

# Discipline and Due Process in a Digital Age

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License discipline requires due process by an impartial decision maker in a fair proceeding. This article discusses how board members' use of technology before, during, and after a license discipline proceeding can affect the validity of the proceeding, even if no harm is intended. This article explains the implications of delivering due process using technology and provides case examples from various states. The objective is to provide general guidance on the use of technology, most notably electronic communications, to protect the integrity of the license discipline process.

*Keywords:* Board proceedings, due process protections, electronic communication, social media, technology

## Objectives

- Describe the use of technology to participate in board business
- Discuss considerations for using technology in disciplinary hearings
- Identify actions boards can take to address use of technology related to disciplinary hearings

Technology can facilitate the process of professional licensing discipline in many ways, but its use during the license discipline process must be carefully monitored because license discipline is the interaction of the government with a licensee. The government that granted a license is now charged with determining whether the licensee can practice competently and safely under that license. This interaction is governed by laws that provide basic due process protections to a licensee, and these protections can be negatively or positively affected by the use of technology.

License discipline is governed not only by concerns about providing due process to a licensee, but also by various statutes, rules, and policies that protect the state's decision regarding how much of the license discipline process is conducted in the public view. Many codes governing professions, the license discipline process, and the statutory scheme outlining the public nature of license discipline were drafted and enacted before much of today's technology existed. Even governing codes that are relatively modern may not have kept up with the rapid pace of technological development.

## Administrative Law Hearing

Professional license disciplinary hearings use the tools of administrative law, which is best described by Friendly (1974):

Administrative law includes the entire range of action by government with respect to the citizen or by the citizen with respect to the government, except for those matters dealt with by the criminal law and those left to private civil litigation where the government's participation is in furnishing an impartial tribunal with the power of enforcement.

An administrative law hearing is a proceeding that is slightly less formal than a civil court proceeding. Some rights commonly associated with court proceedings apply, and some do not. States provide basic due process rights at a license disciplinary hearing, including notice of the action, the right of the licensee to be heard on the matter in a reasonable time and a reasonable manner, and a fair and impartial decision maker. All these protections may be affected by the use of technology.

The overall actions of the board are generally open to public review. Although some states have protections for the license discipline process, many do not. In this environment, the use of technology by board members and staff must be monitored.

### Disciplinary Hearings: Public or Private

States vary as to when the public may begin to observe the license discipline process. States rely on various aspects of the law to ensure the correct amount and timing of public scrutiny. Sources may include statutes that address the confidentiality of license discipline matters or general statutes that apply to hearings. For example, by a statute specific to the license discipline process, Indiana allows the public to be aware of and observe the license discipline process from the point of filing the official complaint with the board (Professions and occupations, 2016): "...[A]ll complaints and information pertaining to the complaints shall be held in strict confidence until the attorney general files notice with the board of the attorney general's intent to prosecute the licensee."

However, any hearing conducted in the matter is open to the public pursuant to a statute of general applicability to all hearings. Similarly, Iowa Code Annotated § 272C.6 provides that license disciplinary hearings “shall be open to the public at the discretion of the licensee” (Regulation of licensed professions and occupations, 2016).

In New York, the license discipline process must remain private until the adjudicating body determines that a violation has taken place and that a sanction is appropriate based on the theory that a licensee should not suffer adverse publicity that could affect her or his professional stature in the eyes of the public or his or her colleagues until the complaint has been proven (*Anonymous v. Bureau of Prof'l Med. Conduct/State Bd. for Prof'l Med. Conduct*, 2004).

In *Johnson Newspaper Corp. v. Melino* (1990), the Court of Appeals of New York relied on traditional policy when it held that “because there is no suggestion that professional disciplinary hearings have any tradition of being open to the public and no showing that the public access plays ‘a significant positive role’ in the functioning of the proceedings there is no First Amendment right of access . . .” The court further held that neither a state constitutional right of access to disciplinary hearings nor a common-law right could overcome the applicable confidentiality policy protecting complainants as well as reputations that might otherwise be tarnished—unless the licensee requests an open proceeding.

Specific statutory authority can guide the public or private nature of a license disciplinary hearing and place the ability to decide the public nature of the proceeding in different hands. In *Coe v. U.S. Dist. Court for Dist. of Colorado* (1982), the court found that the Colorado Board of Medical Examiners’ decision not to close the formal proceeding against Coe to the public did not violate his due process rights and did not abuse the board’s discretion to determine the public or private setting of a license disciplinary hearing it conducted pursuant to statutory authority. The court concluded no licensee has a right to a secret, closed nonpublic hearing before the board. Rather, the court held that the public or private nature of the matter was within the board’s statutory authority, subject to its sound discretion in the balancing of public and private interests. Thus, the Colorado General Assembly placed the discretion to determine whether a license discipline hearing is open to the public in the hands of the board.

### Sunshine Laws

Other states may rely on their version of Sunshine or Open Meetings laws. Virtually all states and territories have these laws that render many if not all board meetings and actions open to the public and that allow the public to access the documents generated by the boards. States adopted these laws as a response to a nationwide call for more transparency in government. However, different states have made different determinations about when

a license disciplinary hearing is confidential based on the state’s Sunshine laws.

In *Spray v. Board of Medical Examiners* (1981), a doctor sought a review of a board order revoking his license to practice medicine in Oregon. The Court of Appeals reversed and remanded the decision of the Oregon Board of Medical Examiners in part because it believed that the board improperly held a closed hearing in violation of the Oregon Public Meeting Law. However, upon reconsideration, the court noted that the Open Meetings law did not apply to the board’s license disciplinary hearings because of an exception within the law.

In *Appeal of Plantier* (1985), a doctor faced allegations that he committed sexual misconduct with minors, and the New Hampshire Board of Registration in Medicine revoked his license. An issue in Plantier’s appeal was whether the board had denied him due process when it refused his request for a hearing open to the public rather than the private hearing he was afforded. The board had denied Plantier’s request for an open hearing, to which he was entitled under the law applying to the license discipline of physicians and surgeons in New Hampshire (relying on Injunction, [1983]). The board’s decision was based on the state’s Open Meetings law that permitted the board to go into executive session because the matter under consideration would adversely affect the reputation of the complainant (relying on Nonpublic sessions, [1983]).

On appeal, the New Hampshire Supreme Court held that the state legislature provides that a physician is entitled to an open disciplinary hearing if he or she requests one. The court determined that the decision regarding whether a license disciplinary hearing is in the public view rests with the licensee because the more specific law granting that right prevails over the more generally applicable Open Meetings law.

All boards engaged in the license discipline process should know their state’s statutes and case law pertinent not only to the delivery of due process, but also to when the process is open to the public and when it is confidential. As the above cases and statutes illustrate, each state draws on its own legal landscape created by its own statutory scheme and case law. Moreover, boards should be updated regularly because the law and technology, as well as the members of the board, change.

### Using Technology for Board Business

Some states issue e-mail accounts to board members to facilitate their work. In states that do not, board members use their personal or employer-issued e-mail accounts for board business. And some board members with state-issued e-mail accounts use private e-mail accounts for board business for the sake of convenience. This intersection of technology and board work raises numerous questions.

Which materials may be sent to a board member’s personal e-mail account? Does the state have statutes or rules governing

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