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DEPARTMENT OF

Professional & Financial Regulation

STATE OF MAINE

- OFFICE OF SECURITIES
- BUREAU OF INSURANCE
- CONSUMER CREDIT PROTECTION
- BUREAU OF FINANCIAL INSTITUTIONS
- OFFICE OF LICENSING AND REGISTRATION

Report of the Commissioner

Department of Professional and Financial Regulation

Submitted to the
Joint Standing Committee on
Labor, Commerce, Research and Economic Development

Pursuant to Legislative Resolve 2009, c. 191

**Directing the Department of Professional and Financial
Regulation To Study the Complaint Resolution Process**

February 1, 2011

Commissioner's Report Pursuant to Legislative Resolve 2009, c. 191

"Resolve, Directing the Commissioner of Professional and Financial Regulation to Study the Complaint Resolution Process"

Legislative Resolve 2009, c. 191, enacted by the 124th Legislature, directs the Commissioner of the Department of Professional and Financial Regulation to “study the need for changes in the complaint resolution process” used by the licensing programs within and affiliated with the Department.

Sec. 1. Commissioner of Professional and Financial Regulation directed to study procedural changes in the complaint resolution process. **Resolved:** That the Commissioner of Professional and Financial Regulation, in consultation with interested parties including the Maine Regulatory Fairness Board, shall conduct a study of the need to establish protocols for the resolution of complaints made to occupational and professional licensing boards within and affiliated with the Department of Professional and Financial Regulation; and be it further

Sec. 2. Reporting date established. **Resolved:** That the Commissioner of Professional and Financial Regulation shall submit any recommendations from the study under section 1 to the joint standing committee of the Legislature having jurisdiction over business, research and economic development matters by February 15, 2011.

Resolve Background:

LD 1608 "An Act to Establish an Office of Administrative Law Judges for Licensing Boards" was considered by the Joint Standing Committee on Business, Research and Economic Development during the second regular session of the 124th Legislature. The bill, as drafted, would have shifted the statutory authority to make disciplinary decisions currently granted to professional and occupational licensing boards to a new Office of Administrative Law Judges established within the Department of Professional and Financial Regulation. The bill provided for a staff of state employees who would serve as administrative law judges.

LD 1608 was submitted at the request of the Maine Regulatory Fairness Board (RFB), an advisory board created by the Legislature in 2005. The RFB was “established to hear testimony and to report to the Legislature and the Governor at least annually on regulatory and statutory changes necessary to enhance the State's business climate.” (5 MRSA §57).

The focus of the bill was the process used by state agencies to resolve complaints. LD 1608 would have established an independent office within the Department of Professional and Financial Regulation to hear disciplinary cases. However, it was not clear which state agencies would be affected by the bill. The inference of its sponsors and supporters was that the traditional process of resolving complaints before state agencies pursuant to the Maine

Administrative Procedure Act is unfair to licensees and, therefore, a new division within the Department should be established.

LD 1608 received a public hearing on January 21, 2010 before the Business, Research and Economic Development Committee. A member of the RFB spoke in favor of the bill, as did three private attorneys speaking on their own behalf. The Department of Professional and Financial Regulation, which administers a variety of licensing programs, and representatives of several professional associations representing thousands of licensed professionals opposed the bill. At the conclusion of the public hearing, the Committee directed the interested parties to meet as a group and determine whether the issues raised by the bill could be resolved.

A special open meeting at the Department was convened on January 29, 2010. Interested parties discussed subjects including the intent and focus of the bill; specific licensing programs to which the bill would apply; the financial impact of the bill were it to be enacted; and a variety of other issues related to complaint resolution processes. The meeting concluded with general agreement that the discussion had been productive, with lines of communication opened between and among the interested parties. In addition, although no consensus was reached on specific issues, there appeared to be general willingness to invest time in future meetings to further discuss these and other issues in more depth and in an orderly manner.

Based on an oral report of the interested parties to the Committee that there was a strong interest in continuing the group discussion, the Committee voted not to pursue the bill but to convert it to a resolve directing the Department to study, in conjunction with the Regulatory Fairness Board and the other interested parties, the need for changes in the complaint process and report its findings and recommendations to the Committee on or before February 15, 2011.

General Overview of the Authority and Purpose of State Licensing Boards

Title 10, sec. 8008 states that “*the sole purpose of an occupational and professional regulatory board is to protect the public health and welfare. A board carries out this purpose by ensuring that the public is served by competent and honest practitioners and by establishing minimum standards of proficiency in the regulated professions by examining, licensing, regulating and disciplining practitioners of those regulated professions. Other goals or objectives may not supersede this purpose.*” The tradition of professional self-regulation through the operation of state licensing boards using the expertise of gubernatorially appointed members of a profession is an important use of a state’s police power to protect its citizens from harm.

Licensing boards are authorized by the Legislature to determine practice standards and standards of professional conduct. Boards have statutory authority to conduct investigations of complaints against licensees in many professions and occupations and to hold disciplinary hearings to determine whether or not a licensee has violated a board’s statutes or rules. Licensees found to have violated board statute or rule may be disciplined by the board with sanctions including monetary fines, restrictions on practice up to and including suspension or revocation of the right to practice. The authority granted to state licensing boards by the Legislature is based on the understanding between the Legislature and board members that the powers are to be used only to protect the public and for no other purpose.

Inherent in the process by which the State protects the public through the licensing process is the concept that members of the public should be able to bring a complaint against a practitioner to the licensing board that issued the practitioner's license, and be assured that the matter is investigated and resolved. The process by which a State licensing board resolves a complaint filed against a licensee is the subject of the discussion described below.

Discussion Process

The Department convened the first interested party stakeholder meeting on May 19, 2010 from 1:00-3:00 p.m. at the Department in Gardiner, Maine. Additional meetings were held on May 26 (small group meeting), June 16, July 21 and October 20. With Commissioner Anne Head acting as discussion chair, the group met for a total of approximately 15 hours. Representatives of licensees, licensing boards, the Attorney General's Office, the Regulatory Fairness Board and attorneys in private practice participated in some or all meetings. A list of participants is included as an attachment to this report.

The group's several discussions focusing on complaint resolution models and the adjudicatory hearing process covered a wide variety of topics and issues. It became apparent that licensing boards within and affiliated with the Department have developed, with the advice and counsel of the Attorney General's Office, individual variations on the general complaint resolution process. Although the process varies somewhat from board to board, certain components appear to be common to all boards, such as complaint docketing, document exchange, investigation, complaint presentation, consent agreement negotiation, and adjudication. Each board has adapted its complaint process to the elements of the particular regulated professional practice within the due process requirements of the Maine Administrative Procedure Act (5 MRSA §§8001 – 11008).

This report explains the Maine APA provisions that apply to agency complaint resolution systems, the manner in which consumer complaints against licensees are resolved, and provides information about the nature and number of complaint cases processed in a given year.¹

Maine Administrative Procedure Act (Maine APA)

The Maine APA defines "adjudicatory proceeding" as "any proceeding before an agency in which the legal rights, duties or privileges of specific persons are required by constitutional law or statute to be determined after an opportunity for hearing" (5 MRSA §8002(1)).

Although the Maine APA sets forth the general parameters for an adjudicatory hearing, it does not specify in detail the manner by which the administrative hearing should be conducted. The goal to be attained by the general requirements of the Maine APA is to proscribe a proceeding

¹ In calendar year 2010, DPFR's Office of Licensing and Registration (thirty-seven licensing programs) received 830 complaints. During the same time frame, 293 complaints were dismissed for lack of evidence of a violation, 269 were resolved by voluntary consent agreement, and 79 were resolved by adjudicatory hearing. Approximately 8% of cases resolved in any given year involve attorneys hired by licensees.

that meets the basic mandates of due process. The Maine Law Court, however, has made it clear that the full range of procedural protections required of the courts is not demanded of administrative bodies. *See, Town of Vienna v. Kokernak*, 612 A. 2d, 870, 874 (Me. 1992) (finding due process requirements for administrative bodies to be “flexible” and requiring “no specified form or procedure”).

The complaint resolution process used by licensing programs within and affiliated with the Department is integral to the overall adjudicatory hearing process governed by the Maine APA. For purposes of this report, the complaint process² can be described in general terms as follows:

Generic Complaint Resolution Process³

Complaint, Licensee’s Response and Complainant’s Reply

When a complaint is received, a copy of the complaint is forwarded to the licensee. The licensee is given 30 days to respond in writing. The licensee’s response is forwarded to the complainant who is given 10 days to reply to the response. The complaint, response, and reply are forwarded to the board’s complaint committee for review.

Review by Complaint Committee

The Complaint Committee, typically comprised of one board member (“Complaint Officer”), the board administrator, an investigator, and the assigned Assistant Attorney General, reviews the complaint documents and investigates the matter.

Board discussion of Complaint, Response and Reply

When an investigation is complete, the complaint committee presents the matter to the board. This presentation is made at a public meeting of the board of which the licensee and the complainant are given advance notice. The complaint and all information associated with it are confidential, so during this public presentation and the board’s subsequent public discussion, no identifying names and locations are used. The board has the option of dismissing the complaint, continuing the investigation to obtain additional information, or setting the matter for an adjudicatory hearing. In lieu of going to hearing, the board may also attempt to resolve the complaint through a consent agreement. If a consent agreement is rejected by the licensee, the matter moves to an adjudicatory hearing.

² Statutes establishing the Real Estate Commission and the Manufactured Housing Board proscribe a complaint resolution structure in which the Director and Executive Director, respectively, have statutory authority independent from the licensing entity, to investigate and resolve complaints without involvement by the licensing entity.

³ Licensing boards affiliated with the Department may use different variations of the generic complaint process described.

Consent Agreement

A consent agreement is a voluntary agreement reached by the licensee, the board and the Attorney General's Office to conclude the matter without further legal process. Typically, the board specifies the terms of the consent agreement and authorizes the Attorney General's representative to negotiate a consent agreement with the licensee or counsel for the licensee within those parameters. If the licensee agrees to the terms offered, the consent agreement is executed and the complaint is resolved.

Adjudicatory Hearing

If the licensee decides not to sign a consent agreement, the matter is scheduled for an adjudicatory hearing before the board. A "notice of hearing" must be sent to the licensee sufficiently in advance of the date of the hearing so that the licensee can prepare for hearing. The hearing notice identifies and limits the scope of the matters that will be examined. It must include a "*statement of the legal authority and jurisdiction under which the proceeding is being conducted*" with specific citations to the statutory and rule provisions involved. In addition, the notice must contain a "*short and plain statement of the nature and purpose of the proceedings and of the matters asserted.*" Further, the notice must include "*a statement of the time and place of the hearing,*" and other pertinent information (5 MRSA § 9052(4)).

The board's complaint officer is recused from participation in board deliberations and final decision at the hearing because of his or her role as complaint officer. The adjudicatory hearing is presided over by a Hearing Officer who is independent of the board and the Attorney General's Office. The hearing officer directs the proceeding, swears witnesses, rules on procedural motions, and serves as legal advisor to the board during the proceeding.

At the adjudicatory hearing the Assistant Attorney General assigned to the board prosecutes the matter against the licensee who may or may not be represented by legal counsel. When all testimony has been taken, the hearing is closed for purposes of the record and the board deliberates in public. The board first votes on whether to dismiss the complaint or find a violation(s) of law. If it finds by a preponderance of the evidence that the licensee has committed a violation, it then votes on whether and to what extent to impose discipline.

The board specifies the findings of fact on which the decision rests, and the hearing officer prepares a draft decision and order. The draft is reviewed by the board, signed by the Board Chair and issued to the licensee. A disciplinary decision issued by a licensing board may be appealed to Superior Court (10 MRSA § 8003 (5) (G); (5-A) (G)).

Due Process Requirement: Notice of Hearing and Opportunity to be Heard under the Maine Administrative Procedure Act

The Maine APA, 5 MRSA Chapter 375, the provisions of which apply to all State agencies, describes actions that must be taken whenever the State moves to take disciplinary action against an individual's state-issued license. State agencies are required to provide for and protect a

licensee's "due process" rights by affording the licensee "notice of hearing" and an "opportunity to be heard." Hearings must be held in a fair and impartial manner pursuant to the provisions of Subchapter 4 of the Maine APA.

As noted previously, other than the provisions of the Maine APA, there is no specific formula with which to determine that due process rights of licensees are protected. Concerns have been raised by the Regulatory Fairness Board and members of the private bar, as well as by the Maine Dental Association and Maine Medical Association, about whether the processes used by licensing boards within and affiliated with the Department of Professional and Financial Regulation satisfy due process requirements. On the other hand, licensing board members, licensees, and many professional associations representing licensees other than medical and dental professionals take the opposite view—contending that the complaint resolution process used by licensing boards is fair, equitable, and cost effective for licensees, and that the process used today by licensing boards more than satisfies due process requirements of Maine and federal law.

Discussion Topics

1) Dual Role of Licensing Board (investigator/adjudicator)

Although there are variations in board process, the Department's licensing boards generally employ the "complaint committee" model to separate the complaint review/investigation function from the adjudicatory function. Incoming complaints are reviewed by the complaint committee led by a board member serving as "complaint officer" working with staff and the board's legal advisor to review the facts of the complaint and conduct the investigation.

When the matter is initially presented to the board, the board members are provided with all the written materials in the complaint file and a member of the complaint committee orally outlines the salient facts. At this stage, the complaint officer is not acting as a board member but as a reporter of activity associated with the complaint committee's investigation. The question for the board is whether, if proven true at hearing, the alleged facts will support a finding of a violation of statute or rule. The purpose of this board discussion is not to find a violation but to ascertain whether a violation may have occurred if the alleged facts are proven at hearing. If the answer is no, the case should be dismissed. If the answer is yes, the board must then decide how to proceed. The board makes no findings of fact at this stage.

During the interested parties' discussions, a group of private attorneys expressed a preference for a complete separation between a board's role in the investigative phase and the adjudicatory phase, and recommended that board membership be expanded in order to have sufficient members to create a separate adjudicatory panel. Under this arrangement, the existing board would conduct complaint reviews and investigations, while a separate, special group of board members would be empanelled to conduct adjudicatory hearings in cases in which the consent agreement process is not successful. The purpose of the separate adjudicatory panel, according to the attorneys making the recommendation, would be to avoid any perceived bias by panel members during the adjudicatory hearing. The adjudicatory panel would hear the facts of the case, as well as any evidence presented, for the first time.

The Maine Board of Dental Examiners, through its representatives, signaled its interest in working to create a panel, separate from the existing board, which would convene at the request of the board to hear disciplinary matters that could not be resolved through the consent agreement process. Proposed legislation that would effectuate the board's interest in the concept of a separate adjudicatory panel is not included in this report. It is likely, however, that such proposed legislation will be introduced for consideration by the 125th Maine Legislature.

Other participants in the interested parties' meetings observed that the complaint committee model currently in use by almost all licensing boards provides sufficient separation between investigatory and adjudicatory phases, and that the concept of empanelling a separate hearing panel is unnecessary. Further, this group of participants noted that enlarging the existing system to include 40 additional adjudicatory panels would greatly increase the cost of State licensing, a result that would be unacceptable and unnecessary. Other participants asserted that no evidence of unfairness or bias on the part of one or more board members had been presented and this group could find no reason to alter or change the process.

Private attorneys speaking for themselves explained that, in their view, when a group of board members participates in a complaint discussion for the purpose of determining whether an investigation is complete or whether the matter can be negotiated to a consensual settlement using the consent agreement process, certain information about the complaint is made known to board members. These private attorneys contend that exposure to information at this early stage of the complaint may cause board members to form a hardened opinion about the complaint and the licensee, and thereby prevent the board member from acting in an unbiased manner at any subsequent adjudicatory hearing.

Licensees and professional associations of licensees taking part in the interested parties' meetings disagreed with the inference that the complaint process used by licensing boards is unfair to licensees and that due process is not currently being provided to licensees who are the subject of complaints. They asserted that the value and benefit to licensees of the current process is that their cases are reviewed and decided by board members who are licensed practitioners who understand the regulated practice and ultimately make fair and impartial decisions in complaint cases.

These participants reject the notion that the disciplinary system in use today must be essentially identical to the judicial system in order to meet due process requirements. They assert that the current system actually benefits licensees given that the decision makers (board members) have significant expertise in the regulated profession and possess an understanding of the difficulties inherent in the regulated profession.

A review of complaint resolution methodology used in other states reveals that there is no right or wrong way to resolve complaints either informally or by adjudicatory hearing. Processes used by other states depend in large part on how the departments of state government are organized. Some states with large populations use centralized administrative hearing processes whereby disciplinary cases are received by licensing boards, and are then assigned to investigators within the same department or to investigators in the state attorney general's office. The administrative

hearing staff may or may not have statutory authority to render a final decision in a particular case. In other states, the central hearing officer produces a proposed decision which is then ratified or rejected by the licensing board. Still other states use a system similar to that used by the Department of Professional and Financial Regulation. Some states have autonomous licensing boards with large staffs specifically dedicated to investigation, negotiation of consent agreements, and adjudication.

Advocates of the original bill (LD 1608) recommended that the group consider the complaint system currently in use by the Maine Board of Bar Overseers. This adjudication system, developed by attorneys for attorneys, is described online at:

www.mobaroverseers.org/attorney_complaints/grievance_complaints.htm

It is important to note that although no one precise set of procedures has been required in order to fulfill due process requirements, the United States Supreme Court has made clear that the combination of the investigative and adjudicative functions by a state professional licensing board does not in itself constitute a violation of due process. *See Withrow v. Larkin*, 421 U.S. 35, 57-58(1975).

2) Dual Role of Assigned Assistant Attorney General (legal advisor/prosecutor)

Licensing boards in the Department have traditionally been assigned legal counsel by the Attorney General. One assistant attorney general may be assigned to more than ten licensing programs. These attorneys attend board meetings, meet with complaint committees, participate in complaint investigations, and prosecute complaints at adjudicatory hearings.

As a general matter, an Assistant Attorney General performs two different functions. In one role, the attorney provides routine legal counsel to the licensing board on a variety of issues that come before it for resolution. In a second role, the attorney prosecutes those matters that the board has set for adjudicatory hearing.

As noted, some private attorneys participating in the interested parties' discussions view the dual role of board attorneys as unfair to licensees. They believe unfairness stems from the familiarity that they contend may develop between the board and its assigned attorney as a result of the working relationship between the AAG and the board. These private attorneys perceive that over time, the AAG becomes a trusted participant in the complaint process which then carries over to the adjudicatory hearing, wherein the AAG serves as prosecutor. A second area of perceived unfairness according to private attorneys is that the AAG acting as prosecutor has worked on the case from receipt of the complaint through the investigative stage and has more opportunity to prepare for hearing than counsel for the licensee who, although given notice of the complaint immediately, may wait to hire an attorney until after the initial presentation or even until just before the adjudicatory hearing.

As an alternative to the practice of assigning board attorneys to both functions in support of licensing boards, these private attorneys suggested separating the two functions so that one group of AAGs would be assigned to provide routine legal support for licensing boards, and another group of AAGs would prosecute complaints at adjudicatory hearings.

The attorneys believe this separation would avoid the perceived problem of unfair familiarity between the prosecuting AAG and the board, because the prosecuting attorney would only prosecute matters before the board and would not serve as legal counsel to the board.

Although representatives of the Attorney General's Office indicated no preference for one method of attorney assignments over another, they noted that such a system may lead to decreased efficiencies and the need to hire additional attorneys. Significant value may be lost by not having a single AAG experience all aspects of the board's work. These AAGs believe that broad exposure to the issues facing the regulated profession play a vital role in the AAG's education about the profession and enables the AAG to work more effectively and efficiently.

In addition, with two attorneys assigned to each board, without an increase in staff, it may prove impossible to cover the additional number of board meetings that each AAG would be assigned. Even currently, it is difficult to avoid board meeting conflicts. AAGs indicated that the boards for which they provide routine day to day advice frequently disagree with or disregard the AAG's arguments when they act as prosecutors before the same board during adjudicatory hearings. They further noted that their role at the initial complaint presentation stage was not to advocate for prosecution, but to provide the board with as much information as necessary to decide whether to go to hearing or dismiss the complaint.

The AAGs asserted that they could not identify any "special treatment" or "consideration" on the part of board members sitting as adjudicators. Similarly, licensees and their representatives who participated in the interested parties meetings could identify no inherent unfairness in the current assignment process. Other private attorneys participating in the discussion indicated that although they could not identify unfairness in the current system they would like to adjust other parts of the complaint resolution system as discussed in the sections that follow.

3) Role of Hearing Officer

Licensing boards typically, although not always, engage a hearing officer to conduct adjudicatory hearings. The Department has authority to contract with individuals with expertise in administrative law to preside over adjudicatory hearings. Although an independent hearing officer is not required by statute or policy, the Department recommends that a hearing officer be engaged to provide the board with support in specific areas. The Maine APA states that the "presiding officer" may a) administer oaths and affirmations; b) rule on admissibility of evidence; c) regulate the course of the hearing, set the time and place for continued hearings, and fix the time for filing of evidence, briefs and other written submissions, and take any other action consistent with statute or agency rule consistent with the Maine APA (5 MRSA §9062).

An independent hearing officer is also charged with the responsibility of ensuring that board members carefully consider issues of personal or professional bias on the record (5 MRSA §9063). Members who recuse themselves are asked to leave the hearing room. The hearing officer is not a fact finder or decision maker. Rather, the hearing officer directs the proceeding, making sure that the board, as fact finder and decision maker, fully explains its reasoning and the facts on which it bases its final decision.

A few private attorneys participating in the stakeholder meetings stated that it would be helpful if the assignment of hearing officers could be determined on a more random basis. Currently, the Department maintains a contract with one hearing officer, and from time to time makes arrangements for an alternate hearing officer. There appeared to be general interest in expanding the number of independent hearing officers available to preside over board adjudicatory hearings.⁴

4) Initial Complaint Presentation

As noted previously, a board complaint committee reviews incoming complaints, determines the scope of investigation, gathers information, and presents the case to the board at what is called a “complaint presentation.” Typically, the Board members are provided with the written materials in the complaint file and a brief oral overview of the case is made by the complaint officer, an assistant attorney general or a staff member. The board then determines whether to dismiss the complaint or set it for hearing. If the alleged facts would constitute a violation of statute or rule if proven true, the board will set the matter for hearing. If the alleged facts would not constitute a violation, the board will dismiss the matter.

Private attorneys in the stakeholder group focused on the initial complaint presentation as an area that should be changed in various ways. For example, they suggested the possibility of permitting the licensee and/or legal counsel for the licensee to make an oral presentation to the board at the initial complaint presentation. Currently, any member of the public, including the licensee and the complainant, may be present in the board room while a complaint is discussed; however, members of the audience are not permitted to engage in discussion with the board.

During discussion of this suggestion, several stakeholder participants noted that allowing the licensee and/or legal counsel to interact directly with the board at this stage would expand the time it takes to resolve a complaint. It also raises the question of whether, in addition to the licensee, the complainant should be permitted to address the board. Both scenarios have been discussed from time to time by Department staff. It was determined that an initial presentation to the board by the complaint committee solely is the most expeditious way to present information about a case for the purpose of determining the nature of the conduct. It was also noted that if the matter eventually ended up at hearing, direct exposure of the board to the licensee prior to hearing (particularly if there was some type of negative interaction) might affect the board’s ability to be impartial at the hearing.

Also suggested during stakeholder discussions was whether the initial complaint presentation to the board was necessary at all. Representatives from the Attorney General’s Office noted that under current law, only the board, not a subgroup of board members, (*e.g.*, the complaint committee) has statutory authority to review and dismiss a complaint if it does not include alleged facts that if proven, would constitute a violation of law or rule. Some participants were interested in amending current law to grant dismissal authority to a complaint committee in order to streamline the complaint resolution process.

⁴ Efforts to increase the number of independent hearing officers available to PFR licensing programs is already underway. The Department anticipates adding two hearing officers to the roster over the course of the next six months.

5) Negotiation of Consent Agreements

As a complaint moves to the initial presentation stage and the board makes an initial determination that the facts as presented, if true, indicate that a violation of statute or rule may have occurred, there is an opportunity for the board to offer to settle the matter without further proceedings through the voluntary consent agreement process. Under current law, only the board can execute a consent agreement with the licensee who is willing to settle the case. Frequently, the terms offered to the licensee by the board through its legal counsel are subject to negotiation with the licensee or counsel to the licensee. If the terms agreed upon by board counsel and the licensee differ in any way from the terms offered by the board, board legal counsel must re-present the consent agreement to the board for final approval.

During stakeholder meetings, private attorneys presented two areas of concern pertaining to current law and practice regarding the negotiation of consent agreements. First, they assert that the need to return to the board for approval of even minor changes to the consent agreement is cumbersome and time consuming. Second, they contend that using this mechanism allows for the possibility of board member bias being introduced. For example, if a board offers a consent agreement to a licensee in lieu of further legal proceedings, the terms are negotiated by legal counsel. If the board rejects the consent agreement or the licensee later decides not to sign the consent agreement, private attorneys assert that board members may have formed an opinion about the matter and thus be unable to act in an impartial manner at hearing.

Most participants agreed that negotiations of the terms of consent agreements extends the process of resolving cases and noted a preference for allowing consent agreements to be finalized by either a subcommittee of a board or by counsel for each party to the case.

On the issue of whether board members become biased against licensees during the period of time during which a consent agreement process breaks down, licensees and board members taking part in stakeholder discussions disagreed with private attorneys that board members cannot or do not act in an impartial manner when the matter is adjudicated at hearing. Licensees and board members asked for any evidence that private attorneys could provide that would show such bias, but no specifics were offered.

6) Use of Informal Conference

The use of informal conferences to resolve complaints was discussed at length. Some board statutes, although not all, include authority to use an “informal conference” when a board has questions that can be answered by speaking directly with the licensee and/or complainant. An informal conference allows the board to gather facts not readily available during a paper review of the complaint. Information gathered at the informal conference is then used to decide how a complaint should be handled. The Board of Licensure in Medicine and the Board of Dental Examiners both use informal conferences to resolve complaints. A licensee must sign a “waiver of objections to further proceedings” before a board will initiate an informal conference.

Some stakeholder private attorneys indicated a preference for the use of informal conferences as a way to allow their clients to speak candidly with a board and resolve complaints without an adjudicatory hearing and to maintain confidentiality of the information discussed at the informal conference.

Other private attorneys advocated using the informal conference to allow a licensee to present evidence at an early stage and allow legal counsel to participate directly. Although informal conferences may be subject to some variations depending on the board, most boards invite licensees to participate in informal conferences when board members have specific questions that were not answered by the licensee's written response. Finally, members of the private bar stated that licensees should not be required to waive their due process rights in order to participate in an informal conference.

Still other private attorneys do not favor the use of informal conferences because they give board members an opportunity to obtain information that may be introduced at hearing if the matter cannot be resolved through the consent agreement process.

Currently, only licensing programs affiliated with the Department are authorized by statute to engage in informal conferences in the resolution of complaints against licensees.

7) Rules of Evidence and Discovery

Currently, the Maine APA provides that “agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law.” Further, the Maine APA provides that “evidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs...” (5 MRSA §9057(2)).

Private attorneys in the stakeholder group expressed a preference for requiring Maine Rules of Evidence to be used during adjudicatory hearings before licensing boards. These rules of evidence are standard in civil and criminal court proceedings and attorneys who practice in those forums are well-versed in the use of Maine Rules of Evidence. According to the private attorneys, if the Maine Rules of Evidence are required in adjudicatory hearings before licensing boards, evidence that doesn't meet the standard would not be allowed, thus, protecting the licensee from any unfair treatment. In other words, some private attorneys take the position that unless Maine Rules of Evidence are required in adjudicatory hearings, there is no standard to apply to evidence, and the hearing fails for lack of due process.

Licensees, board members and associations of licensees countered that, in fact, the Maine APA sets forth a workable and fair standard designed to allow the hearing officer to determine whether a particular piece of evidence satisfies the APA. The APA gives the hearing officer authority to determine whether a piece of evidence is “the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs.” If the evidence does not meet that standard, it is not admissible in an adjudicatory hearing.

Licensees and their representatives also said they were certain that board members are equipped to weigh the credibility of the witness or evidence, thus, the licensee is not disadvantaged by using the APA evidence standard rather than the Maine Rules of Evidence. Of greatest concern to stakeholder group licensees in the event the Rules of Evidence were to be required, was the financial expense of hiring legal counsel in every complaint matter, a burden considered extremely costly to the individual licensee, and altogether unnecessary from a fairness perspective. The administrative complaint resolution process for state agencies is based on the rationale that licensees should be able to have complaints against their licenses resolved without having to hire legal counsel. Application of formal rules of evidence in these administrative proceedings would likely force many licensees to accept the financial burden of hiring an attorney and delay final disposition of a matter substantially.

With respect to the use of discovery practices, participating private attorneys advocated for a legal requirement that licensees and legal counsel be permitted to engage in discovery practice similar to discovery under the Maine Rules of Civil Procedure---with legal counsel able to depose state witnesses and complaint office staff in advance of hearing, pose interrogatories, etc.

Licensees, board members, and board counsel noted that licensees and their attorneys are currently entitled to request and receive information contained in a complaint file and further, that the licensee has ample opportunity to cross examine witnesses during adjudicatory hearing.

A licensee may obtain copies of any document placed in the complaint file before the issuance of a notice of hearing. However, the state has no reciprocal right to have copies of whatever documents the licensee may have generated in the licensee's defense. Licensees' counsel can interview witnesses who may have knowledge of the conduct involved but the state does not have the right to review those witness statements before the hearing. The licensee's counsel can take advantage of the element of surprise because the state has no claim to examine the licensee's case file. It appears that the current complaint resolution process gives private attorneys open access to complaint files involving their clients following the initial presentation, and in some cases, the notice of initial presentation is accompanied by a letter specifying the information and documents that will be used by the board to determine whether an adjudicatory hearing is necessary.

The Department currently uses a resolution process whereby licensees can handle their cases themselves, before a group of individuals who understand the regulated practice, without incurring attorneys' fees or having to understand rules of evidence. Many stakeholders believe these features are of great value and importance to licensees and to the State. They argue that this process is efficient and inexpensive and serves licensees well.

8) Standard of Proof

In legal terms, "standard of proof" measures the proof or evidence required to sustain a charge of violation of a law or rule. In adjudicatory hearings before licensing boards, the Board can make a finding of a violation only if the finding is supported "by a preponderance of the evidence." This is the same preponderance test used in civil litigation. The preponderance test means that the factual conclusions of a board must be supported by at least 51% of the evidence. In other

words, the factual conclusions of the board acting as fact finder must be convinced that its conclusion is more likely than not. In criminal proceedings, the standard of proof is higher. The standard in that setting requires the State to prove its case against a defendant “beyond a reasonable doubt.”

During interested party meetings, some private attorneys and the Maine Dental Association advocated for the use of a higher standard than is used currently in administrative hearings at the State level. They expressed a preference for use of a “clear and convincing” standard of proof which sets a higher bar than is used now, although not as high as the criminal standard of proof “beyond a reasonable doubt.”

Licensees, board members, and association representatives other than those associated with the Maine Dental Association were unable to identify any problem with using the preponderance test. These participants knew of only one other board in another state that does not use the preponderance test as a measure of proof. All other states, including Maine, use the preponderance test in its adjudicatory and administrative hearings.

9) Assessment of Hearing Costs

Maine law authorizes licensing programs within and affiliated with the Department of Professional and Financial Regulation to assess the costs of conducting an adjudicatory hearing to a licensee who is found to have violated board statute or rule (10 MRSA §8003-D). In pertinent part, that section states that *“When there is a finding of a violation, a board or commission listed in section 8001, subsection 38 or section 8001-A may assess the licensed person or entity for all or part of the actual expenses incurred by the board, commission or its agents for investigations and enforcement duties performed.”*

This provision has been in place for several years and acknowledges that adjudicatory hearings can be expensive to the State and may exceed a licensing board’s ability to absorb the expense. Typical hearing costs include the expense of hiring a hearing officer, of preparing the administrative record of a hearing, of covering witness fees, as well as the cost of hiring investigators.⁵

Private attorneys asserted that it is inherently unfair to assess hearing costs to a licensee, particularly in cases of suspension and revocation when the licensee is not permitted to practice by board decision.

10) Option for Licensee to Request District Court ruling when a complaint is filed against licensee

During stakeholder discussions, some participants suggested that since licensing boards have statutory authority under Title 4 to refer licensing complaints to District Court for a disciplinary

⁵ The Department has submitted proposed legislation to limit hearing cost assessments for licensing programs within the PFR Office of Licensing and Registration to the costs associated with preparing the administrative record when a licensee appeals a final board decision.

ruling, licensees should also be permitted to request that a complaint against him or her be referred to District Court for a ruling, rather than allowing a licensing board to make decision in the matter.

Title 4, section 152 (9), however, does not authorize licensing boards to refer such matters to the District Court. Subsection 9 applies to agencies of State government other than licensing programs within or affiliated with the Department. If there is interest in permitting licensees to ask the District Court to hear licensing matters, that authority would need to be added to current Maine law.

4 MRSA §152(9) provides in pertinent part:

9. Licensing jurisdiction. Except as provided in Title 5, section 10004; Title 8, section 279-B; Title 10, section 8003; Title 20-A, sections 10712 and 10713; Title 29-A; Title 32, chapters 2-B, 114 and 135; and Title 35-A, section 3132, exclusive jurisdiction upon complaint of an agency or, if the licensing agency fails or refuses to act within a reasonable time, upon complaint of the Attorney General to revoke or suspend licenses issued by the agency. The District Court has original jurisdiction upon complaint of a licensing agency to determine whether renewal or reissuance of a license of that agency may be refused. The District Court has original concurrent jurisdiction to grant equitable relief in proceedings initiated by an agency or the Department of the Attorney General alleging any violation of a license or licensing laws or rules."

11) Financial Impact on State Resources

Participants generally agreed that any change discussed would substantially increase the cost of the process to the State and to licensees.

No consensus or agreement was reached on the issues of 1) adopting the Maine Rules of Evidence and Discovery; 2) increasing the burden of proof in State administrative hearings; and 3) allowing licensee/legal counsel to make evidentiary presentations at initial complaint discussions.

These changes would significantly alter the purpose of licensing boards and administrative hearings, add considerable expense to the cost of the complaint process for the State and licensees, and delay final resolution of complaints. Self-regulation of professions through the licensing board process was not intended to replicate the judicial system. Licensing boards provide Maine citizens an opportunity to have their concerns and complaints heard by a board of the licensee's peers without the need for licensees to hire legal counsel. In most cases handled by the Department's licensing boards, licensees speak directly to the board on their own behalf. Most stakeholders recognize that plumbers, electricians, real estate professionals, professional counselors, accountants and a wide range of other licensed professionals do not wish to be burdened with the cost of hiring legal counsel and the additional process time that extends the life of a complaint matter.

Department Recommendations for Change

1. Board Member Orientation and Educational Opportunities

It was suggested that formal board member orientation and educational opportunities be a priority to ensure that experienced board members, as well as newer ones, gain a clear understanding of their role and duties. This effort would also be intended to emphasize that board member conduct and speech must be above reproach and subject to a high standard. Although all board members currently receive orientation, instruction and training, a working group of staff within the Office of Licensing and Registration has compiled additional materials that will be incorporated into the orientation process and used during board meetings and adjudicatory hearings.

2. Enlarging the statutory role of Complaint Committee

The concept of segregating a board's complaint committee and its specific functions from other board duties, including complaint adjudication, appealed to some participants, including board members. Rather than expanding licensing boards to allow for separate adjudicatory panels, which for most licensing boards would not be practicable, the complaint committee, led by a board member "complaint officer," could be given statutory authority to review complaints, make decisions to dismiss complaints that are frivolous or do not fall with the board's jurisdiction. This would reduce the time devoted at board meetings to complaint presentations.

If complaint committees are statutorily authorized to conduct investigations, dismiss complaints, and negotiate consent agreements without interacting with the full board, two objectives could be achieved. First, the complaint process could be significantly streamlined; and second, licensing boards would have no exposure to the alleged facts of a case before an adjudicatory hearing, thus reinforcing the importance of impartiality of decision makers in disciplinary hearings. This concept would require statutory change. During the next six months, boards administered by the Department's Office of Licensing and Registration will work with board administrators to develop the statutory construct for this change.

Appendix

List of stakeholders

Andy MacLean - Maine Medical Association
Angela Westhoff - Maine Osteopathic Association
Avery Day - Pierce Atwood
Geraldine Betts - Dept. of Professional and Financial Regulation
Andrew Black - Attorney General's Office
Myra Broadway - Maine State Board of Nursing
Charlie Dingman - Preti Flaherty
Charlie Gilbert - Gilbert & Greif
Chris Philbrook - Maine Association of Realtors
Dave McConnell - Perkins Thompson
Doug Carr – Perkins Thompson
Ed Phillips - Maine Regulatory Fairness Board
Eliot Stanley - Maine Regulatory Fairness Board
Susan Giampetrucci - Maine State Board of Optometry
Torrey Gray - Dept. of Professional and Financial Regulation
Anne L. Head - Dept. of Professional and Financial Regulation
Cheryl Hersom - Dept. of Professional and Financial Regulation
Jamie Belleau - Skelton, Taintor & Abbot
Jerry Petruccelli – Petruccelli, Martin & Haddow
John Bastey - Maine Dental Association
John Doyle - Preti Flaherty
John Paterson - Bernstein Shur
Teneale Johnson - Maine Board of Dental Examiners
John Block - Pierce Atwood
Jon Doyle - Pierce Atwood
Ken Altshuler – Childs, Rundlett, Fifield, Shumway & Altshuler
Ken Lehman - Bernstein Shur
Beatrice Labbe - Maine Board of Licensure of Professional Engineers
Robert Leclair - Dept. of Professional and Financial Regulation
Carol Leighton - Dept. of Professional and Financial Regulation
Linda Gifford - Maine Association of Realtors
Randal Manning - Maine Board of Licensure in Medicine
Thomas Merrill - State Planning Office
Mike Hodgins - Bernstein Shur
Pam Cahill - Howe Cahill
Patricia Aho - Pierce Atwood
Peter Chandler - Maine Board of Accountancy
Roger Katz - Lipman Katz McKee
Ron Schneider - Bernstein Shur
Rufus Brown - Brown Burke Law
Scott Stone - Modular Home Builders Association
Susan Strout - Maine State Board of Osteopathic Licensure

Tim Woodcock - Eaton Peabody

Walt McKee – Lipman Katz McKee

Wendy Whiting - Maine Society of Certified Public Accountants

Bob Perkins - Attorney General's Office

Dennis Smith - Attorney General's Office

George Ames - Maine Board of Licensure of Professional Engineers