

**MANUAL
FOR CONDUCTING
ADMINISTRATIVE
ADJUDICATORY PROCEEDINGS
2012 EDITION**

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PREFACE TO THE 2012 EDITION

On the 25th anniversary of the first publication of this manual in 1983, a new generation of Assistant Attorneys General in the Government Bureau began to collaborate with the Division of Administrative Law Appeals and Division of Professional Licensure to reissue the following updated edition of this training resource.

As you will note from the original Preface, this manual initially was oriented toward members of the various professional licensure or registration boards in Massachusetts that were conducting adjudicatory hearings. As with the first draft 21st Century editions, this edition attempts to broaden the scope of the manual, to make it a useful resource for many different types of presiding officers and board members who conduct administrative adjudicatory proceedings. Nevertheless, there are so many different, and potentially unique, types of administrative adjudicatory proceedings that it may well be impossible to describe, at least at the outset, all of the important facets of such variegated proceedings. **Please note: The caveats contained in the 1983 Preface still apply today.**

As we hope that future editions of this manual will follow this one, we encourage you, the reader, to consider this manual to be a work in progress. Your ongoing comments and contributions are encouraged and welcomed.¹

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I appreciate the support of Attorney General Martha Coakley and Administrative Law Division Chief William Porter in recognizing the importance of the manual. Retired Appeals Court judge William Cowin deserves special thanks for contributing significantly to the chapter on decision-writing. Many state administrative law specialists contributed their expertise by reviewing drafts of the manual, including, but not limited to: Richard Heidlage, the Chief Administrative Magistrate of the Division of Administrative Law Appeals (DALA); Reece Erlichman, the Director of the Bureau of Special Education Appeals (BSEA); James Rooney and Ken Bresler, DALA Administrative Magistrates; William Crane, a BSEA Hearing Officer; Susan Stein, General Counsel of the Department of Public Health; and Sheila York, a senior staff attorney at the Division of Professional Licensure. Assistant Attorneys General Timothy Casey, David Hadas, David Marks, Maryanne Reynolds, Amy Spector, and paralegal Julie Collins all helped to review and revise drafts of the manual and contributed their expertise in other ways. Several law students interning at our office provided invaluable assistance, including: Chris Ferro, Denise Katz-Prober, Elizabeth Johnston, Jordan O'Donnell, Danielle Sievers, and Joseph Toomey. In the process of revising this manual, we were continuously reminded of the importance of the work that we do and the valuable colleagues who share our commitment to public service and administrative law. Thanks to all!

Finally, this manual represents the opinions and legal conclusions of its editors and contributors and not necessarily those of the Office of the Attorney General. Opinions of the Attorney General are formal documents rendered pursuant to specific statutory authority.

Assistant Attorney General Robert L. ("Rob") Quinan, Jr.

August 7, 2012

PREFACE TO THE 1983 EDITION

This manual is designed to serve only as guidance to the members of the various boards of registration who, from time to time, participate in the adjudicatory proceedings conducted by the boards. **The manual is not intended to serve as a statement of the law, as it contains advice in many areas which is not legally compelled but rather derives from experience and a desire to conduct the business of the board in a professional manner.** Accordingly, a departure from the advice contained in this manual does not amount to a violation of law or standards, and any conflict between this manual and the standards of law contained in M.G.L. c. 30A, the Standard Rules of Adjudicatory Procedure, the particular statutes and regulations governing the individual boards, or the applicable decisions of the courts must be resolved against the manual.

The manual is the result of a collective effort by Government Bureau attorneys and is based on their years of experience in advising the boards on the conduct of adjudicatory proceedings. Although the manual cannot substitute for case-by-case legal counsel (and in some areas the manual suggests that resort be had to legal counsel), it is the authors' intention that the manual enable board members to become more nearly self-sufficient in conducting adjudicatory hearings.

Although they always have our gratitude for the fine job they perform day in and day out, we also acknowledge here the extraordinary efforts of Betty Pylypink and our secretarial staff in producing this manual under very trying conditions.

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CHAPTER I

BASIC PRINCIPLES

The purpose of this manual is to outline how administrative adjudicatory proceedings should be conducted by an administrative agency, a board of professional licensure, or a similar governmental body. The archetypal proceeding that will be used for illustrative purposes throughout this manual is a hearing conducted by a board on whether to revoke or suspend a professional license held by a licensee. At the outset, it is helpful to state some of the general principles that underlie all of the subsequent chapters.

Before reading further, it may be helpful identify the applicable statutory and regulatory scheme that applies to the administrative agency that you are concerned about.² The governing laws are often available on an administrative agency's website (visit the "agency finder" feature at <http://www.mass.gov>). In addition, it may be helpful to review certain sections of the State Administrative Procedure Act, especially M.G.L. c. 30A, §§ 1, 8, 10-14, and the Standard Adjudicatory Rules of Practice and Procedure, 801 C.M.R. § 1.01 (Formal Rules), § 1.02 (Informal/Fair Hearing Rules), and § 1.03 (collectively, the "Adjudicatory Rules"), all of which are included in the Appendix to this Manual.

A. Due Process.

The first of these general principles is the concept of "due process." Due process is a phrase that can be traced back as far as the Magna Carta, but for purposes of this manual, it is relevant because of its appearance in the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment provides that no state can deprive a person (which usually includes a corporation) of life, liberty, or property without "due process of law."³ Of this triad, the most important for purposes of this manual is the concept of "property." Any administrative proceeding that could result in imposition of a monetary fine, because that constitutes the deprivation of property, must afford the respondent due process. Courts also have consistently construed professional licenses, for example, to constitute "property." In other words, an individual who holds a professional license has a "property right." Thus, when a state or local agency initiates an administrative proceeding to revoke or suspend a professional license, this proceeding must be consistent with "due process." Derby Refining Co. v. Board of Aldermen of Chelsea, 407 Mass. 718, 721-22 (1990).⁴ Likewise, in some

² To begin, see M.G.L. c. 30A, § 1(1) (defining "adjudicatory proceeding" and "agency"), and note that not all Massachusetts state entities authorized to conduct adjudicatory proceedings are embraced within c. 30A and its definition of "agency."

³ Massachusetts appellate courts "have treated the procedural due process protections of the Massachusetts and United States Constitutions identically." Liability Investigative Fund Effort, Inc. v. Massachusetts Med. Professional Ins. Ass'n, 418 Mass. 436, 443 (1994).

⁴ In the leading treatise on administrative law in Massachusetts, Professor Alexander J. Cella notes, more broadly, that "[i]f a person has a sufficient constitutionally protected interest in a statutory (footnote continues on the next page . . .)

circumstances, a professional licensee may be considered to have a “liberty” interest in maintaining his or her good name and so official publication of material injurious to that reputation may also warrant due process protections. See, e.g., Smith v. Commissioner of Mental Retardation, 409 Mass. 545, 550 (1991).

“Due process” is not a neatly packaged concept. It is a constantly evolving idea, and it has a variety of meanings depending upon the context. However, due process does have a basic core that applies to the proceedings that administrative agencies are likely to initiate. See Duarte v. Commissioner of Revenue, 451 Mass. 399, 411-12 (2008). This core includes: (1) **notice** – a professional licensee’s right to be aware of a proceeding concerning him, to know the subject of the proceeding, and to have an adequate amount of time to prepare for that proceeding;⁵ (2) **engagement** – the right of a licensee to hear the evidence, which includes testimony, offered against him and an opportunity to question witnesses who testify;⁶ (3) **defense** – the right to introduce evidence in support of his position;⁷ (4) **counsel or authorized representative** – the right to have his attorney or other representative assist him;⁸ and (5) a **fair hearing** – the right to have an impartial decision-maker adjudicate the matter or make the decision and provide reasons for that decision.⁹ These five principles are not necessarily the full panoply of due process rights, nor are all of them constitutionally required. However, in the general run of hearings being conducted by administrative agencies, these principles should be observed as part of due process.

B. The Administrative Record.

A second basic principle is the concept of the “administrative record.” M.G.L. c. 30A, § 11(8). The record is everything that is properly before the decision maker in rendering the

entitlement, he is owed some measure of procedural due process before he may in any way be deprived of his constitutionally protected interest.” 38 Alexander Cella, Massachusetts Practice: Administrative Law and Practice, § 213 at n.23 (1986).

⁵ See M.G.L. c. 30A, § 11(1); 801 C.M.R. § 1.01(6); Duarte v. Commissioner of Revenue, 451 Mass. at 412; Matter of Angela, 445 Mass. 55, 62 (2005) (“The fundamental requirement of due process is notice and the opportunity to be heard at a meaningful time and in a meaningful manner.”).

⁶ See M.G.L. c. 30A, § 11(3).

⁷ See M.G.L. c. 30A, § 11(3); Duarte v. Commissioner of Revenue, 451 Mass. at 412.

⁸ See 801 C.M.R. 1.01(2). This provision also states that the adjudicatory process regulations should be “construed to secure a just and speedy determination.”

⁹ See M.G.L. c. 30A, §§ 10 and 11(8). To further ensure a fair hearing, M.G.L. c. 30A, § 14, furnishes the right to have a court review most adverse administrative adjudicatory actions.

decision.¹⁰ It consists of documents submitted to the presiding officer that have also been provided to all other parties. It also includes oral testimony given in the presence of the presiding officer and the parties and that is subject to cross-examination. It can also include procedural documents—for example, the docket or rulings on motions. Finally, it includes any final decision or decisions issued by the decision maker and the reasons given for that decision.

Section 11(5) of M.G.L. c. 30A permits decision makers to draw upon their professional expertise and specialized knowledge in evaluating the record, so long as all of the parties are apprised of the “administrative notice” being taken of such matters and given the opportunity to contest the facts so noticed. Otherwise, facts that are outside the record cannot be considered by the decision maker; nor should these facts be allowed to infect a decision-maker’s thinking. Arthurs v. Board of Registration in Medicine, 383 Mass. 299, 304-305 (1981). For example, assume a hearing is being held on the issue of whether a professional licensee’s administration of a certain drug violated professional standards. A published article submitted to the board and to all parties would be part of the “record,” as would testimony given by an expert if the witness could be cross-examined. Thus the board could base its decision on such evidence. But information known only to the board member that was not called to the attention of the parties cannot be part of the record and so it could not be a basis for the board’s decision.

While decision makers have the power to use their professional expertise to evaluate the contents of the record and, as discussed in the chapter on evidence, they can sometimes supplement the record by taking “administrative notice” of technical matters that are not fairly subject to dispute, these powers are not adequate substitutes for record evidence. See M.G.L. c. 30A, § 11(5). The decision maker should strive to ensure that the record contains evidence on all necessary factual issues, including technical or professional matters, even though she may be an expert on such matters. For example, if an electrician is charged with installing certain wires in an unsafe manner, there are three possible issues: (1) did he install the wires a certain distance apart; (2) if so, did that create a safety hazard; (3) if so, is that unprofessional conduct that warrants a sanction? There is no doubt that the first issue must be decided solely on the basis of record evidence and that the third issue is solely a matter of law and the board’s judgment. Arguably, the board could decide the second question on the basis of the board members’ professional expertise, but it would be preferable to have a witness testify on that

¹⁰ The certified administrative record may not consist of literally everything pertinent to the proceeding in the decision maker’s possession. Personal notes may be omitted. Note also this important limitation: “Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.” M.G.L. c. 30A, § 11(2). While traditional rules of evidence do not apply in administrative adjudicatory proceedings, rules of privileges do. Chapter 30A’s §11(2) states: “Unless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law.” Finally, as discussed further in Chapter V, “[a]gencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.” Id.

matter and be subject to cross-examination. There is thus an unavoidable tension between the necessary focus on the record and the equally necessary reliance on the decision maker's own knowledge and expertise to evaluate that record.

Since materials not in the record cannot be a basis of the decision, the hearing officer should avoid being exposed to them. That is, she should not engage in "ex parte communications," or discussions about individuals or matters that are before her for decision in an adjudicatory hearing. 801 C.M.R. 1.03. It is of even more importance to avoid such discussions with one party that do not occur in the presence, or with the knowledge of, other parties to the adjudicatory proceedings. "Ex parte" communications are more fully discussed below in the chapter on the code of conduct applicable to hearing officers. See Chapter VII, § B.

A final and important note. It is best practice to ask the parties and their counsel to redact personal identifying data from any documents that will be included in the record in accordance with the Interim Guidelines for the Protection of Personal Identifying Data in Publicly Accessible Court Documents, which were approved by the Supreme Judicial Court and made effective on September 1, 2009.¹¹ If such data are not necessary to the decision maker's ability to adjudicate the matter, the following data should be redacted: social security numbers, taxpayer identification numbers, credit card or other financial account numbers, driver's license numbers, state-issued identification card numbers, or passport numbers [or, alternatively, include only the last four digits]; and a person's mother's maiden name. In the event that the decision is appealed, redaction during the administrative process can prevent the unnecessary inclusion of personal identifying data in the record, which otherwise could lead to identity theft, given that the record is a publicly-accessible document filed with the reviewing court. Given their familiarity with the documents, the parties to the administrative hearing and their counsel are in the best position to redact or omit this data. Failing to ask the parties and their counsel to make those redactions could lead the Attorney General's Office to require the hearing officer to make those redactions after a decision has been rendered if the decision is appealed.

C. Burden of Proof.

A third basic principle is the concept of "burden of proof." The burden of proof is a device for allocating to one party the burden of persuading the decision maker. As a general matter, a hearing requires the determination of one or more principal issues as well as a number of subsidiary issues. For each issue a burden of proof is assigned and the party that has that burden of proof must show by the "clear weight" or the "preponderance" of the credible evidence that his position is justified or else a decision on that issue will be granted in favor of the opposing party. See Medical Malpractice Joint Underwriting Ass'n of Mass. v. Commissioner of Insurance, 395 Mass. 43, 46 (1985). For example, consider the simplest of

¹¹ These guidelines are available at <http://www.mass.gov/courts/sjc/docs/interim-pid-guidelines.pdf>

cases where only one question is involved – such as whether or not a surveyor conducted a land survey in accordance with professional surveying practices. In such a case, the party seeking revocation has the burden of proof. Therefore, the party seeking revocation of the surveyor’s license (normally the board’s complaint counsel or a complainant) must show that it is more likely than not, based upon evidence in the record, that the particular survey in question was not a proper exercise of professional practice. If the board determines that, based solely on the record before it, it is equally likely that the survey was or was not good practice, then judgment must be entered in favor of the opposing party – that is, in favor of the surveyor who seeks to retain his license.

However, the burden of proof is not always borne by the party seeking revocation of a license. In some cases, particularly those that involve what are usually called “affirmative defenses,” the burden of proof on a particular issue is borne by the licensee. For example, assuming that an architect designed a building that was clearly in violation of professional standards, it might be a defense for the architect to show that the client insisted upon that particular type of design. In that case, the architect would bear the burden of proof, which would mean that she would have to show that it is more likely than not, based upon the record, that the client had made such a demand. If the board concluded that either result was equally likely, then, because of the burden of proof, it should rule against the architect on this issue. While accurately determining which party has the burden of proof can entail a thorough consideration of both procedural and substantive law, often the answer can be derived from analyzing which party would be legally entitled to prevail if no evidence were introduced by any party in an effort to persuade the fact-finder. (The party that would lose in such a situation is generally the party bearing the burden of proof.) In any event, the burden of proof in an adjudicatory proceeding does not shift but rather remains with the same party throughout.¹²

D. Adjudicatory Proceedings.

The concept of an “adjudicatory proceeding” is essential to due process. An adjudicatory proceeding is defined both by statute, M.G.L. c. 30A, § 1(1), and by regulation, 801 C.M.R. §§ 1.01, 1.02 and 1.03. Essentially all of the discussion in this manual relates to adjudicatory hearings or the proceedings prior to such hearings. Adjudicatory proceedings include hearings at which evidence is presented and witnesses testify, usually under oath, and are subject to cross-examination, and at which decisions are made solely on the basis of the record as discussed above.

¹² 19 K.B. Hughes, Massachusetts Practice: Evidence, § 23 (1961). The burden of proof should not be confused with the burden of production, which can shift between the parties. Id. The burden of production is concerned with the order of proof, of who has to introduce evidence at a given stage to prove the existence or non-existence of essential facts or else risk an adverse determination. Roughly speaking, the party that would not reasonably be expected to prevail on the current state of the evidence is generally the party bearing the burden of production. Id.

Adjudicatory hearings may be distinguished from informal or public hearings during which decision-makers hear unsworn statements of fact or opinion and decide either on the basis of those statements or on the basis of other considerations. An example of an informal hearing is the type of hearings held in connection with proposed agency regulations at which members of the public are free to come and state their views on proposed regulations, but the agency is not required to justify its final regulations solely or even partially upon those public statements.

Adjudicatory hearings on the other hand are not only appropriate but they are both statutorily and constitutionally required in cases in which an individual's professional license may be at stake. Hearings are also a required part of any administrative process that may result in a monetary fine. Thus, license revocation, suspension, probation, a fine, or even a reprimand cannot be ordered against an individual (or a corporation) unless an adjudicatory hearing is either provided or explicitly waived by the individual or entity. However, when an agency recognizes that there is a threat to the public health, safety or welfare, it may suspend a license prior to such a hearing. M.G.L. c. 112, § 52F; Levy v. Board of Registration in Dentistry, 2007 WL 6823651 (Mass. App. Ct. July 10, 2007). The licensee does have a right to a prompt review of that emergency action (i.e., summary suspension), in addition to the right to a hearing on the ultimate determination of whether his license should be revoked.

E. Parties.

Every adjudicatory proceeding involves at least two and sometimes more "parties." In licensure cases, the licensee is always one necessary party. Another party is the board in its prosecuting capacity. In this context it is important to distinguish between the board as the prosecutor and the board as adjudicator. The board, or different board employees or members, can simultaneously fill both roles, but no individual board employee or member can simultaneously fill both roles. Kippenberger v. Board of Registration In Veterinary Medicine, 448 Mass. 1035, 1036 (2007). That is, a board member or an employee can act as a prosecutor while the remaining board members can adjudicate the matter before it. Finally, in addition to the licensee and the board prosecutor(s), other individuals or corporations can be parties. Most often such a third party is the individual or corporation who filed a complaint against the licensee that led to the adjudicatory hearing; the mere filing of a complaint, however, does not make the complainant a party. Such person must ask to intervene and have her request granted by the board. 801 C.M.R. § 1.01 (9). For example, a person who believed that her hair was permanently damaged by a hairdresser and filed a complaint with the board that supervises hairdressers could be given status as a party (ordinarily, such a party is called an "intervenor") to a disciplinary proceeding involving that hairdresser. Whether or not a complainant is given intervenor status depends upon the rules and discretion of the board and upon the wishes of the complainant herself. All parties – the licensee, board prosecutor(s), and any intervenors – have the same rights to be present at the presentation of the evidence, to cross-examine witnesses, and to present evidence, including, their own testimony. No hearing should take place unless all parties are given prior notice and an opportunity to appear and be heard. Similarly, no board member should ever communicate with one party about a case

without informing –or (the better practice) being in the presence of—all other parties to the case.

F. Informal Proceedings.

The detailed rules for adjudicatory proceedings can limit the flexibility of the agency and the ability of the parties to narrow or resolve areas of dispute. Fortunately, agencies are also permitted to conduct more informal proceedings. These informal proceedings are not substitutes for formal adjudicatory proceedings; rather, they are intended to facilitate or obviate such hearings. Informal conferences, for example, can be conducted at any stage of the process. For example, after a board receives a complaint about the conduct of a licensee, it may convene an informal hearing at which the complainant and the licensee can appear before one board member to discuss the problem and see if the matter can be resolved informally. If all parties agree on a resolution, then the informal proceedings can be the end of the matter, but if all parties do not agree and the matter proceeds, then the licensee retains his right to a formal adjudicatory hearing, unless that right is expressly waived. Informal hearings, therefore, do not require the presentation of evidence, the testimony of witnesses, or the keeping of a record, but they must not violate fundamental due process notions of fairness. For example, an informal hearing cannot be held without giving notice to all parties, nor can the statements made at such a hearing be relied upon by the decision maker at any future point in the administrative adjudicatory proceedings. Furthermore, since informal hearings are designed to determine whether a mutually agreeable resolution can be reached, attendance at such an informal hearing is voluntary and a refusal by the licensee to attend is not a basis for any sanction or adverse inference. Of course, if a licensee chooses not to attend, he may lose his opportunity to persuade the board not to issue a formal Order to Show Cause.

G. Conclusion.

The most important principle that should guide the presiding officer in conducting adjudicatory proceedings is fairness. Each party should be given an opportunity to appear and be heard. As discussed elsewhere in this manual, the presiding officer has ample means to control the conduct of the hearing and the parties appearing before her. It is equally important for the presiding officer to keep an open mind and to maintain her impartiality throughout the hearing so that the decision rendered is one that is based solely on the administrative record compiled during that hearing and is not based upon extraneous considerations such as the personality of a party (or counsel) or upon information which has not passed through the crucible of the hearing process. If the presiding officer is fair and impartial and confines her deliberations to the administrative record before her, then she fulfills the responsibilities of a decision maker.

CHAPTER II

COMMENCEMENT OF AN ADJUDICATORY PROCEEDING

Adjudicatory proceedings relating to professional licensure usually begin with the board's issuance of an Order to Show Cause why a licensee should not be disciplined. See 801 C.M.R. 1.01(6)(a). This chapter reviews the principles governing the decision to issue such an Order or to initiate a formal hearing, the content of the Order, and the authority of boards to act on the Order without holding a hearing.

A. The Decision to Conduct a Formal Hearing.

1. The Complaint.

Most disciplinary actions begin with a consumer complaint. (A board investigator can also bring a complaint against a licensee.) A consumer complaint, usually in the form of a letter, describes what the consumer perceives as improper behavior on the part of the professional licensee. Upon receiving a consumer complaint, the board generally has three choices concerning the action it will take:

(a) The board may decide that the complaint raises matters that are not sufficiently serious to require further board action. In some cases, the complaint may allege matters outside of the scope of the board's authority. In such cases, the board should inform the consumer of the board's lack of authority over the subject of the complaint, and, if possible, refer the consumer to another state agency that does have jurisdiction over the complaint.

(b) The board may decide that an investigation is necessary to determine what action, if any, the board should take. A complainant may allege that a licensee has violated the board's rules. If the complaint itself does not allege precisely the facts that would constitute a violation of board rules, further investigation might be necessary to determine if a violation has occurred. The investigation may take one of two directions. The board may inform the licensee of the complaint and ask the licensee to respond to it either in writing or at an informal conference. Or, the board may send out its own investigators to determine whether the licensee is in fact engaging in improper behavior.

(c) Finally, a complaint may require the immediate action of the board because there a threat to the public health, safety or welfare. The board may find that the licensee's alleged behavior is of sufficient seriousness for the board to initiate immediately a formal hearing.¹³

¹³ Although not strictly within the scope of this manual, the question of the confidentiality of consumer complaints is a common one and warrants a brief comment. Whether a consumer complaint falls within the public record law must be addressed on a case-by-case basis, given privacy and investigatory considerations. The board may release a complaint if both the complainant and the
(footnote continues on the next page . . .)

2. Reasons for Initiating a Formal Hearing.

The board may decide to initiate a formal hearing for many reasons, including:

- (a) the board believes that the complaint is sufficiently serious to require formal adjudication;
- (b) the licensee fails to respond to the board's letter concerning a complaint, and the board believes that there are sufficient grounds to justify further action;
- (c) the licensee's response to the board's letter does not convince the board that further action is unwarranted;
- (d) the board's investigation reveals the need to take further action; or
- (e) an informal hearing or conference with the licensee fails to resolve all the issues.

Unlike a consumer complaint, the Order to Show Cause is a public document. Unless the board's governing statutes state otherwise, the board may release the Order to the public. The board, however, should delete all identifying data relating to the complainant before releasing the Order unless the complainant gives permission to have his or her name and other identifying information released.

B. The Content of the Order to Show Cause.

Good administrative practice and the Adjudicatory Rules require the board to include the following in its Order to Show Cause:

1. Docket Number.

All orders to show cause must contain a docket number. This is a number which

licensee give their permission. If permission is not granted, a complaint may be released if identifying information is deleted and the disclosure would not jeopardize the privacy or reputation of the licensee or complainant. However, the board may refuse to release a complaint in part or in whole if its disclosure would prejudice the conduct of the investigation or discourage other complainants from coming forward. G.L. c. 4, § 7, cl. 26(f); Globe Newspaper Co. v. Police Comm'r of Boston, 419 Mass. 852, 858 (1995). The board may, however, reveal the existence of complaints against a licensee. The board may advise people that complaints have been filed against a particular licensee; but the board should not reveal the content of the complaint. In this way, the board protects the public, while at the same time it protects both the privacy of the licensee whose guilt has not yet been determined and the privacy of the complainant, so as to not deter other individuals from making complaints. Of course, the final disposition of a complaint is a public record that should be disclosed.

identifies the case being brought by the board. Under the rules of adjudicatory procedure, each board is required to maintain a list of all the documents filed in a particular action. 801 C.M.R. § 1.01(5)(e). This list should be kept separately from the board's other files and the documents should be entered upon the list chronologically in the order in which they are received. 310 C.M.R. § 1.03(8)(a).¹⁴ A sample docket index is contained in the Appendix.

2. Title or Caption of the Case.

An Order to Show Cause should also include the title of the case. Ordinarily, the title will simply be "In the matter of Named Licensee."

3. Notice of Statutory Authority.

Rule 801 C.M.R. § 1.01(6)(a) requires that the board identify its authority for conducting the adjudicatory proceeding and imposing sanctions. Under this rule, the board should cite all of the statutes or regulations that (1) establish its jurisdiction over the subject matter; and (2) authorize it to discipline its licensees. It is also a statutory requirement for some boards (and good practice) to provide a list of the possible sanctions that may be imposed on the licensee. Thus, the board should set forth all possible sanctions that it may impose upon the licensee if the allegations or charges against him are proven.

4. Factual Allegations.

The board must set forth the factual basis for its Order to Show Cause. 801 C.M.R. § 1.01(6)(a). The Order must state the factual allegations upon which it will rely to fine, take adverse action against, or discipline a respondent or licensee with enough specificity to provide the individual or entity with notice so that a response to these allegations at the hearing can be expected. M.G.L. c. 30A, § 11(1); Vaspourakan, Ltd. v. Alcoholic Beverages Control Com'n, 401 Mass. 347, 353 (1987). This is by far the most important part of the Order. The factual allegations not only apprise the respondent of the grounds for the board's potential actions, but also limit the board's ability to act. The board may take disciplinary action only for those allegations set forth in the Order. For example, if the Order states only that a licensee has improperly treated a particular patient during a certain period of time, the board may not discipline the licensee for his treatment of another patient at some other time, unless it modifies the Order or otherwise provides the licensee with notice and an opportunity to be heard. The order should set forth the factual basis for the board's action and must, therefore, include every action taken by the licensee that the board will consider at the hearing.

¹⁴ Furthermore, "unless otherwise prescribed by law, each agency shall maintain, on a current basis, a decision index and compilation of decisions. Said index shall contain an alphabetical listing by name and subject matter of all decision maker decisions rendered and shall contain a further cross-reference as to the page number in the compilation where the subject decision may be found. All names and addresses of parties shall when appropriate be deleted from the decisions in the compilation in order to protect confidentiality." 310 C.M.R. § 1.03 (8) (b).

This is not to say that the board may do nothing if, following the initial Order to Show Cause or even during the hearing, the board realizes that the licensee may have acted improperly in other circumstances. For example, the veterinarian's board may allege that a veterinarian has improperly and unprofessionally examined and treated a poodle. During discovery or the hearing, the evidence may reveal that the veterinarian has also improperly recorded his treatment of the poodle. If the board's initial Order to Show Cause did not cite poor recordkeeping as a basis for its actions, it can be amended upon the request of board's prosecutors. 801 C.M.R. § 1.01(6)(f), which governs amendments to pleadings (including Orders to Show Cause), states simply that amendments may be permitted "upon condition[s] just to all parties." Common sense and fairness are the guiding standards. Thus, to return to our example, if the poor record-keeping issue arises for the first time during the hearing, the board may permit an amendment to the Order to allege inadequate recordkeeping. The board, however, must give the veterinarian sufficient notice and an opportunity to answer the new allegations and, if necessary, an opportunity to prepare his case further. In some cases, this may mean that the board must stay its proceedings to provide the veterinarian with sufficient opportunity to prepare a defense against the new allegation(s).

It is not enough simply to allege facts that the licensee has acted in a way which the board disapproves. The licensee's action (or failure to act) must violate a legally binding standard of professional conduct. For these reasons, the Order to Show Cause should list each and every statutory or regulatory provision that the licensee is charged with violating. Again, the board must recognize that it can only sanction a licensee for the reasons stated in the Order. Therefore, the board should be certain that it has included every violation upon which it will rely for sanctioning the licensee. Each violation or alleged violation should be stated in a separate paragraph.

5. Sanctions.

The board has broad authority to sanction a professional licensee, not to punish that licensee, but to promote the public health, welfare, and safety. Duggan v. Board of Registration in Nursing, 456 Mass. 666, 683 (2010); Anusavice v. Board of Registration In Dentistry, 451 Mass. 786, 801-02 (2008). In addition to establishing the board's authority to sanction the licensee, the Order to Show Cause should list all of the possible sanctions that could be imposed upon the licensee. Generally, the sanctions each board is authorized to impose are set forth in the board's enabling statutes and regulations. There is nothing to prevent the listing of all authorized sanctions in order to give the board maximum flexibility in imposing discipline. A sample Order is contained in the Appendix.

C. Service of an Order to Show Cause.

Although the Adjudicatory Rules do not require a specific type of service for an Order to Show Cause, it is good practice for the board to send the Order by certified mail, with a return receipt requested, to the licensee and her attorney, if any. The board may also wish to send a copy to the complainant.

D. Responding to a Motion for More Definite Statement.

The Adjudicatory Rules permit a licensee to request a more definite statement from the board. 801 C.M.R. § 1.01(7)(b). This means that if the responding party believes that the Order to Show Cause is so vague or so ambiguous that she cannot reasonably frame an answer to the allegations, she may ask the board to be more specific. A motion for a more definite statement must be filed within 21 days, the time for responding to or answering the Order. Upon receipt of such a motion, the board should ask itself the following questions:

1. Is the Order sufficiently detailed so as to provide the respondent with adequate notice of the allegations against her?
2. Are the factual allegations contained in the Order sufficiently specific? If the board answers these questions in the affirmative, it should deny the motion for a more definite statement. On the other hand, if, after reviewing the Order, the board realizes that its allegations are vague or ambiguous, the board should amend its order to explain in more detail the ambiguous portions.

E. Action Without Evidentiary Hearings.

Licensees are generally entitled to a hearing prior to any disciplinary action. Thus, in most instances, the board will not discipline a licensee prior to an adjudicatory hearing. However, there are certain instances where the board may take action prior to or instead of a formal hearing. Generally, these instances are the following:

1. Default.

A person may choose to waive his right to a hearing. He may do this either expressly or by failing to respond to the Order to Show Cause or by failing to appear at a scheduled hearing. 801 C.M.R. § 1.01(7)(g)(2) (failure to prosecute or defend); 801 C.M.R. § 1.02(10)(d) (dismissals for failure to appear). Under these circumstances, the board may assume the truth of the allegations in the Order and impose an appropriate sanction on the licensee. The presiding officer should verify the timeliness of the parties' actions in response to the board's communications with them; he may require a showing of good cause (e.g., the delay was due to events outside their control or was otherwise reasonable) if their actions are not timely.

2. Consent Order or Settlement.

A person may also waive his right to a hearing by entering into a consent order or settlement with the board. A consent order is an order requiring some action by the licensee and is made by the board with the consent of the licensee. A consent order is not the result of the board's deliberations, but represents the board's acceptance of an agreement reached between the board and the licensee. A consent order involves the licensee's assent to some form of discipline by the board. For this reason, the consent order must be in writing and should be signed by both the licensee and the board or the board's authorized representative.

A consent order or settlement may be entered by the board and the licensee to govern the status quo pending a final adjudication. Thus, a physician alleged to be drug-dependent may enter a temporary agreement to surrender his license while he engages in a drug rehabilitation program. If the arrangement is acceptable to the board, further proceedings may be stayed until the program is completed and the physician's progress is assessed.

Settlements between the licensee and the private complainant do not preclude disciplinary action by the board. The board may still decide to take action against the licensee. Whether or not the board decides to proceed may depend upon the nature of the offense, the evidence before the board, the licensee's past record, and other relevant considerations.

3. Summary Decision.

The board may also take disciplinary action without an evidentiary hearing when the licensee does not raise a factual issue that must be determined by a hearing. 801 C.M.R. § 1.01(7)(h). For example, when the Order to Show Cause is based solely on a criminal conviction and the respondent's answer does not deny the conviction, the board may take disciplinary action without a hearing. M.G.L. c. 112, § 52D; Anusavice v. Board of Registration In Dentistry, 451 Mass. at 801; Kobrin v. Board of Registration in Medicine, 444 Mass. 837, 848 (2005). The board should, however, exercise care in taking disciplinary action without an evidentiary hearing. The board must assure itself that no genuine issue of material fact is raised by the respondent's answer before proceeding in this manner. Even where the dispositive material facts are uncontested, a hearing still may be necessary to comply with a statutory guarantee of a hearing. See Veksler v. Board of Registration in Dentistry, 429 Mass. 650, 652 (1999). Also, the board may find it useful to hear evidence on the question of appropriate sanctions. If so, it may hold a hearing on sanctions even if the facts relevant to liability are uncontested.

4. Summary Action or Suspension.

Some boards may, by statute or regulation, have the authority to suspend a license before a formal hearing is held. M.G.L. c. 30A, § 13. Generally, this may be done in limited situations where, in the board's judgment and based on preliminary, but credible, evidence, the licensee's continued practice threatens the public health, safety, or welfare. M.G.L. c. 112, § 52F; Levy v. Board of Registration in Dentistry, 2007 WL 6823651. For example, the Board of Medicine may have sufficient information to believe that a licensee is practicing under the influence of drugs. In these circumstances, the board should strictly adhere to the pertinent statutes or regulations. It must provide the licensee an opportunity for a hearing and issue a decision within a short time after the summary action has been taken. The board's full adjudicatory hearing should follow promptly.

CHAPTER III

PRE-HEARING MATTERS

The individuals conducting administrative hearings are referred to variously—*e.g.*, presiding officer, administrative magistrate, hearings officer, hearings counsel, to name a few. A board may designate an employee or a member to act as the presiding officer who conducts the administrative proceedings. For simplicity, these individuals will primarily be referred to as the presiding officer.

A. Appearances.

The respondent may appear in his own behalf (this is called appearing “pro se”) or accompanied by an “authorized representative”¹⁵ who may or may not be an attorney. An authorized representative must file a written appearance with the board, which should include the name, address, and telephone number of the representative. 801 C.M.R. § 1.01(3)(b). The board should require current contact information for the respondent and authorized representative in order to provide them with proper notification of the proceedings. Whether a respondent appears pro se or is represented by an attorney will often affect the type and complexity of preliminary motions filed as well as the conduct of the hearing itself.

B. Pre-Hearing Conferences.

The board may, at the request of a party or on its own initiative, order a pre-hearing conference. 801 C.M.R. § 1.01(10)(a). The pre-hearing conference is generally helpful to both the presiding officer and the parties. It is an opportunity to define the issues in dispute, to resolve some of them (including procedural issues), and to ensure that everyone is prepared to participate in the hearing. A successful pre-hearing conference is thus likely to result in a more successful hearing. Written notice of the conference should be sent to all parties prior to the conference, unless it was included in the notice of hearing. The purpose of a pre-hearing conference is to (1) identify and (hopefully) simplify the issues to be adjudicated; (2) stipulate to facts not contested by the parties; (3) identify the witnesses and exhibits—that is, documents that the parties expect to offer into evidence—and make sure that they will be available; (4) hear arguments and rule on pre-hearing motions; and (5) consider any other matter that might facilitate the expeditious conduct of the hearing. 801 C.M.R. § 1.01(10)(a). For example, the parties may agree that the respondent has been convicted of a crime for which the board has the authority to impose sanctions. They may further agree that the only remaining issue for the hearing is the appropriate sanction to be imposed. The presiding officer

¹⁵ 801 C.M.R. § 1.01(2)(c) states that an authorized representative is “an attorney, legal guardian or other person authorized by a party to represent him in an decision making proceeding.” Moreover, 801 C.M.R. § 1.01(3)(a) further states that “an authorized officer or employee may represent a corporation, an authorized member may represent a partnership or joint venture, and an authorized trustee may represent a trust.”

may want to issue an order that all preliminary motions should be filed at least 10 days before the conference. If she determines that oral argument on a pending motion is necessary to decide the motion, she may use the conference to hear oral argument. The pre-hearing conference is also an opportunity to determine if other pending matters bear on the hearing (e.g., litigation, bankruptcy).¹⁶ The date for the adjudicatory hearing should be agreed upon at the pre-hearing conference, if it has not already been set. If any complicated legal issues are raised at the pre-hearing conference, the presiding officer should seek legal advice before the adjudicatory hearing. For example, a physician may indicate that he plans to submit in evidence certain conversations with his patient. Uncertainty about whether such conversations are privileged should be resolved before the hearing.

C. Consolidation of Hearings.

With the agreement of the parties, the board has discretion to order that two or more cases be consolidated for a single hearing if they involve overlapping facts and the evidentiary presentations and issues in the cases will be substantially alike. 801 C.M.R. § 1.01(7)(j). Such a consolidated hearing may conserve resources.

D. Intervention and Participation.

The presiding officer may allow, upon a written request, any person who is not initially a party to the adjudicatory proceeding to either intervene or participate. A person who is “substantially and specifically” affected by the proceeding should be permitted to intervene. An intervenor shall have all the rights of a party and, of course, be subject to all the limitations imposed upon a party. A person who is “specifically” affected by a proceeding should be permitted to participate. The rights of a participant are limited to the right to argue orally at the close of the hearing and the right to file an amicus brief. A person who petitioned to intervene but was allowed only to participate may participate without waiving any right to administrative or judicial review of denial of the request for leave to intervene. 801 C.M.R. § 1.01(9)(e).

E. Discovery.

Discovery is the disclosure of facts, documents, or other things within the knowledge or possession of one party that may be necessary or useful to prove facts to the decision maker. Discovery allows each party to become familiar with the evidence the other party expects to produce at the adjudicatory hearing. Discovery should assist the parties in their preparation for the hearing, but should not be used for “annoyance, embarrassment, oppression, or undue burden or expense.” 801 C.M.R. § 1.01(8)(a).

¹⁶ If a factual or legal determination has previously been made in a formal prior adjudication regarding the same party and the same claim or issue, the presiding officer’s latitude to act may be hemmed in by the doctrine of “collateral estoppel.” That is, he may be precluded from issuing a finding or conclusion that is inconsistent with the previous determination.

Ordinarily, the parties will conduct discovery (except for depositions described below) without the need for intervention by the presiding officer. However, when there is a discovery dispute, one party may bring a “motion to compel discovery” or a “motion for a protective order.” The presiding officer has the discretion to limit the scope, method, time, and place for discovery. 801 C.M.R. § 1.01(8)(a). When ruling upon a party’s discovery motion, she should determine whether the information requested is relevant to the proceeding and whether it is confidential or privileged information. Parties are required to comply with specific time periods for discovery set forth in the Adjudicatory Rules. 801 C.M.R. § 1.01(8)(b)-(c).

The following types of requests for discovery can be expected:

1. Requests for documents.

A party is entitled to inspect or copy all relevant documents in the possession of the other party. Most often, it is the respondent who seeks to inspect complaints and other written documents upon which the board’s Order to Show Cause is based. The board is entitled to reimbursement for the cost of the photocopying. 801 C.M.R. § 1.01(8)(b). To the extent possible, the board should provide the party requesting these documents with a cost estimate.

If a party intends to introduce a document into evidence at the hearing, copies of it should be provided to the other parties and to the presiding officer ahead of time. A document that was not provided to other parties, if complicated, may be disregarded by the presiding officer and excluded from consideration at his discretion. (The exclusion should be noted and a copy of the document placed in the record.) It is best that all exhibits be labeled prior to the hearing.

2. Depositions.

A deposition is the written transcription of sworn testimony taken orally before an officer having the power to administer oaths. 801 C.M.R. § 1.01(8)(c). Unlike depositions taken in connection with court proceedings, administrative depositions are not taken as a matter of course. A request to take a deposition must include the reason for the deposition and the subject matter about which the witness is expected to testify. The hearing officer has the discretion to allow a deposition to be taken only upon a showing that (a) the parties have agreed to submit the deposition instead of testimony by the witness at the hearing; or (b) the witness cannot appear at the hearing without substantial hardship. 801 C.M.R. § 1.01(8)(c). For example, it is proper to allow the deposition of a central witness who is moving to another state and will not be in Massachusetts at the time of the hearing. In addition, the parties must show that the testimony is significant, not privileged or confidential, and cannot be obtained by any other means. 801 C.M.R. § 1.01(8)(c).

3. Interrogatories.

Interrogatories are a series of written questions submitted by one party to be answered under oath by another party.¹⁷ For instance, the board's prosecutor may ask such questions as: "On what date were you first licensed as an licensee?" and "State the dates and places that you have been employed in your capacity as a professional licensee." A party is limited to 30 interrogatories unless the presiding officer believes that more are necessary. 801 C.M.R. § 1.01(8)(g).

If a party objects to the interrogatories and provides reasons to support those objections, the presiding officer may rule that the propounded interrogatories appear annoying, embarrassing, oppressive, unduly burdensome or expensive. For example, if the interrogatories include personal questions that are not relevant to the licensee's professional practice, the presiding officer should consider limiting the questions or permitting a party not to answer. 801 C.M.R. §§ 1.01(8)(h)-(i).

F. Subpoenas.

The purpose of a subpoena is to require the attendance and testimony of witnesses or the production of documents at the hearing. M.G.L. c. 30A, § 12; M.G.L. c. 233, § 8. (A subpoena that requires a person to produce books, records, correspondence, or other materials is called a "subpoena duces tecum"). Upon a written request, a party is entitled to the issuance of a subpoena as of right, although that subpoena may later be modified or vacated by the presiding officer at the request of the witness for whom the subpoena is issued. M.G.L. c. 30A, § 12(3)-(4); 801 C.M.R. § 1.01(10)(g).¹⁸ All boards should have a standard form subpoena that can be prepared by the executive secretary of the board. The person to whom the subpoena is directed must comply with it unless excused by the presiding officer. In acting upon such a request, the presiding officer should consider (1) whether the testimony or evidence sought is relevant or reasonably related to the proceeding; (2) whether the subpoena adequately describes the evidence required; (3) whether compliance with the subpoena poses an unreasonable burden on the witness; and (4) whether the testimony or material requested falls within a constitutional or statutory privilege.¹⁹ M.G.L. c. 30A, § 12 (4). For example, where the issue at an adjudicatory hearing will be the appropriateness of the respondent's treatment of a

¹⁷ Unlike depositions, which may be directed to non-party witnesses, interrogatories may be addressed only to a party. 801 C.M.R. § 1.01(8)(g).

¹⁸ See also Boston Police Superior Officers Fed'n v. City of Boston, 414 Mass. 458, 459 (1993).

¹⁹ For a discussion of the proposition that the privilege against self-incrimination may properly be invoked in opposition to an administrative subpoena, even in the context of a civil adjudicatory hearing, see 38 Cella, Mass. Practice, § 148. Note, however, that records exempt from disclosure under state public records laws nonetheless may be subpoenaed pursuant to M.G.L. c. 30A, § 12. Boston Police Superior Officers Fed'n v. City of Boston, 414 Mass. 458, 465-66 (1993).

particular patient on a particular date, a subpoena duces tecum directing the respondent to bring in all records from sometime prior to that date of treatment is likely to be overbroad and, if it seeks records about totally unrelated procedures, irrelevant to the issue being adjudicated. The presiding officer may also excuse a person from complying with a subpoena when the party requesting the subpoena fails to demonstrate that the information sought from it cannot be obtained in any other way.

If a person fails to comply with a subpoena, the board, through its board counsel and with the permission of the Office of the Attorney General, may apply to the Superior Court for an order directing the person to comply. M.G.L. c. 30A, § 12 (5). Under M.G.L. c. 233, § 8, which applies to many, but not all, administrative adjudicatory agencies, a subpoenaed witness is subject to the same penalties for default as witnesses in civil cases before the courts.

G. Preliminary Motions.

A request to the presiding officer is normally made in the form of a motion. 801 C.M.R. § 1.01(7). It is impossible to list every preliminary motion that can be filed. They will be as varied and creative as the parties preparing them. The presiding officer should require that all motions be in writing and set forth the reasons for the motion and the specific action requested. Either before or at the pre-hearing conference, the presiding officer should set a date by which all pre-hearing motions must be filed. She may allow oral argument on a motion if it is necessary to or helpful in deciding the motion. She may also request that certain motions be accompanied by a memorandum setting forth the party's legal or factual arguments in support of the motion. She can probably respond to most motions by writing a "margin decision," that is, by writing "allowed" or "denied" on the motion itself, and asking the board's secretary or clerk to notify the parties of the decision. Some motions, particularly if they have a dispositive effect on the adjudicatory proceeding, may require a written decision setting forth the reasons for the ruling. The following is a list of some common motions:

1. Motion for extension of time.

Motions for extension of time are filed if a party seeks to extend the responsive dates set forth in the Adjudicatory Rules or previously ordered by the presiding officer, e.g., motion for extension of time to answer an Order to Show Cause or file discovery motions. A decision maker can exercise discretion and consider what is "reasonable" when ruling on such motions. 801 C.M.R. § 1.01(4)(e). For example, a request for 90 days in which to answer the Order to Show Cause is probably not a reasonable request. On the other hand, a request for an additional week in which to file objections to a recommended decision may not be unreasonable. The presiding officer should consider whether the party bringing the motion has provided good cause.

2. Motion for continuance.

Initially, the presiding officer should strive to set a hearing date convenient for all parties. Once the date has been set and stenographic and witness arrangements have been

made, motions for continuances should not be granted without good cause. In ruling upon a motion for a continuance, she should strive to maintain a balance between providing a “just and speedy determination of every proceeding” with the right of a respondent to fully and adequately respond to the allegations made against him. A scheduled hearing may be continued to another date for good cause shown upon agreement of the parties or by motion. See 801 C.M.R. § 1.01(7)(d).

3. Motion for decision on the pleadings.

In some cases there may be no need for a hearing at all. Once an answer to the Order to Show Cause has been filed, the parties may request that the case be decided on the basis of the Order and the answer alone. In such cases, the decision maker should rely only upon those documents, with exhibits or other attachments, in determining whether the allegations in the Order have been proved. 801 C.M.R. § 1.01(10)(c).

4. Motion for summary decision.

All or part of a case normally may be resolved by way of “summary decision,” if there are no material issues of fact in dispute. 801 C.M.R. § 1.01(7)(h). [But see Chapter II, § E.3, *supra*.]

5. Motion for recusal.

A respondent may request that the decision maker not hear the matter because he believes that the decision maker is partial, biased, or otherwise not able to adjudicate the matter fairly. 801 C.M.R. § 1.03(5) (setting forth standard for recusal).

H. Pre-Hearing Orders

Whenever the presiding officer takes any action before the hearing, it should be through a written pre-hearing order sent to all parties. For example, a pre-hearing order can be used to set the responsive dates for discovery or motions or to set the date of the hearing. A pre-hearing order can also be used to communicate rulings on pre-hearing motions.

I. Briefing of Issues

It is often useful for the parties to file written arguments, or briefs, in support of their case. If one of the parties submits a brief, the presiding officer should allow the other party to submit one as well. The presiding officer may impose page limits on the parties’ briefs.

J. Failure to Prosecute or Defend.

If a prosecutor fails to file documents, respond to notices, or comply with pre-hearing orders, or if that party otherwise indicates an intention not to continue to participate in the proceedings, the presiding officer may issue (sua sponte or at the request of another party) an Order to Show Cause why the non-participating party’s claim should not be dismissed for lack

of prosecution. 801 C.M.R. § 1.01(7)(g)(2). If the party against whom the Order issues does not respond appropriately within 10 days, the presiding officer may dismiss that party's claim with or without prejudice. Id. Similarly, claims may be dismissed for failure to appear or prosecute under the Informal/Fair Hearing Rules. 801 C.M.R. § 1.02(10)(d),(e). These regulations also apply to a failure to defend.

CHAPTER IV

THE HEARING

A. Preparation for the Hearing.

1. Notice of Hearing.

Notice of the hearing may be contained in the Order to Show Cause or may be issued separately, after receipt of a request for a hearing by the respondent. Notice of the hearing should be issued within a reasonable time before the hearing. M.G.L. c. 30A, § 11(1). Except in unusual circumstances (as, for example, when all parties have requested an immediate hearing), at least 10 days' notice should be given. It is preferable to give 30 days' notice and it may be reasonable to allow even more time, depending on the complexity of the issues.

Notice of the hearing should be sent to all parties or their attorneys, if represented by counsel. In order to create a record that notice has been received by the parties, notice may be sent by registered mail with a return receipt requested.

2. Contents of Notice.

Per M.G.L. c. 30A, § 11(1), the notice of the hearing should contain the following information:

- (a) time and date of hearing;
- (b) place of hearing;
- (c) sufficient notice of the allegations made and the issues involved to afford the parties reasonable opportunity to prepare and present evidence, including testimony, and argument; this section should include a statement of the specific allegations made against the respondent, the factual basis for those allegations, and the sanctions that may be imposed if the allegations are substantiated;²⁰
- (d) notice of a party's right to present evidence, to call and examine witnesses, and to cross-examine witnesses who testify, and to submit rebuttal evidence;
- (e) notice of a party's right to appear on her own behalf or to be represented by an attorney or other authorized person;
- (f) notice of a party's right to order a stenographer to transcribe the proceedings at her own expense and a description of the arrangements that must be made

²⁰ Alternatively, such notice may be accomplished by reference to a detailed order to show cause.

before the hearing to have a stenographer present;

(g) notice that the hearing will be conducted pursuant to M.G.L. c. 30A, §§ 10 and 11, and the Adjudicatory Rules, 801 C.M.R. §§ 1.01 (or 1.02) and 1.03.

A standard form for a notice of hearing is included in the Appendix to this Manual.

3. Place of Hearing.

Hearings may be held at any location designated by the board. Any party may move to have the location changed for all or part of the hearing. Allowing or denying such a request is in the discretion of the presiding officer. In ruling on such a request, he should consider the wishes of the parties, transportation expenses and difficulties, the appropriateness of the alternative site, and convenience of the alternative site for witnesses. 801 C.M.R. § 1.01(7)(e). Arrangements should be made well in advance of the hearing date to insure that the place designated in the notice of hearing is reserved for that date. The hearing room should be large enough and contain sufficient furniture to accommodate all parties, witnesses, counsel, and other persons expected to be present. Hearings may also be held by telephone if necessary. The hearing process is the same as for an in-person hearing. When conducting hearings by telephone, it is especially important for documents to be exchanged and labeled in advance, and for the presiding officer to make sure that participants identify themselves (and any exhibits being discussed) for the record.

4. Recording Capacity.

Arrangements should be made to record the proceedings even if one of the parties has arranged for a stenographer. 801 C.M.R. § 1.01(10)(i) (1). The recording can later be used by the board in preparing its decision in the event that no stenographic transcript is ordered and provided by the parties. Before the hearing begins, the presiding officer should make sure that the recorder is in good working order and that there is a sufficient supply of tapes or disk to cover the anticipated length of the hearing. The recorder or microphones should be located so as to pick up the voices of all persons who speak during the proceedings. During the hearing, the presiding officer should test the audio equipment to make sure that the voices are being recorded, that the recorder is on at all times, and that the speakers are identifiable. If the recording fails or is of insufficient quality to transcribe, a court may remand the matter for a new hearing. To avoid the extra work that such a remand would entail, it is important to take the time at the hearing to ensure the quality of the recording.

5. Designation of Presiding Officer.

The board can designate an employee to act as the presiding officer or a member of the board should to act as the presiding officer to conduct the adjudicatory hearing. 801 C.M.R. 1.01(2).

6. Review of the File.

Before the hearing, the presiding officer and all board members who expect to attend the hearing should review the administrative record as it has developed up to that point in the case including the Order to Show Cause, the answer and any other pleadings on file, and any documents that have been submitted prior to the hearing. Note, however, that any such materials that are not admitted into evidence at the hearing may not be relied upon by the board in its decision. M.G.L. c. 30A, § 11(4). In reviewing the file, the board should identify any procedural or evidentiary questions that are likely to arise at the hearing and seek legal advice from board counsel on those issues before the hearing. The board should also formulate any factual questions it may want to raise at the hearing and identify facts of which the board may want to take administrative notice. See 801 C.M.R. 1.01(10)(h).

B. Conduct of the Hearing.

1. Decorum.

Hearings should be as informal as is reasonable and appropriate under the circumstances, but all persons present should conduct themselves in a manner consistent with the standards of decorum commonly observed in court. 801 C.M.R. § 1.01(10)(d)(1). For example, smoking, gum chewing, shouting, foul language, or speaking out of turn should be strongly discouraged in the hearing room.

2. Duties of the Presiding Officer.

Per 801 C.M.R. § 1.01(10)(d)(2) and 801 C.M.R. § 1.02(10)(f), the presiding officer has the following duties:

- (a) to conduct a fair hearing to ensure that the rights of the parties are protected (in doing so, the presiding officer should review the case file in advance and be prepared for the case; allow the parties to present their positions at reasonable length; listen carefully and attentively; and be conscious of both verbal and nonverbal behavior that might undermine the appearance, or guarantee, of a fair hearing);
- (b) to maintain decency and decorum (making sure that everyone is treated with respect);
- (c) to ensure an orderly presentation of the evidence and issues, and to rule on questions regarding admission or exclusion of evidence or any other procedural matters (if necessary, the presiding officer may adjourn the hearing temporarily to obtain advice of counsel if counsel to the board is not present);
- (d) to administer an oath or affirmation to all witnesses;

- (e) to ensure that a complete record is made of the proceedings; and
- (f) to reach an independent and impartial decision based on the issues, the evidence, and the law (the presiding officer should not prejudge the outcome or indicate the expected outcome until a determination has been reached).

3. Order of Proceedings.

The hearing should be conducted in the following order in accordance with 801 C.M.R. § 1.01(10)(e):

(a) Convening of the Hearing.

The presiding officer should convene the hearing by stating the purpose of the hearing, as set forth in the Notice of Hearing and the Order to Show Cause (this may be done by reading the Order into the record); and stating that the hearing will be conducted pursuant to the requirements of M.G.L. c. 30A and the Adjudicatory Rules. A smoother hearing process will likely ensue if the rules of procedure are made clear to everyone at the outset.

(b) Attendance Sheet to Identify Persons Present for the Proceeding

All persons in attendance should identify themselves for the record by stating their names and their roles in the hearing— e.g., board member, counsel, party, and witness. It is important that anyone listening to the audio recording should be able to identify each speaker. Requiring every person present to sign in on an attendance sheet created for that purpose will make it easier later on to tell who was present in the event a transcript of the proceedings is not ordered. The attendance sheet should be made part of the record on judicial review.

(c) Swearing in and Sequestering of the Witnesses.

All witnesses may be sworn at the outset, or, in the alternative, each witness may be sworn immediately before testifying. M.G.L. c. 30A, § 12(1); M.G.L. c. 233, § 8. No specific form of oath or affirmation is required, but each witnesses should raise his or her right hand and be asked whether he or she swears or affirms to tell the truth, the whole truth, and nothing but the truth, and should answer audibly and affirmatively before being permitted to testify. 801 C.M.R. § 1.01(10)(f)(1).²¹

²¹ One possible version of the oath is: “Do you solemnly and sincerely affirm under the penalties of perjury that the testimony you are about to give shall be the truth, the whole truth and nothing but the truth?”

There are two types of witnesses. Fact witnesses have personal, first-hand information relevant to the issues in dispute. The presiding officer should ordinarily sequester fact witnesses (i.e. exclude them from the hearing room) until they are called to testify. Expert witnesses have training and experience that enable them to offer their own considered opinions as testimony. The presiding officer must qualify expert witnesses by reviewing their credentials at the hearing and by allowing them to be subjected to cross-examination as to their credentials. Expert witnesses should ordinarily not be sequestered, since it is often beneficial for expert witnesses to respond to the testimony of opposing expert witnesses. Sequestered witnesses may stay in the hearing room once they have finished testifying.

(d) Opening Statements.

The presiding officer begins the hearing with a brief opening statement, which should ideally include: the presiding officer's name and title; the date, time, and location of the hearing; the identity of the parties; a description of the board's authority to hear the case; a request that everyone present identify themselves and state their role in the proceedings; a description of the hearing process, the procedures to be used, and the rights of the parties; a description of any stipulations; a request for preliminary questions; and the administration of the oath to anyone testifying.

Each party or party's representative may make a brief opening statement (15-20 minutes) either at the outset of the hearing or immediately before presenting evidence. These remarks should be limited to a summary of the evidence that the party expects to present, a discussion of the applicable legal standards, and a statement of what action the party wants the board to take.

(e) The Complainant's Case.

Ordinarily, the complaining party should be permitted to present its case first. At this time, the complainant should also introduce any exhibits into evidence. In hearings resulting from an Order to Show Cause, the issuing agency shall open and first present evidence. 801 C.M.R. §1.01(10)(e)(1). The order of presentation may, however, be altered by the presiding officer. 801 C.M.R. § 1.01(10)(e)(4). For example, if only the respondent has knowledge of the relevant facts, she may be required to present her case first. In the presentation of both cases, the opposing party has the right to object to the questions or exhibits of either party. Each witness for the prosecution or complainant may be cross-examined by the respondent immediately after that witness's direct testimony has been received. The purpose of cross-examination is to clarify issues raised on direct examination or to impeach the credibility of the testimony. Many hearing officers permit the scope of cross-examination to exceed that of the direct examination in order to ensure a complete and useful evidentiary record. Whenever appropriate, the presiding officer should permit re-direct and re-cross examination. In addition, board members or the presiding officer may pose questions to witnesses. The presiding officer should not dominate the questioning, however, and should allow each of the parties to present their case before asking questions. The presiding officer should make participants identify exhibits for the record when they are introduced into

evidence or discussed during testimony. The presiding officer should interrupt proceedings to make sure that this is done, and similarly, if a participant points to an exhibit during the hearing, the presiding officer should describe what is happening for the record.

(f) The Respondent's Case.

The respondent's witnesses may testify after the complainant's or prosecutor's case is completed. After their direct testimony, witnesses for the respondent may be cross-examined by the opposing party and questioned by members of the board or the presiding officer. If appropriate, the presiding officer should permit re-direct and re-cross examination. 801 C.M.R. § 1.01(10)(f). At this time, the respondent should also introduce any exhibits into evidence (unless the tribunal's practice is to have all parties move for admission of all exhibits at the start of a hearing). The presiding officer should ask the complainant or agency counsel whether any rebuttal evidence will be offered.

(g) Objections.

Any party may object to another party's evidence. 801 C.M.R. § 1.01(10)(f). If a party or a party's representative objects to a question or a piece of documentary evidence, the presiding officer should ask the grounds for the objection, allow the opposing party to state why the evidence should be admitted, and then rule either to sustain the objection (keeping the evidence out) or to overrule the objection (allowing the evidence in).²² If a party's objection to a question is sustained, the witness should not be permitted to answer the question. If a party's objection to a document is sustained, the document should not be admitted.

Upon request, the presiding officer should allow the proponent of the evidence to make an offer of proof on the record by reciting a brief summary of the evidence that the proponent expects to elicit. 801 C.M.R. § 1.01(10)(f)(2). If the offer of proof consists of documents, the documents should be marked with numbers or letters "for identification" and kept with the case file, but separate from the exhibits actually admitted into evidence. See id.

(h) Written Presentations.

Chapter 30A does not foreclose written evidentiary submissions or presentations in lieu of oral testimony in adjudicatory proceedings. See Matter of Tobin, 417 Mass. 92 (1994) ("paper hearing" did not violate respondent's right to due process when respondent given

²² The presiding officer can also allow in the evidence "de bene" (provisionally, subject to future challenge). The objecting party may be permitted to renew its objection later. When there is an objection, and the presiding officer may not be sure how to rule on it, he or she may want to allow it in, but state that "upon review of the entire matter, the board will give it what weight is appropriate" or words to that effect. It may be that the board does not feel much weight, if any, should be given to the question or exhibit when it reviews the entire matter.

copies of documentary evidence in advance and had opportunities to defend against allegations at hearing). Where the personal demeanor and credibility of witnesses may significantly affect the ultimate disposition of a case, the fact-finder should insist on evidence being presented orally. But where those factors are not in play, and especially if the subject matter at issue is highly complex or technical, written presentations of evidence can save valuable time and lead to a more reliable and accurate record. Just be sure to afford parties ample opportunity effectively to rebut or contest written evidence (if necessary, through cross-examination of the author of the written presentation). If a witness is unavailable for questioning, a witness statement may be introduced; the presiding officer must then decide how much weight the statement should have, considering factors like the inability to cross-examine the witness.

(i) Administrative Notice.

After all parties have presented their evidence, the presiding officer may take administrative notice of additional facts in accordance with M.G.L. c. 30A, § 11(5) and 801 C.M.R. § 1.01(10)(h).

(j) Closing Arguments.

Each party (or her attorney or representative) should be permitted to make a brief closing argument (15-30 minutes) summarizing the evidence that has been presented and applying the applicable law to the facts of the case. The party that presented opening argument first should be permitted to present closing argument last. 801 C.M.R. § 1.01(10)(e)(3).

(k) Closing the Hearing.

After each party has presented closing argument, the presiding officer should close the hearing by announcing on the record that the hearing is closed. Sometimes, one or more parties may request that the record be held open to allow for the submission of additional materials. The presiding officer has the discretion to allow such a request, but should clearly state on the record (or by written order) when the record will close and decline to accept any documents proffered after that date. 801 C.M.R. § 1.01(10)(k)(2).

C. Post-Hearing Matters.

After the hearing is closed, the presiding officer may request or allow the parties to file proposed findings of fact and conclusions of law and post-hearing briefs at a later date. 801 C.M.R. § 1.01(10) (j). The purpose of such briefs is to allow the parties to present written legal and factual arguments for the Board's consideration on the issues in dispute. At this time, parties may also request that the recorded or stenographic record of the hearing be transcribed at their own expense. 801 C.M.R. § 1.01(10)(i)(1). The board may wish to meet in a closed session immediately following the hearing to reach a tentative decision and to discuss the mechanics of preparing a final written decision.

If unsolicited information is received after the hearing has been closed, the presiding officer must determine if it is relevant and nonduplicative. She must also make sure that the parties have been served with a copy of the information. If the presiding officer decides that the information is irrelevant or duplicative, she should notify the parties of why it was not considered and notate the record accordingly. If she decides that the information is relevant and nonduplicative, the record should be reopened to allow the parties to respond to it.

CHAPTER V

EVIDENCE

A. Introduction.

Webster's Dictionary defines evidence as "something legally submitted to a competent tribunal as a means of ascertaining the truth of any alleged matter of fact under investigation before it." In a word of one syllable, evidence is proof. "Substantial evidence" means such evidence as a reasonable mind might accept as adequate to support a conclusion. M.G.L. c. 30A, § 11(1)(6). However, in adjudicatory proceedings, "evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." M.G. L. c. 30A, § 11(2). Thus, presiding officers must ground their decisions on the preponderance of the reliable or credible evidence found to be relevant to the issues before the agency. This standard allows the fact-finder to harbor some doubt and yet, on balance, she must be persuaded that a particular fact or set of facts is more likely true or probable than not.

In court proceedings the decision to admit or exclude evidence may be crucial to the outcome of a case. Strict rules govern such decisions. This is what keeps trial lawyers exclaiming "Objection!" The judge who rules on the lawyer's objection has to be well-versed in the applicable rules and able to decide quickly whether to admit the evidence. The lawyer needs to know the rules even better.

The job of the presiding officer at an adjudicatory proceeding is made simpler than a trial court judge's by a long-standing tradition that administrative agencies are not bound by the rules of evidence. M.G.L. c. 30A, § 11(2). In decades past, administrative agencies functioned politically and administratively rather than judicially, and had little need to apply the rules of evidence to their deliberations. It was also usually true that neither the agency members nor those arguing before them had any familiarity with the rules of evidence. The principle was born that agencies could hear and consider any reasonable evidentiary or testimonial offer made.

Today many agencies, including boards of professional licensure or registration, act at times as quasi-judicial bodies, making important decisions that affect the lives and livelihoods of citizens. Administrative decisions are afforded deference by reviewing courts. Many board members and presiding officers are attorneys, as are many of those who argue before the agency. For these reasons, and since rules of evidence are designed to force parties to present the freshest and most reliable evidence available, a familiarity with some basic rules of evidence is advised, even though the presiding officer still has the discretion to receive almost any evidence offered. (Later, in the decision-making process, board members will have a chance to evaluate the evidence in terms of its probative value.) The Supreme Judicial Court Advisory Committee on Massachusetts Evidence Law has published a particularly useful and comprehensive resource, the Massachusetts Guide to Evidence (2011 ed.), available at <http://www.mass.gov/courts/sjc/guide-to-evidence/>. The following sections will briefly

describe evidentiary issues that may arise in an adjudicatory proceeding and how the presiding officer might deal with those issues.

B. What Rules Apply?

As a general matter, administrative agencies are not bound by the formal rules of evidence that pertain in court. But they do have to observe the rules of privilege recognized by law, per M.G.L. c. 30A, § 11(2), and there are some further general principles that the presiding officer is required or allowed to observe.

First, as noted above, evidence may be admitted and given probative effect only if it is “the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.” M.G.L. c. 30A, § 11 (2). Candidly, this is not much of a restriction. The result is to leave the presiding officer free to receive any evidence or testimony she considers worthy of reliance, since most presiding officers are reasonable persons. Still, if there is an objection to certain evidence, consideration should be given to this principle in receiving or excluding evidence which has a high degree of unreliability: newspaper clippings, anonymous letters, affidavits drafted by counsel and signed without having been read by the affiant, scientific or expert analysis prepared by unknown persons who are not subject to cross-examination, and other types of evidence that easily could be used to manipulate or distort the truth. Just because evidence is admissible does not automatically make it reliable or credible. The reliability and credibility of the evidence introduced at hearing is a determination that must be made based on the circumstances giving rise to that evidence. Costa v. Fall River Housing Authority, 453 Mass. 616, 625 n.16 (2009).

The presiding officer may (and should) exclude unduly repetitious evidence, whether offered on direct or cross-examination of witnesses. M.G.L. c. 30A, § 11(2). Evidence is unduly repetitious if it tends only to prove the same point to which other evidence has been offered, without adding to the weight of the already presented evidence. It is excluded to save time and administrative resources. If the evidence does add to the weight of evidence already in the record, it should not be excluded. (For example, the more witnesses who corroborate a respondent’s key claim, the more credible it may be.) The presiding officer should also exclude irrelevant evidence; that is, evidence that does not make the truth of a disputed fact more likely than it already is without the evidence. If the presiding officer decides to exclude evidence, the proponent’s counsel may be well advised to make an “offer of proof” as a way to preserve the record regarding excluded evidence.

All evidence, including any records, investigations, reports, documents and stipulations to be relied upon in making a decision must be offered and made a part of the record. M.G.L. c. 30A, § 11(4); 801 C.M.R. 1.01(10)(k). No other factual information or evidence may be considered in making a decision (including administratively noticed facts). Documentary evidence may be received in evidence in the form of copies or excerpts, or by incorporation by reference. M.G.L. c. 30A, § 11(4); 801 C.M.R. 1.01(10)(k). If the presiding officer decides to exclude evidence, or if he decides to admit evidence in the face of an objection, the reasons for

his decision shall be documented in the record, and the excluded evidence should be retained in the case file.

A stipulation is an agreement that a certain fact is not in dispute and establishes that fact without the necessity of any other evidence. Once stipulated to, a fact is considered uncontested, and serves as evidence that the decision maker can rely on.²³ At the hearing, the presiding officer should not admit evidence or arguments that contradict the parties' stipulations (unless the stipulation is withdrawn by one of the parties). It might be an oral stipulation read into the record, but a better practice would be to have it in writing and signed. An example of a stipulation is: A physician stipulates that on a certain date, a patient came to his office for treatment of a specific injury. The use of stipulations to establish undisputed facts should be encouraged because they save time by eliminating the need for hearing witnesses. In many situations, it might be possible to establish many of the relevant facts by a series of stipulations, or as it is commonly called, a "statement of agreed facts."

In conclusion, the presiding officer may admit any reasonably reliable offer of evidence, may exclude unreliable or unduly repetitious evidence, and must observe the rules of privilege recognized by law. Those rules are discussed in the next section.

C. Rules of Privilege.

As previously noted, M.G.L. c. 30A, § 11(2) provides that agencies "shall observe the rules of privilege recognized by law." A privilege is the legal right of a person to prevent or prohibit testimony on certain subjects. A privilege can either be claimed or waived only by the holder. (The holder does not have to be a party to claim the privilege.) An obvious privilege is the one afforded by the Fifth Amendment: a person has a right not to give self-incriminating testimony.²⁴ Similar to a privilege is a disqualification: a rule of law (statute or case law) that bars certain testimony even if no one objects to it.

By statute and case law, Massachusetts recognizes a privilege to protect from disclosure the substance of confidential written and/or oral communications between persons in several kinds of relationships. See M.G.L. c. 233, §§ 20, 20A, 20B; see also Massachusetts Guide to

²³ Standard Rule 801 C.M.R. § 1.01(10)(b) addresses stipulations as follows: "In the discretion of the presiding officer, the parties may, by written stipulation filed with the presiding officer at any stage of the proceeding, or by oral stipulation made at a hearing, agree as to the truth of any fact pertinent to the proceeding. The presiding officer may require parties to propose stipulations. In making findings, the presiding officer need not be bound by a stipulation which is in contravention of law or erroneous on its face."

²⁴ It should be noted, however, that a person's Fifth Amendment privileges are limited. They only protect witnesses from testifying to things that would tend to make them criminally liable. If there is no potential criminal liability, a witness cannot refuse to testify. Similarly, witnesses cannot invoke the Fifth Amendment on behalf of corporations that their testimony would incriminate.

Evidence §§ 502 - 521. Examples of relationships which give rise to a privilege in certain circumstances include: husband-wife (M.G.L. c. 233, § 20;²⁵ Mass. G. Evid. § 504 (a)); attorney-client (or prospective client), in a professional consultation, with the privilege belonging only to the client, who may waive it (Mass. G. Evid. § 502);²⁶ priest-penitent, at the option of the person making the communication (M.G.L. c. 233, § 20A; Mass G. Evid. § 510); psychiatrist-criminal defendant (M.G.L. c. 233, § 23B);²⁷ psychotherapist-patient (M.G.L. c. 233, § 20B ; Mass G. Evid. § 503); and social worker-client (M.G.L. c. 112, § 135; Mass G. Evid. § 507). In Massachusetts, there is no statute prescribing a general physician-patient or news reporter's privilege. But see *Alberts v. Devine*, 395 Mass. 59, 67 (1985) (common law physician-patient privilege). However, a physician's duty to keep medical facts communicated to or discovered by the physician confidential has been read into administrative regulations concerning the profession. Mark S. Brodin & Michael Avery, *The Handbook of Massachusetts Evidence § 5.5.1*, at 214 (8th ed. 2007); *Hellman v. Board of Registration in Medicine*, 404 Mass. 800, 803-804 (1989).

Furthermore, Sections 204 and 205 of M.G.L. c. 111 provide that documents and testimony derived from an internal "peer review" (conducted by peer review committees established in many medical fields) shall not be admissible as evidence in an administrative hearing except in very limited circumstances.²⁸ Mass. G. Evid. § 513.

²⁵ Presumably, this statutory privilege extends to same-sex marital partners, although no reported case has yet applied the principles of *Goodridge v. Dept. of Public Health*, 440 Mass. 309 (2003), to this statute. In some circumstances marital communications and testimony are subject to a disqualification; in other circumstances they are subject to a privilege. Review the text of the statute for details.

²⁶ See 38 Alexander Cella, *Massachusetts Practice: Administrative Law and Practice*, § 286 (1986); see also *Suffolk Const. Co., Inc. v. Division of Capital Asset Management*, 449 Mass. 444, 448, 450 n.9 (2007).

²⁷ M.G.L. c. 233, § 23B states specifically: "Except as hereinafter provided, in any court proceeding and in any proceeding preliminary thereto and in legislative and administrative proceedings, a patient shall have the privilege of refusing to disclose, and of preventing a witness from disclosing, any communication, wherever made, between said patient and a psychotherapist relative to the diagnosis or treatment of the patient's mental or emotional condition. This privilege shall apply to patients engaged with a psychotherapist in marital therapy, family therapy, or consultation in contemplation of such therapy." The statute lists six instances in which the protection does not apply.

²⁸ Section 204 of M.G.L. c. 111 states: "The proceedings, reports and records of a medical peer review committee shall be confidential and shall be exempt from the disclosure of public records and shall not be subject to subpoena or discovery, or introduced into evidence, in any judicial or administrative proceeding, except proceedings held by the boards of registration in medicine, pharmacy, social work, or psychology or by the department of public health pursuant to chapter 111C, and no person who was in attendance at a meeting of a medical peer review committee shall be permitted or required to testify in any such judicial or administrative proceeding, except proceedings held by the
(footnote continues on the next page . . .)

To be protected by privilege, a communication must be confidential (made in private, with no third persons present). If it has been made public (even to one person), or if it is presented in evidence without objection, the privilege is waived. Once the privilege is waived, it can never be restored as to that communication. It is impossible to put the genie back in the bottle. Mass G. Evid. § 523.

Some specific types of information are privileged, such as state tax returns, if introduced in evidence against the taxpayer (G. L. c. 62C, § 21). The Handbook of Massachusetts Evidence § 5.11, at 252; Finance Commission of Boston v. Commissioner of Revenue, 383 Mass. 63, 71 (1981). Federal income tax returns are subject to discovery and admissible in evidence if substantial necessity is shown for their production. Handbook of Mass. Evidence § 5.11 at 251; Town Taxi Inc. v. Police Comm’r of Boston, 377 Mass. 576, 586-588 (1979).

Although Massachusetts courts do not recognize any executive privilege, Mass. G. Evid. § 518, some government records and reports may nevertheless be privileged based on their nature in a case-by-case evaluation, particularly when the release might prejudice the possibility of effective law enforcement, for example, an ongoing investigation, and when such disclosure would not be in the public interest. See Rafuse v. Stryker, 61 Mass. App. Ct. 595, 596-598 (2004). The deliberations of judicial or quasi-judicial bodies may not be testified to by members of the bodies (this is a disqualification and applies also to jurors). Markee v. Biasetti, 410 Mass. 785, 789 (1991) (juror deliberations).

It can be seen from the discussion above that there are many rules of privilege that might or might not be applicable in a given situation. The rules are too complicated to be reduced to any simple workable guidelines. Yet the presiding officer must observe the rules of privilege. The best course, then, when a privilege is claimed, is for the presiding officer to recess or adjourn the hearing to seek legal advice on whether any particular claim should be honored.

If evidence is excluded (not permitted), it would clearly be improper to draw any conclusion from a witness’s failure to give it. If a husband-wife communication is disqualified, for example, it would be wrong to infer from a spouse witness’s failure to testify about the content of the communication that the content would be harmful to the spouse party. On the other hand, with respect to claims of privilege by a party, such as a refusal to answer on grounds of the Fifth Amendment privilege against self-incrimination, the agency is permitted to draw an adverse inference from the refusal to testify, although such an inference would not be permitted in a criminal trial. See Custody of Two Minors, 396 Mass. 610, 616 (1986). In certain circumstances, however, a presiding officer may allow an adverse inference to be drawn from a

boards of registration in medicine, pharmacy, social work or psychology or by the department of public health pursuant to chapter 111C, as to the proceedings of such committee or as to any findings, recommendations, evaluations, opinions, deliberations or other actions of such committee or any members thereof.”

non-party's invocation of a privilege when that adverse inference is "reasonable, reliable, relevant to the dispute, and fairly advanced against a party." Lentz v. Metropolitan Property and Casualty Ins. Co., 437 Mass. 23, 28 (2002) (adopting the analysis set forth in LiButti v. United States, 107 F.3d 110, 123-24 (2d. Cir. 1997)) (emphasis in original).

D. Confidentiality of Certain Documents.

"Not every record or document kept or made by [a] governmental [entity] is a 'public record.'" Suffolk Constr., 449 Mass. at 454. The Public Records law specifies fifteen categories of materials or information that fall outside the definition of a "public record," either permanently or for a specified duration. M.G.L. c. 4, § 7, cl. 26; Cape Cod Times v. Sheriff of Barnstable Cty., 443 Mass. 587, 591-592 & n.14 (2005) (summarizing the statutory exemptions). Documents containing privileged or exempted information, e.g., individuals' social security or tax identification numbers, should be redacted before being entered in the record.

E. Hearsay May Be Admitted in Adjudicatory Proceedings.

Everyone has heard of hearsay evidence. Hearsay occurs when the speaker of a statement is not available to be cross examined. When that statement is offered for the truth of the matter asserted, it is considered to be hearsay. For example, a witness may testify that a patient, who is not at the hearing, said, "The dentist removed three of my teeth without asking my consent." If the witness's testimony is offered to prove the truth of the matter asserted – that the dentist removed the patient's teeth without asking her consent – it is hearsay. An attorney might object to the witness's testimony on the grounds that it is hearsay and unreliable. The problem is that the patient is not present to be cross-examined about her statement. Her demeanor and credibility may not be observed.

It is unlikely, but could happen, that the reason for offering the evidence is to prove that the patient actually spoke. Then her statement is not hearsay. The witnesses may be cross-examined and his veracity and memory tested. In such circumstances, the evidence could not be relied upon to prove that the dentist removed the patient's teeth without consent.

In court proceedings, hearsay evidence often is admitted because it meets certain tests which indicate it is more likely than not to be reliable. Those tests constitute the hearsay exceptions. Hearsay generally is admitted in adjudicatory proceedings, although the degree of credibility or weight assigned to it may be reduced because it is hearsay. See Mass. G. Evid. § 802; Costa, 453 Mass. at 625 n. 16.

Exclusive reliance on hearsay evidence, particularly in the face of conflicting direct evidence, may increase the risk of reversal of the board's decision on judicial review. It could be argued that a decision based exclusively on hearsay evidence is not in itself "substantial evidence." Arnone v. Commissioner of Dept. of Social Services, 43 Mass. App. Ct. 33, 36 (1997). See Merisme v. Board of Appeals on Motor Vehicle Liability Policies and Bonds, 27 Mass. App. Ct. 470, 473-75 (1989) (unsworn and unchallengeable hearsay unreliable and thus not substantial evidence). However, administrative entities may base their decisions "on hearsay

alone if that hearsay has ‘indicia of reliability.’” Covell v. Dep’t of Social Services, 439 Mass. 766, 786 (2003), quoting Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm’n, 401 Mass. 526, 530 (1988). The safest course is to receive hearsay evidence and then to give the evidence only the weight to which a reasonable person would attach to such evidence in the conduct of serious affairs.

F. Evidentiary Rulings on Objections and Motions to Strike; Offers of Proof.

If in the course of a hearing, an objectionable question is asked and the answer given, the question and answer become a part of the record even if it is inadmissible, unless someone makes an objection. It is not up to the presiding officer to protect a party’s rights. It is her duty to make a ruling if there is an objection to a question, or a motion to strike from the record objectionable testimony that has occurred in an answer (the answer was unexpected or the objection just wasn’t made in time to stop the answer). The objection or motion to strike should be noted for the record, and both the proponent and opponent of the testimony should be permitted to make an argument (very briefly) for allowing or excluding the evidence.

If the presiding officer excludes the evidence, it is incumbent upon the proponent to make an offer of proof. 801 C.M.R. § 1.01 (10) (f) (2). An offer of proof is a statement of what the proponent expects to prove by the answer of the witness. The offer of proof saves the proponent’s appellate rights by creating a record that enables a reviewing court to determine whether reversible error has been committed; that is, whether exclusion of the evidence actually harmed the proponent’s ability to prove his case. It also gives the presiding officer a chance to reconsider her ruling. If the excluded evidence consists of materials in written or documentary form, a copy of such evidence should be marked for identification and that will constitute the offer of proof.

If the presiding officer thinks it necessary, she may take a brief recess to consult with counsel on a difficult evidentiary question. To avoid delay, it is a better practice to admit the evidence and, if it is later determined to be inadmissible or unreliable, not to rely on it in the decision. If this occurs, the decision should state that the particular evidence was not relied upon.

G. Exhibits.

It is generally a good idea to mark as exhibits, often the first ones, the notice of the hearing, the Order to Show Cause or other initiating document, and any pertinent correspondence (such as agreements to reschedule the hearing date). If there are other important documents already in the presiding officer’s file, an agreement to have them deemed admitted may be advisable. Some presiding officers ask counsel to come to the hearing with a jointly-developed list of pre-marked exhibits, the admissibility of which is acknowledged by both sides. In complex cases, the availability of pre-marked exhibits before the hearing can be very helpful to the efficient conduct of the proceedings.

Parties also have the right to introduce exhibits at the hearing, which may consist of records, investigations, reports, stipulations or other documents, photographs, or physical objects. G.L. c. 30A, § 11(3). Documentary evidence may be received in the form of copies or excerpts, or may be incorporated by reference (reducing the bulk of the record). See Mass. G. Evid. §§ 1001-1003. Incorporation by reference is done by noting clearly in the record something like, "Exhibit No. X in evidence consists of x number of pages of hospital records of a patient for x period of time, which are hereby incorporated by reference." Then the hospital records custodian can return the voluminous records to the hospital, where presumably it will be kept safe and available in the unlikely event any party or board member needs to see them again. And of course, the records are "in the record" like any other evidence for whatever reference anyone wants to make to them. Documents which are not in the hearing room for the examination of the parties should not be incorporated by reference (unless everyone agrees).

More typically, a party will offer into evidence a document or item which will become physically a part of the record. If the presiding officer determines that the proffered item is relevant, i.e., it bears in some way on the issues presented, she should then ascertain whether the proposed exhibit appears to be either an authentic or a true copy of the original. She should be satisfied that the exhibit is what it is claimed to be. Usually, this is done by having it authenticated by the keeper of the record. The presiding officer should exercise reasonable judgment if it is not so authenticated.

The usual procedure for dealing with a potential exhibit is this: the party hands the exhibit to the other parties, if any, for examination, and then to the presiding officer. (Be sure the other side has seen the exhibit before you consider whether to admit it.) If there is no objection or if an objection is made and overruled, the presiding officer should mark the exhibit with an exhibit number (it is probably wise also to mark it with an identifying caption or docket number). She should state for the record what she is doing, such as, "I am taking into evidence the letter from the patient x to the physician x, dated on x date, which I have marked as Exhibit No. X in evidence."

If the presiding officer sustains an objection and refuses to allow the exhibit into evidence, i.e., excludes the exhibit, the proponent may make an offer of proof, which in the case of documentary evidence would be the evidence itself. Mass. G. Evid. § 1002. She would similarly mark the exhibit, noting, "I have excluded the letter from the patient x to physician x, dated on x date, which has been made as an offer of proof and which is marked as Exhibit No. X for identification."

Of course, the way an exhibit is marked – for either admission or identification – depends on the nature of the exhibit. If it is a sheet of paper it could be written on, labeled, or stamped. An object would be marked by affixing a tag to it. A photograph could be stamped on the back. X-ray film would be marked with a gummed label, and so on.

It is probably a good idea to number marked exhibits in sequence, whether they are admitted or marked for identification. Thus, the third exhibit offered becomes Exhibit No. 3

whether it is taken into evidence or marked for identification. You can also number exhibits according to which party introduced them, such as C-1 (complainant's first exhibit), R-1 (respondent's first exhibit), J-1 (Joint Exhibit 1), and so on. It is also a good idea to keep an "Exhibit List," indicating the name of the hearing, the date, what party introduced the exhibit or, if it is a joint exhibit, the number of the exhibit and, if possible, a brief description of the exhibit. This will help you keep better track of the various exhibits and will make it easier to complete the record of the hearing. All the physical exhibits should, of course, be carefully preserved as a part of the record of the proceedings.

H. Administrative or Official Notice.

Judicial notice occurs when a court takes note of a fact that is a matter of common knowledge and indisputably true. M.G.L. c. 30A, § 11(5). Judicial notice relieves a party of having to prove such a fact. The general rule in Massachusetts is that courts will take judicial notice of regulations when they have been submitted by the agency to the Secretary of State and are published in the Massachusetts Register. M.G.L. c. 30A, § 6; Shafnacker v. Raymond James & Associates, Inc., 425 Mass. 724, 731 (1997). Judicially noticed facts might include an undisputed historical fact. Courts may also take notice of facts that are not common knowledge but are capable of immediate and accurate determination by resort to sources of indisputable accuracy (distances between geographic points, atomic weight of elements, location of certain streets, dosages and effects of medicine, and the like). Commonwealth v. Wilborne, 382 Mass. 241, 250 (1981). Judicially noticed facts may not include facts known only by personal observation of an adjudicator. Town of Nantucket v. Beinecke, 379 Mass. 345, 352 (1979). Agencies may take notice of any fact that may be judicially noted by the courts, and in addition, may take notice of general, technical, or scientific facts within their specialized knowledge. M.G.L. c. 30A, § 11(5). It is general knowledge that cancer tends to shorten life. All boards could take official notice of that fact. Only the board of medicine could take official notice that some types of cancer tend more than others to shorten life, or, as a further example, of specific treatments for cancer. The electricians' board could take official notice of the properties of electricity, which would not be proper if officially noticed by the board of architects. M.G.L. c. 30A, § 11(5). Both electricians and architects probably could take notice of certain facts about wiring houses during construction.

Parties must be notified of the material so noticed, and afforded an opportunity to contest the facts so noticed (*i.e.*, show they are not indisputably true), whether notice occurs at the hearing or subsequently. M.G.L. c. 30A, § 11 (5). Administratively noted facts must be noted in the record or appended thereto. If the official notice occurs at the hearing, a statement should be read into the record that the board "takes official notice of the fact that the Massachusetts Turnpike runs through Newton, MA." If it occurs subsequent to the hearing, the statement should be put in writing and appended to the record, along with a certification that all parties were notified.

If a fact is not in the record, whether it has come in through an expert witness or by official notice, that fact may not be relied upon in the board's decision as proof. M.G.L. c. 30A,

§ 11(4). The board must make certain that sufficient evidence is in the record to support its findings and to permit a court to review the evidence on which the board relies.

In the process of decision, as distinguished from the process of proof, agency officials may and should utilize their expertise, including their technical competence, and experience to evaluate the evidence presented to them. This is different from using that expertise and experience as a substitute for evidence and as a basis for making factual findings as to matters not proved by evidence in the record.

I. Presumptions.

The word “presumption” is used to describe a number of quite different concepts, some of which cause “confusion in Massachusetts decisions.” Handbook of Mass. Evidence (8th ed.) § 3.5 at 81. Given that even the late Justice Liacos, long the evidentiary expert on the Supreme Judicial Court, acknowledged the considerable confusion caused by presumptions, the topic can readily be seen as a tough subject to summarize for the presiding officer. Some common concepts of presumption include:

1. Conclusive or irrebuttable presumptions – such as dependency of spouses and children or a fully expressed legal contract;
2. Prima facie evidence – evidence that, on its own, maintains the proposition and warrants the conclusion for which it was introduced;
3. Inferences – where proof of fact “A” logically will lead to the inferred conclusion “B.” For further details, see Handbook of Mass. Evidence §§ 3.5-3.5.4 at 81-91.

The best course is to use common sense if a party brings up the subject. It may be reasonable to presume that if Bill testifies he sent a letter to Mary, Mary received the letter. If Mary testifies that she did not receive the letter, the board can decide which testimony to believe.

Sometimes a law or regulation creates a presumption that may be conclusive evidence on a certain point. If a party brings such a statute or regulation to the board’s attention, and there is any confusion about its effect, a recess to seek advice of counsel is in order.

J. Presumptions regarding the Burden of Proof.

According to The Handbook of Massachusetts Evidence, in civil cases the burden of persuasion is on the plaintiff as to some issues and on the defendant as to others and it is variously stated that, in civil cases, the burden of persuasion should fall on the party who is seeking relief under a statute. Handbook of Mass. Evidence § 3.3 at 64; William Rodman & Sons v. State Tax Commission, 373 Mass. 606, 610-611 (1977).

K. Conclusion.

If the presiding officer is wrong in excluding any particular evidence, a party has no valid complaint on review unless he objected at the time, and unless he shows that the erroneous evidentiary ruling resulted in a denial of substantial justice. In most cases, allowing even clearly inadmissible evidence will not result in a denial of substantial justice, if that evidence is not relied on in the decision-making process. Accordingly, she should err on the side of allowing rather than excluding evidence at the hearing. Mistakes can be corrected at a later time.

CHAPTER VI

TECHNIQUES OF PRESIDING

A. Preparation and Concentration.

Among the presiding officer's responsibilities in conducting an adjudicatory hearing is to enable the parties to create a record upon which a fair decision can be made without depleting the agency's or parties' resources. While the preparation and skill or lack thereof of the parties' counsel is important, the presiding officer is the one who is ultimately responsible for ensuring that the record is both as complete and circumscribed as possible. She has significant responsibility, but also has ample resources and authority to meet that obligation.

The conduct of the hearing does not really begin with an opening statement. The presiding officer must come to the hearing adequately prepared. At a minimum, this means that she must become familiar with the Order to Show Cause or other initiating document, the answer, and any memoranda filed by the parties. She should also have given some prior thought to the nature of the issues likely to be presented. If in an unfamiliar area, she should familiarize herself with the applicable laws. As discussed more fully in the next chapter, she must approach the hearing with an open mind and impartiality, but that does not require an empty one. Without having read the parties' memoranda or the Order to Show Cause and the answer, she cannot deal effectively and efficiently with questions as they come up in the hearing. Equally important, without adequate pre-hearing preparation, she may not understand the relevance of evidence as it is introduced and so will not be able to place that evidence into proper perspective. Thus, adequate preparation is the first obligation of any presiding officer.

Preparation prior to the hearing must be accompanied by concentration during the hearing. Witnesses and attorneys may be unable to express their positions concisely. But no presiding officer should yield to the temptation to ignore what seems certain to be irrelevant testimony. Even the most confused witness may have something to say, and, unless the presiding officer is alert enough to hear it, that evidence may be lost. Reading a cold record is no substitute for attention to live testimony.

Attention alone is not enough. The presiding officer should focus on the substance of what is being said and the extent to which it relates to the issues involved in the proceeding. Otherwise it will be difficult to make necessary connections or to obtain direct answers to questions on matters the witness might not otherwise discuss. A hearing is, in part, an opportunity for the presiding officer to weigh the evidence and make credibility determinations, and later, to make factual findings and conclusions of law.

The presiding officer should take advantage, given constrained budgets, of any technology that is available to record or videotape the hearing. A presiding officer should take good notes, which will be more resilient than relying on one's memory. A laptop computer can help organize information relevant to the ultimate decision. The presiding officer should

exercise care to copy and back up electronic files and to maintain the confidentiality of these files.

B. Judicial Attitude, Demeanor, and Behavior.

A presiding officer is viewed by the parties as a judge and should strive to act so as to earn that respect. This means maintaining at all times a fair, open-minded, and impartial attitude. It is particularly important to avoid any appearance that she is identified with the agency or board that is prosecuting the proceeding. She is supposed to be, and must be, and must appear to be, fair and impartial. Otherwise the parties may feel that they have been denied their right to a fair hearing.

The presiding officer should be clear and direct, but considerate of counsel, parties, witnesses, and others in attendance. Each witness should be called by name and thanked when she is excused from the stand. Reprimands when necessary should ordinarily be delivered privately during recesses or off-the-record; they should be entirely avoided if possible.

The presiding officer should not argue with counsel. She should listen to counsel's point at reasonable length, make a ruling, and proceed. If counsel attempts to continue the argument, she should instruct counsel to proceed with the examination or use any other courteous admonition to close the discussion.

C. Control of the Hearing.

It is the presiding officer's responsibility to control the hearing. That responsibility has two aspects: keeping the hearing moving and keeping it moving smoothly. The parties' primary responsibility is to present the evidence and, therefore, the presiding officer must allow the parties to present their cases rather than intervening too frequently or disrupting their presentation. At the same time, it is the presiding officer's responsibility to ensure that the parties' presentation remains focused on the issues at hand or avoids being mired in irrelevancies or redundancies. She must keep the proceedings reasonably controlled and circumscribed.

That can often be accomplished by requiring the parties' counsel to indicate at the pre-hearing conference, or at the beginning of the hearing, all of the witnesses and testimony each intends to present. Once that is done, the presiding officer can direct the parties to discuss with each other what points are really not in dispute and so can be ignored, and what points can be agreed to. Such discussion can often shorten the hearing. Furthermore, such a procedure may aid the attorneys or parties in organizing their presentation in an efficient and meaningful manner; this may be a particular problem for the pro se party. After the witnesses have testified and have been cross-examined, the presiding officer may question them to obtain additional information and to clarify things for the record if their testimony was unclear, confusing, or conclusory. He may have to be more active in questioning pro se parties to obtain pertinent information. However, his questioning should always remain neutral and objective.

It sometimes happens that a party, particularly one who is pro se, begins to struggle with making a point or addressing an issue in his case. In these circumstances, the presiding officer should politely suggest that the party clarify the testimony or argument being made or move on. Such comments must be made carefully, since a reviewing court examining a transcript might interpret them as reflecting animus or partiality or bias. Thus, the presiding officer must always be careful to show, on the record, that a party has been given every reasonable opportunity to present his case and to rebut his opponent's case. But once that opportunity has been given, the presiding officer can and should insist that the party either make a point or move on to another point. Not exercising this power is an abdication of the presiding officer's responsibility to control the hearing and can lead to delay, which is not only a waste of time, but is also unfair to the agency and parties involved in the proceedings.

The second aspect of control of the hearing is ensuring that the hearing remains what it is designed to be: a neutral adjudication. Emotions often run high in agency proceedings, and it is the presiding officer's responsibility to ensure that those emotions do not get out of control. There is absolutely no place for inappropriate language by the parties and the presiding officer must promptly assert control to prevent such abuses. Personal insults, whether direct or implicit, should normally be promptly stricken from the record, and a party making inappropriate comments or statements must be admonished. When matters appear to be getting out of hand, the presiding officer might find it useful to call a recess, speak briefly with the parties off the record, and then separate them for a few minutes to allow them to regain their composure. An evidentiary proceeding that spirals out of control is not fair to the parties, is not a reasonable basis upon which a fair decision can be made, and so is itself vulnerable upon judicial review. In extreme cases and after due warning, when the behavior of one or more of the participants persists in disrupting the hearing, the presiding officer may eject the offending participants, issue a continuance, or terminate the hearing altogether.²⁹ By maintaining firm but fair control, insisting upon proper decorum, refusing to fall prey to baiting behavior, and treating all who appear before you in the manner you would wish to be treated, you will ensure justice and avoid appearing in an unfavorable light should the proceedings later be reviewed in court.

D. Off-the-Record Discussions.

As discussed above, the administrative record of the proceeding is the sole basis upon which a decision may be made. In a hearing, of course, that record primarily consists of the verbatim recording or transcript. However, this does not mean that the presiding officer must

²⁹ In rare cases when terminating the hearing seems necessary, the presiding officer should document the record ahead of time, reminding the participants of his responsibility to maintain decorum and warning them about the potential consequences of their disruptive behavior. He should then set a reasonable timeframe during which the record will be kept open for submission of arguments and evidence, and notify the parties that the case will be adjudicated on the record assembled both during and after the hearing.

conduct all business on the record. Much of the routine business of controlling and scheduling a hearing can be discussed off the record. The hearing officer should feel free to do so, provided always that off-the-record discussions are done only in the presence of all parties or their counsel, or are at least conducted with the knowledge of all parties. Off-the-record discussions in the absence of one or more parties are called “ex parte” discussions and are normally considered improper. That subject is discussed in the next chapter.

Off-the-record discussions are useful for such matters as scheduling further hearings. They can also be used for matters such as scheduling the appearance of witnesses or the identification or introduction of documents or otherwise discussing the conduct of the proceeding. They also help to clear up substantive matters without cluttering the record. For example, counsel and witness may so confuse each other that the record makes little or no sense. A short discussion off the record will clear up the problem and make the resulting record easier to understand. Similarly, counsel and witness may basically agree on a point but their ideas of how to record the matter may differ. A few minutes off the record may result in a succinct and accurate statement that may save substantial time and make a cleaner record. Another important use of off-the-record discussions is to explore the possibility of settlement. But the merits of the case should not be discussed off the record. If such a discussion takes place, the presiding officer should summarize the discussion, ask the parties to confirm that the summary is accurate, and introduce the summary into the record.

This device of holding discussions off the record can, however, be overused. Requests for off-the-record discussions in the presence of the presiding officer should be denied unless a verbatim transcript is clearly unnecessary or will serve no apparent purpose. Even when discussions are held off-the-record, any resulting decisions or agreements should be summarized for the record and confirmed by counsel to prevent later misunderstanding.

The three key points to remember about off-the-record discussions are: (1) such discussions are less formal than on-the-record discussions and reduce the eventual expense of preparing a transcript, and so should be freely used when appropriate to expedite and simplify the proceeding; (2) off-the-record discussions are, by definition, not part of the administrative record, and so nothing said or heard in such a discussion can constitute a part of the factual basis of the decision; (3) off-the-record discussions must include all the parties.

E. Recesses.

As discussed earlier, timely recesses are often of considerable aid in allowing parties, and their counsel, to regain their composure. More generally, recesses can and should be used to assist in the conduct of the hearing. For example, recesses should be taken after a prolonged period of hearings so that the parties can stretch their legs or visit the bathroom or take a break for a meal.

Recesses can also be used to assist the parties in presentation of their case. For example, if a witness must leave for personal or business reasons, a recess can be called, or if a witness will not be available, a recess can be called to allow that witness to attend.

Furthermore, if the parties wish a temporary break in the proceedings so that they can research a legal or factual question, a recess can be called.

Equally important, a hearing officer can use her power to order a recess to assist in the conduct of the proceeding. If she finds that her attention is lagging, a brief recess might help. Similarly, if a difficult legal or evidentiary point comes up, a hearing officer should feel free to temporarily recess the proceeding so that she can either consider the issue or obtain legal counsel on that point. It is imprudent to go ahead and make a potentially important decision without taking the time to consider it and, when appropriate, to seek the guidance of counsel.

A hearing officer has almost total discretion in deciding whether or not to grant a recess. The only limiting principle is that this power should not be used to prejudice a party either affirmatively or negatively.

F. Sanctions.

The subject of sanctions is a difficult one. The problem is not in describing the powers that a hearing officer technically has, since those are both broad and clear. The problem lies in advising a hearing officer in how to use those powers. The proper use of sanctions so as to obtain the desired effect without prejudicing the validity and integrity of the proceeding is much more of an art than a science.

Beginning with the easier issue, the hearing officer has broad power to issue sanctions against parties and their counsel. For example, if a hearing officer concludes that a party's presentation is unduly repetitious or redundant, the hearing officer can order that further inquiry be abandoned. Similarly, if a hearing officer believes that a comment or statement was improper, either legally or as a matter of propriety, she can have it stricken from the record. More generally, a hearing officer who believes that a party is abusing the adjudicatory process can order whatever remedy seems appropriate to correct such abuse. Remedies might include refusing to order compliance with subpoenas, or prohibiting the party from testifying or examining another party on certain matters in dispute, or precluding a party from introducing certain evidence, or even concluding that a certain subsidiary point will be conclusively decided in a party's favor. Ultimately, a hearing officer has the extraordinary power to terminate a proceeding and issue a judgment in favor of one party upon a finding that the other party has lost the right to further proceedings because of extreme, sanction-worthy conduct.

The range of available sanctions is exceptionally broad. The problem is choosing how to use sanctions so as to maintain the validity and integrity of the proceeding without at the same time denying a party his right to due process. Thus, except in the most extreme cases, the ultimate resort of sanctioning a party by ruling against him or by denying him process, should not be used. Similarly, imposing restrictions on the presentation of certain points, the questioning of witnesses, or the presentation of other evidence, should normally be threatened rather than used, and, in any event, a party should always be warned that he is being repetitious, irrelevant or improper, before he is ordered to stop his inquiry. And even then

before a sanction is imposed, the offending party should be given an opportunity to explain his conduct.

In actual practice, imposition of sanctions rarely occurs. A hearing officer who firmly asserts control of the proceeding from the outset and who demonstrates an open mind and impartiality, but also an ability to reach a decision and stick to that decision, should not often find it necessary to impose sanctions upon a party. Sanctions are to be avoided, but if they are necessary, they must be imposed in a fair and calm fashion. The sanction should never be nor appear to be the result of personal animus on the part of the hearing officer and the sanction should never be more than is necessary to halt or correct the improper conduct identified by the presiding officer. Whenever a sanction is imposed, the hearing officer should be careful to articulate on the record the reasons for the sanction and the efforts she made to correct the problem without having to impose the sanction. Finally, the hearing officer should take great care not to punish a party because of his attorney's persistent misconduct.

CHAPTER VII

CODE OF CONDUCT FOR BOARD MEMBERS

The following pointers are designed primarily to ensure the fairness, validity, and integrity of the adjudicatory process, but they have another purpose as well. We work in a time when many are quick to criticize and lawyers are paid by their clients to be distrustful of the process by which their clients' livelihoods are threatened. Accordingly, board members should conduct themselves in a manner which not only avoids impropriety, but also avoids the appearance of impropriety. Public attitudes about quasi-judicial conduct have become more demanding and less forgiving in recent years and board members serving in an adjudicatory (or quasi-judicial) capacity should be sensitive to public expectations. Bear in mind that disgruntled respondents have a right to judicial review of your professional conduct and will seek to paint a picture of unfair treatment in the adjudicatory process. Don't give them anything to complain about.

A. Confidentiality.

The board's official decisions must be kept confidential until released to the parties and the public. Until the decision is finally issued or published, the board or presiding officer should in no way reveal it to the respondent, the complainant, or anyone else except those (such as counsel or other board members sharing the adjudicatory panel) involved in the decision-making process. Maintaining confidentiality requires constant vigilance. The obligation of confidentiality could be violated, for example, by a statement in a totally unrelated case which happens to involve similar facts or legal issues.

B. Ex Parte Communications.

Any communication to the board or a hearing officer relating to an on-going adjudicatory proceeding which comes from a party, including agency staff, without giving other parties the opportunity to be present is an ex parte communication. Such communications in the adjudicatory process are improper. All parties to a quasi-judicial matter are entitled to know all of the evidence the fact-finder will be using to decide the matter. They are entitled to be able to respond to the "I heard such and such," or the "I don't think they are telling the truth," statements that might arise in an ex parte contact.³⁰

Many ex parte conversations are innocent in the sense that the person approaching the hearing officer is unaware that his action is improper. When such an incident occurs, the hearing officer should dictate a statement on the record at the next hearing date or prepare a written memorandum describing the conversation and file it in the public record, giving notice

³⁰ The hearing officer may discuss purely procedural matters with agency officials without providing notice to the parties (e.g., scheduling, address verification, procedural questions, etc.), but care must be taken to avoid discussing substantive matters.

to all parties. Another common type of innocent ex parte communication involves letters received by the hearing officer relating to issues before him; they should also be filed in the record with notice to the parties. All written communication between the presiding officer and anyone else associated with the case must be provided to all of the parties. And, of course, the board, its members, or the presiding officer should not initiate any communications with a party, witness, or other person (other than counsel or fellow board members on the hearing panel) outside the formal adjudicatory hearing setting. 801 C.M.R. § 1.03(6). If, following the conclusion of the hearing, the presiding officer has a question about any substantive matter, she should contact the parties and request that they submit their views in writing, or alternatively she should reconvene the hearing to obtain the parties' positions on the matter.

Where an ex parte communication appears to be knowingly improper, or appears to be an attempt to influence the decision outside of the formal adjudicatory process, the board should expeditiously refer the matter to the Attorney General's Office. If one of the parties initiates an improper ex parte communication, the presiding officer may require the party to show cause why the party's case should not be dismissed or otherwise adversely affected.

C. Fraternization.

It occasionally happens that persons coming before the board or presiding officer, either as parties, counsel, or witnesses, are friends or acquaintances of the board member or presiding officer. In such situations the presiding officer should avoid any action that might create the appearance that she might favor or accept the views of friends and acquaintances more readily than those of unknown parties. The same considerations argue against social contacts with persons who are directly involved in pending adjudicatory matters.

One approach is for the board member to disqualify himself in any case in which a friend or an acquaintance appears. If the board member knows many people in a particular profession, this may prove to be impractical as well as unfair. An alternative course is to describe on the record the relationships whenever a friend or associate is involved and offer to disqualify oneself if so requested. This may put an unfair burden on objecting counsel by requiring him to imply publicly that the board member may be biased; also, if done frequently, it may seem to be avoidance of the board member's own responsibility. Sound judgment will be required.

In any event, the hearing officer must avoid the appearance of impropriety. Thus the hearing officer should not engage in extended friendly chats with one side or the other before or after the hearing, or during recesses. The presiding officer should never socialize with the parties while the case is pending, no matter what type of relationship they may have had prior to the hearing. And in no event should the hearing officer ever make a remark, casual or otherwise, about any party, witness, fact, or any other matter related to the proceeding, to persons outside the hearing process.

D. Bias.

801 C.M.R. § 1.03(5) provides: “No Presiding Officer who has a direct or indirect interest, personal involvement or bias, in an Adjudicatory Proceeding shall conduct a hearing or participate in the decision-making for the relevant Adjudicatory Proceeding.” A partiality, bias, prejudice, or interest on the part of a board member will render the proceedings in which the member is involved null and void. 38 Alexander Cella, Massachusetts Practice: Administrative Law and Practice, §§ 311-322 (1986). The existence of the kind of interest, involvement, or bias to which the rule is addressed is very often a matter of judgment. The following discussion, taking the items in reverse order, suggests that there is no clear rule which will dictate the appropriate course in every case, although hearing officers generally will be held to the same standards as judges.

“Bias” is a word with a multiplicity of meanings which must be separated and distinguished if problems of disqualification of board members are to be addressed practically and sensibly. One meaning of bias is a more or less preconceived point of view about issues of law or policy. Thus it may be said that the boards have a general bias against the continued licensure of persons who have been shown to have harmed the public in the exercise of their professional licenses (for example, physicians or pharmacists who have been convicted of trafficking in narcotics). A point of view regarding regulations, policies, or laws – evidenced, for instance, in prior rulings in similar cases – is rarely grounds for disqualifying a presiding officer.

Closely related but distinguishable is bias concerning issues of fact in a particular case. For example, it may be undeniable fact, based on the physical properties of the elements that aluminum wiring is more likely than copper wiring to cause a fire in a particular electrical installation. As a result, members of the electricians’ board may have a professional “bias” or preference for copper wire. Thus, a case involving allegations of professional incompetence due to the use of aluminum wire on a particular job may call into play such a bias or prejudgment. Ordinarily, such prejudgment of adjudicative facts does not require disqualification but the board members must take great care to decide the case solely on the facts about the particular case. In the absence of a dispositive statute or regulation, e.g., prohibiting the use of any electrical wire other than copper, the electricians’ board could not discipline our hypothetical electrician unless there was credible evidence in the record that the particular use of aluminum wire in the particular installation constituted a breach of professional standards.

A third form of bias is partiality or personal prejudice for or against a party as distinguished from issues of law or policy. This type of bias exists when a hearing officer is so predisposed with respect to a matter before him that he cannot reasonably be expected to adjudicate the matter fairly and impartially. With this degree of substantiality, this form of bias should ordinarily disqualify a hearing officer. Also, bias may arise from an “interest” which the hearing officer has in the case. The presiding officer should avoid the appearance of a “conflict of interest” as well as an actual conflict. A board member who stands to gain or lose by a decision either way has a conflict of interest – he may have a financial interest in the outcome,

or he may be related to a party or otherwise affiliated with someone with a financial interest in the outcome, or his own personal desires may be substantially affected by the outcome – and he should be disqualified if the interest is substantial. For example, a pharmacist-board member who is to decide a license revocation proceeding against a pharmacist whose business is located in a town thirty miles from his own has a theoretical interest in eliminating a competitor, but the interest is so minimal as not to justify recusal. However, if the proceeding were against the only other pharmacist in the board member's town, the interest would be so substantial as to likely require disqualification.³¹

If the board member is aware of a ground for disqualification, he should withdraw from all consideration of the case. He need not give the reasons in any detail. If a party moves for recusal, the board member should not be offended, but rather should consider the matter seriously to make sure that any resulting action will not be invalidated because of the appearance of impermissible bias or prejudgment. Occasionally, evidence might come to light during the course of a hearing that creates a potential conflict of interest situation. If this happens, the board member or hearing officer should call for a recess and then consult with counsel. If a quorum of the board is subject to disqualification in a particular case, the "rule of necessity" will permit otherwise disqualified officers to make decisions,³² although the board may wish to allow a substitute tribunal, such as the Division of Administrative Law Appeals, to hear the evidence and make the factual findings in such cases.

E. Personal Investigations.

Board members are not required to block out what they see and observe in everyday life. A problem might arise, however, when a particular matter is pending before a board and a board member decides to do some personal and independent investigation. An example might be attempting to recreate an incident that is the subject of a board proceeding. A board member's trip to the scene to see if matters could have unfolded as a witness testified is fraught with peril. The parties to the proceeding are not present to confirm the accuracy of the re-enactment or to provide necessary commentary on the "view." Such an investigation can easily lead to a reversal.

A site visit or re-enactment in the presence of all parties is acceptable and, in certain cases, appropriate. Common sense rules apply. Displaying knowledge of the twenty pub

³¹ Although it is not within the scope of this Manual, board members should be generally aware of G.L. c. 268A, governing the conduct of public officials. Some potential conflicts can be addressed by making a disclosure of the situation pursuant to G.L. c. 268A, § 23. Questions concerning the application of c. 268A may be referred to the State Ethics Commission.

³² The situations in which this rule can be employed properly, however, are so few and rare that board members should not even consider applying the rule without specific guidance from counsel. Inconvenience, having to reschedule a matter, or having to arrange for someone else legally qualified to perform the adjudicatory function are not sufficient grounds to invoke the rule of necessity.

licenses in a particular area and then producing a map to show them is probably acceptable, as long as the map is introduced at the hearing and parties are given the opportunity to respond. A board member conducting his own investigation into an incident and speaking to witnesses outside of the hearing is traveling the road to trouble, possibly opening himself up to charges of civil rights violations or procedural misconduct.

F. Individual Requests for Information.

The board may occasionally receive requests for information from interested persons, particularly in cases which have received attention from the press. Frequently the information sought will be confidential, such as what the decision will be, how soon it will be issued, and what effect it might have on the community. Although the board cannot answer all such questions, it should explain courteously its refusal to answer (for example, "That matter is under advisement and I am not permitted to comment on it.") and, if possible, suggest other sources not subject to quasi-judicial restraints such as the prosecuting counsel or a private party involved in the proceeding. Some questions can be answered by reference to documents that are public records; for example, the order to show cause provides the nature of the matter under consideration.

G. The Open Meeting Law

Many boards established to hear adjudicatory matters are subject to the Open Meeting Law, G.L. c. 30A, §§ 18-25. The Open Meeting Law applies to any "multiple-member board, commission, committee or subcommittee within the executive or legislative branch or within any county, district, city, region or town, however created, elected, appointed or otherwise constituted, established to serve a public purpose." G.L. c. 30A, § 18.

The law requires that such boards post notice of their meetings, open their meetings to the public, and keep minutes and records of those meetings. When a board subject to the Open Meeting Law conducts an adjudicatory proceeding, it must still follow this law, unless specifically exempted by statute. However, a board is not subject to the Open Meeting Law when meeting to make a decision required in an adjudicatory proceeding brought before it. G.L. c. 30A, §18. So while the proceeding must be held during an open meeting or properly convened executive session (see G.L. c. 30A, § 21), the decision-making portion of the proceeding may be held outside of public view. There are no requirements that a board provide notice or keep minutes when meeting solely to make a decision in an adjudicatory proceeding.

H. The Media

In some cases the press or a blogger may seek to obtain information directly from the board outside of the formal adjudicatory process. Although the news media or blogger may be persistent at times, the board ordinarily should answer all questions about non-confidential matters so long as this does not interfere with the orderly conduct of the hearings or offer a glimpse into the decisional process. Some agencies conducting disciplinary proceedings, e.g.,

Civil Service Commissioner or Division of Administrative Law Appeals, are required to maintain the confidentiality of the proceedings unless the parties agree to make the proceedings public.

If the proceedings are not confidential, the board may respond to questions about the place or time of the hearing or length of a recess. However, no board member should discuss the merits in any way either directly or by implication, and he should not permit himself to be interviewed under circumstances likely to lead to questions relating to the merits, including what the board's decision means. A board member should not give off-the-record or not-for-attribution interviews. If the material is not confidential, he should permit quotation; if it is confidential, he should not reveal it in the first place.

CHAPTER VIII

THE DECISION

A. Oral or Written Decisions.

Every board decision in an adjudicatory proceeding must be written or stated orally in the transcript of administrative proceedings. G.L. c. 30A, § 11(8). Written decisions are preferable. However, in cases involving few parties, limited issues, and short hearings, the board may decide that it could save time by rendering a decision orally.

If the decision is to be rendered orally, the parties should be advised before the hearing of that fact and that they may present oral argument on the merits of the case at the close of the testimony. G.L. c. 30A, § 11(7). After all evidence has been received and any procedural matters disposed of, the board may recess the hearing for a few minutes to give parties an opportunity to check their notes and prepare their arguments. The parties should also be advised before the hearing that they will have an opportunity, at the close of the testimony, to orally propose the factual findings and legal conclusions that they wish the board to reach. G.L. c. 30A, § 11(7). After submission of proposed findings and oral argument, the board should recess the hearing, discuss the case, and vote on a decision. After reconvening the hearing, the presiding officer may then render the decision orally. When an oral decision is issued, the transcript pages upon which the oral decision appears constitute the official decision. See G.L. c. 30A, § 11(7). No changes except typographical corrections should be made on those pages.

Oral decisions obviously increase the risk of oversight: the board may overlook some material fact or important legal principle. In simple cases the risk may be insubstantial. Compensating advantages include board time saved and the enhanced ability of board members to weigh the credibility of witnesses through fresh recollection of testimony and demeanor.

Most cases, because of their complexity, the size of the record, the number of parties, or the number of issues, do not lend themselves to oral disposition. For this reason, written decisions are preferable to oral decisions.

1. **Key Purposes Served by Issuing a Written Decision.**³³

What purposes are served by G.L. c. 30A, § 11's requirement that every agency decision committed to writing shall be "accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision . . ." ? Writing a reasoned justification for the outcome of a case is a prime way of achieving key goals of our system of administrative justice. A well written decision will:

³³ This subsection and the next and subsection G draw from Nancy Wanderer's article, *Writing Better Opinions: Communicating with Candor, Clarity, and Style*, 54 Me. L. Rev. 47 (2002).

- (1) guide the parties and other citizens in their interactions with state government;
- (2) persuade judges, officials, and citizens that the decision-maker has reached the proper resolution of a dispute; and
- (3) ensure consistency and reduce the chances of arbitrariness infecting the decision or contemplated governmental action.

Providing a reasoned response to the parties' arguments is an essential aspect of guaranteeing fair and effective adjudication. Without written decisions, the parties have to take it on faith that their participation in the adjudicatory process was genuinely meaningful and that the presiding officer in fact understood and took into account their evidence and arguments. Requiring magistrates and hearing officers to give reasons for their decisions not only educates and persuades the readers of those decisions, it encourages transparency, candor, and accountability in government and is designed to provide a profound constraint on official discretion.

2. Other Advantages of a Written Decision.

The discipline of preparing findings ensures that agencies confine their decisions to evidence in the record. Having to focus on the evidence steers decision-makers away from pure gut-level decisions. A losing party is more likely to feel treated fairly if the decision is supported by a careful statement of findings and reasons. Also, requiring written reasons can limit the issues in any subsequent litigation by confining judicial review to only those reasons proffered by the agency.

Requiring magistrates and hearing officers to explain the outcome of each case reinforces the agency's authority to regulate others and informs citizens about the rules of conduct that will apply all. And published reasoned decisions tend to ensure consistency, leading to a desirable degree of predictability.

B. Preparing to Write the Decision.

Ideally, the presiding officer starts planning the decision when the case is assigned. The whole process, not least the preparation of the decision, will be easier if the presiding officer begins to focus before the hearing commences. She should think about:

1. What is she being asked to do? [Issue, suspend, or revoke a license; impose a fine or penalty; approve a plan or proposal; resolve a dispute between two parties; determine eligibility for a benefit; etc.?)]

2. What are the governing legal principles? [Consult all relevant statutes, regulations, court decisions, terms of an agreement, etc.]
3. Who has the burden of convincing the fact-finder? [Note that it could be different parties on different questions.]
4. What facts must the party with the burden establish in order to obtain relief?
5. Is it a case in which the board has to formulate a remedy? What are the permissible alternatives?

These are guides to what to look for during the hearing. They are shaped by pleadings and other pre-hearing submissions, and sometimes by the presiding officer's own experience and assumptions. A wise magistrate will eschew any temptation to be inflexible. Her views on one or more of the disputed matters may change during the hearing.

C. Reviewing the Record.

The evidentiary record, which of course includes documentary evidence or other exhibits as well as oral testimony, is created expressly for the purpose of fact-finding. Legal principles exist independently of the evidentiary record, and come into play after the fact-finder has determined the relevant facts. Naturally, the applicable law may inform the hearing officer what facts are or are not meaningful to a resolution; but the record itself either will or will not contain "substantial evidence" in support of the findings sought to be established. In conducting any hearing, the presiding officer should always strive to produce a clear, concise, and fair record. Ambiguities or omissions in the record will make decision-making more difficult.

The decision-writer should start by defining (mentally or on a notepad) the factual issues to be decided. (Revisit question 4 in the preceding section.) Then, in going through the record, she should organize the evidence by those categories. The nature of the hearing process being what it is, the evidence often will not come in in an organized fashion. The presiding officer will have to reorganize it so that it can be evaluated issue by issue.

D. Weighing the Evidence.

On any given issue, the fact-finder should note the relevant evidence on both sides. While administrative fact-finding is entitled to considerable judicial deference, especially with respect to credibility determinations, the substantial evidence test requires that the board take into account the evidence that is adverse to its findings, not merely the evidence that supports them. In this regard, the board's job is more onerous than that of a trial judge, who, as fact-finder governed by the "not clearly erroneous" standard, needs only to be able to point to some supporting evidence.

1. The Burden and Standard of Proof.

Here again the fact-finder must take account of the burden and standard of proof, which is discussed at greater length in section C of Chapter I and sections A and J of Chapter V. The burden of proof typically rests on the charging party (usually an agency, board, or commission) with respect to charges or the respondent with respect to affirmative defenses. Ultimately, in a license revocation case, the decision-maker must decide whether a preponderance of the credible evidence submitted supports the charges alleged in the order to show cause against the licensee or, conversely, the affirmative defenses raised by the respondent. While the standard of proof usually follows the “clear weight” or, more commonly, “preponderance of the evidence” formulation, note that such is not always the case, as in civil service proceedings and child abuse/neglect administrative appeals.³⁴ The written decision should state which party has the burden of proof and the quantum of proof required.

2. Impartiality.

The board should not be influenced by the order to show cause or any other preliminary official action that may reflect a tentative finding of fact or conclusion of law or policy. The board should subject all evidence and the inferences and views of all of the parties to the same impartial scrutiny. The board should not consider other pending charges but it may consider previous disciplinary action taken against the respondent with respect to sanctions. (If it does so, it should be sure explain how prior discipline has factored into the current sanction.) The board should not base its decision on or otherwise consider facts outside the record that may have been available to them during a board investigation prior to the issuance of the order to show cause. Such evidence must be in the record to be relied on.

3. Evidence Considered.

Massachusetts law provides that “evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.” G.L. c. 30A, § 11(2). Parties often object to “hearsay” statements in

³⁴ “Generally, the standard applied in civil cases is proof by a preponderance of the evidence.” Doe v. Sex Offender Registry Bd., 428 Mass. 90, 101 (1998). In civil service cases, though, the governing statute, M.G.L. c. 31, § 2(b), requires the commission to find “whether, on the basis of the evidence before it, the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” City of Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 303 (1997). There is also a special formulation of the standard of proof required to uphold a Department of Children & Families investigator’s substantiation of a report of child abuse or neglect. “[T]he issue on . . . administrative appeal from the investigator’s decision is whether, based on all information then available (which may take into consideration information not considered by the investigator during the original investigation), there was—and still is—‘reasonable cause to believe’ that the child was abused or neglected.” Lindsay v. Department of Social Services, 439 Mass. 789, 798 (2003) [citing 110 Code Mass. Regs. § 4.32(2)].

the testimony of witnesses before an administrative tribunal. Hearsay statements are written or oral statements made outside of the hearing related by witnesses and offered to the board to prove the truth of the matters contained in those statements. See Chapter V, § E. In a board hearing, such statements may be admitted and given probative effect. See G.L. c. 30A, § 11(2). However, an administrative decision which rests solely on hearsay evidence can be upheld. Costa, 453 Mass. at 623-24 (holding that the due process clause does not bar an administrative agency from “basing its decision in whole or in part on hearsay evidence so long as the evidence is reliable”). Therefore, the board should ordinarily not rest a decision entirely on hearsay evidence though there may be exceptional cases in which such action is necessary and appropriate. Discussing the reliability of hearsay evidence that is used, including the citation and enumeration of any indicia of reliability, can only help the chances of a reviewing court finding that a decision’s reliability on hearsay was appropriate.

For example, in a proceeding to revoke a physician’s license for the illegal sale of drugs, the only evidence of the sale may be hearsay statements made to law enforcement officials by a person approached by the physician. Such statements are often related to the board by police officers. To avoid a legal challenge to a subsequent decision to revoke a physician’s license, the live testimony of the person approached or of undercover officers investigating the same sale may be introduced. Admissions made by the physician are not hearsay and may also be introduced. In the absence of such evidence, the board may still conclude that the testimony of law enforcement officials as to statements made by other persons, standing alone, should be given probative effect on the issue of the sale. However, it would be advisable to rest the decision on non-hearsay evidence as well.

In every case, the board should make a finding on every factual element of the charge against the respondent. See G.L. c. 30A, § 11(5). The fact-finder must fairly examine all evidence in the entire record, taking into full account whatever evidence weakens or undermines reasonable reliance on the proof underlying a factual conclusion. If the evidence sought to be relied upon to support a finding still remains reasonably credible and believable after the weighing process, it may then form the basis of a proper finding.³⁵ Based on its factual findings, the board could conclude that, for example, the respondent failed to use certain procedures or misapplied other procedures. The board could also conclude that the respondent failed to properly diagnose a problem. The board would next render its legal conclusion: If, by failing to properly treat his patient, the respondent failed to exercise the degree of care and skill possessed by an average qualified practitioner, the board may conclude that that failure constitutes malpractice under the applicable statute.

³⁵ The Supreme Judicial Court, in Cohen v. Board of Registration in Pharmacy, 350 Mass. 246, 253 (1966), and its progeny, has repeatedly warned administrative adjudicators against merely seizing upon any available piece of evidence to support a finding; rather, all favorable evidence must first be subjected to critical scrutiny in the light of any other record evidence that tends to detract from its credibility and believability.

4. Expertise of Board Members.

Agencies “may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them.” G.L. c. 30A, § 11(5). However, an agency may not substitute that expertise for evidence in the record as the basis for decision. D’Amour v. Board of Registration in Dentistry, 409 Mass. 572, 583 (1991). For example, in D’Amour, the agency properly relied on its expertise to decide between conflicting medical testimony. 409 Mass. at 583. But in Arthurs v. Board of Registration in Medicine, 383 Mass. 299 (1981), the agency improperly used its medical expertise to conclude a party did not keep adequate records, despite there being no supporting evidence in the record. See id. at 310. Arthurs discusses those instances in which “administrative notice” may be taken by an agency, and the procedural steps it must follow to do so.

5. Official notice / Matters outside the Record

The board can find facts only on the basis of the evidence submitted at the hearing and made part of the administrative record. G.L. c. 30A, § 11(4); see Chapter I, § B. One reason for this rule is that the parties cannot be expected to rebut contentions or evidence not in the record. As stated above, the board must then determine whether the facts in the record support the charges brought against the licensee. For example, in a case involving the charge of professional malpractice, the board would consider whether a preponderance of the credible evidence demonstrates that the conduct of the respondent fell short of the standard of care of an average practitioner. Relevant factual findings would include: the names of the respondent, the complainant, and other witnesses; the chronology of material events occurring prior to the alleged misconduct; the actions or omissions which constitute the misconduct; and subsequent events, including further actions by other practitioners to cure or repair damage that resulted from the misconduct. Also necessary for decision may be factual findings concerning the degree or skill of an average qualified practitioner.

Likewise, a decision should not rest upon a point which has not been raised at the hearing, in briefs, or in oral argument. Thorough preparation and proper management of the earlier stages of the proceeding should avoid this problem; but if, after the proceeding has concluded, the hearing officer finds an unexplored issue that may be dispositive, at a minimum, supplementary memoranda should be requested.

If a hearing officer discovers during the preparation of a decision that it is necessary to take official or administrative notice of something highly relevant, the officer should reopen the proceedings and allow the parties a chance to introduce any contrary evidence. Assuming any contrary evidence is not persuasive, the findings should clearly reflect what matters have been the subject of official notice and why any rebuttal evidence was not persuasive. Although cumbersome, this procedure is less burdensome than the inevitable remand if the decision-maker failed to give the parties advance notice of the fact that she intended to take official notice of something, thereby denying the parties their right to rebut. The ultimate decision is also more vulnerable if the official notice issue is not addressed explicitly in the statement of

reasons.

E. The Vote.

The enabling statute of the board generally establishes the quorum and voting requirements necessary for board action. Voting by proxy or notation should not be permitted. Thus, board members should not vote by telephone, by “pairing” their votes with members casting opposing votes, by relaying their votes through other board members or intermediaries, or by written notation on a written decision circulated among board members. Decisions should be rendered only by members voting while physically present at formal meetings.

F. “Tentative” Decisions.

1. When is a tentative decision required?

Additional procedures must be followed if the agency’s ultimate final decision maker -- the head of the agency if he or she is the statutorily designated final decision maker or a majority of the members of a multi-member board -- has neither heard nor read the evidence. G.L. c. 30A, § 11(7); Town of Middleborough v. Housing Appeals Committee, 66 Mass. App. Ct. 39, 52 (2006). This procedure requires several steps. First, a “tentative” or “proposed” decision by the hearing officer must be delivered or mailed to the parties. That tentative decision, like any decision, must contain a statement of reasons, including factual findings and conclusions of law. Second, the agency must permit each party adversely affected by the tentative decision to file objections to it and present arguments regarding it to the final decision maker (either the agency head, *e.g.*, the Commissioner of the Department of Environmental Protection, or a majority of the members of a multi-member board, as the case may be). The argument may be either orally or in writing, at the agency’s discretion. G.L. c. 30A, § 11(7). After considering the objections and argument, the final decision maker may then proceed to issue the agency’s final decision. G.L. c. 30A, § 11(7). While the final decision maker should consider the objections to and argument regarding the tentative decision, he or she does not have to review the underlying administrative record itself if the tentative-decision procedure is being used. Arthurs v. Bd. of Regis. in Med., 383 Mass. 299, 316 (1981).

The agency may by regulation provide for the suspension of the tentative-decision procedure in particular cases. To do so, the regulation must provide that, unless a party makes a written request in advance for a tentative or proposed decision, the agency may dispense with that procedure. G.L. c. 30A, § 11(7); see also 801 CMR §§ 1.01, 1.02. In those cases where (1) the agency has promulgated such a suspension regulation and (2) the requisite written advance request for a tentative decision has not been made, a reasonable construction of Section 11(7) is that the final decision maker does not have to either review the record or comply with the tentative-decision procedure before issuing a final decision. On the other hand, if an agency does not have a suspension regulation in effect and the tentative-decision procedure is not employed, then the final decision maker must in fact review the entire administrative record before issuing the final decision. G.L. c. 30A, § 11(7); Catlin v. Bd. of

Regis. of Architects, 414 Mass. 1, 6 (1992); Bd. of Appeals of Maynard v. Hous. Appeals Comm., 370 Mass. 64, 66 (1976); Middleborough, 66 Mass. App. Ct. at 52.

As a final note, Section 11(7) is inapplicable where a tentative decision is not adverse to any party other than the agency. 38 Cella, Massachusetts Practice: Administrative Law and Practice, § 403 (1986).

2. Discretionary Use of Tentative Decisions.

The board also may in its discretion issue a tentative decision in any case if it determines that additional objections and argument by the parties will aid the decision-making process. For example, a case may involve a novel question of law or a complex factual record. If so, the board may issue a tentative decision to the parties and weigh the objections and arguments submitted on the most troublesome questions. The board may then affirm, revise, or reverse its initial decision.

G. Writing the Decision.

The following components should be considered in writing the decision:

1. The Format.

A sample decision is included in the Appendix. As the Appeals Court has stated, “a written decision of findings and reasoning should contain sufficient explanation to assure the application of a correct legal standard to trustworthy information.” Costa, 71 Mass. App. Ct. at 282. Under G.L. c. 30A, § 11(7), “[e]very agency decision shall be in writing or stated in the record. The decision shall be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision, unless the General Laws provide that the agency need not prepare such.” If the case involves multiple issues, each should be clearly distinguished and separately resolved with the support of factual findings and legal conclusions. In most cases, the decision should include the following sections:

a. Introduction to the Decision: An opening paragraph should acquaint the reader with the essence of the case. Without this, the reader starts (and sometimes ends) with a mystery plot in which he doesn’t know why facts may be important or why legal principles may be relevant. In other words, he may not know what it is he should be looking for. Identify the parties and the claim or other contention, the principal issue(s) to be resolved, and the board’s conclusion. Think like a newspaper reporter writing a lead, rather than like a novelist.

b. Statement of the Case: This should be a brief statement of the nature of the proceedings and how the case reached the stage of the administrative hearing. The charges in the order to show cause should be set forth. The statement of the case may also include a summary of applicable statutes and regulations. However, the board should not just repeat the words of the enabling act (*e.g.*, that a rate is “fair, reasonable, and adequate”) and

expect that a later, wholly conclusory statement will suffice to withstand judicial review. See G.L. c. 30A, § 11(8); 38 Cella, Massachusetts Practice: Administrative Law and Practice, § 406 (1986). Detailed contentions of the parties need not be recited. These lengthen the opinion unnecessarily since, if they are material and relevant, they will most likely be discussed, along with how the statute applies, in the “Discussion” section. A lot of procedural skirmishes turn out to be meaningless and need not be recorded. Obviously, if some procedural dispute (e.g., a refusal to disclose discoverable evidence) turns out to be meaningful, then identify it specifically so that the reader is aware that it will play a role in the decision-making.

c. Findings of Fact: A statement of the findings of fact made by the board, based on its assessment of the oral testimony, physical exhibits, and any other evidence presented to it, is essential to any decision. The findings resolve factual disputes when there is evidence in the record that supports opposing views of the facts. Administrative decisions must be based on substantial evidence as well as reasoned findings; this is what makes effective judicial review possible. Fender v. Contributory Ret. Appeal Bd., 72 Mass. App. Ct. 755, 760 (2008). The decision should include findings on all important facts in issue in the case, but it should be limited to those facts actually in dispute; extensive detail is unnecessary.³⁶ The board is not required to address each and every legal issue, theory, and case citation relied on by a party. Weinberg v. Bd. of Registration in Med., 443 Mass. 679, 687 (2005). The findings of fact should be numbered for ease of reference and review. They should be followed by appropriate references to the transcript (“Tr. at_”) and exhibits (“Ex._”). Further, the board need only record findings that are necessary for it to decide the issue and provide the courts with a basis for judicial review. Catlin v. Bd. of Registration of Architects, 414 Mass. 1, 6 (1992). But the board must do more than merely recite the evidence or state major facts. It must make “subsidiary findings of fact” in support of any ultimate findings of fact made. 38 Cella, Massachusetts Practice: Administrative Law and Practice, § 408 (1986). It is crucial that the decision specify that the hearing officer is actually making findings of fact (*i.e.*, crediting certain evidence) and not merely stating the evidence presented by a party.

The single most pervasive problem that occurs in administrative decision-writing is the finding of fact articulated as a statement of evidence. “Mr. Smith testified that he arrived home at noon” is not a finding; it is merely a recitation of testimony that the presiding officer as the fact-finder may or may not credit. If the magistrate believes Mr. Smith on the question, then his finding should be “Mr. Smith arrived home at noon.” The finding is based on the testimony, but the testimony is not itself the finding. The findings of fact should not include any legal conclusions. For example, if the weight of evidence clearly shows that a prison guard, appealing his termination to the Civil Service Commission due to alleged excessive use of force on an inmate, actually did punch the inmate in the nether areas, the statement of facts should say, “The appellant punched the inmate in the groin,” and not “The appellant assaulted the

³⁶ Overly long findings of fact present the risk that a reviewing court will become distracted from the core evidence sustaining a board’s decision, or that a busy judge will give short shrift to the written decision.

inmate.” A *punch* is a fact; an *assault* is a legal conclusion.

Findings that are arbitrary and unsupported by substantial evidence, even those regarding the credibility of witnesses, may be set aside by a reviewing court. Bettencourt v. Bd. of Registration in Med., 408 Mass. 221, 227 (1990). The agency in Bettencourt ignored a physician’s testimony and was found to have acted in an arbitrary manner. See 408 Mass. at 227. Agencies are, in fact, required to confront problems in a witness’s testimony and to provide “an explicit analysis of credibility and the evidence bearing on it.” Herridge v. Bd. of Registration in Med., 420 Mass. 154, 165 (1995), citing Morris v. Bd. of Registration in Med., 405 Mass. 103, 107, cert. denied, 493 U.S. 977 (1989).

i. What makes for adequate findings of fact?

What makes a finding of fact proper is that the content of the statement (1) is derived from the credible evidence, and (2) describes an event, a condition, or the physical manifestation of something at a certain point in time. Findings of fact must be sufficient in number and depth to make the agency’s reasoning transparent. Findings that do little more than restate the ultimate conclusion are good candidates for reversal upon review. Findings should be an evaluation of the evidence, and not just a recital of testimony and documentary statements. Findings that distill the board’s thought process – for instance by identifying credible witnesses or authoritative experts, or recite carefully the policy reasons guiding agency interpretation of a statute – are more likely to earn deference.

The decision should not recount all the facts received in evidence, but just those facts that are either legally significant or necessary to establish the context of the events described. In the case of Box Pond Ass’n v. Energy Facilities Siting Bd., 435 Mass. 408, 418 (2001), the court wrote that an “agency need not refer to all evidence in its decision.” It is enough that the findings are sufficiently specific to enable a reviewing court to understand the decision-maker’s path of reasoning.

The decision-writer should identify clearly the source of his findings. If he does not do so, a reviewing agency or court may second-guess whether his findings are primary or instead derivative or inferential and not based on witness credibility. In sum, the hearing officer must spell out clearly and with precision his specific factual findings, and indicate the weight given by him to the various pieces of evidence, so that a reviewing court can determine the substantiality of his findings without fishing through the entire record.

ii. Documenting credibility determinations.

Where any of the testimony, oral or documentary, was controverted, the hearing officer should make an explicit credibility determination, using such words as “I find that . . .” or “credit the testimony of . . .” or “afford great weight [or credibility] to . . .” Perhaps there were inconsistencies in one witness’s testimony (or prior inconsistent statements); perhaps another witness’s testimony was corroborated by other evidence. To the extent possible, findings

grounded on witness demeanor should have some reference point in observed behavior, such as evasiveness, hesitancy, or discomfort under questioning.

iii. Other suggestions for drafting good findings of fact.

In July of 2012, retired Appeals Court judge William I. Cowin offered the following suggestions to a large group of Massachusetts magistrates and hearing officers:

1. Ordinarily the best organization for the recitation of findings is chronological. Tell the story in the order in which it took place. This is particularly important if you are going to believe/disbelieve testimony because it is logical/illogical when compared to something that has taken place in the past.
2. Don't make findings of facts that don't matter. At best this makes the decision longer than necessary. At worst this confuses the reader and makes him think that the extraneous facts may have some importance. Where a petitioner went to college may be meaningful if the issue is his competence to receive a professional license. It is probably irrelevant if he is being classified as a sex offender.
3. Make findings on every factual issue that matters. In particular, don't stop after the subsidiary findings and neglect to state the ultimate finding: e.g., "based on my subsidiary findings, I find that the petitioner did not have the qualifications necessary to be a waste water treatment operator."
4. Don't equivocate. Evidence may be close on a given issue (it often is not), but you must decide one way or the other. "It appears that Mr. Smith arrived home at noon" doesn't do it. He either did or he didn't.
5. Particularly in the case of findings that are critical or hotly contested, provide citations to the record. This gives a reviewing judge easy access to the source of a challenged finding, and creates confidence that you know what you're doing. It is also good discipline for the writer, because it is a hedge against relying on what you thought you heard as opposed to what you actually did hear.
6. If an inference is relevant and reasonable, include it as a finding of fact. Make sure to label it as an inference that you draw from an otherwise established fact, and be certain that the inference follows logically from the

factual premise from which it is derived. Then the inferential chain must stop; don't use an inference to support a further inference.

7. Avoid interspersing legal conclusions with findings of fact: e.g., "the department is required to show" Save that for the discussion section.
8. If you receive proposed findings of fact, avoid a wholesale adoption of the recommendations of one party (even in the unlikely event that they are completely unbiased, accurate, and reflective of your views). While it is not an error per se to do so, it is a red flag that can be exploited by an advocate trying to show that you were biased or inattentive. Make at least some changes, even cosmetic ones, in more than one portion of the proposals.

d. Rulings of Law (versus Conclusions of Law): It is generally unnecessary to have a separate set of rulings of law. Most cases involve a limited set of legal principles anyway. Putting them in one place as abstract propositions detached from the findings to which they relate serves no meaningful purpose. Furthermore, some administrative judges have a tendency to include legal propositions that have little or nothing to do with the case, thus unnecessarily prolonging the agony and misleading the reader into thinking that these extraneous propositions may have some importance. It is normally better to save the statements of legal principles for a discussion section in which they can be explained and their significance demonstrated.

As will be elaborated upon in the next section, the board does, however, need to apply the applicable law to its factual findings and explain the reasons for its conclusions of law. The conclusions of law are the consequences that follow from applying the pertinent statutes and regulations to the findings of fact in the case. The discussion need not be lengthy; the board should at a minimum, however, explain the factual basis for each conclusion that the conduct of the licensee violated a statute or regulation.

e. Discussion/Analysis: After the findings of fact, this is the most important part of the decision. It is where the writer transforms sometimes reluctant judicial deference into confidence on the part of the judge that the board is right (or at least that its determination cannot be set aside). Depending on the case, this section will have one or more of three parts:

i. Explanation of findings. Particularly when the fact-finder is crediting certain testimony as opposed to contrary testimony, it is important to explain why he believed one witness rather than another. There are various valid reasons, including such factors as bias, lack of memory, lack of logic, conflicts within the testimony or with other facts known to be true, evasiveness, demeanor, etc. If the fact-finder is able to articulate reasons for his choices, it is very difficult for a judge to say that these choices are arbitrary.

ii. Legal interpretations. Here the writer can identify the operative statute, regulation, or other source of authority and interpret it if its meaning is disputed. He can also identify any aids to interpretation such as court decisions or his own agency's previous rulings. If appropriate, he should explain why he did not consider it necessary to make certain findings or apply certain legal principles (thereby demonstrating that he didn't simply ignore or was unaware of these matters). In addition, he can explain if necessary how the governing legal principles combine with the facts he has found to produce the final decision.

The legal analysis section of the decision should follow a distinctly logical path. First, identify the discrete issue, perhaps by a section heading; then present the statutory or common law rule that applies and show how that rule has been applied in other analogous cases. Finally, apply that rule to the facts in the case at hand by presenting both parties' arguments and reach a definite conclusion indicating which argument is more persuasive.

When analyzing an issue, use deductive logic (such as a categorical syllogism) to derive a valid and sound conclusion. In the typical three-part legal syllogism, the writer sets forth two propositions that are true – the major and minor premises—in order to come to a valid and true conclusion. Often, a statutory provision, a regulation, a binding opinion, or an agency policy makes up the major premise. Just be sure to state the law accurately. The minor premise comes from the factual pattern of the specific case at hand. The writer first has to make one or more findings of fact to state a true proposition that will be adopted as the minor premise. Deductive logic requires the conclusion to be true if the propositions are both true and the conclusion is derived validly from the propositions.

In structuring a paragraph with a legal syllogism, it is entirely possible and beneficial often to follow the I-R-A-C (issue-rule-analysis-conclusion) format. The format can be repeated for however many issues the case presents. Naturally, the final disposition of the case should reflect the sum of, and not be inconsistent with any of, the individual conclusions pertaining to the separate issues on appeal.

iii. Remedy. Certain cases will require that the board formulate a remedy. Many statutes and regulations authorize a range of remedies, with the ultimate choice left to the administrative agency. In this section, the writer has an opportunity to explain the basis on which the board exercised its discretion.

Boards do not, in general, have the duty to explain why the result in one case is different from the result in another. Rather, the reasons provided by the board serve to distinguish cases. Massachusetts Electric Co. v. Dept. of Public Utilities, 376 Mass. 294, 312 (1978). That said, in cases in which a board is departing from longstanding precedent, the board must explain its rationale carefully. Although not bound in a strict sense by *stare decisis*, boards and administrative tribunals are under a special duty to explain themselves where they depart from an established line of decisions.

f. Sanction or Other Disposition: In the final section of its decision, the board should state the sanction, if any, imposed on the licensee or respondent. It is important for the board to explain the reasons for its choice of sanction. The board may impose any sanction authorized by the pertinent statutes or regulations. Generally, the sanction should be based on the nature of the violation found; sanctions imposed in prior, similar situations; previous violations by the same licensee; and future danger posed by the licensee to the health, safety, and welfare of persons in the Commonwealth. The board may also consider whether alternative sanctions, if authorized by statute and related to the violations found, such as community service or additional education, will rehabilitate the licensee and prevent recurrence of the violation.

The decision should be signed by either the Chairman or the Secretary of the Board. Those members who participated in the decision may be listed. The decision should be dated. The decision must also include a clear statement of the parties' rights to judicial review or appeal of the decision within the agency or before the courts, and the time limitation on the exercise of their appellate rights. G.L. c. 30A, § 11(8). It is important that this notification track the language of the governing statute as closely as possible.

2. Additional Suggestions for Writing the Decision.

Garnering deference: It can be particularly helpful, because of the agency's expertise to which the courts will defer, for the decision to reflect how the underlying public policy and legislative purpose is served by the decision. Especially where legislative intent may be shrouded, it is imperative to take considerable care in setting out the legislative scheme and articulating the position, point, or purpose of the particular provision being interpreted within that whole scheme. Decisions that recite carefully the policy reasons guiding the interpretation of a statute are more likely to garner judicial deference. References to legislative history or other indicia of legislative intent, when used to bolster agency interpretations, can also earn deference points. In all events, reasonableness should be the decision-maker's polestar.

Favor simplicity: The author of the board's decision should remember to (1) use simple words and phrases, (2) avoid technical jargon and redundant phrases, (3) use short paragraphs, and (4) maintain a clear format for ease of public reference and judicial review. Other writing style tips:

Prefer the active voice: Use of the active voice rather than the passive voice is frequently preferable for two reasons. First, it leads to leaner writing, often by saving words. Second, it is more likely to reveal who the actor is. In addition, the active voice is normally more direct and vigorous. The subject of the active-voice sentence is acting or doing something. Consequently, the active voice should be used in the absence of a good reason for using the passive. The passive voice, however, may be preferable when the *thing* done is important and who did it is not, or when the actor is unknown or indefinite. The passive voice can also be employed usefully when detached abstraction is desired.

Create a strong Subject-Verb unit: The best way to achieve an energetic yet lean style is to make sure that the subject-verb unit carries the core of meaning in the sentence. To create a strong subject-verb unit, decision-writers should choose concrete subjects for their sentences and put the real action in the sentence in the verb, not bury it in a noun. For example, the following sentence is weak because the verb is “are”: “The facts in the case are an illustration of this point.” Putting the core meaning of the sentence into the subject-verb unit creates a more energetic style: “The facts in the case illustrate this point.”

Avoid Nominalizations: Likewise, nominalizations – turning verbs into nouns – should be avoided. They dilute the impact of the sentence and convey an abstract impression. For example, “reached an agreement” should be “agreed” and “made a statement” should be “stated.”

Don’t try to be too witty or clever: Attempting to shine with cleverness is often a good way to look foolish. The ideal is not demonstrated brilliance. In fact, the ideal lies in the opposite direction. The ideal is a decision that takes so little effort to read and understand that the reader becomes unaware of the writer.

H. Notifying the Parties About the Decision.

Under G.L. c. 30A, § 11(7), the agency is responsible for notifying the parties about its decision: “Parties to the proceeding shall be notified in person or by mail of the decision; of their rights to review or appeal the decision within the agency or before the courts, as the case may be; and of the time limits on their rights to review or appeal. A copy of the decision and of the statement of reasons, if prepared, shall be delivered or mailed upon request to each party and to his attorney of record.” It is best practice to send the decision by certified mail with a return receipt requested. The ability to document when the parties received notice of the decision may become important in the event that the aggrieved party exceeds the time limit for appealing that decision.

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