



**BOARD OF ACCOUNTANCY
ENFORCEMENT
RESOURCE GUIDE**

Nonbinding guidance for the exclusive use of State Boards of Accountancy

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PREFACE

Our economy depends upon reliable public accounting and financial reporting. The need for public trust in the accountancy profession has been amply demonstrated by the dramatic collapse of prominent, publicly-held companies in the early 2000s; the associated accountancy scandals; recent high-profile investment frauds; and the current economic downturn.

The 55 Member Boards of the National Association of State Boards of Accountancy (NASBA) are charged with ensuring that persons entering the profession are competent, guaranteeing that those holding the CPA license maintain high standards of personal conduct and competency; and holding CPAs publicly accountable for their actions. By fulfilling these responsibilities, the State Boards of Accountancy (Accountancy Boards, Member Boards or Boards) enhance the credibility, validity, and reliability of the CPA license on which the public and United States financial system rely.

In addition to being crucial to public protection and economic vitality, each Board's enforcement efforts truly affect the public protection in every other jurisdiction. Interstate mobility, an advancement by which CPAs can practice anywhere in the U.S. without obtaining a reciprocal license in every jurisdiction, requires all states actively regulate their licensees. The ability to bring enforcement actions based on conduct performed through mobility is pivotal to the success of the mobility model.

The mission of the National Association of State Boards of Accountancy (NASBA) is to enhance the effectiveness and advance the common interests of the Board of Accountancy. For the reasons detailed above, a significant concern of NASBA, all Accountancy Boards, individual CPAs, and other parties, is the consistent and effective enforcement of states' accountancy statutes and regulations. NASBA has developed this guide to help Accountancy Boards better carry out their duties and responsibilities in the area of enforcement. We ask that Accountancy Boards assist in maintaining this resource by providing input and updates to keep these materials current.

INTRODUCTION

Background

This guide was developed in order to provide Accountancy Boards with a wealth of information on practices in enforcement. It is intended to be used as a resource in developing or enhancing their enforcement systems.

This guide draws on the enforcement procedures of a number of different Accountancy Boards. Therefore, it reflects the great diversity in Accountancy Board size, structure, and approach to enforcement. Some Boards are fully autonomous in their enforcement work, employing staff attorneys or contracting with outside counsel, processing complaints, completing investigations, and holding hearings. Some Boards instead operate as part of a larger “umbrella” agency and play more limited roles in enforcement processes. And, a few boards are primarily advisory in nature, with no involvement at all in specific enforcement cases. Therefore, just as the size of states varies from less than a million residents to over 35 million residents, the size, funding, and activities of Accountancy Boards vary widely as well. The procedures that Boards use are determined by state statutes and Board-enacted rules. State and federal courts also shape enforcement practices through case law developments. Additionally, standards for the accountancy profession are created by a number of private and governmental, national and international bodies.¹ Each of these codes cover a range of issues, such as initial and continuing education, technical audit standards, advertising, firm formation, and behavioral requirements. Given all these sources and all this variation, there is no “one size fits all” prescription for enforcement practice. Instead, this guide sets out the major operational issues for enforcement and describes successful and innovative practices that can work in most states.

This guide is broken down into nine “components” with each section addressing the various stages of the enforcement process, from start to finish. The nine components are as follows:

¹ For example, the American Institute of Certified Public Accountants (AICPA)’s Professional Ethics Executive Committee (PEEC); the Public Company Accounting Oversight Board (PCAOB); and the International Federation of Accountants (IFAC). AICPA, IFAC, and NASBA (by way of the UAA Model Rules) have all produced Codes of Conduct for accountants. These codes are typically incorporated into states’ rules and laws by reference, or are drawn from in creating state standards.

Component 1 - Seeking, Accepting and Recording Complaints

Component 2 - Management of Complaint

Component 3 - Decision to Dismiss, Investigate or Settle

Component 4 - Investigations

Component 5 - Hearings

Component 6 - Sanctions and Compliance

Component 7 - Appeal Process

Component 8 - Recording and Publicly Reporting Decisions and Sanctions

Component 9 - Monitor Provisions and Sanctions

In each component section, the enforcement step is defined and explained, and guidance is given for enforcement procedures. These component sections were created based on the Committee's review of Accountancy Boards' disciplinary guidelines and enforcement manuals. The Committee identified best practices for each component, with reference at the end of each component to the state from which the guidance was drawn. Additionally, if further detail on one of these states' procedures is needed, the relevant state enforcement manuals can be found within the Appendix section of this guide, along with a selection of attorneys general opinions, and cases.

OVERVIEW OF THE ENFORCEMENT SYSTEM

To protect the public, each Accountancy Board has a system of enforcement to protect the CPA designation, license accountants, and regulate the profession. As mentioned, the Boards' enforcement systems exist within a larger regulatory context. Federal entities (primarily, the Securities and Exchange Commission, the PCAOB and the IRS) all regulate some aspects of the practice of accountancy, as well as setting some technical standards. The AICPA plays a large role in technical and ethics standard setting as well. State and federal courts and state attorneys general are the source of many requirements. Accountancy Boards' enforcement systems are based in part on these entities' standards, and also their individual state laws and rules.

THE NEED FOR UNIFORMITY IN ENFORCEMENT PROGRAMS

This guide advocates for greater uniformity among Board enforcement programs. Since jurisdiction sizes and Boards' functions, resources and authority vary widely, the goal is not to create one cookie-cutter enforcement program for every state. Instead, this guide recommends all Boards:

- Adopt a uniform approach to track complaints via a centralized database;
- Quickly make decisions on probable cause;²
- Rely on Investigators (or other appropriate persons including Board members and/or staff) to competently and thoroughly complete investigations and efficiently and confidentially use resources;³
- Encourage cooperation between licensees and Investigators;
- Ensure licensees receive a fair and timely investigation, and trial or hearing;
- When appropriate, report Board decisions to stakeholders, such as other Boards of Accountancy, impacted federal agencies and other authoritative bodies; and
- Provide disciplinary markers and/or details as part of regular data feeds to the Accountancy Licensee Database (ALD).

In order to accomplish a more uniform enforcement program, we believe Accountancy Boards should develop the nine components of enforcement. Additionally, all states are encouraged to contribute additional or alternate practices that can be added to this guide.

² Some states do not use “probable cause” review. Instead, they delegate the task to Board committees to avoid having all Board members prejudiced by reviewing the evidence. In these states, Board staff will routinely obtain “consents to *ex parte*” from respondents so that the Board committee may review the potential evidence and then participate in a hearing on the case.

³ Some states' public records laws require that even investigative files regarding dismissed complaints be available to the public.

COMPONENT 1

SEEKING, ACCEPTING AND RECORDING COMPLAINTS

Component 1, the initial enforcement phase, is the Accountancy Board's process of identifying licensed CPAs or unlicensed persons/businesses who appear to have harmed the public by violating the laws or regulations of the profession or failing to comply with other Board requirements. Component 1 includes the Accountancy Board's process of determining if the Board has personal jurisdiction over the respondent and subject matter jurisdiction over the matter, as well as the next steps once the complaint has been filed or violation has been identified. Recording complaints entails organizing and tracking the complaint and associated information.

TYPES OF COMPLAINTS⁴

Boards receive a variety of complaints. These can include, but are not limited to, the following:

Code of Conduct

- Professional conduct standards;
- Independence;
- Integrity and objectivity;
- Confidentiality and client records;
- Form of practice;
- Substandard compilation, review, audit or tax services;
- Conviction of or a guilty plea to a felony or any crime involving moral turpitude or involving activities related to the practice of public accounting;
- Falsification of renewal information; and
- Habitual use of drugs or intoxicants to such a degree as to render the licensee unreliable and unfit to practice as a CPA, or first-time alcohol/drug misdemeanor offenses.

See, also, UAA Section 10, for uniform statutory language providing a list of grounds for discipline.

Competency

- Failure to maintain competency and adhere to technical standards;
- Inappropriate conduct of compilation, review, audit or tax services;
- Gross negligence in the performance of professional services;
- Any violation of the Accountancy Board's statutes or rules, federal or state laws, standards or procedures of national professional accounting organizations, and/or accountancy laws of other states or the federal government; and
- Failing to timely complete an accounting engagement (or not completing the engagement), and failing to respond to a client's inquiries.

Title⁵

- Improper use of CPA title;
- Form of practice related to structure of the practice unit; or
- Misleading firm name.

Fraud

- Ethical or moral violations including fraud, embezzlement, dishonesty or conspiracy.

Quality Assurance Review

- Failure to comply with peer review requirements;
- Failure to register for peer review; and
- Technical deficiencies.

Continuing Professional Education

- Failure to obtain required continuing education; and
- Misrepresentation of CPE credit obtained to the Board.

⁵ Some Accountancy Boards also address complaints against non-CPAs for their unauthorized use of terms reserved to CPAs, such as "accountant" or "certified public accountant."

Administrative Violations

- Board compliance requirements;
- Failure to renew license in state of principal place of business;
- Failure to register office in a jurisdiction; and
- Failure to register out-of-state firm in a state when rendering defined attest services.

SEEKING COMPLAINTS

In most states, almost anyone can submit a complaint about a licensee. There are a variety of ways that complaints can be received against individual CPAs and CPA firms. Complaint sources include:

- Members of the general public;
- Licensed CPA practitioners or firms;
- Self-reported information as required by law;⁶
- Law enforcement agencies with adverse civil or criminal court findings;
- Boards of Accountancy or other state regulatory agencies;
- The SEC, PCAOB, IRS, HUD, and other federal agencies, as well as state government entities;
- The AICPA, state societies of CPAs or any other professional organizations;
- Articles from newspapers or other publications;
- The Board, based on information staff obtains in the course of conducting their business, addressing other complaints, or searching for violations; and⁷
- Anonymous public complaints.

⁶ See UAA Model Rules, Rule 11-2 (Reporting convictions, judgments, and administrative proceedings) for rules regarding licensee self-reporting requirements. See, also, Rule 23-3 (Reporting moral character violations).

⁷ Extraordinary situations might include matters in which the violation is flagrant and poses a danger to the public. On the other hand, caution should be used in evaluating anonymous complaints regarding private disputes or including factual assertions that might not be verifiable by independent evidence, especially in light of a defendant's right to confront the accuser.

ACCEPTING COMPLAINTS

Complaints should be accompanied by the Board's designated complaint form, filled in as completely as possible. Complaint forms should be available online and accepted via fax, email or regular mail. If the Complainant contacts the Board office by phone with a complaint, the Complainant will be advised of the process for filing a complaint and provided with a complaint form or instructions on accessing a complaint form on the Board's website. If a Board Member is contacted directly regarding a complaint, the Board Member should advise the Complainant to contact the Board office. The Board Member should not discuss the matter, as doing so may disqualify the member from participating in the hearing or making determinations on the matter.

The complaint must center on a violation (such as listed in the types of complaints). The complaint should provide a) specific and detailed summary of the complaint, b) evidence in support of the allegations and c) names of all parties involved. The complaint may include additional materials to evidence the allegations. All documents and information submitted with the complaint should be incorporated into the complaint file. Because of the importance of establishing the reliability of information in the complaint, notarized complaints should be encouraged.

As previously mentioned, complaints may not just originate from the public, other CPAs, or other government sources. A Board-initiated complaint may also be warranted based on information obtained by Board staff during the course of its business. This includes the review of self-reported information or failure by a licensee to respond or comply with Board-mandated programs (e.g., peer review and CPE). The requirements and procedures for Board-initiated complaints are the same as for complaints submitted by outside sources.

RECORDING COMPLAINTS – OR “ACTIONS UPON RECEIPT OF A COMPLAINT”

The following specific steps are recommended for handling a complaint once identified or received by the Board:

- The complaint is stamped with the date the information is received by the Board office.
- The Enforcement Division, Executive Director, General Counsel, or other designated staff⁸ reviews the complaint within five business days of receipt/identification to determine probable cause to open an investigation. The designated staff determines:
 - The nature and basic facts of the complaint;
 - Whether the Respondent is a current licensee of this Board or any other jurisdiction’s Accountancy Board;
 - Whether the complaint falls within the Board’s jurisdiction;
 - If there are substantial and tangible facts relating to specific violations of the Board’s laws and regulations; and
 - If necessary, the designated staff may request additional information to evaluate whether there is probable cause to open an investigation.⁹
- Once Board staff has determined that a complaint lies within the Board’s jurisdiction, they shall assign a case number and create a file regarding the complaint.¹⁰ This information will be entered into the Board’s database. State laws and rules will determine whether the complaint file is a public record.
- The complaint will be acknowledged within 15 days of receipt with a form letter stating that the complaint information has been received and is being reviewed. The letter need not state a deadline by which the decision will be made, unless a particular statute or regulation provides otherwise. The letter is simply intended to inform the Complainant that his or her correspondence has been received and reviewed. This acknowledgment helps reduce Complainants’ follow-up contacts regarding concerns over whether their correspondence was received.

⁸ See UAA 11(b).

⁹ See UAA § 11(a).

¹⁰ See UAA §4(j).

- The Respondent against whom the complaint is filed should be notified within 15 days of receipt of the complaint. At that time, the licensee should be requested to respond to the allegations within 20 days of receipt (unless an extension is obtained from the Board).

The Board may determine it does not have jurisdiction in a matter, or that the issue does not merit further investigation. Or, for other reasons, the Board may determine it not necessary to take action on a complaint. In that case, the relevant Board staff will close the complaint matter. A letter will be sent to the Complainant and the licensee advising them of the Board's decision to close the complaint. The records shall be destroyed or maintained in accordance with the Board's record retention schedules and/or the state's public records laws.

MATTERS THAT MIGHT NOT WARRANT AN INVESTIGATION

The appropriate committee or staff may recommend that the complaint does not warrant an investigation because of lack of jurisdiction, lack of probable cause of a violation, or other factors.

Regardless of approval or denial of an investigation, Board staff should record all complaints by date received.

The Board should not accept matters that fall outside the legal jurisdiction of the Board. Examples of issues that are usually not within a board's enforcement jurisdiction include the following:

- Private disputes regarding employer/employee relations or internal partnership disputes.
- Private fee disputes which are appropriately adjudicated by the courts or settled through arbitration.

The Board should make Complainants aware that investigations of complaints and enforcement proceedings can be complex and involve a substantial amount of time. The Board should not provide the following:

- An interpretation of U.S. or state tax code;
- Advice concerning business decisions or legal advice;
- Assistance in settlement of private claims; or
- Notification or disclosure to the public regarding a complaint prior to it being appropriate for public disclosure.

A Board may choose to refrain from making a determination of probable cause or recommendation from the Board's attorney regarding a complaint involving matters that are pending court cases. (A licensee must sign an affirmation and send to the Board office when information has been disclosed pertaining to litigation that has not been finalized. See sample Pending Litigation Form). Depending on the circumstances, the Board may wish to proceed with its usual investigation and enforcement process, despite ongoing litigation in a related civil or criminal matter. However, in some states, the Board may temporarily suspend the CPA's license if it deems the licensee to be a threat to the public.

COMPONENT 2

MANAGEMENT OF COMPLAINT

The Board's oversight of the complaint process includes: notification, follow-up, internal responding mechanisms, reporting and communication.¹¹

CONFIDENTIALITY

During the initial analysis, the complaint, preliminary report, correspondence and other documents relating to the complaint, including the fact that a complaint was filed, are considered confidential and closed to the public.¹² However, confidentiality of certain records will vary among jurisdictions based on the open meetings law and public records act applicable in the particular jurisdiction.

OVERSIGHT OF THE COMPLAINT

Receipt of Response

The Board's staff, Legal Counsel, or Investigator will monitor the progress of the complaint to assure that a response has been provided by the respondent within the requested time period. If and when a response is received, that information will be forwarded to Legal Counsel or committee to determine whether probable cause exists to proceed with investigation.

Once the response from the licensee is received and reviewed and probable cause has been established, it may be necessary to send the Respondent's response to the Complainant to give them an opportunity to comment upon the response within a specified number (15) of business days. If this step is taken, in terms of fairness, the Respondent should also be given a chance to reply to any additional information provided by the Complainant. As the investigation progresses, the investigative process may require additional information and/or evidence from the Complainant, the Respondent, and any related parties.

¹¹ It should be noted that generally boards will handle staff- initiated matters somewhat differently from third-party complaints. For example, a matter might come to the staff's attention through processing renewals. Until further inquiry indicates a potential disciplinary violation, the staff might maintain the record of that matter as an "inquiry." Once the staff determines that further investigation is appropriate, the matter is assigned a case number. Typically, laws, rules and/or case law and/or custom permit inquiries to be closed at staff level, but require either committee or Board action to dismiss a third-party complaint.

¹² See, suggested uniform language in UAA § 4(j).

Extended Response Period

If the response has not been received, additional attempts will be made to contact the Respondent for a response. A non-response notice will be sent, by certified mail - return receipt requested, to the Respondent who fails to address the issues in a complaint within the response deadline.

Continued failure to respond will result in the matter going before the Board for recommendation of commencing a formal disciplinary proceeding. In most jurisdictions, the formal proceeding starts with service of a Notice of Hearing. If the Respondent is a non-licensee, the laws/rules may allow the complaint to be referred to the appropriate law enforcement agency for criminal prosecution of unlicensed conduct.

Legal Counsel Obtained by Parties

At any time during the complaint process, the Complainant or Respondent may choose to be represented by Legal Counsel. Once Legal Counsel has been obtained, communication regarding the matter must be handled through the respective Legal Counsels.¹³

Investigator Assignment

If an Investigator is warranted¹⁴ and assigned, staff should:

- Confirm the Investigator's independence and lack of conflict.
- Review the prospective Investigator's competence in the areas expected to be of issue in this matter. For instance, an Investigator with only tax experience or non-public company attest experience might not be best qualified to investigate a matter related to a public company audit.
- Enter into a contract for investigative services, if the Investigator is an independent contractor.
- Notify the Respondent and Complainant of the appointment of an Investigator.

Complaint File Maintenance

The Board should maintain a case file for each complaint. The contents of the case file include the original allegations and supporting material, information received during the course of the investigation, and any interim reports prepared by the Investigator. The Investigator's notes and synopses of conversations/interviews with the parties are also included, along with electronic mail transmissions and facsimile transmissions relating to the complaint. Consideration should be given before file data becomes a public record to obtaining a protective order from a hearing officer or an agreement of the parties for redaction to protect confidential information such as social security numbers, trade secrets or personal/ business financial information.

¹³ Most state bars forbid communication with a represented party. In some states the prohibition bans attorneys for a Respondent from directly contacting non-attorney board staff.

¹⁴ The decision to use an Investigator typically depends upon the complexity and severity of the case, the amount of additional evidence needed, and whether the credibility of witnesses is at issue. Inevitably these decisions are also based upon prioritization and efficient use of limited Board resources.

Electronic and/or hard copy file updates should be made by Board staff involved in the complaint investigation on the same day an activity occurs, or as soon thereafter as possible. All activities including receipt of reports and other materials and verbal communications should be promptly noted on the file record.

Board Disciplinary Report

The advisory committee or Board should receive a summary report of each complaint received by the Board. The Executive Director, General Counsel, or Investigator then submits a recommendation and/or request to the advisory committee, with a determination as to how to proceed. At the conclusion of each advisory committee or Board meeting, direction is given to staff and/or Legal Counsel regarding how to proceed with complaints. Then, staff shall prepare a written description of all directions to be transmitted to Legal Counsel and Investigators, if appropriate, within a specified number (3) of business days.

Case Determination

If staff or the Investigator is unable to obtain sufficient evidence to substantiate the allegations or the matter has been resolved, Board staff or the Investigator will send the information to the Board President or Legal Counsel with a recommendation to close the case. The matter is then brought to the Board for a final motion to close with or without prejudice. A case closed without prejudice may be reopened if substantial additional evidence is obtained at a later time which substantiates the original allegations.

Monitoring Pending Litigation

If a licensee provides the Board with information pertaining to pending litigation, Board staff will give the licensee a Pending Litigation Form to complete. Upon receipt of the completed form, Board staff will monitor the matter for the final court decision.

Parties Resolve Complaint – Board Continues Investigation

Once a complaint has been filed and the matter is subsequently resolved between the Complainant and licensee, the Board's investigation will continue until the Board determines that its disciplinary interests have been resolved regarding the alleged violations.

Alternative Means of Resolution

Depending on the nature of the complaint, the Executive Director or Investigator may suggest alternative means of resolution, such as contacting the Attorney General's Consumer Protection Division, notifying law enforcement, or seeking private legal advice.

COMPONENT 3
DECISION TO DISMISS, SETTLE OR INVESTIGATE

Decision to dismiss is the determination of the Board to decline to process a case, reject a claim, or take any further action.

Decision to settle is based on the determination to resolve issues by an agreement between the parties.

Decision to investigate is based on the review of a complaint to determine if an allegation is a violation of rules of professional conduct, standards or laws that require further review.

BOARD REVIEW OF RECOMMENDATION FOR DISMISSAL

A board might arrive at a decision to dismiss a matter for the following reasons:

- There is insufficient evidence to warrant further investigation, and the matter should be dismissed for lack of evidence of a violation of the rules of professional conduct, standards or laws.
- There is evidence of a violation of standards, but the violation is not significant enough to warrant disciplinary action.
- There is evidence of a violation, the licensee has voluntarily corrected the deficiencies, and the matter should be dismissed for voluntary compliance or resolution between the parties.
- There is a lack of jurisdiction.
- Complainant withdraws the complaint.
- Complainant declines to cooperate with the investigation.
- Complaint lacks merit.

DECISION TO SETTLE

In order to facilitate a resolution of issues and to minimize expense to both the licensee and the Accountancy Board, the parties can negotiate a settlement. The inclusion of a practitioner in the settlement negotiation may be useful to provide a professional perspective on the reasonableness of the settlement and the impact on the complainant. Negotiations can be requested by either the licensee or the Board.

Once a determination has been made to seek a settlement, staff and Legal Counsel may approach the licensee to negotiate a Consent Order for settlement prior to a hearing. The majority of cases are resolved by Consent Order because this allows the Board more options in achieving a balanced resolution.

Decision to investigate is further discussed in Component 4.

COMPONENT 4

INVESTIGATIONS¹⁵

It is key to the enforcement missions of Boards to objectively evaluate and investigate complaints that involve alleged violations of the accountancy law.

The purpose of investigating complaints is to promote the integrity of public accounting services so that consumers and users of CPA and PA services can rely on the quality and consistency of licensees' work products.

The other goal of an investigation is to gather relevant documents, interview witnesses, and prepare a report. This report is used to determine if there is probable cause to take disciplinary action against a licensee or legal action against a non-licensee for unlicensed conduct.

Additional information and resources for Investigative Report Writing can be found in the Investigator Training Series at <http://nasba.org/mc/investigatortrainingseries/>.

INVESTIGATIONS INITIATED BY NON-ACCOUNTANCY BOARD ENTITIES

The AICPA is one of the non-Accountancy Board entities that may investigate CPA actions. The AICPA can only investigate members of the AICPA or of a Joint Ethics Enforcement Program (JEEP) participating society.¹⁶ It does not matter if the firm is a member; the AICPA's Ethics Division will only take action against individuals who are members of the AICPA or a JEEP participating society. When the AICPA investigates cases against persons who are members of

¹⁵ See UAA Model Rules, Article 11 (Enforcement Procedures - Investigations).

¹⁶ The AICPA publishes a Joint Ethics Program Manual of Procedures available at <http://www.aicpa.org/interestareas/professionalethics/resources/ethicsenforcement/pages/jointenforceprocedures.aspx>.

the participating JEEP state societies only (and not AICPA), it sends the results of the investigation to the state society with its recommendation.

The AICPA sends notice of disciplinary actions to the appropriate Accountancy Board. This is only for members who have been admonished, suspended or expelled. Other actions are confidential as they are considered remedial and the deficiencies did not rise to the level that required discipline.

Other governmental agencies also investigate CPAs and refer their findings to the appropriate Accountancy Board. State agencies (e.g., Departments of Education) and federal agencies (e.g., the U.S. Department of Housing and Urban Development) are sources of investigations. Additionally, some government agencies copy Accountancy Boards on referrals when they are made to the AICPA.

GENERAL PROCEDURES FOR INVESTIGATIONS

Accountancy Board investigations may be conducted by staff, the Board, an appointed committee, contracted CPAs, an Investigator, or the Attorney General.¹⁷ This is sometimes determined by statute or by administrative procedures.¹⁸ If a Board member has a conflict of interest, the member should recuse himself/herself from all deliberations and discussions of the particular case. Most Boards enjoy broad subpoena power through statutes in order to obtain the relevant documents and testimony.¹⁹

Activities conducted in each investigation include interviewing potential witnesses, obtaining copies of relevant documents, and accumulating evidence either in person or by mail.

Typically, the Investigator will interview the Complainant or the source of the initial report, as well as all witnesses or persons with pertinent information. After collecting and reviewing relevant documents, the Investigator will conduct an interview with the Respondent. The results

¹⁷ See UAA §11(b).

¹⁸ See Appendix A, p. 3, describing a 2002 Nebraska Attorney General Opinion which concluded that the use of CPA volunteers to advise the Board in its enforcement duties or assist with purely ministerial tasks was probably a defensible exercise of the Board's authority.

¹⁹ See UAA §11(a).

are fully documented as a written report, which is submitted to the Enforcement Committee, Board attorney, Attorney General or applicable party to pursue the matter. Care should be taken to maintain the chain of evidence.

Investigations should generally include many, if not all, of the following activities:

- A review of the complaint letter and associated material.
- Examination of the Board's records and other public sources (as necessary) to confirm:
 - Status of the licensee's individual license, as necessary, through the duration of the investigation/resolution process;
 - Status of corporate or partnership license;
 - Approval of fictitious name; and
 - Prior complaint(s), citation(s), fine(s), and disciplinary history.
- Contact with the Complainant to discuss complaint and secure additional evidence as needed.
- Contact with the licensee to obtain a written response to the complaint, including obtaining copies of any relevant documents supporting the licensee's position. Request all documents that are related to the complaint (including work papers) if the matter relates to work product competence.
- Verification of the licensee's address of record, and if the address is not current, an attempt to obtain the current address.
- Preparation of an investigative plan, when applicable.
- Investigation of the complaint.
- A review of available remedies and consideration of the appropriateness of available remedies to the matter.
- Preparation of a written report summarizing investigative procedures performed and conclusions reached, including a recommendation for citation and fine or other disciplinary action within the remedies available to the Board.
- Assembly of all exhibits.

PLANNING FOR THE INVESTIGATION

Complaint investigation and resolution will be preceded by planning; the approach will be developed based on the nature and complexity of the issues involved. Regardless of whether a formal investigative plan (IP) is prepared, all case files should set out the specific allegations to be resolved and, if appropriate, the expected internal time frames to be adhered to by the Investigator or investigative team.

The extensiveness of an IP depends on the complexity of the issues involved. Some investigations may require revisions to the IP, or a supplemental IP, after receipt of information from the Respondent or after an onsite investigation is conducted. The basic IP will help the Investigator focus on the principle issues to be explored in the course of the investigation, as well as the sources of evidence available to resolve them.

An IP will generally include at least the following:

- Jurisdictional information: does the violation come under this Board's jurisdiction?
- Identification of bases and issues, including the basis of the complaint and the allegations.
- Identification of the applicable legal theories and a determination of theoretical resolutions.
- Conclusions drawn from the analysis of the data or other evidence already gathered, along with the probable outcome given the obvious violations.
- Description of the documentary, testimonial, and statistical evidence required to complete the investigation and the best sources and means of obtaining each type of evidence.
- The anticipated sequence of case activities, including any onsite visits.
- Anticipated time frames for obtaining and analyzing evidence.
- List of parties to the complaint including witnesses so that no subpoenas are missed.
- A statement of known or anticipated defenses that may be used by the Respondent and a description of the evidence required to test their validity.

EVIDENTIARY PROOF

Evidentiary proof is an inductive process where demonstrable facts (e.g., items of evidence) serve as building blocks to structure a determination of compliance or noncompliance. This structure can only be as sound as the evidence that is its foundation. Different types of evidence can contribute in different ways to the proof for the findings; a little of one kind of evidence may be just as good or better than a lot of another type of evidence, if the latter is weak and unreliable.

Ideally, Board staff will be able to obtain evidence directly supporting or refuting the underlying action that has been alleged (direct evidence). Secondly, it may be possible to also gather evidence regarding the actual subjective intent of the person(s) charged with a violation. Evidence may take the form of an admission of the violation, although this will rarely occur. Instead, direct evidence may instead be collected to show facts tending to establish the subjective motives of persons involved in the alleged violation. This direct evidence might include any of the following:

- Public statements or speeches;
- Minutes of hearings; and
- Contemporaneous statements (e.g., attributed by third parties).

The Investigator should exhaust all sources likely to support the Complainant and all sources likely to support the Respondent; there need not be equal amounts of evidence for each party. An investigation conducted in this manner might reveal that there is no evidence to support the Complainant's allegations and ample evidence to support the Respondent's version of the facts. In this case, the investigation would be complete.

REQUESTING INFORMATION FROM THE RESPONDENT

Telephone responses are not recommended for gathering information from the Respondent (the person being investigated or responding to a complaint). Generally, in gathering information

from the Respondent, an initial request for response letter is sent requesting information relevant to the allegations under investigation. The information request letter may take any of several forms. Boilerplate language for request letters should generally contain:

- Identification by case number;
- Citation to the statute and/or regulations under which the investigation is being conducted;
- Reference to the Board's legal authority for access to information;
- The information requested;
- An offer to settle or resolve the complaint, if appropriate;
- Deadline for responding to the request for information; and
- Information explaining the rights of the Respondent and the process to be followed in this matter.

ONSITE VISITS TO COLLECT EVIDENCE

An onsite investigation may be necessary depending upon the outcome of the information requests and the strength of the evidence gathered up to this point in the process. Considerations for making an onsite visit might include:

- The degree to which all of the allegations have been addressed and supporting documents have been submitted with the response from the Respondent; and
- Whether the Respondent can provide written documentation to verify his/her position in the response to the agency's information request letter.

Upon the determination that an Accountancy Board investigation requires an onsite visit to either the Respondent or the Complainant, a notification letter will be sent to the Respondent. Some Boards may also choose to keep the Complainant informed as the investigation progresses. If so, the onsite notification letter to the Complainant will include, but need not be limited to, the following:

- Anticipated date of the onsite visit;
- Time and place (not the Respondent's place of business) for interviewing the Complainant;
- A request that the Complainant provide any additional information and documentation he/she considers relevant to the investigation. This will include a list of witnesses whom the Complainant believes have information relevant to the allegations; and
- A timeframe to provide the additional information or documentation and list of witnesses.

At this point in the investigation process, the Respondent is already aware of the existence of the complaint, the Board's jurisdiction, the basis of the complaint, and the legal authority to investigate the Complainant's concerns. In addition, the letter notifying the Respondent of the scheduled onsite visit will:

- Restate the allegations made by the Complainant, the basis on which they are made, and the legal authority under which the complaint is being investigated;
- State the section of the appropriate regulation that explains the violation;
- Provide the general time schedule under which the Board will conduct its investigation;
- Request the additional information or data that the Board wants the Respondent to submit for review prior to the onsite visit, including a timeframe for submission of the information;
- Identify additional data that the Board wants to review during the onsite visit, as a result of the review of information and data obtained prior to the onsite;
- Request that the Respondent's staff be interviewed and that staff responsible for the release of additional records be asked to be available as appropriate during the onsite visit;
- Identify in advance the Respondent's staff to be interviewed, if applicable.

Before conducting an onsite interview, the Investigator should attempt to learn as much as possible about the purpose(s) intended to be served by the interview. He or she should consider which subjects it would be desirable to have the interviewee's unequivocal statement on and in which areas he or she may want to wait to pursue questioning. The Investigator should make certain strategic decisions as to which witnesses to interview for which purpose, and in what sequence the interviews should be conducted. In a complex case where the likelihood of formal disciplinary action is greater, the Investigator should confirm his interview plan with the Board's attorney or the Complaint Committee to ensure that the intended interview questions will address all anticipated issues.

When conducting onsite interviews, the Board Investigator should:

- Introduce himself or herself, show credentials and describe the interviewing process;
- Actively listen during the interview and take clear and precise notes;
- Distinguish factual information from opinions;
- Appropriately handle negative reactions during the interview;
- Use effective probing questions;
- Prepare and obtain a signed summary statement of the interview, forwarding to the Respondent.

A written record of both telephone interviews and face-to-face interviews should be made to preserve the probative value of the information obtained and should be included as part of the case file. This information will also be helpful to the Investigator when reviewing the case file in preparation for testimony at a formal hearing. Notes and subsequent reports of the interview should contain the following information:

- Case number;
- Name, address and phone number of the witness;
- Date, time and location of interview, including whether the interview was conducted by telephone;
- Name of the Investigator or person conducting the interview;

- A summary of the questions and responses (This need not be a verbatim transcript but will accurately reflect the questions posed and the responses of the witness); and
- If required by rule/law, signature of the interviewee.

INTERVIEW WITH THE COMPLAINANT

Prior to meeting with the Respondent, the Board's Investigator may need to have an in-depth meeting with the Complainant. Based on prior information received from the Complainant, the Investigator will have already developed a list of questions for the Complainant. The purpose of the meeting with the Complainant is to:

- Explain the investigation and (if relevant) the mediation/conciliation process;
- Remind the Complainant that the Investigator's role is only to determine, in connection with each allegation raised by the Complainant, whether the Respondent did or did not violate specific legal authorities the Board is responsible for enforcing;
- Secure any additional information with respect to the allegations;
- Explain the Complainant's rights under any applicable state or federal Privacy Act and the applicable state Public Records Act or Freedom of Information Act (FOIA);
- Explain that the Complainant may be contacted periodically, as necessary, during the investigative process and given an opportunity to respond to any information that is presented by the Respondent;
- Consider recording the interview in accordance with state laws for purposes of relaying information to others involved;
- Remind the Complainant of the prohibitions against retaliation and intimidation.

The desired rapport between the Investigator and the Complainant is a relationship in which each understands and accepts the role that the other has in the investigation and resolution of the case at hand.

The Complainant should be informed of the following:

- Whether or not, depending upon the state's public records laws, all of the information submitted regarding the complaint might be subject to disclosure upon a FOIA request upon the closure of the case;²⁰
- That complaint cases are kept on file permanently;²¹
- That the Respondent will be contacted in order to obtain a response to the allegations and could be shown the information provided by the Complainant;²² and
- Most states have statutes that prohibit the Board from disclosing any information regarding open disciplinary cases; however, the Board will attempt to keep the Complainant as informed as possible, if applicable in the subject state.

Generally, the Investigator will have already obtained at least the following information from the Complainant in the first interview (which is usually by telephone or, if that is not possible, in writing):

- The name and location of the Respondent and individuals involved in the case;
- The relationship of the Complainant to the matters alleged;
- The precise circumstances and chronology of events that led to the action, decision or condition giving rise to the complaint;
- The identity of any witnesses who can attest to the validity of the Complainant's statements, and some indication of the matter on which each witness may be expected to provide information;
- The specific resolution sought by the Complainant to the extent within the Board's jurisdiction; and
- Any additional information essential to an understanding of the specific matter giving rise to the case and the environment in which it occurred, including any prior interaction

²⁰ Disclosure of investigative files is prohibited in many states and contrary to the UAA § 4(j).

²¹ Some states allow or require that closed investigative files be disposed of after a specified period of time.

²² See *Christiansen v. Missouri State Board of Accountancy*, summarized in Appendix A, pp. 2-3, in which a Missouri court held in 1988 that the Respondent had a right to copies of the Board's investigative materials.

between the Complainant and Respondent which might have an impact on the current complaint.

Since much of the information described above will have already been gathered and already be located in the complaint file, a face-to-face interview with the Complainant will provide the Investigator with an opportunity to evaluate the information given in the context of the Complainant's presentation of what happened.

THE INVESTIGATIVE REPORT

When to Prepare an Investigative Report

The investigative report (IR) will be prepared whenever a full investigation is completed and all supporting documentation has been gathered, including evidence, responses and statistical information needed for the Board or advisory committee to make a fair and equitable decision or recommendation to the Board.²³

The IR will be a detailed and logical document that (a) sets forth all facts pertinent to the case, (b) analyzes those facts in light of the Complainant's allegation(s), and (c) makes a determination as to the validity of the allegation(s) based on that analysis and the compliance status of the Respondent. Generally, the IR is not released to the Complainant or the Respondent except in conjunction with a judicial or administrative proceeding.

Formatting the Investigative Report

Consideration might be given to organizing the investigative report in the following manner, containing the following major Sections:

- Introduction/Summary of Allegations;
- Allegations/Timeline of Events;
- Response to the Allegations from Respondent;

²³ See UAA §11(b).

- Conclusion (up to the present); and
- Analysis and Recommended Determination.

Additionally, citations to Board regulations should be included to direct the reader of the report to the appropriate supporting documentation in the case file.

Introduction/Summary of Allegations

This section will provide an Executive Summary of the case to include any and all statutory or regulatory provisions that the allegation would violate, including any activities that may have taken place prior to accepting the complaint for investigation.

Allegations/Timeline of Events

In this section of the IR, the Investigator will describe, as succinctly and clearly as possible, a timeline of events after the acceptance of the complaint. The Investigator will organize the Complainant's allegations into a logical sequence that would be necessary to sustain a finding of compliance or noncompliance.

Response to the Allegations from Respondent

Here, the Investigator will provide the information regarding all allegations from the Respondent. The Respondent must have addressed each allegation with an explanation of who, what, when, where and why. Where attempts have been made to provide the Respondent with an opportunity to reply to the Complainant's allegations, but the Respondent has failed to respond or provide any support for its position, a description of the Investigator's efforts to let the Respondent respond will also be included in this section.

Conclusion (Up to the Present)

All facts relevant to the Investigator's analysis and recommended determination in the case will be set forth in this section. It is important both to the settlement/conciliation process and for establishing credibility of the determination that only clear, accurate and factual evidence be included in this section. Facts will be presented in a logical sequence, such as the chronological order of the events or by subject matter. Factual issues in dispute will be resolved through

examination of the relevant documents. This section is intended only to establish the factual and logical basis for a determination on the merits of the allegations. Each fact or series of related facts will be sequentially numbered and listed separately.

Analysis and Recommended Determination

In this section, the Investigator will summarize the analysis of the facts presented, and draw his or her conclusions as to the validity of the Complainant's allegations based on that analysis. The Investigator shall also include references to any applicable disciplinary guidelines and/or any similar, previous Board action for the Enforcement Committee to use as a guideline to remain consistent. If the Investigator has recommendations as to the appropriate remedies that might be considered, those recommendations would be included in this final summary.

COMPONENT 5

HEARINGS

After thorough investigation of a complaint as well as any alternative dispute resolution that a state's statutes allow, the next step is to proceed with a hearing. The purpose of a formal hearing is to assure objective and comprehensive review of alleged violations and give the Respondent a fair and impartial opportunity to present any evidence or mitigation that would have a bearing on any disciplinary action.

If the Board determines that the necessary probable cause exists to continue a case after the initial investigation and informal resolution has been unsuccessful or is not appropriate in the given case, the next step is to proceed with a formal hearing.²⁴

Notice

Adequate notice of the hearing must be provided to any parties involved in accordance with the state's Administrative Procedures Act, as well as applicable rules or regulations as to timing.²⁵

The notice will indicate the alleged violations. The notice will specifically give the date and time of the hearing and the consequences of not attending a hearing.²⁶ It will also identify a Board or staff contact person to answer any questions or discuss a postponement. The Board will have some rules about how often or long a postponement can be granted. This way, the licensee can be represented by an attorney and can call any witnesses to present their case.

The Conduct of the Hearing

Depending upon the state's Administrative Procedures Act, the hearing will be conducted before the Board, or a hearing officer or an Administrative Law Judge. The state's case will be

²⁴ See UAA § 12, "Enforcement Procedures – Hearings By The Board" for related suggestions. That portion of the UAA has been substantially adopted by statute in New Hampshire.

²⁵ See UAA § 12(a), which recommends providing Respondents at least 30 days of notice. Mailing a complaint via registered mail to the Complainant's last known address is considered sufficient notice.

²⁶ See UAA § 12 Comment, which notes that many Boards allow prehearing disclosure of evidence supporting the complaint to Respondents.

presented by Board Legal Counsel, the Investigator, a Board member designated to deal with the matter,²⁷ or a member of the Attorney General's office who will present the evidence supporting the alleged violation.²⁸ The Respondent will have the right to appear before the decision maker and present his or her case, with representation. He or she may compel the presence of witnesses and the production of evidence.²⁹ All witnesses will testify under oath or affirmation administered by the presiding officer or the court reporter. Board members or the hearing officer will be allowed to ask questions of the licensee or any witnesses. If the licensee has not requested a postponement and does not attend the hearing, the hearing will proceed in his or her absence and the Board's representative will present the appropriate evidence of violation to the Board.³⁰ After presentation of evidence, each side will be permitted rebuttal and closing arguments.

Any Board member who has a conflict of interest, predisposition or bias regarding the parties³¹ to a case will recuse himself or herself from the hearing so as to not jeopardize the case. All hearings will be transcribed by a court reporter or equivalent method, and any evidence will be formally admitted.³²

Issuance of the Board's Decision

After conclusion of the hearing, the licensee should be told the timing of the Board's decision and how it will be delivered (preferably certified mail, priority mail, or in whatever method is

²⁷ Any Board member participating in the prosecution of the case should not participate in the Board's deliberation on the matter. See also footnote 34.

²⁸ See UAA § 12(e) ("the Board shall be advised by counsel, who shall not be the same counsel who presents or assists in presenting the evidence supporting the complaint"; the purpose of this requirement is to separate the prosecutorial and adjudicative functions of the Accountancy Board, however, "It should be noted that this provision would not require two lawyers in all cases: It simply requires that if there is counsel involved in presenting the complaint, in addition to counsel advising the Board, it must not be the same counsel. If there were two counsel, they might both be provided by the state attorney general's office, so long as they were firmly insulated from each other.")

²⁹ See UAA § 12(c).

³⁰ See UAA § 12(i).

³¹ In most jurisdictions, simply knowing a party to the case might not be adequate grounds for recusal, but such knowledge should be disclosed. See UAA §12 Comment (again, the purpose of this requirement is to separate the prosecutorial and adjudicative functions of the Accountancy Board).

³² See UAA §12(g).

necessary to ensure receipt by the licensee).³³ Depending on state laws, the Board would meet in Executive or Closed Session to decide the case and any disciplinary action to be taken.³⁴ A majority vote (excluding any Board members who recused themselves from the proceedings) should be required to impose any penalty on the Respondent.³⁵ Immediately after it is issued, the Board's decision should then be communicated to the licensee. Some decisions may be issued by the ALJ or hearing officer rather than the Board, depending on the Administrative Procedures Act of the particular jurisdiction. The provisions for notifying the licensee of the decision and any requirements or responsibility to publicize the decision will also be dependent upon the jurisdiction's administrative laws and rules.

³³ Most jurisdictions' state Administrative Procedures Act requires service in person or by certified or other return receipt service. Some states deliberate and reach a decision on the same day of the hearing and inform the respondent of the result immediately thereafter in public session on the record.

³⁴ Generally, staff, legal counsel or Board members who participated in the prosecution of the case, should not attend the closed session. See Appendix A, p. 9, for a summary of a 1984 Oklahoma Attorney General Opinion which held that deliberation and final decision of the Oklahoma Board following a public hearing on a disciplinary action were not required to be conducted and reached in open meeting since they were quasi judicial actions. Five years prior to that, the Oklahoma Attorney General ruled that the Board was required to deliberate openly following a hearing on a complaint against a licensee for disciplinary action, and the Board could not confer in executive session.

³⁵ See UAA §12(h).

COMPONENT 6

SANCTIONS AND COMPLIANCE

A sanction is the imposition of a fine, penalty, and/or other remedies by the Board in response to the findings of the hearing process. Compliance encompasses the Respondent's response to the sanctions imposed by the Accountancy Board.

DIFFERENT TYPES OF SANCTIONS

The Board's decision to impose sanctions against the Respondent for violating professional standards can take several different forms. A sanction may result from a disciplinary proceeding or from a negotiated settlement of alleged violations in lieu of further disciplinary proceedings. An order (often called a Board Order) is the typical result of a disciplinary proceeding such as an informal conference or formal hearing. It reflects a Board's final decision following the proceeding.

Many states have disciplinary guidelines containing suggested sanctions for possible violations. The guidelines are designed for the use of the Board Members, Administrative Law Judges, attorneys, Board licensees, and others involved in the Board's disciplinary process. The recommended penalties and conditions of probation are merely suggested, and mitigating or aggravating circumstances and other factors may necessitate deviations. Thus, these guidelines may be followed to varying degrees based on the exact facts of a case, and the different types of sanctions will be imposed based on the type of violation that has occurred.

Consent Order/Stipulated Agreement³⁶

An order resulting from a negotiated settlement of alleged violations, either prior to or in lieu of further disciplinary proceedings, reflects a decision agreed to by a committee or a Board and a Respondent in the form of a consent order. The consent order or consent agreement cannot be appealed, and the Respondent agrees to waive all rights to an informal or formal hearing before the Board. In other words, the Respondent agrees to be responsible for everything that is stated in the “terms and conditions” section to include all violations stated in the consent order or agreement.

Board Order from a Hearing Decision

If a matter proceeds to a formal hearing, the Board next renders a decision and adopts an order. In many states, the Board will enter a closed session to deliberate, but ultimately vote on a final disposition of the case in open session.³⁷ If the Board finds evidence of a violation of professional standards that warrants disciplinary action, that decision is typically announced to the Respondent, if he or she is present, at the conclusion of executive session and is subsequently provided in writing in the form of a final Board order. The Board makes findings of fact and conclusions of law, which form the basis for its sanction.

An order that results from a formal hearing represents the final decision of the Board in the matter. The procedures following the final decision will again depend on the Administrative Procedures Act of the particular jurisdiction. Speaking generally, after all evidence in the case is presented in the formal administrative proceeding, each party is given the opportunity to submit closing arguments or proposed findings of fact and conclusions of law for consideration by the Board or panel hearing the matter. The Board then convenes in executive session to deliberate and reach its final decision. If the Board finds evidence of a violation warranting disciplinary

³⁶ See Appendix A, p. 7, for cases regarding consents and settlements. For example, in *Dorr v. Wyoming Board of Certified Public Accountants*, that a PA violated settlement agreement prohibiting him from performing audits without first obtaining the Board’s approval where he procured audit work and performed certain aspects of audits even though he had another CPA sign the audit reports. However, in *Asbury v. Texas State Board of Public Accountancy*, a court held that a CPA was entitled to a hearing even though he had originally orally agreed to a settlement, but never signed.

³⁷ This will usually depend upon each state’s Open Meetings law or Administrative Procedures Act. In some states the Board’s deliberations are excluded from the Open Meetings law. In some states, the Attorney General has ruled that all aspects of the hearing process must be open to the public.

action, its decision is typically announced to the Respondent after reconvening in open session. The Board may read the findings of fact, conclusions of law, and ordered sanction (if any), and the decision is transcribed by a court reporter. Subsequent to the proceeding, a written order is provided to the Respondent.

Reinstatement³⁸

For individuals seeking reinstatement³⁹ after disciplinary action taken against their CPA license or for applicants that have issues prior to application for licensure, the burden of proof rests with the Petitioner to establish evidence that they are rehabilitated and competent to practice. The Board will review all relative information that would indicate the individual has met all provisions of prior disciplinary action and/or court proceeding provisions.⁴⁰

INFORMATION TO BE INCLUDED IN DECISIONS/SANCTIONS

All disciplinary actions and decisions of the Board shall be published in accordance with policy or law. Best practices dictate that the order or agreement for proposed decisions or sanctions will include the following:

The Relevant Law, Rules and Facts of the Case

- The specific laws/rules that were violated, along with explanations/definitions of the violation.
- A clear description of the violation.
- The Respondent's explanation of the violation (if the explanation was presented at a hearing, provided in writing, or in a verbal statement, to Board staff).
- If Respondent failed to appear for the scheduled hearing, such action shall be noted.
- Findings of Fact, including details regarding aggravation, mitigation and rehabilitation, where appropriate.

³⁸ See, also, the discussion infra re "[Rehabilitation.](#)"

³⁹ Some states have provisions for "modification of discipline" by which one can obtain relief from a disciplinary order based upon such considerations as "complete rehabilitation." See, for example, South Dakota Rule ARSD 20:75:06:01; North Carolina Rule 21 N.C.A.C. 8I.0104.

⁴⁰ See UAA Model Rules, Rule 13-1 (Applications for relief from disciplinary penalties) and Rule 13-2 (Action by the Board) for an example of specific rules on reinstatement.

- When the Board, at a reinstatement hearing, denies a Petitioner’s request for reinstatement, the language must clearly set forth the reasons for denial. Such a statement may include a statement on rehabilitation, including suggestions for further approaches by Petitioner to demonstrate rehabilitation, where appropriate.

Reimbursement

- Reimbursement of the Board’s investigation/prosecution costs, as warranted.⁴¹ The Board will consider stipulated agreements or settlements to promote cost effectiveness and to expedite disciplinary decisions if such agreements achieve the Board’s disciplinary objectives. Investigators, Legal Counsel or Board staff will inquire as to Respondent’s interest in stipulated settlement. If the stipulated settlement appears unlikely, the case will be set for hearing. Matters resolved under stipulation may include cost recovery provisions.

Sanctions Against the Respondent

- Revocation: With hearing decisions involving revocation, the order may include the requirement that Respondent must comply with the outstanding requirements that caused the revocation as well as reimburse the Board for all reasonable costs of investigation and prosecution prior to or upon reinstatement consideration of Respondent’s revoked certificate.
- Probation: If probation is recommended, the period will be stated in the order. During the probation period, Respondents may be required to obtain additional or specified CPE; reimburse the Board for all reasonable costs of investigation and prosecution; obtain pre-release review of attest work; obtain accelerated peer review; receive a letter of reprimand; and/or appear in person at interviews/meetings as directed by the Board.⁴² Another type of probation includes “conditional practice” which allows the Respondent

⁴¹ See Appendix A, pp. 11-13, for case and Attorney General opinion summaries regarding the recovery of administrative costs and attorney fees. For example, in the 2008 case of *Rogers v. Texas State Board of Public Accountancy*, the court held that the Board was not statutorily authorized to award attorney fees to itself. However, in *Rosen v. State Board of Public Accountancy*, an award of attorney fees to the Alaska Board was affirmed. See also UAA Section 10(c) for an example of statutory authorization for awarding costs of a proceeding.

⁴² See UAA §10(b)(2).

to maintain the CPA designation but restricts the type of services (such as ERISA audits or attest services) that can be performed until the probationary period and all required remedial measures have been completed. Typically the type of work restricted during the probationary period is in the same technical or subject matter area as the violations giving rise to the disciplinary action.

- **Suspension:** If suspension is recommended, the period of suspension will be stated. During the suspension period, the Respondent shall not engage in activities for which certification is required. In addition, the Respondent shall relinquish the certificate in question to the Board and shall notify clients regarding the suspended status of the certificate, if directed to do so by the Board. The Respondent shall reimburse the Board for all reasonable costs of the investigation and prosecution.
- **Reference to Guidelines:** When suspension or probation is recommended, the Board may request that the disciplinary order include terms within the recommended guidelines for that offense unless the reason for departure is clearly set forth in the findings and supported by the evidence.

AGGRAVATING CIRCUMSTANCES

Evidence of aggravating circumstances should be considered in providing for penalties in proposed decisions. The following are examples of aggravating circumstances:

- Evidence that the violation was knowingly committed and/or was premeditated.
- Respondent's history, if any, of prior violations, particularly where sanctions were imposed for the same or similar type of conduct as at issue in the present case. Violation of Board probation should also be taken into account.
- Whether licensee's actions resulted in financial damage to his or her clients or other consumers. The amount of these losses may be an additional aggravating factor.
- Misappropriation of entrusted funds or other breach of fiduciary responsibility.
- Failure to comply with the provisions of any Board order.
- Evidence that the licensee has not cooperated with the Board's investigation.
- The length of time during which the violations occurred.

- Evidence that the licensee knew or should have known that his or her actions could harm his or her clients or other consumers.
- Evidence that the licensee took advantage of his or her client for personal gain, especially if the licensee was able to take advantage due to the ignorance, age, or lack of sophistication of the client.
- Case involving numerous violations of Board's statutes and rules, as well as federal or other state statutes.

MITIGATING CIRCUMSTANCES

The following are some mitigating circumstances, evidence of which may be taken into account in determining penalties in proposed decisions:

- The licensee's cooperation with the Board's investigation, with other law enforcement or regulatory agencies regarding the same matter, and/or with the injured parties.
- The sanctions or penalties from the disciplinary action of other Boards or agencies.
- The passage of considerable time since an act of professional misconduct occurred with no evidence of recurrence or evidence of any other professional misconduct.
- Clear and convincing proof of rehabilitation as well as other relevant considerations.
- Demonstration of remorse by the licensee, or recognition by licensee of his or her wrongdoing and demonstration of corrective action to prevent recurrence.
- Correction of the violation without monetary losses to clients and/or restitution made in full.
- For violations involving multiple licensees, the relative degree of culpability of the subject licensee will be considered.

REHABILITATION CRITERIA

When evaluating the rehabilitation of the applicant and their present eligibility for a certificate or permit (in the context of denial of a certificate or permit, the suspension or revocation of a certificate or permit, or restoration of a revoked certificate), the Board will consider the following criteria:

- The nature and severity of the act(s) or offense(s);
- Criminal record and evidence of any act(s) committed subsequent to the act(s) or offense(s) under consideration that could also be considered as grounds for denial, suspension or revocation;
- The time elapsed since commission of the act(s) or offense(s);
- The extent to which the applicant or Respondent has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against the applicant or Respondent;
- If applicable, evidence of expungement proceedings;
- Evidence, if any, of rehabilitation submitted by the applicant or Respondent.

ADMINISTRATIVE PENALTIES

The administrative penalty assessed may be in addition to or in lieu of any other penalties or sanctions imposed on the licensee or other person, including but not limited to, license revocation, license suspension, denial of the application for licensure, or denial of admission to the licensing examination. When probation is ordered, an administrative penalty may be included as a condition of probation.

A Respondent (firms or individuals) may be assessed an administrative penalty not to exceed the amount provided within state law.⁴³

⁴³ The laws in many states allow the Board to obtain civil penalties in excess of the statutory limit if the amount is agreed upon by the Respondent in a consent order or consent judgment.

Cost recovery ordered⁴⁴ will not be a reason to reduce or eliminate the amount of administrative penalties.

The following criteria will be considered in assessing administrative penalties:

- Nature and extent of actual and potential consumer harm;
- Nature and extent of actual and potential harm to clients;
- Nature and extent of restitution to consumers harmed by violations;
- Whether the violations involved sanctions by other government agencies or other regulatory licensing bodies, i.e. Internal Revenue Service, Securities and Exchange Commission, and Public Company Accounting Oversight Board; and
- Other aggravating or mitigating factors.

RESPONDENT COMPLIANCE

If provisions or sanctions are approved by the Board through hearing decision, stipulated agreement or consent order, Board staff will monitor for compliance. The procedures will verify that the Respondent has complied with provisions within the specified timeline as outlined within the Board's final decision documentation. The following are examples of the types of monitoring required:

- Completion of a continuing education course;
- Completion of an ethics examination course;
- Reimbursement of attorney's fees and costs, imposed penalties or fines, investigative costs, or any other fees imposed;
- Peer review reporting;
- Pre-release review of attest engagement reports prior to release to client;
- Notification to clients of violation;

⁴⁴ In many states, administrative costs cannot be recovered without express statutory authorization, or without the consent of the Respondent pursuant to a consent order or consent judgment. Factors to consider in requiring and setting the amount of administrative costs include unjustified delays or refusal to cooperate in the case.

- Removal of CPA designation;
- Restitution;
- Prohibition from handling funds; or
- Any other provisions deemed appropriate by the Board.

COMPONENT 7

APPEAL PROCESS

The appeal process encompasses the process available in various states for a person to appeal a final Accountancy Board (or similar state agency) decision.

THE RIGHT TO AN APPEAL

In every jurisdiction, a Respondent has the right to appeal a Board's decision. The Board's decision can be reviewed by a variety of decision-making bodies such as:

- A full Board hearing;
- Circuit Court;
- Court of Appeals; and/or
- Supreme Court.

The appeal reviewing body may affirm the Board's decision, or suspend or set it aside and remand the matter back to the Board for further proceedings.

STEPS IN THE APPEALS PROCESS

Once a Board has issued a final Order in a case, the Respondent's next step is to appeal to an appropriate court. In a few states, before the Respondent can appeal, the Respondent must file a timely motion for rehearing in order to preserve the right to appeal and show that all administrative remedies have been exhausted. If a timely motion is filed, the Board can grant the rehearing or deny it. If the Board denies the rehearing or all the available time for such a motion expires, the Respondent has a specified number of days (typically 30) to file an appeal to the appropriate court.

The judicial review of the Board decision is a review of the record. The Board may require a party who seeks judicial review of a final decision of the Board to pay all or part of the actual cost of preparation of the original or a certified copy of the record required to be transmitted to a reviewing court. The record in any case includes:

- All pleadings, motions, and intermediate rulings of the hearing officer, Board or Administrative Law Judge;
- The transcript of the hearing on the merits;
- The evidence received or considered at the hearing on the merits;
- Any statements of matters officially noticed;
- All objections to evidence, rulings on the objections and any offers of proof;
- Any decision or opinion, objections to any decision or opinion, and rulings on the objections;
- All staff memoranda and correspondence from parties or data submitted for the record to or considered by the hearing officer, Board or Administrative Law Judge in making decisions.

Accountancy Boards have a variety of different approaches to staffing the appeals process. In some cases, the state Attorney General receives case files and handles appeals; in some instances, outside counsel has that responsibility, and sometimes the Board staff themselves handle at least some appeals.

COMPONENT 8

RECORDING AND PUBLICLY REPORTING DECISIONS AND SANCTIONS

The best practices for documenting and publicly reporting Accountancy Board decisions impacting licensees, including sanctioning agreements, suspensions, stayed suspensions, revocation, and practice restrictions, are summarized in this section.

ACCOUNTANCY LICENSEE DATABASE (ALD)

The Accountancy Licensee Database (ALD) is a central repository of current licensee and firm records and information. It was conceptualized to become a national database of CPAs that would be a valuable resource to Boards of Accountancy for assisting with regulatory activities and responsibilities. The number of states including data in the database is growing and ideally the ALD will include current and accurate licensing information for individual CPAs and public accounting firms for each of the 55 CPA licensing jurisdictions. The ALD is hosted by NASBA and access to the system is free and limited to only Executive Directors and authorized Board staff. Boards can participate by sending licensee and firm data information via a secure electronic file to NASBA.

The ALD is useful for exam grades and license verification when processing CPA license applications, but it is also a key component for enforcement efforts both at the state level and nationwide. By publishing disciplinary and enforcement information in the database, Boards can have access to a single source to find out if a licensee has ever had action taken against him/her by another jurisdiction. In order for Boards to receive the full advantage of the database, sending all disciplinary data associated with licensees is highly recommended. Since only authorized Board staff and limited NASBA staff have access to this secure information, it is extremely useful for other Boards to have as much information regarding the disciplinary action as possible. Shared knowledge is power when it comes to enforcement efforts.

The disciplinary information provided to the ALD is used to trigger alerts to the Boards.

Released at the end of 2011, the disciplinary email alert system within the ALD is one of its most

valuable features. When a CPA's license is revoked for disciplinary reasons in a jurisdiction that participates in the ALD, an email alert is sent to all other jurisdictions where the individual holds a license notifying them that there has been action taken against the licensee in another jurisdiction. This provides almost real-time notice when a licensee in one jurisdiction has had disciplinary action taken against them in another jurisdiction. NASBA also created the same type of alert when a licensee passes away, and their status is changed to deceased in the other jurisdiction where they were licensed. The alert feature demonstrates the power of having a national database.

Some boards have developed additional enforcement processes around the ALD email alerts. For example, the Tennessee State Board uses the disciplinary email alerts to draft warning letters that are sent to the licensees mentioned in the alerts. Please see a sample warning letter, used by the Tennessee Board, in the Sample Documents section of this Guide.

In order for a CPA's license records to be matched in the data from jurisdiction to jurisdiction, so that disciplinary alerts can be triggered to the respective jurisdictions and so that a CPA's multiple state license records show all linked to one person, a unique identifier must be established and used. When a CPA is licensed in more than one jurisdiction, several board records show up in the ALD for that person. For example, the New York license of John Smith is linked to his license in Texas if the database can match his records as the same John Smith. The system knows these records are for the same person because of their unique identifier.

The unique identifier is created by processing a few key data components with a hashing algorithm that is used to transform the data into a code that no longer resembles the original data. This means that the original components of the data *never* even need to leave the Board's system, only the hashed data is transferred. It is very important to use this hashing mechanism with the data that is sent to NASBA to ensure records are linked to other boards. Without the ability to link records, the true power of the national database is lost.

CPAVERIFY WEBSITE

NASBA has worked closely with its member Boards to design and launch CPAVerify, a public-facing version of the ALD. With the wide-spread adoption of mobility, the need for consumers of accounting services to be able to determine if a person or firm is licensed and in good standing is more prevalent than ever. It is important for the protection of the public that an intuitive public national resource be available to provide CPA licensee information across jurisdictions. The launch of the public version of the ALD (CPAverify.org) in the fall of 2011 was a huge step in providing public consumers a single source search that reveals all jurisdictions where a person or firm is currently licensed and if the CPA has had disciplinary action taken against them. Now *anyone* can use this national database. The CPAVerify website gives visitors the ability to search through thousands of CPA records without registering and is completely free of charge. A national database of this kind has been requested for some time by various stakeholders, including firms, federal agencies, CPAs and the public at large. The adoption of mobility legislation in most jurisdictions has increased the need for such a resource.

The information in CPAVerify is fed over from the ALD system, but only limited data elements are published. Generally, only basic information is shown. The publicly displayed fields include: state of licensure, licensee or firm name, city and state, license number, status, type of license, issue date, expiration date and an indicator or marker of any possible disciplinary history. CPAVerify users are encouraged to contact the Board directly to get the full details about an action when the marker of enforcement, non-compliance or disciplinary action is present on the record. The indicator that displays for a licensee with disciplinary history is a message that says, "Contact Board for Details." Help text on the CPAVerify website defines this further to explain that if "Contact Board For Details" is displayed then the Board has reported some type of enforcement, non-compliance or disciplinary action to this site and the Board should be contacted for full details about the action reported.

NASBA and the ALD Task Force are continuously considering ways for the ALD to better assist Boards and new improvements to the system are always being introduced. Full participation by

all 55 US jurisdictions in the ALD and CPAverify including disciplinary information will mean even greater efficiencies to the enforcement efforts of state boards.

The ALD Task Force and NASBA staff are available to discuss any questions and concerns regarding the ALD website and the CPAverify website. Contact the ALD Manager at ald@nasba.org to request access to the ALD or for assistance adding State CPA and data to the database.

PUBLICATION OF BOARD ORDERS

A general public notice will be posted on the Board's website indicating that information on Board orders and other sanctioning agreements is available under the state's Public Records Act, Freedom of Information Act or Public Disclosure Act by contacting the Board's office.

The Board will post notice of Board orders for suspension, stayed suspension, revocation and practice restriction on the Board's website for approximately three years following the year of the Board order. In addition, for license and certificate suspension (including stayed suspension) and revocation:

- Notice will be provided to the AICPA and state Society;
- Other jurisdictions in which the Respondent practices accounting will receive notice;
- Other jurisdictions that have licensed the individual will be notified;
- The Complainant(s) will be notified; and
- Notice will be sent to the newspaper(s) in the Respondent's location.⁴⁵

In cases of non-compliance not resulting in administrative sanction, suspension, stayed suspension, revocation, or a Board-ordered practice restriction, the Executive Director, with a majority vote of the Board, may direct that a notation be made referencing each of the Board's

⁴⁵ Some states only send disciplinary actions to the press if the discipline includes suspension or revocation of the license.

sanctioning actions on the Board's website (licensee search database) for up to three years following the year the sanction was imposed.

In cases of administrative sanction, the Board may publish the individual's or firm's name unless handled as a private reprimand as provided within that state's laws. The Board shall comply with the state's Public Records Act, Freedom of Information Act or Public Disclosure Act.

AICPA ENFORCEMENT PROCESSES RELATIVE TO ACCOUNTANCY BOARDS

When an investigation leads to disciplinary action as noted above, the AICPA publishes the results in the *Wall Street Journal* and *The CPA Letter*. When the member is also a member of a state society that participates in the JEEP investigative process, the state society usually publishes the actions as well. Such publications generally include a notice advising members where they can file complaints.

The AICPA sends the publications of disciplinary actions to the Accountancy Boards. This is only for members who have been admonished, suspended or expelled.

However, the AICPA can only investigate members of the AICPA or of a JEEP-participating state society. If a Respondent is not a member of the AICPA but is a member of a JEEP-participating society, the AICPA can investigate the matter. The AICPA frequently investigates cases against persons who are members of JEEP state societies only and sends the results to the society with its recommendation.

COMPONENT 9

MONITOR PROVISIONS AND SANCTIONS

Monitoring provisions include the system or procedures of tracking the terms of a final Board order. This would include provisions within a sanctioning agreement, probation, stayed suspensions, and practice restrictions. The process is designed to ensure compliance throughout the term of the sanction and to ensure sanctions are lifted when all provisions are met or additional sanctions are imposed when terms are not met.

MONITORING PROCEDURES

In most cases, CPAs become subject to a final order as a result of an investigation of alleged wrongdoing while they are licensed. However, in some cases, alleged wrongdoing comes to light prior to licensure. Applicants and licensed CPAs can voluntarily agree to sign a Consent Order or Consent Agreement with the Board to settle their matters by mutual agreement. These consents are reviewed and finalized by the Board at Board meetings. If a CPA contests the recommended sanctions and does not voluntarily agree to sign consent, the matter may need to be litigated. The final decisions of the Board will be set out in writing in final orders.

After each Board meeting, the staff assigned to monitor will be provided electronic versions of all the final orders. The monitor will download the orders and place them in a separate monitoring file. The monitoring files are of three types: suspension, probation, or remedial compliance. CPAs on suspension have a set period of time during which they cannot perform services, such as two years. CPAs with probationary status or conditional practice are subject to practice limitations, required to perform affirmative acts, or both. They may not be able to perform certain attest services and/or they may be required to have their attest services pre-approved by another CPA before issuance. Remedial compliance requires only that the CPA perform certain acts, such as taking an ethics course. When the acts have been completed, the person is no longer monitored.

The monitor will read the orders and prepare a chart for each one. The chart contains the name and license number of each Respondent and the file numbers of the investigation. The chart will detail each of the requirements ordered, including fees, penalties, continuing professional education (CPE), pre-issuance review, and other reporting requirements. Due dates will be computed for each of these requirements. The charts will be consulted on a monthly basis to determine the required responses from each CPA.

It is the responsibility of the CPA to comply with ordered provisions. The Board may, but is not required to, send a reminder letter for submission of an ordered provision. The letter should include language indicating the ultimate responsibility for compliance falls to the licensee. If the Board does not provide a reminder to the CPA, it shall not excuse the CPA's timely compliance with ordered provisions.

The Board may acknowledge receipt when the CPA pays a fee or penalty, provides other requirements such as CPE, affidavits, a pre-issuance report or other monitoring materials as required.

If the CPA fails to comply with any of the provisions as ordered by the Board, the staff monitoring the matter shall bring the violation to the Board's or its assigned staff person's attention. The Board then has the ability to impose harsher sanctions, lengthen the probation or suspension terms, or revoke the licensure.

If the Executive Director has the right to revoke or suspend, the CPA will be informed that the Board is making this decision. The CPA will be provided a deadline to convince the Executive Director not to impose discipline. If the CPA does not respond, the Executive Director imposes discipline, including suspension or revocation.



**BOARD OF ACCOUNTANCY
ENFORCEMENT RESOURCE GUIDE
APPENDIX A**

Nonbinding guidance for the exclusive use of State Boards of Accountancy

Second Edition, October 2015

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APPENDIX A

Cases and Attorney General Opinions Re: Procedural Issues in Disciplinary Actions^{46,47}

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⁴⁶ With Hyperlinks to Publicly Available Cases, Rulings and Opinions, and Cross References to the UAA.

⁴⁷ Note: This Appendix is updated regularly. It primarily contains limited summaries of cases and attorney general opinions directly involving or pertaining to the state regulation of accountancy. Within a subheading, the cases and opinions are usually arranged with the most recent being first. Every case involves not only particular facts but also unique statutes and rules as well as the jurisprudence of individual jurisdictions. Some of the decisions have been designated by the courts as “unpublished” and have limited or no precedential value, but are included for analysis and general guidance. Additionally, some of these cases might be subject to further appeal. Of course, state boards and others should rely upon their own legal counsel’s interpretations of these decisions, especially regarding cases from their jurisdiction.

A. Board Investigations

1. Cases

Newby v. Enron Corp. (In re Enron Corp. Securities), 443 F.3d 416 (5th Cir. 2006), *aff'g*, 229 F.R.D. 126 (S.D. Tex. 2005). Judge did not abuse discretion by permitting the Texas Board to intervene in the Enron litigation. **See UAA Section 11 re: Board's right to conduct investigations.** (<http://www.ca5.uscourts.gov/opinions/pub/05/05-20462-CV0.wpd.pdf>)

The Texas Board filed a motion to intervene in litigation against the Enron Corporation and its officers. The Board sought intervention to aid in its investigations of audit misconduct by the Texas licensees who were involved in the Enron audit. Specifically, the Board sought access to discovery protected by a court order in *In re Enron*. The Board was granted access by the district court, provided that it complies with the applicable confidentiality orders. Arthur Andersen appealed the decision, and two former Andersen CPAs were granted intervention in the appeal.

The Fifth Circuit noted that the Public Accountancy Act “contemplates that the Board will gather and receive information from third parties regarding licensees.” The appellants argued that the Board had other means at its disposal to obtain the information. The Fifth Circuit, however, determined that the Board met the threshold intervention requirement of having questions of fact and law in common with the Enron litigation since the Board was investigating audit failures that may have led to Enron’s collapse. The appellants also claimed that the Board had already conducted exhaustive investigations of Andersen and the individual CPAs. This argument did not sway the court, which observed that state law governing the Board’s Investigatory powers did not comment on what tactics the Board may not take in conducting its investigations.

The Fifth Circuit summarized its decision as follows: “The Board’s intervention does not ‘unduly delay or prejudice the adjudication of the rights of the original parties.’ Further, permissive intervention is within a court’s discretion. Texas granted the Board broad powers of investigation to oversee the public interest in maintaining high standards of competence and integrity in the practice of public accountancy. Since state law does not explicitly limit the Board’s Investigatory powers through the mechanism of its intervening in this case, federalism and comity concerns are not implicated. The state statutes governing the Board do not indicate any intention by the state that the Board’s Investigatory powers are to be scrutinized and strictly regulated by the state.” Therefore, the court concluded that the district judge did not abuse her discretion.

Christiansen v. Missouri State Board of Accountancy, 764 S.W.2d 952 (Mo. Ct. App. 1988). CPA had right to copies of the Board’s Investigative materials. **See UAA Section 12(b) re: right to examine Board’s evidence prior to hearing.**

The Board conducted a disciplinary hearing, seeking to revoke Christensen’s license. The Board refused Christensen’s request for copies of the Board’s investigative materials. It claimed that

there was competent and substantial evidence to support its decision, despite anything Christensen might have discovered from the information he sought. After the decision to revoke the license was affirmed on appeal, Christensen sought review.

The Missouri Court of Appeals reversed, holding that Christensen had a fundamental right to receive the investigative material against him. However, he was unable to assert a claim of ineffective assistance of counsel because there was no constitutional or statutory right to counsel in civil proceedings. The court also determined that Christensen was not precluded from litigating issues in his disciplinary proceedings that were the subject of a prior civil action. The Board failed to show evidence relative to the terms of the settlement agreement reached in the prior action. Therefore, under the circumstances presented, the court ruled that neither collateral estoppel nor *res judicata* applied. The case was remanded, with instructions to reinstate Christensen's license.

2. Attorney General Opinions

Op. Att'y Gen. Neb. No. 02024 (Aug. 20, 2002), 2002 Neb. AG LEXIS 23. Use of CPA volunteers to advise the Board in its enforcement duties or assist with purely ministerial tasks was probably a defensible exercise of the Board's authority.

http://www.ago.state.ne.us/agopinions/details.htm?searchStr=1&_search_id=1940

The director of the Nebraska Board inquired as to whether the Board had the authority to create an Enforcement Committee of volunteer CPAs, and whether the Board could pay those CPAs for their participation. The Board also asked whether it would be liable for the volunteers, and whether payments to the volunteers' firms instead of directly to the volunteers would change the liability. The Attorney General found that the use of volunteers to advise the Board in its enforcement duties or assist with purely ministerial tasks was probably a defensible exercise of Board authority. No statutory authority, however, existed for the payment of a per diem to volunteers on a committee. But, if it appeared that the volunteers were actually members of a state committee, the Board might be able to reimburse the actual and necessary expenses of the volunteers. It would depend on the facts of the situation, and on what role the volunteer members of the proposed enforcement committee would play. To the extent reimbursement of actual expenses may be authorized by statute, such payment would be made to the individual volunteer. The issue of liability would be dependent upon the facts and circumstances of each case.

43 Op. Att'y Gen. Ore. 145 (Jan. 21, 1983), 1983 Ore. AG LEXIS 43. CPAs who volunteered their services to the Oregon Board to investigate and review complaints against licensees were agents of a public body for purposes of the Oregon Tort Claims Act.

The Oregon Board inquired whether CPAs who volunteered their services to the Board at the Board's request to investigate and review complaints against licensees of the Board were agents of a public body for purposes of the Oregon Tort Claims Act. The state Attorney General opined that CPAs who volunteered their services to the Board at the Board's request to investigate and review complaints against licensees of the Board were agents of a public body for purposes of

tort claims coverage and as such they were entitled to defense and indemnification. In addition, CPAs who served on a statutorily created committee under the Board's jurisdiction were public officers for purposes of tort claims coverage.

13 Op. Att'y Gen. Okla. 21 (Apr. 6, 1981), 1981 Okla. AG LEXIS 183. There was no statute of limitations that would preclude the Oklahoma Board from investigating an alleged violation of the accountancy laws and regulations at any point in time when the alleged violation first came to the Board's attention. **See UAA Section 11(a) re: right to conduct investigations.**

(<http://www.oklegal.onenet.net/oklegal-cgi/ifetch?okag+1000022127075+F>)

The Oklahoma Board presented several questions to the state Attorney General regarding investigations of alleged violations. The Attorney General opined that there was no statute of limitations that would preclude the Board from investigating an alleged violation of the accountancy laws and regulations at any point in time when the alleged violation first came to the Board's attention. In addition, the Board and its investigative committee could not subpoena documents from a registrant prior to the institution of an individual proceeding. Finally, specific procedures to be observed by the Board's Investigators in interviewing a licensee under investigation depended on the facts involved in each particular case but always had to comply with due process.

Op. (Inf.) Att'y Gen. Alaska (Oct. 1, 1980), 1980 Alas. AG LEXIS 424. Board should refrain from active involvement in investigations, but may be provided basic information relative to complaints.

The Alaska Board requested a clarification of a previous opinion of the Attorney General (AG) regarding the Board's role in investigations. The AG said, "we think that a board may, consistent with due process, be informed of the names of licensees against whom complaints have been made and the general nature of the complaints, without becoming unduly involved in the investigative process. We believe, however, that the reports of pending investigations and complaints should be limited to this information. There may, of course, be situations in which an exception would be warranted, but these should be reviewed by an attorney from our department before any action is taken."

59 Op. Att'y Gen. Md. 10 (May 10, 1974), 1974 Md. AG LEXIS 2. Maryland Board had no authority to employ independent investigative agencies.

The Maryland Board asked several questions of the state Attorney General. The final question was whether the Board had the authority to delegate its investigative functions to a private organization such as the Maryland Association of Certified Public Accountants as opposed to the Division of Investigative Services of the Department of Licensing and Regulation. According to the statutes, the Board could enlist the help of the Attorney General and his assistants, but there was no authority to employ independent investigative agencies. However, the Board could apply to the Secretary of the Department of Licensing and Regulation if it needed special technical assistance in the investigation a case from an outside agency.

B. Board Subpoena of Client Records

1. Cases

Colorado State Board of Accountancy v. Arthur Andersen LLP, 116 P.3d 1245 (Colo. App. 2005), *cert. denied*, No. 05SC278, 2005 Colo. LEXIS 666 (Colo. July 25, 2005). Colorado Board had authority to investigate firm that voluntarily relinquished its license. (<http://www.courts.state.co.us/coa/opinion/2005/2005q1/03CA1872.pdf>)

Arthur Andersen served as the outside auditor for a company that filed for bankruptcy. The bankruptcy trustee brought an action against the accounting firm, alleging that its audits were not conducted in accordance with generally accepted auditing standards. The matter was brought to the attention of the Colorado Board, which started an investigation as to whether the firm violated the Accountancy Act. When the firm, which had voluntarily relinquished its Colorado license, questioned the Board's jurisdiction, the Board brought an *ex parte* petition seeking to enforce the subpoena. The district court granted the petition, but modified the subpoena to limit some of the Board's document requests. Both parties appealed.

Arthur Andersen argued that the Board could not enforce the subpoena because its license had been voluntarily relinquished and the subpoena was not for a lawful purpose. The court of appeals disagreed. Pursuant to Colo. Rev. Stat. § 12-2-126(I)(a)(I), the Board was authorized to investigate "any person." The court concluded that the legislature's use of the term "any person" permitted the Board to investigate complaints against person or entities other than current licensees. If the firm did misrepresent the financial condition of the bankrupt company and its audits violated generally accepted auditing standards, the firm was in violation of the Accounting Act. Therefore, the Board's investigation was for a lawfully authorized purpose. In addition, the trial court had acted within its equitable authority when it modified the Board's subpoena. Audit manuals completed after the date that the firm stopped representing the bankrupt client and peer reviews of work done for other clients were not relevant to the Board's investigation. The trial court's judgment was affirmed.

Colorado State Board of Accountancy v. Raisch, 931 P.2d 498 (Colo. App. 1996), *aff'd*, 960 P.2d 102 (Colo. 1998). Colorado's accountant-client privilege prevents compliance with state board's subpoena. **See UAA Section 4(g)(1) re: Board's powers.**

The Colorado Board sought production of client documents from an accountant for a licensure investigation. The accountant filed a motion to resist the Board's subpoena, citing the state's statutory accountant-client privilege. The statute at issue provides that a certified public accountant and specified employees of the accountant shall not be examined as witnesses without the consent of the client as to "any" communication by the client. The CPA's motion was denied by the trial court, which issued an order compelling production of the client records. That decision was reversed by the court of appeals, which held that notwithstanding a separate statute authorizing the Board to subpoena records, production of client records could not be compelled without a client's consent.

The decision went before the Colorado Supreme Court, which affirmed the holding of the court of appeals. The court said, “[w]e hold that creation of an exception to the accountant-client privileges for Board Investigatory subpoenas is a matter for legislative determination. While we recognize that the Board acts in the public interest in regulating CPAs, we decline to imply the existence of a missing statutory provision. ... Accordingly, absent an express statutory exception, the Board’s Investigatory subpoena power does not create an exception to Colorado’s accountant-client privilege.” The court noted that the Uniform Accountancy Act which had been adopted in many states recommended an exception to the privilege for production to state boards, but that it had not been adopted in Colorado. (NASBA filed an *amicus curiae* brief in support of the Colorado State Board of Accountancy.)

C. Delay in Prosecution

1. Cases

Goldberger v. State Bd. of Accountancy, 833 A.2d 815 (Pa. Commw. Ct. Oct. 10, 2003). Revocation of CPA’s certificate for GAAS violations in SEC audit was not excessive punishment; 18 month delay did not violate due process.
(http://www.courts.state.pa.us/OpPosting/CWealth/out/1854CD02_10-10-03.pdf)

Goldberger’s CPA license was revoked by the Pennsylvania board for misconduct during an audit of a publicly-traded company. (The SEC had found that Goldberg failed to conduct the audit in accordance with generally accepted auditing standards and that his conduct constituted “improper professional conduct.”) He sought review of the revocation.

The Commonwealth Court affirmed the Board’s decision. Because of the seriousness of the harm caused by Goldberger’s conduct, his failure to present any mitigating evidence, and the need to discourage such conduct in the future, the Board did not abuse its discretion by revoking his certificate. The revocation sanction was not inconsistent with the sanctions imposed on the other parties involved in the same audit. One of those CPAs surrendered his license and was forever barred from retaking the CPA exam; another appeared at a mitigation hearing to explain his role, which was deemed less culpable than Goldberger’s conduct. CPA firm that employed Goldberger was not punished by the SEC for its conduct in the audit nor was any failure found on its part to supervise its auditors. In addition, the CPA’s due process rights were not violated by the 18-month delay in imposing a penalty since he did not intend to practice public accountancy again, and he failed to show that the Board was influenced in any way by public concern about high profile accounting scandals.

Weinberg v. Commonwealth, 509 Pa. 143, 501 A.2d 239 (1985), *rev’g*, 76 Pa. Commw. 216, 463 A.2d 1210 (1983). The doctrine of laches did not bar the Pennsylvania Board from disciplining CPA for misconduct occurring five years earlier.

On behalf of a client, Weinberg bribed an IRS agent in 1974. The following year, he agreed to cooperate with the IRS in the investigation and prosecution of the agent and others. He also testified against his former business partner. In 1981, the Pennsylvania Board of Examiners of Public Accountants brought disciplinary charges against Weinberg. His defense consisted of the

doctrine of laches. Seven years had passed since the events cited by the Board. Weinberg's conduct had been impeccable since the one incident, and he had cooperated fully with the prosecuting authorities. The case reached the state supreme court, which reversed the lower court's holding. Although the Board had failed to act until five years after the misconduct occurred, the accountant had nevertheless failed to demonstrate that he had been prejudiced by the Board's inaction. Nor was there a lack of due diligence on the part of the Board, which had begun the disciplinary action against Weinberg soon after learning of his misconduct in 1980 during the disciplinary proceeding against his former partner.

Manning v. Nevada State Board of Accountancy, 99 Nev. 842, 673 P.2d 494 (1983). The board was estopped from restraining an unlicensed accountant from using the word "accountant" in connection with his business as it had waited 15 years before pursuing the matter.

The Nevada board obtained an injunction restraining the unlicensed appellant from using the word "accountant" in his business. The Nevada Supreme Court held that the board was estopped from pursuing its case against Manning. The court said, "[t]here is not a scintilla of evidence suggesting that Manning's accounting services had not been satisfactory. The Board had actual knowledge for many years of Manning's use of the word 'accountant' in his practice. ... It waited fifteen years while Manning worked diligently to build a practice that has enabled him to make a tolerable living. To now bar Manning from that practice would be unfair and unjust."

D. Consents/Settlements

1. Cases

Dorr v. Wyoming Board of Certified Public Accountants, 146 P.3d 943 (Wyo. 2006). CPA violated statute prohibiting dishonesty in the practice of accounting by withholding information about license restrictions from an audit client and entering into audit engagements without informing the Wyoming Board or seeking its approval. (<http://wyomcases.courts.state.wy.us/applications/oscn/deliverdocument.asp?id=448222&hits=>)

Dorr, a CPA, entered into a settlement agreement with the Wyoming Board that prohibited him from performing audits without first obtaining the Board's approval. Following the Wyoming Supreme Court's decision in *Dorr v. Wyoming Board of Certified Public Accountants*, 21 P.3d 735 (Wyo. 2001), a Board committee filed another complaint against Dorr alleging that he violated both the settlement agreement and the Wyoming Certified Public Accountant's Act by performing two audits without the Board's permission. The Board held a contested case hearing and entered a decision suspending Dorr's license. Dorr petitioned for judicial review, and the lower court upheld the Board's decision.

On appeal to the Wyoming Supreme Court, one of several issues was whether Dorr engaged in dishonesty in the practice of accounting by withholding information about the restrictions on his license from an audit client and entering into audit engagements without informing the Board or

seeking its approval as required by the settlement agreement. The Court answered this question in the affirmative and affirmed the lower court's ruling upholding the Board's decision.

Wyoming Board of Certified Public Accountants v. Christensen, 800 P.2d 853 (Wyo. 1990). Board enjoined from pursuing one count in disciplinary proceedings against CPA. (<http://wyomcases.courts.state.wy.us/applications/oscn/DeliverDocument.asp?CiteID=122632>)

The question posed in this case was whether the Wyoming Board was enjoined from continuing with one of the counts in a disciplinary proceeding. The Board contended that CPA disciplinary proceedings were within its exclusive jurisdiction and that the injunction entered by the district court infringed upon the exercise of the Board's lawful jurisdiction. Christensen sought the injunction pursuant to the terms of a settlement agreement between himself and the Board. In that settlement agreement, Christensen was required to undergo two peer reviews, with any violations to be disclosed in a letter of comment. The Board also committed itself to pursue any further disciplinary action only by giving written notice of its decision to proceed within sixty days after its receipt of the letter of comment. The trial court found that the Board had failed to proceed in accordance with the settlement agreement and that the Board, therefore, was foreclosed from pursuing the challenged count in the disciplinary proceeding. The Supreme Court agreed with the ruling, viewing the dispute as a contractual matter rather than an administrative disciplinary proceeding, and affirmed the order of the district court.

Asbury v. Texas State Board of Public Accountancy, 719 S.W.2d 680 (Tex. App. 1986). CPA who did not sign a formal settlement document was entitled to an adversarial hearing under the Texas administrative procedure act.

Asbury agreed to enter into a settlement agreement that would have suspended her C.P.A. license for a three-year period. The agreement was presented to a three-member panel of the Board, which recommended that the full Board accept the agreement. The panel, after receiving evidence in support of the agreement, prepared a Proposal for Decision to that effect, but the proposal was never signed by Asbury. The Board, after denying permission to Asbury to address the Board, then unanimously approved the panel's proposal and suspended Asbury's license. The court of appeals reversed and remanded the case to the Board. The court found the suspension invalid because Asbury withdrew from the proposal without signing it. She was entitled to an adversarial hearing under Texas law.

E. Conduct of Hearings/Proceedings

1. Cases

Texas State Board of Public Accountancy v. Bass, 2012 Tex. App. LEXIS 1482 (Tex. App. Austin Feb. 24, 2012) [unpublished]. Board orders imposing discipline on licensees were not rendered voidable because the Board held closed sessions to confer with counsel. **See UAA Section 4(b) re: Board meetings; Section 10 re: discipline; Section 12 re: Board hearings.** (<http://www.3rdcoa.courts.state.tx.us/opinions/PDFopinion.asp?OpinionID=20844>)

The Texas Board appealed a district court grant of summary judgment for three accountants licensed in Texas. Following the collapse of Enron, the Texas Board investigated, among other things, the actions of the three licensees involved in this matter (“accountants”). At the culmination of its investigations, the Board initiated disciplinary proceedings against the accountants which involved contested-case hearings before two administrative law judges (“ALJs”). The ALJs issued proposals for decision finding that the accountants had displayed “serious mistakes in professional judgment that contributed to the material misstatements in Enron’s . . . financial statements,” including, not conforming to GAAP. The ALJs recommended that two of the accountants be admonished and have to pay a penalty and costs. The third accountant should have had the charges dismissed against her according to the ALJs.

The Texas Board held four meetings regarding the accountants. The Texas Board’s rules and the Texas Open Meetings Act require that “all final decisions and orders shall be made during a public meeting duly noticed.” All four meetings were public and with proper notice provided. However, at each meeting, the Board went into closed session during which it consulted with counsel as provided for under the Open Meetings Act. Although the Board adopted most of the ALJs’ findings, the Board determined that the ALJs “failed to apply or interpret applicable law, rules, and policy” when determining the accountants’ fitness to practice and recommendations regarding discipline. The Board openly debated the accountants’ situations and publicly voted to revoke two of their licenses and suspend the third. In its orders imposing discipline, the Board stated the specific reasons and the legal basis for the modifications it made to the ALJs’ conclusions and recommendations.

The accountants filed suit for judicial review and included a claim that the Board violated the Texas Open Meetings Act by deliberating on the cases at issue “almost exclusively in lengthy closed sessions.” The Open Meetings Act provides that “any action taken as a result of the improper closed session is voidable and should be considered void.” The district court, in granting summary judgment for the accountants, held that the Board violated the Open Meetings Act as a matter of law and declared the Board’s actions void. Further, the district court enjoined the Board from re-prosecuting the accountants for the alleged violations.

On review, the appellate court delved into the particular provisions of the Open Meetings Act to determine when a board may utilize closed sessions and what could be discussed in the closed session versus open session. The court noted the accountants had assumed that if the Board’s closed sessions were not proper under the Open Meetings Act, then any subsequent action by the Board was voidable. According to the court, this assumption was incorrect because the Open Meetings Act does not render voidable either defective meetings or publicly-made decisions that occur after closed-meeting deliberations. “Thus, to establish that the Board’s orders violated the [Open Meetings] Act, the accountants must establish that ‘the actual vote or decision’ to adopt the orders was not made in open session.” Significantly, “allegations of improper closed deliberations alone do not provide a sufficient basis for voiding all subsequent related actions.” The court evaluated the meetings’ transcripts, noting that all Board members openly debated regarding the accountants and all votes were done publicly. Thus, the debate after the closed session was over and the oral arguments that took place in open sessions were conclusive evidence showing that the Board members “had not already made final decisions regarding the

contested cases in closed session.” The court even stated that, assuming that the only act the Board took in open session regarding the contested cases was to take a vote on the orders, “the Board’s public votes on the orders satisfy the [Open Meetings] Act’s requirement that a final action, decision, or vote on a matter deliberated in a closed session may only be made in an open meeting, and thus, the orders are not voidable.” Since the accountants could not demonstrate this essential element, summary judgment was improperly granted by the district court. Accordingly, the appellate court granted partial summary judgment for the Board regarding the Open Meetings Act claim, reversed the district court’s injunction prohibiting the Board from re-prosecution of the case, and remanded for further proceedings. On remand, the district court will consider the accountants’ claims on appeal beyond their Open Meetings Act claim.

NOTE: This case is related to *Texas State Bd. of Public Accountancy v. Bass*, No. 03-09-00251-CV, 2011 Tex. App. LEXIS 294 (Tex. App. Jan. 14, 2011) [unpublished], where the court found no subject matter jurisdiction over the defendant auditors’ declaratory judgment action against the Texas Board; the action was barred by sovereign immunity and there was also a pending administrative appeal.

Henss v. Iowa Accountancy Examining Bd., No. 8-562/07-1638, 2008 Iowa App. LEXIS 570 (Iowa Ct. App. Aug. 13, 2008). A former CPA’s tort claims against the Iowa Board based on the revocation of his CPA license were barred by the applicable statute of limitations. **See UAA Section 4(g)(2) re: immunity for Board members and agents.** (http://www.judicial.state.ia.us/court_of_appeals/Recent_Opinions/20080813/8-562.pdf?search=+Henss+)

The Iowa Board revoked Henss’s CPA license in 1994. Henss subsequently filed a tort action against the Board in 2007 based on alleged improprieties during the hearing process that led to the revocation of his license. Specifically, Henss claimed he was denied procedural due process, his counsel conspired with another party, the hearing was fatally defective, and the Board engaged in selective enforcement. The Board filed a motion to dismiss which the trial court granted on the following grounds: 1) claim preclusion; 2) exclusivity of judicial review; 3) failure to state a claim upon which relief can be granted; 4) sovereign immunity; 5) quasi-judicial immunity; and 6) statute of limitations. Henss appealed.

On appeal, the Iowa Court of Appeals held that Henss’s claims were barred by the applicable statute of limitations and affirmed the trial court’s dismissal of his action. Iowa had a two year statute of limitations for tort actions. However, Henss’s claims were based on events that allegedly occurred 13 years before he filed suit.

Mack v. Maryland State Board of Public Accountancy, No. 30 (Md. Ct. Spec. App. July 7, 1997). Maryland CPA’s license was correctly revoked for fraudulent behavior.

The Maryland Board revoked Mack’s CPA license based on a complaint by one of his clients. Mack filed a petition for judicial review. The court affirmed the Board’s decision, finding “substantial evidence ... that Mack did act fraudulently, in a grossly negligent fashion and in adverse reflection of his fitness to practice.”

On appeal to Maryland's Court of Special Appeals, the court affirmed primarily for procedural reasons. The record was clear that Mack had indeed been formally charged, and his hearsay testimony issue was not presented to the trial court for review. In addition, there was no motion ever filed for remand so the Board could consider some additional evidence in Mack's favor. The appellate court also noted that the Board left the record open for an additional 30 day period although Mack had two years to compile evidence for the Board's review. Thus, there was no error or abuse by the trial court.

Asman v. Ambach, 64 N.Y.2d 989, 478 N.E.2d 182, 489 N.Y.S.2d 41 (1985), *rev'g*, 98 A.D.2d 847, 471 N.Y.S.2d 336 (1983). Failure to make a stenographic record of accountant's professional conduct hearing resulted in a remand. See UAA Section 12(g) re: records of hearings.

After expedited professional conduct proceedings, Asman's license was revoked based upon his conviction of a crime. A stenographic record of the hearing was not made because, at the time of the hearing, no such record was required. The relevant statute, N.Y. Educ. Law § 6510, was subsequently amended to require the making of a stenographic record. The trial court confirmed the revocation order and denied the accountant's petition for review.

On appeal, Asman maintained that the refusal to make a stenographic record during his hearing was a denial of due process. The refusal to do so also precluded the board of regents from properly considering a full record of the relevant proceedings, including the evidence and testimony relating to the nature and severity of the penalty to be imposed upon him. The court of appeals reversed and remanded the trial court's order. The appellate court held that the law that existed at the time of the accountant's appeal was applicable and that, given the remedial nature of the amendments to the relevant statute, a new proceeding was required in order to conform with the statute as amended.

Buchman v. State Board of Accountancy, 262 So. 2d 198 (Fla. 1972), *aff'g in part & rev'g in part*, 245 So. 2d 888 (Fla. Dist. Ct. App. 1971). Florida Board's suspension of a CPA's certificate was remanded because the Board's vote was no longer unanimous after the chair changed his mind. See UAA Section 12(h) re: votes during hearings.

Buchman was charged by the Florida Board with grossly violating professional auditing standards. The Board unanimously voted to suspend his certificate for one year. The following day, the Board's chair announced that he wanted to change his vote. The other members would not reconsider the matter, and Buchman was suspended. He petitioned the court of appeals for a writ of *certiorari*, maintaining that his suspension was not valid because a unanimous vote of the Board was required. The court of appeals reversed the Board's decision because it was not satisfied that the unanimity requirement was met. The matter went to the Supreme Court of Florida, which noted that a CPA's certificate could be revoked or suspended only by the unanimous vote of all Board members. Before the vote became official upon its filing, it was known that the Board chair no longer agreed. The Board should have noted this change at its next meeting and proceeded to reconsider the matter. The matter was remanded to the Board with instructions to consider a milder penalty of public censure.

2. Attorney General Opinions

Op. Att’y Gen. Okla. No. 83-290 (Mar. 20, 1984), 1984 Okla. AG LEXIS 105. As quasi judicial decisions, the deliberation and final decision of the Oklahoma Board following a public hearing on a disciplinary action were not required to be conducted and reached in open meeting.

The Oklahoma Board presented the following questions to the Attorney General: 1) is the Board required to deliberate in open meeting following a public hearing upon a complaint brought against a registrant for disciplinary action and 2) if not, may the Board’s legal counsel be present in the closed session to consult with the Board with respect to legal issues raised during the public hearing? The Attorney General opined that the deliberation and final decision of the Board following a public hearing upon a complaint brought against a registrant for disciplinary action were not required to be conducted and reached in open meeting since they were quasi judicial actions. Further, the Board could consult with its legal counsel in closed meeting with respect to legal issues raised during such proceedings unless the legal counsel prosecuted or acted as an adversary in the matter. In such case, the consultation would violate the registrant’s right to due process.

11 Op. Att’y Gen. Okla. 41 (Mar. 26, 1979), 1979 Okla. AG LEXIS 216. The Oklahoma Board was required to deliberate openly following a hearing on a complaint against a licensee for disciplinary action, and the Board could not confer in executive session. See UAA Section 4(b) re: open meetings.

<http://www.oklegal.onenet.net/oklegal-cgi/iffetch?okag+964620127861+F>

The Oklahoma Board presented several questions related to the state’s Open Meeting Act to the state Attorney General. The Attorney General opined that the Board was required to deliberate openly following a hearing on a complaint brought against a licensee for disciplinary action, and the Board could not confer in executive session with its attorney on legal issues raised during the conduct of an open hearing on a disciplinary complaint.

38 Op. Att’y Gen. Ore. 1914 (Apr. 5, 1978), 1978 Ore. AG LEXIS 167. The administrative committees of the Oregon Board were authorized to conduct formal disciplinary hearings, but they could not revoke or suspend licenses. See UAA Section 12(h) re: votes during hearings.

The Oregon Board inquired whether its administrative committees were authorized to conduct formal hearings, enter orders as a result of such hearings, and revoke or suspend licenses of public accountants. The state Attorney General opined that the Board’s administrative committees were authorized by statute to conduct formal disciplinary hearings, but they could not revoke or suspend licenses. Further, the Board could in its discretion limit the administrative committees’ jurisdiction and functions relating to public accountants. [NOTE: This particular provision of Oregon law has since been repealed.]

59 Op. Att’y Gen. Md. 10 (May 10, 1974), 1974 Md. AG LEXIS 2. Due consideration of the appearance of prejudice. See UAA Section 4(f) re: Board staff; UAA Section 12(c)

re: respondent's rights; UAA Section 12(d) re: evidence; UAA Section 12(e) re: Board counsel during hearings; UAA Section 12(g) re: records of hearings.

The Maryland Board asked several questions of the state Attorney General. The first was whether the Board would prejudice the rights of an individual by asking him to an informal hearing, where he may or may not be represented by counsel and where no transcript of the proceedings would be made. The Attorney General opined that a Board member could be designated to preside over the informal hearing, but he/she should not act as one of the ultimate triers of the issues. His or her sole function should be to recommend whether a formal hearing should be held. "Accordingly, the involvement of Board members in preliminary investigative processes or informal hearings should be avoided unless they do not participate in a later formal hearing or in the determination of the issues. Due consideration of the rights of applicants and licensees requires procedural as well as substantive safeguards for the avoidance of prejudice."

The second question was whether it was proper for the office of the Attorney General to act as a presenter of evidence before the Board and as its legal advisor. The Attorney General opined that there would be no impropriety involved with this arrangement as long as there was no unfairness. This arrangement was proper, particularly where there were two assistants, one acting as legal advisor to the Board and the other as presenter of evidence before the Board.

F. Recovery of Costs/Attorney Fees

1. Cases

Davis v. State Board of Certified Public Accountants of Louisiana, 2013-0514 (La. App. 4 Cir. 12/18/13), 131 So. 3d 391. Louisiana Board properly revoked certificate of CPA who engaged in unprofessional conduct and fraud, but the Board was not entitled to attorney fees.

The Louisiana Board revoked Davis' license, imposed a \$55,000 administrative fine, and ordered him to pay the board's costs, including \$105,679.85 in attorney fees. Davis appealed the Board's decision to the district court, which affirmed the revocation and fine, but reversed the portion of the Board's order requiring Davis to pay the attorney fees. Davis appealed the revocation of his license, and the Board sought reinstatement of the attorney fees.

In his appeal, Davis contested the Board's findings of fact as to his conduct and the resulting revocation of his license. He asserted that the Board had made an error when it found that the financial information provided to another CPA about a pharmacy business that Davis was personally involved in could not be relied upon to perform a business valuation and that those documents were not prepared "in accordance with Mr. Davis' professional obligations." Further, the other CPA never testified about the matter. The court noted,

Whether that outside CPA testified about these matters, however, is unimportant as those conclusions are the types of decisions specifically entrusted to the Board. The Board's conclusion as to whether Mr. Davis deviated from his professional obligations, and provided data that falls below the minimum standards required of

a practitioner of public accounting are at the essence of the Board's specialty and competence. In our review of such administrative actions, we are cognizant of the "strong presumption of validity and propriety in such administrative actions where casting judgment upon the professional behavior of a fellow member of a profession is a matter peculiarly within the expertise of an agency composed of members of that profession."

Other findings of misconduct by Davis included: 1) systematic and consistent underreporting of monthly sales figures used to prepare business sales and use tax reports; 2) unauthorized use of collected but not remitted sales tax funds for his personal benefit; 3) improperly structuring the ownership of the pharmacy businesses through entities owned by Roth IRAs; 4) issuance of multiple compilation reports after his firm's registration lapsed; 5) failure to note that he was not independent of entities for which he prepared compilation reports; and 6) forgery of a signature on a tax return. After a review of all the evidence, the court of appeals sustained the Board's conclusions that Davis engaged in unprofessional conduct and fraud.

As to the Board's contention that it should be reimbursed for its attorney fees, the court would not defer to the Board's interpretation of La. R.S. 37:79, which was amended to specifically allow attorney fees for the Board in 2013—after Davis's violation and hearing before the Board occurred. The court said, "[w]e only defer to the Board's interpretation of its own regulations provided that the regulations are promulgated pursuant to statutory grants of authority and the procedures of the Louisiana Administrative Procedure Act." Because the legislature did not provide that the amendment was retroactive, the court found no statutory authority for the fees. Also, the Board's contention that the attorney fees were implied as part of "costs" in the pre-amendment version of La. R.S. 37:79 was rejected by the court since attorney fees were specifically allowed for violations of other sections of the accountancy statute. The district court was legally correct in reversing the Board's order that Davis pay its attorney fees.

Rogers v. Texas State Bd. of Pub. Accountancy, 310 S.W.3d 1 (Tex. App. 2008). Board was not statutorily authorized to award attorney fees to itself.

<http://www.3rdcoa.courts.state.tx.us/opinions/HTMLopinion.asp?OpinionID=16764>

Following a contested case hearing, Rogers' CPA certificate was revoked by the Texas Board; an administrative penalty of \$8,000 was also levied against him. In addition, the Board reversed the award of costs imposed by the administrative law judge and instead imposed an award of \$225 in administrative costs and \$32,980 in attorney's fees as "reasonable costs for staff attorney time expended in the handling of this case."

On appeal, Rogers argued that the Board lacked statutory authority to award attorney's fees. The appellate court noted Section 901.501 of the Texas statutes only authorized the Board to award "direct administrative costs." The Board's contention that it promulgated a rule interpreting and defining "direct administrative costs" to include attorney's fees did not sway the court because the "plain language of the Act does not authorize the Board to award attorney's fees." Also, the Board's legislative acceptance argument was not persuasive; the court held that the doctrine may only be used when the text of a statute was ambiguous, which was not the case here. The Board's further argument based on the Self-Directed Semi-Independent Agency Project Act

(SDSI) and its status as a “self-directed, semi-independent agency” did not convince the court, which opined that nothing in the SDSI Act allowed the Board to award itself attorney’s fees.

Rogers also contended that: 1) the Board erred when it found that he violated the Accountancy Act, 2) the Board’s order was not supported by substantial evidence, and 3) the revocation of his certificate was arbitrary and capricious. As to these issues, the court found that the Board did not miscalculate the period of time that Rogers’ certificate was suspended. Regardless, the court found substantial evidence in the record to support the Board’s conclusion that Rogers held himself out as an accountant during the suspension period. There was also substantial evidence that Rogers committed other violations of the Act and rules during the suspension period.

In addition, the court did not find the Board’s decisions to be arbitrary or capricious. The Board was expressly authorized by the legislature to revoke Rogers’ certificate if grounds for discipline existed. The court could not substitute its judgment for that of the Board. Based on the record, the court found that reasonable minds could have reached the same conclusion as the Board and that the Board acted within its authority to revoke Rogers’ certificate.

State ex rel. Oklahoma Accountancy Board v. Townshend, 81 P.3d 75 (Okla. Civ. App. 2003). Oklahoma statute allows Board to receive restitution of attorneys fees expended to enforce an injunction by contempt proceedings against nonlicensee.
(<http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=438197>)

Board obtained an injunction against Townshend prohibiting him from holding himself out as a CPA in Oklahoma. He was subsequently found in contempt and was required to pay restitution of \$63,000 to the Board for its costs and attorneys fees. The court of appeals held that Oklahoma statutes permitted restitution in cases where a party incurs attorney fees while attempting to enforce an injunction by contempt proceedings. In this case, the defendant’s original wrongful act involved the Board in litigation and caused it to incur attorneys’ fees to protect its interests. In addition, the court found the Board counsel’s hourly rates (\$150) were reasonable for the services rendered and covered only the costs incurred in prosecuting the contempt citation.

Rosen v. State Board of Public Accountancy, 689 P.2d 478 (Alaska 1984). Award of attorney fees to the Alaska Board was affirmed. **See UAA Section 10(c) re: costs of proceedings.**

The Alaska Board revoked Rosen’s CPA license, and he sought judicial review. The trial court upheld the Board’s order and awarded attorney’s fees to the Board. Rosen sought review of the portion of the judgment awarding attorney’s fees. On appeal before the Supreme Court of Alaska, Rosen contended that he was entitled to *vacatur* of the award because the trial court failed to state whether the award was made pursuant to Alaska R. App. P. 508 or Alaska R. Civ. P. 82. Rosen also maintained that no award of attorney’s fees should have been made against him because he met the requirements for a public interest litigant. The court affirmed the award of attorney’s fees, holding that the award was clearly based on Alaska R. App. P. 508 (which permits an award of attorney fees if costs are allowed). The court also held that, because Rosen had sufficient economic incentive to bring the action, he did not meet one prong of the four-prong test for a public interest litigant. The court found no abuse of discretion by the trial court.

Filipino Accountants' Association, Inc. v. State Board of Accountancy, 155 Cal. App. 3d 1023, 204 Cal. Rptr. 913 (1984). Petitioners were entitled to attorneys fees for pursuing their due process and equal protection case against the California Board.

Under the section of the California Business and Professions Code in effect at the time this controversy arose, the California Board was permitted to grant waivers of the CPA exam to an applicant holding a comparable certificate or degree issued in another state or in a foreign country. The association petitioned for a writ of mandate, alleging that the Board had refused to exercise its authority under the pertinent statute and grant waivers to accountants certified in the Philippines. Petitioners charged that the Board's history of granting waivers to accountants licensed in British Commonwealth countries but not to those licensed in the Philippines was "arbitrary, unreasonable and an abuse of discretion, and constituted intentional irrational discrimination." They also alleged that the Board violated duties imposed by the due process and equal protection clause of the U.S. and California Constitutions.

The case went to trial, and the trial court issued a "Notice of Intended Decision," which provided that the Board had abused its discretion by denying waivers to licensed Filipino CPAs. The parties subsequently entered into a stipulation of judgment where the Board was ordered to reevaluate the applications that it had received from Filipino CPAs from 1957 through 1977 using the same standards that it applied to applicants from New Zealand, India and Australia.

The issue before the court in this opinion was whether the association and other petitioners could recover attorneys' fees for bringing their case against the California Board. The Court of Appeals affirmed the award of attorney fees to the association. It held that the petitioners met all of the criteria for an award of attorney fees pursuant to the federal Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. § 1988, which permits an award of reasonable attorneys fees to the prevailing party in an action to enforce specified civil rights laws and applies in state as well as federal courts. The petitioners had prevailed in the litigation because the trial court expressly found that they had vindicated Filipino CPAs' rights to equal protection. The court of appeals also held that because a respectable body of law supported their constitutional claims under 42 U.S.C. § 1981, providing the full and equal benefit of all the laws to all persons, the claims were neither fictitious, insubstantial, nor frivolous. Finally, the court held that the petitioners' state statutory claims arose out of the same common nucleus of operative fact as their claim under 42 U.S.C. § 1981.

2. Attorney General Opinions

54 Op. Att'y Gen. N.C. 1 (July 10, 1984), 1984 N.C. AG LEXIS 23. There was no statutory authority for the Board to impose fees or charges for certain activities.

The Attorney General was asked whether the copying, printing, communication, and personnel costs incurred by the Board for functions such as processing exam applications, rule making proceedings, contested cases, and general information requests were chargeable to the individuals who initiated those actions. The answer was "no" because the Board had only the authority expressly granted it by the General Assembly. Pursuant to N.C. Gen. Stat. §12-21,

regarding fees and charges by agencies, neither general statutory authority to promulgate rules nor a statutory direction to fulfill a duty constitutes sufficient authority to impose fees or charges.

38 Op. Att’y Gen. Mont. 314 (July 18, 1980), 1980 Mont. AG LEXIS 27. The Montana Board may impose a late renewal fee not to exceed the added administrative costs incurred by failure to renew on time but may not impose a penalty or fine for late renewal that exceeds administrative costs.

An inquiry was made whether the Montana Board had the authority, statutory or implied, to impose a fee for late renewal of the annual license to practice the profession of a public accountant in Montana. The Attorney General opined that the Board may impose a late renewal fee not to exceed the added administrative costs incurred by failure to renew on time but may not impose a penalty or fine for late renewal that exceeded administrative costs.

G. Surrender of License

1. Attorney General Opinions

36 Op. Att’y Gen. Ore. 407 (Apr. 17, 1973), 1973 Ore. AG LEXIS 16. The Oregon Board was authorized to accept the voluntary surrender of a license.

The Oregon Attorney General was asked by the State Board whether it was authorized to accept the voluntary surrender for cancellation of the license or certificate of a CPA or public accountant. A previous opinion issued in 1958 by the Attorney General expressed that the Board did not have such authority. At the time, there was no statutory authority authorizing the Board to accept voluntary resignations. The Attorney General noted that the previous opinion was overruled by a then-recent opinion of the Oregon Court of Appeals, *State ex rel. Black v. American Recovery, Ltd.*, 12 Ore. App. 139, 505 P.2d 1166 (1973). The surrender was effective on acceptance by the Board or on any particular date specified by the licensee. A formal hearing was not required before accepting the resignation. A voluntary surrender placed the person in the same position as a new applicant who sought the right to engage in the activity for which the license or certificate was required.

29 Op. Att’y Gen. Ore. 11 (July 17, 1958), 1958 Ore. AG LEXIS 103. The Oregon Board did not have the authority to accept the resignation of a CPA who wished to return his license to the Board for cancellation.

The Oregon Board inquired whether it could accept the resignation of a CPA who wished to return his license to the Board for cancellation. The state Attorney General opined that the Board did not have the authority, either express or implied, to accept the resignation of a CPA who wished to return his license to the Board for cancellation. The license would remain in effect, unless revoked or cancelled, regardless as to whether the licensee practiced accounting or not.

H. Miscellaneous Procedural Issues

1. Cases

Gustafson v. Board of Accountancy, 270 Ore. App. 447 (2015). Oregon Board's reliance on past disciplinary actions when imposing a longer suspension period than that recommended by the ALJ was not unfair or an abuse of discretion.

Gustafson's CPA license was suspended by the Oregon Board for two years for directing his staff to negotiate a client's tax refund check and apply part of the proceeds to bring the client's account with his firm current. The balance of the check was remitted to the client as "overpayment." Gustafson was also ordered to pay a civil penalty of \$5,000 and the Board's contested case costs of \$31,768. The Board's final order adopted much of the ALJ's proposed order, but rejected the ALJ's recommendation that Gustafson's license be suspended for 60 days. In the final order, the Board provided a lengthy explanation for the severity of its discipline, citing the seriousness of the violation and the ALJ's reliance on attorney discipline cases versus prior disciplinary cases involving CPAs.

On appeal, Gustafson argued that the Board failed to provide him with copies of previous disciplinary orders on which it relied to support the two-year suspension. The court found no unfairness or abuse of discretion in the sequence of events that occurred after Gustafson's informal and formal requests for the information. The Board provided Gustafson with a penalty matrix and summary of past disciplinary actions in response to his informal request, but it objected to his formal request as burdensome. Gustafson, however, did not pursue the formal request any further.

Gustafson also argued that the Board prevented him from adequately defending himself because the Board did not identify the prior disciplinary orders on which it relied until after the contested case hearing, thus relying on materials that were not available in the administrative record and not before the ALJ. The court was not persuaded. Gustafson had failed to take advantage of available procedures after the Board objected to his discovery request and could not point to any authority that would require the Board to furnish prior disciplinary authority as a matter of course. The court concluded that "[n]othing precludes the board from relying on its own knowledge of its prior decisions without placing those prior decisions in the evidentiary record." The Board's decision was affirmed.

Osborne v. Tennessee State Board of Accountancy, No. M2014-01050-COA-R3-CV, 2015 Tenn. App. LEXIS 113 (Tenn. Ct. App. Mar. 10, 2015). CPA's petition for review regarding the revocation of his license and his accounting firm's permit was untimely filed.

Osborne's license and his firm's permit were revoked by the Tennessee Board for practicing after the expiration of the license and permit and failing to provide proof of peer review. An attorney with the Regulatory Boards Division of the Department of Commerce and Insurance forwarded the final order to Osborne via mail and email. In the email, the attorney explained the discrepancy in the date shown on the certificate of service, where he had crossed out the original

date of service and hand-wrote the correct date. Osborne responded to the email with a question. He later filed a petition seeking judicial review, and the Board successfully moved to dismiss because the petition was untimely.

On appeal, the court noted that the Administrative Procedure Act required a person aggrieved by a final decision of an administrative agency to file a petition for review within 60 days after entry of the agency's final order. Here, because the petition was filed after the sixty-day deadline, the trial court properly dismissed the petition for lack of subject matter jurisdiction. The court rejected Osborne's argument that he was required to be served with the final order before it was filed with the Secretary of State. The court held that the Board properly complied with the rules of the Department of State regarding service of the final order. Finally, the differences in the final order submitted in support of the Board's motion to dismiss and the final order entered by the Secretary of State were not material. The dismissal of the petition for review was affirmed.

Gutraj v. Department of Financial & Professional Regulation, 2013 Ill. App. 4th 121096-U (Oct. 24, 2013) [unpublished]. Pursuant to the provisions of Illinois' public accountancy act, the Department of Financial & Professional Regulation was not required to hold a hearing prior to refusing to renew a CPA's license for failure to repay student loans; the absence of a hearing did not violate the CPA's due process rights.

The Illinois Department of Financial and Professional Regulation refused to renew Gutraj's CPA licenses for nonpayment of student loans guaranteed by the Illinois Student Assistance Commission ("ISAC") until such time as a satisfactory repayment schedule was established and approved by the Department. Gutraj filed an emergency motion for a stay or temporary restraining order. The circuit court did not have jurisdiction to enter a stay, but affirmed the Department's refusal to renew order.

On appeal, Gutraj contended that 20 ILCS 2105/2105-15 required the Department to conduct hearings prior to taking action affecting a professional license. The Department countered that Gutraj's position was "frivolous" and section 20.01(e) of the Illinois Public Accounting Act stated that the Department may deny renewal, without hearing, to a person who defaulted on an education loan. Gutraj further argued that section 20.01 of the Act should not be considered on appeal because the Department's nonrenewal orders did not reference the Accounting Act. The court found this argument without merit, explaining that the "plaintiff provides no support for his assertion a reviewing court should ignore controlling law because it was not cited in an administrative order." The court further noted that Gutraj was provided with a citation to section 20.01 in response to an email inquiry that he made to the Department; Gutraj used that email as an exhibit to a memorandum filed with the court. Thus, the Accounting Act did not require a hearing prior to the issuance of the Department's orders refusing to renew the licenses.

Gutraj's appeal also included a due process claim, wherein he maintained that his property and liberty interests in his accounting licenses were protected under the U.S. and Illinois constitutions. He argued that he possessed a fundamental right protected by the due process clause to renew a professional license. The court observed that the U.S. Supreme Court "has never extended the right to privacy to include a general right for individuals to do as they please without governmental interference." In addition, the court noted, the Illinois Supreme Court has

held that “the right to pursue a profession is not a fundamental right for due process purposes and legislation infringing upon that right need only be examined under the rational basis test.” Therefore, the court did not find a fundamental right on Gutraj’s part in his CPA licenses.

Gutraj also maintained that he was denied procedural due process by the Department’s failure to provide him with notice of its refusal to renew order. He argued that had the Department held a hearing, he could have addressed the student loans issue and would certainly have entered into a repayment arrangement prior to the hearing if the Department had provided him with evidence that there was a balance due on the loans. The court rejected Gutraj’s suggestion that the Department was responsible for notifying him about his student loans balance; further, Gutraj never claimed to have not received a notice from the ISAC with a provision that action could be taken against professional licenses for non-repayment. Nor did Gutraj claim to be unaware of his responsibility to pay his student loans or the repayment period, or that he was making any payments. Indeed, the Department’s order, stating that renewal would be denied if a repayment scheduled was not established, was sent to Gutraj several months in advance of the expiration of his license. In sum, the court said, “[i]t is difficult to understand how there is a risk of ‘erroneous deprivation’ where plaintiff does not even argue he was paying his loans, he was not in default, and had several months before his license expired to ensure he could renew his license, which he does not argue he attempted.” Pointing to the primary legitimate government interest in regulating public accountants and the secondary interest in student loan repayment, the court concluded that the Department’s summary refusal to renew was sound and not a violation of Gutraj’s due process rights.

Suzuki v. Board of Public Accountancy, No. SCPW-12-0000968, 2013 Haw. LEXIS 15 (Haw. Jan. 10, 2013) [unpublished]. Petition for a writ of mandamus was not the proper channel for CPA to seek review of the Hawaii Board’s action against him.

Suzuki filed a petition for a writ of mandamus regarding the Board’s proceedings against him; it was denied. The Hawaiian Supreme Court found that Suzuki failed to demonstrate that the Board and/or the Department of Commerce and Consumer Affairs (also a named defendant in the case) were not performing duties that were owed him. Suzuki failed to demonstrate that he had a clear and indisputable right to the remedy of mandamus. The court denied the writ and advised that Suzuki could seek review in circuit court and appellate court instead. [NOTE: Suzuki is a former state representative who pled guilty in 2004 to conspiring to set up offshore accounts in Hong Kong and Tonga to assist in tax evasion. In 2010, the Board of Accountancy suspended his CPA license.]

Larson v. Missouri Board of Accountancy, No. 10-CV-06094-NKL 2011 U.S. Dist. LEXIS 3391 (W.D. Mo. Jan. 13, 2011) [unpublished]. Plaintiff’s federal suit against the Missouri Board was dismissed because there was a case based on the same facts pending before the Missouri Hearing Commission. **See UAA Section 14(c) re: prohibition against use of CPA title or abbreviation; UAA Section 14(g) re: titles and abbreviations.**

https://ecf.mowd.uscourts.gov/cgi-bin/show_public_doc?2010cv6094-17)

Larson, a Missouri CPA, had not renewed his CPA license after September, 2001. However, he continued to use the CPA title, despite the Board's demands that he either submit to its jurisdiction, or cease using the title. Larson filed an action with the U.S. District Court in Missouri, seeking declaratory and injunctive relief. He contended that the Missouri statute prohibiting holding out violated the First and Fifth Amendments to the U.S. Constitution due to a statutory exception that allowed a person licensed before 2001 to use the title, so long as that person did not engage in the practice of public accounting, auditing, bookkeeping or a similar occupation.

At the same time, there was also a pending proceeding before the Missouri Administrative Hearing Commission based on the same facts. Larson claimed that the commission did not have the "authority to consider and litigate constitutional issues." Citing well established case law discouraging the federal courts from the "exercise of such jurisdiction where particular kinds of state proceeding have already been commenced," the court dismissed the suit, based on the grounds that Larson would have a full opportunity to litigate his constitutional claims in the hearing before the commission.

DeBerry v. Kansas State Bd. of Accountancy, 196 P.3d 958 (Kan. Ct. App. 2008), *petition for review denied*, No. 07-99003-A, 2009 Kan. LEXIS 959 (Kan. Sept. 2, 2009). The Kansas Attorney General was authorized to serve as the Board's counsel, and the district court had no jurisdiction to consider the CPA's petition for review. **See UAA § 4(f) re: retaining counsel and advice of Attorney General.**

The Kansas Board suspended the plaintiff CPA. The Board later requested documentation that he had complied with the terms of the suspension. After finally obtaining the documentation, the Board issued an order censuring the CPA for failure to comply with the suspension terms and imposed a \$2000 fine. From this order, the CPA filed a petition for review. On the advice of the assistant attorney general, the CPA went ahead and paid the fine so as not to expose himself to disciplinary action for failure to pay. The Board moved to dismiss the petition on the grounds that the fine had already been paid. The district court issued three findings – 1) the attorney general's office was authorized to represent state agencies and officials; 2) because the fine had already been paid, the stay was moot; and 3) by paying the fine, the CPA had acquiesced in the Board's final judgment and the district court had no jurisdiction to consider the petition.

The matter went to the court of appeals, which held that the attorney general's office was authorized to represent the Kansas Board – a role consistent with the attorney general's role as the chief legal officer for the state. There were no allegations made on appeal that the CPA's obligations were affected by, or the result of the Board's choice of counsel. On this issue, the court concluded, "[t]he Board hears the evidence and issues the orders, not its attorney."

As to the payment of the fine, the court noted that the CPA did not request the Board to stay imposition of the fine and censure. By not filing a motion to stay, the CPA failed to exhaust his administrative remedies. The CPA could have requested the Board to stay imposition of the fine pending resolution of his petition for review. Failing that, he could have filed a petition for review of a denial of a stay with the district court. Given that the CPA's actions in paying the fine were voluntary, the court found that he had acquiesced to the Board's judgment, thus

foreclosing his right to appeal the agency action on grounds that it was unreasonable, arbitrary, or capricious.

Raynor v. Titus, No. 4:06CV3244, 2008 U.S. Dist. LEXIS 12533 (D.C. Neb. Feb. 19, 2008). CPA/attorney's complaint against the Nebraska Board was dismissed without prejudice for failure to make proper service. **See UAA Section 4(g)(1) re: Board powers.**

The defendants in this case were the Nebraska Board and its members; the plaintiff was an attorney who was also a CPA. The defendants filed a motion to dismiss for lack of personal jurisdiction. They maintained that the plaintiff failed to serve them properly within 120 days of filing his amended complaint. The Magistrate Judge agreed with the defendants and issued a Report and Recommendation that the court dismiss the action with prejudice. The plaintiff objected to the Report and Recommendation, "arguing that his repeated failures to serve Defendants properly [were] 'technicalities.'" After a review, the court found that the plaintiff had not shown any good "(or any)" cause for his failure to properly serve the defendant Board members and so dismissed the amended complaint, but without prejudice.

Graham v. Ohio State Board of Accountancy, No. CA91-11-087, 1992 Ohio App. LEXIS 5661 (Ohio Ct. App. 1992) [unpublished]. CPA's license was reinstated due to Board's failure to timely prepare and certify a record of the revocation proceedings.

The plaintiff accountant's license was ordered reinstated after the Ohio Board failed to prepare and certify a complete record of the certificate revocation proceedings within 30 days after notice of the accountant's appeal of the Board's decision. The court of appeals affirmed the lower court's decision, holding that the common pleas court was required to rule in the accountant's favor based on the Board's failure to comply with Ohio Rev. Code § 119.12. There was no error or confusion on the part of the common pleas court as to the differences between a certificate and permit, both of which were required in order to practice as a CPA.

Rifkin v. Commissioner of Education, 178 A.D.2d 856, 577 N.Y.S.2d 914 (1991). Death of a hearing panel member before an order revoking a CPA's certificate was signed did not have an effect on the validity of the order. **See UAA Section 12(h) re: requirement for majority vote in Board hearings.**

Rifkin, a CPA, was accused of converting more than \$50,000 of a client's money for his own personal use. He appeared before a hearing panel of the New York Board, which found Rifkin guilty of practicing the profession fraudulently and exercising undue influence on a client in such a manner as to exploit the client for his own financial gain. Prior to issuance of the hearing panel's order, one of its members died. Rifkin argued that the hearing panel's report was invalid, and he sought judicial review. The trial court disagreed and confirmed the order based on the hearing panel's report that the accountant was guilty. The matter went to the appellate court, which held that the signing of the order merely embodied the prior determination and was a ministerial act; therefore, there was no need for a *de novo* proceeding regarding the charges against Rifkin.

Nelson v. State Board of Accountancy, 355 So. 2d 216 (Fla. Dist. Ct. App. 1978). Hearing officer must make preliminary ruling as to whether Board complied with requirements re: probable cause findings.

The Florida Board filed a complaint against the petitioner accountant and his firm, alleging violations of certain accounting statutes and rules. While the complaint was pending before the Division of Administrative Hearings, the petitioners sought review of the proceedings. They alleged that the Board failed to comply with the requirements of law essential to probable cause findings against them. The petitioners raised the same question before the hearing officer, but were not sure whether the hearing officer had the authority to make such a ruling. The court granted the Board's motion to dismiss for lack of subject matter jurisdiction, holding that the hearing officer had authority to make the preliminary ruling, which would have been subjected to ultimate review by the court.

Guymon v. State Board of Accountancy, 55 Cal. App. 3d 1010, 128 Cal. Rptr. 137 (1976). Trial court was not bound by the Board's determinations of the credibility of witnesses.

Guyman's petition for a writ of administrative mandate, in which he sought to overturn the conditional revocation of his license to practice, was granted by the trial court. The California Court of Appeals affirmed the decision of the trial court. It rejected Guyman's argument that the trial court was bound by the determinations of witness credibility made by the Board at the hearing. The court reasoned that the rationale of reliance upon administrative expertise to bind judicial review to an agency's resolution of credibility had been rejected. The court held that an administrative determination could be, and usually was, made with no more exposure to witnesses than was the decision of the reviewing court. The court held that the trial court had the power and responsibility to weigh the evidence at the administrative hearing and to make its own determination of the credibility of the witnesses.

Texas State Board of Public Accountancy v. Bass, No. 03-09-00251-CV, 2011 Tex. App. LEXIS 294 (Tex. App. Jan. 14, 2011) [unpublished]. There was no subject matter jurisdiction over the defendant auditors' declaratory judgment action against the Texas Board. **See UAA Section 4(g)(2) re: immunity for Board members and agents.** (<http://www.3rdcoa.courts.state.tx.us/opinions/PDFOpinion.asp?OpinionId=19910>)

Three auditors filed a declaratory judgment action against the Texas Board regarding the authority exercised by the Board in a disciplinary matter. During the relevant period, two of the auditors were licensed as CPAs by the Texas Board and the third was a manager who later became licensed by the Board. All were employed by Arthur Andersen and participated in the preparation of Enron's audited financial statements. After Enron's collapse, the Board investigated the audits and subsequently began disciplinary proceedings against all three. A hearing was held before two administrative law judges ("ALJs"), who concluded that the auditors, while competent, had made serious mistakes that violated GAAS and GAAP standards. Also, the supervising CPA (Bass) had final responsibility and was therefore responsible for the other auditors' work.

The ALJs recommended that the licensed CPAs be admonished and that the charges against the unlicensed manager should be dismissed for lack of jurisdiction. Upon consideration of these recommendations, the Board instead revoked the certificates of the licensees and assessed administrative costs and civil penalties. The Board further concluded that it did have jurisdiction over the manager (who had since become licensed) and suspended her license for three years, but probated that discipline. The auditors then sought judicial review, contending that the Board's standards and principles were unconstitutionally vague and failed to identify what actions constituted violations. They also filed suit, seeking declarations regarding the Board's authority. The Board filed a plea, asserting that the Administrative Procedures Act provided the sole method for challenging actions taken by the Board. The court denied the Board's plea.

The Board then filed an interlocutory appeal with the Court of Appeals of Texas, asserting that the court had erred in its decision because the suit was barred by sovereign immunity and also because the auditors were already seeking relief through the Administrative Procedures Act. The appellate court concluded that because the declarations sought by the auditors related to actions which they asserted were outside the scope of the Board's authority, they were, in effect, *ultra vires* claims. As such, the action should have been brought against the individual Board members in their official capacities, and not against the Board. Also, the court found that the relief pursued in the lawsuit sought impermissible redundant remedies, in light of the fact that each of the auditors had also filed appeals under the Administrative Procedures Act. The court reversed the district court's decision and dismissed the action for lack of jurisdiction.

Waldrop v. Alabama State Board of Public Accountancy, 473 So. 2d 1064 (Ala. Civ. App. 1985). Statutes do not require the circuit court to review Board's factual findings *de novo*, in fact the circuit court's review of Board's record is limited.

Alabama Accountancy Act did not require that the circuit court conduct a *de novo* review of the record established by the Board. Where the circuit court's review of the Board's decision pursuant to a particular subdivision of the statute was based on the record made before the Board, the circuit court's authority did not extend to trying the case over with the possibility of receiving new evidence and rendering its own decision.

2. Attorney General Opinions

Op. Att'y Gen. N.H. No. 84-107-I (July 5, 1984), 1984 N.H. AG LEXIS 78. Two New Hampshire Board members could still participate in a hearing if three other members abstained from the proceedings. See UAA Section 4(b) re: Board quorum.

The New Hampshire Attorney General was asked whether the remaining Board members could participate in a hearing if the three other members recuse themselves from participating. N.H. Rev. Stat. Ann. § 309-A:2, Ic specified that a quorum consisted of not less than three members. The Attorney General said that the three members could be present for the beginning of the proceeding, satisfying the quorum requirements, but they would then not participate in the deliberations and determination of the matter. The New Hampshire Supreme Court ruled that "when a quorum is present, action by the deliberative body does not require a majority of those

present where some members remain silent or abstain.” [NOTE: The current statute, N.H. Rev. Stat. Ann. § 309-B:4, II(b), identifies a quorum as a majority of the members present.]

Op. Att’y Gen. Okla. No. 77-273 (Jan. 31, 1978), 1978 Okla. AG LEXIS 168. The Oklahoma Board could engage private legal counsel upon a finding of need. See UAA Section 4(f) re: Board staff.

<http://www.oklegal.onenet.net/oklegal-cgi/ifetch?okag+1041224844375+F>

The Oklahoma Board inquired whether it was authorized to engage private legal counsel. The Attorney General opined that the Board was authorized to hire private legal counsel upon a finding of need. There was no statutory provision, however, directing the capacity in which private counsel could serve the Board. If private counsel was employed, the capacity in which she or she served the Board was subject to the Board’s control as long as it was not inconsistent with Oklahoma law.

23 Op. Att’y Gen. Ore. 518 (May 28, 1948), 1948 Ore. AG LEXIS 93. The Oregon Board could institute disciplinary proceedings against a CPA upon its own motion or require the filing of a complaint by a member of the public provided it gave written notice to the CPA at least twenty days before the hearing. See UAA Section 11(a) re: Board’s authority to investigate; UAA Section 11(d) re: review of publicly available professional work; UAA Section 12(a) re: enforcement procedures.

The Oregon Board requested an opinion from the state Attorney General as to the procedure to be followed in revoking a CPA’s certificate. The Attorney General opined that the Board could institute disciplinary proceedings against a CPA upon its own motion or require the filing of a complaint by a member of the public provided it gave written notice to the CPA at least 20 days before the hearing. [NOTE: The notice period has since been changed to 21 days.]

18 Op. Atty’ Gen. Ore. 439 (Nov. 5, 1937), 1937 Ore. AG LEXIS 263. The Oregon Board could initiate disciplinary proceedings against a CPA for unprofessional conduct upon its own volition in the absence of a formal complaint. See UAA Section 11(a) re: Board’s authority to investigate; UAA Section 11(d) re: review of publicly available professional work; UAA Section 12(a) re: enforcement procedures.

The Oregon Board inquired whether it could initiate disciplinary proceedings against a CPA for unprofessional conduct where no formal complaint was filed against the CPA with the Board. The state Attorney General opined that the Board could initiate disciplinary proceedings against a CPA for unprofessional conduct upon its own motion where no formal complaint had been filed against the certified public accountant with the Board. There was nothing in the applicable statute making the Board’s authority to revoke a certificate dependent upon the receipt of a complaint.

APPENDIX B

Bibliography of Disciplinary Procedures, Resources, and Links

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