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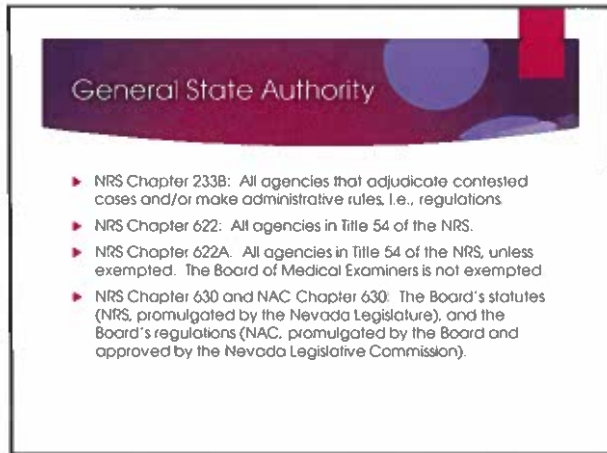
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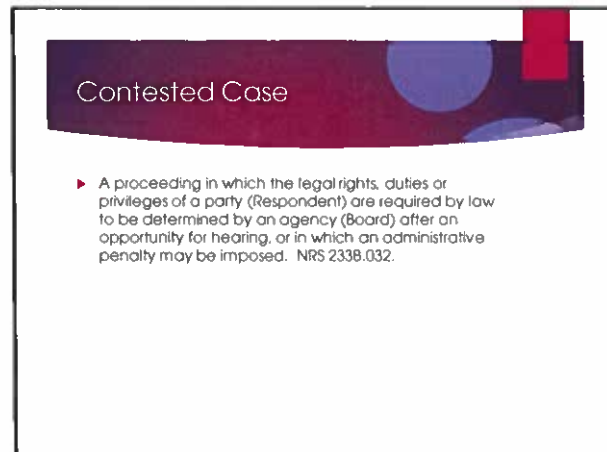
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## Constitutional Issues

- ▶ A state-issued license to practice a profession carries a constitutionally protected property interest. *Gilman v. Nevada State Board of Veterinary Examiners*, 120 Nev. 263 (2004).
- ▶ Due Process prevents the state from taking an individual's occupational licenses without a "fair trial in a fair tribunal." *In re Murchison*, 349 U.S. 133 (1955).

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## Due Process

- ▶ Guaranteed by the 5th and 14th Amendments of the U.S. Constitution and Article 1, Section 8 of the Nevada Constitution.
- ▶ Two kinds:
  - ▶ Procedural due process ("fundamental fairness"), and
  - ▶ Substantive due process ("fundamental rights").
- ▶ Generally, administrative proceedings will involve issues of procedural due process.

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## What Does Due Process Require in an Administrative Proceeding?

- ▶ Notice.
- ▶ Opportunity for hearing.
- ▶ Unbiased adjudicators:
  - ▶ Investigators, i.e., IC members, cannot participate in adjudication.
  - ▶ Determinations based on the record of the case.

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## Notice

- ▶ Due process requires that the notice fairly notifies the Respondent of factual and legal issues that will be raised at hearing.
  - ▶ NRS 622A.300 Board files and serves charging document (formal complaint).
  - ▶ NRS 630.339(1) Formal complaint must be in writing and include the charges alleged (violations of law) in clear, concise and plain language and must include each act or omission upon which the charges are based.

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## Opportunity for Hearing

- ▶ In the hearing, the Respondent has a right to:
  - ▶ Present evidence in support of legal position:
    - ▶ Call witnesses (including providing own testimony).
    - ▶ Introduce exhibits.
  - ▶ Cross-examine opposing witnesses.
  - ▶ Present argument on all issues.
- ▶ Right to Counsel.
- ▶ Right to Impartial Adjudicator(s).

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## Burden of Proof in an Administrative Hearing

- ▶ What party has burden to prove case?
  - ▶ The IC (represented by Board attorney) has the burden of proof. NRS 622A.370.
- ▶ Case must be proven by a preponderance of the evidence:
  - ▶ Evidence that enables the trier of fact to determine the existence of the contested fact is more probable than the nonexistence of the contested fact, i.e., more likely than not. NRS 233B.0375.
  - ▶ Findings of fact must be based on a preponderance of the evidence. NRS 233B.121(9).

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## Board Adjudication: Impartial Adjudicator

- ▶ No agency member who acts as an investigator or prosecutor may take part in the adjudication of such a case. NRS 233B.122(1); NRS 630.352.
- ▶ Ethics in government statutes requires disclosure and preclude the participation of a person who has an "interest in case," e.g. personal interest, gift or loan, personal relationship. NRS 281A.420. Disclose often. Abstain only in clear cases where the independence of judgement would be materially affected by a conflict of interest. If you have questions, please consult with counsel.
- ▶ If one member of an adjudicating body is actually biased, or where circumstances create the appearance that one member is biased, the proceedings violate due process. *Stivers v. Pierce*, 71 F.3d 732 (9th Cir. 1995).

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## Ex Parte Communications

- ▶ Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, not, in connection with any issue of law, with any party or his representative, except upon notice and opportunity to all parties to participate. NRS 233B.126; NRS 622A.340.
- ▶ Settlement agreements contain explicit waiver which allows Adjudicator(s) to talk to assigned attorney prior to Board meeting.

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## Board Adjudication Hearing (1)

- ▶ Adjudicator(s) acknowledge that they have received and read all materials.
- ▶ President/Vice President asks for a discussion regarding the case.
- ▶ Discussion should reflect thorough and complete discussion of the hearing transcript, evidence, hearing officer's recommendations, filed pleadings, and other materials available in the Board packet.
  - ▶ Adjudicator(s) may use technical knowledge to evaluate the evidence in the case. NRS 233B.123(5).
  - ▶ Adjudicator(s) must base their decision on the evidence presented in the case, not external investigation.

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## Board Adjudication Hearing (2)

- ▶ First, overall impression:
  - ▶ Did hearing officer provide detailed synopsis with cites to transcript/evidence? Are there items omitted?
  - ▶ Do you agree/disagree? Why/why not?
- ▶ Motion should be made to accept, reject, or modify hearing officer's recommendations. Reasons for/against the motion and discussions of facts/law should be stated on the record.
- ▶ Only Adjudicator(s) and the Board's Deputy Attorney General participate in this discussion.

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## Reasoned Decision— NRS 233B.125

- ▶ Decision must include both:
  - ▶ Findings of Fact:
    - ▶ Must include concise and explicit statement of the underlying facts supporting the findings.
    - ▶ Facts supporting decision must be in the record and must be supported by a preponderance of the evidence.
  - ▶ Conclusions of Law (violations of law that are supported by the facts).
- ▶ In writing or stated on the record.
- ▶ If in writing, must be personally served or sent by certified mail to the parties.
- ▶ Time limit provided by statute for written orders: NRS 622A.380(1)(f) allows 60 days.

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## Discipline Imposed, if One or More Violation of Law is Proven

- ▶ Must comply with statutory authority in NRS 630.352 (one or more of the following):
  - ▶ Probation for specified period, public reprimand, supervision of Respondent's practice, require additional CME/other educational requirements.
  - ▶ Limit practice or exclude one or more specified branches of medicine from his or her practice.
  - ▶ Suspend the license for specified period (has a license but may not use it until specified period has passed).
  - ▶ Revoke the Respondent's license (no longer has a license).
  - ▶ Require alcohol or substance use or other treatment program.
  - ▶ Fines not to exceed \$10,000 per violation. Require community service.
  - ▶ Require a physical or mental examination or a test of competence.

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## Revocation of a License

- ▶ NRS Chapter 622A requires that, if a license is revoked, the Board Order must prescribe a period of time during which the respondent may not re-apply for licensure.
- ▶ The prescribed period must be at least one year but not more than ten years. NRS 622A.410.
- ▶ If/when the respondent applies for licensure in the future, he or she must apply as if he or she had never been previously licensed and meet all requirements for licensure at the time of application. The future application will require an appearance before the Board, and the Board will have access to previous disciplinary history to review prior to making a licensing decision.

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## Recovery of Costs— NRS 622.400

- ▶ NRS 622.400 allows a regulatory body to recover reasonable attorney's fees and costs that are incurred by the regulatory body as part of its investigative, administrative and disciplinary proceedings against a Respondent if:
  - ▶ The Board enters a final order finding that the Respondent has violated a portion of law that the Board has the authority to enforce, OR
  - ▶ The Board and the Respondent enter into a settlement agreement in which the Board finds that the Respondent violated a portion of law or the Respondent does not contest that he or she violated a portion of law.
- ▶ Board must find that the costs are reasonable, necessary, and actually incurred. See NRS 622.400(1); *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 120 (Sup. Ct. 2015).

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## Costs

- ▶ Must be itemized and provided to the Respondent prior to the award of costs to the Board. NRS 622.400(2).
- ▶ Costs include (NRS 622.400(3)):
  - ▶ Costs of an investigation.
  - ▶ Costs for photocopies, facsimiles, long distance telephone calls and postage and delivery.
  - ▶ Fees for hearing officers and court reporters at any depositions or hearings.
  - ▶ Fees for expert witnesses and other witnesses at any depositions or hearings.
  - ▶ Fees for necessary interpreters at any depositions or hearings.
  - ▶ Fees for service and delivery of process and subpoenas, and
  - ▶ Expenses for research, including, without limitation, reasonable and necessary expenses for computerized services for legal research.

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## Judicial Review of Board Order

- ▶ Must be filed within 30 days after service of the final decision. NRS 233B.130.
- ▶ Confined to record of hearing. NRS 233B.135.
- ▶ Board order is not stayed unless the Respondent files a motion for stay contemporaneously with the petition for judicial review and stay is granted by the Court. NRS 233B.140. Generally, the stay will be granted by the Court before the Board knows that petition and motion have been filed.
- ▶ Exclusive remedy to party requesting judicial review or judicial action regarding a final decision of the Board in a contested case. NRS 233B.130(6).

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## Judicial Review—NRS 233B.135

- ▶ Court considers whether decision:
  - ▶ Violates constitutional or statutory provisions.
  - ▶ Exceeds the Board's statutory authority.
  - ▶ Made upon unlawful procedure.
  - ▶ Affected by legal error.
  - ▶ Is clearly erroneous in view of reliable, probative and substantial evidence on the whole record. or
  - ▶ Is arbitrary, capricious, or characterized by abuse of discretion.

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## Deference to the Board

- ▶ The final decision of the Board shall be deemed reasonable and lawful until reversed or set aside in whole or in part by the Court.
- ▶ The burden of proof is on the Respondent to show that the final decision is invalid.
- ▶ The Court shall not substitute its judgment for that of the Board as to the weight of evidence on a question of fact.
- ▶ Court's standard of review is "substantial evidence" supporting the Board's decision.
  - ▶ NRS 233B.135.

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## Stipulation for Settlement: Settlement Agreement (1)

- ▶ The IC and the Respondent agree on the contents and the discipline contained in the Settlement Agreement.
- ▶ Adjudicator(s) may accept, reject or ask for a modification.
- ▶ Proposed modifications must be accepted by the Respondent before the Agreement may be amended.
- ▶ Adjudicator(s) do not hear any evidence.

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## Stipulation for Settlement: Settlement Agreement (2)

- ▶ Settlement agreements must be reviewed, discussed, and approved in a public meeting. NRS 622.330(1).
- ▶ Settlement agreements are public records. NRS 622.330(3).
- ▶ Board may not recover costs unless the Agreement contains an admission of or a statement that the Respondent does not contest the violation. NRS 622.400(1)(b).
- ▶ Costs recovered must be the actual amount expended (cannot disguise a fine by calling it a cost).

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## Voluntary Surrender in Lieu of Other Disciplinary Action

- ▶ Respondent agrees to surrender his or her license in lieu of other forms of discipline.
- ▶ Adjudicator(s) may accept or reject in a public meeting, and the Adjudicator(s) is agreeing to impose no other discipline if the Surrender is accepted.
- ▶ Adjudicator(s) imposes time period that precludes Respondent from re-applying for a new license. Must be a minimum of one year and a maximum of ten years.
- ▶ This has been called "the Cadillac of discipline," because the Respondent no longer has a license (like a revocation), and the Respondent may not appeal and there is no hearing.
- ▶ This is discipline! NRS 233B.121(6).
- ▶ For health care providers, all Surrenders must be reported to the National Practitioner Data Bank.

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## **Disciplinary Action Training Handout**

After the Investigation is completed and the assigned IC gives the authority to file a Formal Complaint:

Matter proceeds to a settlement agreement that is negotiated between the licensee and the assigned IC or a hearing before a hearing officer.

A settlement agreement is a full resolution of the case that is brought to the Board at a public meeting for approval.

- The settlement agreement includes a summary of the alleged violations, information about which violations the Board will deem proven upon approval of the settlement agreement, and the discipline that will be imposed by the Board, if the agreement is approved. Generally, the Board votes to accept or reject as presented.

After a hearing, the Board will be asked to adjudicate the matter. The Board receives the full record from that hearing (transcript of hearing, evidence received, hearing officer's recommendations) and determines whether a violation of Nevada law has occurred. Only Board members and the Board's Deputy Attorney General participate in this discussion.

- It is helpful if the Board members discuss the record from that hearing and explain why they do or do not believe that a violation of Nevada law has occurred. The IC's burden of proof is a preponderance of the evidence.
  - A preponderance of the evidence means evidence that enables the Board to determine that the existence of the contested fact is more probable than the nonexistence of the contested fact. NRS 233B.0375.
- At the end of the discussion there should be at least one motion either finding that a violation of law has or has not been proven. The Board can choose to accept, reject, or modify the hearing officer's recommendations.
- After the Board makes a finding regarding violation(s) of Nevada law, Counsel for the assigned IC will provide a disciplinary recommendation. The licensee and/or his or her attorney is then

allowed to provide comments on the disciplinary recommendation.

- The Board can assess any penalty allowed under the Board's chapter (NRS 630.352 and NRS 622.400).
  - From NRS 630.352(4)
    - (a) Place the person on probation for a specified period on any of the conditions specified in the order;
    - (b) Administer a written public reprimand to the person;
    - (c) Limit the person's practice or exclude one or more specified branches of medicine from his or her practice;
    - (d) Suspend the person's license for a specified period or until further order of the Board;
    - (e) Revoke the person's license; *[NRS 622A.410 requires that this be for a minimum of one year to a maximum of ten years]*
    - (f) Require the person to participate in a program to correct an alcohol or other substance use disorder or any other impairment;
    - (g) Require supervision of the person's practice;
    - (h) Impose a fine not to exceed \$10,000 for each violation;
    - (i) Require the person to perform community service without compensation;
    - (j) Require the person to take a physical or mental examination or an examination testing his or her competence; and
    - (k) Require the person to fulfill certain training or educational requirements.
  - NRS 622.400 allows the Board to recover its reasonable attorney's fees and costs if the Board finds that the licensee violated Nevada law.

### Voluntary Surrender in Lieu of Other Disciplinary Action

- This is essentially an agreed to revocation. Because the licensee agrees to it, it cannot be appealed. Like a revocation, minimum of one year, maximum of ten years.

### Summary Suspensions

- This is an emergency action. From NRS 233B.127(3)
  - If the agency finds that public health, safety or welfare imperatively require emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action.

- For summary suspensions, Counsel for the IC will present the evidence gathered and explain the need for the summary suspension to the IC for approval prior to issuing the summary suspension. The Board's Executive Director also always approves the summary suspension before it is presented to the IC.
- Usually these result in two hearings:
  - A "show cause hearing" within 45 days and a regular hearing (see above).

#### Suspension for Failure to Comply with a Board Order or Settlement Agreement

- Similar to a summary suspension, except that the health, safety, and welfare threshold is not required. These suspensions are authorized by the Board Order or term in the Settlement Agreement. There will be two hearings, a "show cause hearing" within 45 days and a regular hearing (see above).