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

TABLE OF CONTENTS

File No. 2 — Page

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 -