

Introduction

Serving on a social work regulatory board can be a challenging and demanding experience. For several years, the Association of Social Work Boards has helped board members to meet these challenges by providing training sessions in the basics of legal regulation.

This manual was created to support the training sessions, and to provide ASWB member boards with a “stand-alone” guide that covers the same areas addressed in the training. While attendance at an actual ASWB New Board Member Training session is probably the best way for a recently appointed board member to get a thorough understanding of roles and responsibilities, the ASWB *Manual for New Board Members* can serve as a good starting point for board members who are unable to attend a session, or need information quickly.

We hope you find this manual useful. Congratulations on your appointment to the regulatory board, good luck in your future service to the public.

Chapter 1

Where it began

A short history of social work regulation

As regulated professionals, social workers are fairly recent arrivals on the scene. Although 1999 marked the 100th anniversary of the social work profession in the states, the regulatory structures guiding that profession are less than half as old, having their beginnings in legislation enacted in Puerto Rico in 1934, but seeing no real growth until the late 1960s and early 1970s. This growth could not be described as the smooth expansion of a uniform regulatory system: the history of the legal regulation of social work in the United States and Canada is one of starts and stops, steps forward and steps backward, victories, defeats, and compromises, all of which play a role in the patchwork of social work regulation in place today.

Social work's relatively late entry into regulation can in large part be attributed to the debate—which some would argue still goes on—over whether social work is in fact a “profession” in the truest sense of the word. Although most social workers (and social work regulators) today are in solid agreement that social work is truly a profession, this debate has lingered, and has tended to slow wide public (and thus legislative) acceptance and understanding of the profession *as a profession*. However passé this discussion may seem to social work professionals, remnants of this debate can still be found in some states, which still allow the term “social worker” to be applied to certain employees in certain job settings, regardless of their training and overall competence.

Despite these issues, the overall health of social work regulation in North America is very good. The number of legally regulated social workers is on the rise—the Association of Social Work Boards estimates that there are over 400,000 licensed or certified social workers across the US and Canada—and regulatory boards are regulating multiple professional levels in increasing numbers. The licensure examinations used by the ASWB member boards are valid and reliable measures of

competence. And perhaps most encouraging, legislatures, the public, and social workers themselves are coming to understand that professional regulation needs to be rooted in the principles of public protection, and not in the enhancement of professional status. Although social work may have been a latecomer in terms of its regulatory development, it has already passed some “older” regulated professions in its responsiveness to the public.

It is possible to trace professional regulation in the U.S. back to 17th century laws that regulated physicians’ fees, but the beginning of professional regulation in the states is most often associated with professional societies that developed in the early 19th century around medicine, dentistry, pharmacy, and veterinary medicine. These societies sought to establish standards in practice and education, and were sometimes able to persuade state legislatures to adopt these standards into law.

These groups followed a more-or-less standard evolution into a legislatively-enacted regulatory structure. They began by creating a voluntary organization (sometimes called a guild, union, society, or other such term) to establish a kind of professional self consciousness; they worked to develop standards for education in the profession; they developed education accreditation mechanisms; and they (successfully) pressed for governmental certification or licensure of professionals meeting certain educational and experience standards.

Social work regulation in the United States followed roughly the same pattern, beginning in the early part of the 20th century. Bruce A. Thyer and Marilyn Biggerstaff, in their monograph titled *Professional Social Work Credentialing and Legal Regulation* (Springfield: Charles Thomas Publishers, 1989) identified stages of development:

The beginning recognition of a social worker or “friendly visitor” was through an agency on the basis of employment. During the second stage competency for practice was recognized as holding a graduate-level degree in social work. The third stage was marked by the slow emergence of certification through a professional organization setting minimum standards for practice. During the fourth stage credentialing began through establishment of statutory requirements primarily on a voluntary basis for the state-regulated practice. The fifth and current

stage is the development of legal regulation including establishing mechanisms for assuring a minimum level of competency for social workers at the entry level of practice. The sixth stage is emerging in the development of specialty board certification programs. The final stages, including development of periodic recertification and the practice audit, are not yet evident in the social work profession. (page 13)

The first social work regulatory legislation was introduced in California in 1929. This bill was defeated by the legislature there, and did not reemerge in California until 1945, when California adopted a registration system. In the meantime, Puerto Rico had enacted a statute in 1934, making it the first U.S. jurisdiction to adopt a system for the legal regulation of social workers.

During the 1940s and through the 1950s, legislative activity remained fairly quiet. The real upsurge in regulation came in the 1960s, '70s, and '80s, when eight, 14, and 27 states enacted social work regulation, respectively. Today, every state in the country, Puerto Rico, the U.S. Virgin Islands, and the District of Columbia has some form of social work regulation in place.

The pattern of legislative development in Canada was similar, developing over a period of more than 65 years. Early efforts to gain legislative recognition began within the Canadian Association of Social Workers (CASW) in 1938, although the first social work law in Canada was not enacted until 1966, in Manitoba. As of 1998, with the passing of the Social Work and Social Service Work Act (SO 1998) in Ontario, all ten provinces have social work practice legislation.

The Association of Social Work Boards

As social work licensing spread in the 1970s, a group of social workers saw the need for an organization whose primary concern would be social work regulation. These early regulators felt that this association would need to stand apart from any professional organization, and should be focused primarily on licensure as a public protection issue.

The Association of Social Work Boards (ASWB) was incorporated

in 1979 as the American Association of State Social Work Boards (AASSWB). Comprised of regulatory boards that oversee social work, ASWB membership now includes 49 states, the District of Columbia, the U.S. Virgin Islands, and all 10 Canadian provinces. In 1999, the association changed its name to the Association of Social Work Boards to reflect both its changing membership and the growing importance of social work regulation internationally.

ASWB's mission is to enhance the protection of the public through assistance to boards of social work. The association owns and maintains the licensing examinations used in 49 states, two Canadian provinces, D.C, and the Virgin Islands, and manages the most complete national databank of disciplinary actions taken against social workers. The association also works with other regulatory board associations, professional social work organizations and social workers themselves to increase understanding of the legal regulation of social work.

You will learn more about the ways in which ASWB helps regulatory boards and their members throughout this manual.

Licensing - still evolving

While social work regulation across the U.S. and Canada is more widespread than at any time in its history, the regulation of the practice is still evolving . The social work community has, to a certain extent, not yet fully grasped the ramifications of true professional regulation, and the relationship of that regulation to the public, to professional associations, and to academia.

Perhaps the most difficult issue that needs to be addressed is also one of the most basic--the relationship between a profession and that profession's regulatory mechanisms. The existence of legal regulation of social work in the U.S. is a result of the efforts of social workers, and to their predominant professional association, the National Association of Social Workers, and its state chapters. It was, after all, social workers who saw the need for the establishment of standards. It was social workers who pressed for the development of a single standardized examination program. It was, very often, social workers who were instrumental in

drafting licensing laws and advocating for their passage, and of course social workers comprise the majority of social work regulatory boards. and even today, social workers and state professional associations are the frontline defenders of licensure laws that come under the attack of legislatures seeking to eliminate "unnecessary" regulation. These contributions should never be ignored.

At the same time, however, in order for a licensing law and regulatory board to function properly, it must be remembered that professional regulation's primary mission is public protection. The public—consumers of social work services—must always come first; the needs of the social work profession must be secondary. Social workers who view regulation as a way to protect and promote the profession of social work are correct, but only in an indirect way: the profession of social work is best served when its governmental regulatory arm is devoted to public protection. When consumers and legislatures are convinced that the social work board is acting as an advocate for public protection, the profession of social work gains respect and trust.

Licensing can only be concerned with minimal competence, but it is understandable that a profession would want to encourage excellence. The social work profession has been successful at creating and promoting these measures of excellence in the form of additional professional credentials. The National Association of Social Workers has established a Clinical Social Work Registry, a Diplomate program, and the Academy of Certified Social Workers—all designations that require experience beyond the minimum requirements for licensure. Similarly, the American Board of Examiners in Clinical Social Work has developed a diplomate program, and is now considering establishing professional credentials in clinical social work sub-specialties.

Social workers and their professional associations should be concerned with the continued health of their profession, and should work to promote and spread knowledge of the value of social work. Social work regulatory boards, while they should be comprised primarily of professional social workers, must have a different focus. Tensions will inevitably develop between the professional and regulatory communi-

ties, but this tension is a good thing, and helps to ensure that both the profession and its regulatory components are strong.

Similar tensions should exist between social work regulation and the social work education communities—these are essentially the tensions between practice and theory. The licensing examinations should not be construed as outcome measures of academic programs, nor should academic programs be overly concerned with teaching only the knowledge required for licensure. Social work educational programs need to have the freedom to teach a range and depth of knowledge beyond the minimum competencies demanded by licensure. In the same way, the regulatory community should maintain its focus on actual practice, and the skills needed to practice competently and safely.

These three groups—the professional community, the academic community, and the regulatory community—must continually work to understand the extent of common areas and differences. There will always be common areas, and there will always be differences. Fortunately, social work is a profession that embraces diversity, acknowledges honest differences, and uses these differences to build a stronger whole. Effective professional regulation will continue to be a part of that stronger whole.

Chapter 2 ASWB

Your association--how it works, what it does

When ASWB (at that time AASSWB—The American Association of State Social Work Boards) began in 1979, its founders were hopeful that the organization could work toward creating an examination that could be used by a few licensing boards. Within 20 years, the association had accomplished that, and much more. Today, the Association of Social Work Boards provides four national examinations, the most extensive and reliable database of disciplinary actions taken by boards, a continuing education provider approval program, and many other services. While the licensing examination program remains at the center of the association, ASWB has grown into a strong international organization that helps social work regulatory boards carry out their work effectively and creatively.

ASWB's mission

Although the actual text of the association's mission statement has changed from time to time, the focus of ASWB has always been on consumer protection. By helping to encourage more uniformity, by facilitating the sharing of information between boards, and by providing a valid, reliable examination, ASWB assists its member boards in protecting the public.

The current ASWB mission statement describes the association's work this way:

The mission of the Association of Social Work Boards is to assist social work regulatory bodies in carrying out their legislated mandates, and to encourage jurisdictional efforts to protect a diverse public served by social workers who are regulated through common values, ethics, and practice standards. The Association will help to foster public and professional understanding of the value, competency, and accountability of regulated social workers.

An association of boards

The Association of Social Work Boards is, at its core, an organization made up of, and owned by, its member boards: boards, through their delegates, set broad association policy, elect ASWB leadership, and make important decisions regarding the examination program, large expenditures, and other matters.

Perhaps more important, because ASWB is driven by its member boards, boards can collectively develop and use programs that might be too costly or labor-intensive for any single regulatory body. Examination programs, for example, are highly complex, expensive operations that require constant maintenance. For most boards, mounting a defensible examination program would be impossible. Through ASWB, however, boards can have access to, and control over, an international examination program.

Similarly, other programs—such as the ASWB Approved Continuing Education Program (ACE), the Social Work Registry, and the association's application processing and continuing education audit services—can free boards and staff from some administrative burdens without “outsourcing” to private agencies that may or may not be responsive. Additionally, programs such as the board member training program, and the Disciplinary Action Reporting System (DARS) essentially allow boards to carry out their own responsibilities more effectively.

The association holds two meetings every year—an educational meeting in the spring, and its annual business meeting in the fall.

Governance

The Delegate Assembly

The Association of Social Work Boards is controlled by its Delegate Assembly, a governing body comprised of one Delegate and Alternate from each member jurisdiction. Delegates meet annually, during the ASWB Annual Meeting, at which time the assembly receives reports on various ASWB programs, elects members of the association's Board of Directors and Nominating Committee, and votes on recommendations and motions brought forward by the Board of Directors, various ASWB Committees, or from the assembly itself. Each member board gets one vote in the Delegate Assembly; most motions require a simple majority to pass.

Since 1994, ASWB has funded one delegate from each member jurisdiction to attend the association's annual meeting

The Delegate Assembly has specific powers reserved for it through the ASWB Bylaws, but also has fairly wide latitude to shape association policy and programs. Since 1994, ASWB has funded attendance for one delegate from every jurisdiction that chooses to participate in the ASWB annual meeting.

The Board of Directors

The ASWB Board of Directors is elected by the Delegate Assembly, and oversees the ongoing business of the association. The association has an eight member board consisting of President, President-elect/Past-president (alternating years), Secretary, Treasurer, and four Directors at Large. At least one member of the board must be a public member and one at-large seat is reserved for a current staff member of a member board. The association president must be a licensed social worker.

Committees and Task Forces

The Association of Social Work Boards relies heavily on volunteers to oversee several important elements of the organization. The members of these volunteer committees are appointed by the President at the beginning of each year, with a few exceptions. Current committees include:

Examination Committee. This committee is responsible for overseeing the items on the ASWB examinations. Examination Committee members are carefully selected to represent diverse ethnic, geographic, and practice settings, and need not be members of a social work regulatory board. Most members of the examination committee are drawn from the ASWB item writer program.

Finance Committee. The finance committee monitors ASWB revenue and expenditures, and helps the Board of Directors develop policies and procedures to maintain the overall financial health of ASWB.

Approved Continuing Education Committee. The ACE committee reviews applications from continuing education providers for possible approval from the ASWB ACE program.

Bylaws and Resolutions Committee. This committee reviews all proposed changes to the ASWB Bylaws, as well as any resolutions that are forwarded to the Delegate Assembly. The committee can also draft its own proposals for bylaws changes.

Regulation and Standards Committee. The RAS committee's primary responsibility centers on the ASWB Model Social Work Practice Act. The committee conducts regular reviews of the model, and addresses emerging issues in social work regulation.

Program Planning and Education Committee. As its name implies, the Program Committee is responsible for developing the programs presented at the ASWB spring education meetings.

Nominating Committee. This elected committee creates the slate of candidates for all elected positions within the association.

Practice Analysis Task Force. Not a standing committee, this group is created whenever ASWB conducts the studies of social work practice necessary for the examination program.

The ASWB Examination Committee is a demanding volunteer position, requiring members to attend at least four three-day meetings a year.

Association office

The Association of Social Work Boards is headquartered in Culpeper, Virginia. Staff at the association office is responsible for the daily operations of the association, from supporting volunteers and committee work to registering candidates for the licensing exam. The work of the staff is guided by the Board of Directors by way of the Executive Director, and through policy.

ASWB services

The range of services provided by the Association of Social Work Boards has expanded to meet the needs of its membership. With the exception of the examination program—the use of which is required by every member whenever applicable—the programs offered by ASWB are voluntary, to be used at the discretion of each member board.

As an extension of the services directly related to its members, ASWB also works to educate social workers, social work students, schools of social work, and the public on issues related to licensure and regulation. These programs, which include informational brochures, website content, conference exhibits, and presentations, range from explanations of examination construction to discussions of broad regulatory issues such as licensure exemptions and internet-based practice. All services and programs offered to member boards are free.

Some of the services offered by ASWB include:

Disciplinary Action Reporting System (DARS). The DARS is a nationwide repository of information on individuals who have been sanctioned by a regulatory board. This cooperative effort among boards is now the most complete databank of disciplinary actions in the country. Boards can use the DARS as a flagging system during application and renewal review—particularly when reviewing an application from a social worker previously licensed in another jurisdiction.

HIPDB/NPDB Reporting Service. The U.S. federal government now requires all health-related regulatory bodies to submit regular disciplinary reports to the Healthcare Integrity Protection Databank (HIPDB) and the National Practitioner Databank (NPDB). The Association of Social Work Boards has been approved as an official reporting agent for social work boards, and can process and forward a member board's reports to the federal systems.

Board Member Training program. The association offers training sessions intended to help new members of regulatory boards become familiar with their roles, the responsibilities of the regulatory board, and the ways in which ASWB can help. Attendance is funded by ASWB for a limited number of participants at each session. Typically, one session is held in the spring, another during the summer, and a third program is presented in the fall. Most sessions are held in the Northern Virginia area near Washington, D.C. but ASWB does occasionally conduct these sessions in other parts of the U.S. and Canada.

ASWB Approved Continuing Education program (ACE). The ASWB ACE program helps boards, continuing education providers, and social workers by standardizing continuing education approval and identifying high quality continuing education

programs. ACE approval from ASWB is an acknowledgement of a ce provider's qualifications to present, monitor, and maintain quality social work continuing education offerings. Boards use ACE approval status in a variety of ways, from accepting all ce offered by ACE providers to using ACE approval as one factor in presentation-by-presentation reviews of ce.

ASWB Social Work Registry. The Registry is a repository for social worker credential information that serves as a verification source for social work boards. Through the Registry, social workers establish a permanent file containing primary source records important to licensure decisions. At the request of the social worker, information on these records can be transmitted to any regulatory board.

Model Social Work Practice Act. The model law is a resource designed to provide regulatory boards with a practice act informed by a national perspective. The ASWB Model Social Work Practice act contains laws, regulations, and accompanying explanations that can help boards who are attempting to make a change to their own laws and regs.

ASWB website. The association's website (www.aswb.org) supplies visitors with extensive information on social work regulation and the examinations. The ASWB website places special emphasis on providing information to social workers who want to learn more about licensure and continuing education, and includes regulatory information from every state and province.

Email groups. Members of regulatory boards and board staff can participate in ASWB-sponsored email groups that allow boards to discuss issues and share information electronically. The administrator message list is used extensively by administrators to post questions; similarly, ASWB uses both lists as its primary method of communicating with its member boards. To join an email group, contact ASWB at info@aswb.org.

Spring Education Meeting. The annual ASWB Spring Education Meeting allows members of social work regulatory boards to participate in programs delivered by nationally-recognized speakers, as well as by leaders within ASWB. Past meeting topics have included continuing competence, social work ethics, supervision, and internet-based practice.

Administrators Forum. These meetings, scheduled to coincide with each Spring Education Meeting and Annual Meeting, provide an opportunity for social work board administrators to discuss mutual concerns and interests and share ideas.

ASWB Publications. The association offers a range of publications on different topics. These include:

Association news. A bimonthly e-newsletter, *association news* keeps member boards up to date on happenings within the association. Association news also contains regular columns on regulatory and legal issues.

Social work laws and regulations online comparison guide. This online database found at www.aswb.org contains information on every social work regulatory board in the US and Canada. In addition to basic contact information, the guide also contains descriptions of laws, regulations, practice definitions, continuing education requirements, fees, and other topics.

Understanding and complying with the ADA. This booklet helps members of social work boards get a better sense of how the Americans with Disabilities Act (ADA) may impact examination and licensing operations.

Sunset: how to avoid having your board ride off. Regulatory boards facing so-called “sunset” provisions can use this publication to help them prepare for the review process.

The examination blue book. The ASWB examination program is built on exacting and sometimes hard-to-understand psychometric standards. This publication attempts to make the details of the examination process understandable to members of regulatory boards.

Informational brochures. The Association of Social Work Boards produces a variety of brochures on different topics, ranging from the basics of licensure, to advice to social workers seeking continuing education, to a general brochure on the association.

Study guides and online practice examinations. The association publishes guides to preparing for the licensing examinations as well as fullscale online practice exams for the Basic, Masters, and Clinical examinations.

The social work licensing examinations

The licensure examinations developed by ASWB are the single most important service provided by the association. Each year, the association devotes more than 60 percent of its budget to examination development and maintenance, and hundreds of volunteer and staff hours are devoted to keeping the ASWB examinations valid and reliable measures of social work competence.

The ASWB examinations are called “high stakes” examinations for good reason: social workers who fail an ASWB examination can be prevented from pursuing their chosen career. Because boards rely upon these examinations to help them make decisions in the interest of public protection, the construction, validation, and maintenance of the testing program are extremely important.

The basics - testing format and delivery

The ASWB examination program is one of the larger health care licensure testing systems, with a volume that ranges from 28,000 - 31,000 administrations annually. The ASWB examinations are the only social work licensing examinations with an international scope and standardized passing scores.

The ASWB examinations are offered in five categories: Associate, targeted at non-social work-degreeed applicants for paraprofessional social work licenses offered in a few jurisdictions; Bachelors, appropriate for BSWs with 0-2 years of experience; Masters, for use by MSWs with 0-2 years of experience; Advanced Generalist, for MSWs with 2-5 years of post-degree experience in non-clinical settings; and Clinical, for MSWs with 2-5 years of post-degree experience in a clinical setting. Each test consists of 170 multiple-choice items, 20 of which are non-scored “pretest” items. Test-takers have four hours to complete the examination. Content outlines for all exam categories are included in the appendices to this manual.

The association works with a testing contractor that provides psychometric and administration support services. Tests are administered

Beginning with examinations administered after May 16, 2004, three of the ASWB Examinations were given new names--"Basic" became "Bachelors," "Intermediate" became "Masters," and "Advanced" was renamed "Advanced Generalist."

through computers at over 200 testing sites across the U.S. The examinations are scored immediately after completion of the test, so that an examinee can get preliminary results on the test day. Results remain preliminary until they are forwarded and accepted by the social work regulatory board.

At present, only two Canadian jurisdictions--Alberta and British Columbia--are using the ASWB examinations for licensure.

The watchwords - validity and reliability

The main challenge to a licensure testing program is to find the theoretical line that separates those who are *minimally* competent from those who are not. It would be easy to construct a test that would separate those with highly advanced knowledge and skills from those without, but these tests would not be appropriate for use in a licensing system. Legal regulation's focus must remain on making determinations that protect the public from incompetent practice—regulatory bodies cannot restrict licenses to only those practitioners who demonstrate excellence, because excellence and competence are different concepts. In turn, licensing examinations must be able to measure *minimum* competency, and must be able to do so consistently—they must, in other words, be *valid* and *reliable*. Validity and reliability are intertwined terms that, together, establish the legal defensibility of a testing program.

Validity, as it is used in licensing examination programs, refers to the extent to which a test measures what it is supposed to be measuring, and the test's ability to ensure that minimally competent candidates are passing the examination and minimally incompetent candidates are not passing. Validity is accomplished primarily through the way the test is constructed, and the method by which passing scores are set. The central component of the ASWB examination program's overall validity rests with the practice analysis process (see below).

Reliability centers more on the tests after they have been constructed, and refers to the consistency of an examination. A highly reliable test is one that would produce similar scores for each test-taker time after time. The reliability of the ASWB examinations is maintained

More details on the ASWB examination program can be found in the ASWB bluebook, a free publication that explains the entire exam process.

through its test development efforts and the statistical monitoring of individual item (test question) and candidate performance.

Together, validity and reliability are the foundation for the examination program's legal defensibility as a fair and consistent tool in making minimum competence decisions as part of the licensure process.

Constructing the examinations - the practice analysis

The ASWB examinations are based on periodic practice analyses. The practice analysis begins with a survey of social work practice in a wide variety of setting across the US and Canada—its results shape not only the actual questions that appear on the examinations, but the very need for a particular examination at a particular level of practice. From the job analysis ASWB finds out what social workers are doing at various levels of practice.

The practice analysis survey lists a series of tasks common to social work, and then asks participants to rate how often they perform each task, how critical knowledge of the task is regardless of how often it is performed, and whether the ability to perform this task is a necessary entry-level skill at their particular level of practice. The results give ASWB a highly accurate profile of social work, and help the association to establish the various categories of examinations offered. The entire job analysis is based on standards set out the Standards for Educational and Psychological testing developed by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education.

The association's first practice analysis was conducted in 1980-81, with a practice analysis verification study completed in 1988. The next practice analyses were completed in 1996 and 2003. The latest practice analysis began in 2009, with new blueprints anticipated to go online in 2011.

After survey results have been compiled and tabulated, subject matter experts sift through the ratings and identify those tasks critical to entry-level practice. Once the most important tasks have been identified, content experts target the knowledge areas that are essential to performing

a particular task. Usually, there are several knowledge areas attached to any one task, reflecting the complexity of social work practice.

With task and knowledge areas defined, content outlines, also called examination blueprints, are created. Essentially, the content outline is the skeletal version of the examination itself, with content heading and subheadings indicating the percentage of items relating to each topic. These content outlines, one for each category of the ASWB examinations, are built on the results of the practice analysis, and guide all item development.

Finally, examinations are created to fit this blueprint, and passing scores (or cut scores) are set using a psychometric process called a modified Angoff method. In this method, social work experts review examination questions on the basis of the abilities of a “minimally competent” practitioner. They then make decisions on the probability that this practitioner will answer correctly. The judgments are averaged, and the averages are used to compute a recommended cut score for the examination as a whole.

The 2003 practice analysis was the first to incorporate data from the Canadian provinces. Analyses comparing the results from the US and Canada demonstrated a high level of commonality, and led to ASWB's decision to create a unified content outline and passing score for all test-takers at each examination category.

Test development

For each category of examination, ASWB maintains a bank of questions, or items, coded to specific content areas. These items are written by social work practitioners across the US and Canada who have been contracted to write items in various areas of practice. The items writers are selected by the association to ensure an accurate representation of practice, ethnic, racial, and geographic diversity, and are trained in the fine points of item writing.

Once created and edited, items are presented to the ASWB Examination Committee. This committee is the most important element in the continued health of the examination program, and like the item

writing group, is carefully selected to reflect the diversity of the social work profession. At each of its meetings, the Examination Committee reviews items for possible inclusion on the examinations as “pretest” items—the audition that every item receives as a non-scored question on an ASWB examination.

Every item approved for use in the ASWB item pool is coded and statistically tracked, both during its pretest phase and through its use as a scored item. Before any item can be included in the pool of standard scored items, it must perform acceptably as a nonscored pretest item. There are 20 pretest items on every ASWB examination, mixed in with regular scored items. All pretest items must have several hundred responses before a statistical analysis of its function is meaningful.

The statistical tracking also allows ASWB to attach a difficulty rating to each question. These ratings play an important role in the way the examinations are scored, and allow ASWB to create multiple versions of an examination while keeping overall difficulty constant (see “equating” below).

To maintain a high level of security, ASWB creates several versions, called “forms,” of each examination, with different items testing the same content. Examination candidates are tracked and linked to specific forms, so that a failed candidate who retakes the test will never be presented with the same version of an examination.

Equating - keeping the difficulty consistent

When examination forms are created, the individual difficulty levels of the items are accounted for in the passing score for that particular form. Put simply, it is quite possible that any given combination of items will result in a test that is more or less difficult than another form, but passing scores on individual forms are calibrated to the same level of difficulty as the original form on which the anchor score was set. The passing score adjustments mean that, in the end, passing each test requires the same level of overall ability, even though questions may vary. The process for accounting for differences in overall difficulty is known as equating.

This statistical/psychometric process is essentially “invisible” to test-takers, except to the extent that equating makes it impossible to establish an unchanging number of items that need to be answered correctly in order to pass every form of each category of ASWB examination. Candidates taking one form of the examination may have to answer more or fewer questions correctly than candidates taking another form. These variations—typically very slight—are accounted for in the passing score set for each form.

Consistency across jurisdictions - scaling

Many jurisdictions set a "passing score" for examinees--typically a "70" or "75" is cited as the minimum acceptable score for purposes of licensure. However, this does not mean that passing the ASWB examination is easier in some jurisdictions than in others.

The association uses a process called "scaling" to ensure that the actual pass point remains consistent. Essentially, scaling allows the association to translate a candidate's raw score--the actual number of questions answered correctly--into the score scale used in a particular jurisdiction. For example, if a candidate correctly answers exactly the minimum number of questions required to pass a form of the exam, that score would be reported as a "70" in jurisdictions that have set passing performance at 70, and as a "75" in those jurisdictions that use a 75 scale. This scaled score is reported only to boards. Candidates receive score reports that identify exactly how many questions they answered correctly, and how many were needed to be correctly answered to pass the examination.

For candidates who pass the test in one jurisdiction and later request that their scores be forwarded to another for purposes of licensure, their performance is reported as only a "pass" or "fail."

Administration policies

The social work licensing examinations are intended to be measures of social work knowledge, and not tests of reading, deduction, or the values of one culture over another. To guard against overly complex language, all examination items are thoroughly edited for simplicity

and straightforward language; jargon is eliminated wherever possible, and readability tests have been conducted on the examinations. The last such test revealed the examinations to function at about the U.S. 10th grade reading level—more difficult than a national newspaper, but less challenging than the standard social work texts used in most BSW and MSW programs.

Cultural bias is also monitored closely. The association takes steps to guard against this bias by including diverse participants in every phase of examination development and item writing. Further, individual test items are monitored for the presence of Differential Item Functioning (DIF), or the tendency for one subgroup of test-takers to answer the item in ways that are disproportionate. When consistent DIF is identified in an item—usually in pretest items that are being tested for possible scored use—the item is returned to the Examination Committee for further assessment.

ASWB is also sensitive to the special needs of test-takers. Long before the United States adopted the Americans With Disabilities Act (ADA), the association was providing accommodations to candidates with disabilities. These accommodations continue today, and range from audiotape and Braille examinations to the provision of readers and sign-language interpreters, as well as allowances for extra time in which to complete the examination. Most jurisdictions also allow ASWB to make arrangements for test-takers whose primary language is something other than English. Typically, these ESL candidates are allowed the use of up to two dictionaries (one of which may be a standard English dictionary), and additional time to complete the test.

case file:

ADA

TC 2003-26

Rush v. National
Board of Medi-
cal Examiners
268 F. Supp.2d
673 (D.C. TX
2003)

What's this?

Throughout this manual, you will find boxed "case file" notes. These are court cases that help to illustrate some of the concepts being addressed here. The small "TC" number will help you locate the case summaries in the "Top Cases" Appendix at the back of this manual. Cases are identified by year and list number—this case would be in the 2003 section under the 28th entry. The reference information under the name of the case (in this example, "268 F. Supp.2d 673," etc.) can help you or your legal counsel locate further information on the case.

If there is no "TC" number, the box will include a brief summary of the case, and it won't appear in the "Top Cases"

Chapter 3

The big picture

The licensing law and regulations

United States Constitution 10th Amendment

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The regulation of professionals in the United States is, and will likely remain the responsibility of individual states. There is no federal social work license, primarily because the U.S. Constitution reserves the right to regulate professionals to individual states. The Canadian Constitution similarly delegates the authority to regulate professions to the provincial level. The result of these provisions is that professional regulation tends to vary among states and provinces. There are, however some basic features of social work regulation that are shared by nearly all jurisdictions.

Licensing statutes are enabling acts that include the requirements for which the department or board has responsibility. Ideally, the acts are broad, setting out the general guidelines for social work regulation--it's the administrative regulations that provide the details. Statutes are passed by legislatures, while boards and agencies write and promulgate administrative regulations.

A good example of this separation often can be found in the ways a jurisdiction establishes the use of a licensing examination. The statute may mandate that all licensing candidates must successfully complete a licensing examination, but the board is left to develop (or contract for) an adequate examination, and is usually authorized to adopt specific regulations spelling out the type of exam to be given, the subject areas the exam will include, the frequency and location of the exams, and the minimum passing score the applicants must obtain.

Most boards and agencies are authorized to adopt administrative regulations that supplement--in a sense, flesh out--the licensing statutes. Because of this relationship, regulations must be consistent with the enabling statutes, and can be adopted only when there is statutory language granting the board authority to promulgate regulations on the topic in question.

This does not mean that a regulatory board can implement regulations in whatever way it chooses: proposed regulations or changes in the regulations must be adopted in accordance with the jurisdiction's administrative procedures act (or other relevant legislation), which usually allows public notice and a comment period. These provisions can vary across jurisdictions.

As with all laws, formal interpretations--attorney general/legal opinions, court decisions, legislative history, etc.--can be very enlightening. These interpretations can be useful even if they do not address a jurisdiction's law and regulations covering social work--case law from other jurisdictions, and from other regulated professions, can provide insight into the strengths and weaknesses of the social work licensing law.

The shape of social work regulation

The first licensing laws tended to focus on clinical social work practice, and were aimed at regulating those social workers with an MSW (Masters in Social Work) degree and some years (usually two or more) experience beyond the degree. Today, only a few U.S. jurisdictions regulate social workers at only the clinical category—the vast majority also regulate social workers at other educational and experience levels, most often at the “graduate” category (MSW and no experience) and the “bachelor’s” category (Bachelor in Social Work [BSW] and no experience). The trend in the U.S. has been toward this kind of “multilevel” licensure.

In Canada, nine provinces have single-tier systems with licensing (typically referred to as "registration") at the BSW level and above. Some provinces have additional categories of licensure at the two-year diploma level as well as for clinical social workers and independent practitioners. The designation for all categories is Registered Social Worker (RSW), with the exception of Ontario, which has the designation Registered Social Services Worker (RSSW) for two-year diploma graduates.

The multi-tiered systems set out practice scopes for each license category. These scopes are intended to be appropriate given the educational and experience levels of the licensees in each category. Even in multilevel regulatory systems, however, the ability to receive direct

payment for services, or “third party reimbursement” (payments from private or governmental insurance programs) is almost always restricted to independent clinical social workers only. Generally the requirements for licensure contain some basic components:

Education. Depending on the licensure level being sought, licensure applicants are required to have received the appropriate degree from a recognized or accredited institution. Boards across the United States rely on the accreditation standards developed by the Council on Social Work Education (CSWE), a private nonprofit entity. Most Canadian boards accept the accreditation standards established by the Canadian Association of Social Work Educators (CASWE). Foreign-trained applicants are usually required to provide proof of equivalency of degrees earned to degrees from an accredited program. Again, CSWE provides the most widely-used equivalency service used in the U.S. Several agencies provide this service in Canada.

Personal History. Applicants are required to provide information regarding any history of previous licenses held, disciplinary actions pending or taken, or criminal convictions. Increasingly, jurisdictions also mandate criminal background checks as a requirement for licensure. Some jurisdictions also require letters of reference or other documents related to "suitability" to practice.

Licensure Examination. All 50 states, the District of Columbia, and the U.S. Virgin Islands require a passing score on one or more licensure examinations. Of those jurisdictions, all but one—California—use one or more of the examinations offered by the Association of Social Work Boards. The ASWB examinations are nationally-developed examinations with national passing scores. The tests are offered in five categories: Associate, Bachelors, Masters, Advanced Generalist, and Clinical.

Supervised experience. This requirement generally applies to only those applicants seeking more advanced licensure status, typically as clinical social workers. The details of the requirements vary, but the average requirement is for the social worker to

have accrued about two years of post-degree experience under regular supervision before he/she can qualify for the clinical or advanced license. Jurisdictions establish rules regarding the frequency and structure of the supervision, i.e., how many hours per week/month, whether the supervision can be in a group setting or individual, etc., and also set out the requirements for supervisors themselves. Traditionally, rules have allowed any of a range of mental health professionals to provide social work supervision, but some jurisdictions are beginning to narrow these allowances, either by requiring social work supervisors to be social workers themselves, or by mandating a board-approved supervisor credential.

Additional examination requirements for licensure are not unusual. For example, California requires a multiple choice as well as a "vignette" examination, and several states including Florida and Colorado, require applicants to pass an examination focused on that state's social work laws and regulations.

Certification, licensure, registration, credentials...

Regulators and others talk about certification, licensure, registration, and credentialing, but what do these terms really mean? What do people mean when they say a law has moved from "certification" to "licensure"?

The relatively rapid rise of social work regulation left very little time for clearly defining these terms. The result is that some of these terms tend to be confused with each other, while differences of meaning are assigned to other terms where in fact there is none. And the use of terms like "certified social worker" versus "licensed social worker" has compounded the misconceptions.

For the purposes of regulation, there is no difference between certification and licensure, and in Canada, between these terms and "registration". Although it's common for "certification" and "registration" to be used to describe a less rigorous regulatory framework, and for "licensure" to describe a more comprehensive system, the words themselves do not necessarily carry this meaning—it's like saying that a Hyundai is a *car*, but a Mercedes is an *automobile*.

Differences can exist. Of the three terms, registration can have a more specific meaning, at least in the United States. “Registration” is the term usually used to describe a voluntary system wherein professionals join a registry in order to be allowed to use a certain restricted title. But this isn't the case everywhere: In Canada, "registered" is widely used as an equivalent for "licensed."

The real difference in licensing laws lies in how the law goes about regulating the profession, not what titles are conferred on the professionals regulated. Today, social work licensing laws tend to take one of two general forms either as a *practice act* or as a *title protection* law. Title protection statutes seek to reserve the title of, for example “Licensed Social Worker” to only those people who have met the requirements for the license. A practice act sets forth a definition of social work practice (sometimes, at various levels), and requires a license of anyone engaging in the activities defined. Title protection statutes are generally perceived as the weaker of the two types, because these laws do not explicitly prohibit individuals from engaging in unregulated social work practice, so long as they do not identify themselves by one of the protected titles. Practice acts, because they are founded on the activities rather than titles used, give jurisdictions greater enforcement authority. In 2009, six U.S. states and four Canadian provinces defined their social work statutes as title protection only. Most often, jurisdictions use a combination of title protection and practice act language.

Historically, the terms “certification” and "registration" were often associated with title protection laws, while “licensure” was associated with practice acts. As a result, social work titles that use the word “certified” or "registered" are sometimes thought to reflect less effective laws than titles with the word “licensed” included. In fact, this isn't always the case: it is not uncommon for jurisdictions that use the term “certified” or "registered" to have more stringent laws than those that use the term “licensed.” The differences are largely semantic.

Finally, while the term "credential" is sometimes used to describe any document that verifies the qualifications of a social worker, its most appropriate use is in conjunction with the various privately-administered

professional recognitions offered to practitioners. Social work credentialing programs include the National Association of Social Workers' Qualified Clinical Social Worker (QCSW) program, the American Board of Examiners in Clinical Social Work's Diplomate program, and other speciality recognitions created by private professional groups. Typically, professional credentials require that an applicant demonstrate achievement, experience, or abilities beyond the minimum competency requirements for licensure.

Professional credentials are fundamentally different than licenses in two important ways: first, credentialing programs are usually operated by private groups whose mission often involves a heavy degree of professional promotion. Second, credentialing programs are voluntary programs designed to acknowledge abilities other than minimum competency to practice.

A national perspective - the ASWB model act

The Association of Social Work Boards has provided some guidance to its members through the development of a model law, a resource document first presented in 1997. The document consists of an entire social work practice act, certain regulations, and commentary that addresses social work licensure from an international perspective. The intent of the model is to provide a basis for greater uniformity of laws among the jurisdictions, which will, in turn, increase ease of mobility for social workers, enhance consumer access to qualified practitioners, and provide jurisdictions with a standard from which to base their own laws and regulations. Some of the features of the model include:

- **Practice act structure.** The model is designed as a practice act, with three licensure categories: BSW (Baccalaureate Social Worker); MSW (Masters Social Worker); and Clinical (Licensed Clinical Social Worker).
- **Allowance for independent practice.** The model anticipates that social workers at all categories of practice may be legitimately employed outside of a supervised agency setting (for example, in some remote rural locations). Providing these social workers have obtained the appropriate supervision for their licensure category, the model law allows this *independent*

practice. *Private* practice—that is, the provision of clinical social work services in exchange for direct payment or third party reimbursement—is restricted to clinical social workers.

- **Exemptions.** Most current social work regulations contain exemptions from licensure—settings/situations in which individuals may practice social work without a license. These exemptions were often carved out as compromises along the way to the passage of a licensure bill. The model act allows no exemptions from licensure.
- **Sexual relationships with clients.** The model act stipulates that it is never appropriate for a clinical social worker to engage in a sexual relationship with a current or former client.
- **Independent social work board.** The model establishes an independent social work board.

Because the model is intended as a resource, its provisions are open for amendments or changes by the association and its Delegate Assembly.

Chapter 4

Understanding the limits

Board powers and responsibilities

*A*t first, the whole issue seemed like a no-brainer—at least as far as board member Ginny White was concerned. But that was a meeting ago. Now, this seemingly open-and-shut case was back..

During the last meeting, the board administrator updated the board on the most recent group of licensure applicants. Among them was a candidate who had earned a graduate degree from an accredited school, had passed the licensing exam, and seemed to be well on the way to receiving a license. However, the board office had received information, which was later confirmed, that the applicant had been convicted of a felony five years ago. As far as Ginny and the rest of the board was concerned, that was that: as qualified as the applicant appeared to be, the board simply could not confer a license on a convicted felon.

But now the application was back on the table, and Ginny wanted to know why. “It’s pretty simple, really,” said the administrator. “Our lawyer says that our laws and regs don’t contain any ‘good moral character’ clauses, and we don’t run a criminal background check as part of the application process, so technically, the board has no right to deny licensure to this person. We don’t ask, and they don’t need to tell.”

Ginny was stunned. Did this mean that any convicted felon who met the requirements could get a license? Child molesters? Rapists? People who had committed other acts of violence? And if that was the case, how could her board say, in good conscience, that it was protecting the public?

*I*f nothing else, Janice Blue now understands the phrase “Be careful what you wish for.” For many years, her board knew that there were shortcomings in the state’s practice act, and worked to develop changes that would tighten up the law. Now that the law has been “opened” for amendment, however, threats have emerged from all sides. Some of the draft language being discussed would actually make the law weaker, while other proposals would abolish the law altogether.

Like the rest of her board, Janice is frustrated. Often, it seems like the board’s good

ideas are drowned out by all the competing voices. To make matters worse, Janice's background as a social worker prepared her for advocacy—something the board's proposal needs desperately—and to date, she hasn't done much to support the bill.

After receiving another not-so-encouraging status report from the board administrator, Janice speaks up. "We really need to step up to the plate here," she tells the rest of her board. "I know that some of the people on this board would be talented lobbyists, and that's what we need right now. We have to convince the legislature, the public, and the social workers out there that we need to have our version passed. We can't just sit back and hope it all works out for the best."

One of the things Sandra Violet loves about small-town life is that sooner or later, you get to know just about everyone. On a recent trip into town, however, she came across a sign for someone she'd never heard of: "Patrick Red, MSW". Apparently, Mr. Red had recently moved into town and opened an office—strange, because Sandra hadn't heard about this new colleague, nor had she seen his name as a recent applicant for licensure at one of her state's board meetings.

Curious about the situation, Sandra went to her board's website when she got home. Patrick Red did not appear on the licensee lookup, but she was able to find a website for Red—a personal site he had developed to advertise his services as a mental healthcare provider. According to the site, Red graduated from a well-known MSW program, and had achieved several professional credentials in various specialty areas. Sandra couldn't help thinking that Patrick Red seemed to have everything you'd want in a social worker—except the license.

Sandra put in a call to her board administrator. "We need to do something about this right away," Sandra said. "This guy is out there practicing, and he's unlicensed."

"Unfortunately, we can't do anything about it," said the administrator. "And do you want to know why? Because he's not licensed. We only have jurisdiction over licensees—unlicensed people are beyond our reach."

case file:
**Exceeding
authority
through rules**

Merritt v. Department of Business and Professional Regulation, Board of Chiropractic
654 SE 2d 1051
(App. Ct. FL 1995)

Rule on chiropractic peer review enlarged, modified, and contravened statute and was thus invalid.

The scenarios on the preceding pages have to do with the conflicts individual board members face, but what they're really about is these members' perceptions of board powers and responsibilities. Should boards help to protect the profession they're regulating? Should boards lobby? Who, exactly, is beyond the board's reach, and why?

Licensing boards are made up of individuals, with individual strengths and weaknesses, but the board is more than just a collection of people. Regulatory boards exist as an entity, and just as there are certain expectations of individual board members, so there are powers and responsibilities that are associated with the board as a whole. Board members come and go, but the board itself remains.

This chapter addresses what is expected of a board. Board members need to understand not only the range of powers available to the board, but also the limits of these powers. Boards unfamiliar with the full scope of their responsibilities run the risk of leaving gaps in public protection. Conversely, legal challenges to board actions are often based upon claims that the board somehow overstepped its bounds—a danger when a board is not acquainted with the limits of its authority.

The source of the board's power

All of a licensing board's powers come from the legislation creating the board. The legislature determines the scope of the licensing board's authority—likewise, the legislature can take away some or all of this authority at any time.

In the U.S., board members are typically appointed by and subject to the governor's office. While some boards may never have any direct contact with the governor's office, the fact remains that the licensing board's membership and operations are generally subject to the governor's review. At the same time, the board is subject to oversight by the legislature. Essentially, the legislature is interested in knowing how the licensing board is executing the powers that have been granted to

case file:
**Authority to
regulate**

Dent v. West Virginia
129 U.S. 114
(1889)
State police powers recognized as authorizing regulation of physicians and surgeons.

it through the licensing law. Additionally, the legislature almost always wants to know how much money the board is spending.

The oversight by both the legislature and governor may be minimal, or it may be extensive. Both entities will be interested to know how well the board is functioning, albeit from different perspectives, and both entities have the power to significantly affect the functioning of the board, should either find something objectionable. The impact these reviews may have on a board range from minor changes to the office workflow or staff to a complete elimination of the licensing law—and the board.

While some Canadian provinces also have boards comprised of members appointed by the government, most provincial boards are made up primarily of social workers elected by the regulated practitioners within the jurisdiction. Public members of the board are most often appointed directly by the provincial government. As in the U.S., oversight by the government may be minimal or extensive.

The source of the board's power, however, is the primary difference between the Canadian and U.S. regulatory systems. The majority of social work board in the U.S. operate on a model with direct government involvement, while the Canadian boards operate through more of a "self-regulation" model. In most Canadian provinces, registered social workers pay fees directly to the board; staff are hired by the board; and governments can only intervene if a board fails to fulfill its legislated mandate. As well, the majority of Canadian boards have additional responsibilities only tangentially related to licensure, while U.S. boards have a more limited scope.

In order to address these issues, each country's framework needs to be addressed individually.

The real issue - delegation in the United States

In the U.S., legislatures may see the need for professional regulation, but they are in no position to oversee the day-to-day administration of

case file: Appointment

TC 2003-47
Vuagniaux v.
Department
of Professional
Regulations
802 N.E. 2d 1156
(IL 2003)

ASWB has adopted the Federation of Associations of Regulatory Boards (FARB) Code of Conduct for Regulatory Board Members-- it's a great resource for gaining a perspective on the responsibilities and expectations of board service.

regulatory law, nor are they equipped to create and monitor the details that will make up the necessary rules and regulations that accompany the law. Instead, regulatory boards are created and empowered through the enactment of the licensing law. Day to day responsibilities are given to the regulatory board, and the board addresses these responsibilities by adopting regulations to spell out the specifics of the regulatory framework.

Delegation is what allows a board to come into being, and what allows a board to do its job effectively. But delegation isn't simply a matter of assigning another entity a duty: delegation must be constantly weighed against principles of the governmental separation of powers, and due process of law. Delegation that crosses either line may be improper, and can have serious legal consequences.

At the federal and state levels, the principle of delegation of authority is addressed in the respective constitutions: the US Constitution vests congress with the power to legislate, and its 14th Amendment guarantees that every citizen is entitled to due process of law. At the state level, state constitutions generally support the same concepts.

The first level of delegation, then, is from the legislature to the board, by way of the licensing statute. The board is empowered to create the regulations and rules that will make the law operational. At the same time, boards soon realize that some aspects of its duties, such as examination requirements or evaluation of educational programs, may in fact be too complex or costly (or both) for the board to accomplish directly. In turn, the board relies on outside entities such as ASWB to provide some of the services associated with licensure decisions. This, too, is delegation, but it is usually accomplished through the board's rules.

So far, so good. But problems can arise when delegation occurs without appropriate governmental oversight. While legislatures should rely on boards, and boards on carefully selected outside entities, everyone involved should be mindful of the necessity for the ultimate authority to lie with the government. There are important judicial concerns that need to be considered in order to evaluate a particular statute or regulation.

When judging whether an instance of delegation is legally appropriate, some of the questions to consider include:

Are the delegate's (the entity that will receive the delegation) actions subject to meaningful review by a branch of government?

Are persons affected by the delegate's actions adequately represented in decision-making?

Is the delegate's power limited to making rules?

Is there an absence of pecuniary or personal interest that may conflict with public function?

Is the delegation narrow in duration, extent, or subject matter?

Does the delegate possess special qualifications?

Have standards been provided to guide the delegate?

Has the role of the delegate been clearly defined to limit its ability to define criminal acts or impose criminal sanctions?

In a well-crafted practice act, the delegation of authority from legislature to board meets these criteria: boards are reviewed, powers are limited, board members offer special expertise, etc. Such may not be the case if, for example, a practice act were to turn over the regulation of social workers to a private corporation by naming that corporation in the statute. Similarly, the citation of private entities in other parts of the statute or regulations—for example, including ASWB as the examination source, or the Council on Social Work Education (CSWE) as the entity responsible for establishing the standards by which degrees will be evaluated—can cloud delegation issues, and spark challenges.

The legal assessment of the citation of private entities in the board's rules may be examined in light of the questions listed above. If, how-

case file:

Delegation

FM Proper-
ties Operating
Companies v.
City of Austin
22 S.W. 3d 868
(TX 2000)

*The delegation
questions listed
here were the
ones considered
by the court in
this case.*

ever, the board uses its rulemaking process to adopt the "standards and criteria" of the private entity, it can rely on the decisions of the outside entity because of the like standards and minimize the likelihood of a legal challenge.

Why is the delegation issue so important? Together with claims of conflict of interest (which you will read about later), allegations of improper delegation of authority are the most common grounds upon which people challenge a regulatory board, and the licensing law in general. These allegations may not be stopped completely, but a thorough understanding of the limits of delegation can help a board to prepare for them.

The real issue - delegation in Canada

As in the U.S., the regulatory authority of the boards is established through legislation passed by the provincial government. The law in each case names the entity (a board or association, not a private corporation) to which the authority is delegated and specifies legal obligations that come with that authority. The legislation outlines a governance structure, rulemaking authority, who must be licensed (and any exemptions), and defines the processes for professional discipline. Although the government has the authority to repeal or change legislation, government oversight in most cases is limited to appointing public members to the board and receiving an annual report detailing the board's activities. The processes and structures established in each province vary widely, but the principles are fairly standard, including a respect for due process of law and a primary focus on public protection.

Most Canadian boards operate as "policy" boards, setting the rules by which staff, committees, and other organizations carry out the many responsibilities that come under the board's mandate. The legislation in some cases defines the roles and responsibilities of committees other than the board, such as disciplinary committees. The structure of the committees and how members are selected or appointed may be defined in the legislation, regulations, or through bylaws.

When it comes to delegation, it is the board's responsibility to provide

oversight, and to define the extent of delegation. The board typically hires an executive director or registrar (or both), who is in turn responsible for hiring other staff, and for overseeing day to day operations. The boards have authority granted under the legislation to enter into contracts with outside bodies and to make all major financial decisions relevant to regulating the professionals in the province.

Canadian boards should consider the questions raised in the previous section with regard to delegation, recognizing that they rather than the government bear responsibility for oversight. Some of the slightly different questions include:

How with the board provide meaningful review of the delegate's actions?

Are persons affected by the delegate's actions adequately represented in decision-making?

Is the delegate's power limited to making rules?

Is there an absence of pecuniary or personal interest that may conflict with public function?

Is the delegation narrow in duration, extent, or subject matter?

Does the delegate possess special qualifications?

Is there a process for appealing a delegate's decision?

Responsibilities are a part of the power

Even with the limits and oversight that come with proper delegation from the legislature, licensing boards can wield a significant amount of power—particularly as far as the regulated profession is concerned. This power is only as effective as the board is at understanding how to use it wisely. And a wise use of power requires a thorough knowledge of the responsibilities that come with it.

As a whole, the board is responsible for maintaining the following characteristics:

➤ *Strong working knowledge*

Obviously, boards should be established and maintained within all legal and governmental guidelines, but a board shouldn't rely on its administrator to be the only person with a thorough understanding of the licensing statute, the administrative procedures act (or relevant legislation), and rules/regulations. Board members must also be knowledgeable in the law, rules, and regulations.

➤ *Good organization*

The board should be organized for maximum effectiveness, and attention should be paid to the efficiency and consistency of board operations.

Boards should have:

- Bylaws and operating procedures
- A regular system for officer elections
- The ability to establish needed subcommittees
- The capacity to consistently monitor workloads
- Regular meeting times
- Procedures for workflow and agenda-setting
- An address for official and public contact

➤ *Clarity of purpose*

A regulatory board's mission is to protect the public, something members must never forget. But it is also helpful to develop a list of objectives that will help the board accomplish its mission. Such lists help to maintain the board's focus, especially in the midst of political struggles that involve issues of professional promotion.

➤ *High standards*

The board should establish the expectations for board service, including attendance and involvement in the board's work. New members should be oriented to these expectations.

➤ *Self-awareness*

As a whole, the board should be conscious of the balance of personalities and backgrounds necessary to do its job effectively, as well as the way these personalities play against the various political elements affecting the board. In situations where board members are appointed, the board should be aware of opportunities to provide input on appointments to ensure that the board will continue to have an appropriate mix of skills.

➤ *Strong management skills*

Often, boards are empowered to hire a staff. The board needs to understand its role as a manager, and the various relationships between the board and administrator, including the various powers and responsibilities assigned to the board and its staff.

➤ *Solid financial management*

Boards need to understand how money is acquired, where the money is spent, and whether the operating budget is sufficient to accomplish the board's mission.

➤ *A proactive approach*

Boards should regularly evaluate the current laws and regulations to identify areas that could be changed in ways that would help the board in its mission.

➤ *Strong ties to the public*

A good public relations program is a necessity. The public being protected needs to know that the board exists, and needs to have complaint information easily available. The board should also make efforts to get the public's input whenever possible.

➤ *Accountability*

Boards should constantly monitor the impact of its decisions on consumers, the community, and the profession, and make regular reports to the government, the regulated professionals, and the public.

A board that takes on these responsibilities is in a better position to use its powers effectively. A board that is disorganized, uninvolved, or foggy on its mission may wield the same power as a more responsible board, but chances are that it won't be long before a legal challenge or legislative/executive oversight will raise serious questions about the real value of the board. If they can't be answered in ways that demonstrate knowledge and commitment, these questions can cost the board its existence.

Board powers

A board is granted its powers because it's the sensible thing to do: individual professional regulatory boards are in a much better position to understand and manage the details involved with regulating a specific profession. Essentially, this division of labor allows the various elements of government to do what they do best, or at least what they would *like* to do best.

Basically a board decides who meets the qualifications for licensure and renewal, and adjudicates administrative matters involving individuals impacted by the practice act. Legislatures establish requirements for initial and ongoing licensure, and boards make decisions about who has and has not met these requirements. Most often, decisions about

qualifications are made at the level of initial application, but boards are also empowered to decide whether a licensed professional can continue to practice, and under what conditions practice may continue. Some of these important powers of the board are covered in separate chapters.

The board's powers, then, include whatever is considered necessary to fulfill its duties under statute. Obviously a thorough understanding of the licensing law is crucial to effective use of these powers. As summarized from the ASWB Model Social Work Practice Act, boards generally have the following powers:

- Licensure by examination or license transfer
- License renewal
- The establishment and enforcement of professional standards of practice and rules of conduct
- The determination of standards for approval of degree programs of schools and colleges of social work, and the specification and enforcement of requirements for practical training
- The enforcement of provisions relating to the conduct or competence of social workers, including investigation of any activities related to the practice or unauthorized practice of social work the
- Suspension, revocation, or restriction of licenses to engage in the practice of social work
- Issuance of orders directing the applicant or licensee to submit to a mental or physical examination or chemical dependency evaluation
- The collection of professional demographic data
- The issuance and renewal of licenses of all persons engaged in the practice of social work

- Investigation of any individual for the purpose of determining if any provisions of the laws governing the practice of social work are being violated
- Membership in professional organizations and associations organized exclusively to promote the improvement of the standards of the practice of social work for the protection of the health and welfare of the public and/or whose activities assist and facilitate the work of the board
- Collection and expenditure of funds
- Establishment of a Bill of Rights for clients concerning the services a client may expect in regard to social work services
- Power to conduct investigations
- Power to issue written notices or warnings
- Power to subpoena and to bring before it any person and to take testimony either orally or by deposition, or both, in the same manner as prescribed in civil cases
- Fee setting
- Recovery of costs

These powers are necessary in order for the board to carry out its duties under the law. But in order for the board, the public, licensees, and applicants to understand the limits of these powers and the ways these powers will be applied, the board should exercise its rulemaking authority to provide details about how it will do its job.

Rulemaking authority

Historically, legislatures have given licensing boards broad rulemaking authority that ranges from establishment of the specific application steps a licensure candidate must follow to detailed standards of practice and ethical conduct with which social workers must comply.

Legislatures have every right to be cautious, because the authority to

case file: Rulemaking mandate

State Board
of Dentistry v.
Blumer
261 NW 2d.
186 (App. Ct. MI
1978)

Failure of board to adopt rule further defining "dishonorable or unprofessional conduct" prohibited board from using such statutory grounds for discipline.

case file:
**Rulemaking
authority**

Jackson v.
Composite
State Board of
Medical Exam-
iners of Geor-
gia
347 SE 2d (GA
1986)

*Rule prohibit-
ing treatment of
obesity through
prescriptions of
amphetemines a
valid exercise of
delegated authority.*

promulgate rules is an enormous delegation of authority. Rules implemented by boards have the force and effect of law: that is, provided that a rule is written within the scope of the licensing law (and duly adopted), it may be enforced against a licensee in the same manner and to the same extent as a law enacted by the legislature.

What is a rule?

A rule is any statement of general applicability that implements, interprets, or prescribes law or policy, or defines the organization or the procedure and practice requirements of an agency of jurisdictional government. In other words, rules can provide the details about how licensing will work, as well as how the board will go about its business. Rules can establish requirements, standards, fees, procedures, compliance guidelines, organizational structures, implementation procedures, and proceeding structures. In some jurisdictions rules may be called bylaws or regulations.

The rules for rules – the Administrative Procedures Act

Most boards are also limited in their rulemaking authority by an Administrative Procedures Act (or similarly titled law). This law governs rules made through all governmental agencies, and can also establish the systems all boards will use to handle fees and set budgets, as well as the ways in which boards will investigate and adjudicate complaints. Board members and staff need to be familiar with their jurisdiction's APA, but it is also important to seek legal advice when addressing these complex issues.

There is no Canadian equivalent to an APA. This is partly due to the fact that the Canadian delegation of authority is broader, so the government has less to say about the rules. Canadian legislation normally identifies the areas where each board has the authority to develop rules. These rules must meet government standards, but this is usually accomplished through a consultative, rather than legislative, process.

Getting there – guidelines for adopting rules

Obviously, there is no single procedure for the adoption of rules that would apply to every regulatory boards—jurisdictions have their own requirements, which must be followed. And while individual Acts will govern the actual process, there are a few standard guidelines that are relevant in most jurisdictions.

1. Be responsible

Before setting out to make any rule change, make sure that your board understands its role as an agent of consumer protection. Board members need to be sure that the board is acting responsibly, and within its statutory limitations.

Depending on the rule being considered and the legislative requirements in a particular jurisdiction, some boards hold public hearings before a rule is actually drafted. In some situations, the board does this because it seems to be the best process for a given proposal; in other cases, boards do it because they are required to by law.

2. Provide adequate notice and publication

A board must give adequate advance notice of proposed rules, except in emergency situations (see “Emergency rulemaking” later in this chapter). Notice is designed to give all interested persons the opportunity to learn of and comment on the proposal. Generally, notice is given in the official register publication and in other publications likely to reach various stakeholders. Increasingly, jurisdictions are turning to the internet as the primary medium through which notice is posted. Pay careful attention to time requirements for notice set by statute. At a minimum, the notice should contain:

- A concise statement of the substance of the proposed rule and the issues
- A statement of the statute or other authority that gives the board the authority to issue rules
- A statement of the statute to which the rule relates
- Text of the rule (or information on how a copy can be obtained)

- A request for comments, comment deadlines, and any guidelines for comment format
- Certification by the appropriate official

3. Allow for public comment

All interested parties must be given the opportunity to submit information and opinion on the proposed rule. These comments must be considered by the board.

Administrative laws will usually set out the procedures for submitting written documents, but the board may define the general form of written comments, number of copies required, as well as the time and place where written comments will be received. Keep a list of all comments, and make all comments available for public inspection. Some jurisdictions have found the internet to be a particularly valuable tool in this phase of the process.

4. Hold a hearing, if applicable

Jurisdictional law may require a public hearing on a proposed rule, or a board may decide that a public hearing is appropriate. In either case, it is crucial that a record is kept of all comments received at the hearing.

5. Take final action

After receiving public comments and, perhaps, holding a public hearing, the board is ready to take final action on the proposal. Basically, there are four options available:

- 1 Adopt the rule as proposed
- 2 Adopt the proposed rule with minor changes
- 3 Revise/amend the rule with substantive changes
- 4 Withdraw the proposed rule

Options 1 and 2 launch the rule as an official change. Depending on the extent of the revision, option 3 may require the board to begin the notification and comment process all over again. Obviously, option 4 brings the matter to a close.

6. Follow publication requirements

After a final rule is written, the board will often be required to publish it. Sometimes, boards also produce comments on the new rule, including an account of the comments it received, and the board's reactions to these comments. This is seldom a requirement.

7. Get legislative approval, if applicable

Many jurisdictions require that final rules be submitted for legislative approval.

Emergency rulemaking

Occasionally, boards are faced with an immediate threat to public protection that can be lessened or eliminated through the adoption of a rule, the implementation of which should not be delayed. In these instances, boards may be empowered to promulgate emergency rules. Not every board has this power--be sure that you understand your board's legislative authority to conduct emergency rulemaking.

Emergency rules are just that—for use in emergencies only. Typically, the emergency rules trade permanence for expediency: the emergency rule doesn't have to jump through the same notification and hearing hoops as a permanent rule, but the rule will have a limited lifespan.

Obviously, boards considering the adoption of an emergency rule must be prepared to document the imminent danger posed to the public, as well as the need for a rule change, and the rule's potential to lessen the danger. The APA will usually set out the requirements for and limits of an emergency rule. At the very least, the implementation of an emergency rule will buy the board some time to adopt a permanent rule following the appropriate notice and hearing requirements.

Emergency rulemaking is not a substitute for regular rulemaking. There must be a real emergency. Before considering drafting an emergency rule, the board should ask itself the following questions:

Is there a danger to public health that a rule could diminish or suppress?

Is there likely to be physical danger to the public in the absence of this rule?

Would the rule insure an immediate stop to an unsafe condition?

Has the situation creating the need recently arisen, or is it a condition that has existed for a significant period of time, during which regular rules could have been adopted?

Have longstanding conditions suddenly worsened, making the situation an immediate threat to the public?

Emergency rules take effect immediately upon adoption. Most jurisdictions require the publication of emergency rules as soon as possible afterwards.

Chapter 5

Truth and consequences

The role of the board member

Board member Bruce Gray has been waiting for this day for a long time: the social work board in his state has finally decided to revise its rules and regulations. He spends the weeks before the first drafting meeting talking with colleagues and taking in the political landscape. By the time the meeting finally arrives, he has already worked up some draft language for what he considers the most important regulations. He even shows up early for the session to get some last-minute background from the board administrator.

Finally, the meeting begins. Bruce is the first to speak.

“I am very pleased we are revising the rules and regs,” he says. “Social workers work too hard, and get paid too little. On top of that, the counselors, the marriage and family therapists, and the psychologists are trying to crowd them out of the jobs they deserve. It’s about time we did something to make sure that social workers are protected from this kind of unfair competition. We owe the profession at least that much.”

Bill Green was honored to find out that he had been appointed to serve on his social work board, and he felt ready to face what he knew would be some big challenges. But there was a problem: part of the reason he felt so energized lately is that he had taken up yoga. His weekly classes had proven to be a wonderful way to release tension and “recharge” him for another week. Besides that, recently his wife had joined him in the classes, and they were really enjoying this time together. Over the past few months, these classes had become an important part of his life.

However, as he reviewed the social work board’s schedule for the year, Bill realized that at least one-half of the meetings would conflict with his yoga classes. He thought about this conflict carefully, but in the end, decided to accept the board appointment while honoring his commitment to his yoga classes. Sure, he thought, he would miss half of the board’s meetings, but without the benefits of his classes, he wouldn’t be any good to the board anyway. He figured that he had a choice: he could sleep and grumble his way through every single board meeting, or he could be a high-functioning, contributing mem-

ber at select few board meetings. As far as Bill was concerned, he'd be doing the board a favor by only attending those meetings at which he could be at his best.

Tom Black and Mae Brown joined the social work board at the same time. They were now veteran board members, having served four years, and over that time, their working friendship had turned into a full-blown romantic relationship.

They had managed to keep their relationship quiet—so much so that both Tom and Mae doubted that anyone on the board or in the staff office was aware of their involvement. Moreover, both were unmarried, and they had very different careers in opposite corners of the state—Mae was involved in the administration of a state-run hospital in a major city, and Tom had a private clinical practice in a small town about 300 miles away. There was little chance that their professional lives would cross; besides, both Tom and Mae were very familiar with the necessity for social work regulators to be able to keep their various roles separate. They agreed that in a sense, their relationship was simply another facet of their lives—such as their professional affiliations—that needed to be kept out of their roles as members of the social work board.

After the most recent board meeting, Tom confided to Mae that one of the licensees that would soon be brought before the board on a complaint of serious sexual misconduct was a good friend of his from graduate school, a friend who had seen Tom through some difficult times. “There’s no way he could have done the things they claim he did,” Tom said. He told Mae that while he would review all of the evidence in as objective a way as possible, he was fairly certain that the complaint would wind up being dismissed.

“But please, whatever you do,” Tom pleaded, “don’t let on that you know about my friendship with this guy. He deserves a fair hearing, not a witch-hunt. I owe him at least that much. Besides, if you say something about my friendship with him, people may start asking questions about our relationship, and we both know that wouldn’t be good for anyone.”

This chapter could be summarized in one sentence: “The role of the board member is to protect the public.” Of course, *Moby Dick* could be summarized as “Dude and whale mix it up for awhile—whale wins.”

The problem with most one-sentence summaries is that they tend to make things sound a little too simple. For regulatory board members, the very basic idea that public protection is at the center of their role can sometimes get a little complicated, for several reasons.

First, professional identification can run deep. The fact of the matter is that unless they are a public member, regulatory board members are usually members of the profession the board is attempting to regulate—typically, they are high-functioning people who are committed to their profession. And even if the member is appointed as a consumer representative, it is not unusual for that member to have some knowledge of and respect for the regulated profession. Regulatory board members tend to care deeply about the profession they’re overseeing, and hold that profession in high regard. That can be both a good and bad thing.

Second, board members are human beings, with their own personalities and assumptions. While social workers can be especially adept at understanding when a personal bias is getting in the way of the rational evaluation of a situation, nobody is completely immune from having their judgment clouded by whatever personal feelings they may have. This extends to issues beyond dealings with licensure applications or complaints—a board member’s ability to work with the rest of the board, or with staff members, can have a big impact on the entire board’s effectiveness.

Third, board members have their own lives. Professional and personal responsibilities can sometimes make it difficult to be an effective regulator. The demands of work and family can have an impact on a board member’s ability to prepare for—or even attend—meetings; a board member who is active with his or her professional association in other ways can find that they have personal connections to licensees under investigation; a board member whose connections helped them get on

the board may experience the uncomfortable pull of those connections later on; the list goes on.

Is there an easy way to eliminate these factors? No. But developing an awareness of the challenges facing a board member can go a long way toward helping a regulator prepare for the tensions they will face.

The board member's responsibilities

A board member's role is bound up in expectations. After all, a board member who understands his or her role, but does not live up to the responsibilities associated with that role, will not be a very effective member of the board.

At the broadest level, the board member's primary responsibility is to the public. Board members make decisions on behalf of consumers of social work services, and on another level, on behalf of the public as a whole. Everything that follows is rooted in this most basic responsibility.

But there are additional responsibilities. Protection of the public must be balanced against fair treatment of the professionals being regulated—after all, the regulated professionals are a part of the public. Social workers should have easy access to all relevant information about the regulation of their profession—the licensing law, of course, but also the rules, regulations, various forms, and contact information. The board needs to be clear about what is expected of social workers, and what happens if those expectations aren't met.

Finally, a board member has a responsibility to his or her fellow board members, and to the board staff. Of course board members need to be attentive, fair, and thoughtful; but it is also crucial that the board member help the group as a whole to be as effective as possible. Board members need to respect and consider the viewpoints of other members, and they need to have a clear understanding of the board – staff relationship.

The characteristics of an effective board member

In a way, being a good board member is no mystery—keep public protection at the forefront of everything you do, be responsible, and use your common sense, and chances are good you will be able to make an important contribution to professional regulation. Still, there are a few qualities that effective board members have in common.

- Clear concept of board responsibility and structure
- Ability to work with a group to make decisions
- Respect for the democratic process
- Willingness to devote time to board work
- Openness to alternative solutions to problems
- Good communication skills
- Understanding of staff responsibilities
- Ability to withhold judgment until all information has been reviewed
- Ability to recognize personal feelings or biases, and to avoid allowing these feelings to affect decisions

Not every board member will excel at every one of these qualities—some may be more aspirational than others for any particular person—but it is important to have an awareness of abilities that help board members do their jobs well.

The big issue - conflict of interest

Even the most dedicated, responsible board member will face situations that underscore one of the biggest challenges of regulatory work—conflict of interest, sometimes referred to as “board bias.”

Strictly defined, “conflict of interest” exists when a person participating in the exercise of regulatory board functions stands to gain or lose personally by a board's decision. Functionally, the concept is even broader, and is often applied to any of a range of situations in which a board or board member may stand to gain or lose from a particular decision, a situation in which a board or board member has a preconceived opinion or predisposition to decide in a certain way, or any situation in which a board or board member *appears* to be in a conflict-of-interest. Conflict of interest is an issue that almost by its very nature tends to escape easily-identified parameters.

Part of the reason why conflict of interest can be so nebulous is that it represents the opposite of an equally nebulous concept—the “fiduciary responsibility” of the board and board members. Essentially, “fiduciary” is used to describe the level of trust that the public places in board members. Board members have an obligation to uphold this trust, and to act in ways that do not endanger the public’s confidence. What are the limits of this confidence? What does and does not constitute a violation of the public trust? There are, of course, obvious transgressions, but like conflict of interest, fiduciary responsibility has as much to do with perception and individual situations as it does hard and fast rules.

One thing is nearly certain: conflict of interest—or the possibility of conflict—will arise. For the most part, though, these conflicts are fairly predictable. Board members who are aware of the potential for conflict of interest can usually avoid entangling themselves in situations that risk calling the integrity of the entire board into question. Conflict of interest can occur in just about every phase of board operations, but board members should be particularly attentive to the following issues:

Affiliation with professional organizations. Professional organizations often play an important role in the creation of licensing laws, and sometimes even exert significant control over who gets appointed to the board. In Canada, the connection can run deeper, with the majority of provinces having a single body responsible for both regulatory and professional affairs. Additionally, professional regulatory board members typically are dedicated professionals themselves, with a strong sense of professional identity.

While board members need not relinquish their membership in the professional organization, they must understand that from a regulatory perspective, activities intended to promote the interests of the profession may conflict with the requirement to protect the public. Professional interest groups may seek to influence the work of the board or some aspect of regulation, and while this may be a perfectly appropriate ac-

tivity for a professional association, boundaries between the requirements of regulation and the preferences of members of a profession must be clearly maintained. Of course, where there are separate bodies, board members should not hold an office in the professional association of the profession he or she is regulating.

- *In jurisdictions where the professional association has a direct involvement in the regulation of practice, there are a number of measures that should be taken to establish the boundaries between roles. Some suggestions:*

- *Where the association names members to be on the regulatory board, the rules should prohibit naming any member currently on the the association's executive committee, or should require that the board member step down from one role to assume the other.*

- *Where a single body is responsible for both regulation and professional affairs, separate roles by establishing separate boards or committees, with different membership, to manage the different activities.*

- *Create clearly stated policies for measures to be taken should a member of the association executive committee have a complaint made against them.*

- *Never take on an advocacy role for individual members who may be facing discipline within the profession.*

- *Ensure that all activities intended to promote the interests of the profession are also in the best interest of the public, recognize the difference between the two, and establish guidelines for determining which activities are appropriate and which are not.*

Fortunately, there are a growing number of organizations that seek to support the board member as a board member, and not as a member of a particular profession. The Association of Social Work Boards works to support board members in their roles as board members; likewise, the Federation of Associations of Regulatory Boards (FARB), the Council on Licensure, Enforcement, and Regulation (CLEAR), the Canadian Network of National Associations of Regulators (CNNAR), and the

Citizens Advocacy Center (CAC) are dedicated to the concept of regulation as it relates to public protection.

Service to other organizations. Involvement with other organizations should not necessarily be avoided, but board members should remember that relationships formed in other settings may have an impact on their role as a board member. Board members who are social workers—particularly social workers in rural areas—are already familiar with the ways in which participation in activities that seem to be “outside” their practice can wind up affecting their professional lives. A board member who becomes active in a political party, for example, can be perceived as having a philosophical bias that affects his or her ability to make impartial decisions. Does this kind of involvement mean that the board member would be incapable of making fair decisions? No, but the board member needs to be acutely aware of the potential these situations have for conflict—both actual and perceived.

Sexual relationships with other board members or staff. No board member should engage in a sexual relationship with any other board member or staff during board membership.

Representation outside of the board. While the board member is an extension of the board as a whole, he or she is not the entire board, nor is he/she the single spokesperson for the board. Board members need to be extremely careful about encouraging any perceptions that his or her status as a board member is being used to influence any areas outside the board’s direct business.

These are just the biggest potential pitfalls. There are many, many other, less clearly-defined areas that can place a board member in a conflict-of-interest situation almost before he or she knows it is happening.

The real key is to remember three things: first, in a profession that already places extreme importance on the understanding of boundaries and dual relationships, social work regulatory board members are held to an even higher standard. Even the best social worker can be drawn into a conflict of interest situation that might not seem like such a big deal if it occurred on a professional level. Board members must be constantly on the watch for areas that could create bias.

Second, board members can never forget that the *perception* of conflict of interest can have just as big an impact as actual conflict. Because the entire regulatory board system is built on public trust, perception tends to become reality. If a board member *seems* to have a conflict of interest, the entire functioning of the board may be called into question.

Third, board members must remember that their actions affect more than themselves—they affect the entire board. A board member who becomes entangled in a conflict of interest essentially pulls the entire board into that conflict.

Conflict of interest within board activities

Conflict-of-interest issues don't exist only in relation to a board member's "outside" activities: boards and board members can also be accused of conflict of interest on the basis of how they carry out their regulatory responsibilities.

The reason why the potential for conflicts exists is fairly clear—boards wield a wide range of powers. Board members need to understand the way these powers work, and when one board process should be conducted separately from another.

The main potential pitfall has to do with how the board decides to move forward with a complaint, how it proceeds with the investigations, and how it structures the actual hearing. Basically, boards need to be sure that investigative, prosecutorial, and adjudicative functions are kept separate—for example, the board members who conduct an initial assessment of a complaint against an individual should not participate in hearing the case. Similarly, board members who are involved

in prosecuting the case should not participate in the adjudication of the case.

The best way for a board member to develop an awareness of the potential for conflicts of interest in board processes is to become knowledgeable about the processes themselves. Learn how complaints are handled in your jurisdiction, from initial report to final order. Become familiar with who assesses a complaint, who conducts investigations, who participates in any prosecution, who hears the case, and who is empowered to draft the final order.

For more information on conflict of interest, see the Federation of Associations of Regulatory Boards (FARB) Code of Conduct for Regulatory Board Members.

It's not impossible to avoid conflicts of interest

Seeing the potential for a conflict is the single most important way to avoid these situations. And you are in a better position to see these conflicts coming if you follow the following suggestions:

Educate yourself. There is usually very little time for on-the-job learning when a board member begins his or her service. Usually, the member inherits the board's challenges, and has little time to learn about the job of being a regulator.

ASWB's Board Member Training program, held several times a year, offers new members the opportunity to participate in an intensive three-day training session that brings together new social work regulators from across the U.S. and Canada. The program is free to all ASWB member boards. Contact the ASWB office for more information.

Get the big picture. It's easy to get so involved in the operations of the board that you lose sight of the broad standards for and expectations of a board member. In an effort to help board members understand standard conduct for regulators, ASWB has adopted the FARB Model Regulatory Board Member Code of Conduct (included as an appendix to this manual). This model, developed by several regulatory board associations, clearly defines the performance standards and behavior expected of a regulatory board member.

Talk to people who know. If you sense a potential conflict, talk with board counsel to get a better idea of how the situation can be handled. If you understand the board's function and the role of the board member, your instincts will usually be correct, but it's always a good idea to ask others in the know for their opinions.

Use your common sense. In the end, avoiding conflicts of interest demands that you apply what you learn about regulatory work to the real-world challenges you face on the board. Using this knowledge effectively means that you must rely on common sense to guide you.

Remember that in your role as a board member, perceptions matter, and trust is hard-won and easily lost.

Chapter 6

Opening the doors

The work of the board: licensure and renewal

The licensure law sets out the criteria for who does and does not qualify for a license, and while these qualifications can seem fairly straightforward, sometimes getting at all the information needed to make a licensure (or renewal) decision can be complicated. Maybe the candidate graduated from an accredited social work program, but was it accredited at the time he or she received the degree? Maybe the candidate can document that he or she has achieved the required number of hours of supervised work experience, but was there a significant gap in experience, or does the experience show a pattern of rapid job changes? Maybe the candidate has no record of any disciplinary actions, but what if he or she has been denied licensure in several other jurisdictions?

The fact is, even though the review of licensure applications may be largely a staff function, the final decision to issue or deny a license is a decision of the board. Boards need to be confident that they are licensing the people who qualify for licensure, and denying licensure to those who truly do not meet the statutory requirements.

The application

One of the board's best tools can be its application form. The questions asked on these forms can provide boards with the information needed to make an informed licensure decision. But it isn't as simple as asking a question: boards also need to think about *how* the question is being asked, and if the question leaves any semantic loopholes an unqualified candidate might be able to slip through. Additionally, boards need to think about why the question is being asked, and whether the question is really relevant to its responsibility in making licensure decisions.

Finally, boards need to realize that application forms need to be adapted to the changing needs of the regulatory authority. Boards should peri-

odically review and revise application and renewal forms to make sure that relevant information is being collected. Unfortunately, applications must be created with the unethical candidate in mind, and must be constructed in such a way that there can be no confusion—intentional or not—about the information being asked.

Components of the application

Application forms can vary widely, but most of them have been designed to get at the same information. Generally, applications will attempt to get the following information:

Identifying information. Basically, the identifying information is needed to facilitate contact with the licensee, but boards should also seek information on citizenship status, because individuals not lawfully in the country may be prevented from obtaining professional licensure. It is also important to ask for further identifying information such as place of birth, maiden names, surnames, or aliases, and the actual street address (as opposed to a box number) of the applicant. Finally, the identifying information should require the applicant to provide current, permanent, and business mailing addresses, and to indicate a preference as to which address should be used (and made available to the public if the legislation allows such release).

Demographics. Obtaining demographic information can further assist the board in being able to connect a license with a particular licensee.

Education. Obviously boards need to assess the social work educational qualifications of application, but it is also important to obtain information on all educational degrees earned, as well as institutions attended even if a degree was not earned.

Experience / Work History. This is an extremely important component for any professional license that requires a certain period of employment in a specified setting in order to obtain licensure. In addition to information about the name and address of the employer, boards should also ask for hours worked

The Federation of Associations of Regulatory Boards (FARB) has developed a generic model application form that has been included in this guide's appendices. For a board looking at revising its application form, this is a good place to begin—nearly everything needed on a social work licensure application is contained in the FARB model.

case file:

Citizenship

TC 2003-29

Wallace v.

Calogero

2003 WL

221774289 (E.D.

La., Sept. 2003)

LeClerc v.

Webb

270 F. Supp.2d

779 (E.D. La., July

2003)

per week, the type of employment (full or part time), the names of supervisors, job title, a description of duties, and the reasons for any employment resignation or termination. Boards need to pay particular attention to any gaps in employment.

Examination information. Although boards generally request that examination results be sent directly from the testing service to the board, boards should also inquire into the complete examination history of the applicant. Applicants should list any licensure examinations they have taken (not just for a social work license), where and when they took it, and whether they passed or failed. All attempts—not just the passes—should be recorded. Boards can look to ASWB for verification of this additional data.

Personal history / good moral character. “Good moral character” or similar provisions are a fairly common criterion for initial licensure, renewals, or grounds for discipline. While a board’s decision on moral character should be based on a wide range of information, one of the best ways to provide an assessment is to request a detailed personal history formatted as a list of questions about past history, particularly in regard to any professional complaints, discipline, voluntary licensure surrenders, or other actions.

Licensure in other jurisdictions / other professions. Boards should be fully informed about any current or past licenses held by the applicant, in any profession. This information should include the jurisdiction issuing the license, the license title and number, how the licensed was obtained, the date of original issuance, and explanations of why any listed license are not current or in good standing.

In addition to these elements, several boards also require criminal background checks as part of the application process. These checks can reveal important applicant information and can have a significant bearing on licensure decisions.

case file:
**Good Moral
Character**

TC 2003-16

Schmitt v.
Counselor and
Social Work
Board
2003 WL
21511163 (Ct.
App. OH 2003)

case file:
**Withdrawal of
application**

TC 2003-23

Simms v. Na-
politano
73 P.3d 631 (Ct.
App. AZ 2003)

Reciprocity, endorsement, and the Social Work Registry

Boards of social work also process applications from people who are licensed in another jurisdiction. While it might seem reasonable to assume that the applicant's status as a currently-licensed social worker in one jurisdiction is sufficient to grant licensure in a second jurisdiction, boards need to be vigilant in their information-gathering efforts. Applicants currently licensed in one jurisdiction should be expected to provide the same application information as non-licensed applicants.

Primarily out as a service to the profession, attempts have been made to facilitate licensee mobility between jurisdictions. Generally, the systems tend to be based on one of two basic concepts—reciprocity or endorsement. Both systems are set forth in statute.

In reciprocity systems, jurisdictions set up a “license transfer” option, essentially working out an agreement with another jurisdiction that they will recognize each other's licensees. This reciprocal agreement requires that the candidate supply the board with application information and proof of current licensure in good standing in the other jurisdiction. The candidate's license is then “transferred” to the new jurisdiction.

In endorsement systems, jurisdictions don't attempt to set up mutuality arrangements with each other; instead the board is allowed to license an applicant licensed in another jurisdiction, providing the requirements for licensure are substantially similar to those of the new jurisdiction. Essentially, endorsement provides a way for a board to facilitate licensure if it chooses to do so.

Both systems can be extremely attractive to professionals who are interested in making the licensure process as easy as possible. Boards, however, need to weigh the potential convenience against public protection and jurisdiction issues.

As a way to increase convenience to professionals while maintaining individual board control over applicants, ASWB has begun a Social Work Registry program. This new service, free to boards, is designed to gather and store licensure eligibility information on behalf of so-

cial workers. At the request of individual social workers, ASWB will hold primary source documents for verification or dissemination, so that a social worker wishing to be licensed could simply ask that the information be forwarded to the appropriate board.

Boards may choose to rely on an ASWB attestation of the relevant documents (exam scores, transcripts, supervision verification, work experience verification, etc.), or may request the provision of digital copies of the documents. If necessary, ASWB can even forward the actual documents to the board. Through the registry system, boards can streamline the license transfer process (while maintaining the ultimate level of control) and decrease the amount of processing of paperwork. At the same time, social workers could also benefit from the establishment of a one-stop repository and dissemination service.

Renewals

The work of the board doesn't end with the approval of an application—the granting of licensure renewals demands much of the same scrutiny from board members. Through the requirements for renewal, boards are able to monitor the continuing competence of the licensees and get updated contact information.

case file: Renewal

TC 2003-34

Baldwin v.
Board of Chi-
ropractors
79 P.3d 810 (MT
2003)

While certain information, such as educational transcripts or supervision documentation may not need to be re-submitted for renewal, boards should ask many of the same personal history questions as are on initial application form, and should ask for licensure status in all jurisdictions and professions. This practice not only helps boards to cross check and update its information, it encourages licensees to be mindful of eligibility issues at least with every renewal cycle.

Continuing education, a continuing challenge

In addition to basic renewal requirements, most boards also require continuing education as a condition of renewal—an admirable concept, but sometimes a tough nut to crack from a logistical standpoint. Boards, usually through their regulations, have to decide how the hours will be accrued, which delivery methods and topics are acceptable, how and when verification will be provided, whether providers

of continuing education must receive approval by the board before conducting a course, whether certain content areas will be required, and how compliance will be monitored.

The Approved Continuing Education (ACE) program of ASWB assists boards in this important facet of renewal. The ACE program provides boards with a uniform assessment tool for evaluating the ability of a provider to supply relevant social work content. This level of quality assurance saves boards from provider-by-provider reviews of continuing education programs.

The one common thread – DARS

Regardless of whether a board is reviewing a new application, an application from a candidate licensed elsewhere, or a renewal application, boards should always consult the ASWB Disciplinary Action Reporting System (DARS). Checks against DARS should be a routine part of any review, and can bring to light a problem that the board may have missed otherwise.

Boards are faced with so many challenges that it's sometimes easy to view the application and renewal process as little more than an administrative function that is handled by staff or, in a few jurisdictions, by private companies. While these processes do tend to involve a lot of paperwork that is probably best left to staff, boards should never lose sight of the fact that they are the entities responsible for making licensure decisions that have direct impact on the public. If boards ask the wrong questions, or if they ask the right questions in the wrong ways, they run the risk of opening a professional door to a person that should never have knocked in the first place.

Disciplinary Action Reporting System (DARS)

The DARS is a repository of information on individuals who have been sanctioned by a regulatory board. This cooperative effort among boards is now the most complete data-bank of disciplinary actions in North America.

case file: Denial of Application

TC 2003-27

Gipe v. State
Medical Board
of Ohio
2003 WL
21757507 (Ohio
App. 10 Dist)

Chapter 7

Keeping watch

The work of the board: complaints and discipline

No matter how careful the board may be about granting and renewing licenses, the fact is that complaints about social workers will arise, and violations will occur. In these instances, the board must essentially police the practice of social work—a responsibility that requires the board to establish a consistent disciplinary process.

Because it is an essential element of the board's public protection mission, the authority to discipline an individual needs to be included in the regulatory law. The sanctions available to the board are administrative sanctions—they exist in addition to any civil or criminal remedies that may be available to the public.

The disciplinary process can vary widely from jurisdiction to jurisdiction, and from professions regulated within a jurisdiction. Board members need to understand how the process works for their own board. This manual cannot account for all of the variations that exist, but it can help you become familiar with some of the most common legal and technical terms associated with complaints and discipline.

The complaint process

A complaint filed against a social worker is the most common way that boards learn about potential violations of the licensing law. Obviously, not every complaint ends in a disciplinary action by the board—some don't move much beyond preliminary investigation—but each complaint follows the same general path toward resolution.

It is crucial that the public understands that it has the right to file a complaint against an individual. Simply having a mechanism for handling complaints isn't enough—boards need to make a concerted effort to educate the public on the board's mission, and the role of the complaint process in that mission. Contact and complaint filing information should always be easily understood and readily accessible to everyone.

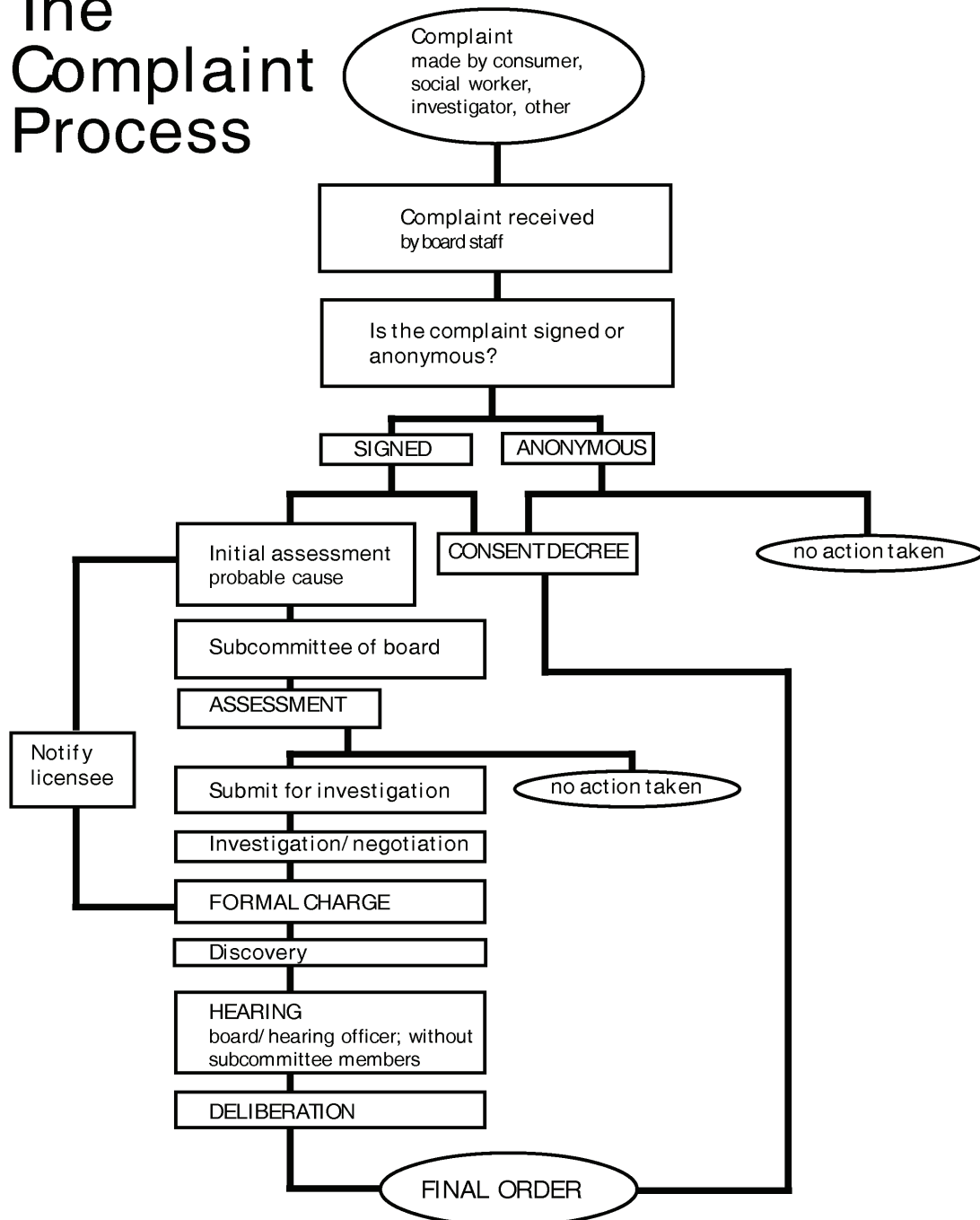
When talking about complaints and discipline, this manual often uses the word "individual" rather than "licensee"—remember, boards should have jurisdiction over both licensed and non-licensed people who violate the regulatory law.

Of course, the ability to file a complaint with the board is not limited to consumers—a complaint may also be filed by a fellow social worker, an investigator, a board member or board staff, a representative of another government office, or others.

Mapping the process

While it is true that wide variation exists in the details, the range of options and dispositions used by boards tends to be fairly consistent. The following chart maps out the basic elements.

The Complaint Process



As you can see, boards have options available when handling complaints; depending on the circumstances surrounding the complaint, and the expert assessment of the complaint by members of the board, the board may take no action against the individual, enter into a consent decree that would impose a sanction without the need for a formal hearing, or move ahead with its investigation and, ultimately, a formal hearing. It is extremely important for board members to understand the general paths available, and to be aware of what legal options exist for both the board and the licensee.

The disciplinary process Know your (and others') rights

Regulatory boards are empowered to make disciplinary decisions that could affect a person's life. Board actions can effectively prevent a person from continuing the career path they have chosen for themselves—a path they have trained for at considerable cost.

Because of the factors that could well hang in the balance, boards need to be especially aware of the legal issues that have to do with rights—both the rights of the accused and the board itself. The following terms tend to emerge whenever rights come into play (in these definitions, the word "respondent" refers to the individual accused of or charged with violating the practice act):

Jurisdiction. The “authority” the board has over the subject matter and/or person in an administrative proceeding before the board. Personal jurisdiction has to do with the authority over a person, based primarily on “contact” with the jurisdiction. Subject matter jurisdiction has to do with the board’s authority to adjudicate a particular issue. Boards have both personal and subject matter jurisdiction over their licensees.

Due process. The overriding constitutional and statutory rights designed to provide the respondent with the opportunity to receive notice of the charges, present a defense, confront and cross-examine witnesses, and present evidence and witnesses before a fair and impartial tribunal.

case file:
Due process

TC 2003-1

Maryland
State Board of
Pharmacy v.
Spencer
819 A.2d 383
(App. Ct. Md.
2003)

Notice. A due process right of the respondent to receive notice of the charges, and to have the opportunity to prepare a defense.

Specificity of pleadings. The respondent must be well-informed of the alleged wrongdoings—at least well enough to prepare a defense to the charges. The pleadings should cite the statute(s) alleged to have been violated.

Continuances. A request for more time to prepare for the hearing. Requests for continuances may be relatively common under certain circumstances.

Form of the hearings. How the case will be heard. Some jurisdictions use Administrative Law Judges (ALJ), while others use Hearing Officers (HO). In some jurisdictions the entire board acts as the tribunal during the formal hearing.

Right to counsel. Unlike a criminal setting, where the accused is provided with a lawyer if he or she cannot afford one, administrative hearings do not obligate the board to provide or fund representation of the respondent. However, boards may wish to advise respondents that they may choose to be represented by counsel.

Combining investigative, prosecutorial, and adjudicative functions. Just as it sounds, this describes incidents in which the same board members are involved in the investigation, prosecuting, and hearing phases of a complaint. Such overlapping roles can raise questions of due process, and boards are cautioned to avoid commingling these important functions.

Fair and impartial tribunal. The board (or ALJ, HO, or other) that conducts the formal hearing. The right to a fair and impartial tribunal is a due process right.

Confrontation and cross examination of witnesses. Another Association of Social Work Boards
Manual for New Board Members
due process right, this refers to the right of the respondent to question those accusing him or her of wrongdoing.

Protection against self-incrimination. Generally only applicable in criminal proceedings, this has to do with the rights granted under the 5th Amendment to the US Constitution and the Canadian Charter of Rights and Freedoms prohibiting mandatory testimony against one's own interests. In most jurisdictions, his right may be exercised by a respondent in the administrative hearing.

Record of the proceedings. The transcription or recording of all formal proceedings.

Emergency or summary suspensions. The board authority to suspend a license without hearing due to the imminent potential for harm to the public. Typically, a post-suspension hearing is held within a short period of time to provide the licensee with an opportunity to defend him/herself.

Venue. The location in which a circuit court has jurisdiction of an appeal of an administrative order.

As you can see in this section (and the ones that follow), terms often associated with civil and criminal trials tend to emerge in regulatory discipline cases. Sometimes, the concepts translate fairly directly into the regulatory settings; at other times, the comparisons are not so direct—or not comparable at all.

Getting at the facts – discovery

Discovery is the general term applied to the procedures used by the board and respondent to access materials or evidence in the possession of the opposing party. Typically, the rules for discovery can be found in a jurisdiction's administrative procedures act or similar legislation, and generally, discovery only takes place after a formal charge has been filed by the board. Terms and concepts that are related to discovery include the following:

Constitutional issues. Generally, constitutional issues do not

case file:
**5th
Amendment**

TC 2003-7
Sherman v.
Cryns
786 N.E. 2d 139
(Ill 2003)
2003 WL

case file:
**Record of
proceedings**

TC 2003-30
In re Main-
street Phar-
macy
76 P.3d 91 (App.
Ct. OK 2003)

case file:
Venue

TC 2004-3
Taylor v. Mis-
sissippi Board
of Nursing
863 So. 2d 1015
(App. Ct. MS
2004)

case file:
Discovery

TC 2003-50
Galvin v. Hob-
lock
2003 WL
22208370
(S.D.N.Y)

have a bearing on pre-administrative hearing discovery. The rights of discovery are usually addressed in jurisdictional law, generally in the Administrative Procedures Act (APA).

Subpoenas. If authorized, subpoenas can be issued from a board or court as a means to legally require the production of documents and/or individuals to testify. Many boards do not have subpoena power and may have to obtain evidence through other means.

Patient privacy / privileged communication. In regard to discovery issues, this is a potential defense that may be used by an individual or entity when asked to reveal information in the investigative process. There are numerous state, provincial, and federal laws pertaining to privacy.

Investigative files. The files maintained by the board/AG representative relevant to a particular ongoing investigation. In some jurisdictions, investigative files are subject to discovery.

Work product. Basically, the materials and communications developed in preparation for litigation. Work product materials are generally not subject to discovery.

Compelling discovery. The process by which a board enforces a subpoena not complied with by the recipient. Generally, boards do not have the authority to legally enforce discovery requests. Enforcement is accomplished through the courts.

case file:

Privacy

TC 2004-4

Doe v. Maryland Board of Social Workers
840 A.2d 744
(App. Ct. MD 2004)

Administrative search and seizure

Through orders or subpoenas, the board may be empowered to compel the respondent to produce certain materials relevant to a case, but there may be limitations on the authority of a board to "search" and "seize" records and other materials as part of an investigation or audit. Some of the most important concepts associated with administrative search and seizure include:

Administrative searches. A board’s authority to review the records in possession of a licensee or other individual under audit, investigation, or review.

Search warrants. The formal court-entered authorization to review and seize relevant materials in the possession of an individual or licensee.

Illegal or improper searches. Obviously, illegal or improper searches can impact the admissibility of evidence.

Evidence seized by non-governmental/authorized agents.

Boards may receive evidence obtained by people who are not associated with the board and its investigators, but questions may arise as to its admissibility.

In order to pursue administrative prosecution of an alleged wrongdoing, the board must not only possess credible evidence, but must cite the grounds that empower it to issue a sanction.

**case file:
Search &
seizure**

TC 2003-24

United States
v. Funaro
253 F. Supp.2d
286 (D.C. CT
2003)

Grounds for disciplinary proceedings

Generally, grounds can be found broadly outlined in the licensing statute; often, further clarification is included in the regulations. But such clarification may not be necessary for the board to proceed—certain commonly used grounds, such as “unprofessional conduct,” are purposefully broad, providing the board with a good “catch-all” phrase that could encompass activities not specifically set forth in the law.

Grounds for discipline might include the following:

- Violation of the code of conduct, standards of practice, or applicable ethics standards
- Unprofessional conduct
- Fraud in the procurement of a license
- Misrepresentation of a material fact by an applicant or licensee
- Practicing outside the scope
- Negligence, incompetence, malpractice
- Conduct that violates the practice act or rules
- Incapacity or impairment
- Conviction of a felony

- Acts involving moral turpitude or gross immorality
- Boundary violations
- Violations of laws/rules of this or any other state/province or federal laws/rules relating to the practice of social work
- Fraud in connection with billing practices
- Engaging/aiding/abetting unlawful practice
- Failing to pay costs/fines associated with previous discipline
- Violating this act or board rules
- Conduct that violates the security of the examination or examination processes
- Being subject to discipline by the board of this or any other jurisdiction

Evidentiary matters

As in civil and criminal hearings, there are limits on what things can be admitted into evidence and thus considered during the board's deliberations. Legal terminology around evidentiary matters includes the following:

Decision based on evidence. Basically, the concept that all final decisions in a hearing must be based on evidence duly presented in the hearing—matters outside the record established during the proceedings may not be considered.

Rules of evidence. As you might guess, these rules govern how evidence is dealt with during administrative proceedings. Usually, these rules are found in the statutes, but tend to be relaxed in administrative settings as compared to civil or criminal proceedings.

Hearsay. Testimony about a matter in which the person testifying has no direct personal knowledge, but knows what others have said. Because it is not subject to cross-examination, hearsay testimony may be inadmissible in judicial proceedings; however, the rules of evidence are relaxed in administrative proceedings, and hearsay testimony may be admitted by the decision-maker in professional disciplinary hearings.

Necessity for expert testimony. This refers to the need for the prosecution to submit experts that will establish the standard of practice, and explain how that standard has been breached by the accused. Some jurisdictions rely on the board to be the experts, while others require that such expertise be presented for the record.

Conflicting expert testimony. Even though the prosecution may provide expert testimony, in many instances, the defense will be ready with experts of its own. Decision-makers must weigh the conflicting testimony.

Burden of proof. The standard by which the facts will be judged to determine guilt or innocence. In administrative settings this burden can vary from one jurisdiction to another. Some examples include “preponderance of the evidence,” “clear and convincing evidence,” and “supported by substantial evidence.”

Sufficiency of evidence. This concept refers to the kinds of assessments made by the courts on appeal. Basically, appellate courts will ask whether the evidence on record supports the findings of the board.

Harmless error rule. The concept that even if an appeals court finds that a board made an error during an administrative proceeding, the error might not be significant enough to require a reversal of the board’s decision. In other words, not every error made by a board in a hearing will result in a successful appeal.

Specific evidentiary questions. The presiding officer will be expected to make rulings regarding the admissibility of evidence into the record.

The accused practitioner may attempt to structure a defense against the charges being leveled. Just as in civil and criminal cases, these defenses can take many forms. Generally, the defenses encountered

case file:
Hearsay

TC 2002-42

Dorman v.
State Board of
Registration
for the Healing
Arts
62 S.W. 3d 446
(App. Ct. MO
2002)

case file:
**Expert
testimony**

TC 2003-11

Watkins v.
North Carolina
State Board of
Dental Examin-
ers
579 S.E. 2d 510
(App. Ct. NC
2003)

case file:
**Harmless
error rule**

TC 2003-8

Missouri Board
of Nursing
Home Ad-
ministrators v.
Stephens
1065 SW3d 524
(App. Ct. MO
2003)

by boards fall along four broad categories: they will attempt to argue that the action did not take place, that the action did take place but was excusable, that the actions alleged to have taken place are not subject to sanction by the board, or that one or more procedural aspects of the administrative proceedings violate the rights of the accused.

Defenses to disciplinary actions

Some of the most common defense related concepts are:

Impairment / alcoholism / ADA. The respondent's actions are excusable because of an alleged impairment.

Lack of evidence. The facts and evidence do not support the finding of the decision maker.

Presumptions of innocence. The respondent should be presumed innocent, and the board is not recognizing this presumption. This defense may be coupled with allegations of board bias.

Pardons / expunged records. The action cannot be pursued, because the grounds for disciplinary action are based on an ancillary matter (for example, a criminal conviction) that has been removed from the respondent's record.

Statute of limitations / laches. The passage of time makes it unfair to proceed with the disciplinary action.

Entrapment. The respondent was enticed unfairly by the government into doing something he or she would not have done otherwise (applicable in criminal proceedings).

Unlawful searches. The evidence cannot be used because it was obtained illegally.

Collateral estoppel. The matter has been previously dealt with based on the same set of facts and parties. This principle can also be used by the prosecution.

case file:
**Statute of
limitations**
TC 2003-28
Hossenipour v.
State Medical
Board of Ohio
2003 WL
21061314 (Ohio
Ct. Cl. 2003)

Ineffective counsel. The respondent was not adequately represented in the administrative proceeding—a more common defense in criminal matters.

Bias / due process. The Constitutional rights of the defendant were abridged.

Double jeopardy. The respondent is being punished twice (for example, criminally convicted and then administratively prosecuted) for the same set of facts. Double jeopardy does not apply in administrative proceedings, with the possible exception of administrative fines.

Decision making in contested cases

Finally, board members are required to make a decision about a case. Usually, the process for deliberation will be carefully laid out, but mistakes can still be made. Several thorny legal issues are at stake when boards work toward the disposition of a case, and it's a good idea to have a working knowledge of some of the relevant concepts associated with decision-making. These concepts include:

The deliberation process. The circumstances under which the decision makers deliberate and discuss the record and make the ultimate determination. In some jurisdictions, the deliberation process occurs as an open meeting.

Hearing officer recommendations. In many jurisdictions, the matter is heard before a hearing officer, who then makes a recommendation to the board. Numerous judicial opinions address whether the board is bound by the recommendation, and to what extent recommended sanctions can be modified. Board must be aware of the discretion granted to reject or change a hearing officer recommendation.

Necessity of participating in the hearing. Decision-making board members should attend the entire hearing. If a board member is unable to attend a portion of the hearing, he or she should, at a minimum, review the entire record.

**case file:
Hearing
officer recom-
mendations**

TC 2003-44
Texas State Board
of Medical Exam-
iners v. Dunn
2003 WL
22721659 (Ct.
App. TX 2003)

**case file:
Hearing
officer recom-
mendations**

TC 2002-43
Fowler v. Dept.
of Health, Bd. of
Optometry
821 so. 2d 1246
(App. Ct. FL 2002)

**case file:
Form of hearing**

TC 2003-10
Suits v. Idaho
Board of Profes-
sional Discipline
64 P.3d 323 (ID
2003)

**case file:
Findings of
fact**

TC 2003-14
Missouri State
Board of Registra-
tion of the Heal-
ing Arts v. Brown
2003 WL 939812
(App. Ct. MO
2003)

Elements of the final order. The final order is the final dispensa-
tion of an administrative matter. Final orders can be agreed-
upon settlements, or post-hearing findings. All orders should
include the following *at a minimum*:

- **Findings of fact.** The findings obtained from the record.
- **Conclusions of law.** Explanation of how the findings of fact violate the practice act/regulations.
- **Burden of proof.** The standard by which the findings were established.
- **Sanction.** The penalty imposed on the respondent, set forth in detail.
- **Reinstatement rights, if any.** The requirements that must be met in order for the respondent to seek licensure.
- **Publication of order.** A statement that the final order will be published (for example, in the board newsletter, on the board's website) and reported (to HIPDB, ASWB DARS, and other systems).
- **Appeal rights.** Notification that the respondent has the right to appeal the administrative ruling through the courts.

Sanctions: what the board can do

Given the wide variation between jurisdictions (and beyond that, between the US and Canada), it is difficult to include a comprehensive list of the actions available to all boards. Some boards may have a fairly restricted range of options available to them in a disciplinary matter; others may have fairly wide latitude. The following set of terms is not exhaustive, but it may provide an idea of the range of approaches possible.

Permissible disciplinary actions

If authorized by the practice act, the board can take action before and after the formal hearing. Although wide variation exists, generally the board can:

Issue summary discipline. The social work board may be empowered to summarily suspend a license prior to a formal hearing where the board believes a violation presents a serious threat to the protection of public health. A social worker whose license is summarily suspended must immediately cease social work practice pending the results of a formal hearing or an order of the court to the contrary. If a license is summarily suspended, a formal hearing must be held within a specified (usually short) period of time after the suspension.

Require evaluation. The board may request that a licensee be examined regarding his or her physical and/or mental condition, or be evaluated for chemical dependency. If the licensee refuses and the board has probable cause to believe that the condition of the licensee may constitute a violation of the social work practice act of the rules and regulations, the board may summarily suspend the licensee's license where it believes that such a suspension is necessary to protect public health and safety.

Require re-examination. The board may order the respondent to take a licensure examination or participate in continuing education.

Issue a letter of concern. The board may issue a letter to a licensee noting conduct that could be disciplined or could lead to formal action. The letter may request that licensee provide the board with clarifying information. The issuance of the letter does not preclude subsequent formal action against the licensee by the board.

Revocation. The social worker's right to practice can be terminated through a revocation of his or her license. While this may seem like an appropriate sanction in many cases, boards need to understand that a revocation may not prevent the social worker from practicing again. Many jurisdictions provide an opportunity for the revoked licensee to apply for a new license or reinstatement of a previously issued license. By not specifying the amount of time that must pass before a revoked social worker

case file:
**Re-exami-
nation**
TC 2002-1
Gardner v.
Ohio Vet-
erinary Medi-
cal Licensing
Board
2002 WL
31740289 (Ohio
App. 12 Dist.)

can reapply, boards may be confronted with an application for re-licensure or reinstatement from a revoked individual soon after the board action. Under such circumstances, the board may need to provide a legal basis for denying the reinstatement application. A well-drafted final order can help the board make the sanction do what the board wants it to do.

Suspension. The social worker's license may be suspended for a specified period of time. Orders appropriately drafted suspending the license of a practitioner should mandate that the individual reapply to the board for permission to practice, or for the reinstatement of the license. The original order suspending the license should dictate the circumstances under which the suspension will be lifted. Under certain circumstances involving unlawful activities of a lesser degree, licensure suspensions can be "automatically" lifted based upon the passage of time, providing the individual with the renewed right to practice without formal board action.

In jurisdictions where revocations may statutorily provide for the right of an individual to reapply for licensure after a set period of time (i.e. 1 or 2 years), social work boards may want to consider using a longer suspension with delineated reinstatement rights. Under such circumstances, the disciplined individual will be removed from practice as well as bear the burden of establishing the right to reinstatement to the satisfaction of the board. A long-term suspension may be more effective than a revocation where the statutes provide for the right of reinstatement application after the expiration of a "shorter" period of time than the suspension.

Probation. A licensee may be placed on probation for a period of time, subject to specific conditions determined by the board. The licensee is permitted to continue practice only within the conditions established by the board. A violation of the conditions can result in more serious disciplinary action by the board.

Limited licensure. Limitations and conditions may be established by the board pertaining to the continued practice of a licensee who has violated the practice act or regulations. A licensee is permitted to continue social work practice but may be more severely disciplined for violation of the conditions determined by the board.

Censure. The board may issue an official reprimand or condemnation for misconduct under the social work practice act and/or regulations.

Reprimand. A board declaration of errant or improper conduct by a licensee, usually with no limit on the right to practice.

Fines. Disciplinary action taken by the board may include fines against a licensee, up to the statutory limitation. In most cases, these fines are paid into the jurisdiction's general fund and generally are not used to support board activity.

Assessment of costs. Where statutory authority exists, the costs of a disciplinary proceeding including investigation, prosecution, and attorney fees may be charged to the successfully prosecuted respondent. Costs may also be assessed against the board in the event of an unsuccessful prosecution.

The end of the line? Not really.

The existence of a final order does not necessarily shut the door on a disciplinary case. The board's decisions may be appealed through the courts, who have the power to review and rule on board actions. Sometimes, courts address issues much wider than a particular decision made by the board--for example, through interpretation of the statute--and can impact the way in which a board regulates the profession.

It's all but inevitable that sooner or later, a board will be faced with a legal challenge to one or more of its decisions. And while there is little the board can do to completely eliminate the possibility for appeals, a board that understands its powers and responsibilities, and that keeps in close touch with legal counsel, can move forward with confidence.

case file:
Costs/fines
TC 2002-35
Luebow v.
Wisconsin
Dept. of Regu-
lation and
Licensing
642 N.W. 2d 645
(WI App. 2002)

case file:
Costs/fines
TC 2003-40
In re Matter of
Weisman
2003 WL
23024232 (App.
Ct. MN 2003)

case file:
Costs/fines
TC 2003-45
Linden Medi-
cal Pharmacy
v. Ohio State
Board Phar-
macy
2003 WL
22927377 (Ohio
App. 10 Dist
2003)

Don't forget to share information

Boards should also be aware of their obligation to other boards in other jurisdictions, as well as to other professional licensing boards in their own jurisdictions. In addition to the publication requirements, boards should also report all final disciplinary actions to the ASWB Disciplinary Action Reporting System (DARS), the international database of disciplinary actions. It is extremely important that other boards have access to this information, in the event that a social worker sanctioned in one jurisdiction attempts to get a license in another.

Chapter 8

Careful, but confident

Immunity from legal challenges

If a board is doing its job well, it is protecting the public on at least two levels: first, the board is protecting the public by preventing those who should not be practicing social work from doing so; and second, the board is protecting the public by seeing to it that licensees continue to practice safely. Obviously, this means that the board will inevitably make decisions that individuals will find upsetting, embarrassing, and possibly unjust. And almost as inevitably, some social workers will pursue legal challenges to a board's decision.

The threat of possible legal action against a board doesn't come only from practitioners. Any constituent over which the board's decisions has some impact—continuing education providers, schools of social work, examination programs, and even consumers—can be adversely affected by a board decision, and can seek relief through the courts. Regardless of the source—from an applicant, licensee, continuing education provider, or others—the heart of the allegation will be similar: the board violated the complainant's rights in one way or another.

These challenges may or may not be different than the challenges a board may face as a result of a disciplinary action: often, social workers appealing a sanction will focus on the substantive or procedural aspects of the administrative prosecution. But boards can also face challenges that are more broad, challenges that actually accuse the board or board members of somehow denying a legal right. This chapter will focus on these claims of rights violations.

Most claims against a board or board member are based on an alleged violation of civil rights—in other words, a deprivation of life, liberty or property without due process of law, as guaranteed in the United States Constitution. In the first half of the 20th century and before, these claims were not as prevalent as they have been since the enactment of the Civil Rights Act (U.S.) and the Canadian Charter of Rights and Freedoms, which have provided avenues to make allegations against

law enforcement, judges, city and county boards, administrative and regulatory boards, and other governmental officials.

Where immunity fits in

While these rights are among the most basic legal principles we enjoy, without some balancing mechanism, they can easily be misused. The constant threat of retaliation by legal prosecution of boards, board members, and others, could so hobble a government agency or official that they might not be able to carry out their legislated mandates. As a kind of check against this abuse of a legitimate right, the legal system has established the concept of immunity.

Basically, immunity is a legal principle that grants public officials freedom from prosecution for injuries resulting from acts done by that person while acting in an official capacity and within the scope of authority. Immunity says that under certain circumstances, a public official is provided with a defense to being sued for doing his or her job.

Types of immunity

Generally, there are two types of immunity: absolute immunity, and qualified immunity.

Absolute immunity

Sometimes called judicial, or quasi-judicial immunity, this refers to the complete exemption from civil liability given to officials presiding over “judicial” functions. Judges, and those presiding over administrative hearings qualify for this sort of immunity. Other officials may or may not qualify for this immunity—factors that help to determine whether absolute immunity applies include:

Is there a need to insure that the functions must be performed without harassment or intimidation?

Are there safeguards in place that reduce the need for private damage actions to control unconstitutional conduct?

case file:
Immunity

TC 2004-45

Vanhorn v.
Nebraska State
Racing Com-
mission
2004 WL 161324

Is there adequate insulation from political influence?

How important is precedent?

Is the process adversarial in nature?

Can errors be corrected on appeal?

Qualified immunity

Just as it sounds, this brand of immunity comes with more strings. While qualified immunity can be more broadly applied than absolute immunity, certain conditions must be met. Basically, qualified immunity may afford immunity from civil liability to public officials performing discretionary functions, so long as the conduct does not violate clearly established constitutional or statutory rights. Two important questions to ask when evaluating whether an official has qualified immunity against a claim are:

Has the alleging party asserted the violation of a clearly established constitutional right?

If the answer is *yes* to the first question, was the conduct of the official objectively reasonable?

Another protection – the 11th Amendment

Though not exactly immunity, the 11th Amendment to the United States Constitution also provides protection to regulatory boards and board members. This amendment prohibits federal courts from exercising subject matter jurisdiction in a suit brought against the state by a citizen of that state.

Bottom line: there are no guarantees

Just as there are no steps a board can take to prevent challenges to its administrative decisions in a disciplinary case, so there are no procedures that a board can follow to avoid lawsuits filed under the Civil Rights Act or the Canadian Charter of Rights and Freedoms. But a

**case file:
11th
Amendment**

TC 2003-17

Chalmers v.
Marks
2003 WL
21468509 (D.C.
TX 2003)

well-educated board can minimize the likelihood of these kinds of allegations. Board members should take the time to do the following:

Understand the board's scope of authority. Board members must familiarize themselves with the laws, rules, regulations and anything else that defines the limits of the board's authority. These authority-related elements set out the board's duties, responsibilities, and limitations, and establish the procedures to be followed by the board in meetings, hearings, and other activities.

Follow the statutes and procedures. Once a board member is educated on what a board can and can't do, he/she must see to it that the board's powers are fully exercised, but only within its scope.

Provide adequate notices. Many potential challenges can be avoided if the board establishes policies that ensure early notifications, and clear explanations.

Be consistent. Wide variations in methodology or behavior give rise to suspicions of unfair treatment.

Keep adequate records. Detailed, clear records are sometimes the only way a board can later establish the fairness and consistency of any particular process.

Seek legal guidance. Boards need to stay in close contact with a legal representative at all times, and not just when a problem arises.