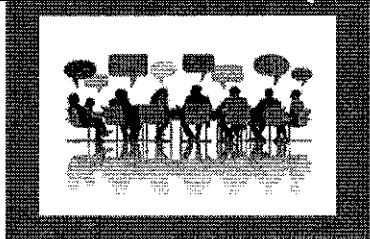
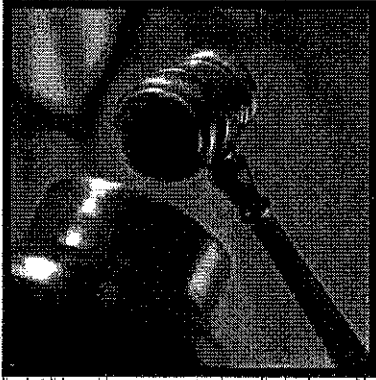


## **AGENDA ITEM 16**

### **DISCIPLINARY PROCESS OVERVIEW BY LEGAL COUNSEL.**



# The Adjudication Process

1



## First, A Big Thank You

- This is Tough Stuff...



Hey.  
You're  
Awesome.

The Five W's and the H

- Who
- Why
- When
- Where
- What
- How

Let's Begin



## The Who – You, The Members

- Board members make decisions on cases
- But you don't:
  - Get involved in investigations or prosecutions
  - Conduct your own investigations
  - Perform your own fact finding
  - Stray outside the "Administrative Record"
  - Participate in "Ex Parte Communications"

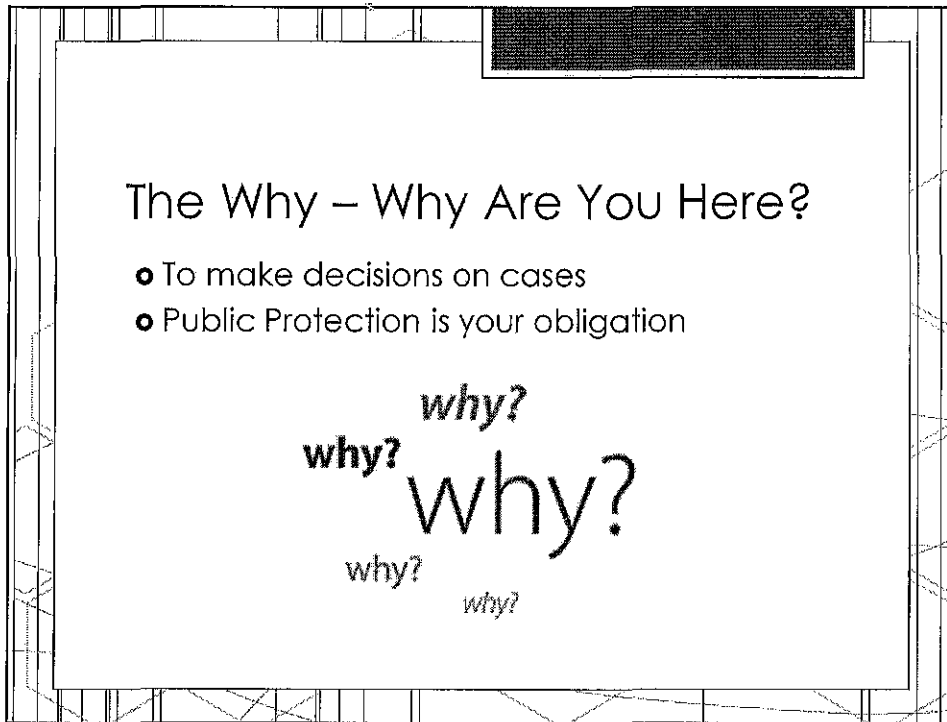
## Definitions:

### **Administrative Record**

- The pleadings, notices, orders issued by the Board
- Transcript of the administrative hearing
- All exhibits and evidence
- Proposed Decision

### **Ex Parte Communications**

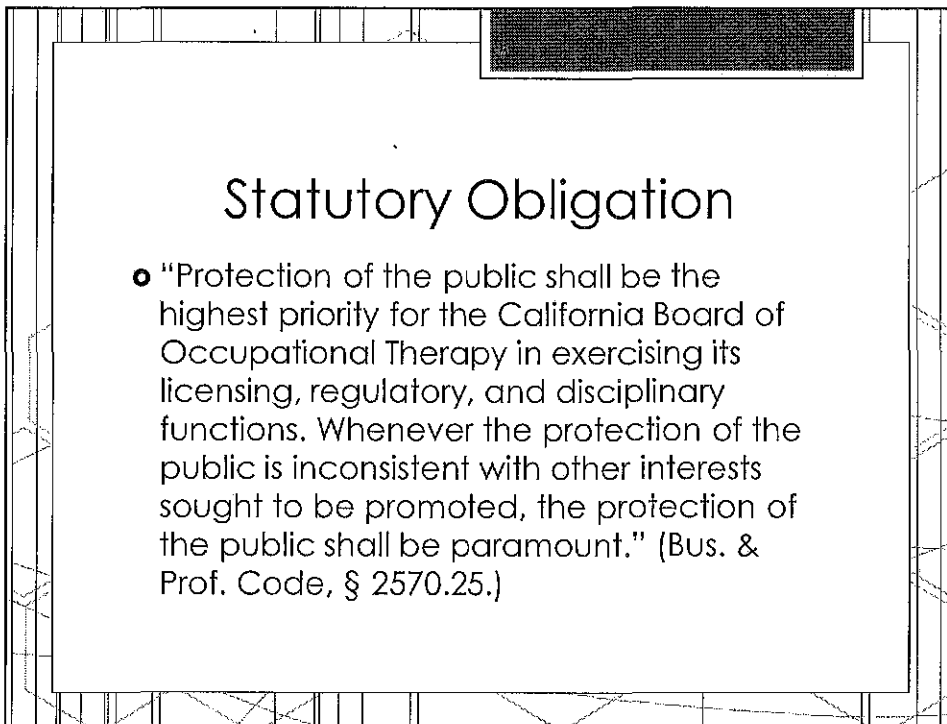
- While the proceeding is pending
- Communication (direct or indirect) about the proceeding
- Generally; to the Decision Maker from an employee or representative of the Board that is a party to the case or from an interested person outside the agency
- Without notice and opportunity for all parties to participate in the communication
- Certain exceptions, including: matters relating to procedure or practice that is not in controversy



## The Why – Why Are You Here?

- To make decisions on cases
- Public Protection is your obligation

why?  
why?  
why?  
why?



## Statutory Obligation

- "Protection of the public shall be the highest priority for the California Board of Occupational Therapy in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount." (Bus. & Prof. Code, § 2570.25.)

## Public Protection, Not Punishment

- This concept is rooted in case law


*L*

"The purpose of such a [disciplinary] proceeding is not to punish but to afford protection to the public upon the rationale that respect and confidence of the public is merited by eliminating from the ranks of practitioners those who are dishonest, immoral, disreputable, or incompetent."

*(Borror v. Department of Investment (1971) 15 Cal.App.3d 531, 540.)*

## Which Hat Do I Wear?

- Industry Member?
- Professional Association Member?





- 
- The When – When Do I Decide?
- After reading the appropriate documents
    - Accusation or Statement of Issues
    - Proposed Decision or Stipulated Settlement
    - Written Argument
    - The Administrative Record
  - After determining that you do not have a conflict
    - Personal
    - Social
    - Business
- A slide with a decorative border. At the top center, there is a dark rectangular box. Below it, the title "The When – When Do I Decide?" is centered. The main content is a bulleted list with two primary categories, each followed by sub-bullets. The first category is "After reading the appropriate documents" and the second is "After determining that you do not have a conflict".

## Definitions:

- Accusation: the charging document for a licensee
- Statement of Issues: the charging document for an applicant
- Proposed Decision: the decision proposed to the Board by the ALJ who heard the matter
- Stipulated Settlement: a negotiated agreement to resolve the matter without having a hearing

## The Where – Where Does The Magic Happen?

- Closed session at a meeting
- Mail or e-mail vote
- “What happens in closed session...”
  - Note: Decisions are public, but Deliberations are not



## What Kind of Cases Will I Be Considering in Closed Session?

- **Licensing** (applicants)
  - Examples: practicing without a license for more than 1 year; denial of application for licensure
  - Statement of Issues
- **Disciplinary** (licensees)
  - The Board may discipline a licensee for various types of misconduct, such as "unprofessional conduct" and violating the OT Practice Act
  - Accusation

## What Kind of Cases Will I Be Considering in Closed Session?

- **Petitions for Reinstatement**
  - License previously revoked and petitioner seeking to have license reinstated
  - Statutory waiting periods apply (B&P §2570.32)
- **Petitions for Modification or Termination of Penalty**
  - License previously suspended or placed on probation and petitioner seeking to modify or terminate suspension or probation
  - Statutory waiting periods apply (B&P §2570.32)
- **Requests for Reconsideration**
  - Applicant or licensee submits a request to the Board to reconsider its Decision
  - Board's power to order a reconsideration expires after certain period of time (Gov. Code §11521)

## What Kind of Cases Will I Be Considering in Closed Session?

- **Petitions to Vacate Default Decision**
  - Respondent received a Default Decision by failing to either file a Notice of Defense or appear at the administrative hearing
  - Respondent has 7 days from the date the Default Decision was served to request that the decision be vacated
  - Executive Officer is delegated the authority to grant a motion to vacate a Default Decision (16 CCR §4101)
  - If a motion to vacate is granted, the EO sets the matter for hearing
- **Citations**, if an evidentiary hearing is requested

## Licensing Cases How Did We Get Here?



### Applicants

- A person wants a license and submitted an application to the Board
- Application for licensure was denied
- The applicant requested a hearing to contest the denial
- Hearing held before an ALJ, who issued a Proposed Decision
- The Board decides whether to adopt the Proposed Decision as its Final Decision
  - In closed session at a properly noticed meeting; or
  - Via mail/e-mail ballot

## Licensing Cases

### Reasons For Denial

- Criminal Conviction – Substantial Relationship to the qualifications, functions or duties of the business or profession for which the application is made
- Material omission or misrepresentation in the application
- Commission of an act that would be grounds for discipline had the person been a licensee

## Licensing Cases

### Key Concepts

- A Statement of Issues is the charging document for an applicant
- The Burden of Proof is on the applicant to demonstrate fitness for licensure by a Preponderance of the Evidence
- Has the applicant demonstrated sufficient rehabilitation to issue them a license?

**Core Question – Is issuing this license in the public interest?**

## How Much is a *Preponderance of the Evidence*?

- Preponderance of the evidence refers to "evidence that has more convincing force than that opposed to it."
  - *People ex rel. Brown, v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.
- "The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the *quality* of the evidence. The *quantity* of the evidence presented by each side is irrelevant."
  - *Glage v. Hawes Firearms Company* (1990) 226 Cal.App.3d 314, 324-325.

## Licensing Cases

### Probationary Licenses

- The Board is authorized to issue an initial license on probation, with terms and conditions
- Used in cases where outright denial is not warranted and the terms and conditions of probation are sufficient to protect the public
- May also be issued pursuant to a stipulation or Proposed Decision
  - Subject to review and approval by the Board

## Disciplinary Cases

### How Did We Get Here?

- The person has a license
- The Board is taking action against the person's license



## Disciplinary Cases

### Essential Presumptions

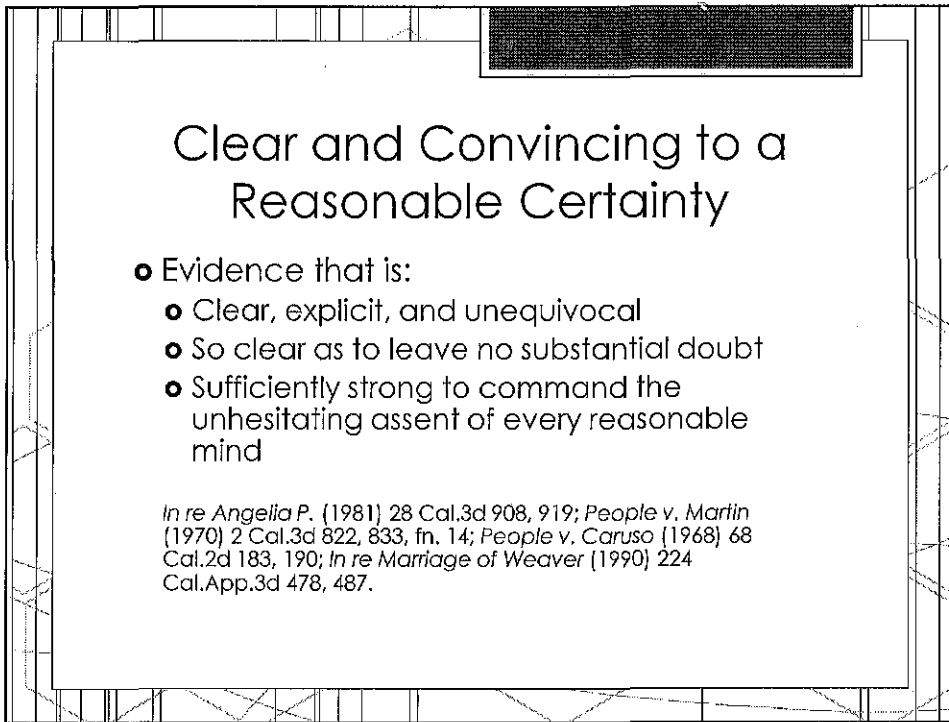
- Before disciplinary action, these steps have occurred:
  - A complaint has been made or an issue has been brought to the Board's attention
  - An initial review has been performed
  - An investigation or review has established non-compliance
  - The Board is taking action against the license

## How Do I Make These Decisions?

- Step 1 – Determine the Type of Case
- Step 2 – Consider How the Case is Proposed to Be Resolved
- Step 3 – Review Your Tools
- Step 4 – Make the Decision With Public Protection in Mind

## Step 1 – Type of Case

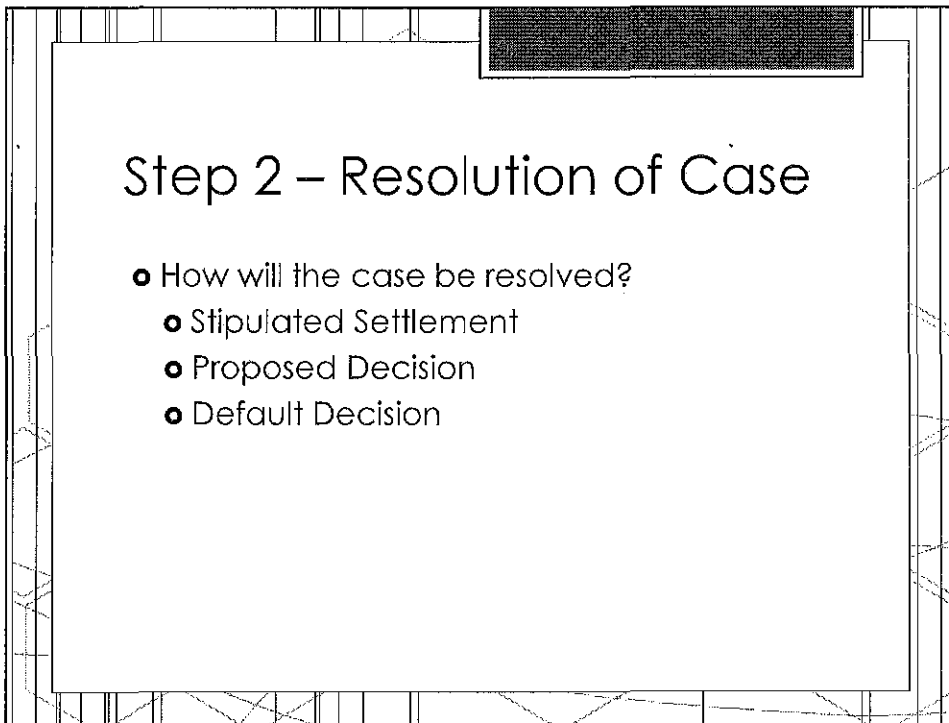
- **Licensing** – A License is Sought
  - Burden is on applicant to demonstrate fitness for licensure by a "Preponderance of the Evidence"
- **Discipline** – A Licensee Has Gone Awry
  - Burden is on the Board
  - Evidentiary Standard is "Clear and Convincing to a Reasonable Certainty"



## Clear and Convincing to a Reasonable Certainty

- Evidence that is:
  - Clear, explicit, and unequivocal
  - So clear as to leave no substantial doubt
  - Sufficiently strong to command the unhesitating assent of every reasonable mind

*In re Angelia P.* (1981) 28 Cal.3d 908, 919; *People v. Martin* (1970) 2 Cal.3d 822, 833, fn. 14; *People v. Caruso* (1968) 68 Cal.2d 183, 190; *In re Marriage of Weaver* (1990) 224 Cal.App.3d 478, 487.



## Step 2 – Resolution of Case

- How will the case be resolved?
  - Stipulated Settlement
  - Proposed Decision
  - Default Decision

## Stipulated Settlement

- A negotiated agreement to resolve the matter without a hearing
- Different rules – the concept of waiver applies
- Communication is authorized – Staff may be present in closed session
- Attorney General Memorandum – explains the case, its foundation and any shortcomings or deficiencies
- Licensing or Disciplinary cases

## Options When Deliberating on a "Stip"

- **Adopt**
- **Reject** and Set for Hearing
- Make **Counter Offer** and if Accepted, Will Dispose of the Matter
  - If the Counter Offer is rejected, the matter is set for hearing (most cases)



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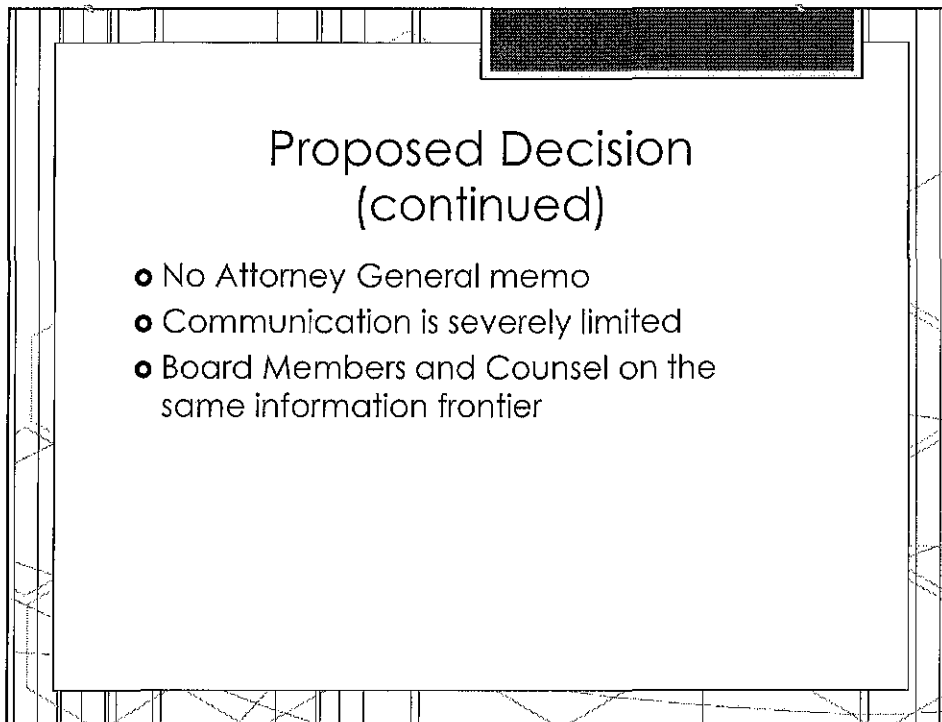
## Stipulated Settlement

- What might be the advantages of a stipulation?

A slide with a decorative border and a dark rectangular box at the top. The title "Proposed Decision" is centered. Below it are three bullet points: "Licensing and Disciplinary cases", "Issued by an Administrative Law Judge (ALJ) after having heard the matter alone", and "Contains: Findings of Fact, Legal Conclusions, and Credibility Determinations".

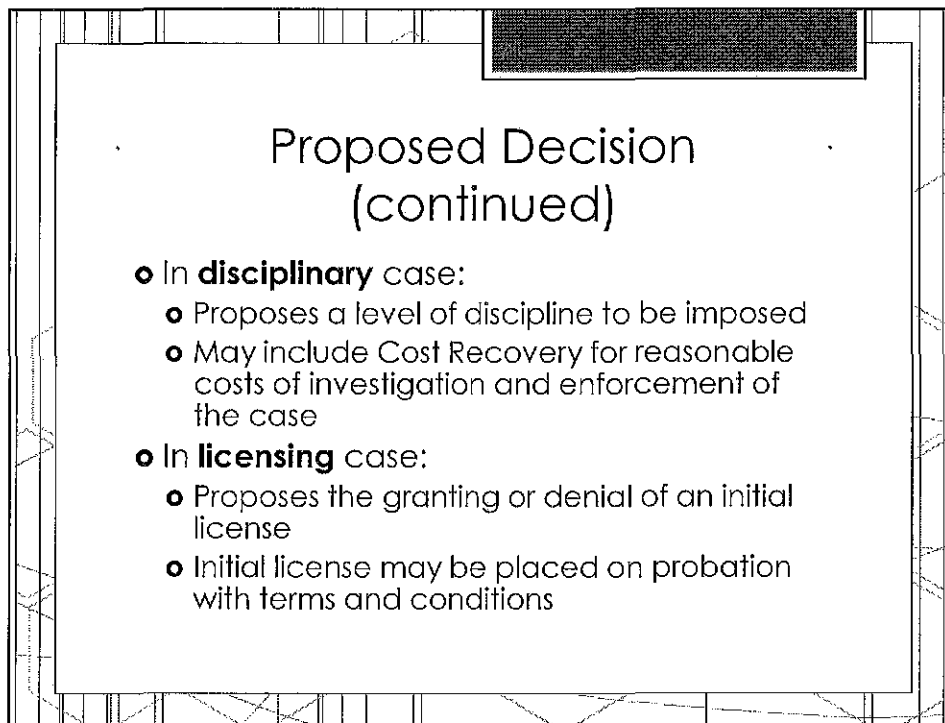
## Proposed Decision

- Licensing and Disciplinary cases
- Issued by an Administrative Law Judge (ALJ) after having heard the matter alone
  - **Except** cases where a license was denied due to an allegation that respondent has practiced OT without a license for more than 1 year
- Contains: Findings of Fact, Legal Conclusions, and Credibility Determinations



Proposed Decision  
(continued)

- No Attorney General memo
- Communication is severely limited
- Board Members and Counsel on the same information frontier



Proposed Decision  
(continued)

- In **disciplinary** case:
  - Proposes a level of discipline to be imposed
  - May include Cost Recovery for reasonable costs of investigation and enforcement of the case
- In **licensing** case:
  - Proposes the granting or denial of an initial license
  - Initial license may be placed on probation with terms and conditions

## What Are the Board's Options When Deliberating on a Proposed Decision?



## The Board Has Five Options

- **Adopt** the proposed decision in its entirety.
- **Reject** (non-adopt) the proposed decision and develop own decision based on a review of the record, including hearing transcripts. Must give the parties the opportunity to present either oral or written argument before the Board.
- **Remand** (return) the proposed decision to the ALJ for the taking of additional evidence. The proposed decision must address all points of evidence submitted. If it does not, the decision can be returned to the ALJ for additional consideration.
- Make **technical or minor changes** to the proposed decision.
- **Mitigate** (lessen, reduce) the proposed penalty and adopt the rest of the Proposed Decision.

## Proposed Decision: What are the Timelines?

- The ALJ provides a Proposed Decision within 30 days after the case is submitted
- Within 100 days of the Board's receipt of the Proposed Decision, the Board must decide whether to:
  - (1) adopt; (2) reject; (3) remand; (4) make technical or minor changes; or (5) mitigate

## Rejecting a PD: What are the Timelines?

- If the Board rejects the Proposed Decision:
  - The Board must issue its Final Decision within 100 days after it rejected the Proposed Decision; OR
  - Within 100 days after the Board received the hearing transcript

## Default Decisions

- Statement of Issues or Accusation
- Issued when the respondent fails to file a Notice of Defense within 15 days after the Statement of Issues or Accusation is served or fails to appear at the hearing
- Accusation (licensee) -- Board may take action based on the evidence without notice to the respondent
- Statement of Issues (non-licensee applicant) -- Board may take action without taking evidence

## Request to Vacate a Default Decision

- Within 7 days of the date the default decision is served on the respondent, he or she may request to have the decision vacated
- The Board has the discretion to vacate the decision and grant a hearing based on a showing of "good cause"

### Step 3 – Use Your Tools to Assist Your Deliberations

- Disciplinary Guidelines adopted by the Board
  - Suggested Level of Discipline
- Your counsel, if a legal question arises

### Possible Outcomes of Formal Discipline

- Revocation of a license
- Suspension of a license
- Probation following an actual or stayed (halted) suspension or stayed revocation
- Public Reproval (also referred to as Public Reprimand)
- Dismissal of the accusation

## Guidelines vs. Case

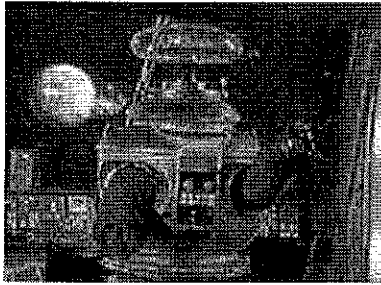
- What do the Guidelines Call For?
- What discipline does the Proposed Decision or Stipulation impose?
- Is there a deviation from the Guidelines?
  - Are there mitigating or aggravating facts?
  - Is the deviation warranted?
  - Did we show our work?

## Example:

- Licensee found to have engaged in gross negligence
- Disciplinary Guidelines call For 7 years probation, practice monitor, additional education, competency determination
- Proposed Decision imposes a single year of probation with no optional conditions

## Doing the Math

- That does not compute – *or does it?*



## Step 4 – Make Your Decision

- Public protection is your highest priority
- Keeping in mind:
  - Not punishment
  - The applicable evidentiary standards and burdens
  - Mitigating or aggravating circumstances
  - What's in the Administrative Record
  - The Decision is Public



## Other Cases Considered in Closed Session

- Petitions for Reinstatement
- Petitions for Modification or Termination of Probation
- Requests for Reconsideration

## Petitions for Reinstatement or Modification/Termination of Probation

- A licensee whose license has been:
  - Revoked, or
  - Suspended or placed on probation ...
- May petition the Board for:
  - License reinstatement, or
  - A reduction or termination of probation

## Petitions for Reinstatement or Modification/Termination of Probation

- The Board **may** refuse to consider a petition if the petitioner is:
  - Under sentence for any criminal offense, including court-imposed probation or parole, or
  - Required to register as a Sex Offender under Penal Code §290
- The Board **shall not** consider a petition if an accusation or petition to revoke probation is pending

## Petitions for Reinstatement or Modification/Termination of Probation

- Petitioner has burden to establish by "**clear and convincing evidence**" that he or she is entitled to the relief sought
- These cases are heard before the Board with an ALJ present
  - Board's Decision is drafted by the ALJ
- The Board has 100 days from the date the case was submitted (which is usually the date of the hearing) to issue its Decision

## Requests for Reconsideration

- The Board has issued its Final Decision
- Applicant or licensee submits a request for the Board to reconsider its Decision
- The Board may reconsider the petition itself or assign to an ALJ
- Consider:
  - All pertinent parts of the record; and
  - Additional evidence and argument

## Requests for Reconsideration: What are the Timelines?

- Board's power to order a reconsideration expires:
  - 30 days after the Decision was served; **or**
  - The effective date of the Decision, if less than the 30 days; **or**
  - At the end of a stay (max. 30 days) granted to allow a request for reconsideration to be submitted
- Board staff may grant a stay (max. 10 days) of that expiration to consider a petition that has already been submitted

