BOARD MEMBERS' HANDBOOK
OF
LEGAL ISSUES

LORI SWANSON
Attorney General
State of Minnesota

October 2015 Edition

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INTRODUCTION

This manual is designed to be a guide for state boards, their members, and their staff. It generally describes the role of boards in state government. It also discusses several important laws that apply to the operations and activities of state boards. Although it is intended to be educational and informative, it should not be viewed as a substitute for boards actually seeking legal advice when specific situations raise questions of a legal nature.

Our Office hopes that the manual will serve both as a handbook for new board members and staff as well as a reminder of relevant laws for those with more experience.

I. ROLE OF ADMINISTRATIVE AGENCIES IN GOVERNMENT

A. What is an Administrative Agency?

A fundamental principle of the U.S. Constitution requires that the executive, legislative, and judicial powers be exercised by separate branches of government, each of which may check or balance the actions of the others. Administrative agencies occupy a unique place in government because they have the statutory authority to exercise all three types of powers in the course of performing their official business. An administrative agency is an entity within the executive branch of government. It exercises its authority to enforce the statutes enacted by the Legislature. By adopting rules to further implement applicable statutes it also exercises "quasi-legislative" authority granted to it by the Legislature. Finally, it also has powers similar to courts to resolve particular kinds of disputes and to require individuals to give testimony as witnesses.

Because administrative agencies combine the powers of all three branches of government, the very existence of early administrative agencies troubled the courts. Courts finally resolved this issue by recognizing that the danger to citizens' liberty is not in blended power itself, but in unchecked power. Two checks on agency powers have been established. First, only the Legislature may create agencies. The Legislature must declare a legislative policy and establish primary standards for agency actions. Agencies have authority to fill in details, through rules or adjudication, but the agency action must be consistent with legislatively-determined policy. Second, the judiciary operates as a check by retaining residual authority to prevent and rectify errors or abuses.

Judicial review of agency decisions is important. The role of the courts is twofold: (1) to make sure that the Legislature does not unlawfully vest powers in an administrative agency, and (2) to ensure that administrative agencies exercise their powers within the limits set by the Legislature and without violating anyone's legal or constitutional rights. If a court finds that an agency has exercised powers beyond the limits set by the Legislature or that it has violated a person's rights, the administrative agency's decision or action may be overturned.

State boards are a type of administrative agency. In the case of licensing boards, the Legislature has reposed in such boards the power to regulate specialized professions for which licenses or certificates are required. The boards are often mainly composed of persons in those professions and are often complemented by public members, bringing other backgrounds, knowledge, and experience to board activities.

B. Administrative Agencies and the Due Process Clause

The due process clause is found in the Fourteenth Amendment to the U.S. Constitution and states that "No State shall . . . deprive any person of life, liberty, or property without due process of law. . . ." Courts have held that a professional license is a property right to which the Fourteenth Amendment applies. In reviewing procedures used by boards to deal with the property rights of applicants or licensees, courts recognize two types of due process: substantive and procedural. Substantive due process requires that agency actions relate to the purpose for which the agency exists. Procedural due process requires an agency to use methods that deal fairly with those it regulates.

Due process primarily affects the adjudicatory functions of a board. A board acts in its adjudicatory capacity whenever it reviews the activities of a particular individual or party, makes determinations of fact based on such a review, and issues an order affecting that specific individual or party. A party is entitled to notice of a proposed board action and, in some instances, to a "contested case hearing" before a board makes findings of fact or issues an order affecting the party's activities. For further discussion of contested case hearings, especially in the context of licensing board activities, see section IV of this manual.

Boards must take great care in implementing their responsibilities. The requirements of procedural due process are contained in court interpretations of the United States and Minnesota Constitutions, the Minnesota Administrative Procedures Act, the rules of the Office of Administrative Hearings, and in other statutes and rules. Their underlying purpose is to ensure fundamental fairness.

The law also requires that boards follow certain requirements in establishing jurisdiction, interpreting legislative standards, and imposing remedies. Courts may review actions of all boards to determine whether the boards complied with due process requirements, acted within their jurisdiction, and interpreted the governing law reasonably.

II. ROLE OF THE ATTORNEY GENERAL IN GOVERNMENT

A. Authority of the Attorney General

The power of the Attorney General stems from three sources: the Minnesota Constitution, the Minnesota Statutes, and the common law derived from court decisions. The constitution establishes the Attorney General as the state's chief legal official within the executive branch. The Attorney General is elected by the state's voters. The Minnesota Statutes, particularly chapter 8, set forth some of the Attorney General's responsibilities. The Attorney General acts as the attorney for all state officers, boards, or commissions in matters pertaining to their official duties. Minn. Stat. § 8.06.

The Minnesota Supreme Court has described the expansive powers of the Attorney General:

> The attorney general is the chief law officer of the state. His powers are not limited to those granted by statute but include extensive common law powers inherent in his office. He may institute, conduct, and maintain all such actions and proceedings as he deems necessary for the enforcement of the laws of the state, the preservation of order, and the protection of public rights. He is the legal adviser to the executive officers of the state, and the courts will not control the discretionary power of the attorney general in conducting litigation for the state. He has the authority to institute in a district court a civil suit in the name of the state whenever the interests of the state so require.

Slezak v. Ousdigian, 110 N.W.2d 1, 5 (Minn. 1961).

As an elected constitutional officer, the Attorney General has authority to make independent legal decisions, based on the public interest, regarding the representation of state agencies and boards. This authority distinguishes the relationship between the Attorney General and a client from the attorney-client relationship found in the private sector.

B. Structure of the Attorney General's Office

The Attorney General has divided the office into six sections, each of which holds several divisions. The Solicitor General and five deputies head up the six sections. Division managers and section deputies are responsible for the management of the day-to-day operations of the divisions.

Many of the divisions have been created to serve the needs of the various departments and agencies within state government. The Transportation Division, for example, provides legal representation to the Department of Transportation. Other divisions, on the other hand, exist to carry out special Attorney General responsibilities. The Antitrust and Utilities Division, for example, advocates for interests of residents and small businesses with respect to utility issues. In these matters, the Attorney General, not a state agency, is the party.

C. Legal Representation of State Boards

Legal advice is regularly sought by state boards and board staff on a variety of issues. Representation of non-health-related boards is largely consolidated in the Office's State Agencies Division. The Health Occupations Division represents health-related boards.

When a matter proceeds to a contested case or a suspension proceeding, more than one attorney from the Attorney General's Office will become involved in the case. The first attorney will be the attorney for the committee while the second attorney will be the advising attorney for the board. The committee and advising attorney roles are discussed further in section IV-C of the manual.

III. LICENSING BOARD RESPONSIBILITIES

As administrative agencies, licensing boards have only those powers that the Legislature gives them in statutes. Chapter 214 of the Minnesota Statutes and the boards' individual practice acts are the principal statutes that define and limit licensing boards' powers and responsibilities. Licensing board duties fall into two major categories: (1) granting and denying licensure and certification, and (2) resolving complaints which may include discipline. The goal of board actions must always be to preserve the health, safety, and welfare of Minnesotans, and to act in the best interests of the public.

A. Licensure and Certification

A board is given authority to ensure that only qualified persons engage in a profession. The Legislature has predetermined which individuals are "qualified" for licensure through the legislative requirements for licensure found in every board's act.

As opposed to the disciplinary function of a board, which is often discretionary, a board's licensing or certifying function is largely "ministerial" in nature. A "ministerial" act is one that involves executing specific standards that allow for little interpretation by a board. The Legislature determines the qualifications needed for a profession by setting out specific education and experience requirements. If those requirements are met, a board may not deny licensure or certification, except as set out below. In this way, the Legislature mandates that boards license or certify particular persons while withholding approval from others.

Even though licensing or certification is largely ministerial, a board can and does exercise some discretion. First, while a board's practice act sets out mandatory requirements for licensure or certification, the act also allows the board to adopt rules to implement the legislative standards. For example, even if a practice act has a mandatory examination requirement, the board has discretion to define in its rules the nature and scope of the examination or a passing score.

Second, many practice acts require that applicants be "of good moral character" or that they have not "engaged in conduct warranting disciplinary action." Those types of requirements

afford boards some discretion to decide how a statutory criterion applies to each applicant. For example, if the evidence warrants, a board may deny a license to a person who has engaged in fraud under the "good moral character" requirement. If the board receives information about an applicant demonstrating that the applicant should not hold an unlimited license or certificate to engage in a profession, a board may attach conditions or restrictions to the license. For those cases, a board's discretionary decision could range from restricting the scope of practice or requiring monitoring or supervision of a licensee or certificate holder to less stringent conditions such as requiring additional educational courses, as warranted by the evidence.

B. Complaint Resolution

The second major type of licensing board function, the complaint resolution process, is outlined in parts B.1-B.5 below. The Peace Officer Standards and Training Board (POST Board) has unique statutory procedures governing complaint resolution, which are outlined in part B.6 below.

1. Initial Handling of Complaints

A licensing board's receipt of a complaint begins the complaint resolution process. Most complaints consist of a statement of grievances or accusations against a licensee or certificate holder and a request or demand for board intervention. A complaint may be submitted orally or in writing. Minn. Stat. § 214.10, subd. 1. Before an oral complaint is resolved, the complaint must be put in writing or transcribed. Complaints may be submitted by anyone, including a board member or board staff.

A licensing board generally has the authority to act on any complaint that is jurisdictional. A complaint is jurisdictional if it "alleges a violation of a statute or rule which the board is empowered to enforce." Minn. Stat. § 214.10, subd. 1. Jurisdictional determinations relate exclusively to whether a board has legal authority to act based on the facts presented by the particular complaint. Whether a complaint is true or can be proven is not germane to the jurisdictional determination.

If the board determines that a complaint is non-jurisdictional, the board may refer the complaint to other agencies that may have jurisdiction.

Many licensing boards have established a complaint panel or committee. The panels normally consist of one or more board members. The complaint panel may make recommendations on how best to pursue a complaint. Options may include, for example, requesting the licensee's written response to the complaint; asking the complainant for additional information; referring the matter to an outside consultant for expert advice; scheduling a disciplinary conference or educational meeting; or dismissing the complaint. A board member who has had a financial or professional relationship with the subject of a complaint may be prohibited from participating in complaint panel activities involving that person. A detailed discussion of conflicts of interest issues appears in section VII.E of this manual. Members of health-related licensing boards should also be aware of the prohibition regarding conflicts of interest in Minn. Stat. § 214.10, subd. 8(b).

2. Investigation of Complaints

Each licensing board has developed procedures for investigating complaints. Section 214.10, subdivision 2, of the Minnesota Statutes allows a non-health licensing board's complaint committee to decide whether to obtain additional information regarding the complaint with the assistance of board staff and to consult with the Attorney General's Office if legal questions arise. Health licensing boards are required to refer any matter requiring investigation to the Attorney General's Office. Minn. Stat. § 214.103, subd. 5. Sometimes boards may desire to hire an outside consultant to assist in investigating a particular complaint. If this is done, the consultant should sign a nondisclosure agreement to ensure the privacy of data related to the active investigation of the complaint.

The collection, storage, and dissemination of data during a board's investigation of a complaint must be consistent with the requirements of the Minnesota Government Data Practices Act ("MGDPA"), Minnesota Statutes chapter 13. The MGDPA is discussed in detail in

section VII of this manual. This section presents a brief overview of how the MGDPA affects the investigation of complaints.

The MGDPA classifies a complainant's identity as private data unless the complainant consents to disclosure. Therefore, a complainant's identity should not be revealed to third parties without first obtaining the complainant's written permission. If this permission is not given, then the identity cannot be disclosed. Minn. Stat. § 13.41, subd. 2. Also, before an investigator interviews people or asks them to provide information related to the complaint, a warning on using the data commonly known as the Tennessen Warning[1] should be given. In conjunction with this warning, it is a good idea to briefly describe the complaint-resolution process to the person from whom information is sought. Further, data collected and maintained as part of a complaint against a licensee are classified as confidential under Minn. Stat. § 13.41, subd. 4. A board should take appropriate measures to protect the confidentiality of this data.

The Tennessen Warning, found in Minn. Stat. § 13.04, subd. 2, should be given to all witnesses and to other third persons from whom information is sought. This statute requires that, whenever a governmental agency asks an individual to provide private or confidential information about himself or herself, the individual must be informed of:

a. The purpose and intended use of the information within the collecting agency;

b. Whether the individual is legally required to supply the requested data;

c. Any known consequences of giving or refusing to give the information; and

d. The identity of other persons or agencies authorized by state or federal law to receive the information.

At the investigation stage, third parties do not have to provide the information requested unless they are subpoenaed by the board or the board's statutes and rules require the third party to make the disclosure. Some boards' statutes specifically require third parties to provide information requested by a board complaint committee without the necessity of issuing a

[1] The commonly used reference to the "Tennessen Warning" is derived from Robert Tennessen who was the chief author of the original MGDPA.

subpoena. Licensing boards identified in chapter 214 can ultimately rely on the subpoena power found in Minn. Stat. § 214.10, subd. 3, to obtain information relevant to a complaint. Board subpoenas may be enforced in district court if the subpoenas are not honored by the recipient.

After witnesses are interviewed and acquired documents are reviewed, an interview with the subject of the investigation may be required. That person may be contacted by telephone, in person, or by letter, and advised of the complaint. As with all persons interviewed, the licensee should be given the Tennessen Warning and information concerning the complaint resolution process. The licensee should also be informed that he or she may have an attorney present during the interview.

Members of health-related licensing boards, except the Board of Veterinary Medicine, should also be familiar with the special requirements for investigations, information exchanges, and handling of complaints found in Minn. Stat. § 214.10, subd. 8.

3. Conferences

The conference is the complaint panel's chief vehicle for resolving complaints. A conference may be held for the purposes of investigation, negotiation, education, or conciliation. The licensee is notified of the conference by service of a notice of conference that identifies the conduct alleged to violate the board's practice or certification act and gives the licensee information about the process. Generally, a licensee receives the notice about thirty days before the conference, although this is not a statutory requirement. In emergency cases, the licensee may receive only a few days' notice.

Thorough conference preparation by the complaint panel members and board counsel is essential to accomplishing the purpose of the conference. Preparation should include reviewing the notice of conference, any investigative data, any licensee's response to the allegations, and all other written material relevant to the complaint. A licensee may be represented by an attorney at a disciplinary conference.

At the conference, the panel chair or board attorney generally opens with a brief statement about procedural matters. A Tennessen Warning should be given before anyone asks the licensee questions. The panel then questions the licensee about the allegations in the notice of conference. In addition to the panel members, board staff sometimes ask questions. Questioning should be relevant to the complaint's subject matter and help panel members develop a full understanding of the licensee's position with respect to the allegations. This discussion should also allow the panel to assess the licensee's credibility and candor regarding the allegations, as well as the licensee's understanding of the appropriate statutes and rules. Gathering this information permits the panel to decide how it will proceed with the case. Sometimes, when highly technical issues are involved, the panel may hire an outside consultant to participate in the conference.

When the questioning is complete, the licensee is excused while the panel deliberates. The panel has a variety of options, including dismissing the complaint, continuing the matter to gather additional information, negotiating disciplinary action pursuant to a stipulation and consent order, or recommending to the board that certain disciplinary action be taken and that a contested case hearing be held to determine whether that disciplinary action is appropriate and proper.

Health-related licensing boards have the additional option of taking "corrective action." Minn. Stat. § 214.103, subd. 6. Corrective action is intended to be used when the panel identifies practice problems but the deficiency does not warrant disciplinary action or the evidence is insufficient to sustain disciplinary action. Corrective action is memorialized in a written agreement between the panel and the licensee. Once the licensee completes the corrective action, the complaint is dismissed.

4. Disciplinary Action

As discussed above, disciplinary action, such as reprimands, civil penalties, suspensions, or revocations of licenses, may be accomplished through a consent order or through a contested

case. A consent order is issued after the full board reviews and approves a written stipulation setting forth facts and discipline to which both the complaint committee and the licensee have agreed. Contested cases are discussed more fully below.

Licensing boards also have the option of seeking an injunction from the district court. Section 214.11 of the Minnesota Statutes empowers boards to seek injunctive relief for two purposes: to restrain any unauthorized practice or activities or to prevent a threatened violation or violation of any statute or rule that the board has authority to enforce. If an injunction is granted, the board can still proceed with its own disciplinary action in respect to the person's license or application for license or renewal. Obtaining an injunction also does not preclude an appropriate criminal prosecution of the person who has been enjoined, and boards should refer all potential criminal violations to the appropriate criminal authorities.

The Legislature has also given many boards specific authority to issue cease and desist orders. This type of board order requires that certain conduct violating a board's rules or statutes stop. A cease and desist order must be served on the person(s) whose conduct is the subject of the order. The order must also contain language providing an opportunity to request a hearing before an administrative law judge ("ALJ") concerning the allegations in the order. If a hearing is not requested within thirty days, the cease and desist order becomes final. A final cease and desist order is a public document under the MGDPA. A violation of a properly served, final cease and desist order may form the basis for a board to seek injunctive relief in district court.

The Legislature also requires boards to initiate contested case proceedings to suspend or revoke a license, or to refuse to renew a license, of a person convicted of certain criminal offenses. Minn. Stat. § 214.10, subd. 2(a).

5. Temporary Suspensions

Some boards can use the remedy of temporary suspension. Temporary suspensions are reserved for cases in which a licensee's continued practice presents an immediate threat to the public. Although each board with authority to temporarily suspend licenses may have slightly

different procedures, the following is a general description of how the process works. A board with such authority may temporarily suspend the license of a licensee without a full trial-type hearing if it has probable cause to believe that the licensee violated a rule or statute that the board is empowered to enforce and that the licensee's continued practice would create a serious or imminent risk of harm to the public. The suspension is effective upon written notice to the licensee, specifying the rule or statute violated. The suspension remains in effect until the board issues a final order in the matter. When the board issues the suspension notice, it must commence a disciplinary hearing within a specified period, often thirty days.

a. Record to be considered by the board on temporary suspension

When the complaint committee decides that a case warrants temporary suspension, the full board must be asked to take this action, usually by petitioning for temporary suspension.

b. Notice

Because of the nature of temporary suspension cases, the board generally acts quickly to consider the committee's petition. Efforts are made to provide reasonable notice to the licensee regarding the time, date, and place of the board meeting at which the board will consider the temporary suspension. The licensee is served with a copy of the materials the complaint committee will submit to the board, and is informed that the licensee has the opportunity to present argument and information to the board regarding the proposed temporary suspension. The licensee or the licensee's attorney is also informed that any questions regarding procedures to be followed should be raised with the board's advising attorney. The advising attorney also receives a copy of this notice.

c. Evidence

Evidence presented by the parties is usually in affidavit form only. The board usually does not hear testimony at the hearing on the temporary suspension.

d. Board order of temporary suspension

The complaint committee submits a proposed order of temporary suspension to the board in advance of the meeting. A copy is simultaneously provided to the licensee. After the meeting, the board must issue an order, either suspending or not suspending the licensee. If suspension is ordered, the board will schedule a contested case hearing within a specified period after issuing the suspension order. If a contested case hearing is held, the ALJ typically will issue a report within thirty days after the contested case hearing record closes. Some practice acts require that the board issue a final order within thirty days after receiving the ALJ's report and any exceptions to it.

The emergency nature of temporary suspension proceedings may require that one or more of the above procedures be dispensed with in an unusual case. In exceptional cases, an *ex parte* proceeding (one in which the licensee does not participate) could be held involving the temporary suspension of the licensee's license.

6. Complaint Resolution Procedures of the Peace Officer Standards and Training Board

Under Minn. Stat. § 214.10, subds. 10-13, when the executive director or a board member of the POST Board receives a complaint that alleges a violation of the board's statutes or rules, the executive director and the chair of a three-member committee (discussed below) must select a law enforcement agency to investigate the complaint. The law enforcement agency has 30 days to investigate the complaint and submit a written report to the executive director.

Following the investigation, the executive director must schedule a meeting between the licensee who is the subject of the complaint and a three-member committee of the board to determine whether there are reasonable grounds to believe the licensee violated the board's statutes or rules. The three-member board committee must include at least two board members who are peace officers.

At least 30 days before the meeting, the executive director must give the licensee and the complainant written notice of the meeting and give the licensee a copy of the complaint. At the

meeting, the committee must give both the licensee and the complainant a reasonable opportunity to be heard.

After considering the investigative report and the information provided by the licensee and the complainant, the committee, by majority vote, must take one of the following actions:

a. Find that there are reasonable grounds to believe that the licensee has violated the board's rules and order an administrative hearing; or

b. Decide that no further action is warranted; or

c. Continue the matter.

The executive director is required to promptly give notice of the committee's action to the complainant and the licensee.

If an administrative hearing is ordered, the ALJ makes a recommendation on the matter and the full board makes the final decision on the complaint. Before the board meets to consider the matter, however, the executive director must notify the licensee and the complainant of the meeting. After the board has made its decision, the executive director must notify the licensee, the complainant, and the chief law enforcement officer of the employer of the licensee of the decision of the board.

IV. CONTESTED CASES

A. Adjudicatory Functions of the Board

Whenever a board reviews the activities of a particular individual or party, makes determinations of fact based upon this review, or issues an order with regard to that specific individual or party, it is acting in an adjudicatory capacity, like a court. For example, when a licensee and a board complaint panel cannot agree on the facts or the disciplinary action to be taken concerning a licensee, a contested case becomes the method of resolving the disputes.

The term "contested case" is defined in Minn. Stat. § 14.02, subd. 3, as a "proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing." Put another way, a contested case is a type of proceeding in which the board makes a specific factual, legal, or factual and legal determination regarding a specific party. Thus, it differs from a rulemaking proceeding, in which the board is establishing general standards for future conduct by all licensees and future determinations by the board. Rulemaking involves the making of laws by the board, pursuant to the board's legislative authority. Contested cases involve a resolution of a particular case pursuant to the board's "adjudicative" or quasi-judicial authority.

A contested case hearing is necessary only if adjudicative facts are disputed. Generally, for licensing boards, contested cases will involve one of two situations:

a. The board denies licensure to an applicant because of a failure to meet qualification requirements or because of some past activity. For example, an applicant's ethical standards might be called into question because of some past activity; or

b. The board initiates a disciplinary hearing because of past or current activities engaged in by an individual already licensed or registered by the board.

A non-licensing board may be required to use a contested case if the board statute requires such a process or if a constitutionally protected interest is involved. The following is a description of the contested case hearing process in the context of a licensing board.

B. Steps in the Contested Case Process

A contested case proceeding involves a number of steps, beginning with a decision of the board's complaint panel or discipline committee and its executive director to initiate a contested case hearing and ending, potentially, with review by an appellate court. The various steps will be briefly reviewed below.

1. Initiation of a Hearing

If, after investigation, certain board representatives believe that a licensee has engaged in illegal or unauthorized activities warranting board action, a disciplinary hearing may be initiated. Minn. Stat. § 214.10, subd. 2. A hearing is initiated when the executive director of the board issues a notice of, and order for, a hearing or prehearing conference.

After initiating a contested case proceeding, an agency may, by order, provide that the report or order of the ALJ constitutes the final decision in the case. *Id.* § 14.57(a).

2. Agreement to Arbitrate

As an alternative to initiating or continuing with a contested case proceeding, the parties, subsequent to agency approval, may enter a written agreement to submit the issues to arbitration by an ALJ according to Minn. Stat. §§ 572B.01 to 572B.31. Minn. Stat. § 14.57(b).

3. The Hearing

A contested case hearing is a formal proceeding similar to a trial by a judge, without a jury. An ALJ appointed by the Office of Administrative Hearings presides over the hearing. Each ALJ is an attorney, independent from any state agency other than the Office of Administrative Hearings. In the hearing process, one party is the board's complaint or disciplinary panel, represented by the Attorney General's Office. The licensee or license applicant is the other party. Each party has a right to present witnesses and documentary evidence, and to cross-examine any witnesses presented by the other party. The investigative report, which is used by the board's complaint panel in determining whether to initiate the hearing, does not become a part of the hearing record unless it is introduced as evidence. After

the hearing, the ALJ issues a report to the board consisting of findings of fact, conclusions, and a recommendation. This report, a transcript of the testimony, all documentary evidence, and the written arguments of the parties are submitted to the board after the hearing. The ALJ's report is a recommendation to the board. The board is not bound by the report and is obliged to make its own determination. Any modification or rejection of the report, however, must be based on evidence contained in the hearing record.

4. Board Decision

After receiving the ALJ report, the board must review the report and the hearing record. Failure to do an adequate review of the record can lead to reversal on appeal. In *Morgan v. United States*, 298 U.S. 468 (1936), the court held that the decision-making process was defective when the Secretary of Agriculture did not review any of the evidence or briefs, did not hear the oral arguments, and relied solely on what he derived from consulting with agency employees. The court held that an official who decides the matter must consider the evidence and argument.

In *Urban Council on Mobility v. Minnesota Department of Natural Resources*, 289 N.W.2d 729 (Minn. 1980), the court addressed whether the agency head had adequately reviewed the record. The court upheld the agency's decision, stating:

> [T]he commissioner made an informed decision, after adequate consideration of the voluminous evidence submitted at the hearing. He spent about ten hours personally studying the record. The commissioner reviewed the entire transcript 'reading verbatim those areas of testimony which (he) felt were of substance or were in dispute,' and examined every exhibit submitted at the hearing. In addition, he received a four-or-five-hour briefing from his staff, which consisted of a review of the evidence and the arguments made by the parties.

289 N.W.2d at 736.

In most cases board members should review the ALJ report and the entire record. Reviewing the record also includes reviewing any "exceptions" made by the aggrieved party. Parties must have an opportunity to file "exceptions" or objections to the ALJ report. A

minimum of ten days is provided to file exceptions. Minn. Stat. § 14.61, subd. 1. While not required, non-aggrieved parties also may be allowed to file exceptions. *In re Residential Bldg. Contractor License of LeMaster Restoration, Inc.* No. A10-1700, 2011 WL 2437463 (Minn. Ct. App. June 20, 2011). Each licensing board generally schedules a specific time following review of the record for the attorneys representing each party to present oral argument on the case.

Once the board determines the facts of the case and whether a person violated the board's statute or rules, it must decide what action, if any, to order. The board's decision and order must be in writing, be based on the record, and include the findings of fact and conclusions on all material issues. Minn. Stat. § 14.62, subd. 1.

The board decision should be reached at a meeting following discussion by all board members eligible to vote on the matter. The decision should not be reached through meetings or telephone calls involving only two or three board members at a time. The board's advising attorney should generally be present. These board deliberations are typically conducted in a closed portion of an official board meeting.

The contested case record must be closed upon the filing of any exceptions to the ALJ report and presentation of argument or upon the expiration of the time allowed for submitting exceptions and arguments. The agency shall notify the parties and the presiding ALJ of the date when the hearing record is closed. *Id.*, subd. 2. If a decision or order rejects or modifies a finding of fact, conclusion, or recommendation contained in the report of the ALJ, it must include the reasons for each rejection or modification. *Id.*, subd. 1.

5. Administrative Law Judge Decision Could Become Final

The report or order of the ALJ constitutes the final decision in the case unless the agency modifies or rejects it under Minn. Stat. § 14.62, subd. 1, within 90 days after the record of the

proceedings closes. Some boards may have a shorter statutory time limit in which to make a decision. When an agency fails to act within 90 days in a licensing case, the agency must return the record of the disciplinary proceeding to the ALJ for consideration of disciplinary action. Minn. Stat. § 14.62, subd. 2a.

In most circumstances the board must issue its decision within 90 days after the record of the proceedings closes. If the board fails to announce the date the record closes under Minn. Stat. § 14.61, subd. 2, the court will determine the date the record closed. *See In re Cich,* 2008 WL 4909757, at *2 (Minn. Ct. App. Nov. 18, 2008) (determining the record closed when the parties filed additional memoranda for the board's consideration as agreed during arguments before the board).

A decision may be required in less than 90 days in some circumstances. For example, when there is a written request relating to zoning or other matters under Minn. Stat. § 15.99, the agency must affirm or deny the request after the record closes, unless the agency grants itself an extension. Minn. Stat. § 15.99, subd. 3(f). If the agency fails to approve or deny the request within 60 days of the record closing, the request will be approved regardless of the ALJ's recommendation. *See In re Hubbard ex rel. City of Lakeland*, No. A07-1932, 2008 WL 5136099 (Minn. Ct. App. Dec. 9, 2008).

6. Board Order

The board order is public under the MGDPA regardless of whether the board takes disciplinary action. Minn. Stat. § 13.41, subd. 5. Confidential or nonpublic data collected as part of an active investigation for commencing a civil action may be made public if it will aid law enforcement or promote public health or safety. *Id.*, subd. 6. When a board published a temporary suspension order that contained data classified as confidential under Minn. Stat.

§ 13.39, subds. 1, 2(a) on its website, the court held the board was permitted to publish the data so as to promote publish health and safety. *Uckun v. Minn. State Bd. of Med. Prac.*, 733 N.W.2d 778 (Minn. Ct. App. 2007).

7. Judicial Review of an Agency or Board Decision Following a Hearing

a. Decisions based on the official record before the board

A board or agency's decision can be challenged in an appeal to the Minnesota Court of Appeals on multiple grounds, including that it is arbitrary and capricious. Minn. Stat. § 14.69. "An agency's decision is arbitrary and capricious if it represents the agency's will and not its judgment." *In re Petition of N. States Power Gas Util.*, 519 N.W.2d 921, 924 (Minn. Ct. App. 1994). "Will" is the desire to achieve a certain result but without factual support. "Judgment" occurs when the board desires to achieve a certain result and has facts to support the conclusions.

The Minnesota Court of Appeals has also stated that:

> An agency ruling will be determined by the courts to be arbitrary and capricious if: (a) an agency relied on factors not intended by the legislature; (b) it entirely failed to consider an important part of the problem; (c) it offered an explanation that is contrary to the evidence; or (d) the decision is so implausible that it cannot be explained as a difference in view or a result of the agency's expertise.

States Power Gas Util., 519 N.W.2d at 925.

Therefore, board members should always base their decisions on the facts in the official record of the matter before them.

b. Judicial deference to the board's interpretation of statutes and rules

A reviewing court will consider and will usually give some weight to a board decision on technical issues within the board's area of expertise. For example, a board's decision that a machine does not meet the technical parameters set forth in board rules will usually be given

deference. But a board's decision that a licensee did not properly deliver a document to the board will probably not. A court will likely apply more scrutiny to an issue that either falls outside an area of board expertise or is a legal question of procedure or statutory interpretation. Nevertheless, sometimes a reviewing court gives great weight to a board's long-standing interpretation of a statute or rule, especially if the legislature has not acted to overturn that long-standing administrative interpretation.

C. Committee and Advising Attorneys

Whenever the board's complaint panel or disciplinary committee decides to initiate a contested case or temporary suspension proceeding, the committee presents and advocates a case supporting the complaint panel's or disciplinary committee's position on disciplinary action against the licensee. As an advocate, the attorney representing the panel or committee may not advise the full board when it assumes its quasi-judicial role as the final decision-maker in a contested case. But, the full board will need the services of an attorney to advise it on any legal issues that arise. The attorney advising the board at the decision stage of the contested case process must not have been involved in representing the committee in presenting the case before the ALJ. The Attorney General's Office has, therefore, created separate roles for attorneys advising boards and for attorneys representing committees in contested cases.

As soon as the attorney for the complaint or disciplinary committee determines that there is a good probability that the matter he or she is working on will proceed to a contested case hearing, an advising attorney is appointed for the full board unless a standing advisor has already been assigned. (Some boards have standing advising attorneys because of the large volume of cases for those boards.) The advising attorney is someone who has not been involved in the handling of the case or any discussions relating to it. Upon designating an advising attorney, all other division attorneys, as well as board staff, are informed of the appointment. The advising attorney is then isolated from the prosecution of the case.

Until the case goes to the board for a decision, the advising attorney does not review any of the case files and avoids discussion about the matter with the attorney representing the committee bringing the case or any individuals with knowledge of the case. Once the case is referred to the board, the advising attorney reviews the record. At that point, while the advising attorney may meet with the deliberating board members and discuss the case with them, the advising attorney continues to refrain from discussing any issue of law or fact raised by the case with any person who has been involved in the hearing or investigation. The advising attorney may, however, discuss administrative and procedural matters with board staff. The advising attorney assists the board in drafting the decision and will provide the board with advice about any legal issues or other matters involved in the case. Once the board issues its decision, the advising attorney also advises the board in connection with any request for reconsideration, for a stay of the decision pending appeal, or for a waiver of bond.

D. Disqualification of Board Members

Some board members may be prohibited from participating in a decision in a contested case or in a temporary suspension of licensure under certain circumstances. For example, any board member who was consulted during the course of the investigation may not vote on any matter pertaining to the case once it goes before the board following a formal contested case proceeding. Minn. Stat. § 214.10, subd. 2. This prohibition is followed with respect to temporary suspensions as well. But the law does not prohibit complaint panel members from discussing a contested case in board deliberations or from participating in a board's final decision to adopt an agreed-upon stipulation. The prohibition only applies to voting on a contested case proceeding.

Finally, a board member's personal familiarity with the person subject to the contested case should be taken into account when deciding whether to disqualify oneself. Familiarity with the person who is the subject of the proceedings does not in itself disqualify a board member. As a general rule, a board member should disqualify himself or herself if the board member's

familiarity with the person will affect the board member's ability to render a fair and impartial decision. With regard to health licensing boards, Minn. Stat. § 214.10, subd. 8(b), states that "a board member who has a direct, current or former financial connection or professional relationship to a person who is the subject of board disciplinary activities must not participate in board activities relating to that case." Note that this prohibition prevents participation in any board activities relating to a case in which the conflict is presented. Thus, the board member may not participate either on a complaint committee or as a board member in issuing a final decision. *See also* Section VII.D of this manual dealing with conflicts of interest.

V. THE ROLE OF BOARD MEMBERS IN HEARINGS

A. Judicial Demeanor

A member of a state board acts in a quasi-judicial role when serving as the "finder of facts" and the decision-maker over a particular set of facts. It is important that the board members act in ways that will generate respect from those who appear in front of them.

Judges follow the code of judicial conduct and must be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and staff. Members of a state board acting in a quasi-judicial capacity should demonstrate the same patience, dignity, and courtesy that a judge would. Remember that it is the advocate's job to make the best and most persuasive argument he or she can for the position desired. Although board members may not agree with the position advocated, they should not try to discourage the position by being discourteous, making belittling statements, or being excessively argumentative.

B. Consistency

A board member in a quasi-judicial role should treat, and be perceived as treating, all who appear in front of the board fairly and consistently. Consistency helps regulated individuals and the general public predict how the board will view a certain situation. But a board should not blindly follow its previous decisions on a particular topic. If the facts of a contested case differ in material respects from a previous case, the board does not always have to follow its prior decision. While consistency also does not mean that a board cannot change its position or interpretation of a law, a new interpretation of the board's statutes *may* have to be implemented through rulemaking if the board's new position will be generally applicable to the public in the future.

C. Objectivity

The role as a board member acting in a quasi-judicial capacity is as decision-maker, not advocate. Board members must carefully listen to oral arguments and review the record, including any written exceptions and the ALJ's report, before the board votes on its decision. This will ensure that the board makes decisions in an informed and impartial manner.

Objectivity or, at a minimum, the perception of objectivity, is threatened by *ex parte* communications and contact. *Ex parte* contact is contact by a decision-maker with only one party, without the other party's knowledge or consent. Ideally, although the Open Meeting Law does not apply to board deliberations in a contested case proceeding, adhering to some of its principles can preserve the integrity of the decision-making process and maximize the perception of objectivity. It is therefore a best practice to not discuss the matter currently before the board with anyone, even other members of the board, outside the forum for adjudication.

VI. RULEMAKING

The authority of a state agency or board to adopt, amend, and repeal rules is one of the most important tools for refining and implementing the public policy set by the Legislature for the state. This chapter of the manual is designed to familiarize board members with the concept of rulemaking and provide practical information relating to rulemaking and their role in it.

A. Rulemaking Overview

Rulemaking by an agency or board is often described as a quasi-legislative function. It is the part of the administrative process that resembles a legislature's enactment of a statute. "Rule" is defined in the Administrative Procedure Actas "every agency statement of *general applicability and future effect*, including amendments, suspensions, and repeals of rules, adopted to implement or make specific the law enforced or administered by it or to govern its organization or procedure." Minn. Stat. § 14.02, subd. 4 (2014) (emphasis added). [2]

Administrative rules are legally binding; they have the force and effect of law within the state. Typically, rules are directed to a particular group of people. This is the case with the boards, whose rules regulate only those persons subject to the jurisdiction of the board.

B. Statutory Authority

Under the Minnesota Constitution, the Legislature has the power to establish the state's policy, but the Legislature may delegate its lawmaking authority to agencies and boards to make more specific directives to implement that policy, so long as the Legislature gives the agencies and boards reasonably clear standards to guide their actions. When a state agency or board adopts rules, it exercises the power the Legislature delegated to it. For a board to adopt rules, a statute must grant rulemaking authority to the board on a given subject matter. Any rules

[2] Minn. Stat. § 14.03 excludes several items from the definition of a rule, including standards concerning only the internal management of the agency that do not directly affect the rights of the public.

adopted by a board must be authorized by statute and must not exceed the scope of, or conflict with, the authority granted by the Legislature.

C. Basic Rulemaking Procedures

Rulemaking is a lengthy and involved process. It is more than simply drafting rules. In fact, rule drafting is only the first of many steps that must be followed in sequence before rules take effect. This section does not attempt to explain the intricate procedures involved. Instead, it provides board members with a general overview of rulemaking procedures.

The Administrative Procedure Act establishes two different procedures for adopting rules: (1) procedures applicable to *controversial* rules, Minn. Stat. §§ 14.131--.20; and (2) procedures applicable to *non-controversial* rules, Minn. Stat. §§ 14.22--.28. The Act also contains some general requirements applicable to all rules, Minn. Stat. §§ 14.05--.128; a procedure for adopting rules under an exemption from rulemaking requirements for good cause, such as an immediate threat to public health or welfare, Minn. Stat. § 14.388; an expedited procedure to repeal obsolete rules, Minn. Stat. § 14.3895; and an expedited procedure that applies only if the law requiring or authorizing adoption of rules authorizes the expedited procedure, Minn. Stat. § 14.389.

The main difference between controversial and non-controversial rules is that a public hearing before an ALJ is required for controversial rules. A proposed rule is considered controversial if twenty-five or more people request a hearing on it. Interested persons may appear and testify at the hearing and submit written comments. The ALJ then recommends whether the board should adopt the proposed rules, modify it, or withdraw it. After considering the ALJ's recommendation, the board decides whether to adopt the proposed rule. If the board modifies any part of a proposed rule, it must return the adopted rule to the Chief ALJ. The Chief ALJ then reviews the legality of the modification, including whether the modified rule is substantially different from the rule as originally proposed. Minn. Stat. § 14.16, subd. 1. Non-

controversial rules may be adopted after a period for written comment by the public, but must still be approved by an ALJ after adoption. Minn. Stat. § 14.26.

Excluding the time for drafting the rules, which in itself may take many months, the series of steps involved in rulemaking require a minimum of six to nine months, depending on whether the rules are non-controversial or controversial.[3] It is realistic to expect non-controversial rule procedures to take about nine months. Controversial rule procedures may take twelve months or longer because of the public hearing and additional review requirements involved.

D. Major Rulemaking Responsibilities of Board Members

The first major responsibility of board members is to decide the goal of the rulemaking and then to draft the rule language. This can be a difficult and time-consuming task. Rules must be drafted to accomplish the board's intent and be clear enough to be understood by those being regulated and those administering the rules.

The next major responsibility is to draft the "statement of need and reasonableness" (also referred to as the "SONAR") for the rules. A board or agency cannot adopt rules unless it can make, during the formal rulemaking process, an affirmative presentation of facts establishing that each rule is both needed and reasonable.

Establishing that a rule is needed and reasonable requires evidence that (1) a problem exists that needs to be addressed by rulemaking; and (2) the proposed rule is an appropriate response to the problem. To support its conclusion that a rule is needed, a board must explain the facts and circumstances creating the need for the proposed rule, citing the specific evidence that the board is relying on. This evidence may be in the form of public testimony, scientific

[3] These steps include soliciting outside comment from affected persons before beginning the process; drafting rules and a statement of need and reasonableness; publishing and mailing various notices; receiving outside comment on the rules as drafted, including a public hearing in some cases; submitting the rules for review and approval by the Revisor of Statutes, the Governor's Office and an ALJ at various stages and, in certain cases, the Chief ALJ and legislative bodies.

data, studies, statutory requirements, or board experience. To show that the proposed rule is reasonable, the board must explain why the proposed rule is an appropriate means of addressing the problem. The board should explain the expected benefits of the rule and the impact the rule will have on those who must comply with it. The board must also address probable costs of complying with the proposed rule.

Drafting the rules and the SONAR are the key responsibilities of board members during the rulemaking process. The remaining steps of the rulemaking process are accomplished mainly by board staff.

The governor may veto all or a severable portion of a board or agency's rule by submitting notice of the veto to the State Register within 14 days of receiving a copy of the rule from the Secretary of State or agency. The veto is effective when the veto notice is submitted to the State Register. Minn. Stat. § 14.05, subd. 6.

The Legislature may also advise against adoption of a rule. If standing committees of the House of Representatives and the Senate with jurisdiction over the subject matter of a proposed rule both vote to advise an agency not to adopt the proposed rule, the agency may not adopt the rule until the Legislature adjourns the annual legislative session that began after the committees' vote. Minn. Stat. § 14.126, subd. 1. In addition, if the cost of compliance with a rule exceeds a certain threshold, it will not take effect with respect to certain small businesses and small cities until the rules are approved by a law enacted after adoption of the rules. Minn. Stat. § 14.127. With certain exceptions, if a local government will be required to adopt or amend an ordinance or other regulation to comply with an agency rule, the rule may not become effective until the next July 1 or January 1 after notice of adoption of the rule is published. Minn. Stat. § 14.128.

The elected governing body of any statutory or home-rule city, county, or sanitary district may petition an agency to amend or repeal a rule or a specified portion of a rule. The petition must demonstrate that since the adoption of the rule, either (1) significant new evidence relating to the need for or reasonableness of the rule has become available; or (2) less costly or intrusive methods of achieving the purpose of the rule have become available. Within 30 days of

receiving a petition, an agency shall reply to the petitioner in writing stating that the agency will either (a) give notice of its intent to adopt the amendment or repeal requested; or (b) give notice that it does not intend to amend or repeal the rule and that it has requested that the Office of Administrative Hearings review the petition. Minn. Stat. § 14.091. Any other person may also request adoption, amendment, or repeal of a rule, and the agency must respond within 60 days regarding its intentions. Minn. Stat. § 14.09.

Even if a board or agency is exempt from following the general rulemaking provisions of the APA for a specific rule, it must generally still follow certain procedures to have the force and effect of law. *See, e.g.*, Minn. Stat. §§ 14.386; 14.388. With certain important exceptions, exempt rules are only effective for two years.

E. Variances From Formally Adopted Rules

A person or entity may petition an agency for a variance from an adopted rule as it applies to the petitioner. The agency may attach conditions to a variance as necessary to protect public health, safety, or the environment. A variance has prospective effect onlyand the agency may not grant a variance from a statute or court order. Minn. Stat. § 14.055, subd. 2.

An agency must grant a variance if it finds that applying the rule, as applied to the petitioner's circumstances would not serve any purpose of the rule. The agency may adopt rules establishing general standards for granting mandatory or discretionary variances from its rules. Minn. Stat. § 14.055, subd. 5. In general, an agency may grant a variance if it finds: (1) applying the rule to the petitioner would result in hardship or injustice; (2) the variance would be consistent with the public interest; and (3) the variance would not prejudice the substantial legal or economic rights of any person or entity. An agency must generally issue a written order granting or denying a variance within 60 days of receiving the completed petition, unless the petitioner agrees to a later date. Failing to act on a petition within 60 days constitutes approval of the petition. Minn. Stat. § 14.056, subd. 5. If an agency is authorized by another state or federal law or rule to grant variances, sections 14.055 and 14.056 do not apply. Minn. Stat. § 14.055, subd. 6.

VII. SPECIAL STATUTES THAT AFFECT BOARDS

A. Removal For Missing Meetings

Members of a state board may be removed after missing three consecutive board meetings under Minn. Stat. §§ 15.0575, 15.059, and 214.09, subd. 4. A board chair must inform the board's appointing authority (generally the governor) if any board member misses three consecutive meetings. The board secretary must provide written notice to a board member who misses two consecutive meetings that the member may be removed for missing the next meeting.

B. Open Meeting Law

1. What is the Open Meeting Law?

The Minnesota Open Meeting Law requires that, except as otherwise expressly provided by statute, all meetings, including executive sessions, of any state board, and of any committee or subcommittee of the board, shall be open to the public. Minn. Stat. ch. 13D. The votes of the members of a board, committee, or subcommittee on any action taken in such a meeting must also be recorded in a journal kept for that purpose. The journal must be open to the public during all normal business hours. Meetings at which a state board exercises quasi-judicial functions involving disciplinary proceedings, including complaint committee meetings, are not subject to the Open Meeting Law. Minn. Stat. § 13D.01, subd. 2.

The Minnesota Supreme Court has articulated three purposes of the Open Meeting Law. First, the law prevents "actions being taken at a secret meeting where it is impossible for the interested public to become fully informed concerning board decisions or to detect improper influences." *Lindahl v. Indep. Sch. Dist. No. 306*, 133 N.W.2d 23, 26 (Minn. 1965). Second, the law assures the "public's right to be informed." *Channel 10, Inc. v. Indep. Sch. Dist. No. 709*, 215 N.W.2d 814, 821 (Minn. 1974). Finally, it gives the public an "opportunity to present its views to the board." *Sullivan v. Credit River Twp.*, 217 N.W.2d 502, 506 (Minn. 1974).

2. What Constitutes a Meeting?

The Open Meeting Law has been broadly construed in favor of the public. In *Moberg v. Independent School District No. 281*, 336 N.W.2d 510 (Minn. 1983), the Minnesota Supreme Court held that all gatherings of at least a quorum of a board or of a committee or subcommittee at which members discuss, decide, or receive information as a group on issues related to official business of the board are "meetings" subject to the act. Although non-business occasions such as purely social gatherings are not subject to the requirements of the law, a quorum of board members may not as a group discuss or receive information on official business in any setting without complying with the open meeting requirements. In *Thuma v. Kroschel*, 506 N.W.2d 14 (Minn. Ct. App. 1993), the mayor and enough council members to constitute a quorum of a planning commission left a commission meeting for eight minutes and were seen talking outside the meeting about a contract matter. The mayor later stated at the commission meeting, "what 'we' had decided to do" with respect to the contract. The Court of Appeals held that the mayor and council members violated the Open Meeting Law. The Supreme Court later held that neither the city nor its insurer were required to reimburse the mayor and council members for the fees and costs incurred in defending a lawsuit related to their violations. *Kroschel v. City of Afton*, 524 N.W.2d 719 (Minn. 1994). The court held that even if their actions were a "misstep" or "stumble," they were subject to monetary sanctions for violating the Open Meeting Law.

The statute generally does not apply to communications among less than a quorum. But discussion and persuasion among small groups of members may be improper under the Open Meeting Law when designed to avoid public discussions, to forge a majority in advance of public hearings on an issue, or to hide improper influences such as the personal or pecuniary interest of a public official.

The Minnesota Supreme Court has held that informational seminars that include discussions about board business, attended by the whole board, must be publicized and open. Whether board members took official action or made decisions is irrelevant. If information was received and discussions held at such meetings could foreseeably influence later decisions of the

board, the Open Meeting Law applies. *St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Sch.*, 332 N.W.2d 1, 6 (Minn. 1983).

The statute's application is not strictly limited to face-to-face communications. In a 2009 advisory opinion, the Commissioner of Administration concluded that a quorum of members of a joint-powers board violated the Open Meeting Law by exchanging e-mails approving an official response to a forthcoming newspaper editorial. Minn. Dep't of Admin. Adv. Op. No. 09-020, Sept. 8, 2009. The Commissioner noted that one-way communication between the board chair or staff and members would be permissible so long as no discussion or decision-making ensues. But in the case addressed by the opinion, the members had expressed their views on the proposed response to each other and the originating staff member by shared e-mail replies. As a result, board members should avoid engaging in e-mail exchanges involving a quorum of board members. A best practice is to not use "reply to all" when responding to an e-mail sent to more than one board member.

In any open meeting, at least one copy of any printed materials relating to the agenda items of the meeting that are prepared, distributed, or available to board members must be available in the meeting room for the public to inspect while the board considers the subject matter of the materials. This requirement does not apply to materials classified by law as not public under the Minnesota Government Data Practices Act or to materials relating to the agenda items of a meeting permitted to be closed.

3. Electronic Meetings

Meetings subject to the Open Meeting Law may be conducted by electronic means if specific statutory requirements are satisfied. Minn. Stat. § 13D.015;[4] *see also* Minn. Dep't of Admin. Adv. Op. No. 09-020 (discussing risks of violating law through electronic communications).

[4] Minn. Stat. § 13D.021, which also authorizes state boards and local governing bodies to conduct telephonic meetings with similar conditions, applies only in circumstances involving a health pandemic or state of emergency declared under other statutory provisions.

4. Notice to Public of Meetings

a. Regular meetings

The Open Meeting Law requires a board to keep on file at its offices a schedule of all regular meetings. If a regular meeting is held at a time or place different from the time or place stated in the schedule of regular meetings, the board must provide the same notice of the meeting that the board is required to provide for special meetings. In *Merz v. Leitch*, 342 N.W.2d 141, 146 (Minn. 1984), the court held that a county board of commissioners violated the Open Meeting Law by conducting business about one-half hour before the meeting's announced start time.

b. Special meetings

For special meetings, except emergency meetings or special meetings for which a separate statutory procedure governs notice, the board must post a written notice containing the date, time, place, and purpose of the meeting on the board's bulletin board or on the door of its usual meeting room. A bulletin board for this purpose must be located in a place reasonably accessible to the public. *Rupp v. Mayasich*, 533 N.W.2d 893, 895 (Minn. Ct. App. 1995). The board must also mail or otherwise deliver notice to each person who has filed a written request for notice of special meetings. Notices of special meetings must be posted, mailed, or delivered, as appropriate, at least three days before the date of the meeting. In lieu of mailing or personal delivering notice of special meetings, a board may publish notice in the State Register at least three days before the meeting. Presently the State Register is published each Monday, and it generally requires that notices for publication be submitted by the Tuesday before the publication date.

c. Emergency meetings

An "emergency" meeting is a special meeting called under circumstances that, in the judgment of the board, require immediate consideration by the board. For emergency meetings, boards must make good-faith efforts to provide notice, which may be by telephone, to each news medium that filed a written request for such notice. The notice must include the subject of the

meeting. Posted or published notice is not required. If the board discusses or acts on matters not directly related to the emergency, the minutes of the emergency meeting must include a specific description of those matters.

d. Recessed meetings

For recessed or continued meetings, Minn. Stat. § 13D.04, subd. 4, provides that no further published or mailed notice is necessary, provided that the time and place of reconvening the recessed or continued meeting was established during the previous meeting and recorded in the minutes of that meeting.

e. Committee meetings

Care should be taken that a properly noticed committee meeting not evolve into an unannounced meeting of the full board because board members who are not committee members may sometimes attend public committee meetings. If they participate in the committee's discussion, they could be counted toward a quorum of the entire board, and the meeting could be considered an unannounced meeting of the full board.

5. Relationship of the Open Meeting Law to Other Laws

The Open Meeting Law must sometimes be construed with other legislation, such as the Minnesota Government Data Practices Act. Occasionally, a board needs to discuss data classified as not public at a meeting. In most circumstances, the board may not close the meeting to discuss the data. Such data may be discussed without liability or penalty if the disclosure relates to a matter within the board's authority, is reasonably necessary to address the item before the board at a required public meeting, and is disclosed without malice.

6. Closed Meetings

Closed meetings are subject to the same notice requirements as other meetings. The law specifies certain instances in which meetings must be closed to discuss nonpublic information. Minn. Stat. § 13D.05, subd. 2(a). Instances in which meetings must be closed include discussions of:

1. Data that would identify alleged victims or reporters of criminal sexual conduct, domestic abuse or mistreatment of minors or vulnerable adults;

2. Active investigative data or internal affairs data relating to allegations of law enforcement personnel misconduct collected or created by a state agency, statewide system, or political subdivision;

3. Educational data, health data, medical data, welfare data, or mental health data that are not public data under certain sections of the data practices law; or

4. An individual's medical records governed by Minn. Stat. §§ 144.291 to 144.298.

In addition, a board must close one or more meetings for preliminary consideration of allegations or charges against an individual subject to its authority. But these meetings must be open at the request of the individual who is the subject of the meeting. If the members conclude that discipline of any nature may be warranted as a result of those specific charges or allegations, further meetings or hearings relating to those specific charges or allegations held after that conclusion is reached must also be open. As noted above, however, the Open Meeting Law, including this provision, does not apply to meetings at which a board exercises quasi-judicial disciplinary functions.

A public body may also close a meeting to evaluate the performance of an individual who is subject to its authority. The public body shall identify the individual to be evaluated before closing a meeting. At its next open meeting, the public body shall summarize its conclusions regarding the evaluation. A meeting must be open at the request of the individual who is the subject of the meeting.

A body may further close a meeting to review not-public property appraisals or other information related to pricing, offers, or counter-offers for purchasing or selling property. Before closing the meeting the body must identify on the record the particular property at issue. The meeting must be recorded. Any final purchase or sale agreement must be approved at an open meeting.

The nature of the attorney-client privilege in the context of the Open Meeting Law is much narrower than the privilege recognized in the private sector, and it has evolved over time. Currently, courts require a balancing test before recognizing a need for absolute confidentiality.

Prior Lake Am. v. Mader, 642 N.W.2d 729, 737-38 (Minn. 2002); *Brainerd Daily Dispatch v. Dehen*, 693 N.W.2d 435 (Minn. Ct. App. 2005). The "public's right to be informed of all actions and deliberations made in connection with activities geared to ultimately affect the public interest" must be balanced with the policies served by the attorney-client privilege to determine whether a need for absolute confidentiality exists. *Mader*, 642 N.W.2d at 738-39, 742.

The privilege does not normally apply to ordinary legal advice, or to evaluating the potential for litigation in connection with a proposed action of the body. *Mader*, 642 N.W.2d, 738-42. In appropriate circumstances, however, the privilege may be invoked where specific litigation has been threatened but not actually commenced. *Dehen*, 693 N.W.2d 440.

Minn. Stat. § 13D.01, subd. 3, requires that before closing a meeting, the body must state on the record the specific grounds permitting closure and describe the subject to be discussed. A mere statement that the meeting will be closed "under the attorney-client privilege to discuss pending litigation" is insufficient. *Free Press v. Cnty. of Blue Earth*, 677 N.W.2d 471, 475-77 (Minn. Ct. App. 2004). Rather, a more detailed description of the matter was required.

7. Penalties for Violating the Law

Any person who intentionally violates the requirements of the Open Meeting Law, including the recording of votes, is subject to personal liability in the form of a civil penalty of up to $300 for a single occurrence. Minn. Stat. § 13D.06, subd. 1. The public body cannot pay the penalty on behalf of the person who violated the law. In *Brown v. Cannon Falls Township*, 723 N.W.2d 31, 44-46 (Minn. Ct. App. 2006), the Minnesota Court of Appeals held that town board members could not avoid a finding of intentional violation by claiming reliance on advice from the town's attorneywhen their reliance on the advice was clearly unreasonable. The *Brown* court also found that a town board member intentionally violated the law when he agreed to holding a noncomplying meeting, even though he did not actually attend the meeting. *Id.* at 48. The court also found it significant that his absence was for personal reasons, and was not motivated by a desire to avoid violating the Open Meeting Law. *Id.*

If a person intentionally violates the law in three or more separate actions connected with the same board, the person forfeits any further right to serve on the board, or in any other capacity with the board, for a period of time equal to the term of office the person was then serving. The court, upon finding the occurrence of a third violation, unrelated to the previous violations, will issue an order declaring the position vacant and notify the appointing authority or clerk of the board. As soon as practical thereafter, the appointing authority shall fill the position. Minn. Stat. § 13D.06.

8. Advisory Opinions on Open Meeting Law Issues

A government entity such as a state board may ask the Commissioner of Administration for a written opinion on any question relating to the entity's duties under the Open Meeting Law. An opinion may also be requested by a person who disagrees with how members of a governing body perform their duties under the Open Meeting Law. The government entity or person requesting this type of opinion must pay a $200 fee to the Commissioner of Administration. Minn. Stat. § 13.072, subd. 1.

Opinions issued by the Commissioner are not binding on the government entity or members of a body subject to Minn. Stat. ch. 13D, but a court must give deference to an opinion. A government entity or members of a body subject to the Open Meeting Law acting in conformity with a written opinion of the Commissioner is not liable for fines, attorney fees, or any other penalty under chapter 13D. A member of a body subject to chapter 13D who relies on an opinion of the Commissioner is not subject to forfeiture of office. Minn. Stat. § 13.072, subd. 2. Conversely, a court will award attorney fees if a public body defendant failed to act in conformity with a previous Commissioner's opinion directly related to the subject matter of the litigation. Minn. Stat. § 13D.06, subd. 4(e).

C. Public Meetings Prohibited on Certain Days

No state agency, board, commission, department, or committee shall conduct a public meeting on the day of the state primary or general election , or after 6:00 p.m. on the day of a major political party precinct caucus. *See* Minn. Stat. § 204C.03, subd. 4 (addressing election data). Except in cases of necessity, public meetings may not be held on official state holidays listed in Minn. Stat. § 645.44, subd. 5.

D. Minnesota Government Data Practices Act

The MGDPA, which is found in chapter 13 of the Minnesota Statutes, is a complex piece of legislation that has been frequently amended over the years. The correct legal analysis of issues concerning application of the MGDPA depends on the specific facts presented. The MGDPA has become an increasing source of litigation in recent years. The MGDPA governs nearly every aspect of a government entity's collection, creation, storage, maintenance, or dissemination of information and provides for the recovery of civil damages, punitive damages, and attorneys' fees for violating the law. Minn. Stat. § 13.08, subd. 1. The MGDPA specifically waives the state's immunity from liability, and government entities have been held liable for releasing or refusing to release information. *See, e.g., Navarre v. S. Wash. Cnty. Sch.*, 652 N.W.2d 9 (Minn. 2002) (affirming $520,000 jury award for damages for releasing information about complaints concerning teacher's competency); *Wiegel v. City of St. Paul*, 639 N.W.2d 378 (Minn. 2002) (holding city liable for attorney fees for failing to disclose interviewers' notes about applicants who failed civil service exams).

The thrust of the MGDPA is that all government data collected, created, received, maintained, or disseminated by any state agency or board are public unless classified otherwise by federal law, state statute, or temporary classification by the Commissioner of Administration. Minn. Stat. § 13.01, subd. 3. The major exceptions are data on employees, applicants, and contractors, and data on students which are presumed private unless specifically classified as

public. Minn. Stat. §§ 13.32, .43. A chart summarizing the classification of some types of board data under the MGDPA is found at the end of this section.

Basic definitions employed throughout the statute include the following:

"Data on individuals" means all government data in which any individual is or can be identified as the subject of that data. Minn. Stat. § 13.02, subd. 5.

"Confidential data on individuals" means data that are made not public by statute or federal law and are inaccessible even to the individual subject of that data. Minn. Stat. § 13.02, subd. 3.

"Private data on individuals" means data that are not accessible to the public but is accessible to the individual subject of that data. Minn. Stat. § 13.02, subd. 12.

"Protected nonpublic data" means data not on individuals which are made by statute or federal law applicable to the data (a) not public and (b) not accessible to the subject of the data. Minn. Stat. § 13.02, subd. 13.

"Nonpublic data" means data not on individuals that are made by statute or federal law applicable to the data: (a) not accessible to the public; and (b) accessible to the subject, if any, of the data. Minn. Stat. § 13.02, subd. 9.

"Summary data" means statistical records and reports derived from data on individuals but in which individuals are not, and cannot be, identified. Minn. Stat. § 13.02, subd. 19.

The "responsible authority" in a state agency means the state official designated by law as the person responsible for collecting, using, and disseminating any data on individuals, government data, or summary data. Minn. Stat. § 13.02, subd. 16. The responsible authority must establish procedures to ensure that requests for government data are received and complied with in an appropriate and prompt manner. Minn. Stat. § 13.03, subd. 2. The responsible authority is required to prepare a written data access policy and update it as necessary no later

than August 1 of each year to reflect changes in personnel or circumstances that might affect public access to government data. Minn. Stat. § 13.025, subd. 2. The responsible authority must also prepare a written policy addressing the rights of data subjects and specific procedures for access by the data subject to public or private data on individuals, and update it as necessary no later than August 1 of each year. Minn. Stat. § 13.025, subd. 3. The responsible authority must make copies of the written policy easily available to the public by distributing free copies of the procedures to the public or posting a copy of the policy in a conspicuous place within the government entity that is easily accessible to the public, or posting them on the government entity's website. Minn. Stat. § 13.025, subd. 4.

For purposes of the MGDPA, "state agency" includes any state board. Minn. Stat. § 13.02, subd. 17.

1. Duties of Responsible Authority and Compliance Official

Each agency's responsible authority must prepare an annual inventory, a public document containing the agency's name, title and address, and a description of each category of record, file or process the agency maintains containing private or confidential data on individuals. Minn. Stat. § 13.025, subd. 1. Collecting, storing, using, and disseminating private and confidential data on individuals is limited to that necessary for administering specifically authorized programs. Individuals must be informed at the time of collection of the purposes for collecting, storing, using, or disseminating data. Data cannot be used for any other purpose.

The responsible authority must establish procedures to assure that all data on individuals are accurate, complete, and current for the purposes for which it was collected. The responsible authority must also establish appropriate security safeguards for all records containing data on individuals. When a board enters into a contract that requires board-collected data to be made available to the contracting party, the contracting party is bound to maintain the data according to its chapter 13 classification. Minn. Stat. § 13.05, subd. 6.

A state agency that collects, creates, receives, maintains, or disseminates private or confidential data on individuals is required to disclose any breach of the security of the data following discovery or notification of the breach. Notification must be made to the individual subject of the data whose private or confidential data was, or is reasonably believed to have been, acquired by an unauthorized person. Notification must be within the most expedient time possible, consistent with the legitimate needs of a law enforcement agency and with any measures necessary to determine the scope of the breach and restore the reasonable security of the data. If a law enforcement agency determines that the notification will impede an active criminal investigation, the notification may be delayed. Alternate methods of notification include first-class mail, electronic notice, and "substitute notice." Electronic notice must be consistent with the provisions regarding electronic records and signatures as set forth in 15 U.S.C. § 7001. Nationwide consumer reporting agencies must also be notified, without unreasonable delay, if the state agency discovers circumstances requiring notification of more than 1,000 individuals at one time of a breach of the security of private or confidential data. Minn. Stat. § 13.055.

The use of summary data derived from private or confidential data on individuals is permitted. Any person may request an agency to prepare summary data. The cost of preparing the summary data is borne by the requesting person. Minn. Stat. § 13.05, subd. 7.

A responsible authority shall allow another responsible authority access to data classified as not public only when the access is authorized or required by statute or federal law. An agency that supplies government data under this provision may require the requesting agency to pay the actual cost of supplying the data. Minn. Stat. § 13.05, subd. 9.

Contracts by a government entity with a private person to perform any of its functions, must include contract terms making it clear that all data created, collected, received, stored and used, maintained, or disseminated by the private person in performing those functions is subject to the requirements of Minn. Stat. ch. 13 and that the private person must comply with those requirements as if it were a government entity. Minn. Stat. § 13.05, subd. 11(a). This does not

create a duty, however, on the part of the contractor to provide access to public data if the public data are available from the government entity unless the terms of the contract create such a duty. Minn. Stat. § 13.05, subd. 11(b).

Each government entity must appoint or designate an employee to act as its data practices compliance official. Minn. Stat. § 13.05, subd. 13. People may direct questions or concerns regarding problems in obtaining access to data or other data practices problems to the data practices compliance official. The responsible authority may also be the data practices compliance official.

Particular attention should be paid to the treatment of personnel data. Certain types of personnel data are public, such as an employee's name, salary, job title, and educational background. Minn. Stat. § 13.43, subds. 1-2.. These data, however, are private with respect to employees of contractors or subcontractors as the result of a contractual relationship between a government entity and a contractor or subcontractor entered into on or after August 1, 2012. Minn. Stat. § 13.43, subd. 19. Most other types of personnel data are private, including the specific reasons and basis for complaints about an employee (or applicant) until there has been a "final disposition of any disciplinary action." Minn. Stat. §§ 13.43, subds. 2(a)(5), 4; 13.601, subd. 3. During such an investigation, the MGDPA "only authorizes the disclosure of the existence and status of complaints *and nothing more*. The type of complaint is separate and distinct from its existence and status." *Navarre*, 652 N.W.2d at 22 (emphasis added).

2. Rights of the Subject of Data

a. Rights before collection: Tennessen Warning

Individual subjects of data are given specific rights by the MGDPA. Perhaps the most well-known of these is the so-called "Tennessen Warning" contained in Minn. Stat. § 13.04, subd. 2. An individual asked to supply private or confidential information concerning the individual must be informed of: (a) the purpose and intended use of the requested data; (b) whether the individual may refuse or is legally required to supply the requested data; (c) any known consequence arising from providing or refusing to provide private or confidential data;

and (d) the identity of other persons or entities authorized by state or federal law to receive the data. The Tennessen Warning is not required to be given in writing, but if given orally, it should be documented in the appropriate board file.

If an investigation is an attempt to gather factual information about an incident, and identifying a particular individual is only incidental to the focus of the inquiry, a Tennessen Warning may not be required. But legal counsel should be consulted before deciding not to give the warning.

b. Rights after collection

i. *Access by subject of data*

Upon request to a responsible authority, an individual must be informed whether he or she is the subject of stored data and whether the data are classified as public, private, or confidential. Upon request, an individual who is the subject of public or private data must be shown the data without any charge and, if requested, shall be informed of the data's meaning if the data are unclear. After showing the individual the data, the government entity need not be disclosed to that individual again for six months, unless an action or dispute is pending or additional data have been collected or created. If possible, the responsible authority must comply immediately with any request, or within ten working days of the date of the request if immediate compliance is not possible. The responsible authority may require the requesting person to pay the actual cost of making and certifying copies. Minn. Stat. § 13.04, subd. 3.

ii. *Inaccurate data*

An individual subject of data may contest its accuracy or completeness. To exercise this right the individual must notify the responsible authority in writing, describing the nature of the disagreement. In most cases, the responsible authority must then either correct any data found to be inaccurate or incomplete and notify past recipients of inaccurate or incomplete data, or notify the individual that the authority believes the data are correct. Minn. Stat. § 13.04, subd. 4. Data in dispute shall be disclosed only if the individual's statement of disagreement is included with the disclosed data. The determination of the responsible authority may be appealed pursuant to

the provisions of the Administrative Procedure Act relating to contested cases. Data on individuals that have been successfully challenged by an individual must be completed, corrected, or destroyed by the board, depending on the nature of the inaccuracy.

3. Rights of Third Persons to Discover Data

Upon request to a responsible authority or designee, a person must be permitted to inspect and copy public government data at reasonable times and places, and, upon request, shall be informed of the data's meaning. Minn. Stat. § 13.03, subd. 3. Unless authorized by statute, an agency or board cannot require a person to identify himself, state a reason for, or justify a request to gain access to public government data. Minn. Stat. § 13.05, subd. 12.

No fee may be charged to inspect data. Minn. Stat. § 13.03, subd. 3(a). Inspection includes, but is not limited to, the visual inspection of paper and similar types of government data. It does not include printing copies unless printing a copy is the only method to permit inspection of the data. If data are stored by the government entity in electronic form and made available to the public on a remote-access basis, inspection includes remote access to the data by the public and the ability to print copies of or download the data on the public's own computer equipment. If the government entity has a specific grant of statutory authority, it may charge a reasonable fee for remote access to data. A government entity may charge a fee for remote access to data where either the data or the access is enhanced at the request of the person seeking access. Minn. Stat. § 13.03, subd. 3(b). If a person requests copies or electronic transmittal of the data to the person, the responsible authority must provide copies, but he or she may require the requesting person to pay the actual costs of searching for and retrieving the government data, including the cost of employee time and the costs of making, certifying, compiling and transmitting the copies. If 100 or fewer pages of black and white, letter- or legal-size paper are requested, however, actual costs cannot be charged. Instead, the responsible authority may charge no more than 25 cents for each page copied. The authority may not charge for separating public from not public data. If copies are not able to be provided when a request is made, the

responsible authority shall provide them as soon as reasonably possible. Minn. Stat. § 13.03, subd. 3(c).

If the responsible authority maintains public government data in a computer storage medium, the agency must provide, upon request, a copy of public data contained in that medium, in electronic form, if a copy can reasonably be made. However, data only has to be provided in the same electronic format or program used by the agency. Minn. Stat. § 13.03, subd. 3(e).

If the responsible authority determines that the requested data are classified so as to deny the requesting person access, the responsible authority must inform the requesting person of the determination either orally when the request is made, or in writing as soon after the request as possible. When denying access, the responsible authority must cite the specific statutory section, temporary classification, or specific provision of federal law on which the determination is based. Upon the request of any person denied access, the responsible authority is required to certify in writing that the request has been denied and identifying the legal basis for the denial. Minn. Stat. § 13.03, subd. 3(f).

Data disseminated by the judicial branch to government entities have the same level of accessibility in the hands of the agency receiving it as it has in the hands of the judicial branch entity providing it. Minn. Stat. § 13.03, subd. 4(c).

If a state agency opposes discovery of government data on the grounds that the data are not public, a party seeking access to the data may bring an action to compel discovery before the appropriate presiding judicial officer or ALJ. The judge must first decide whether the data are discoverable or releasable pursuant to the rules of evidence and of criminal, civil, or administrative procedure appropriate to the action. If the data are discoverable, the judge must then decide "whether the benefit to the party seeking access to the data outweighs any harm to the confidentiality interests of the agency maintaining the data, or of any person who has provided the data or who is the subject of the data, or to the privacy of an individual identified in the data." *Montgomery Ward & Co. v. Cnty. of Hennepin*, 450 N.W.2d 299, 306 (Minn. 1990). In making this decision the judge is required to consider whether notice to the subject of the data

is warranted, and may fashion and issue any protective orders necessary to assure proper handling of the data by the parties. Minn. Stat. § 13.03, subd. 6. The Minnesota Supreme Court has held that failure to use this two-prong analysis is an abuse of discretion.

4. Dissemination

Private data may be used and disseminated to any person or agency if the individual subject of the data has given informed consent. Informed consent may be given by signing a consent statement. Whether a data subject has given informed consent shall be determined by rules of the Commissioner of Administration. Minn. Stat. § 13.05, subd. 4(d). Private data may also be disseminated as authorized by law and to individuals within the agency whose job duties reasonably require access to it.

The Legislature allows government entities, in consultation with appropriate law enforcement, emergency management, or other officials to share security information to "aid public health, promote public safety, or assist law enforcement." Minn. Stat. § 13.37, subd. 3(b).

5. Licensing Data

The licensing data section of the MGDPA is frequently encountered by state boards. "Licensing agency" means any board, department, or agency with statutory authority to issue professional or other types of licenses, except those administered by the Commissioner of Human Services. Minn. Stat. § 13.41. Data collected by a licensing agency during an active investigation of complaints against a licensee are confidential. The identities of complainants who have made reports concerning licensees are private data and can be released only if the complainant consents. When a licensing agency has completed its work on a case, the data become inactive investigative data, which are private. Minn. Stat. § 13.39, subd. 3. Orders for hearing, findings of fact, conclusions of law, and final disciplinary actions are generally considered public. If the licensee and the licensing agency settle the dispute in writing, the agreement is public.

A board must include in its final order only those findings of fact that form the basis for disciplinary action. In *Doe v. Minnesota State Board of Medical Examiners*, 435 N.W.2d 45

(Minn. 1989), the Board of Medical Examiners found that a doctor engaged in misconduct by misprescribing medication and the board dismissed the remaining charges of sexual improprieties with former patients. The board released portions of the decision relating to the dismissed charges of sexual improprieties. The Supreme Court held that a "final decision" of the board following a contested-case disciplinary action includes its "finding of fact, conclusions of law and order," and that document is a public document. But the Court also held it was improper for the board to incorporate in its final decision the discussion of the dismissed charges because the board's rule limited the scope of data that can be made public in a final decision. The doctor was awarded attorney fees pursuant to Minn. Stat. § 13.08, subd. 4(a).

6. Investigative Data

Data collected by state boards as part of an active investigation undertaken to commence or defend a pending civil legal action, or which are retained in anticipation of a pending civil legal action, are protected nonpublic data (data not on individuals) or confidential (data on individuals). A "pending civil legal action" includes but is not limited to judicial, administrative, or arbitration proceedings. Whether a civil legal action is pending should be determined by the board's attorney. State boards may, however, make otherwise confidential or nonpublic data accessible to any person, agency, or the public if a board determines that access will aid law enforcement, promote public health or safety, or dispel widespread rumor which poses a threat. Minn. Stat. § 13.39.

7. Personal Contact and Online Account Information

Subject to limited exceptions, the following data on an individual collected, maintained, or received by a government entity for notification purposes or as part of a subscription list for an entity's electronic periodic publications as requested by the individual are private data on individuals: (1) telephone number; (2) e-mail address; and (3) Internet user name, password, Internet protocol address, and any other similar data related to the individual's online account or access procedures. Minn. Stat. § 13.356.

8. Penalties for Violating the Act

a. Board liability

Violating the MGDPA may subject the state agency and individual state officers or employees to a variety of civil sanctions. A board that violates any provision of the act is liable to a person or representative of a decedent who suffers any damages as a result of the violation. An action may be brought to recover any damages sustained, plus costs and reasonable attorney fees. Minn. Stat. § 13.08, subd. 1. In the case of a willful violation the board is additionally liable for exemplary damages of not less than $1,000 nor more than $15,000 for each violation. The state is deemed to have waived any immunity to a cause of action brought under the MGDPA. The responsible authority may also be enjoined by the district court to stop further violations of the MGDPA. In addition, any aggrieved person may bring an action in district court to compel compliance with the MGDPA and may recover costs and disbursements, including reasonable attorney fees, or seek administrative remedies under Minn. Stat. § 13.085 (*see* paragraph 9 of this section). If the court determines the action is frivolous, it may award reasonable costs and attorneys' fees to the responsible authority. Courts can also impose a civil penalty of up to $1,000 against the government entity if an order to compel compliance is issued. Minn. Stat. § 13.08, subd. 4.

In any action involving a request for government data under sections 13.03 or 13.04, the court may inspect *in camera* the government data in dispute but must conduct its hearing in public and in a manner that protects the security of data classified as not public. An agency that releases data pursuant to the order of a presiding judicial officer is immune from civil and criminal liability for the data's release. Minn. Stat. §§ 13.03, subd. 6, 13.08, subd. 5.

b. Individual liability

Any person who willfully violates the MGDPA or any rules adopted under it is guilty of a misdemeanor. Willfully violating the MGDPA by any public employee constitutes just cause for suspension without pay or dismissal of the public employee. Minn. Stat. § 13.09.

9. Opinions by the Commissioner of Administration

A government entity such as a state board may request an opinion from the Commissioner of Administration on any question relating to public access to government data, rights of subjects of data, or classification of data under Minn. Stat. ch. 13 or other state statutes governing government data practices. An opinion of the Commissioner of Administration may also be requested by any individual who disagrees with a determination regarding data practices made by a government entity regarding the individual's rights as a subject of government data or right to access to government data. Opinions issued by the Commissioner are not binding on the government entity whose data is the subject of the opinion, but they must be given deference by a court in a proceeding involving the data. Minn. Stat. § 13.072. A person may bring any other action in addition to, or instead of, requesting a written opinion.

In determining whether to assess a penalty for an MGDPA violation, the court will consider whether the government entity acted in conformity with a written opinion of the Commissioner. Minn. Stat. § 13.08, subd. 4(b). A court or other tribunal shall award reasonable attorney fees to a prevailing plaintiff who has brought an action in district court under Minn. Stat. § 13.08, subd. 4, or as an administrative remedy under Minn. Stat. § 13.085, if the government entity that is the defendant was the subject of a written opinion of the Commissioner and the court or ALJ finds that the opinion is directly related to the cause of action being litigated and that the government entity did not act in conformity with the opinion. Minn. Stat. §§ 13.08, subd. 4(c), 13.085, subd. 6(b).

10. Administrative Remedies for Certain Violations of the Minnesota Government Data Practices Act

Minnesota law provides for administrative remedies for certain violations of the MGDPA. A person may bring an action to compel compliance with the MGDPA at the Office of Administrative Hearings. Minn. Stat. § 13.085, subd. 3. The complaint must be filed with the Office of Administrative Hearings within two years after the occurrence of the act, or failure to act, that is the subject of the complaint. An exception exists if the act or failure to act involves

concealment or misrepresentation that could not be discovered during the two-year period. In those instances, the complaint may be filed within one year after discovering the concealment or misrepresentation. The complaint must be accompanied by a $1,000 filing fee or a bond to guarantee payment of the fee.

After receiving the complaint, the Office of Administrative Hearings must immediately notify the respondent by certified mail and expeditiously provide the respondent with a copy of the complaint. The Office of Administrative Hearings must also notify the Commissioner of Administration. Proceedings must be dismissed if a request for an opinion from the Commissioner of Administration was accepted on the matter under Minn. Stat. § 13.072 before the complaint was filed, and the complainant's filing fee must be returned or must be refunded.

The respondent must file a response within 15 business days of receipt of the notice of the complaint. The ALJ will then either dismiss the complaint or schedule a hearing within 30 days.

If a complaint is dismissed, a party may seek reconsideration by the Chief ALJ.

When a case proceeds to hearing, hearings are open to the public, unless the matter involving a request for nonpublic government data, in which case the ALJ may conduct a closed hearing and take other measures to maintain the record in a manner that protects the securities of the not public data. Minn. Stat. § 13.085, subd. 4. Within ten business days after the hearing record closes, the ALJ must determine whether the violation alleged in the complaint occurred and must make at least one of five possible dispositions: (1) dismiss the complaint; (2) find that a MGDPA violation; (3) impose a civil penalty of up to $300; (4) issue an order compelling compliance; and (5) refer the complaint to the appropriate prosecuting authority for consideration of criminal charges. Minn. Stat. § 13.085, subd. 5.

A party aggrieved by the final decision is entitled to judicial review under Minn. Stat. §§ 14.63-.69. But proceedings are not considered contested cases within the meaning of Minn. Stat. ch. 14 and are not otherwise governed by Minn. Stat. ch. 14. An order issued by an ALJ is enforceable through the district court in the judicial district where the respondent is located.

The outcome of the administrative proceedings is not controlling in any subsequent action for damages brought in district court on the same matter. A government entity that releases not public data pursuant to an order is not liable for compensatory or exemplary damaged awards or awards of attorney fees in district court actions brought under Minn. Stat. § 13.08 or Minn. Stat. § 13.09.

There is a rebuttable presumption that a complainant who substantially prevails on the merits is entitled to an award of reasonable attorney fees, not to exceed $5,000. Attorney fees will be denied if the violation is found to be merely technical in nature or genuine uncertainty exists about the meaning of the governing law. Reasonable attorney fees shall be awarded to a substantially prevailing plaintiff who has brought an action if the government entity that is the respondent in this action was also subject of a written opinion issued under Minn. Stat. § 13.072, the ALJ finds the opinion is directly related to the matter in dispute, and the government entity did not act in conformity with the opinion.

The Office of Administrative Hearings must refund the filing fee of a prevailing complainant, less $50. Costs associated with the hearing are billed to the respondent, not to exceed $1,000. A complainant who does not substantially prevail on the merits shall be entitled to a refund of the filing fee, less any costs incurred by the Office of Administrative Hearings in conducting the matter. If the complaint was frivolous, without merit, and lacked a factual basis, the complainant must pay the respondent's reasonable attorney fees, not to exceed $5,000, and the complainant is not entitled to a refund of the filing fee.

MINNESOTA GOVERNMENT DATA PRACTICES ACT

Public	**Private**	**Confidential**
All data that are not made private or confidential by state or federal law	*Accessible to data subject but not the public*	*Not accessible to data subject or public*
Applicant name and address		
Application data submitted by *licensees*	Data submitted by licensure *applicants*, except for names and addresses	
Orders for hearing, unless specifically exempt by statute	*Inactive* investigative data	*Active* investigative data
Findings of fact, conclusions of law, and stipulated agreements		
Disciplinary orders and the record of disciplinary hearing if hearing was public	Name of complainant when it appears in inactive investigative data	
Board staff and consultants: name; salary or contract fees; pension and benefits information; expense and other reimbursement paid; job title and description; education, training and work experience; dates of employment; existence and status of any complaints and final disciplinary action, including reasons therefor; payroll records, work phone number, and designated address	Information relating to unsubstantiated complaints Patient names and patient records Record of disciplinary proceeding except for items classified as public All other data on staff and consultants are private, including unsubstantiated complaints, record of disciplinary proceeding, and non-designated address	
Job applicants: veteran status; test scores; eligibility ranking; job history; education and training; names of job finalists	Names of job applicants, except for finalists	
"Data not on individuals" are public under Minn. Stat. § 13.03. Minn. Dep't of Admin. Adv. Op. Nos. 02-038, 03-004.	"Data on individuals" listed in Minn. Stat. § 13.41, subd. 2, are private. Minn. Dep't of Admin. Adv. Op. Nos. 02-038, 03-004.	

E. Ethics In Government

Many state statutes address ethics in government, some of which apply to members and employees of state boards. The statutes that primarily affect state boards are the statutes in Minn. Stat. ch. 10A (Ethics in Government Act) and Minn. Stat. § 43A.38 (Code of Ethics for Employees in Executive Branch). If a conflict occurs between section 43A.38 and chapter 10A, the provisions of chapter 10A take precedence. The provisions in chapter 10A are enforced by the Campaign Finance and Public Disclosure Board ("CFPDB"), which regulates lobbying, conflicts of interests, political committees, and campaign funding practices. The CFPDB is authorized to investigate any alleged violations of the chapter and to determine whether probable cause exists to believe a violation has occurred.

1. Conflicts of Interest

Minn. Stat. § 10A.07 governs conflicts of interest. It provides that any public official who, in discharging official duties, would be required to take an action or make a decision which would substantially affect the official's financial interests or those of an associated business must follow specified procedures. Section 10A.01, subdivision 35, defines "public official" to include any member, chief administrative officer or deputy chief administrative officer of a state board that either has the power to adopt, amend or repeal rules, or has the power to adjudicate contested cases or appeals; managers of watershed districts; and members of a watershed management district; and supervisers of soil and water conservation districts.[5] The procedures are not required when the effect on the official is no greater than on other members of the public official's business classification, profession, or occupation.

[5] Certain state boards such as the Council on Asian-Pacific Minnesotans, the Council for Minnesotans of African Heritage, the State Council on Disabilities, the Law Examiners Board, the Ombudsperson for Families, the Ombudsperson for Mental Health and Developmental Disabilities, and the Minnesota Council on Latino Affairs, do not have the power to adopt, amend or repeal rules or the power to adjudicate contested cases or appeals. Therefore, members or administrative officers of those boards are not subject to the requirements of chapter 10A that apply to "public officials." But all employees of the executive branch are subject to the requirements of Minn. Stat. § 43A.38. Questions regarding whether an individual is an employee in the executive branch can be directed to your board's counsel.

When faced with a potential conflict of interest, the public official must give notice and not participate in the action giving rise to the potential conflict of interest. Minn. Stat. §§ 10A.07, 43A.38, subd. 7. Notice is given by completing a conflict-of-interest form and delivering copies of the form to the CFPDB and to the official's immediate superior. If insufficient time exists to file the notice in advance, then the public official must orally inform the superior and file the required written notice within one week of learning of the potential conflict.

A public official who has a potential conflict of interest should remove himself from the conflict. In the case of a decision made by a state board, a member cannot "chair a meeting, participate in any vote, or offer any motion or discussion on the matter giving rise to the potential conflict of interest." Minn. R. 4515.0500.

The question arises whether abstention is sufficient without complying with the notice provision. In 1987, the Minnesota Supreme Court implied that both steps were required of a public utilities commissioner faced with a conflict of interest. *In re Petition of N. States Power Co.*, 414 N.W.2d 383, 386 (Minn. 1987). The Court's comments were dicta, however, so some ambiguity remains.

Upon request of an individual, the CFPDB is authorized to publish advisory opinions on any of the requirements of chapter 10A based on real or hypothetical situations. An individual may, in good faith, rely on an advisory opinion response. A written advisory opinion issued by the CFPDB is binding on the CFPDB in any subsequent CFPDB or judicial proceeding brought against the person who requested the opinion or was covered in the request, unless the opinion has been amended or revoked, or the requester omitted or misstated material facts. If the CFPDB intends to apply new principles of law or policy from the opinion more broadly, the CFPDB must adopt rules. Nevertheless, the CFPDB advisory opinions are useful guides to boards with questions regarding chapter 10A. The opinions are available on the CFPDB's website: *http://www.cfboard.state.mn.us/*.

Substantially similar conflict-of-interest provisions apply to all employees in the executive branch under Minn. Stat. § 43A.38.[6] If an executive branch employee is faced with the potential for a conflict of interest, it is the employee's duty to avoid the situation. If the employee or the appointing authority determines that a conflict exists, the matter must be assigned to another employee if possible. If reassignment is not possible, interested persons must be notified of the conflict. The statute enumerates several situations that are deemed to be conflicts of interest.

The Agricultural Chemical Compensation Board has an additional board-specific conflict-of-interest rule. If a board member has a direct or indirect financial or employment interest relating to a matter before the board that is likely to affect the member's impartiality, that member must make the interest known and refrain from participating in or voting on the matter. The abstention of a board member or members does not prevent the remaining members from conducting a legal vote. Minn. R. 1512.0500.

2. Statements of Economic Interest

Under Minn. Stat. § 10A.09, public officials are required to file statements of economic interest. A public official must file a statement of economic interest with the CFPDB within 60 days of the effective date of appointment to the state board. The statement is made on a form prescribed by the CFPDB which calls for the following information: name, address, occupation, and principal place of business; the name of each associated business[7] and the nature of that association; a listing of all real property within the state, excluding homestead property, in which the individual holds an interest valued in excess of $2,500 or an option to buy property worth $50,000 or more; a listing of all securities in which the official's share has a market value of $2,500 or more; a listing of all real property in the state in which a partnership of which the

[6] The Minnesota Historical Society is not considered part of the executive branch for purposes of section 43A.38. Minn. Stat. § 43A.02, subd. 22.

[7] "Associated Business" means any association in connection with which the individual is compensated in excess of $50 except for actual and reasonable expenses in any month as a director, officer, owner, member, partner, employer or employee, or is a holder of securities worth $2,500 or more at fair market value. Minn. Stat. § 10A.01, subd. 5.

individual is a member holds a value in excess of $2,500 or an option to purchase property worth $50,000 or more; and a listing of any investments and property interests held by the official or an immediate family member in the United States or Canada connected with pari-mutuel horse racing. The CFPDB has interpreted this statute to require reporting of all investments, including shares of stock and mutual funds.

Each individual required to file a statement of economic interest must file a supplementary statement on April 15 of each year that he or she remains in office, if information on the most recently filed statement has changed. If a supplementary statement is required, it shall include the amount of each honorarium in excess of $50 received since the previous statement, together with the name and address of the source of the honorarium.

3. Gifts

Minn. Stat. § 10A.071, subd. 2, prohibits public officials from accepting any gifts whatsoever from lobbyists or their employers, with very minor exceptions. Most professional associations are lobbyists, or employers of lobbyists, for these purposes.

A gift is defined as "money, real or personal property, a service, a loan, a forbearance or forgiveness of indebtedness, or a promise of future employment, that is given and received without the giver receiving consideration of equal or greater value in return." Minn. Stat. § 10A.071, subd. 1(b). This broad rule includes entertainment, loans of personal property for less than payment of fair market value, preferential treatment for purchases or honoraria, and food or beverages provided at a meeting, unless the public official is appearing to make a speech or answer questions as part of a program.[8]

[8] Some exceptions to the gift prohibition include:

a. services to assist an official in the performance of official duties,
b. services of insignificant monetary value,
c. a plaque or similar memento recognizing individual services in a field of specialty or to a charitable cause,
d. a trinket or memento of insignificant value, or
e. informational material of unexceptional value.

Again, Minn. Stat. § 43A.38 has substantially similar provisions prohibiting all executive branch employees from accepting any payment of expense, compensation, gift, reward, gratuity, favor, service or promise of future employment or other future benefit from *any source,* except the state, for any activity related to the duties of the employee unless otherwise provided by law. Specific exceptions to the prohibition are enumerated in the statute. There is also a prohibition on gifts related to state contracts. Minn. Stat. § 15.43, subd. 1.

4. Lobbyist Registration

Minn. Stat. § 10A.03 requires lobbyists to register with the CFPDB. A lobbyist is defined by Minn. Stat. § 10A.01, subd. 21, and does not include state employees or "public officials." Therefore, in general, members and employees of state boards appearing before the Legislature in connection with board business are not considered lobbyists under the statute and need not register with the CFPDB. But if a state board member appears before the Legislature under other circumstances, registration as a lobbyist may be required by section 10A.03.

5. Use of State Time, Resources, and Information

a. Confidential information

Minn. Stat. § 43A.38, subd. 3, prohibits an executive branch employee from using confidential information to further the employee's private interest and from accepting outside employment or involvement in a business or activity that will require the employee to disclose or use confidential information.

b. Property, time, and supplies

Section 43A.38, subdivision 4, prohibits a state employee from using or allowing the use of state time, supplies, property, or equipment to be used for the employee's private interests or any other use not in the interest of the state, except as provided by law. This includes the use of state stationery, postage, telephones, WATTS lines, electronic mail, fax machines, and photocopying equipment. The fact that the non-state use does not increase the cost to the state is not an exception to the rule, nor is prompt reimbursement of any costs that may be inadvertently incurred.

One small exception to this general rule has been carved out regarding use of electronic communication (i.e., electronic mail). Executive branch employees may use state time, property, or equipment to communicate electronically with other persons provided that the use, including the value of the time spent, results in no incremental cost to the state or results in an incremental cost that is so small as to make accounting for it unreasonable or administratively impracticable.

6. Political Activity

The Fair Campaign Practices Act, Minn. Stat. § 211B.09, provides that an employee or official of the state may not use official authority or influence to compel a person to apply for membership in or become a member of a political organization, to pay or promise to pay a political contribution, or to take part in political activity. Using an official position to influence political activity is also prohibited in Minn. Stat. § 43A.32, subd. 1.

7. Gubernatorial Appointees

Past governors have issued executive orders that establish a code of ethics for appointees of the governor. The past orders have strongly paralleled the code of ethics for executive branch employees in the areas of conflicts of interest, gifts, use of state time, resources and information, and political activity. In the past, some executive orders have contained stricter provisions.

The provisions discussed above establish ethical principles to preserve public confidence in the integrity of government officials. The intent is to eliminate any potential conflicts of interest, the appearance of impropriety, or influence in government. All board members are encouraged to be cognizant of these prohibitions.

F. The Equal Access to Justice Act

The Equal Access to Justice Act, Minn. Stat. § 15.471-.474, was enacted by the Legislature in 1986. The key provision of the Act is found at Minn. Stat. § 15.472(a), which states:

> If a prevailing party other than the state, in a civil action or contested case proceeding other than a tort action, brought by or against the state, shows that the position of the state was not substantially justified, the court or administrative law

judge shall award fees and other expenses to the party unless special circumstances make an award unjust.

"Party" means a person named or admitted as a party in a court action or contested case proceeding, who is a small business, including a partner, officer, shareholder member or owner. Minn. Stat. § 15.471, subd. 6. "State" is defined as "the State of Minnesota or an agency or official of the state acting in an official capacity." Minn. Stat. § 15.471, subd. 7. "Fees" includes attorney fees not to exceed $125 per hour. Minn. Stat. § 15.471, subd. 5(c). "Substantially justified" means "the state's position had a reasonable basis in law and fact, based on the totality of the circumstances before and during the litigation or contested case proceeding." Minn. Stat. § 15.471, subd. 8. That a party prevailed on the merits in an action against the state does not automatically mean that the state's position was not "substantially justified." *Donovan Contracting v. Minn. Dep't of Transp.*, 469 N.W.2d 718, 720-21 (Minn. Ct. App. 1991).

There is some question whether this statute applies in licensing proceedings because the law focuses on small businesses and a license is typically held in a person's individual capacity. Licensees could, however, argue that it does apply to them. Thus, if a complaint committee brings a disciplinary case and does not prevail, the licensee may bring an action under the Equal Access to Justice Act for costs and attorney fees. To succeed, however, the licensee must demonstrate that the complaint committee's position had no reasonable basis in law and fact and that the licensee is a "party" as defined in the Act.

The term "expenses" includes filing fees, subpoena fees and mileage, transcript costs and court reporter fees, expert witness fees, photocopying and printing costs, postage and delivery costs, and service of process fees. It also includes the reasonable cost of any "study, analysis, engineering report, test or project" incurred by a party in the litigation. Minn. Stat. § 15.471, subd. 4.

G. Litigation Involving Boards

Federal and state discovery rules obligate organizations to preserve documents and other information relevant to potential or pending litigation. If there is potential or pending litigation

involving a board, the Attorney General's Office may send a litigation hold notice reminding the board of its ongoing duty to preserve all documents and electronically-stored information that may be relevant to the litigation. It is the board's responsibility to implement the litigation hold and ensure that individuals with relevant information preserve it throughout the course of any litigation. A board's failure to implement a litigation hold and ensure the continued preservation of all relevant information while litigation is pending or reasonably anticipated may result in the imposition of severe sanctions against the board. Possible sanctions may include monetary penalties, and exclusion of evidence.

H. Tort Claims

A "tort" is a non-contractual civil wrong that is generally defined as the violation of a duty of care owed to a party which results in damage to property, personal injury, or death. The liability of board members for tortuous acts is controlled by Minn. Stat. §§ 3.732-.756. Section 3.736, subdivision 1, provides as follows:

> The state will pay compensation for injury to or loss of property or personal injury or death caused by an act or omission of an employee of the state while acting within the scope of office or employment . . . and who is acting in good faith . . . under circumstances where the state, if a private person, would be liable to the claimant, whether arising out of a governmental or proprietary function. Nothing in this section waives the defense of judicial, quasi-judicial or legislative immunity except to the extent provided in subdivision 8.

For purposes of section 3.736, "state" includes each of the departments, boards, agencies, commissions, courts, and officers in the executive, legislative, and judicial branches of the State of Minnesota. Minn. Stat. § 3.732, subd. 1(1). An "employee of the state" includes all present or former officers, members, directors, or employees of the state. Minn. Stat. § 3.732, subd. 1(2). Rulings of personal liability against board members, however, are rare.

Under the above definitions, state boards are the "state" and their members and employees are "employees of the state" for purposes of the Tort Claims Act.

1. Liability Under Minnesota Statutes and Common Law

a. Statutory exclusions from liability

The Tort Claims Act contains several exclusions so that boards and board members are immune from tort liability for several kinds of conduct. The following exclusions apply to the activities of state boards: good faith immunity; discretionary immunity; and, when applicable, licensing immunity. Minn. Stat. § 3.736, subd. 3.

i. *Good faith immunity*

Good faith immunity provides immunity for "a loss caused by an act or omission of a state employee exercising due care in the execution of a valid or invalid statute or rule." Minn. Stat. § 3.736, subd. 3(a). Good faith immunity applies when, as a matter of law, an employee of the state has a duty to act and exercises due care in executing that duty. *Johnson v. Dirkswager*, 315 N.W.2d 215, 223 (Minn. 1982).

ii. *Statutory discretionary immunity*

Statutory discretionary immunity provides immunity for "a loss caused by the performance or failure to perform a discretionary duty, whether or not the discretion is abused." Minn. Stat. § 3.736, subd. 3(b). The doctrine of statutory discretionary immunity recognizes that the courts, through the vehicle of a negligence action, are not an appropriate forum to review and second guess the acts of government which involve the exercise of judgment or discretion. *Cairl v. State*, 323 N.W.2d 20, 24 (Minn. 1982). In determining whether statutory discretionary immunity shield the state and its employees, courts distinguish between "planning" and "operational" decisions. *Holmquist v. State*, 425 N.W.2d 230, 232 (Minn. 1988); *Hansen v. City of St. Paul*, 214 N.W.2d 346, 350 (Minn. 1974). "Decisions intended to be protected by discretionary immunity are those made upon the planning level of conduct." *Larson v. Ind. Sch. Dist. No. 314, Braham*, 289 N.W.2d 112, 120 (Minn. 1979).

"Planning level decisions are those involving questions of public policy, that is, the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy . . . . Sometimes the implementation of a policy itself requires policy-making."

Holmquist v. State, 425 N.W.2d 230, 232, 234 (Minn. 1988). In contrast, "operational level" decisions include scientific or professional decisions that do not involve balancing of policy with political, economic and social considerations. *Nusbaum v. Blue Earth Cnty.*, 422 N.W.2d 713, 720 (Minn. 1988).

In response to misconduct allegations, the Minnesota Court of Appeals stated:

> Determinations [of] appropriate action to take under these circumstances were necessarily beset with policy-making considerations. For example, management needed to consider the importance of maintaining a workplace free of sexual harassment and the importance of deterring future misconduct. But while considering these policies, management may also have weighed competing policies, such as avoiding unnecessary disruption of the workplace and imposing discipline for alleged harassment only upon the establishment of substantial cause, both for the sake of staff and for protection from expense associated with proceedings premised on a claim of wrongful discipline. …
>
> [I]nvestigation and disciplinary decisions involved the type of legislative or executive policy decisions that we believe must be protected by discretionary immunity. The center's decisions did not simply require the application of professional judgment to a given set of facts, but were necessarily entwined in a layer of policy-making that exceeded the mere application of rules to facts.

Oslin v. State, 543 N.W.2d 408, 416 (Minn. Ct. App. 1996).

Statutory discretionary immunity does not apply to whistleblower claims against boards. *See Janklow v. Minn. Bd. of Exam'rs*, 552 N.W.2d 711, 716-18 (Minn. 1996) (holding that the Whistleblower Act operates as an implied waiver of the statutory immunity provision of Minn. Stat. § 3.736); *Carter v. Peace Officers Standards & Training Bd.*, 558 N.W.2d 267, 269 (Minn. Ct. App. 1997) (concluding that statutory immunity is not available to the Board as a defense to the Whistleblower Act).

iii. *Licensing immunity*

Licensing immunity provides immunity for "a loss based on the failure of a person to meet the standards needed for a license, permit, or other authorization issued by the state or its agents." Minn. Stat. § 3.736, subd. 3(k). The application of licensing immunity is not limited to actions taken with respect to the issuance of a license.

Minn. Stat. § 3.736, subd. 3(k), also immunizes the state and its employees against allegations arising from its licensing activities, including inspections, evaluations, supervision, and related functions. *See Andrade v. Ellefson*, 391 N.W.2d 836, 837 (Minn. 1986) (holding that county was immune from liability for claims of negligent licensing, inspection, and supervision); *Gertken v. State*, 493 N.W.2d 290, 292-93 (Minn. Ct. App. 1992) (holding that state was immune from liability for claims of negligent advice related to licensing standards during licensing inspection). In short, immunity applies if the actions in question were directly related to the scope of the subject matter considered or involved in the issuance of the license. *Id.* at 292.

In addition to those immunities provided by the Tort Claims Act, a second source of statutory immunity provided by the Legislature to protect boards and their members is found in the individual practice acts of the boards. For example, Minn. Stat. § 147.121, subd. 2, provides immunity from civil liability and criminal prosecution for members of the Board of Medical Practice and employees and consultants retained by the board for actions taken relating to their duties under the practice act.

b. Common law exclusions from liability

In addition to statutorily afforded immunity for tort actions, board members are certain common law immunities further protect against claims of allegedly tortious conduct. The most common forms of immunities for board members are discussed below.

i. *Official immunity*

The doctrine of official immunity protects from personal liability a public official charged by law with duties that call for exercising of judgment or discretion, unless the official is guilty of a willful or malicious wrong. *Elwood v. Cnty. of Rice*, 423 N.W.2d 671, 677 (Minn.

1988); *Rico v. State*, 472 N.W.2d 100, 106-07 (Minn. 1991). Although the discretionary immunity afforded under the Tort Claims Act and the common law doctrine of official immunity both protect discretionary acts, "discretion" has a broader meaning in the context of official immunity. "Official immunity involves the kind of discretion which is exercised on an operational rather than a policymaking level, and it requires something more than the performance of 'ministerial duties.'" *Pletan v. Gaines*, 494 N.W.2d 38, 40 (Minn. 1992).

Official immunity is not granted for ministerial duties. *Ireland v. Crow's Nest Yachts, Inc.*, 552 N.W.2d 269, 272 (Minn. Ct. App. 1996). Ministerial duties have been defined as duties "in which nothing is left to discretion . . . a simple, definite duty arising under and because of stated conditions and imposed by law." *Cook v. Trovatten*, 274 N.W. 165, 167 (Minn. 1937).

The discretionary immunity provided by the Tort Claims Act is designed primarily to protect the separation of powers by insulating executive and legislative policy decisions from judicial review through tort actions. Official immunity, however, is "intended to insure that the threat of potential personal liability does not unduly inhibit the exercise of discretion required by public officials in the discharge of their duties." *Holmquist v. State*, 425 N.W.2d 230, 233 n.1 (Minn. 1988); *Rico*, 472 N.W.2d at 107. While official immunity ordinarily applies to the decisions of individuals, it also applies to policies adopted by a committee. *See Anderson v. Anoka Hennepin Indep. Sch. Dist*., 678 N.W.2d 651 (Minn. 2004) (addressing policy adopted by committee of shop leaders on use of table saws).

ii. *Vicarious official immunity*

The doctrine of official immunity can be extended to protect the government employer from liability for the acts of its employees. In this regard, the Minnesota Supreme Court has recognized the doctrine of vicarious official immunity to avoid defeating the purpose of official immunity in cases where a claimant sues the governmental employer based upon the alleged negligence of its employee. *Pletan*, 494 N.W.2d at 42. Whether to extend official immunity to the government employer is a policy question. *Ireland*, 552 N.W.2d at 272. In determining whether official immunity extends to the employer, "[t]he relevant inquiry is whether, if no

immunity were granted, the public employee would think that his performance was being evaluated so as to 'chill' the exercise of his independent judgment." *Id.*

iii. *Quasi-judicial immunity*

"[J]udicial immunity is an immunity from suit, not just from ultimate assessment of damages." *Mireles v. Waco*, 502 U.S. 9, 11 (1991). The only two circumstances in which judicial immunity is unavailable are: (1) when a judge's action is not taken in the judge's judicial capacity; and (2) when a judge's action is taken in the complete absence of all jurisdiction. *Id.* But for these two narrow exceptions, judicial immunity completely protects a judge from suit based on judicial decision making.

Licensing boards act in a quasi-judicial capacity when making decisions involving the imposition of remedial sanctions against a licensee. When performing this function, there is a strong argument that licensing boards and their members are entitled to quasi-judicial immunity. This immunity is the functional equivalent of judicial immunity and it would provide complete protection for a board and its members.

c. Punitive damages

As a general rule, punitive damages may not be assessed against a governmental entity absent statutory authority. *See generally* 1 Am. Law Reports 4th 448, 453. Under the Minnesota Tort Claims Act, the state is immune from paying punitive damages: "The state will not pay punitive damages." Minn. Stat. § 3.736, subd. 3. The Attorney General's Office has argued in certain court cases that because punitive damages are normally awarded to punish a guilty party for the benefit of society, recovery of punitive damages against the government would contravene public policy in that payment of said damages would be forced upon innocent taxpayers.

While it is clear that the state cannot be forced to pay punitive damages for tort claims, because there have been no court decisions on the point, it is less clear whether this prohibition applies to punitive damages awarded against individual employees.

d. Liability limits

Minn. Stat. § 3.736, subd. 4, establishes that the total liability dollar cap of the state and its employees acting within the scope of their employment on any tort claim shall not exceed $500,000 per individual and $1,500,000 for any number of claims arising out of a single occurrence.

Although municipalities, counties, and school boards often purchase liability insurance to cover tort claims, the state generally does not. Pursuant to Minn. Stat. § 3.736, subd. 8, the purchase of insurance waives the state's liability limits under the Tort Claims Act "to the extent that valid and collectible insurance . . . exceeds those limits and covers the claim." *Id.*; *see also Pirkov-Middaugh v. Gillette Children's Hosp.*, 495 N.W.2d 608, 611 (Minn. 1993).

In 2003, the Legislature amended Minn. Stat. § 604.02, subd. 1 to eliminate joint and several liability for defendants found to be less than 50 percent at fault.

e. Indemnification

The Tort Claims Act sets forth the standard for when the state will defend, save harmless, and indemnify any employee of the state against expenses, attorney's fees, judgments, fines, and amounts paid in settlement in connection with any tort, civil, or equitable claim or demand. Minn. Stat. § 3.736, subd. 9. In summary, the standard requires that the officer or employee: (1) meets the definition of "employee of the state," which includes board members; (2) was acting within the scope of his or her employment; and (3) provides complete disclosure and cooperation in the defense of the claim or demand. Minn. Stat. § 3.736, subd. 9.

"'Scope of office or employment' means that the employee was acting on behalf of the state in the performance of duties or tasks lawfully assigned by competent authority. Minn. Stat. § 3.732, subd. 1(3). The definition of "scope of office or employment," however, limits application of the statute to those acts of board members which constitute the lawful duties or tasks of the boards as set out in the boards' practice acts, chapter 214, the Administrative Procedure Act, and other statutes that give boards their authority.

The Tort Claims Act does not require the state to indemnify employees or officers in cases of malfeasance, willful or wanton actions, neglect of duty, nor for expenses, attorney fees, judgments, fines, and amounts paid in settlement of claims for proceedings brought by or before responsibility or ethics boards or committees.

Except for elected officials, an employee of the state is conclusively presumed to have been acting within the scope of employment if the employee's appointing authority issues a certificate to that effect. This determination may be overturned by the Attorney General. The final determination, however, of whether an employee of the state was acting within the scope of employment is a question of fact to be determined by the trier of fact, based on the circumstances of each case. Minn. Stat. § 3.736, subd. 9. If a state board is considering denying certification, the board should contact the Assistant Attorney General before taking any action for advice on whether denying certification is appropriate and a process for making a certification decision.

Minn. Stat. § 8.06, provides that the Attorney General is the attorney for all state boards. The Attorney General's Office generally provides the legal defense in most claims against state officials. Exceptions would be those claims not covered by the Tort Claims Act, such as claims for willful and wanton acts or malfeasance. In addition, the Attorney General also has broad discretionary powers to represent the interests of the state and state officials. *See Slezak v. Ousdigian*, 110 N.W.2d 1, 5 (Minn. 1961). The Attorney General has discretion to decide whether to represent state officials or employees.

If a party brings an action under section 3.736 against an employee of the state and obtains a judgment, the party is barred from bringing any action against that employee for the same conduct in any other proceeding. Minn. Stat. § 3.736, subd. 10.

I. Violations of Federally Protected Rights (Section 1983 Actions)

1. What is a Section 1983 Action?

A federal statute, 42 U.S.C. § 1983, creates a right to sue for deprivation of rights protected by the United States Constitution or by federal statutes. Section 1983 establishes no substantive rights but merely creates the right to sue for a violation of rights established

elsewhere. Potential defendants in a section 1983 suit are those persons who act "under color of any statute, ordinance, regulation, custom, or usage, of any State . . . ." Because board members act under color of state law, board members are potential defendants in section 1983 actions.

2. Defense, Indemnification, and Scope of Liability

The state has applied the indemnification and defense provisions of the Tort Claims Act to section 1983 actions. Accordingly, for the state to provide defense and indemnification, the act complained of must have been within the course of the defendant's employment. Further, as in an action based on a tort claim, the law is unclear as to whether the state indemnifies defendants in section 1983 actions for punitive damages. Accordingly, a board member sued for punitive damages should get legal advice about defense and indemnification. Unlike tort claims, there is no cap on money damages in a section 1983 lawsuit because the liability limits in the Tort Claims Act are preempted by federal law. In addition, pursuant to 42 U.S.C. § 1988, a prevailing plaintiff in a section 1983 action is entitled to reimbursement of reasonable costs and attorneys' fees. An attorneys' fees award is also not subject to the liability limits of the Tort Claims Act.

3. Board Member Immunity

Both judicial and legislative immunity are available defenses to a section 1983 suit. A disciplinary proceeding is a quasi-judicial process. Quasi-judicial immunity applies to those who exercise quasi-judicial authority and to persons integral to the judicial process who must perform their functions without the chilling effect of potential lawsuits. Actions that are legislative in nature, such as rulemaking, are considered quasi-legislative. When state employees are performing quasi-judicial or quasi-legislative functions they are entitled to absolute immunity.

Qualified immunity is a more limited kind of immunity granted for administrative and investigative acts. Qualified immunity is available in a section 1983 action if the state official did not violate any clearly established statutory or constitutional right which a reasonable person should have known. *Johnson v. Morris*, 453 N.W.2d 31, 38-39 (Minn. 1990).

The question of law in section 1983 suits against board members is whether they are analogous to judges and thus possess absolute immunity. If board members are viewed as analogous to administrators or investigators, they will only have qualified immunity. The difference between these two types of immunities is that absolute immunity defeats a lawsuit at the outset without the necessity of arguing the substance of the claims. Qualified immunity, on the other hand, does not avoid a review of the merits of a particular claim, but may ultimately be a defense to the imposition of liability on an official.

Even if a board member is entitled to absolute immunity, that immunity extends only to damages. A party who believes that a federally protected right is being, or is about to be, violated may sue for prospective injunctive relief. An example of such relief would be a lawsuit in which the plaintiff asks that the court declare a rule of the board invalid because it violates the U.S. Constitution.

The U.S. Supreme Court has held that when a plaintiff prevails in a section 1983 suit for prospective declaratory relief, judicial immunity does not bar an award of attorney fees under 42 U.S.C. § 1988 against a judicial officer. *Pulliam v. Allen*, 466 U.S. 522 (1984).[9] Therefore, if a plaintiff obtains injunctive or declaratory relief against a board or a board member, the board or board member could be liable for an award of costs and reasonable attorney's fees. Minn. Stat. § 3.736, subd. 9, however, provides for indemnification of a board member or employee from any personal liability for the award for any act within the scope of the board member's or employee's duties.

4. Insurance Against Section 1983 Liability

Some local government entities, such as municipalities, counties, and school boards, purchase special insurance policies to cover liability for section 1983 actions. The state,

[9] On October 19, 1996 Congress enacted the Federal Courts Improvement Act of 1996 ("FCIA"), Pub. L. No. 104-317, which purported to legislatively reverse the *Pulliam* decision. Section 309 of the FCIA appears to bar awards of costs or attorney's fees against judges in cases based on their judicial acts. It also appears to bar actions for injunctive relief against a judicial officer. Courts are split as to whether section 309 of the FCIA also applies to quasi-judicial acts.

however, has remained either uninsured or self-insured. The Department of Administration, Risk Management Division, is a resource for state boards to contact about insurance questions. The Risk Management Division can make recommendations to a state board about appropriate insurance coverage based on the board's specific needs and obtain insurance quotes for a board before insurance is purchased.

VIII. OTHER POTENTIAL BASES FOR BOARD LIABILITY

A. Antitrust Actions

Antitrust actions against state boards generally arise in one of two ways. First, a government enforcement agency (Department of Justice, Federal Trade Commission, or state Attorney General) may bring a claim against a board if the statutes or rules under which the board acts, including the manner in which the board is enforcing them, have an anticompetitive effect. Second, an individual who alleges to be injured by board conduct may bring an action against the board claiming that a statute or rule as applied to him or her violates state or federal antitrust laws. State entities are often able to assert a defense against antitrust lawsuits under what is known as the "state action immunity doctrine," but specific conditions must be satisfied for certain types of boards to rely on the doctrine. *See N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015).

B. Defamation

1. Elements of a Defamation Claim

For a statement to be considered defamatory "it must be communicated to someone other than the plaintiff, it must be false, and it must tend to harm the plaintiff's reputation and to lower him in the estimation of the community." *Stuempges v. Parke Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980); Restatement (Second) of Torts §§ 558-59.

2. Defenses to a Defamation Claim

The two defenses to a claim of defamation are truth and privilege. Truth is an absolute defense to a defamation claim. A defense based on privilege may apply when a state board is the defendant in a defamation action. If an absolute privilege applies, immunity is given even for intentionally false statements made with malice. *Matthis v. Kennedy*, 67 N.W.2d 413, 416 (Minn. 1954).

3. Immunities

Not all immunities apply to defamation claims. In *Johnson v. Dirkswager*, 315 N.W.2d 215, 223 (Minn. 1982), the Minnesota Supreme Court held that Minn. Stat. § 3.736, subd. 3(a) (good faith immunity) immunized the State and its employees from defamation claims. In *Bird v. Department of Public Safety*, 375 N.W.2d 36, 41 (Minn. Ct. App. 1985), the Minnesota Court of Appeals held that Minn. Stat. § 3.736, subd. 3(b) (discretionary immunity) does not apply to defamation cases. In *Bauer v. State*, 511 N.W.2d 447, 448 (Minn. 1994), the Minnesota Supreme Court held that official immunity does not apply to a defamation action against public officials.

4. Opinions

Not all opinions are protected under the First Amendment. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-21 (1990). Only statements about matters of public concern not capable of being proven true or false and statements that cannot be interpreted reasonably as stating facts are protected from defamation actions under the First Amendment. *Id.*; *see also Geraci v. Eckankar*, 526 N.W.2d 391, 397 (Minn. Ct. App. 1995).

5. Qualified Privilege

Qualified privilege protects the state and its employees from liability for allegedly defamatory statements on matters that are related to their duties as public officials. *See Bird*, 375 N.W.2d at 41. Qualified privilege also exists for all defendants if the defendant establishes that the allegedly defamatory statement was made on a proper occasion, for a proper purpose, and upon reasonable grounds for believing the truth of the statement. *Stuempges*, 297 N.W.2d at 256-57.

6. Absolute Privileges

a. Publications required by law

Public officials and public bodies, such as state boards, have an absolute privilege to publish defamatory matter when required by law to do so. This rule is set forth in the

Restatement (Second) of Torts § 592A as follows: "One who is required by law to publish defamatory matter is absolutely privileged to publish it." Because some boards' practice acts require publication of all disciplinary measures taken by the board, those boards and their members have an absolute privilege against a defamation claim based on the contents of the published disciplinary action. *See, e.g.*, Minn. Stat. § 147.02, subd. 6; *LeBaron v. Minn. Bd. of Pub. Def.*, 499 N.W.2d 39 (Minn. Ct. App. 1993) (holding that statement in district public defender's letter to Board of Public Defense regarding why an employee was terminated were absolutely privileged because statutes required report regarding standards of competency of public defenders). In addition, Minn. Stat. § 13.41, subd. 4, classifies a licensing board's final disciplinary action as public data, thereby requiring a board to disclose its final decision as public data. The absolute privilege extends to a board and its members for disclosing public data.

b. Judicial and quasi-judicial proceedings

There is an absolute privilege for communications made in a judicial or quasi-judicial proceeding. *See Matthis v. Kennedy*, 67 N.W.2d 413, 417 (1954). In *Freier v. Independent School District No. 197*, 356 N.W.2d 724 (Minn. Ct. App. 1984), a school board and its members were not liable for defaming a teacher when they published a termination decision which was subsequently reversed on appeal. The court reasoned that teacher discharge proceedings were quasi-judicial proceedings and communications incidental to judicial proceedings are absolutely privileged, whether or not they are defamatory. *Freier*, 356 N.W.2d at 728-29. From this case it appears to follow that a state board will not be held liable for defamation for disclosing the results of a disciplinary action. As discussed earlier, however, the MGDPA or a board's practice act may prohibit disclosure of certain information.

c. Legislative proceedings

There is an absolute privilege for all statements made during the course of legislative proceedings stemming from the speech and debate clause of the Minnesota Constitution, article IV, section 10. *See Carradine v. State*, 511 N.W.2d 733, 734-35 (Minn. 1994).

IX. CONTRACTING

Although most state contracting laws are contained in Minn. Stat. ch. 16C, numerous other statutorily required contract clauses are scattered throughout the statutes that must be included in specific contracts. Every state agency must contract in accordance with the state procurement statutes. For purposes of chapter 16C, an agency means any state officer, employee, board, commission, authority, department, entity, or organization of the executive branch of state government. While a few specific state organizations such as public corporations are exempt from the requirements of chapter 16C, most state boards are subject to the requirements.

A. Who is Responsible for What

State law divides the responsibility for contracting for services primarily with the agency head requesting the contract and the Commissioner of Administration.

1. Agency Head

Unless altered by statute, the agency head has the responsibility to:

1. Identify the need and specifications for a contract and determine who the contractor will be;

2. Draft the contract;

3. Encumber the funds in the Statewide Integrated Financial Tools (SWIFT) before the contract can be valid. Minn. Stat. §§ 16C.05, subd. 2(a)(3), 16C.08, subd. 2(4); and

4. Ensure that the terms and conditions of the contract and state law are met, that all funds expended under the contract are expended in accordance with the contract and state law, and that the results of the contract (the product delivered or the service provided) meet all the requirements of the contract.

If the contract is for professional or technical services valued in excess of $25,000, the agency head must provide information and certify to the Commissioner of Administration that a specific set of circumstances exist or have been met before the contract will be valid. Minn.

Stat. § 16C.08, subd. 2. These certifications are listed below in section B.1, "Contracts for Professional or Technical Services."

2. Commissioner of Administration

The Commissioner of Administration approves or disapproves the decision of a state agency to contract for goods or services and its selection of a contractor. Minn. Stat. §§ 15.061, 16C.05, subd. 2(a)(2), 16C.08, subd. 3. The Department of Administration must sign all certifications for contracts valued at more than $25,000 for professional and technical services (calculated over the entire life of the contract, including any potential extensions).

B. Types of Contracts

1. Contracts for Professional or Technical Services

"Professional or technical services" means services that are intellectual in character, including consulting, analyzing, evaluationing, predicting, planning, programming, or recommending, and the services result in producing a report or completing a task. Professional or technical contracts do not include providing supplies or materials, except by the approval of the Commissioner of Administration or except as incidental to the provision of professional or technical services. Minn. Stat. § 16C.08.

For all professional or technical services contracts in excess of $25,000, the agency must provide the solicitation documentation along with the following for review and approval by the Commissioner:

1. a certification that all provisions of subdivision 2 and section 16C.16 have been verified or complied with;

2. a description demonstrating that the work to be performed under the contract is necessary to the agency's achievement of its statutory responsibilities and there is statutory authority to enter into the contract;

3. a description of the agency's plan to notify firms or individuals who may be available to perform the services sought in the solicitation;

4. a description of the performance measures or other tools that will be used to monitor and evaluate contractor performance; and

5. a description of the procurement method to be used in addressing accessibility standards for technology services.

Two statutorily required provisions that must be included in all contracts for professional or technical services are:

1. A professional or technical services contract must by its terms permit the Commissioner of Administration to unilaterally terminate the contract prior to completion with or without cause, upon payment of just compensation. The statute does not specify the length of notice required to invoke the cancellation clause and does not prohibit the agency/board from also having the power to unilaterally terminate the contract prior to completion with or without cause, upon payment of just compensation. It is in the agency/board's discretion whether to allow the contractor to terminate the contract prior to completion of the contract.

2. The terms of a professional or technical services contract must provide that 10% of the amount due under the contract be retained by the state agency/board until it certifies to the Commissioner of Administration that the contractor has satisfactorily fulfilled the terms of the contract, unless specifically excluded in writing by the Commissioner of Administration.[10]

For professional or technical services contracts with a value between $5,000 and $25,000, no advertised solicitation is required. The state agency should determine the scope of work and deliverables that will be used to create the quick call for proposals and send the request to at least three vendors. When the agency is satisfied with the contract language, the contractor and the agency head or a designee sign the agreement and send it to the Department of Administration for external review.

For professional or technical services contracts with a value of more than $25,000, the agency must complete a Contract Certification Form and obtain the Commissioner of Administration's approval before sending out a Request for Proposals, either informal ($25,000-$50,000) or formal (more than $50,000). Informal Requests for Proposals for technical professional services from $25,000 to $50,000 may be published in the State Register or posted

[10] Minn. Stat. § 16C.08, subd. 2(10), also provides that the 10% retainage requirement does not apply to contracts for professional services as defined in Minn. Stat. §§ 326.02-.15, regarding the regulation of architects, engineers, surveyors, landscape architects, geoscientists, and interior designers.

on the Department of Administration's Material Management webpage. *See* Minn. Stat. § 16C.06, subd. 1.

Duties of contracting agencies are the following:

1. No contract shall be entered into if a current state agency employee is able and available to perform the services called for by the contract;

2. Unless otherwise authorized by law, a competitive proposal process shall be used to acquire professional or technical services. A competitive bidding process shall not be utilized to acquire professional or technical services;

3. Agencies shall assign specific agency personnel to manage each contract;

4. The agency will not allow a contractor to begin work before the contract is fully executed unless an exception under Minn. Stat. § 16C.05, subd. 2a, has been granted by the Commissioner of Administration and funds are fully encumbered and the contract is fully executed;

5. The contract shall not establish an employment relationship between the state or the agency and any persons performing under the contract;

6. In the event the results of the contract work will be carried out or continued by state employees upon completion of the contract, the contractor is required to include state employees in development and training, to the extent necessary to ensure that after completion of the contract, state employees can perform any ongoing work related to the same function;

7. The agency will not contract out its previously eliminated jobs for four years without first considered the same former employees who are on the seniority unit layoff list who meet the minimum qualifications determined by the agency;

8. The contractor and agents must not be employees of the state;

9. A professional or technical services contract must by its terms permit the Commissioner to unilaterally terminate the contract prior to completion, upon payment of just compensation, if the Commissioner determines that further performance under the contract would not serve agency purposes; and

10. The terms of a contract must provide that no more than 90 percent of the amount due under the contract may be paid until the final product has been reviewed by the head of the agency entering into the contract and the head of the agency has certified that the contractor has satisfactorily fulfilled the terms of the contract, unless specifically excluded or modified in writing by the Commissioner. This

clause does not apply to contracts for professional services as defined in sections 326.02 to 326.15.

Minn. Stat. § 16C.08, subd. 2 (1)-(10).

2. Contracts for Goods or Non-Professional or Technical Services Contracts

The Materials Management Division of the Department of Administration offers procurement training programs during the year to state personnel. The training covers purchasing policies and procedures. If you are interested in any of the classes, please go to the Materials Management Division's website at *http://www.mmd.admin.state.mn.us/*.

3. Grants or Loans

Grants and loans are a class of contracts that provide funding to an outside entity to provide services or support to a third party who is not employed by the state. State agencies do not have general or automatic grant- or loan-making authority. The authority for grants and loans must be specifically stated in the statutes and is generally directly related to the appropriations that fund them. The Office of Grants Management, a division of the Department of Administration, provides guidance to state agencies and boards regarding the administration and management of state grants. The Office of Grants Management's website is *www.mn.gov/admin/government/grants*.

4. Interagency Agreements and Joint Powers Agreements

Agreements with other governmental units are contracts. They may be for services, grants, or loans, but they should be treated like contracts. The authority of state agencies to enter into agreements with other state agencies is, in most cases, not clearly defined. In fact, most state agencies do not have specific authority. Instead, their authority is defined in the Joint Powers Act which gives governmental units broad authority to enter into agreements with each other. Minn. Stat. § 471.59. "Governmental unit" is defined as "every city, county, town, school district, independent nonprofit firefighting corporation, other political subdivision of this or another state, another state, federally recognized Indian tribe, and any agency of the state of

Minnesota or the United States, University of Minnesota, Minnesota Historical Society, nonprofit hospitals licensed under Minn. Stat. §§ 144.50-.56, rehabilitation facilities and extended employment providers that are certified by the commissioner of employment and economic development, day and supported unemployment services licensed under Minn. Stat. § 245D, and includes any instrumentality of a governmental unit." Interagency agreements are between two or more state agencies, while joint powers agreements are between two or more governmental units. Under the Joint Powers Act, the governing body of any governmental unit may enter agreements with any other governmental unit to perform on behalf of that unit any service or function that the governmental unit providing the service or function is authorized to provide for itself. A governmental unit participating in a joint enterprise or cooperative activity with another governmental unit will not be liable for the acts or omissions of the other governmental unit unless it has agreed in writing to be responsible for them. Minn. Stat. § 471.59, subd. 1a.

C. Basic Elements of a State Contract

State agencies are encouraged to use state-approved contract forms when possible. The forms contain required statutory language and other contract terms which are generally in the state's best interests. The Department of Administration's publication *Contracts Manual,* including *Professional/Technical Services Contracts* is a helpful resource. For sample contract forms, refer generally to the Department of Administration's website at *http/www.mmd.admin.state.mn.us/mn05000.htm*. Because these forms are generic, additional clauses may be necessary in some situations. The *Contracts Manual* is helpful for identifying these special situations. Some specific contracting considerations follow.

1. Authority

The state agency must have statutory authority to enter the particular contract. The contractor is presumed to have authority to enter the contract unless it is another public agency.

2. Solicitation Process

Sections 16C.06, 16C.08, 16C.087, 16C.09, and 16C.10 of the Minnesota Statutes govern the requirements for competitive solicitation. Refer to the Department of Administration's publication *Contracts Manual*, including *Professional/Technical Services Contracts*, for further assistance on requirements for advertising, consideration, and award.

3. Encumbering Funds

The state cannot agree to an expense unless the money has been encumbered. "Encumbered" means that the source of the funds to pay the expense have been identified and that the funds will be available when the payment is due. Generally, this also means that the state cannot agree to indemnifying the contractor or to pay expenses such as reasonable court costs, attorney fees, penalties, or damages for economic harm caused to contractor. *See* Minn. Const. art. XI, § 1.

4. Non-Appropriations Clause

Contracts that extend beyond the appropriations period should contain language addressing the possibility of non-appropriations. The following statement is recommended: "Continuation of this Agreement beyond June 30 of any year is contingent upon continued legislative appropriation of funds for the purpose of this Agreement. If these funds are not appropriated, the State will immediately notify Contractor in writing and the Agreement will terminate on June 30 of that year. State shall not be assessed any penalty if the agreement is terminated because of the decision of the legislature not to appropriate funds." An agency may only agree to pay a penalty under specified circumstances if the agency first encumbers the money to pay the potential penalty.

5. Advance Payment

Minn. Stat. § 16A.41, subd. 1, prohibits a state agency from obligating the state to pay in advance for goods or services. Pursuant to Minn. Stat. § 16A.065, the only advance payments that can be made are for software or software maintenance services, for state-owned or leased

computer equipment for information hosting services, sole-source maintenance agreements, exhibit booth space or boat slip rental, and subscription fees for newspapers and magazines. Prepayments can also be made to the Library of Congress and the Federal Supervisor of Documents.

6. Audit Clause

Minn. Stat. § 16C.05, subd. 5, requires the state audit clause to be in all state contracts. The only exception is when the state is selling, leasing or licensing its own software or data to a purchaser.

7. Minnesota Government Data Practices Act

If the contractor will have access to the agency's private and confidential data, the contract must address the contractor's responsibility for handling such data in accordance with the agency's responsibilities under the MGDPA. The agency cannot agree to keep the contractor's data confidential except in accordance with the MGDPA. *See* Minn. Stat. ch. 13.

8. Term

For goods, general services, and building construction, the original contract shall not exceed two years unless the Commissioner of Administration determines that a longer duration is in the state's best interests. The contract and any amendments to the contract shall not have a combined term longer than five years without specific approval of the Commissioner of Administration pursuant to written standards, or unless otherwise provided by law. For professional or technical services, the combined contract and amendments must not exceed five years, unless provided by law. The term of the original contract must not exceed two years, unless the Commissioner determines that a longer duration is in the state's best interest. The term of a contract may be extended beyond the time specified in Minn. Stat. ch. 16C, up to a total term of ten years, if the Commissioner of Administration, in consultation with the Commissioner of Minnesota Management Budget, determines that the contractor will incur upfront costs under the contract that cannot be recovered within a two-year period and that will

provide cost savings to the state and that these costs will be amortized over the life of the contract. Minn. Stat. § 16C.06, subd. 3b.

9. Intellectual Property Rights

If the contract is for services that will produce intellectual property, the contract should contain language protecting the intellectual property rights. Before executing a contractor or license agreement involving intellectual property developed or acquired by the state, a state agency shall seek comment from the Attorney General on the terms and conditions of the contract or agreement. Minn. Stat. § 16C.05, subd. 2(f).

10. Affirmative Action

For all contracts for goods and services exceeding $100,000, it may be necessary for the contractor to have a certificate of compliance with Minnesota human rights laws or to certify its compliance with federal affirmative actions laws. The agency cannot accept a bid or proposal in excess of $100,000 if the contractor has more than 40 employees in Minnesota and the Commissioner of Human Rights has not received the contractor's business affirmative action plan. *See* Minn. Stat. §§ 363A.36, subd. 2, 363A.44, subd. 1. For all contracts for goods and services over $500,000, it may be necessary for the contractor to have an equal pay certificate. Minn. Stat. § 363A.44.

11. Execution

The state has developed the following routing procedure for examining and executing contracts: (1) Other party (e.g., contractor, consultant); (2) State agency (entering into the contract and also encumbering the funds for the contract); and (3) Department of Administration (comprehensive scope, substance and fiscal review - not grants or interagency agreements). Minn. Stat. § 16C.05, subd. 2.

If a subordinate member or agency employee signs the contract, he or she must be lawfully delegated the authority to do so. *See* Minn. Stat. §§ 15.06, subd. 6, 16C.05, subds. 1, 2(a)(1). The Secretary of State maintains a complete list of state personnel legally authorized to

enter certain agreements for their respective state agencies.[11] For contractors that are corporations, at least one corporate officer must sign the contract. Two corporate officer signatures are preferable. If persons other than corporate officers have signed, you must obtain a corporate board resolution authorizing the subject signatures.

12. Amendments

An amendment to a prior agreement must be in writing and it must clearly reference the prior agreement. The amendment is subject to the same signature process as the original contract.

D. Minnesota Government Data Practices Act and Contracting

When a government entity enters contracts with private persons to perform any of the entity's functions, the contract must include terms that make clear that data created, collected, received, stored, used, maintained, or disseminated by the private persons in performing those functions is subject to the requirements in chapter 13 and that the private persons must comply with those requirements as if they were a government entity. Minn. Stat. § 13.05, subd. 11. All contracts entered by a government entity must include notice that these requirements apply to the contract, but failing to include the notice in the contract does not invalidate the application of these requirements. The remedies in section 13.08 apply to the private person under subdivision 11. Private persons do not have a duty, however, to provide access to public data to the public if the public data are available from the government entity, except as required by the terms of the contract. *See* Minn. Stat. § 13.05, subd. 11.

Minn. Stat. § 13.591, subd. 3 governs the classification of data submitted by a business to a government entity in response for bids or requests for proposals. The classification of such data may change at various points during the procurement process.

[11] The statutes for certain boards require contracts to be approved by a majority of the members of the board and executed by the chair and the executive director. *See, e.g.*, Minn. Stat. § 3.922, subd. 5 (Indian Affairs Council); Minn. Stat. § 15.0145, subd. 4(d) (Minnesota Council on Latino Affairs); Minn. Stat. § 15.0145, subd. 4(d) (Council for Minnesotans of African Heritage); and Minn. Stat. § 15.0145, subd. 4(d) (Council on Asian-Pacific Minnesotans).

X. COMPENSATION OF BOARD MEMBERS AND ADVISORY COUNCILS AND COMMITTEES

In general, board members and members of advisory councils and committees are compensated by a per diem set at the rate of $55 for each day spent on board activities, when authorized by the board, plus expenses in the manner and amount as authorized by the Commissioner's Plan. Minn. Stat. §§ 15.0575, subd 3, 15.059, subd. 3. Members of health-related licensing boards may be compensated at the rate of $75 per day on board activities. Minn. Stat. § 214.09, subd. 3.

Key language in the above sections indicates that expenses and per diems can only be paid when authorized by a board, council, or committee. The board, council, or committee, however, may authorize per diems and expenses in various ways so that the work can be accomplished without having to authorize every single request for a per diem or expense. For example, a board may delegate to its executive director or president the authority to approve per diems for board members engaged in disciplinary work or rulemaking. Such a delegation may include establishing a minimum number of hours that must be accumulated before a per diem can be claimed. The executive director or president may also be authorized to set the maximum number of per diems that can be claimed for a single project, such as the review of a contested-case record before a hearing before the board.

In general, a board, council, or commission member who is also an employee of the state or a political subdivision of the state may not be compensated by both the board and the employer for time spent on board activities. The statutes discussed below are intended to prevent "double dipping." The statutes are clear, however, that a state or political subdivision employee shall suffer no loss in compensation or benefits as a result of service on a board, council, or commission and shall receive expenses unless the expenses are reimbursed from another source. Generally, child care expenses may only be reimbursed for state and political subdivision employees for time spent on board activities that are outside normal working hours.

A state or political subdivision employee who is also a member of an administrative board, agency, committee, council, or commission governed by Minn. Stat. §§ 15.0575, subd. 3, 15.059, or 214.09, may not receive the daily payment for activities that occur during working hours for which the person is compensated by the state or political subdivision. A state or political subdivision employee may, however, receive a daily payment if the employee uses vacation time for board, agency, committee, council, or commission activities. Each board, agency, committee, council, or commission must adopt internal standards prescribing what constitutes a day spent on official activities for purposes of paying per diem. Those standards may be incorporated in a delegation of authority to the executive director or president to approve daily payments.

It is important that state and political subdivision employees understand the specific statute that applies to their board, council, or commission when determining whether they are entitled to receive a per diem from the board, council, or committee. It is not always clear whether someone is a full-time state employee or an employee of a political subdivision. For example, it is sometimes difficult to categorize elected officials. There have been no cases under the four statutes as to whether a difference exists between employees and officers, but a difference between public officials and employees has been recognized in other contexts. A public officer or official is distinguished from a public employee in the greater "importance, dignity and independence" of the official's position. *Tillquist v. Dep't of Labor & Indus.*, 12 N.W.2d 512, 514 (Minn. 1943). In *Cahill v. Beltrami County*, 29 N.W.2d 444 (Minn. 1947), the court concluded that an elected sheriff was a public officer and as such, rules governing contractual relations in ordinary cases were inapplicable. Certain statutes contain references to employees and to officers or public officials. *See, e.g.*, Minn. Stat. § 15.054. On the other hand, it can sometimes be argued that an elected official is paid about the equivalent amount of money as a full-time salary for some employee positions. Thus, it could be argued that the spirit of the law would preclude payment to a public official. *See, e.g., Jerome v. Burns,* 279 N.W. 237 (Minn. 1938) (holding that city clerk was not entitled to additional compensation for services

rendered as city commissioner of registration). Anyone with questions regarding whether a member is a state or political subdivision employee should contact the assistant attorney general assigned to the board.

At times, an executive director must contact a board member with a question about a request for a per diem or expense reimbursement. When that happens, keep two things in mind. First, the executive director is in the uncomfortable position of asking his or her "boss" to explain himself or herself. Second, board member compensation is thoroughly scrutinized by the legislative auditors. The executive director's questions protect the board and its members from embarrassment by clearing up these matters in advance of an audit.