their appeal to the same board that passed on their qualifications initially, or which was responsible for preparing and grading the examination that they failed. Arguing that such applicants always have recourse to the courts ignores the simple truth that litigation is both costly and time consuming. If licensed practitioners cannot work, they are unlikely to have the resources to pursue a lengthy legal battle. Clearly, the solution lies in providing applicants with an independent administrative appeal route either through the centralized licensing agency or through a separate board, such as that provided by the New York State Board of Regents.

The licensee who is charged with incompetence or unprofessional conduct faces the loss of his or her livelihood and is entitled to due process protection. Such protection is absent when members of a regulatory board serve multiple functions (investigator, prosecutor, judge, and jury). Once again, such investigations should be conducted by an independent unit. Where probable cause is found, the evidence should be presented before a hearing officer or an administrative judge to establish the facts and determine whether a law or board rule has been violated. To avoid allegations of favoritism, some boards rely on the hearing officer to recommend appropriate sanctions.[3]

In a number of states, boards find that they are enjoined from taking disciplinary action against errant practitioners while civil or criminal actions against such practitioners are still pending. This means that a licensee charged with negligence, incompetence, or serious breach of conduct may continue to provide services even when the evidence suggests that he or she could be a menace to society. To rectify such situations, states are granting regulatory agencies emergency powers which will enable them to suspend an individual's license for a given period where continued practice would not be in the public interest.

The purpose of regulation is to protect the public, not the economic interest of the occupational group.

Boards sometimes make decisions that serve the economic interests of the occupational group rather than those of the public. For example, a board may

tighten entry qualifications or raise the passing score in order to limit the supply of practitioners. They may also pass rules that prohibit price advertising or competitive bidding. Such rules often characterize competitive practices as "unprofessional conduct." Restrictions on the flow of truthful information concerning fees, qualifications, and professional attainments clearly hamper the consumer's ability to shop for services. Competition is lessened, thereby reducing downward pressure on fees.

Many licensing statutes substantially adopt the private ethical code of the profession. These ethical codes are the source of many anticompetitive rules and statutory provisions. Lawmakers should be wary of edifying into public law ethical codes clearly designed to serve and "dignify" the profession. One possible unintended effect of giving specific legislative sanction to prohibitions against competitive bidding, for example, might be to place such practices beyond the reach of federal antitrust law.[4]

The administrative structure should promote efficiency, policy coordination, and public accountability.

While autonomous regulatory boards continue to exist in many states, there is a growing realization that such an arrangement, besides being inefficient from the standpoint of optimal use of state resources, makes coordination and effective oversight very difficult.

Three widespread practices tend to contribute to board autonomy. They are (1) boards are often housed in their own building or rented office space, physically separated from other offices of state government; (2) boards frequently generate their own revenue through the collection of license fees, and thus exist outside the usual budget and appropriation mechanisms of the legislature; and (3) trade and professional associations frequently are vested with the power to nominate board candidates. This practice contributes to the notion that the board is an extension of the association rather than an arm of state government.

Some states have created umbrella agencies to provide administrative, clerical, and fiscal services to the various boards. These are usually "housekeeping" agencies headed by an administrator who has no authority to coordinate board activities or to question board policies. This lack of coordination sometimes results in the setting of standards or promulgation of rules by a board without taking into consideration the probable impact that these may have on other boards or agencies.

Some critics of such "housekeeping" agencies say that the authority of the administrator needs to be strengthened if policy coordination is to occur. They urge that the director have power to hire and fire board staff, control board budgets, review and approve proposed rules and regulations, initiate and conduct investigations, provide legal services to boards, and see that disciplinary

proceedings are conducted expeditiously and with adequate due process safeguards. Under such an arrangement, boards would be largely advisory. They would concentrate on formulating and proposing policies, establishing professional or technical standards, developing examinations, and recommending sanctions in disciplinary matters.

Occupational groups tend to be critical of the strong administrator approach, arguing that there is not sufficient evidence of wrongdoing to suggest that such a proposal is necessary. Moreover, they believe that such an arrangement places too much power in the hands of a single individual. To counter this latter criticism, it has been proposed that, as an alternative to a strong director, rulemaking and decisionmaking authority be placed in a board or commission made up of public members without financial, educational, or marital ties to any of the regulated occupations. Such a group would be better able to evaluate proposed rules and other board actions from a public interest viewpoint. In New York State, for example, where professional boards serve primarily in an advisory capacity, the New York State Board of Regents, a lay board, has decisionmaking authority.

The system used to finance regulatory activities can contribute to the accountability of individual boards and to the effectiveness of the overall regulatory program.

The tradition of financing regulatory activities out of income from fees has contributed to the strength and durability of many autonomous boards. Because such boards do not have to come before the legislature to obtain funds, they are seldom required to justify their budgets or to demonstrate that they are serving an important public purpose. In a very real sense, the fiscal autonomy of boards contributes to their lack of accountability. Moreover, when any of these boards has income in excess of their expenses, such funds are usually placed in segregated accounts under the control of the boards. Board members tend to think of these funds as belonging to the occupational group to be used solely for the benefit of the group.

Many people view a change in the financial structure of licensing as an effective way to make boards more accountable. They argue that since regulation is intended to protect the public, all regulatory activities should be funded, at least in part, by the taxpayers at large. They urge that any income from fees go directly into the general fund and that individual boards be allocated their operating expenses through the normal budgetary process.

Those who oppose this general fund approach express a concern that the legislature may increase regulatory fees solely for the purpose of obtaining additional revenue and that this would constitute an unfair tax on practitioners in regulated occupations. Fears are also expressed that in periods of financial stringency, board budgets would be cut and regulatory activities curtailed, even when income from fees is adequate to support the program.

Some of these fears have been allayed in states which place all income from fees into an account administered by the umbrella agency. Operating budgets for the various boards are allocated by the agency on the basis of need. This pooling arrangement makes it possible to use funds from financially strong occupational boards—usually those with a large number of licensees—to help defray the operating expenses of the smaller and financially weaker boards. Income from fees also covers the cost of operating the agency and providing all boards with essential services. The agency is, of course, accountable to the legislature for the overall effectiveness of the regulatory program.

2. Questions Legislators Should Ask

Questions legislators should ask of groups seeking regulation follow and have been drawn from a variety of sources. For example, the Bateman Commission Report to the New Jersey Legislature[5] was one of the earliest efforts to develop licensing criteria and procedures for scrutinizing applicant groups to determine (1) whether a need for regulation exists and (2) what mode of regulation would be most appropriate.

Staffs of the Educational Testing Service and the Council of State Governments have attempted to synthesize material from these and other sources in order to provide a comprehensive list of questions that legislators may wish to ask of groups sponsoring regulatory legislation. Not all questions will be applicable in every situation. However, the topics covered provide a useful checklist not only for legislators but also for groups sponsoring legislation as well.

What Is the Problem?

- Has the public been harmed because the occupational group has not been regulated?
  - To what extent has the public's health, safety, or economic well-being been harmed?
- Can the claims of proponents of regulation be documented?

Why Should the Occupational Group Be Regulated?

- Who are the users of services offered?
  - Are they members of the general public who lack knowledge necessary to evaluate qualifications of those offering services?
  - Are they institutions or qualified professionals who have the knowledge to evaluate qualifications?
- What is the extent of autonomy of practitioners?
  - Is there a high degree of independent judgment required of practitioners?
  - How much skill and experience are required in making these judgments?
  - Do practitioners customarily work on their own or under supervision?
  - If supervised, is supervisor covered by regulatory statute?
    Note: There is little justification for licensure if practitioners work under supervision. If regulation is needed, it should be the supervisor who is regulated.

What Efforts Have Been Made to Address the Problems?

- Has the occupational group established a code of ethics?
  - To what extent has it been accepted and enforced?
- Has the occupational group established complaint-handling procedures for resolving disputes between practitioners and public?
  - How effective has this been?
- Has a nongovernmental certification program been established to assist the public in identifying qualified practitioners?
- Could the use of applicable laws or existing standards solve problems?
  - Use of unfair and deceptive trade practices laws.
  - Use of civil laws such as injunctions, cease and desist orders, etc.
  - Use of criminal laws such as prohibitions against cheating, false pretenses, deceptive advertising, etc.
  - Use of existing standards such as construction codes, product safety standards, etc.
- Would strengthening existing laws or standards help to deal with the problem?

Have Alternatives to Licensure Been Considered?

- Use of an existing agency under legislative control.
- Regulation of business employer rather than individual practitioner, e.g., licensing restaurants rather than cooks or waiters/waitresses.
- Registration of practitioners coupled with minimum standards set by state agency.
- Certification of practitioners, thereby restricting use of title to those who have demonstrated competence. Occupational group, however, would not have control of field of practice.
- Why would the use of the above not be adequate to protect the public interest?
  - Why would licensing be more effective?

Will the Public Benefit from Regulation of the Occupation?

- How will regulation help public identify qualified practitioners?
- How will regulation assure that practitioners are competent?
  - What standards are proposed for granting credentials?
  - Are all standards job related?
  - How do these standards compare with those of other states?
  - If standards differ from those of other states, can the difference be justified?
  - Are there training and experience requirements?
    - —Are these requirements of excessive duration when compared with other states? Why?
    - —Does training include supervised field experience? If so, is an additional experience requirement justified?

- Are there restrictions on where or how experience may be acquired? Why?
- Will alternative routes of entry be recognized?
  - —Will applicants who have not gone through prescribed training/experience be eligible for licensure or certification?
  - —Will licensure or certification in another state automatically allow an individual to be credentialed in this state?
- Will applicants for licensure or certification be required to pass an examination?
  - —Does an examination already exist?
  - —Does it meet professional and legal testing standards (see footnote 2 on proposed uniform quidelines)?
  - —If no test exists, who will develop it and how will development cost be met?
- Is there a "grandfather" clause in licensure?
  - —Why is it necessary?
  - —Will such practitioners be required to take a test at a later date?

■ What assurance will the public have that the individuals credentialed by the state have maintained their competence?
- Will license or certificate carry expiration date?
- Will renewal be based solely on payment of fee?
- Will renewal require periodic examination, peer review, evidence of continuing education or other procedures for continued competence?

■ How will complaints of the public against practitioners be handled?
- Will there be a method for receiving complaints?
- Will there be an effective procedure for disciplining incompetent or unethical practitioners?
- What grounds will there be for suspension or revocation of credentials?

■ Is it feasible to establish a restitution fund so that the public will be able to recover money lost through actions of unscrupulous practitioners?

Will Regulation Be Harmful to the Public?

■ Will competition be restricted by the occupational group, e.g., prohibiting price advertising?

■ Will the occupational group control the supply of practitioners?
- By standards more restrictive than necessary?
- By restricting entry of those from other states who have substantially similar qualifications?

■ Will regulation prevent the optimum utilization of personnel?
- Will "scope of practice" prevent individuals from other occupational groups from providing services for which they are qualified by training and experience?

■ Will regulation increase costs of goods and services to consumers?

■ Will regulation decrease availability of practitioners?

- Are there safeguards in law to ensure that the occupational group does not use its powers to promote self-interest over those of public?

How Will the Regulatory Activity Be Administered?

- Will the regulatory entity be composed only of members of occupation?
  - Will there be public members on the regulatory entity? In what percentage?
- What powers will regulatory entity have?
  - Will it review qualifications, examinations, investigations, and disciplining of practitioners?
  - Will it promulgate rules and codes of conduct?
- Will actions of regulatory entity be subject to review?
  - By whom?
  - Will reviewing authority have power to override regulatory entity actions? Which ones?
- How would cost of administering regulatory entity be financed?
  - How will fees be set?
  - Will income from fees go into general fund, departmental fund, or special account controlled by regulatory entity?

Who Is Sponsoring the Regulatory Program?

- Are members of the public sponsoring regulatory program?
- What associations, organizations, or other groups in the state represent practitioners?
  - Approximately how many practitioners belong to each group?
  - What are the different levels of practice in each group?
- Which of the above groups are actively involved in sponsoring regulatory programs?
  - Are other groups supporting the effort? If not, why?

Why Is Regulation Being Sought?

- Is the occupational group seeking to enhance its status by having its own regulatory law?
- Is the occupational group claiming it is prevented from rendering services for which its members are qualified by "scope of practice" statement of another occupation?
  - If so, what efforts have been made to resolve differences?
- Is the occupational group seeking licensure in order to gain reimbursement under federal-state programs or private insurers, e.g., Medicare or Blue Cross?
- Is the public seeking greater accountability of the occupational group?

3. Several Case Studies

Questions are being asked about state schemes for regulating occupations. In some states legislators have undertaken comprehensive studies aimed at producing major structural changes in the licensing system. In others, legislators have focused on specific problems, such as the process by which decisions are made to license or not to license an occupation and whether the scope of practice for an occupation should be expanded. There has also been growing interest in devising ways to make boards mc ccountable. Placing public members on boards represents one such effort.

This chapter presents case studies illustrating approaches that three states have taken in dealing with licensing issues. These case studies are not offered as models to be emulated, but rather as examples of how legislators can break out of conventional molds to deal with regulatory problems.

California Public Member Act

A frequent criticism of licensing boards composed entirely of members of the regulated occupation has been that such boards sometimes use their powers to promote the interests of the occupational group rather than those of the public. Some of the ways in which they may do so are by setting excessively high entry standards or promulgating rules that unduly restrict competition.

In recent years a number of states have added one or more public members (citizens with no particular interest in the occupation or profession governed by the board) to licensing boards in an effort to ensure that the interests of the public would be represented in decisionmaking. Such appointments were often viewed as "tokenism" since public members often lacked qualifications and therefore had relatively little impact on the regulatory process.

To increase public confidence in the regulatory process, S.B. 2116 (known as the Public Member Bill) was introduced into the California legislature in 1977. This act, coupled with S. B. 1039 and S.B. 1987, provided for a majority of public members on all boards except the health-related boards and accountancy, where the ratio is one-third public members to two-thirds licensee members. These bills were enacted and went into effect on January 1, 1977. The California Public Member law recognizes the public policy nature of many decisions faced by regulatory boards and it institutes a system that ensures that these decisions will be made by a board containing a diversity of perspectives.

The Department of Consumer Affairs (the agency assigned responsibility for regulatory boards) conducted a wide-ranging "talent search" to identify prospective board members who were either knowledgeable about the occupation or who had background or specialized skills that would enable them to contribute to the work of the board. Among the initial group of appointees were a no-fee physician offering medical services to ghetto residents to the Board of Medical Examiners, a black female law professor specializing in Title VII of the Civil Rights Act to the Board of Dental Examiners, a lawyer/accountant to the Contractor's Board, and a legal aid attorney to the Collection Agency Advisory Board. Perhaps the most widely publicized appointment was that of Robert Truehaft to the Board of Funeral Directors and Embalmers. Mr. Truehaft is the husband of Jessica Mitford, author of *The American Way of Death*. Another appointment that attracted wide attention was that of an ex-convict to the Board of Vocational Nurses and Psychiatric Technicians. It has been alleged that this board had been pursuing a policy of denying licensure to ex-offenders.

The department feels its experience with public members has been highly rewarding. It now has substantial citizen participation which has brought a new perspective to board meetings and decisions. Assumptions of the past are being challenged and a broader range of skills is available for problemsolving.

To orient and educate new public and licensee board members, the department has scheduled periodic orientation sessions of one to two days

duration and it has developed an *Orientation Manual* that details the administrative and disciplinary processes.

A board member newsletter, *Boardialogue*, describing board member activity and experience and containing information and news of interest to board members, is prepared and distributed every other month.

A congress of board members, made up of one elected delegate from each of the 38 boards, is being organized. The purpose of the congress is to provide a forum for the exchange of information, to develop positions on legislation affecting several boards, to formulate and discuss licensing issues, and to advise the director on future directions.

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A Process for Screening Occupational Groups Seeking Regulation

Minnesota

In an effort to halt the unnecessary proliferation of licensing boards and to achieve greater coordination among existing boards, in 1976 the Minnesota legislature enacted an omnibus credentialing act, which amended an earlier law—the Allied Health Manpower Credentialing Act of 1973. This legislation requires that all health and other human services groups seeking to become regulated go through a review process carried out by the Minnesota Department of Health, Division of Health Manpower, for the Human Services Occupations Advisory Council (HSOAC) which advises the commissioner of the Department of Health.

Any group requesting regulation must first fill out a detailed applicant questionnaire documenting the need for regulation based on factors in authorizing legislation (Minn. Stat., Sec. 214.001). After it has been accepted by the commissioner and HSOAC, the completed questionnaire becomes a public document available for inspection by all interested parties. Staff reviews the application and circulates copies to related occupational groups, appropriate government agencies, and consumer groups. Recipients are invited to point out errors or exaggerations and to comment on problems that may arise if the regulatory proposal is implemented.

A number of public forums are then scheduled in various parts of the state so that interested parties may testify and answer questions with respect to the need for regulation, the mode of regulation, and the type of administrative structure. The forums are conducted by members of a subcommittee of HSOAC. The 26-member council is made up of representatives of the 10 existing health licensing boards, two other regulated groups, three related state agencies, and 11 members appointed by the governor, including five members from groups not credentialed at the present time. HSOAC is staffed by the Division of Health Manpower.

The application, staff reports, minutes, other data, written comments, and testimony received at the public forum are reviewed by the subcommittee. A recommendation, accompanied by supporting documentation, is then transmitted to the full council.

The recommendation may take three forms:

(1) No regulation of the occupation is warranted.

(2) The occupational group should be registered, with administrative authority to be vested in one of the existing health-related licensing boards or in the Minnesota Department of Health. Under registration (known elsewhere as "statutory certification" or "permissive licensure") only practitioners meeting certain qualifications may use a particular title. It would not be illegal for unregistered practitioners in other occupational groups to perform similar tasks, but only those listed on the official register could use the designated title. A

recommendation to register a group may be implemented without action by the legislature.

(3) The occupational group should be licensed, either through one of the existing boards, through the Minnesota Department of Health, or through the creation of a separate board. If the recommendation to license is forwarded by HSOAC to the commissioner of the Department of Health and if the commissioner agrees, he will transmit it to the legislature for appropriate action.

Following recommendation 2, administrative rules for the registration of the group are developed through the assistance of a technical advisory group and comments received through public forums held by HSOAC. When the final draft of the rules is completed, the commissioner of the Department of Health authorizes a public hearing.

Since the inception of the applicant group evaluation process in 1974 nine credentialing decisions have been made. Five decisions for registration were for emergency medical technicians, environmental health specialists, speech language pathologists or audiologists, chemical dependency generalists, and contact lens technicians. In three cases no credentialing—neither licensure nor registration—was recommended. These groups were behavioral analysts, medical laboratory personnel, and ophthalmic medical assistants. One preliminary licensure recommendation for X-ray machine operators is being refined to determine placement of responsibility and to define competency and training levels. If licensure is recommended, this recommendation will be brought to the legislature with all the background work completed for a bill and adequate data to support the recommendation.

Supporters of the program believe that it has helped to reduce unnecessary proliferation of licensure and the further fragmentation of health and human services personnel. An added benefit may be the opportunity which HSOAC provides for interdisciplinary dialogue. This dialogue may encourage licensing board members and others to examine the complexity of the health care delivery system and the issues involved in training, regulating, and utilizing health and human services manpower. With the knowledge gained, decisions can be made from a broader and more informed perspective.

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Virginia

The volume of requests for the creation of new regulatory boards and the need for supplemental legislation dealing with existing boards led the Virginia General Assembly in 1972 to pass Joint Resolution 41, directing the Virginia Advisory Legislative Council to study the statutes relating to professions and occupations and their administration.

The report of the committee (H.D. 31), issued in 1974, recommended the creation of a Commission for Professional and Occupational Regulation. The commission consisted of the director of the Department of Professional and Occupational Regulation as chairperson, the commissioner of the Department of Agriculture and Commerce, the commissioner of the Department of Health, the commissioner of the Department of Labor and Industry, and three public members. In 1977, under a reorganization act, most licensing was transferred to the Department of Commerce. The name of the commission was changed to the Board of Commerce. It now consists of nine public members.

The Board of Commerce (like its predecessor) is charged with the responsibility for determining whether professions and occupations not presently regulated should be regulated and, if so, what degree of regulation should be imposed. The legislation specified that the board shall recommend to the legislature only that degree of regulation needed to protect the public health, safety, and welfare. Before recommending any new regulation, the board is directed to consider as alternatives (1) possible statutory changes in civil or criminal law, and (2) possible statutory changes to grant an appropriate state agency power to impose sufficient inspection and injunction procedures.

If these approaches are deemed inadequate, the board is then directed to consider registration or certification as possible alternatives to mandatory licensing. The following criteria are to be considered in determining the proper degree of regulation.

(1) Whether the practitioner performs a service for individuals involving a hazard to the public health, safety, or welfare, if unregulated.

(2) The views of a substantial portion of the people who do not practice the particular profession, trade, or occupation.

(3) The number of states which have regulatory provisions similar to those proposed.

(4) Whether there is sufficient demand for the service for which there is no substitute not likewise regulated and this service is required by a substantial portion of the population.

(5) Whether the profession, trade, or occupation requires high standards of public responsibility, character, and performance of each individual engaged in the profession, trade, or occupation, as evidenced by established and published codes of ethics.

(6) Whether the profession, trade, or occupation requires such skill that the public generally is not qualified to select a competent practitioner without some assurance that he has met minimum qualifications.

(7) Whether the professional, trade, or occupational associations do not adequately protect the public from incompetent, unscrupulous or irresponsible members of the profession, trade, or occupation.

(8) Whether current laws which pertain to public health, safety, and welfare generally are ineffective or inadequate.

(9) Whether the characteristics of the profession, trade, or occupation make it impractical or impossible to prohibit those practices of the profession, trade, or occupation which are detrimental to the public health, safety, and welfare.

(10) Whether the practitioner performs a service for others which may have a detrimental effect on third parties relying on the expert knowledge of the practitioner.

All requests for licensing must be considered by the Board of Commerce before going to the legislature. The board requires each applicant group to submit detailed information relating to the criteria listed in the law. Hearings are held to give the applicant group an opportunity to present its case and for other groups to appear in support of or in opposition to the request. After the board has reached a decision, it transmits its recommendations to the legislature, along with supporting documentation. If the recommendation is in favor of regulation, a detailed set of agreed-upon rules and regulations must be presented to the legislature before action is taken. In this way the legislature knows beforehand what standards and procedures will be used by the regulatory board, even though these details are not incorporated into the regulatory statute.

Since this screening approach was initiated in 1974, 17 groups have filed formal applications. Of these, seven were recommended for licensure, but only three received approval from the legislature. In addition, two groups were recommended for certification, but neither won approval in the legislature. Each year since 1974, fewer and fewer groups have managed to get through the screening process. In 1977 not a single group was recommended for licensure.

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California Experimental Health Manpower Projects

In the early 1970s, the California legislature was besieged with requests to license new health professional groups. At the same time, some groups (nurses particularly) were practicing functions not allowed under the current practice acts. The legislature was faced with making decisions on licensure with minimal or conflicting information and licensing boards were faced, in some cases, with widespread violations of the practice acts.

In 1973 the legislature enacted A.B. 1503. This legislation granted authority to the California Department of Health to waive practice acts or other licensing laws to enable training programs to train practitioners in expanded functions. Responsibility for administering the program is placed in the Department of Health, Office of Health Professions Development (OHPD).

Projects are generally carried out by universities, community colleges, clinics, or hospitals. They must make application for the waiver to OHPD. Applicants must provide information on the nature of the licensing/law practice act for which waiver is being requested; the tasks trainees will be trained to perform; the training program facilities, instructional materials, and faculty; and plans to evaluate the training program and the trainees. A review committee made up of Department of Health program specialists, licensing board members, professional association members, and others conducts an informal review of the proposed training program. Suggestions from the review committee frequently result in changes in the proposed program. Based on the information collected through the process, the Department of Health director makes a final decision on approval of the applications.

Currently 28 projects are in operation. Since the program began in 1973, more than 6,000 trainees have completed the more than 75 training programs. The majority of the projects and trainees have been in the nursing field.

This program is considered quite successful by the Department of Health, licensing boards, professional associations, and the legislature. By providing for experimentation with an expanded scope of practice for a particular group, the legislature has data and experience upon which to base its decisions regarding licensure. The program has contributed to changes in the Nurse Practice Act (1975) and the Dental Practice Act (1976).

This program operates on an annual budget of less than $80,000. While state government does not fund the training programs, the program does offer state policymakers an opportunity to make decisions about the shape of the health care delivery system and on professional licensure matters.[6]

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Footnotes

1. Benjamin Shimberg, *Improving Occupational Regulation* (Princeton, N.J.: Educational Testing Service, 1976).

2. Draft uniform guidelines were published in the *Federal Register* on December 30, 1977. It is expected that the guidelines will be issued in final form during the spring of 1978. These guidelines expressly cover licensing and certification boards and agencies. There is some question, however, whether such boards and agencies are subject to the requirements of Title VII when carrying out their licensing or certification responsibilities.

3. See, for example, Ruth J. Herrink, "Should Hearing Officers Replace Occupational-Professional Boards?," *State Government*, vol. 51, no. 1, winter 1978.

4. *Parker* v. *Brown*, 317 U.S. 431 (1943), and several subsequent U.S. Supreme Court decisions, including *Bates* v. *Arizona State Bar*, 97 S.Ct. 1810 (1977), suggest that restrictions on competition specifically authorized by a state acting as sovereign are not subject to the Sherman Antitrust Act.

5. New Jersey Professional and Occupational Licensing Study Committee, *Regulating Professions and Occupations* (Trenton, N.J.: 1971).

6. See, *Health Manpower Licensing: California's Demonstration Projects* (Lexington, Ky.: The Council of State Governments, 1978).

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