STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

# Regulatory Boards Manual

General Counsel Division
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# Introduction

Regulatory boards serve a vital role in protecting the public by ensuring that professional practices across North Dakota are competent, ethical, and accountable. This manual was created to provide information to board members and staff relative to legal frameworks, responsibilities, and procedures that govern their work. By strengthening knowledge of statutory authority, administrative processes, ethical obligations, and due-process requirements, board members and staff can carry out their duties confidently and consistently, maintaining public trust while upholding the integrity of the professions they regulate.

Within this manual you will find information that has been historically provided during the Office of Attorney General's annual Regulatory Board Training Seminar. It includes authorities, which are intended to be as complete as possible but should not be considered legal advice. Each board is assigned its own legal counsel and should consult with its own legal counsel. This manual does not constitute an Attorney General's opinion or legal advice.

# Duties and Roles

Regulatory boards play a critical role in safeguarding the public by overseeing specific professions and industries. Their work ensures that those who enter regulated fields meet established standards for competence, conduct, and accountability.

Regulatory board members must understand not only what their obligations *are*, but also the limitations of their authority. By adhering to statutory boundaries and maintaining a clear focus on the public interest, board members reinforce trust in professional regulation and support the integrity of the licensed professions they oversee.

## Section 1: Duties of Regulatory Boards

### 1.1 Core Purpose and Mission

The fundamental duty of every regulatory board is to regulate the practice of a particular industry to protect the public's health and safety. This purpose is generally included in the board's statutory mission or enabling statute and reflects the Legislature's decision to oversee certain professions for public welfare.

Regulation ensures that individuals who enter the profession possess the necessary education, skills, and ethical grounding to perform competently and safely.

### 1.2 Authority Defined by the Enabling Statute

A board's authority is not inherent—it is granted explicitly by the Legislature through statute. The enabling statute:

- Defines the board's jurisdiction
- Grants the board authority to regulate the profession
- Permits the board to adopt of rules or regulations related to licensure standards
- Establishes procedural and enforcement powers

Boards must remain within the boundaries of these statutory powers. No board may exceed or create authority beyond what the Legislature has given. All regulatory activity "stems from the NDCC enabling statute," meaning that every policy, rule, and action must trace back to a statutory grant of authority.

### 1.3 Regulatory Functions

Boards regulate professional practice in several ways. These responsibilities typically include:

#### Participating in Board Meetings

Effective governance requires engagement in regular and special meetings. Board decisions—including licensing actions, policy changes, complaint resolutions, and rulemaking—occur through these formal proceedings.

**Ensuring Competency for Entry into the Profession**

Boards evaluate applicants to determine whether they meet minimum qualifications before licensure. This may include reviewing education, examination scores, background checks, continuing education, or other competency indicators.

**Ensuring Ongoing Competency**

Once licensed, practitioners must continue to meet standards of practice. Boards enforce continuing education requirements, review professional conduct, and issue discipline when standards are not met.

**Investigating and Acting on Complaints**

Boards review allegations of misconduct or incompetence. Processes generally include:

- Intake and preliminary review
- Investigation
- Possible administrative action
- Hearings and decisions

Boards may also initiate complaints based on observations made during board activities.

**Auditing Continuing Education**

Periodic or targeted audits help ensure compliance with continuing education requirements.

**Imposing Licensure Limitations**

Boards may place restrictions on practice, impose fines, or take action—including suspension or revocation—when licensees fail to meet standards.

**Criminal Action Referrals**

If potential criminal violations arise (e.g., fraud, unlicensed practice), boards may refer such matters to law enforcement agencies.

**Addressing Unlicensed Practice**

Boards may respond to unlicensed activity within their jurisdiction, though their authority generally extends only to individuals or entities who hold (or are required to hold) licenses under the board.

## 1.4 Policy, Rulemaking, and Legislative Roles

Boards also help shape the evolution of their regulated profession. Activities may include:

**Reviewing and Revising Standards**

As industries evolve, boards must review and update professional standards to ensure public protection.

**Legislative Involvement**

Boards may participate during legislative sessions by:

- Proposing legislation
- Monitoring proposed bills
- Providing testimony
- Collaborating with policymakers and stakeholders

Boards may support, oppose, or provide neutral information on legislation affecting their regulated jurisdiction.

**Administrative Rules**

Boards are responsible for adopting or revising administrative rules necessary to implement statutory directives.

## 1.5 Limits on Regulatory Authority

Although boards play an important regulatory role, they must operate within certain strict limitations:

**Responding to Inquiries**

Boards must be cautious when responding to inquiries. While they may clarify requirements, they cannot:

- Interpret law beyond their authority
- Provide legal advice

**Providing Legal Advice**

Boards cannot act as legal counsel to licensees or the public. That role belongs to designated attorneys.

**Regulating Unlicensed Practice**

Boards often cannot discipline individuals who are not licensed. They may refer cases to appropriate authorities but cannot impose discipline outside their statutory scope.

Board jurisdiction extends only to licensees and applicants governed by the enabling statute.

## 1.6 What Regulatory Boards Must *Not* Do

**Boards must NOT:**

- Protect licensees
- Protect their own business or professional interests

Boards exist to protect the public—not individual licensees or board members.

The example given is **NC State Board of Dental Examiners v. FTC**, where cease-and-desist orders to nondentists performing teeth whitening were found to be anticompetitive. Without proper state supervision, such actions can violate federal antitrust laws.

Boards controlled by active market participants receive immunity from federal antitrust liability **only when**:

1. The challenged restraint is clearly articulated as state policy; and
2. The policy is actively supervised by the state.

## Section 2: Responsibilities of Board Members

Board members hold responsibilities to several stakeholder groups, each requiring fairness, transparency, and diligence.

### 2.1 Responsibility to the General Public

The public expects:

- Qualified practitioners
- Safe and competent services
- Accountability for misconduct
- Clear information about board activities

Board decisions must always align with public safety and welfare.

### 2.2 Responsibility to Potential Licensees

Applicants should have:

- A clear, reasonable, and transparent path to licensure
- Fair evaluation
- Publicly accessible information about requirements
- Clear guidance on transferring or obtaining licensure between states

### 2.3 Responsibility to Current Licensees

Licensed individuals expect boards to:

- Apply standards impartially
- Make decisions based on facts and law
- Operate transparently
- Treat all licensees fairly

Board members must avoid favoritism or conflicts of interest.

### 2.4 Responsibility to Fellow Board Members

Regulatory boards function as deliberative bodies. Members must:

- Collaborate respectfully
- Consider each other's perspectives

- Help create strong policies
- Contribute constructively to board operations

Board culture strongly influences regulatory effectiveness.

## Section 3: Characteristics of Effective Board Members

Effective board service requires more than expertise—it requires dedication to governance and public service. Board members must genuinely value serving the public rather than personal gain or professional promotion.

### 3.1 Understanding and Following Legal Requirements

Members must:

- Know the enabling statute
- Follow administrative rules
- Comply with ethics laws
- Adhere to open meetings and open records laws
- Understand due process obligations

This ensures lawful and defensible decision-making.

### 3.2 Commitment of Time and Effort

Board work can be demanding. Effective members:

- Attend meetings regularly
- Review materials ahead of time
- Participate actively
- Follow through on assigned tasks

### 3.3 Effective Communication

Strong communication supports clear governance. Board members must:

- Speak respectfully
- Listen actively
- Ask questions
- Clarify concerns
- Articulate reasoning

### 3.4 Evidence-Based Decision-Making

Boards must base decisions on:

- Facts

- Investigative findings
- Records
- Statutory authority

Members must avoid decisions motivated by personal feelings or interpersonal dynamics.

## 3.5 Commitment to Public Interest

Decision-making must consistently reflect:

- Public safety
- Public accountability
- Public trust

Not personal preferences or political pressures.

Regulatory boards carry substantial responsibilities in protecting the public and ensuring standards within licensed professions. Board members must understand the scope of their regulatory authority, operate within statutory boundaries, and exercise their duties with integrity, diligence, and impartiality.

# Resources

Regulatory boards manage a wide array of responsibilities that require coordination, compliance, transparency, and stewardship of public resources. To support this work, boards rely on a network of administrative, fiscal, legal, and technological resources across state government. This manual translates the 2024 Board Resources presentation into a structured narrative guide to help board members understand the various support systems available, their responsibilities in using them, and how to navigate policies governing fiscal management, procurement, staffing, technology, and legal counsel.

This resource is intended for board members, executive directors, administrators, and support staff involved in the governance and daily function of North Dakota regulatory boards. It provides foundational guidance on board resource management and emphasizes accountability, lawful operations, and good stewardship of taxpayer dollars.

## Section 1: Fiscal Policy

Fiscal responsibility is one of the most important obligations of public officials. Board members must ensure that all spending supports a public purpose, complies with state fiscal policies, and avoids waste or misuse.

### 1.1 Public Purpose Requirement

Public funds may only be spent on activities that serve a legitimate public purpose or are authorized specifically by law. A *public purpose* is defined as an objective that promotes:

- Public health
- Public safety
- Morals
- General welfare
- Security
- Prosperity
- Contentment of residents

Board members should evaluate any expenditure in light of this definition to ensure tax dollars are used appropriately.

### 1.2 Relevant OMB Policies

State fiscal policies govern allowable and restricted expenditures. Relevant policies include:

- Policy 217 – Meals
- Policy 505 – Reimbursement for Meals & Lodging
- Policy 513 – Lodging Receipts and Payments

- Policy 515 – Coffee and Soft Drink Expense
- Policy 118 – Length-of-Service / Retirement Awards

These policies outline when certain costs are permissible and when they are not. Boards must follow them carefully. Board counsel should be consulted whenever questions arise about allowable spending.

### 1.3 Expenditures

Examples of permissible uses of public funds include:

- Reimbursement for meals and lodging for qualifying board members
- Mileage and travel expenses
- Compensation related to official board duties

Even when expenses appear reasonable, members must verify that they serve a public purpose and align with state policy.

Improper uses of public funds include:

- Refreshments for all board members
- Hiring a lobbyist, unless explicitly authorized by statute

Boards must avoid spending on items or services that do not meet the public purpose requirement or fall outside permitted state fiscal policies.

### 1.5 Misapplication of Entrusted Property

Misusing public funds is not merely a policy violation—it may be a criminal offense.

Under N.D.C.C. § 12.1-23-07, misapplication of entrusted property carries criminal penalties, with the severity depending on the value misapplied. Board members may also face personal liability for unlawful expenditures.

This underscores the importance of adhering strictly to fiscal policy and verifying expenditures with counsel when unsure.

## Section 2: Procurement

Procurement—the process by which public entities purchase goods and services—is governed by strict rules to ensure transparency, fairness, and fiscal responsibility.

### 2.1 Procurement Officer Role

Boards should have an assigned procurement officer, either internally or through the Office of Management and Budget (OMB). When unsure how to handle purchases, consult this officer.

### 2.2 Importance of Procurement Compliance

Following procurement rules is another aspect of being a good steward of public dollars. Failure to comply carries penalties equivalent to fiscal policy violations.

Key principles include:

- Using approved vendors
- Following competitive bidding requirements where applicable
- Documenting purchases appropriately

Direct purchasing by board members is discouraged. The State Procurement Office and its resources exist specifically to assist boards and state agencies.

### 2.3 What Procurement Does Not Cover

Procurement does not assist with:

- Leases or real estate agreements

These matters should be reviewed with legal counsel and appropriate state agencies.

## Section 3: Administrative & Office Support

Boards rely on staff who carry out daily operations. Their roles may vary by board size, funding, and structure.

### 3.1 Staff Roles

Board administrative staff may include:

- Executive Directors
- Executive Secretaries
- Administrative Assistants
- Support Staff

Some boards operate with a single employee; others have several. In many boards, the Executive Secretary may also serve in leadership roles.

### 3.2 OMB Procurement Office Resources

OMB maintains a State Vendor Pool to support administrative service contracts, such as:

- Office services
- Third-party administrative support

Boards can use OMB's resources rather than procuring administrative services independently. Administrative Services Contract: https://apps.nd.gov/csd/spo/services/bidder/main.htm

### 3.3 Employment Questions

If a board has employees, employment issues must be handled carefully and in consultation with board counsel. These may include:

- Hiring
- Performance issues
- Separation
- Workplace policies

Counsel can help navigate employment law requirements and risks.

## Section 4: IT Resources

Technology support is provided by North Dakota Information Technology (NDIT).

### 4.1 NDIT Services

NDIT assists boards with:

- IT infrastructure
- Information management and storage
- Communication systems (phone, email, internet)

Boards should contact NDIT for any technological needs rather than attempting to implement their own solutions.

## Section 5: Manuals and Reference Resources

Boards must rely on accurate, authoritative guidance. Several state agencies publish manuals that help boards comply with law and policy.

### 5.1 Attorney General Resources

- Administrative Rules Manual
- Open Records Manual
- Open Meetings Manual
- Contract Drafting Manual

These resources guide boards through rulemaking, records retention, open meeting requirements, and contract creation.

### 5.2 Legislative Council Resources

- Legislative Drafting Manual
- Preparation of Fiscal Notes (PDF)
- Bill Drafting Checklist

- Legislative Deadlines

These support boards in legislative participation, drafting statutory changes, and providing testimony.

### 5.3 Ethics Commission Resources

- Conflict of Interest Disclosure Form
- Quasi-Judicial Bias Disclosure Form
- Travel Disclosure Form

Boards must use these forms to comply with ethics laws and ensure transparency in decision-making.

## Section 6: General Counsel Resources

Legal counsel plays a critical role in supporting board operations.

### 6.1 What Legal Counsel Provides

Board attorneys can:

- Provide legal advice
- Direct the board to appropriate resources

Counsel helps ensure decisions and operations comply with applicable laws and regulations.

### 6.2 What Legal Counsel Does *Not* Provide

Counsel does not:

- Perform administrative or office support duties
- Make board decisions

Legal counsel guides the board but does not replace its decision-making authority.

### 6.3 When to Ask Counsel

If you are not sure, ask.

It is not uncommon for issues to appear "legal" when they are not—counsel can clarify and prevent unnecessary risk.

### Conclusion

Regulatory boards have access to extensive resources—administrative, fiscal, technological, and legal—that support their critical work in overseeing licensed professions. Understanding these resources empowers board members to:

- Spend public funds responsibly
- Follow proper procurement procedures

- Rely on staff effectively
- Utilize IT services efficiently
- Comply with open records and open meetings laws
- Seek legal counsel appropriately

# Criminal History Background Checks

Criminal History Record Checks (CHRCs) play a critical role in ensuring the integrity of regulated professions and protecting the public. Many North Dakota regulatory boards and agencies are authorized by law to request and review confidential criminal history record information (CHRI) for licensure, employment, or other regulatory functions.

## Section 1: Understanding Criminal History Record Checks

### 1.1 What Is a Criminal History Record?

A *criminal history record* is defined as the compilation of criminal history record information of a person reported to the FBI in accordance with federal and state law.

### 1.2 What Is Criminal History Record Information (CHRI)?

CHRI includes identifiable information collected by criminal justice agencies, consisting of:

- Descriptions of individuals
- Notations of arrests or detentions
- Indictments
- Criminal charges
- Dispositions
- Sentencing information
- Correctional supervision
- Release records

This information is highly sensitive and protected under state and federal law. CHRI may only be used for authorized licensing or employment purposes.

## Section 2: Legislative Authority

Regulatory boards cannot simply decide to require background checks—they must be statutorily authorized.

### 2.1 Federal Authority: Public Law 92-544

Public Law 92-544 authorizes the FBI to exchange confidential criminal history information with state governments when state law requires such disclosure for licensing or employment.

### 2.2 State Authority: North Dakota Century Code

The Bureau of Criminal Investigation (BCI) is authorized under N.D.C.C. § 12-60-24(2) to provide criminal history record checks to specific agencies and entities.

If a regulatory board is allowed to request CHRI, that authority will appear:

- In the board's enabling statute
- In cross-referenced provisions of the Century Code

Board staff should review these statutes and consult legal counsel when determining whether they may require background checks. A regulatory board may not require background checks if they are not explicitly authorized in Century Code. Section 3: Handling & Storage of Criminal History Record Information (CHRI)

CHRI is confidential and subject to strict rules regarding its use, access, storage, retention, dissemination, and destruction. Violations may result in civil, administrative, and criminal penalties.

# Section 3: Criminal History Record Information

## 3.1 Use of CHRI

CHRI may only be used for the purpose for which it was requested.
It cannot be repurposed for unrelated investigations, shared with unauthorized individuals, or used in any manner not expressly allowed by law.

## 3.2 Access to CHRI

Access must be strictly limited:

- Only individuals with a need to know may view CHRI
- Individuals who access or even *hear* the results must undergo required training
- Access is limited to support staff and executive directors who are employees

Importantly:
Independent contractors are not considered employees and may NOT access CHRI. This includes entities who are contracted executive directors such as APT, Olson Effertz, and similar third-party contractors.

## 3.3 Physical and Electronic Storage

**Physical Storage Requirements**

- CHRI must be stored in a locked cabinet or drawer
- Only authorized personnel may access the storage location

**Electronic Storage Requirements**

Electronic CHRI must comply with CJIS (Criminal Justice Information Services) policies. Boards typically receive CHRI by email from the FBI, but the following rules apply:

- Records must be stored on a secure server accessible only to authorized board employees
- CHRI must be triple-deleted:
    - Deleted from email inbox

- Deleted from deleted items
- Deleted locally from the device and its recycle bin

These measures protect confidential information from unauthorized access or accidental disclosure.

### 3.4 Dissemination of CHRI

CHRI may not be shared with any person or agency outside the authorized entity. The only exception:

- CHRI may be provided to the applicant upon request
- Best practice: Verify the applicant's identity before releasing the information

This protects sensitive data and ensures compliance with confidentiality laws.

### 3.5 Retention Requirements

CHRI should be stored only as long as necessary to fulfill its purpose and meet regulatory requirements.

Under the BCI User Agreement, boards must retain CHRI for three years. After that, records must be destroyed according to proper procedures.

### 3.6 Required Destruction Procedures

Records must be destroyed by authorized personnel through:

- Shredding
- Incineration

If a third-party service is used, an authorized board employee must witness the destruction.

## Section 4: Required Agreements & Procedures

### 4.1 BCI User Agreements

Each board authorized to access CHRI must execute a BCI User Agreement. The agreement:

- Describes CHRI handling requirements
- Must be updated each time a board member changes
- Must be followed strictly to maintain CHRI access privileges

Boards cannot receive CHRI without a fully executed agreement.

### 4.2 Written Procedures

Boards must maintain written procedures addressing:

- Use of CHRI
- Handling and storage
- Access control

- Dissemination
- Retention and destruction
- Misuse prevention

These procedures typically appear in a CHRI Manual, a document tailored to the board's specific operations and legal obligations.

# Section 5: Failure to Maintain Standards

CHRI mishandling carries serious consequences.

## 5.1 Criminal Penalties

**Unauthorized Disclosure**

Knowingly disclosing confidential information obtained as a public servant is a Class C felony under N.D.C.C. § 12.1-13-01.

**Willful Violations of CHRI Laws**

Violating any provision of N.D.C.C. §§ 12-60-16.1 to 12-60-16.9 relating to reporting or disseminating CHRI may be a Class A misdemeanor under § 12-60-16.10.

## 5.2 Administrative and Civil Penalties

Beyond criminal sanctions, failure to comply may result in:

- Loss of authority to access CHRI
- Administrative consequences
- Possible civil liability exposure

Boards must comply with all legal requirements to maintain access and avoid liability.

# Section 6: Prior Convictions and Licensure

Background checks commonly raise questions about how prior convictions should affect licensure decisions.

## 6.1 General Rule

Under N.D.C.C. § 12.1-33-02.1(1):

A person may not be disqualified from practicing a licensed occupation solely because of a prior conviction.

However, a license may be denied if either of the following are true:

1. The applicant has not been sufficiently rehabilitated, or
2. The offense has a direct bearing on the applicant's ability to serve the public in the specific profession

This ensures licensing decisions are fair and grounded in public protection rather than punishment.

## 6.2 Determining Sufficient Rehabilitation

The following factors must be considered:

- Nature of the offense and whether it directly impacts the profession
- Degree of rehabilitation, supported by documentation or evidence
- Time elapsed since conviction or release

Importantly, the law provides:

- Completion of five years after final discharge (probation, parole, corrections, imprisonment)
- Without subsequent conviction
- Constitutes prima facie evidence of sufficient rehabilitation

This means that after five years of law-abiding behavior, the burden shifts strongly in favor of licensure.

## Conclusion

Criminal history record checks are essential tools for protecting the public and ensuring the fitness of individuals who enter regulated professions. Handling CHRI requires a high level of confidentiality, responsibility, and adherence to legal requirements.

Regulatory board members must:

- Understand what CHRI is
- Follow strict rules for access, storage, dissemination, and destruction
- Maintain all required agreements and written procedures
- Avoid criminal and civil liability by complying with state and federal law
- Evaluate prior convictions fairly and lawfully

# Voting, Ethics and Conflicts of Interest

Every board member in North Dakota must comply with state laws and rules governing voting obligations, conflicts of interest, and ethical conduct. These rules protect the legitimacy of board actions, promote transparency, and maintain public trust.

Because board actions are subject to public scrutiny and legal oversight, it is essential that board members understand when they must vote, when they may abstain, how to identify and disclose conflicts of interest, and what processes apply in general and quasi-judicial matters.

## Section 1: Obligation to Vote

Voting is a foundational responsibility of every board member. North Dakota law requires board members to vote on matters before them unless a statute or rule specifically allows or requires abstention.

### 1.1 Duty to Vote

Board members must vote unless a legal basis permits abstention. The duty to vote is supported by:

- Attorney General Opinion 2002-L-54
- Northwestern Bell Telephone Co. v. Bd. of Comm'rs of Fargo, 211 N.W.2d 399 (N.D. 1973)

Voting ensures full participation in board decision-making and helps maintain quorum integrity.

### 1.2 Requirement for Public Roll-Call Votes

All substantive votes must be:

- Open
- Public
- Completed by roll-call

This requirement is mandated under N.D.C.C. § 44-04-21, which governs open meeting voting procedures.

These provisions ensure transparency and accountability in board actions.

## Section 2: Conflicts of Interest

Board members frequently face situations where personal interests may intersect with board matters. Ethical rules require board members to identify, disclose, and, when necessary, recuse themselves from decisions involving conflicts of interest.

North Dakota recognizes two primary types of conflicts:

1. General Conflicts of Interest
2. Quasi-Judicial Bias Conflicts

### Section 2.1 Overview of Applicable Laws

The following authorities govern conflicts of interest:

- ND Ethics Commission
- ND Admin Code Title 115
- N.D.C.C. ch. 54-66
- Article XIV of the Constitution
- Relevant enabling statutes (depending on the board)
- Examples: N.D.C.C. §§ 43-62-10, 43-17-07.2, 43-41-08, 43-52-04

These laws establish who qualifies as a public official, what constitutes a conflict, and how conflicts must be addressed.

### Section 2.2 Who Is a Public Official?

Under Article XIV of the Constitution, a public official includes:

- Elected officials
- Appointed officials
- Members of state boards and commissions
- Members of the Governor's cabinet
- Legislative branch employees

Most board members fall under this definition because they are appointed by the Governor and operate within the executive branch.

## Section 3: Quasi-Judicial Bias Conflicts

Quasi-judicial matters involve decisions where the board acts like a judge—commonly disciplinary actions or other matters likely headed to the Office of Administrative Hearings or court.

### 3.1 Identifying Quasi-Judicial Conflicts

A potential conflict in quasi-judicial matters exists when a board member has:

- A gift from a party in the matter
- A significant financial interest in a party or outcome
- A relationship in a private capacity with a party

Definitions include:

- Gift: Anything not otherwise permitted under Article XIV, N.D.C.C. ch. 54-66, or NDAC 115-03
- Significant financial interest: A direct, substantial in-kind or monetary interest not shared by the general public; excludes routine investments, PERS, or lawful campaign contributions

- Private capacity relationship: Past or present commitment or relationship involving an employer or an individual with whom the board member has a substantial business relationship

### 3.2 Procedure for Handling Quasi-Judicial Conflicts

**Step 1: Pre-Meeting Review**

- Examine agenda items for possible conflicts
- Contact the executive director or attorney if a conflict may exist

**Step 2: At the Meeting**

- Disclose the conflict before any discussion
- Provide enough detail to inform the public about material facts
- Disclose directly to the parties involved (unique to quasi-judicial matters)
- Disclosure must occur before taking action

**Step 3: Decision to Recuse**

- Board members may determine for themselves whether to recuse
- Or ask the board (neutral reviewer)
- Following the board's decision grants safe harbor

### 3.3 Quasi-Judicial Standard

The question:

**Does the conflict create an appearance of bias to a reasonable person?** Factors include:

- Whether conflict involves a party
- The issues involved
- Other known bias-creating factors
- Size of the conflict
- Degree of involvement
- Timing of campaign contributions relative to election cycle

## Section 4: General Conflicts of Interest

General conflicts involve board activities such as rulemaking, contracting, policy decisions, budgets, or legislation.

### 4.1 Identifying General Conflicts

A potential general conflict exists when a board member has:

- A gift from a party
- A significant financial interest
- A private capacity relationship

Definitions for general conflicts parallel those used in quasi-judicial conflicts, with one addition:

- Immediate family includes: parent, sibling, spouse, grandparent, grandchild, stepchild, or child by blood/adoption

## 4.2 Procedure for General Conflicts

**Step 1: Pre-Meeting**

- Review agenda
- Contact ED or attorney if any doubt

**Step 2: At the Meeting**

- Disclose the conflict before discussion
- Provide sufficient detail about material facts
- Disclosure must occur before action

**Step 3: Decision to Recuse**

- Public official decides
- Board can act as neutral reviewer
- Safe harbor applies if the member follows board determination

**Key Difference from Quasi-Judicial Conflicts**

- Notice does not need to be given directly to the parties

## 4.3 General Conflict Standards

When reviewing general conflicts, five standards apply:

a. **Rule of Necessity:** Public officials must generally vote unless prohibited.
b. **General Issue Conflict Review Standard:** Recusal should occur only when a reasonable person's independence of judgment would be materially affected.
c. **Law Preventing Recusal:** Some laws require voting.

d. **Presumption Against Conflict Without Personal Benefit:** If no personal benefit exists, a disqualifying conflict is presumed not to exist.
e. **Administrative Guidance:** Use Ethics Commission guidance and precedent.

# Section 5: Ethical Quandaries

This section addresses challenges that arise when conflicts are improperly disclosed or handled.

## 5.1 When a Public Official Fails to Disclose

If a board member does not disclose a clear conflict:

- Any person may raise the concern
- Ethics Commission oversees public officials—not the board
- Board decisions made while the conflicted member participates may be appealed or challenged

## 5.2 When a Public Official Refuses to Recuse

The board may still proceed, but decisions may face legal vulnerability. Public officials determine whether a conflict exists under NDAC.

# Section 6: Best Practices Under N.D.C.C. § 44-04-22

Although not legally required, the Attorney General recommends a best-practice procedure for clear conflicts:

## 6.1 Raising Clear Conflicts

Any board member may identify a clear conflict involving another member.

## 6.2 Statutory Procedure

Under **N.D.C.C. § 44-04-22**, a member with a direct and substantial personal or pecuniary interest:

- Must disclose
- May not vote without majority board approval

## 6.3 Definitions

The statute defines key terms:

- **Direct:** Immediate connection
- **Substantial:** Real worth and importance
- **Personal:** Pertains to the individual
- **Pecuniary interest:** Money-related interest

Appearance of impropriety alone is not a basis for abstention.

# Section 7: Voting Procedures Under N.D.C.C. § 44-04-22

## 7.1 Board Review Process

Steps include:

- Board determines if the conflict exists
- If yes, board votes on allowing participation
- All discussion and vote must be recorded in minutes

### 7.2 Proper vs. Improper Abstention

- **Proper abstention:** Member present, abstains with consent
- **Improper abstention:** Without consent; vote recorded with majority

## Section 8: Ethics Resources

Resources available to board members include:

- ND Ethics Commission
- ND Ethics Commission Educational Resources
- Conflict of Interest Disclosure Form
- Quasi-Judicial Bias Disclosure Form
- ND Admin Code Title 115
- N.D.C.C. ch. 54-66
- Article XIV of the Constitution

## Conclusion

Board members serve the public's interest, and ethical decision-making is essential to trustworthy governance. Understanding voting obligations, applying conflict-of-interest procedures appropriately, and following state laws ensures that regulatory boards operate with fairness, transparency, and integrity.

# Laws

Regulatory board members carry significant responsibility in enforcing licensing laws, upholding standards of professional practice, and protecting the public. To carry out these duties effectively, board members must understand the legal foundations that govern their work—where laws come from, how they operate, how they influence board decision-making, and what role the board plays in the legislative and regulatory processes.

## Section 1: Where Our Laws Come From

There are four primary categories of law that govern regulatory boards:

1. Constitutional Law
2. Common Law
3. Regulatory Law
4. Statutory Law

Each category plays a distinct role in shaping the authority, duties, and limitations of professional licensing boards.

## Section 2: Constitutional Law

Constitutional law originates from the United States Constitution and the North Dakota Constitution. These foundational documents establish rights, obligations, and government structures that impact licensing boards in meaningful ways.

### 2.1 Professional Licenses as Property

Professional licenses are legally recognized as a form of property under the Fourteenth Amendment. Because of this property interest, licensees are entitled to due process protections.

### 2.2 Due Process: Procedural and Substantive

Due process is fundamentally about fairness. It includes two forms:

- **Procedural due process** – ensuring that the process itself is fair
- **Substantive due process** – ensuring that decisions are fair and reasonable

Licensing boards most often encounter due process questions in disciplinary proceedings, where a licensee may face sanctions.

Two key considerations apply:

1. Was adequate notice provided to the licensee?
2. Did the licensee have an opportunity to respond or be heard?

Opportunities to respond may include submitting written comments or participating in hearings.

### 2.3 State vs. Federal Constitutions

The U.S. Constitution is described as a delegation of powers, while state constitutions—such as North Dakota's—operate as a limitation of powers.

State constitutions may also grant rights beyond those in the federal document, making them particularly important for regulatory boards operating under state authority.

## Section 3: Common Law

Common law—also known as case law or judge-made law—comes from judicial opinions issued by:

- Federal courts
- State courts
- Administrative law judges

### 3.1 Precedent and Stare Decisis

When a judge issues an opinion, that decision becomes precedent, meaning future courts in the same jurisdiction must follow it. This gives rise to the doctrine of stare decisis, meaning "to stand by things decided."

### 3.2 Jurisdictional Limits

Precedent is jurisdiction-specific:

- North Dakota Supreme Court decisions bind North Dakota courts
- Minnesota courts are not obligated to follow North Dakota rulings
- The U.S. Supreme Court binds all states and all federal courts

Board attorneys may refer to opinions from other jurisdictions for guidance but are not required to follow them.

## Section 4: Regulatory Law

Regulatory law consists of administrative rules, which are created by executive agencies—including professional licensing boards.

### 4.1 North Dakota Administrative Code (NDAC)

Administrative rules:

- Are different from statutes
- Are secondary to laws in the North Dakota Century Code, including Title 43
- Clarify or implement statutory requirements
- Must be authorized by the Legislature
- Cannot conflict with statutes

Boards must verify that any rule they adopt is supported by statutory authority and consistent with existing law.

# Section 5: Role of the Licensing Board

Licensing boards apply the law to the specific facts of each case. This involves:

- Reviewing applications, complaints, or disciplinary matters
- Applying statutes and rules
- Analyzing factual circumstances
- Rendering decisions supported by law

## 5.1 Key Responsibilities

Boards must:

- Ensure statutory authority exists for their decisions
- Seek consistency with past decisions
- Avoid advisory opinions
- Consult legal counsel for interpretations
- Recognize that facts may implicate multiple laws

Not all violations warrant identical discipline; consistency must be balanced with case-specific facts.

## 5.2 Avoiding Hypothetical Questions

Boards should not answer hypothetical or speculative questions. Doing so may constitute providing legal advice or issuing advisory opinions—a power only granted to a few boards by statute.

# Section 6: Role of the Board Attorney

Board attorneys provide essential legal support but do not make decisions.

## 6.1 Responsibilities of Counsel

Counsel may:

- Provide legal advice
- Offer statutory interpretation
- Review legislative history for intent
- Discuss risks and implications of board actions

## 6.2 Board Reliance on Interpretation

Boards may need to base decisions—such as continuing education hardship exceptions—on statutory interpretation. Consistency in applying discretionary standards is essential.

### 6.3 Counsel Is Not a Subject Matter Expert

Attorneys assist with legal interpretation, but many decisions depend heavily on board expertise regarding professional practice.

## Section 7: Statutory Law

Statutory law consists of laws enacted by the Legislature and codified in the North Dakota Century Code (N.D.C.C.).

### 7.1 Title 43: Occupational and Professional Licensing

Title 43 houses statutes governing:

- Licensing boards
- Occupational requirements
- Board authority
- Discipline

Each board has its own chapter containing specific statutory powers and obligations.

### 7.2 Interstate Licensure Compacts

The Legislature has enacted several licensure compacts enabling:

- Multi-state practice
- Standardized licensure processes
- Shared disciplinary databases
- Greater workforce mobility

States retain authority over initial licensure and practice acts, but compacts improve portability and access to regulated services.

## Section 8: Legislative Process

Boards play an important role in shaping laws affecting their regulated professions.

### 8.1 Steps in the Legislative Process

The general process includes:

- Drafting
- Filing
- House and Senate submission
- Committee assignments
- Amendments

- Hog House procedure
- Passage in committees
- Passage through both chambers
- Governor approval
- Filing with Secretary of State

# Section 9: Bill Drafting and Introduction

## 9.1 Who May Draft a Bill?

Bills may be drafted by:

- Boards
- Legislators
- State agencies
- Stakeholders
- Members of the public

## 9.2 Who May File a Bill?

Bills may be filed by:

- Licensing boards
- State agencies
- Legislators

Agency bills, including licensing board bills, must be filed by **November 25, 2026**.

## 9.3 Role of Legislative Council

Legislative Council:

- Provides legal counsel to the Legislature
- Publishes session laws and the N.D.C.C.
- Oversees Administrative Code
- Maintains resources at https://ndlegis.gov/legislative-council

Boards should consider differences between agency-sponsored and legislator-sponsored bills when developing proposals.

# Section 10: Licensing Board Role in Legislation

Boards must actively participate in the legislative process affecting their professions.

**Key Responsibilities**

Boards should:

- Draft proposed bills or amendments
- Engage stakeholders
- Approve draft language during a public meeting
- Participate in hearings
- Provide written or oral testimony

## Section 11: Additional Considerations During Legislative Session

Boards should also:

- Track legislation that may affect their operations
- Identify related entities and coordinate during bill drafting
- Monitor other legislative actions to anticipate impacts

## Conclusion

Understanding the foundations of constitutional, common, statutory, and regulatory law is essential for regulatory board members. Boards must apply laws consistently, exercise statutory authority carefully, avoid issuing advisory opinions, and participate thoughtfully in legislative processes that shape the professions they regulate.

# Administrative Hearing Process: Ch. 28-32

Regulatory boards in North Dakota frequently engage in disciplinary actions that require formal administrative hearings. These proceedings are governed by the Administrative Agencies Practice Act, located in Chapter 28-32 of the North Dakota Century Code, and carried out in coordination with attorneys from the Office of Attorney General (OAG).

## Section 1: Administrative Agencies Practice Act

North Dakota's Administrative Procedure Act is formally known as the Administrative Agencies Practice Act and is located in N.D.C.C. ch. 28-32. This chapter governs how administrative agencies conduct hearings, issue orders, and manage adjudicative proceedings.

## Section 2: Important Definitions

Understanding certain statutory definitions is essential to conducting administrative hearings appropriately.

### 2.1 "Adjudicative Proceeding"

An **adjudicative proceeding** is an administrative matter that results in an agency issuing an order after an opportunity for a hearing is provided or required.

The term includes:

- Hearings on complaints against specifically named respondents
- Hearings on applications (e.g., licensing or ratemaking)
- Appeals to an agency

Defined in N.D.C.C. § 28-32-01.

### 2.2 "Administrative Agency"

Under N.D.C.C. § 28-32-01, an administrative agency includes:

- Boards
- Bureaus
- Commissions
- Departments
- Any administrative unit of the executive branch
- Individuals acting under agency authority

Subordinate administrative units are treated as part of the larger agency for purposes of this chapter.

### 2.3 Agencies NOT Covered by Chapter 28-32

Several entities are excluded from the Act, such as:

- Office of Management and Budget (with limited exceptions)
- Adjutant General regarding certain programs
- Council on the Arts
- State Auditor
- Department of Commerce (economic development & finance)
- Dairy Promotion Commission
- Education Factfinding Commission
- K-12 Education Coordination Council
- Board of Higher Education
- Indian Affairs Commission
- Parks & Recreation Department
- Parole Board
- State Fair Association
- Attorney General's Office (for certain functions)
- Industrial Commission (for certain functions)
- Commission on Legal Counsel for Indigents

Multiple exceptions apply depending on the nature of authority exercised.

## Section 3: General Administrative Hearing Process

Administrative hearings begin with investigative findings and proceed through multiple formal steps.

### 3.1 Reasonable Cause Determination

The agency must first determine that reasonable cause exists to believe a statute or rule has been violated.
This step typically involves:

- Agency staff
- General counsel

### 3.2 Requesting Litigation Counsel

After finding reasonable cause, the agency or general counsel:

- Contacts the Civil Litigation Division at OAG
- Requests litigation counsel to conduct the proceeding

### 3.3 Complaint Preparation and Service

Litigation counsel:

- Gathers information
- Prepares the formal complaint
- Serves the complaint according to North Dakota Rules of Civil Procedure

The agency decides how involved it wants to be in reviewing or approving the complaint.

### 3.4 Filing With OAH

Litigation counsel files the complaint with the Office of Administrative Hearings (OAH) and requests either:

1. Recommended Findings of Fact & Conclusions of Law, or
2. Final Order (if statute requires or agency requests)

A prehearing conference follows to set:

- Hearing date
- Discovery deadlines
- Procedural details

### 3.5 The Hearing

During the hearing:

- Parties present evidence
- Witnesses are examined and cross-examined
- The North Dakota Rules of Evidence may be waived, often only for self-represented parties

No decision is issued at the hearing itself.

### 3.6 Recommended vs. Final Decisions

If final decision requested → ALJ issues a final decision.
If recommended decision requested → ALJ issues recommended findings.

Once the recommended decision is issued:

- Litigation counsel may not communicate with the agency about the hearing unless the other side is included.

This prevents improper ex parte communication.

## Section 4: Reviewing Recommended Findings

Agencies have important duties in reviewing recommended decisions, including procedural rules and requirements for final orders.

## 4.1 Service of Final Orders

Under N.D.C.C. § 28-32-39, agencies must serve:

- Final orders
- Accompanying findings of fact
- Conclusions of law

## 4.2 Agency Rules on Reviewing ALJ Recommendations

Some agencies adopt specific rules (e.g., N.D.A.C. § 75-01-03-22) describing how a recommended order is reviewed.

Under such rules, the executive director or designee may:

- Adopt the recommended decision
- Decide the matter on the existing record
- Order a new hearing

Staff communications analyzing the application of law or policy are not considered ex parte communications if they do not add to the evidence.

Required components of the agency's final decision include:

- Statement of facts
- Applicable statutes, regulations, or policies
- Reasoning supporting the decision

## 4.3 If No Rule Exists

If the board does not have a formal rule for reviewing recommended findings, it must consult general counsel to determine:

- Open vs. executive session considerations (e.g., Schmitz case)
- Appropriate review procedures

## 4.4 Scope of Agency Review

The agency must determine:

1. Whether the ALJ's decision is supported by facts
2. Whether conclusions of law match facts and legal requirements
3. Whether the agency agrees with the ALJ's decision
4. Whether additional information is needed

The agency may accept or modify the recommended decision.
If it modifies:

- Reasons must be clearly stated

- Any change is considered a “modification”

## Section 5: Appeals (N.D.C.C. § 28-32-42)

Any party may appeal an agency decision within 30 days of receiving notice of the order. The appealing party must serve:

- Notice of appeal
- Specifications of error

These must be served on:

- The administrative agency
- The Attorney General or Assistant Attorney General
- All parties to the proceeding

The notice of appeal must then be filed with the district court.

If no appeal is filed within 30 days → Order is final.

## Section 6: District Court Standard of Review

A district court reviews appeals based solely on the administrative record. The court must affirm unless:

- The order is contrary to law
- Constitutional rights were violated
- Required procedures were not followed
- Agency rules did not afford a fair hearing

Findings are not supported by a preponderance of evidence

- Conclusions of law do not match findings
- Findings do not adequately address evidence
- Conclusions do not adequately explain rejection of ALJ recommendations

These standards emphasize the need for clear, complete, and well-reasoned decisions at the agency level.

### Conclusion

Administrative hearings ensure fairness, due process, and accountability in professional regulation. Board members must understand the structure of adjudicative proceedings, proper communication protocols, review procedures for ALJ recommendations, and appeal rights.