

BEHAVIORAL SCIENCES REGULATORY BOARD BOARD & ADVISORY COMMITTEE MEMBERS ORIENTATION

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PROFESSIONAL LICENSING BOARD IS A CREATURE OF STATUTE

The State of Kansas regulates many professions, including doctors, nurses, real estate brokers, police officers, and barbers. Each of these professions is regulated by a licensing board or commission that was created by the Kansas Legislature for the purpose of ensuring that licensed professionals are competent and do not pose a risk to the public. By enacting legislation creating each licensing board, the Kansas Legislature also bestowed certain powers on those boards, but those powers are limited.

A professional licensing board is created by enabling legislation, which establishes a board's form, mission, powers, functions, tools of implementation, and enforcement abilities. A board is considered to be a "creature of statute," meaning a board's power is dependent upon its authorizing statutes, and therefore any exercise of authority claimed by a board must come from those statutes, either explicitly or necessarily implied. A board may administer, implement, and enforce only those statutes. If those statutes are silent on a particular action, the board lacks authority to take such action. Simply put, a board can do only what Kansas statutes say it can do.

Besides statutes specific to a board, a board's authority is limited by Constitutional Equal Protection and Due Process rights - prohibiting a board from acting in a manner which results in disparate or inconsistent treatment of persons similarly situated, from adopting different standards for similar situations or otherwise acting arbitrarily, capriciously or vindictively. For

example, a licensing board may not impose more severe discipline on male licensees solely because of their gender or a licensing board may not revoke a license simply because the board does not like that particular licensee. Other Constitutional guarantees, such as freedom of speech, rights of privacy, unreasonable search and seizure, and vagueness also establish parameters on a board's authority.

The Kansas Legislature retains control over certain aspects of a licensing board. For example, the legislature could decide to repeal the enabling legislation, which would eliminate the board. In addition, even if a board is fee funded (meaning paid for partly or entirely with fees collected from applicants for licensure), the board must receive a legislative appropriation in order to expend the monies collected. The legislature may also enact legislation that would change the makeup, scope, and/or powers of the board.

In exercising regulatory power, members of a licensing board often struggle with the issue of what their authority is and what their authority is not. Most licensing boards are authorized to exercise discretion when it comes to approving applications or imposing discipline on licensees. Statutes authorizing such discretion state that the board "may" approve an application based on certain criteria, or the board "may" impose discipline on a licensee if the licensee engages in certain prohibited behavior. The word "may" tells the board that it is supposed to consider the facts of each case and decide on an outcome that is fair, supported by the facts, consistent with the public interest, and complies with the language of the applicable statutes and regulations.

Board members at times want to exercise discretion when discretion is not allowed by law, such as wanting to grant a waiver or exception to a statute or regulation. Other times board members do not want to exercise discretion when discretion is called for, preferring a "blanket rule" that would apply in every case, regardless of the facts of a particular case. To meet the challenge of exercising appropriate and lawful authority, a board member must understand the type of entity a board is.

The general purpose (whether explicit or implied) of a license board is to secure for the people of Kansas the services of competent, trustworthy practitioners, and to protect the public against unprofessional, unauthorized, or unqualified practitioners. The purpose of a license board is not to promote or protect the profession as a whole; those functions typically lie with a private professional association.

A licensing board accomplishes its purposes through licensing applicants who meet established eligibility qualifications (generally education, experience, and examination) and through the disciplinary process by which a license may be conditioned, limited, revoked, suspended, revoked, or otherwise sanctioned for the violation of a statute or regulation.

FUNCTIONS AND DUTIES OF A LICENSING BOARD

In order to carry out its purpose, a board is granted (delegated) powers and functions that similarly parallel the three branches of state government: executive, judicial, and legislative.

"Executive" authority is an administrative function by which the board carries its enabling act into effect. In exercising this authority, a board is required to follow Kansas Open Meetings Act and

Kansas Open Records Act to ensure that the public's business is conducted openly.

"Judicial" authority is an adjudicative function to enforce the enabling act by holding quasi-judicial hearings to make findings of fact and conclusions of law in determining whether those facts prove a violation of law has occurred. In serving in a "judicial" capacity, most licensing boards are required to follow the Kansas Administrative Procedures Act in order to achieve uniformity among various agencies of the state with respect to procedural safeguards.

"Legislative" authority (technically, a form of administrative authority) is the authority to adopt regulations in order to implement or interpret the enabling act with more detailed or specific requirements. In adopting rules and regulations, a board is required to follow the Rules and Regulations Filing Act to ensure that the process of adopting administrative regulations is open, receptive to public and legislative input, addresses the economic impact of those affected, and that the regulations themselves are consistent in style, organization and grammar, and are lawful, filed, and published. Properly adopted regulations have the force and effect of law, *i.e.*, they are legally enforceable. A valid regulation must be within the statutory authority conferred upon the agency, implement a specific statute, and otherwise pass the test for "legality." Any regulation will be found illegal if it goes beyond the authority authorized, violates an enabling statute, or is inconsistent with the statutory power of the board, another statute, or the Constitution.

STATUTES, REGULATIONS, AND POLICIES

In order to fulfill its responsibility to protect the public from incompetent, unprofessional, and unauthorized practitioners, a regulatory board implements and enforces statutes and regulations, and at times operates according to internal policies. In order to be effective, board members need to understand the differences between statutes, regulations, and policies.

Statutes are laws passed by the Kansas Legislature through authority derived from the Kansas Constitution and subsequently signed by the Governor. Statutes generally become effective on July 1 of that session year, but can become effective if a different date is specified in the legislation. Statutes set the parameters of a board's authority. Statutes control any inconsistent regulation or policy. If a board becomes dissatisfied with the scope of its authority (e.g., a board determines that it needs investigative subpoena authority), the board must seek legislation to obtain its goal.

Regulations, on the other hand, are adopted by a board to further implement or carry out the purpose of particular statutes. A board's authority to adopt regulations is derived from statute. In adopting rules and regulations, a board is required to follow the Rules and the Regulations Filing Act to ensure that the process of adopting administrative regulations is open, receptive to public and legislative input; addresses the economic impact of board and those affected; the regulations themselves are consistent in style, organization and grammar; are lawful, and are filed and published. Regulations are promulgated to complete or fill in details of a statutory scheme—implementing statutes—and affect rights or responsibilities of third parties outside of the board.

As described below, the process of adopting regulations is quite lengthy, but for good reason.

When adopted in accordance with the Rules and Regulations Filing Act, regulations have the force and effect of law, *i.e.*, they are legally enforceable. To be valid, a regulation must be within the statutory authority conferred upon the board, implement a specific statute, and otherwise pass the test for "legality." Any regulation that goes beyond the authority granted, violates an enabling statute, or is inconsistent with the statutory power of the board, another statute, or the Constitution will be found void.

In determining whether to adopt a regulation, the following factors should be considered:

The need for a regulation

1. Does the action contemplated meet the statutory definition of a regulation? A regulation is "a standard, requirement or other policy of general application that has the force and effect of law, including amendments or revocations thereof, issued or adopted by a state agency to implement or interpret legislation." K.S.A. 77- 415(c)(4). Is the contemplated action one of those specifically excluded from the definition of a regulation? See K.S.A. 77-415(b)(2)(A)-(F).
2. Would a regulation add anything?
 - (i) Does it simply repeat the statute?
 - (ii) Is it purely self-directive?
 - (iii) Is it informational rather than regulatory?

Determine statutory authority to adopt a regulation

1. Does the agency have rule and regulation authority? The history section of every regulation must show the agency's statutory authority to promulgate regulations.
2. Does the agency's authority extend to the subject matter of this regulation? The history section must also state the statutes that are being implemented or interpreted by the regulation; the authorizing statute must correspond to the implementing statutes.

Procedure to adopt a regulation

1. Draft the regulation in accordance with the Policy and Procedure Manual for the Filing of Regulations published by the Department of Administration for form and style requirements. See: https://admin.ks.gov/docs/default-source/chief-counsel/website-documents/reg-manual-june-2018.pdf?sfvrsn=4f2688c7_14
2. Prepare an Economic Impact Statement, and Environmental Impact Statement (if appropriate), and a Private Property Protection Act Report, if Appropriate. See K.S.A. 77-416(b), (c), (d), (e) and K.S.A. 77-706(e).
3. Attach any documents adopted by reference in a regulation. All adopted documents must also be within the board's authorizing and implementing statutes.
4. Submit the regulation, any documents adopted by reference, and the Economic Impact Statement to the Director of Budget for approval. The regulation, any documents adopted by reference, and the Economic

Impact Statement to the Secretary of Administration for approval as to form, style, and orthography. Once approved by the Department Administration, submit the regulation, any materials that are adopted by reference, and the Economic Impact Statement to the Office of the Attorney General for approval. The offices of the Secretary and AG review the entire regulation, not just the new or amended provisions. The AG's review determines:

- a. Board's authority to adopt rules, generally
 - b. Regulation is within the board's scope
 - c. Regulation does not conflict with statutes or constitution
 - d. Regulation is otherwise lawful (AG also makes suggestions regarding clarity and any errors).
5. The regulation must be revised if any changes are made as a result of the review by Secretary of Administration or the Office of the Attorney General. When the revisions are completed, the regulation and the Economic Impact Statement must be resubmitted to the Director of Budget, Secretary of Administration, and Office of Attorney General for approval.
 6. After the regulation has been approved by all three agencies, it is filed with the Secretary of State for submission to the State Rules and Regulations for approval of a temporary regulation and/or the Joint Committee on Rules and Regulations for comment on a permanent regulation. If promulgating a temporary regulation, it is recommended that you also process a permanent regulation at the same time so that it will be ready to take effect when the temporary regulation expires.
 7. Submit notice to the Kansas Register making sure there will be at least 60 days between public notice and the hearing date.
 8. During the 60-day notice/public comment period for a permanent regulation:
 - a. The Joint Committee on Rules and Regulations reviews the rule and makes comments to the agency
 - b. The public has an opportunity to make written comments to the regulation.
 9. Hearing
 - a. Circulate a sign-in sheet for those in attendance
 - b. Record the comments
 10. Revisions
 - a. If revisions are necessary, the Economic Impact Statement and revised regulations must be resubmitted to the Director of Budget, Secretary of Administration, and AG for approvals.
 - b. If the regulation ends up substantially different than what was in the notice of public hearing, the notice, review by the Joint Rules and Regulation Committee, and the public hearing should occur.
 11. Adoption
If the agency head is a bod, the regulation must be adopted in an open meeting and by roll call vote for each regulation. A certificate of the vote

must be completed.

12. File the regulation and certificate of the vote with the Secretary of State. File the regulation with the Secretary of State and publish in the Kansas Register.

Effective date of regulation

1. Permanent regulation: 15 days after publication in the Register
2. Temporary regulation: Upon approval by the State Rules and Regulations Board and filing by the Secretary of State.

Policies may be adopted by a board only to guide its internal operations, such as prioritizing staff workload or explaining the investigative process. Typically, a policy is adopted by the passage of a motion. A board may not adopt a policy that would affect in any manner the persons or entities that it regulates; rather, the Board's enforcement or administration of legislation must be properly adopted, filed, and published as a regulation.

Guidance documents are documents that state a board's current approach to, or interpretation of law, or general statements of policy that describe how and when the board will exercise discretionary functions. Guidance documents do not go through the rules and regulations filing process; thus, they do not have the force of law. Guidance documents must be published on the agency's website.

EFFECTIVENESS AS A BOARD MEMBER

A board expends less time, money, energy, and resources by taking action to prevent a legislative post audit review, a lawsuit, an appeal of administrative action, or a complaint made against you or your board. So, . . .

- Read the board's enabling statutes, K.S.A. 74-7501, *et seq.*
- Read all of the board's licensing acts:
 - Licensure of Psychologists Act, K.S.A. 74-5301, *et seq.*
 - Licensure of Master's Level Psychologists Act, K.S.A. 74-5361, *et seq.*
 - Professional Counselors Licensure Act, K.S.A. 65-5801, *et seq.*
 - Social Workers Licensure Act, K.S.A. 65-6301, *et seq.*
 - Marriage and Family Therapists Licensure Act, K.S.A. 65-6401, *et seq.*
 - Addiction Counselor Licensure Act, K.S.A. 65-6607, *et seq.*
 - Applied Behavior Analysis Licensure Act, K.S.A. 65-7501, *et seq.*
- Re-read all the above licensing acts until you feel you fully understand them. Re-read them as necessary to familiarize and understand the boundaries contained therein—especially as a statute(s) pertains to a specific issue or matter.
- Read the regulations for each licensing act and re-read the regulations as it relates to the implementing statute(s).
- Be on the alert for agency policies and internal procedures which are inconsistent with or conflict with the board's statutes and regulations, or which affect requirements for applicants or licensees. The rationale of "We have always done it this way" is not a legal defense.

- Ensure that decisions are within the authority granted. If any doubt about the legality of an action, consult with the board's attorney.
- Be willing to initiate action to amend statutes or modify regulations. If a statute or regulation seems confusing, unfair, vague, or overly burdensome to you, chances are good that it is confusing, unfair, vague or overly burdensome to those persons who must comply with them. Statutes and regulations may also have to be amended as they become outdated.
- Remember the purpose of imposing discipline against licensees is to encourage compliance with the law and protect the public. Discipline should not be vindictive or disproportionate to the severity of the licensee's violations. The harshest sanction, revocation, is typically reserved for licensees who have committed egregious or multiple violations or has a history of repeated violations and not responded to prior disciplinary action.
- Always be mindful that the role of the board is to protect the public, not the licensee.

CONFLICT OF INTEREST

Conflict of interest typically means having any interest, financial or otherwise, direct or indirect, or engaging in any business or transaction or professional activity or incurring any obligation of any nature, which is in substantial conflict with the proper discharge of the board member's duties in the public interest. Board members must make public and recuse themselves from any conflict of interest that exists to ensure the integrity of the board and all of its decisions. Disclosure and recusal are important tools to avoid actual or perceived conflict of interest, but board members must not overuse recusal as an excuse to avoid conflict in exercising their full responsibilities.

Types of Potential Conflict in External Activities

Personal conflicts are those actions that may ultimately have a personal consequence that is a direct or indirect effect of a decision or action. No decisions should be made that will advance the personal benefit of the board member(s). Some examples of personal conflict include:

- Personal gain: Will this decision affect the board member's personal life, career advancement, or business in any direct way?
 - Example: The Board holds a hearing on a summary proceeding order that denied a license to an applicant who works near Board Member Doe. Board Member Doe is the only other licensee in the area. The denial of applicant's request for licensure means Board Member Doe would see an increase in business.
- Bias: Does the board member's personal relationship with the licensee in question impair his or her ability to render an impartial decision? Is the board member privy to information about the licensee that the other board members do not know, and

that will affect the board member's ability to vote objectively?

- Example: The Board is considering whether to grant a license to an applicant who has a felony conviction and provided some evidence of rehabilitation. The Board is divided on whether to approve the application. Board Member Doe and the applicant's mother are close friends and Board Member Doe has known the applicant since he was a child. Board Member Doe wishes to "vouch" for the applicant.
- Effects on personal relationship: Will there be an effect on the board member's current, past or future personal relationship(s)?
 - Example: The Board is considering whether to fine a licensee. Board Member Doe's supervisor is a close relative of the licensee, and she fears that she will face retaliation from her supervisor if she votes in favor of the fine.

CONFIDENTIALITY

At all times the board member must conform to the rules of confidentiality in dealings outside the boardroom. *Protected information obtained in the capacity of board member must remain confidential during and after board membership.* Termination of board membership does not dissolve the board member from responsibility. The rules that applied during active board membership continue to apply after termination of board membership. Confidentiality must be maintained on all confidential subjects that the individual was privy to as a board member.

- Executive sessions during open meetings: The purpose of an executive session is to allow board members to discuss certain matters privately, outside the public view. Taking an executive session without a proper motion that states the statutory grounds for the executive session can result in the imposition of a penalty. Sharing matters discussed during an executive session with another party defeats the purpose of the executive session. In addition, breaching executive session confidentiality could expose the Board to a KOMA complaint because revealing information intended to be confidential suggests that there was no need to discuss the matter in private. Finally, the purpose of an executive session is typically to discuss private information about an employee or to obtain advice from the Board's attorney to preserve attorney-client confidentiality. A board member may subject the Board to litigation by discussing private information about an employee or waive attorney-client confidentiality by revealing attorney-client communications to a third party. So, do NOT disclose the information that was discussed during an executive session.
- Deliberations after a hearing: Discussions on a decision regarding a particular pending case are considered quasi-judicial deliberations. The Kansas Open Meetings Act (KOMA) and the Kansas Administrative Procedure Act (KAPA) allow Board members to deliberate in private in order to reach a decision in a particular pending case regarding the applicable facts, law, and sanctions. It is understood

that discussions during private deliberations are meant to be confidential.

EX PARTE COMMUNICATIONS

An ex parte communication typically involves receiving information from or discussing with a party or an outside person without the knowledge of the other party; for this reason, it is regarded as a one-sided or partisan viewpoint. For the purposes of the board, an ex parte communication can occur when a board member discusses the details or merits of a particular case with only the applicant or licensee, the board's litigation counsel, or board staff. In other words, one or more litigants or their attorneys in a case are not present during the discussion.

Ex parte communications are problematic because licensees and applicants for licenses are entitled to due process and the board's decisions must be fair and objective. In the case of an applicant for licensure or a licensee in a disciplinary action, the KAPA prohibits board members charged with rendering a decision in a matter from communicating – directly or indirectly through staff – with any party or participant regarding any issue in the proceeding. This rule is designed to prevent decisions based on “secret” information not provided to the other side.

A board member may encounter ex parte communications without advance warning to the board member. For example, a person who has a pending application for licensure may call a board member to advocate for him or herself. Similarly, a licensee might approach a board member at a conference to ask that the disciplinary action against him or her be lifted or changed.

A board member may also inadvertently create ex parte issues by contacting board staff or litigation counsel with questions about a pending hearing or application. Board staff and litigation counsel are aware of ex parte concerns. They will refrain from discussing the particulars of a case with you. Decisions on applications and disciplinary matters must be made based only upon the agency record or evidence presented at the hearing.

It is the responsibility of the board member to disclose ex parte communications. The KAPA requires disclosure of ex parte communications on the record (i.e., in a document filed in the agency record and sent to the litigants or during a hearing open to the public with the litigants present). If a licensee attempts to engage in ex parte communications with a board member but the board member ends the conversation before a discussion of the particulars of a case, the board member still needs to disclose the attempted ex parte communication. If the ex parte communication is such that the board member is partial or biased or if there would be an actual or perceived conflict of interest, the board member must recuse himself or herself from the discussion and decision of the case.

PROFESSIONAL ACTIVITIES

A board member may hold an office in a professional or trade association of the regulated profession, but may not lobby for or cast votes regarding a matter that would impact the professional association or the board member's office in that association. The board member may not use his or her position on the board to further the interests of the professional association or his or her office in that association.

Board members may attend professional conferences and social events, but they must be

mindful of open meetings rules and conflicts of interest. If a majority of board members are present, do not discuss the “business or affairs” of the board to avoid triggering a “meeting” under the KOMA. Additionally, do not discuss matters related to a particular pending application or disciplinary matter.

OTHER CONDUCT

A board member should not represent himself/herself as a spokesperson for the Board unless authorized by vote of the board to speak on the Board’s behalf. If a board member is asked to give the Board’s position on an issue and the Board has not authorized that member to do so, the board member must decline to comment or make clear that any opinions expressed are those of him or her alone and NOT the Board. A board member should not ask board staff or board counsel to provide legal advice or preferential treatment to any applicant or licensee.

THE KANSAS OPEN MEETINGS ACT (KOMA)

The Kansas Open Meetings Act (KOMA), K.S.A. 75-4317 *et seq.*, allows the public to observe governmental entities making decisions. Meetings shall be open to the public because “a representative government is dependent upon an informed electorate.” K.S.A. 75-4317(a). Because the purpose of KOMA is to benefit the public, it is interpreted liberally and exceptions are applied narrowly to carry out its purpose.

The KOMA applies to all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, and other subordinate groups thereof receiving or expending and supported in whole or in part by public funds. K.S.A. 75-4318. The KOMA does not define the term “subordinate groups,” but if created by a covered entity or the group has become an extension of a covered entity, most likely the subordinate group is subject to the KOMA.

The KOMA does not apply to an otherwise covered entity when exercising a “quasi-judicial” function, K.S.A. 75-4318(g)(1), or conducting a proceeding or hearing under the Kansas Administrative Procedures Act (KAPA). K.S.A. 77-523(f); K.S.A. 75-4318(g). KOMA also does not apply to the judiciary, private organizations, and staff meetings of a covered entity.

A meeting is defined as:

- Any gathering or assembly in person, through the use of a telephone, or any other medium for interactive communication
- By a majority of the membership of an agency or public body subject to the act
- For the purpose of discussing the business or affairs of the public body or agency
K.S.A. 75-4317a

Meetings may be conducted by telephone or other electronic medium (e.g., Zoom, Skype) if the board complies with all KOMA requirements. A meeting includes informal discussions before, after the public meeting, or during a recess of a public meeting and all gatherings at all stages of the decision-making process. The name of the gathering is irrelevant; thus, "work sessions" and "retreats" are subject to KOMA. The majority of the membership for a meeting is calculated

by the next whole number greater than one-half the total number of members—including vacant positions and absent members. A majority can be different than a quorum.

A "discussion" does not require binding action or voting. A discussion can occur at social gatherings, retreats and meetings held in private, education conferences/seminars. Thus, when traveling to such meetings, members of the board should avoid discussing business or affairs of the agency.

The presiding officer has duty to provide notice of the meeting, but this duty may be delegated. K.S.A. 75-4318(b). Contrary to popular belief, the KOMA does not require notice of meetings to be published in a paper or on a website. An individual must request notice of meetings. There are no formalities to requesting notice – it can be verbal or written. The notice must provide date, time, and location where body will meet to the person requesting notice in a “reasonable time” before meeting. A request is valid for one fiscal year. The Board must notify a requester of expiration before terminating notice to that requester.

The KOMA does not address meeting procedures; thus, a board is not required to follow Roberts Rules of Order or any similar formal rules of procedure. The KOMA also does not require a board to create an agenda, but if one exists, it must be made available to everyone. An agenda does not have to be mailed out in advance of the meeting. The person may record the meeting as long as doing so is not disruptive. The public does not have the right to speak, but only to listen and observe. The board cannot vote by secret ballots.

A board policy may require minutes to be kept, but the KOMA does not require the board to have minutes *unless* there is a motion to go into executive session. The motion as made must be included in the minutes. An executive session permits discussion of certain enumerated matters outside of public view. To take an executive session, the Board must first convene an open meeting. The Board cannot take binding actions in an executive session, but a consensus is allowed. If a consensus is achieved, the Board must reconvene the open meeting and take a formal vote in open session.

Executive sessions are governed by statute and those requirements must be met. Those requirements are:

1. A formal motion must be made, seconded, and carried;
2. The motion for executive session must contain:
 - (a) A statement describing the subject(s) to be discussed (without revealing confidential information);
 - (b) The justification (listed the statute) for closing the meeting; and
 - (c) The time and place the open meeting will resume; and
3. The complete motion must be recorded in the minutes and permanently retained by the Board. K.S.A. 75-4319(a).

The two most common justifications used by licensing boards are personnel matters of non-elected personnel and legal consultation with the board’s attorney. Executive sessions for personnel matters of non-elected personnel are used to protect the privacy interests of the employee. It can also be used to discuss applicants for employment. Executive sessions under

this subject matter do *not* include contractors or appointments to boards or commissions. See K.S.A. 75-4319(b)(1). Executive sessions for consultation with legal counsel requires the board's legal counsel to be present and the communication to be privileged, *i.e.*, confidential. No third parties may be present as that breaks the privilege. See K.S.A. 75-4319(b)(2).

The most common complaints raised by the public include:

- Executive sessions
- Improper motions for executive sessions
- An executive session for a subject matter, but discussing a different or additional subject matter in session
- Inclusion of non-board members in executive session
- Executive session is extended without reconvening the open meeting, making a motion to extend the executive session, and voting
- Failure to return to open meeting at the stated time/place after an executive session ends
- Revealing information discussed in executive session
- Serial communications
- Failure to give notice when majority of membership of board gathered
- Failure to give notice of meetings

Prosecutions under the KOMA are civil, not criminal. Any person, county/district attorney or the attorney general may bring an action in district court. The county/district attorney and attorney general have subpoena power. Enforcement actions take precedence over all other cases and are assigned for trial at the earliest practicable date.

The remedies for a KOMA violation include: voiding any action taken if prosecuted by the attorney general or county/district attorney only; an injunction (stopping the action); a mandamus (forcing action); and a declaratory judgment. The penalties for a KOMA violation include: a fine up to \$500 per board member, not the board, for each violation; ouster from office; recall from office; court costs assessed to the person seeking enforcement of KOMA; court costs assessed against plaintiff if maintained action frivolously, not in good faith, or without reasonable basis in law or fact. K.S.A. 75-4320; K.S.A. 75-4320a.

Effective July 1, 2015, the Attorney General can enter into a consent order or issue a finding of a violation. Under the consent order provision, the Attorney General may investigate any time prior to filing an action under K.S.A. 75-4320a, use the preponderance of evidence standard, and enter into a consent order with the board member that may:

- Contain admissions of fact;
 - Require completion of training approved by the Attorney General;
 - Impose a civil penalty up to \$250 for each violation;
 - Set forth an agreement to comply with the KOMA; and
 - Require submission of proof consent order requirements met.
- K.S.A. 75-4320d.

The consent agreement must also bear the signature of the head of the board found to have

violated the KOMA and of any other person required by the Attorney General. K.S.A 75-4320d.

Under the provision for finding a violation, the Attorney General may investigate, use the preponderance of evidence standard, and issue a finding of a violation to the board that may:

- Contain findings of fact and conclusions of law;
 - Require the board to do any or all of the following:
 - Cease and desist from further violation;
 - Comply with the KOMA;
 - Complete training approved by the Attorney General;
 - Pay a civil penalty up to \$500 for each violation; and
 - Submit proof of compliance with the finding of violation.
- K.S.A. 75-4320d(a)(2).

The Attorney General may apply to district court to enforce a consent order or a finding of violation. If it finds that the attorney general did not abuse discretion, then the district court shall:

- Enjoin the public body or agency to comply with consent order or finding of violation;
 - Impose a civil penalty not less than the one imposed by the Attorney General and not more than \$500 per violation
 - Require public body or agency to pay court costs and investigative costs incurred by Attorney General;
 - Impose any other remedy authorized by K.S.A. 75-4320a(a).
- K.S.A. 75-4320d(c).

The district court may also award the Attorney General reasonable attorney fees; in certain instances, the district court is required to do so. See K.S.A. 75-4320d(c)(4).

For further information or registration on the next training session, please view the Attorney General's website at: <http://ag.ks.gov/open-govt/resources>

THE KANSAS OPEN RECORDS ACT (KORA)

The Kansas Open Records Act (KORA), K.S.A. 45-215 *et seq.*, requires the board to have its records "open for inspection by any person unless otherwise provided;" and KORA "shall be liberally construed and applied to promote such policy." K.S.A. 45-216(a).

A public agency includes the state or any political or taxing subdivision of the state, or any office, officer, agency or instrumentality thereof or any other entity receiving, expending, or supported in whole or in part by public funds appropriated by the state or political/taxing subdivision. The term "instrumentality" is not defined in KORA. Nevertheless, if created by a covered entity or the group has become an extension of a covered entity, it will most likely be covered. A "public agency" does not include private companies, even if they receive public funds in exchange for goods and services, judges and courts, an individual legislator or member of a governing body, private individuals, or state employees.

A public record includes any recorded information regardless of form or characteristics which is made, maintained, or kept by or is in the possession of any public agency and written records, photographs, computer data, and e-mail. A public record does not include records that are owned by a private person or entity and are not related to functions, activities, programs, or operations funded by public funds or records not in existence at the time of the request. The Board is not required to create a record in order to fulfill a request. See K.S.A. 45-217.

Under the KORA, the Board must:

- Appoint a freedom of information officer to assist with KORA requests
- Display, distribute, or otherwise make available a brochure describing requester rights, agency responsibilities, and procedures for inspecting or obtaining copies of public records
- Include the name/title of a records custodian, fees, and office hours available for anyone to make a request. K.S.A. 45-226 and K.S.A. 45-227.

In Kansas, any person may make a request; the person need not be a resident or provide a reason for their request. The Board may require the request to be in writing, state name and address of the requestor, provide proof of identification, and sign a written certification that the requester will not use names and addresses obtained from the records to solicit sales or services. Unless closed by law, the Board cannot deny a person the right to review its public records. For instance, copyrighted materials may not be reproduced without the permission from the copyright holder, but must be available for viewing or listening. If portions of a record are closed, the remainder of the record must be made available to the requestor; this referred to as "redaction." The Board is not required to make copies of a recording tapes or discs, video tapes or films, pictures, slides, graphics, illustrations *unless* shown at a public meeting.

The request must be "acted upon" as soon as possible, but not later than the end of third business day following the date the request was received by the board. Three responses are acceptable: (1) the record is provided (in the form requested, if possible); (2) the request is under review and the records if permitted will follow; and (3) the request is denied, with a detailed explanation for the denial.

Under the KORA, there is a presumption of openness. As such, the requested public records must be released unless an exemption to disclosure applies. The burden rests on the board to prove the requested records are exempt from disclosure. Exemptions to disclosure may be discretionary or mandatory.

Discretionary closure includes medical, psychiatric, psychological, or alcoholism/drug dependency treatment records pertaining to identifiable patients; personnel records other than an employee's name, positions/titles, salaries or employment contracts; and length of service; information that constitutes a clearly unwarranted invasion of personal privacy if disclosed; records privileged under rules of evidence unless consent is given; records; and records of an investigation conducted under civil litigation or administrative adjudication, if disclosure interferes with the procedure. Mandatory closure includes records that are required to be closed by federal or state statute that are not found in the KORA; the KORA looks to other statutes first.

The Board may recover only actual costs to provide the requested records. These costs include staff time to retrieve and review records, redact information from a record, and copy the record. The fees may be estimated and collected before the records are provided. K.S.A. 45-218(f) and K.S.A. 45-219.

The KORA is a civil act, not a criminal act. Any person, a county/district attorney, or the Attorney General may bring a civil prosecution. The county/district attorney and Attorney General have subpoena power. Such actions are assigned a trial date at the earliest practicable date. K.S.A. 45-222(e). The district court may review the requested records *in camera*. In actions brought by the county/district attorney or Attorney General, fines up to \$500 per violation may be imposed for a knowing violation or an intentional failure to furnish information. Costs and reasonable attorney's fees, including appeals, may be imposed if the board's denial is not made in good faith and without a reasonable basis in fact or law. See K.S.A. 45-222 and K.S.A. 45-223.

The KORA creates graduated enforcement options to encourage resolution of KORA violations in lieu of filing an enforcement action. The Attorney General or a county/district attorney can use a consent judgment in lieu of prosecution. A consent judgment may contain any remedy available to a district court but cannot include an award of reasonable expenses, investigation costs, or attorney fees. The district court must approve a consent judgment and enter judgment. Breach of a consent judgment is a violation of the court order and subject to penalties provided by law. See K.S.A. 45-253.

Effective July 1, 2015, the KORA provisions also authorize the Attorney General to enter into a consent order or issue a finding of a violation after an investigation showing by a preponderance of the evidence that a violation has occurred. The Attorney General can seek district court enforcement of a consent order or a finding of violation. K.S.A. 45-251. The district court may review the requested records *in camera*.

Under the consent order provisions, the Attorney General may investigate using the preponderance of evidence standard and enter into a consent order that may:

- Contain admissions of fact;
 - Require completion of training approved by the Attorney General;
 - Impose a civil penalty up to \$250 for each violation;
 - Set forth an agreement to comply with the KORA; and
 - Require submission of proof that consent order requirements met.
- K.S.A. 45-251(a)(1)(A).

A consent order with a public agency that is not a governing body must bear the signature of the head of the public agency, any officer found to have violated the KORA and of any other person required by the Attorney General. A consent order with a public agency that is a governing body shall include the signatures of all members. K.S.A. 45-251(a)(1)(B). Under the provisions for finding of a violation, the Attorney General may investigate using the preponderance of evidence standard. The Attorney General issues a finding of violation to a public agency that may contain findings of facts and conclusions of law and require the agency to do any or all of the following:

- Cease and desist from further violation;

Comply with KORA;
Complete training approved by the Attorney General;
Pay a civil penalty up to \$500 for each violation; and
Submit proof that of compliance with the finding of violation.
K.S.A. 45-251(a)(2).

In an enforcement action, if it finds that the attorney general did not abuse discretion, then the district court shall:

Enjoin the public agency to comply with consent order or finding of violation;
Impose a civil penalty not less than the one imposed by the Attorney General and not more than \$500 per violation
Require public agency to pay court costs and investigative costs incurred by the Attorney General; and
Impose any other remedy authorized by K.S.A. 45-222(a).
K.S.A. 45-251(c).

The district court shall award the Attorney General costs and reasonable attorney fees if the court finds that the agency's denial of access to the record was not in good faith and without a reasonable basis in fact or law. See K.S.A. 45-222(d).

The most common complaints raised by the public include:

Calculation and explanation of the "reasonable" fee/actual costs
Records provided did not meet the requester's expectations
Requester believes there should be existing public records, but none were found
Is agency/entity covered by KORA, and if not, why not?
Failure to respond within three business days
Failure to provide the requested records
Access to criminal investigation records

For further information or registration on the next training session, please view the Attorney General's website at: <http://ag.ks.gov/open-govt/resources>

The KANSAS ADMINISTRATIVE PROCEDURE ACT

The Kansas Administrative Procedure Act (KAPA), K.S.A. 77-501 *et seq.*, creates only procedural rights and imposes only procedural duties. K.S.A. 77-503(b). The KAPA does not provide substantive law; those laws are governed by the Board's enabling act and licensing acts. The KAPA applies only to the extent that other statutes expressly provide that the provisions of the KAPA govern those provisions. K.S.A. 77-503(a).

Attorney General Opinion No. 2014-07 was issued at the request of the Kansas Board of Emergency Medical Services. It discusses the extent to which that Board's investigations committee must conduct its business in a public meeting under the Kansas Open Meetings Act (KOMA). The general rule is that licensing boards, like the BSRB, must do business in an open meeting under the KOMA unless directed by statute to conduct the proceeding or hearing

pursuant to the KAPA. Those two Acts are mutually exclusive.

The key conclusion in this opinion is that when a licensing board's statutes provide that the KAPA applies to certain decisions, the Board shall follow the KAPA, not the KOMA, when making those decisions. **The KAPA sets out a procedure to follow when the Board is deciding what to do in cases involving individual licensees, much like the procedure that is followed in court cases.** In those types of cases, the Board is conducting a quasi-judicial function in deciding the outcome of the case. When the KAPA applies, none of the stages in a particular case has to be open to public observation **other than a hearing.**

Other than the Behavior Analysts Licensure Act, each of the Board's licensing acts have the following KAPA provision: "Administrative proceedings and disciplinary actions regarding licensure under the [applicable licensing act] shall be conducted in accordance with the Kansas administrative procedure act." K.S.A. 74-5324(c) (psychologist); K.S.A. 74-5369(c) (master's level psychologist); K.S.A. 65-5809(c) (professional counseling); K.S.A. 65-6311(c) (social workers); K.S.A. 65-6408(c) (marriage and family therapists); and K.S.A. 65-6615(c) (addiction counselors). The KAPA provision in the Behavior Analysts Licensure Act states: "Any action taken under this section which affects any license or imposes any administrative penalty shall be taken only after notice and an opportunity for a hearing conducted in accordance with the provisions of the Kansas administrative procedure act." K.S.A. 65-7504(b).

Under the KAPA, neither the public nor an applicant has to be notified when the Board meets to consider an application for licensure. Similarly, under the KAPA, neither the public nor the licensee has to be notified when the Complaint Review Committee (CRC) meets to consider whether probable cause exists in a discipline case or issue a summary proceeding order. Additionally, the Board and the CRC do not need to take a vote in public for decisions made under the KAPA; under the KAPA, decisions are made when the license or an order is issued. The necessary Board staff and the Board's or CRC's attorney can be present during the KAPA discussions to make sure the Board members have the information or legal advice they need to make an informed decision.

There are some Board activities that are not covered by the KAPA, and these must be acted on in an open meeting under the KOMA. These include:

- Approving Board minutes;
- Discussions and votes to approve or amend regulations or guidance documents;
- Delegating authority to a Board member or to the Executive Director to take a particular action;
- Receiving agency updates regarding the budget, legislation, statistics on complaints and CRC activity, education, and the Executive Director's report;
- Decisions whether to renew contracts or change the way contracted services are provided; and
- Policy decisions affecting the way the Board operates internally.

All of the above activities are conducted under the KOMA and require a vote in an open meeting to take action, but the Board may receive confidential legal advice in an executive session before making any of the above decisions.

Taken together, this means that if the Board is considering only KAPA matters (a pending case for a specific applicant or a licensee involving licensure or discipline, petitions for review, petitions for stay, petitions for reconsideration) as authorized by its licensing act, the Board does not have to notify the public of when it is conducting a proceeding in a pending case, can conduct the proceeding in person or electronically, and does not have to have an agenda. The Board, of course, must provide notice to the parties if required by the KAPA—such as a pre-hearing conference or a hearing.

Applications: Applications for licensure are typically handled differently than an investigation. A person who files an application for licensure has the burden of proof; thus, the Board does not usually conduct an investigation on an application. Staff will gather the information submitted by an applicant for the Board's consideration in determining whether an applicant is qualified for licensure or whether a license may be conditioned or restricted. If the Board denies, conditions, or restricts a license, an applicant may request a hearing if the applicant did not agree to such action in a consent agreement and order.

Once a person is granted a license, it becomes a statutory/property right that cannot be taken away by the Board without giving the licensee the due process rights of notice and an opportunity to be heard by a fair and impartial tribunal. The KAPA creates the framework for this to occur. If a proposed action under a licensing statute is not governed by the KAPA, the Board may review the KAPA for guidance or consult with legal counsel to avoid a due process claim.

Investigations and Determination of Probable Cause: The Board has the burden of proof to show a licensee has violated a statute or regulation; thus, the Board conducts an investigation to gather all facts necessary to prove such violation. The remainder of this discussion involves the investigation and prosecution of a discipline case.

All licensing boards can investigate complaints or allegations that a licensee has violated its statutes or regulations. The Board's investigator generally gathers information and then presents that information to the CRC. That information should include the licensee's side of the story. The licensee's position can be presented in writing or in person before the CRC at the option of the CRC. The CRC reviews the information and determines whether there is probably cause, or reasonable grounds, to believe that the licensee has violated specific statutes or regulations. "Reasonable grounds" means information that would lead a reasonably prudent person to believe that the licensee violated one of the Board's statutes or regulations.

When making the determination, the CRC must make sure the conduct that the licensee is accused of actually violates one of the Board's statutes or regulations. The fact that the licensee did something that made someone angry, violated a professional association's ethical code, or did not follow an employer's policy does not necessarily mean that the licensee violated a statute or regulation.

Proceedings after a reasonable grounds determination is made. If appropriate, a consent agreement can resolve a disciplinary matter. The purpose of discipline is to protect the public - not to exact retribution. The disciplinary process can be lengthy and time consuming. A consent agreement may require the licensee to admit wrongdoing but the licensee must agree

to do certain things (practice with restrictions, pay a fine, seek medical treatment etc.) provided the board agrees not to pursue formal disciplinary action.

If a consent agreement is not possible, the CRC requests its disciplinary counsel to take appropriate action by: (1) filing a formal petition charging the licensee with statutory/regulatory violations and setting the matter for hearing or (2) filing a summary procedure order imposing certain discipline and/or a fine. The licensee can request a hearing on the summary proceeding order within a certain prescribed time period. Once a petition or a request for a hearing is filed, the KAPA guides the proceedings and hearing.

If there is an immediate danger to public health, safety or welfare, the CRC may suspend a license without giving the licensee notice and an opportunity for a hearing. A licensee may appeal an emergency order to the district court. After the issuance of a suspension order, the investigation must be completed as quickly as feasible so that a petition and notice of a scheduled hearing can be filed; this ensures that the licensee has an opportunity to appear and contest the action.

If the KAPA does not apply and no other statutory authority exists, the Board cannot use the KAPA provisions governing the summary procedure order or an emergency proceedings order. Rather, the Board must comply with due process by providing notice to the licensee and giving the opportunity to participate in a hearing at an open meeting.

Discovery: Both the Board and the licensee have the right to "discover" the other side's position by submitting interrogatories, requesting documents, and taking depositions. Setting deadlines for these activities are handled during a prehearing conference. Discovery can take, at a minimum, 3-6 months, depending upon the complexity of a case.

Appointing the Presiding Officer and Hearing the Case: The Board can appoint the Office of Administrative Hearings (OAH) or one or more Board members to serve as the presiding officer who will hear the case. Board members who were involved in investigating the case or determining there was reason to believe that the licensee violated statutes/regulations cannot be a presiding officer for the evidentiary hearing. Unless OAH hears the case, the Board's general counsel advises the Board members who serve as the presiding officer, facilitates the hearing if requested, and drafts the order for the presiding officer's approval.

The KAPA proceedings and hearings may be quite lengthy so board members should decide whether they are willing to commit the time. If not, then the Board can contract with OAH to serve as a presiding officer and issue an initial order.

Once the presiding officer is identified, a Notice of Hearing is mailed to the licensee setting the date, time, and place for the hearing. Requests for continuances are common. Generally, the practice is to grant one continuance to a party. Additional continuances may be granted if a party can show cause for a continuance.

The Evidentiary Hearing: Either a court reporter or a recording device makes a recording of the evidentiary hearing. The hearing may be conducted by telephone or video conference. However, this may make it difficult for those participating by telephone to view videos, exhibits,

or documents presented by the parties unless the parties agree to share such material with the presiding officers prior to the hearing.

In a disciplinary case, the Board's disciplinary counsel presents evidence and then the licensee presents evidence. In a case involving an application for licensure, the applicant has the burden and begins the presentation of evidence, followed by the Board's disciplinary counsel presentation of evidence. The Board's general counsel or the OAH presiding officer ensures that the proceedings run smoothly. When the evidence is completed, the parties may present a closing argument. At the close of the hearing, the presiding officer deliberates.

In order to impose sanctions/discipline, the presiding officer must determine that the Board's evidence proves the licensee violated the statutes/regulations charged in the petition or summary proceeding order. The presiding officer looks at the quantity of evidence as well as the quality of evidence and make credibility determinations for any witness. Any penalty imposed must be reasonable – *i.e.*, the justification for the penalty must be articulated in the order and based on the factual findings.

The Board's general counsel drafts an appropriate order and forwards the draft to the presiding officer for review. Once the presiding officer has approved the order, the order is then filed in the Board's records and mailed to the parties.

Presiding Officer Conduct: Once appointed as a presiding officer, a Board member cannot communicate with a party, participant, witness, or a third party regarding any issue in the proceeding without notifying the other party prior to the communication (*i.e.*, an *ex parte* communication). This means that a presiding officer cannot talk about the case with the executive director, staff employees, disciplinary counsel, or other board members who were not appointed as a presiding officer in the matter. This ensures that neither party has an advantage over the other by having the "ear" of the presiding officer. It also ensures that the decision is based only on the evidence presented during the hearing. Board members serving as a presiding officer may discuss the case with each other and the attorney who serves as general counsel to the presiding officer. Additionally, a presiding officer can be disqualified for bias, prejudice, or interest.

Default: If the licensee fails to appear at the hearing, the proceeding is held and evidence is produced or, alternatively, no evidence is taken and the presiding officer simply deems the allegations and violations stated in the petition or summary proceeding order to be true. In the former instance, an order is issued based on the evidence presented at the hearing. In the latter instance, a proposed default order is issued along with a notice giving the licensee seven days to file a motion to vacate explaining why the licensee did not appear at the hearing. If a motion to set aside the default order is timely filed, the presiding officer will decide whether to grant it or not. If the motion is granted, another hearing is scheduled. If no motion to set aside the default order is filed, the licensee may file a timely petition for review with the agency head; if not, the default order becomes final.

Post-Hearing Matters: If the presiding officers are members of the Board, the presiding officer issues a final order. If the presiding officer issues a final order, the licensee can request reconsideration. If a presiding officer with OAH heard the case, the OAH presiding officer issues

an initial order that can be reviewed by the Board if a party timely files a petition for review. Either party can request that the Board review an initial order. The Board can also designate certain Board members to serve as agency head to review initial orders. The agency head's decision on a petition for review will be the final order. Either party may file a petition for reconsideration of the agency head's final order. Both initial and final orders contain "findings of fact," "conclusions of law," and policy reasons for the decision, including the penalty if the evidence is sufficient to support a violation(s) of statutes/regulations. Final orders can be reviewed by the district court and the Kansas appellate courts.

Petition for Judicial Review: A licensee or applicant adversely affected by a Board decision (e.g. denial to issue or reinstate a license; or a restriction, limitation, suspension, or revocation of a license) can ask the courts to review the decision. The burden of proving that the Board's decision was wrong is on the party who appeals. A court may reverse a Board's decision for the following reasons:

- (1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied;
- (2) the agency has acted beyond the jurisdiction conferred by any provision of law;
- (3) the agency has not decided an issue requiring resolution;
- (4) the agency has erroneously interpreted or applied the law;
- (5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure;
- (6) the persons taking the agency action were improperly constituted as a decision making body or subject to disqualification;
- (7) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole; or
- (8) the agency action is otherwise unreasonable, arbitrary or capricious. K.S.A. 77-621(c).

Because a court may be reviewing the Board's action, it is important when deciding what course of action to take to remember how a court will look at it. The board's legal counsel can provide advice in this regard.

THE KANSAS TORT CLAIMS ACT

The Kansas Tort Claims Act (KTCA) generally governs the liability of the State Kansas and its agencies and employees. An employee includes a member of a board or committee 'of a governmental entity, including elected or appointed officials and persons acting on behalf or in service of a governmental entity in any official capacity, whether with or without compensation.'" K.S.A. 75-6102(d)(A). The basic rule of the KTCA is vicarious liability for any actionably wrongful act or omissions of government employees within the course and scope of their employment, subject to affirmative grants of immunity that may exist on a case-by-case basis.

If you are sued for an act that occurred *within the scope of your duties as a Board member*, you are entitled to have the Attorney General's Office defend you at no cost. To obtain representation by the Attorney General's Office, you must (1) submit a written request to the Attorney General

within 15 days after service of a process (include a copy of the petition and summons) and (2) cooperate in your defense. The State may choose not to defend you if you (1) acted with actual fraud or malice or (2) failed to make a timely request for representation.

The general rule is that the State will pay for any judgment rendered against you unless (1) the judgment is for an act or omission that occurred outside the scope of your duties as a board member; (2) you failed to cooperate in your defense; or (3) you acted with actual fraud or malice.

Things to remember if you are sued:

1. File a timely written request for representation by the Attorney General and attach a copy of the petition and summons;
2. Do not sign anything; and
3. Do not say anything.