Legal and Ethical Guide
For Board Members

Bureau of Health Care Practitioner Regulation
Division of Medical Quality Assurance
Department of Health

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INTRODUCTION

All members of boards and councils within the Department of Health (hereinafter referred to generically as boards) need to constantly remind themselves that their duty as board members is to serve and protect the public. As explicitly stated by the Florida Legislature in its introduction to the regulatory scheme governing the Department of Health (hereinafter referred to as department) and the boards within it:

(1) It is the intent of the Legislature that persons desiring to engage in any lawful profession regulated by the department shall be entitled to do so as a matter of right if otherwise qualified.

(2) The Legislature further believes that such professions shall be regulated only for the preservation of the health, safety, and welfare of the public under the police powers of the state. Such professions shall be regulated when:

a. the unregulated practice can harm or endanger the health, safety, and welfare of the public, and when the potential for such harm is recognizable and clearly outweighs any anticompetitive impact which may result from regulation.

b. the public is not effectively protected by other means, including but not limited to, other state statutes, local ordinances, or federal legislation.

c. less restrictive means of regulation are not available.

(3) It is further the legislative intent that the use of the term "profession" with respect to those activities licensed and regulated by the department shall not be deemed to mean that such activities are not occupations for other purposes in state or federal law.

(4)

a. Neither the department, nor any board, may create unreasonably restrictive and extraordinary standards that deter qualified persons from entering the various professions. Neither the department, nor any board, shall take any action, which tends to create or maintain an economic condition that unreasonably restricts competition, except as specifically provided by law.

b. Neither the department, nor any board, may create a regulation that has an unreasonable effect on job creation or job retention in the state or that places unreasonable restrictions on the ability of individuals who seek to practice or who are practicing a profession or occupation to find employment.
c. The Legislature shall evaluate proposals to increase the regulation of regulated professions or occupations to determine the effect of increased regulation on job creation or retention and employment opportunities.

(5) Policies adopted by the department shall ensure that all expenditures are made in the most cost-effective manner to maximize competition, minimize licensure costs, and maximize public access to meetings conducted for the purpose of professional regulation. The long-range planning function of the department shall be implemented to facilitate effective operations and eliminate inefficiencies.

(6) Unless expressly and specifically granted in statute, the duties conferred on the boards do not include the enlargement, modification, or contravention of the lawful scope of practice of the profession regulated by the boards. This subsection shall not prohibit the boards, or the department when there is no board, from taking disciplinary action or issuing a declaratory statement.

Boards must interpret and apply the laws related to their professions in a manner consistent with the intent expressed by the Legislature.

Accordingly, when a board acts on applications, it must grant licenses to persons who meet the statutory requirements; and must deny licenses when the applicants do not meet the statutory requirements. When it acts in disciplinary matters, it needs to first consider what action is necessary to protect the public and then, only secondarily, to consider what action, if any, will serve to rehabilitate the licensee being disciplined.
ACCOUNTABILITY AND LIABILITY OF BOARD MEMBERS

Pursuant to Section 456.008, F.S., each board member is accountable to the Governor for the proper performance of his or her duties as a member of a regulatory board. The Governor is required to investigate any legally sufficient complaint or unfavorable written report received by him, the department, or a board concerning the actions of the board or its individual members. The Governor is authorized to suspend from office any board member for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform his or her official duties, or commission of a felony.

Each board member, and each former board member who serves on a probable cause panel, is exempt from civil liability for any act or omission when acting in his or her official capacity. The department or the Attorney General's Office is authorized to defend a board member or the board in any lawsuit arising from any such act or omission. Furthermore, the department or the Attorney General's Office may defend a board member's company or business if legal action is brought against the company or business because of actions taken by the board member acting in his or her official capacity and acting within his or her statutory authority. (Section 456.008(2), F.S.)

It should be noted that Section 456.001, F.S., provides that a vacancy shall occur if a board member has three consecutive unexcused absences or absences from 50 percent or more of the meetings of the board during a 12-month period.
STANDARDS OF CONDUCT FOR PUBLIC OFFICERS AND EMPLOYEES

The Legislature of the State of Florida has created the Commission on Ethics to enforce the high standards of conduct required of the officers and employees of Florida. (Section 112.320, F.S.)

Disclosure of Financial Interests

Every appointed member of each board or council having statewide jurisdiction is required to file a financial disclosure statement, unless the entity has only advisory powers. The financial disclosure form must be filed by July 1 of each year for continuing members of such entities. New members of councils must file the form within 30 days from the date of their appointment. New members of boards must file the financial disclosure form within 30 days from the date of appointment or prior to Senate confirmation hearings, whichever comes first. (Section 112.31245, F.S.)

Duties and Powers of the Commission on Ethics

It is the duty of the Commission on Ethics to investigate sworn complaints of violations of the Code of Ethics by public officers and employees. The Commission also renders advisory opinions to candidates for public office, public officers, and public employees as to the applicability and interpretation of the Code of Ethics with reference to themselves, or with reference to employees or applicants for employment. (Section 112.322(3), F.S.)

Complaints received by the Commission on Ethics remain confidential (unless the accused waives the right to confidentiality) until such time as the Commission has concluded its preliminary investigation and has determined whether probable cause exists. At that time the Commission shall either dismiss the complaint or find probable cause to believe that a violation of the standards of conduct has occurred. If the complaint is dismissed, the case becomes a matter of public record, along with the findings of the preliminary investigation, unless the complaint concerned a member of the Legislature or an impeachable officer. (Section 112.324, F.S.)

Penalties for violations of the standards of conduct for public officers and employees range from impeachment and removal from office to suspension or public reprimand, including civil penalties not in excess of $5,000 or repayment of pecuniary benefits. (Section 112.317, F.S.)

The Commission has broad statutory authority to turn complaints over to the appropriate prosecuting authority in all instances where probable cause has been found to exist.
Legislative Intent and Declaration of Policy

Section 112.311, F.S., provides for the Legislature’s intent and its declaration of policy in relation to the standards of conduct for public officers. Those provisions are summarized as follows:

1. It is essential that public officials be independent and impartial in the conduct and operation of government. A public office must not be used for private gain other than remuneration provided by law; therefore, the public interest requires that the law protect against conflicts of interest and establish standards of conduct for public officials.

2. However, in order to attract and maintain as public officials those best qualified to serve, it is necessary that restrictions developed to protect against conflicts of interest shall not be unreasonable or an unnecessary impediment to the recruitment and retention of qualified individuals.

3. To preserve and maintain the integrity of the government process, it is necessary that the identity, expenditures, and activities of those who regularly promote specific interests be disclosed to the public.

4. It is the intent of this act to prescribe restrictions against conflicts of interest without creating unnecessary barriers to public service.

5. It is the policy of the State of Florida that no public officer shall have any interest, financial or otherwise, direct or indirect, nor shall he or she engage in any business transaction or professional activity or incur any obligations of any nature which are in substantial conflict with the proper discharge of his or her duties in the public interest.

6. Public officers and employees are agents of the people of the state and hold their positions for the benefit of the public. Their foremost concern shall be promoting the public interest and maintaining the people's respect of their government, regardless of personal considerations. They are bound to uphold the Constitution of the United States and the Constitution of the State of Florida, the laws of the State of Florida and to adhere to the highest standards of ethics consistent with this code.

Standards of Conduct for Public Officers and Employees of Agencies

For the purpose of applying the standards of conduct, the term "public officer" includes "any person elected or appointed to hold office in any agency, including any person serving on an advisory body." (Section 112.313(1), F.S.)

The Code of Ethics enacted by the Legislature and administered by the Commission on Ethics covers gifts which might influence a public officer or employee, an officer or employee doing business with his own agency, unauthorized compensation, voting on salary and expenses, misuse of public position, conflicting employment or contractual relationship, disclosure or use of information not available to members of the general public, disclosure of specific interests, and prohibition against state employees also serving as public officers of the agency which employs them. (Section 112.313, F.S.)
In 2006 the Ethics Law was amended to require that no agency official, member, or employee shall accept, directly or indirectly, any expenditure from any executive branch lobbyist or the lobbyist's principal. (Section 112.3215(6), F.S.) Thus, although other parts of the Ethics Law discuss acceptance of gifts and filing reports on gifts, those provisions are overridden by the new law with respect to lobbyists and their principals.

There is a specific provision that states that no member of a state examining or licensing board (i.e., all the agencies within the Department of Health) may also be an officer, director, or administrator of a Florida state, county or regional professional or occupational association. (Section 112.313(11), F.S.)

In addition, there is a Formal Ethics Opinion which provides that a Board member cannot serve as or receive remuneration from a continuing education provider if the Board has authority over the continuing education programs or process. In such an instance, the conflict of interest that the board member has was found to be a "continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties." Because of this, the Ethics Commission determined that abstention from specific votes by the board member was not sufficient.

All public officers may obtain information as to applicability of the Code of Ethics to them by addressing inquiries to the Commission on Ethics, Post Office Drawer 15709, Tallahassee, Florida 32317-5709. The required financial disclosure forms can also obtained from the Commission on Ethics.
THE SUNSHINE LAW: SECTIONS 286.011 AND 286.012, FLORIDA STATUTES

- Sections 286.011 and 286.012, F.S., (better known as the "Sunshine Law") took effect in 1967 and contain specific provisions relating to the duties and responsibilities of board members:

- Subsection (1) of Section 286.011 provides that all meetings of any board at which official acts are to be taken are public meetings. It further requires that all formal actions be taken in a public meeting in order to be legally binding.

- Subsection (2) states that the minutes of public meetings must be promptly recorded (in writing) and open to public inspection. The circuit courts are empowered to issue civil injunctions to enforce compliance with the Sunshine Law.

- Subsection (3)(a) makes attendance at meetings held in violation of the Sunshine Law punishable by a fine not to exceed $500. Subsection (3)(b) states that a board member who knowingly violates the Sunshine Law is guilty of a misdemeanor of the second degree, which is punishable by a term of imprisonment not to exceed 60 days and/or a fine not to exceed $500.

- Subsection (4) provides that when a lawsuit is filed against a board either to enforce the Sunshine Law or to invalidate actions which were taken in violation of it and the Court finds that there was a violation, a reasonable attorney's fee may be assessed against the board or against individual members of the board; however, if the board sought and followed the advice of its attorney, such fees shall not be assessed against the individuals. Conversely, attorney's fees may be assessed against the individual who filed the action alleging a violation if the action is found to have been filed in bad faith or to have been frivolous.

- Subsection (5) requires that a reasonable attorney's fee be assessed against the board if it appeals a court order which ruled that it violated the Sunshine Law and the order is affirmed. As is the case in subsection (4), the attorney's fee may be assessed against individual members of the board unless the board sought and followed its attorney's advice.

- Subsection (6) prohibits public meetings from being held at any facility or location which discriminates on the basis of sex, age, race, creed, color, origin, or economic status or which operates in such a manner as to unreasonably restrict public access to the facility. Public meetings should never be held in places not easily accessible to the public, such as private clubs or homes, nor should meetings be held outside the State of Florida. Meeting rooms should have ample space for members of the general public who may wish to attend. A board should always be prepared for the public to attend even when it does not expect the public to attend.
• Subsection (7) authorizes any board to reimburse any member for any portion of a reasonable attorney’s fee if that member is charged with a violation of the Sunshine Law and is subsequently acquitted.

Voting

Section 286.012, F.S., provides that all members of a board present at a meeting must vote on each decision made at that meeting. There are only three exceptions to this requirement. Votes or abstentions from voting must be recorded in the minutes for each member present at the public meeting.

The first exception to the voting requirement is that a member may abstain from voting if there is or appears to be a conflict of interest under the Code of Ethics for Public Officers and Employees. A conflict of interest under the Code of Ethics is defined as a situation in which regard for a private interest tends to lead to disregard of a public duty or interest. It generally involves something which inures to the member’s special private gain or to the special gain of a principal by whom the member is retained. (Sections 112.311, 112.313, and 112.3143, F.S.)

If such a voting conflict occurs, generally, the member may abstain or may vote after disclosing the nature of the special interest. However, if the member votes on such a matter, he or she must file a written memorandum within fifteen (15) days with the Executive Director disclosing the nature of the interest. The memorandum then becomes a public record.

The second exception to the voting requirement: a member is not required to vote when that member is “recused.” Recusal is required when a member is disqualified for bias, prejudice, or interest. (Section 120.665, F.S.) When a board member participates in the adjudication of an individual’s rights in a quasi-judicial disciplinary proceeding or license denial action, he or she must avoid impropriety and the appearance of impropriety in all activities.

Among other things, the member must not allow personal relationships to influence his or her official conduct or judgment nor should his or her conduct be dictated by partisan interests or fear of criticism. A board member should not, except as authorized by law, either initiate or consider ex parte or other communications concerning a pending or impending proceeding. (An ex parte communication is one made by or for only one party outside of the public meeting. Both sides have a right to be present during all communications with a board member.) When a board member recognizes that he or she cannot judge a particular matter in an unbiased manner because of personal bias or prejudice concerning a party or because of personal knowledge of disputed evidentiary facts in the proceeding, he or she must recuse himself or herself and not participate in any manner in the proceeding. This applies both when the bias is in favor of a party, as well as when it is adverse.

There have been occasions when board members participated in the discussion of a matter and afterward declared a personal bias or prejudice and declined to vote. This is not appropriate. If a board member has a bias or prejudice, the board member should not participate in the proceeding at all.
The third exception to the voting requirement is found in Section 456.073(6), F.S. This law provides that members of a probable cause panel who reviewed the investigative materials shall not participate when the disciplinary matter comes before the board for final action. This is presumably because the members may have reviewed prejudicial material involving conduct which was neither charged nor proven.

Scope of Sunshine Law

The Sunshine Law is applicable to any gathering where the members deal with any matter on which foreseeable action will be taken by the board unless there is an explicit exemption in the law. Public officials should follow the open meeting policy whenever in doubt as to the appropriate course of action.

Under the Sunshine Law all actions must be carried out in full public view. This means not only that the final decision must be open, but the entire process, including informal discussion, must be carried out in full public view. The law applies not only to the full board, but to any discussion between two or more members on matters on which foreseeable action will be taken. Thus, members should refrain from informal discussions, telephone conversations, texting, emails, luncheon meetings, and so on, between and among themselves in which board matters are discussed. The Sunshine Law also applies to a single member when that member has been delegated authority to act on behalf of the board.

It should be noted that the Sunshine Law applies only to communication by one member to another member. Board members may discuss board business with staff at any time so long as staff contacts are not used to circumvent the law. For example, staff cannot be used as a go-between to effect communication between board members. Meetings of staff are not generally subject to the Sunshine Law, but may become subject to it if staff has been delegated decision-making functions outside the ambit of normal staff functions.

The Sunshine Law requires reasonable notice to members of the public as to the time and place of a proposed meeting of a public agency and of the subjects to be discussed or voted upon. Section 456.004(7), F.S., requires that all proceedings of a board or panel within the department be electronically recorded in a manner sufficient to ensure the accurate transcription of all matters so recorded. Because of this requirement, even meetings that are exempt from the Sunshine Law must be recorded.

There are two commonly-used exemptions from compliance with the Sunshine Law. Under Section 456.073(2), F.S., proceedings of the probable cause panel are exempt from the Sunshine Law until ten days after probable cause is found, or the subject of an investigation waives confidentiality. In addition, Section 455.217(5), F.S., provides that meetings and records of meetings “held for the exclusive purpose of creating or reviewing licensure examinations or proposed examination questions are confidential and exempt from both the Sunshine Law and the Public Records Law.” [emphasis added] Exemptions are interpreted very narrowly. Thus, the exemption with regard to examination discussions is only with regard to the questions; it does not exempt discussions regarding setting a passing score, determining the weight to be assigned different parts of an examination, or other matters outside the consideration of examination questions.
The Public Records Law provides that all state, county and municipal records are open at all times for inspection by any person unless made confidential by law. (Sections 119.01, 119.07, F.S.) Chapter 119, F.S., defines Public Records to include:

[All documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of physical form or characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. (Section 119.011(1), F.S.)

Consequently, any materials that come into a board member’s hands by reason of their position as a public official are probably public records and should be treated as such. For instance, any tape recordings made at public meetings, even if made only for the purpose of writing the official minutes of the meeting, are public records and must be conscientiously preserved. Any questions you may have concerning whether a document you have is a public record should be referred to your board’s legal advisor.

Under Section 456.014, F.S., all information required by the department of any applicant is a public record except financial information; medical information; school transcripts; examination questions, answers, papers, grades, and grading keys. These cannot be discussed with or made accessible to anyone except members of the board and the department and its staff; however, an applicant may waive in writing the confidentiality of his or her examination grades. (Section 456.017(2), F.S.)

When an agency uses public funds to pay dues or membership contributions to any person, corporation, foundation, trust, association, group, or other organization, then the Public Records Law requires that the receiving entity’s financial, business and membership records pertaining to the public agency from which the payments were made shall also be public records. (Section 119.12 , F.S.) Moreover, the records of any private agency, person, partnership, corporation, or business entity acting on behalf of any public agency are public. (Section 119.011(2), F.S.) It is the duty of the person who has custody of the public records to permit them to be examined at any reasonable time and in a reasonable manner by any person. Such examinations must be carried out under the supervision of the custodian of the public records or his designee in order to preserve and protect the records. The custodian is also responsible for furnishing certified copies upon the request of any person and upon payment of a fee, as provided by law. If no fee is provided by law, then the actual cost of the materials and supplies necessary for duplication shall be charged. (Section 119.07(1)(a), F.S.) If the nature or volume of the records requested requires extensive clerical or supervisory assistance by agency personnel, the agency may additionally impose a service charge based on actual labor costs incurred by or attributable to the agency. (Section 119.07(1)(b), F.S.)
Only those records exempted or made confidential by statute are exempt from the disclosure provision of the Public Records Law. Materials that are not public records include patient records, which have been obtained pursuant to a subpoena without written authorization from the patient (Section 456.057(2), F.S.), complaints received by the department, and all information obtained during the disciplinary investigation by the Department. (Section 456.073(10), F.S.) A patient record obtained by subpoena never becomes a public record; however, the complaint and all information obtained during disciplinary investigation, except other materials otherwise exempt, become a public record ten days after probable cause has been found by the probable cause panel or the department, or until the licensee waives his or her privilege of confidentiality, whichever occurs first. If there is no finding of probable cause, or if a letter of guidance is issued in lieu of a finding of probable cause, the material remains confidential.

Whenever the custodian of the records decides to withhold the requested records, the custodian must state the basis for the refusal to disclose the records, citing the statutory authority for the decision. The requesting party may require that the statement of reasons for refusal to disclose be put in writing.

**Exemptions from the Sunshine Law and from the Public Records Law are independent matters; an exemption from one is not necessarily an exemption from the other.** For example, subpoenaed patient records are exempt from the Public Records Law, but a meeting at which disciplinary action may be taken against the treating health care practitioner is a public meeting and any attendant discussion of the contents of the patient records must be had on the record. Accordingly, all Boards must act in a way that carries out their responsibilities to the public insofar as possible, but preserves any exemption.

It is most important to remember that no public record can be disposed of or destroyed without the consent of the Division of Library and Information Services of the Department of State, except in accordance with the retention schedule approved by said Division. (Section 119.041, F.S.)

At the expiration of the term of an official, all records in his or her custody shall be delivered to his successor. (Section 119.05, F.S.)

When a lawsuit is filed in court challenging an agency’s refusal to permit inspection of its public records, the court must give the lawsuit priority and schedule the case for an immediate hearing. If a public official knowingly violates the provisions of the Public Records Law, he or she is subject to suspension and removal from office, or impeachment; a noncriminal sanction of up to $500; and conviction of a misdemeanor of the first degree, punishable by a term of imprisonment not to exceed one year and/or a fine not to exceed $1,000. Agencies are liable for enforcement costs, including attorney's fees, incurred by other parties when a court determines that the agency illegally refused to permit inspection, examination, or copying of its records. (Sections 119.02, 119.10, 119.11, and 119.12, F.S.)

Just as a person may be penalized for refusing to permit inspection of the agency's public records, the person may be penalized if he or she conveys information about a record or
meeting to a person who is not lawfully entitled to that information when the record or meeting is exempt from the Public Records Law or the Sunshine Law. The disclosure of confidential information is a misdemeanor of the first degree, punishable by a term of imprisonment not to exceed one year and/or a fine not to exceed $1,000, and can be cause for removal from office. In addition, a person whose willful disclosure of confidential information injures someone may be sued for treble damages (Section 456.082, F.S.)

As a practical matter, the department is the official custodian of the records of board meetings and activities, and the department must retain the records in accord with the established retention schedule. If, however, you keep your board materials, then you can be required to produce them upon request. If you receive letters and other materials relating to your duties as a board member directly from sources other than the department or board counsel, then you must retain them for the length of time required. One way to avoid running afoul of this duty is to forward all such materials to the board office so that they can be included in the board’s public records.
THE ADMINISTRATIVE PROCEDURE ACT:  
CHAPTER 120, FLORIDA STATUTES

The Administrative Procedure Act (commonly referred to as the “APA”), Chapter 120, F.S., applies to all state agencies, including all boards and councils within the department. The purpose of the APA is to ensure that the general public has access to information regarding the functions and duties of administrative bodies created by the Legislature that take actions which may affect the interests of private citizens. Also, it serves to make uniform throughout the state the rulemaking and adjudicative procedures used by state administrative agencies. This discussion is only a general overview of those portions of the APA considered most immediately applicable to you as a member of a state board.

Meetings, Hearings and Workshops: Section 120.525, F.S.

Except for emergency meetings, notice of all public meetings must be published no less than 7 days in advance in the Florida Administrative Register (formerly the Florida Administrative Weekly).

The APA requires that the agenda for meetings shall be prepared in time to ensure that a copy may be received at least seven (7) days before the event by any person in the state who requests a copy and pays the reasonable cost of the copy.

After the agenda has been made available, no change is to be made unless the person designated to preside at the meeting determines that good cause exists to change the agenda and enters the reasons for the change in the record of the meeting. Interested persons shall be notified of such changes at the earliest possible date. (Section 120.525(2), F.S.)

The Administration Commission (the Governor and Cabinet) adopted Uniform Rules of Procedure relating to rulemaking and hearing procedures and filed them with the Secretary of State. (See Chapter 28, F.A.C.) An agency is required to abide by these Uniform Rules unless the Administration Commission granted an exception. No exceptions have been granted for rules of boards within the department. (Section 120.54(5), F.S.)

Rulemaking – Section 120.54, F.S.

Most agencies are empowered to promulgate rules necessary to implement or interpret the powers and duties set forth in their enabling statute.

The term “rule” is defined, in part, as an agency’s statement of general applicability that implements, interprets, or prescribes law or policy. (Section 120.52(15), F.S.) Agencies must file the rules they promulgate with the Secretary of State, who then publishes them in the Florida Administrative Code (“F.A.C.”). Each agency must make its rules available to the public upon request.
Under Section 120.545, F.S., the Joint Administrative Procedures Committee (“JAPC”), a committee of the Legislature, reviews all proposed and existing rules and the accompanying documentation to determine whether the rule is authorized by law and meets specified guidelines. In addition, rules which have a potential economic impact on small businesses are reviewed by the Office of Fiscal Accountability and Regulatory Reform (“OFARR”).

Rules must be promulgated in a specified manner so that persons whose substantial interests might be affected have notice of a proposed rule before its adoption. A rule may not be adopted until the agency has held a hearing, if a hearing was requested in a timely manner.

A person whose substantial interests may be affected by any rule has the right either to request a hearing before its adoption or to challenge the rule before or after its adoption. A timely challenge to a proposed rule precludes its being filed for adoption; however, a challenge to an existing rule does not alter the rule’s effect unless and until the rule is held invalid. Under Section 456.012, F.S., the Secretary of the department may challenge an existing rule or proposed board rule based upon certain enumerated grounds:

a) the rule is an invalid exercise of delegated legislative authority;

b) the rule does not protect the public from any significant and discernible harm or damages;

c) the rule unreasonably restricts competition or the availability of professional services in the state or in a significant part of the state; or

d) the rule unnecessarily increases the cost of professional services without a corresponding or equivalent public benefit.

**Emergency Rules: Section 120.54(4), F.S.**

Agencies may take emergency action by adopting an emergency rule which temporarily bypasses the notice and hearing requirements of routine rulemaking proceedings. In doing so, the agency must find that the emergency action is necessary to forestall an immediate danger to the public health, safety and welfare. Such actions must be supported by specific facts and reasons for the finding of immediate danger which must be published in writing prior to or at the time of the action. The agency’s action may be appealed to the appellate court.

Courts have strictly construed reasons for an emergency. A showing of administrative inconvenience will not justify emergency rules made by the emergency process. Emergency rules are effective only for ninety (90) days and may not be renewed except during a challenge to proposed rules, which addresses the subject of the emergency rules. Therefore it is advisable that the agency start routine rulemaking proceedings immediately upon enacting an emergency rule.

**Declaratory Statements; Section 120.565, F.S.**

A statement of the applicability of a specified statutory provision or of any rule or order of the agency as it applies to a person in his or her particular set of circumstances may be requested through a petition for declaratory statement. An agency’s declaratory statement interpreting the
statute, rule or order is issued in a final order and is thereafter binding upon the agency. The final order may be appealed to the appellate court. The specific requirements and procedures relating to declaratory statements are set forth in the Uniform Rules of Procedure at Rule 28-105, F.A.C.

**Hearings Determining Substantial Interests; Sections 120.569, 120.57, F.S.**

Persons whose substantial interests are to be determined by an agency have recourse to either evidentiary hearings before an Administrative Law Judge (ALJ) from the Division of Administrative Hearings (D.O.A.H.) or proceedings before the board. An evidentiary hearing, a trial-like proceeding, is required when there is a disputed issue of material fact. A proceeding before the board is sufficient when there is no disputed issue of material fact and the parties just want to present issues of law or information relative to penalty.

Evidentiary hearings on all matters except rule challenges result in an Administrative Law Judge issuing a recommended order to the board. This recommended order contains three (3) parts: findings of fact, conclusions of law, and a recommended disposition of the matter. Generally, the ALJ's findings of fact are binding on a board and can be modified or rejected only if the board members review the entire record and determine either that the findings are not supported by competent, substantial evidence in the record or that the proceedings on which the findings were based did not comply with the essential requirements, of law. An ALJ's conclusions of law and recommended disposition can be modified or rejected by the board; however, a recommended penalty may not be reduced or increased unless the board reviews the complete record, stating with particularity its reasons for modification, and citing to the record to justify the action. Because of the "review of the complete record" requirements, it is common in proceedings to consider recommended orders for each board member to be asked on the record at the meeting whether he or she had reviewed the entire record. The board's stated reasons for departing from the recommended penalty must be set forth in its final order.

Between the time a recommended order is sent to the board and the time the board considers the recommended order, the parties are allowed to file exceptions to the findings of fact. These exceptions are to be filed within 15 days of the date the recommended order is issued. The board must consider the exceptions, and any possible responses, when considering the recommended order.

Final disciplinary hearings held by the board on recommended orders, settlement agreements or stipulations, or other proceedings where there was no disputed issue of material fact ultimately result in a final order issued by the relevant board. These final orders may be appealed to a district court of appeal (except where parties have waived the right to appeal). In rule challenges, the ALJ issues a final order and the board is one of the parties that may take an appeal of the decision to the appellate court.
Licensing: Section 120.60, F.S.

The terms “license” and “licensing” have been broadly defined by the APA. A license means any franchise, permit, certification, registration, charter or similar form of authorization required by law (with the exception of licenses issued for revenue purposes). Licensing means any agency action or process which deals with the issuance, denial, renewal, revocation, suspension, annulment, withdrawal, amendment or imposition of terms for the exercise of a license. (Sections 120.52(9) and (10), F.S.)

When an agency receives an application for a license, it must respond promptly so that the license may be issued within a reasonable time, with due regard to protecting the rights and privileges of all affected parties. Within thirty (30) days after receipt of an application for license, the agency must notify the applicant of any apparent errors or omissions and request any additional information the agency is permitted by law to require. Generally, every application for a license must be approved or denied within ninety (90) days after receipt of the original application, or receipt of the timely requested additions or corrections, unless the applicant waived the 90-day requirement. Under Section 456.013(3)(e), F.S., a board can require a personal appearance of an applicant and, if it does so, the time period for granting or denying the license is tolled until the applicant appears. If the applicant fails to appear before the board at either of the next two board meetings, the application shall be denied.

Any completed application for a license not approved or denied within ninety (90) days must be approved and, subject to the satisfactory completion of an examination, if required, the license shall be issued. (Section 120.60(1), F.S.) However, there is an exception to this general rule: if an applicant is under investigation in any jurisdiction for an act that could be the basis for denial of a license, the license shall not be issued until the investigation is completed. Once it is complete, the board may review the investigation and decide whether to grant or deny the license. An incomplete application expires within one year of its initial filing. (Section 456.013(1), F.S.)

An agency may not revoke, suspend, annul or withdraw a license unless, prior to the entry of a final order, the agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a hearing. If, however, the agency is unable to serve the complaint personally or by certified mail, it may effect service by publishing a notice in the appropriate newspaper. (Section 120.60(5), F.S.)

If the department finds that an immediate serious danger to the public health, safety, or welfare warrants an emergency suspension, or limitation of a license, the department is authorized to take such action. In doing so, the Department must follow the same procedures required for the promulgation of emergency rules. After the emergency action has been taken, the routine procedures described above must also be instituted immediately by the agency. (Section 120.60(6), F.S.)
Variance and Waivers: Section 120.542, F.S.

One provision of the APA permits agencies to grant variances or waivers from the agencies’ rule requirements. The reason for this is that sometimes the strict application of a rule can lead to unreasonable and unintended results. For example, a licensure rule might require a master’s degree in a particular subject area, but the applicant has only a doctoral degree in that area, having by-passed the masters. Under the variance and waiver statute, the board is able to consider whether the license should be granted even though the precise requirements of the rule are not met. The applicant must file a petition demonstrating that the purpose of the underlying statute would be met and that the application of the rule would create a substantial hardship or would be unfair. The issue of lack of fairness is defined as occurring when the application of the rule affects the person in a significantly different way than it affects others who are similarly situated. Agencies can grant variances or waivers only as to their rules, not as to statutes. (Section 120.542, F.S.)

Ex Parte Communications; Section 120.66, F.S.

Generally, this provision of the APA prohibits unilateral communications concerning the merits of an issue before the board or involving threats or offers of reward to the decision maker (board member) by a party or by one who is substantially interested in the proposed agency action. The theory is that whatever that person has to say to the decision maker could have a bearing on the outcome of the proceedings and thus should be presented to all parties to the controversy at the same time and in the same forum. This prohibition does not apply to communications by staff members of the agency who do not participate in the adversarial proceedings or to the activities involved in rulemaking proceedings. Accordingly, board members may not discuss a disciplinary case with the attorney presenting the case, but may discuss it with the attorney serving as the board’s legal advisor.

One who violates these provisions may be assessed a civil penalty not to exceed $500 or may be subject to other disciplinary action. During the course of your term as a board member, you may receive communications from a party to a case pending before the board urging you to "hear their side." If you receive such communications, you must terminate them immediately. Ex parte communications in violation of this provision must be placed on the record by the board member receiving the communication. If you receive written communications, they (or copies) should be forwarded to the Executive Director to be included in the agency’s public records.

Judicial Review; Section 120.68. F.S.

Any party who is adversely affected by a final agency action is entitled to a review by a District Court of Appeal. Immediate appellate court review is also granted to parties adversely affected by a preliminary, procedural, or intermediate agency action or ruling, including any order of an ALJ, if the parties can show that waiting for the court’s review of the final agency action would not provide an adequate remedy. Judicial review may also be available in certain instances in circuit courts.
DEPARTMENT OF HEALTH; SPECIAL PROVISIONS

Complaint, Investigative, and Disciplinary Procedures

In addition to the procedural requirements imposed upon licensing agencies by the APA, Chapter 456, F.S., sets forth particular procedures pertinent to complaints, investigations, and disciplinary matters handled by the professional licensing boards within the department.

The department receives all complaints and is required to investigate any legally sufficient complaint that is in writing and signed by the complainant. In addition, the department is authorized to investigate anonymous complaints and complaints made by confidential informants under certain specified conditions, and the department is authorized to initiate complaints and investigations on its own. (Section 456.073(1), F.S.) Witnesses are granted a privilege against civil liability unless they act in bad faith or with malice in providing information. (Section 456.013(5), and 456.073(11), F.S.)

The department must ensure that investigators working on its behalf are generally knowledgeable in the profession they investigate and it may select only those investigators who meet criteria established with advice by the respective boards. (Section 456.004(8), F.S.) When the investigation is complete a report is prepared, which contains the investigative findings and the department’s recommendation on the existence of probable cause. The recommendation for probable cause is prepared by the department attorney assigned to prosecute cases for that board. By law, the investigation and recommendation to the panel must be made within six (6) months of the complaint (Section 456.073(2), F.S.)

The determination of whether probable cause exists to believe a violation of the statutes or rules governing a license has occurred is made by a majority vote of a probable cause panel of the appropriate board or, if specified by board rule, by the department. If the probable cause panel reasonably requests additional investigation within fifteen (15) days of receipt of the investigative report from the department, the department must provide it. Within thirty (30) days of receipt of the final investigative report, a determination of probable cause must be made. However, these time periods may be extended by the Secretary of the department. If the probable cause panel does not make a determination regarding probable cause or issue a letter of guidance in lieu of finding probable cause within the time limits, the department has ten (10) days to determine whether probable cause exists. (Section 456.073(4), F.S.)

If the probable cause panel finds probable cause exists, it shall direct the department to file a formal complaint against the licensee and prosecute the complaint; however, the department may decide not to prosecute the complaint if it finds that probable cause has been improvidently found. If the department makes such a determination, it shall refer the matter to the board which may then file a formal complaint and prosecute the complaint. The department must refer to the board any investigation or disciplinary proceeding not before D.O.A.H. or otherwise completed by the department within one (1) year of the filing of the complaint so that the board may determine whether to have the department continue with the case or whether to pursue the case itself with private counsel and investigators. (Section 456:073(4), F.S.)
Administrative complaints are served in the manner described above regarding Section 120.60(7), F.S., and licensees receiving complaints have 20 days to request a hearing and elect either an evidentiary hearing or a non-evidentiary hearing before the board. If they elect an evidentiary hearing, they must specify any material facts that are in dispute.

When a disciplinary case is brought before the board for final action, the probable cause panel members who reviewed the investigation cannot participate. (Section 456.073(6), F.S.) Once the board makes a decision in a case, a final order is issued. Any consent or settlement agreement is subject to the approval of both the department and the board. Either the department or the licensee may seek judicial review of any final order of the board.

**Rights of Complainants**

During the pendency of the disciplinary proceedings, the department must periodically inform the person who filed the complaint the status of the complaint in the disciplinary process and whether probable cause was found. If probable cause has been found, the complainant receives a copy of the administrative complaint, an explanation of the administrative process, and of how and when the complainant may participate in the disciplinary process. The complainant is to be given notice of any hearing on the case before the D.O.A.H. (Section 456.073(9), F.S.) The statute explicitly provides that the person who filed the complaint has a right to present written or oral information or argument concerning the charges or the penalty.

If probable cause is not found, the department must inform the complainant and give that person 60 days to provide any additional relevant information for the probable cause panel’s consideration. If additional information is submitted, it shall be presented to the panel. At that time the panel may take no further action or may vote to reconsider the case. (Section 456.073(9), F.S.)

**Notices of Noncompliance; Citations**

There are two special procedures enacted to facilitate the regulatory process in ways that meet the goal of protecting the public without the necessity for a hearing.

The first is a notice of noncompliance. For an initial offense of a minor violation, the department may issue a notice of noncompliance and give the licensee fifteen (15) days to correct the violation. If the licensee does so, the matter is over and the records are not public. This avenue is available only for violations identified by the board by rule as ones which do not endanger the public health, safety, or welfare, and which do not involve a serious inability to practice the profession. (Section 456.073(3), F.S.)

The second is a citation. This is similar to a traffic ticket. For specified violations that do not pose a substantial threat to the public health, safety, or welfare, the board establishes set penalties, such as a fine in a specific amount. Within six (6) months of a complaint, the department may issue a citation for one of those violations. If the licensee accepts the citation or fails to dispute it
within 30 days, the citation becomes a public final order and he or she must comply with it. A citation does not constitute discipline for the first offense, but is discipline for a second or subsequent similar offense. If the licensee timely disputes the citation, then the matter is taken through the regular disciplinary process. (Section 456.077(1), F.S.)
LEGAL ADVISORS

Attorneys from the department serve as prosecutors in disciplinary cases. However, attorneys from the Department of Legal Affairs (called Assistant Attorneys General), or the department’s Office of the General Counsel, serve as legal advisors to each board and council within the department. The primary responsibility of the board attorneys is to represent the interests of the citizens of the state. (Section 456.009(1), F.S.)

The attorneys who serve as legal advisors attend the meetings of the board and its committees, draft rules and orders, and represent the board in license denial hearings, rule challenges, and other litigation involving the board and its members. In addition, they are available to consult with and render advice to individual board members with regard to the proper performance of the board member’s duties. It is not a violation of the Sunshine Law, statutory requirements of confidentiality, or prohibitions against *ex parte* communications, for individual board members to consult with the legal advisor.

Although it does not come up often, it is important for board members to remember that the attorneys serve you in your capacity as a board member. The attorneys for the boards must avoid rendering legal services or legal advice to the board members in the board members’ capacity as private citizens.

The boards are expected to provide periodic review and evaluation of the board counsel. (Section 456.009(1), F.S.)
LOBBYING

Section 11.045, F.S., requires registration as a lobbyist on the part of any person who is employed and receives compensation to influence or attempt to influence the passage, defeat, or modification of any legislation.

Furthermore, Section 11.061, F.S., requires registration as a lobbyist on the part of any person who is employed by any executive, judicial, or quasi-judicial department of the state if that person appears before the Legislature or a committee thereof, and who seeks to encourage the passage, defeat, or modification of legislation.

Both statutory sections pertaining to lobbying efforts contain certain reporting requirements. The Office of the Clerk, House of Representatives, The Capitol, Tallahassee, Florida 32399-1300, will supply the appropriate forms for registration and reporting as a lobbyist.
ASSUMPTION OF THE OFFICE

The process of appointment to membership on an examining and licensing board begins when the Governor notifies an individual that he or she has been selected for the appointment. In the case of an official who is appointed without the necessity of an election, the appointment is effective upon the execution of the commission by the Governor and the attestation of the commission by the Secretary of State. Thus, the duties and responsibilities of public office cannot properly be assumed until the officer's commission is issued by the Secretary of State. Although persons appointed as members of licensure and disciplinary boards must be confirmed by the Senate at the next session of the Legislature, appointees may begin serving as soon as their commission is issued.

Resignation from such an office is not effective until the Governor accepts the resignation. The length of the term of each board or commission member is specified in its enabling statutes. The board office or board counsel are available to address questions about your term.