Legal Overview for New Board and Commission Members

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Every board or commission is assigned an Assistant Attorney General (AAG) to provide legal advice. If you do not know which AAG is assigned to your board or commission, ask the board or commission's staff or send me an email and I will let you know.

This outline provides a general overview of laws and is not intended to cover all applicable laws or the nuances of applicable laws. The outline uses the term "board" to refer to both boards and commissions.

Mission and Authority

1. Boards are created by statute, sometimes called an "enabling act."

2. Boards only have that authority granted by law.

   a. Boards are guided by laws in addition to the law that creates a board.

   b. For example, Iowa Code chapter 272C identifies many duties and powers for all professional licensing boards.

3. Boards may not expand their authority beyond that granted by law.

4. The law may be very specific about how decisions shall be made or may grant a board discretion within specified limits.

Tip: Bring a copy of the main laws governing your board to each meeting.

5. New members should read - and reread - the laws governing the board.

   a. Staff, other board members, prior minutes of meetings, and websites are good sources of information, but board terms are staggered for a reason: new board members bring a new perspective and vitality.

   b. Don't rely exclusively on what others tell you about the mission of the board or its authority.

6. A board's mission is always a public purpose.

7. When serving on a board, you are representing the citizens of Iowa. Be inclusive and listen, but always make decisions with the board's public purpose in mind.

Rulemaking

1. Most boards have rulemaking authority.

2. Rules are in a very real way the board's laws.

3. Rules must be authorized by and consistent with statutes.

4. Rulemaking is a powerful authority. Rules:

   a. Describe the organization and procedures of the board.

   b. State how the board will implement laws.

   c. Inform people about guidelines and policy choices that impact their legal rights and duties.

Tip: Bring a copy of board rules to every meeting.

5. The Governor, Legislature, Attorney General, and the public all have a role to play when boards adopt rules -- there are many checks and balances. Starting July 1, 2012, all boards and other agencies are required to review rules on a five-year rolling cycle.

6. In addition to consistency with statutes, rules should be:

   a. Easy to read and understand.

   b. Tied to specific needs and objectives.

   c. Sensitive to costs - benefits should outweigh costs.

   d. Effective.

   e. Developed with input by those affected.

   f. Fair - use rulemaking power wisely.

Decisionmaking

1. No single board member makes decisions for boards.

2. Boards make decisions by taking votes at board meetings.

3. A "quorum" of the board is needed to take a vote.

   a. A "quorum" may be a majority of board members (e.g., 4 out of 7) or two-thirds of board members (e.g., 5 out of 7).

   b. Many boards' enabling acts state what a quorum is. If the board's law is silent, then a quorum is two-thirds of the members.

4. Once a quorum is attained, most board action is taken upon a majority vote of those participating – but there are important exceptions.

   a. Boards may only go into closed session upon a public vote by two-thirds of the members or all members present.

   b. Discipline can only be imposed on a licensee by a majority vote of members or a higher percentage if required by law.

Tip: Before you vote, determine if there is a quorum and how many "aye" votes are required to take the particular action.

5. The votes of all members must be public and clear during the meeting and in the minutes.

   a. Only take a voice vote when the vote is unanimous.

   b. Use roll call votes whenever voting to go into closed session or when any member abstains or votes "nay."

   c. Never use a secret ballot.

Board Meetings - Inviting the Public

1. Count Heads! If a majority of the board is present (in person or electronically), do not discuss board business unless you are at a board meeting preceded by proper notice to the public and a posted agenda.

2. Purely social or ministerial gatherings are not meetings as long as no board business is discussed, but be careful to avoid even the appearance of holding an illegal meeting.

3. Agendas are a board's invitation to the public to watch the board in action.

   a. Post agendas at least 24 hours in advance.

   b. Identify all topics on which votes will be taken and matters that will be discussed.

   c. The detail needed will depend on the public's familiarity with the matter. The less familiar the public is, the more detail is needed.

Tip: Read the agendas posted for your board over the past year. Can you tell what the board planned to vote on or discuss? If not, advocate more detail in your board's agendas.

4. Stick to the posted agenda. If a new idea comes up at a meeting and there is no emergency requiring immediate action (which would be very rare), place the topic on the agenda for the next meeting.

5. Lights! Cameras! Action! The public has a right to observe the open sessions of your board meetings and may record them or take photographs.

6. The public does not have the right to participate in your meetings, but boards typically provide an opportunity for public comment at meetings.

Board Meetings - Minutes

1. Minutes of board meetings create a permanent record of who met, when they met, what they discussed, what they decided, and by what votes.

2. Accurate minutes are a key tool for conducting the public's business in an open and accountable way.

   a. Minutes are a vital organizational tool for boards.

   b. Minutes are a crucial way for citizens to review public action taken on their behalf.

3. Minutes of open sessions must always include:

   a. The date, time, and place of a meeting.

   b. Which members were present.

   d. Actions taken, with sufficient information to reflect members' votes.

Tip: Read your board's minutes for the past year.
Can you tell what the board voted on or discussed?
If not, advocate more detail in your board's minutes.

4. If a closed session is held, the minutes of the open session must include the legal grounds for a closed session, the vote of each member on whether to go into closed session, and any final action taken – no final votes may be taken in closed session.

5. When applicable, minutes must also explain the legal basis for holding a telephonic meeting, an emergency meeting (less than 24 hours notice), or a meeting at a time or place not reasonably accessible to the public.

Board Meetings - Closed Sessions

1. Closed sessions are serious business! Never ask the public to leave the meeting so the board can talk in private – unless the board has a legal basis to hold a closed session.

2. In order to go into closed session, a board must first meet in open session with proper advance notice and posted agenda.

3. A board can only close an open session if expressly authorized by statute. For example, a board is authorized to go into closed session to discuss pending litigation with counsel, certain personnel matters, or whether to initiate disciplinary action against a licensee.

Tip: You should always ask your board's assigned AAG for legal advice if you are not confident you have grounds to vote to go into closed session. Get the advice in writing or make sure the advice is reported in the minutes of the meeting.

4. After announcing the legal basis for a closed session, take a roll call vote. Remember, a board can only close a session upon an affirmative vote of two-thirds of the members or all members present.

5. While in closed session, boards must:

   a. Record the session (and keep the recording at least a year).

   b. Take detailed minutes.

   c. Limit the discussion to the announced basis for the closed session.

6. Final action must be taken in open session. When the closed session discussion is finished, return to open session and allow those who left the room for the closed session to return. Then make a motion and take a vote on any final action in open session.

Public Records

1. Board records are open to public examination unless specifically made confidential under the law.

2. Public records can be in any form, including e-mail. Board members should not commingle official board business emails with personal emails. Your board's staff or AAG can advise on methods of separating emails.

3. Assume any record you create or receive as a board member is a public record that may be open to the public upon request.

Tip: Practice that old adage – only say what you would be comfortable reading on the front page of your local newspaper!

4. Find out who the public records contact is for your board. The contact person (lawful custodian) is most likely your board's executive officer or administrator.

    a. Requests for public records should be referred to your board's public records contact.

    b. The public records contact is familiar with the law and can assure proper response to requests for public records.

5. Find out if any of the board records you create or receive are confidential.

    a. There may be severe penalties for releasing some types of confidential records -- another good reason to refer all requests for records to the board's public records contact!

    b. Examples of records that may be fully or partially confidential include applications containing social security numbers or credit card numbers, mental health or other patient records, complaints against licensees, and criminal history background reports.

Sunshine Law Enforcement

1. Actions to enforce Iowa's Open Meetings and Public Records Laws can be brought by a citizen of Iowa, a person who pays taxes of any type to the state of Iowa, a person individually aggrieved by a violation, a county attorney, and the Attorney General. Such actions may be brought in court or before the Iowa Public Information Board.

2. Complaints about alleged violations may be made directly to the board, its staff or counsel, or to the Ombudsman's Office, Attorney General, the Governor's Office, the Iowa Public Information Board or legislators.

3. Take all alleged violations seriously.

4. Remedies include removal from office upon a second violation, damages (up to $2,500 for a knowing violation), expenses and attorney fees, and injunctive relief.

Tip: Iowa public officials, by and large, will comply with Iowa's Sunshine laws when they know what they are. Educate yourself and ask staff or the AAG assigned to the board if you are unsure.

5. Even an honest mistake can be a violation of Iowa's Sunshine laws, but individual board members can avoid personal liability when they rely upon the advice of counsel, formally given in writing or provided orally and memorialized in the minutes.

6. Attorney General Tom Miller has issued dozens of "Sunshine Advisories" to educate public officials and the public about Iowa's Open Meetings and Public Records Laws. The advisories (with index) are found at: https://www.iowaattorneygeneral.gov/about-us/sunshine-advisories/. You may also wish to consult the web page of the Iowa Public Information Board at: https://www.ipib.iowa.gov.

Board Members as Judges

1. Some boards conduct hearings, such as hearings conducted by professional licensing boards on charges of licensee discipline. These boards sit as judges during the hearing and make final decisions.

2. Some boards make final decisions after a board panel or administrative law judge (ALJ) conducts a hearing. Examples include the Board of Educational Examiners and the Employment Appeal Board.

3. Board members who conduct hearings or review proposed decisions of a board panel or ALJ are governed by the Administrative Procedure Act (APA) and a Code of Administrative Judicial Conduct.

4. The Code of Administrative Judicial Conduct may be found at:

http://www.legis.iowa.gov/DOCS/ACO/IAC/LINC/8-24-2011.Rule.481.10.29.pdf

5. "An independent and honorable administrative judiciary is indispensable to justice in society." Canon I (a).

    a. All parties are entitled to unbiased, fair treatment – free from improper influences of family, social, political, or other relationships, or prejudgment of the facts.

    b. All decisions must be made solely on the record in the case. Board members shall not communicate with a party to the case without notice to and an opportunity for all parties to participate.

    c. Board members may not personally investigate facts and then sit in judgment on those facts.

Tip: Board members acting in the role of judge generally receive specific training on this important role. During hearings, boards are aided by an ALJ and board staff.

Additional Laws Governing Board Members

1. Gift Law. Board members may not accept gifts (i.e., receiving something for free or for less than it is worth) from those they regulate or contract with. Ask your AAG, board staff, or the Ethics and Campaign Disclosure Board (http://www.iowa.gov/ethics) for guidance on gift law compliance.

2. Sales or leases of goods or services If you sell or lease goods or services to those regulated by your board, ask your AAG, board staff, or the Ethics and Campaign Disclosure Board for guidance on applicable laws.

3. Lobbyist. If a board designates a member to represent the board for the purpose of "encouraging the passage, defeat, approval, veto, or modification of legislation, a rule, or an executive order by members of the general assembly, a state agency, or any statewide elected official," the member is required to register as a lobbyist under Iowa Code chapter 68B. Seek advice if this is a matter that may arise with your board.

4. Conflicts of interest. Conflicts of interest should be avoided, but how and when they arise can be unique to certain boards, especially because the law often requires the appointment of at least some persons who are regulated by the board. Anytime your objectivity may be impaired, seek advice.

5. Judicial review. All board action (or inaction) is subject to review in court on a variety of grounds including whether the action is:

   a. Compliant with the U.S. or Iowa Constitution, statutes or rules.
   b. Consistent, nonarbitrary, logical, and reasonable.
   c. Supported by the facts and law.

6. Antitrust: If your board is controlled by those it regulates, be especially cautious about actions that may impact competition – seek advice first!

Tip: Board members acting in good faith in their official board capacity are generally defended by the Attorney General and indemnified by the State.