# Contested Disciplinary Action (Administrative Procedure Act)

From: 2014 Administrative Law Handbook, Office of the Attorney General

To State Agency and Local Government Officials, Administrators, Counsels and Staff:

Public officers and agencies work hard to serve Texans. In support of the multiple duties required of state and local entities, my office has prepared the 2014 Administrative Law Handbook as a reference tool and guide to three important state statutes. As the 83rd Legislature has now drawn to a close, this 2014 edition provides legislative and judicial updates concerning the Administrative Procedure Act, the Texas Public Information Act and the Texas Open Meetings Act.

The Administrative Procedure Act provides practice and procedure standards for the rules, rates and orders of state agencies that affect the lives of Texas residents in significant ways. The Public Information Act and Open Meetings Act are open government laws that apply to state and local governmental entities and contain important protections for the public.

This Handbook is intended as an aid to understanding the basic protections and requirements of these laws. It is not intended as a substitute for legal advice, but it will explain the fundamental principles of each statute. More detailed guidance on the Public Information Act and Open Meetings Act is also prepared by my office, and these publications are available on the attorney general's website at www.texasattorneygeneral.gov.

We are committed to giving state and local agencies the best possible legal advice and support, and I hope the 2014 Administrative Law Handbook will be a helpful resource to accomplish that goal. Please feel free to contact my office whenever you need legal assistance.

Sincerely,

Greg Abbott
Attorney General of Texas

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**The Administrative Procedure Act**

The Administrative Procedure Act (APA) governs two basic types of agency action: adjudication and rulemaking. Adjudication occurs when the "legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing."4 An agency's enabling statute ordinarily states when an adjudicative or contested case hearing is required. The APA sets out the procedures an agency and parties to a matter must follow in conducting a contested case.

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# ADJUDICATION

## Procedural Requirements Governing Contested Cases

Adjudication generally occurs when an agency refuses to license a person or entity, revokes an existing license or permit, assesses an administrative penalty, or otherwise takes agency action affecting a person or an entity's legal interests. A license includes any "state agency permit, certificate, approval, registration or similar form of permission required by law."6 The APA refers to adjudicative proceedings as "contested cases." According to the APA, a contested case is a proceeding "in which the legal rights, duties, or privileges of a party are to be determined by an agency after an opportunity for adjudicative hearing."7

The APA is a procedural act and does not grant a substantive right to a contested case.8 Compliance with the contested case provisions of the APA is required only if "some other law, statute, or rule requires that agency licensing action be preceded by notice and opportunity for hearing."9 Therefore, not all agency decisions necessitate compliance with the procedural protections afforded by the APA.10

The procedures governing contested cases, from the initiation of a case through judicial review, are outlined below in chronological order. . . .

## Initiating a Contested Case

Many different circumstances arise that cause an agency to deny a license, revoke an existing license or discipline a current licensee. An agency may decide to deny a license in response to the information provided in the license application. An agency may receive a complaint from a member of the public about a licensee. Other times, the agency's own staff may uncover information through investigation or through informal or authorized random compliance visits made to licensees or licensed facilities.

Typically, the agency informs the licensee of an investigation or complaint at the time when adverse action is first contemplated. This may be accomplished by means of a letter.

An agency will ordinarily also provide a licensee with a copy of any complaint against them. Except when an agency's enabling statute specifies otherwise, the law does not require that the licensee receive a separate notification of investigation prior to the official notice of hearing. An agency may also request information from third parties during an investigation.

## Stale Charges

There is no statute of limitations for pre-prosecution delays in agency disciplinary actions, but agencies may have rules that prohibit prosecutions after a certain time period.11 In a case where the agency waited over thirteen years to prosecute a doctor for molesting two female patients, the court found a due process violation as to one of the complaints, but not the other. In finding no due process violation, the court noted that the doctor had "contemporaneous notice" of one patient's complaint, because the patient confronted him during an office visit, wrote him a letter that resulted in a phone conversation regarding the incident, and also filed a written complaint with the county medical society shortly after the touching occurred. The court held that no due process violation had occurred because the doctor had "contemporaneous notice" of the complaint and "documentary evidence" existed, which makes a disciplinary action less likely to be prejudiced by the passage of time.12

## The Licensee's Opportunity to Respond

The APA provides that any revocation or suspension of a license governed by the Act must be preceded by notice and an opportunity to show compliance with the applicable law.

A revocation, suspension, annulment, or withdrawal of any license is not effective unless, before institution of state agency proceedings: (1) the agency gives notice by personal service or by registered or certified mail to the license holder of facts or conduct alleged to warrant the intended action; and (2) the license holder is given an opportunity to show compliance with all requirements of law for the retention of the license.13

The minimum legal requirements for notice and opportunity to show compliance are met by the agency's formal notice of hearing to the licensee.14 As discussed later in this Handbook under the heading Notice of Hearing, the formal notice of hearing requirement must always be met regardless of any other procedures an agency may choose to follow.

While not required to do so by law, an agency may offer an additional opportunity to show compliance when it notifies the licensee of the complaint. Additionally, agencies may hold informal conferences to provide licensees the opportunity to respond to complaints in person after the opportunity previously provided in writing. Agencies are not required to offer or hold informal conferences in every case. However, agencies may be required by statute to adopt procedures governing informal conference and disposition. The APA expressly allows a contested matter to be resolved informally. Agencies frequently include with the letter offering of informal conference an exhibit that details the allegations made against the licensee contained in the complaint previously sent to the licensee and any other allegations as developed through the agency's investigation up to that date. The exhibit should reflect how the allegations, if true, violate the applicable agency statute and rules.

The agency may be persuaded at the informal conference that no violation of the law has occurred. [See Figure 8: Notification of No Action Decision.] The failure of a licensee to respond in writing or to appear at an informal conference does not prevent the agency from proceeding with a formal hearing. Any information gained by the agency at the informal conference may be used at a subsequent formal hearing, unless the agency has stated otherwise to the licensee or in its rules governing informal conferences.

## Agreed Orders

Under the APA, an agency and a party may dispose of a contested case by agreement.15 For example, a licensee might agree to a suspension or administrative fine, if offered, rather than face a potentially harsher penalty if the matter proceeds to a contested case hearing. Any such agreement must be in writing and signed by all parties, including the full board. Occasionally, a licensee may voluntarily surrender the license. Also, an agency may sometimes determine that the licensee's conduct has been so egregious that nothing short of revocation is acceptable. In such a circumstance, the agency may request that the licensee voluntarily surrender the license.

## Notice of Hearing

If the agency chooses to proceed with a formal hearing, notice of the hearing is mandatory and must comply with the requirements of the APA.16 The notification for a hearing in a contested case must include:

(1) a statement of the time, place and nature of the hearing;

(2) a statement of the legal authority and jurisdiction under which the hearing is to be held;
(3) a reference to the particular sections of the statutes and rules involved; and
(4) a short, plain statement of the matters asserted.17

The State Office of Administrative Hearings also requires that the notice contain a citation to its rules.18

The agency must inform the licensee of the specific facts or conduct that caused the agency to take action against the licensee.19 The law does not require that an agency provide details of all the legal theories upon which it may base its action; however, the agency must specify which provisions of law or agency rules it believes the licensee may have violated.20 The agency should cite to each statute and rule that it alleges the licensee violated in order to provide the licensee both reasonable notice and the due process of law guaranteed by the state and federal constitutions.21 The agency should state the issues of fact and law that will control the result to be reached by the agency.

The APA allows for a party to request that the agency provide a more definite and detailed notice of hearing.22 If the party fails to make a timely request for a more definitive statement, the right to complain of defects in the agency's notice is waived.23 An agency should not, however, rely on the possibility that a party may waive the right to complain about the sufficiency of the substance of the notice. An agency should fully describe the actions and/or omissions that the individual is alleged to have committed. The person at the agency who prepares the notice should place himself or herself in the position of the licensee/applicant receiving the notice and answer the question, "Does the notice sufficiently advise me of the reason for and subject matter of the hearing?"

The APA requires the licensing agency to provide ten days' minimum notice in contested cases unless otherwise specified by the agency's enabling statute.24 The date of the hearing should not be included in calculating the date by which notice must be given.25

In some circumstances, the statutorily prescribed 10-day notice period actually may not be reasonable. An applicant or licensee may be entitled, as a matter of statutory right and constitutional due process of law, to show that additional time should be allowed in the interest of fairness.26 The administrative law judge will usually grant a timely motion for continuance when a party shows due diligence in, for example, hiring an attorney or attempting to secure witnesses. The decision to grant a continuance is within the hearing officer's discretion.27

## The State Office of Administrative Hearings

The State Office of Administrative Hearings (SOAH) was created in 1991 by the 72nd Texas Legislature as an independent agency to manage and conduct hearings in contested cases for most licensing and other state agencies.28 Most of the hearings it conducts are governed by the APA, SOAH rules of procedure,29 and applicable statutes, rules and written policies of the referring agency.30

The SOAH was originally created to serve agencies that did not employ persons whose only duty was to preside as hearings officers over matters related to contested cases before state agencies. Certain other agencies not required by statute to use the SOAH have contracted with it to have their hearings conducted by its administrative law judges (ALJs). The SOAH has also been given additional jurisdiction to conduct hearings for other agencies since its creation.31

The SOAH currently conducts hearings for approximately 60 state agencies, including the Public Utility Commission, Texas Commission on Environmental Quality, Texas Department of Insurance, Employees Retirement System, Texas Alcoholic Beverage Commission, Texas Medical Board, Texas Department of Agriculture, Workers' Compensation Division of the Texas Department of Insurance, Texas Board of Chiropractic Examiners, Texas Board of Dental Examiners, and other licensing and regulatory agencies.

The mission of the SOAH is to ensure that contested case hearings are conducted fairly, objectively, promptly and efficiently and that they result in quality and timely decisions. The APA's prohibition on ex parte communications applies to ALJs; therefore, parties should not expect ALJs to field telephone calls regarding their cases. Procedural questions are usually referred to the Docketing Division or support staff for assistance. While most SOAH hearings are conducted in Travis County, some cases are heard in other counties when required by law.

An agency initiates a proceeding at the SOAH by requesting a setting of hearing or requesting assignment of an ALJ to a case. The form "Request to Docket Case" is available online at: http://www.soah.state.tx.us/_files-resources/forms/RequestToDocket.doc. If the agency requests a setting of hearing, the agency usually seeks a specific date or range of dates for the hearing. The SOAH's Docketing Division sets the case as close to that time as the calendar permits and confirms the hearing date with the referring agency. Generally, the referring agency is required to issue the Notice of Hearing to the parties.

An ALJ is assigned to the case approximately one week before the hearing date unless procedural disputes arise or some other reason requires an earlier assignment. If the agency requests the assignment of an ALJ, the case is immediately assigned. The ALJ may set the hearing date, conduct prehearing conferences, and issue orders to establish case-specific procedures or resolve interim disputes. More complex cases usually are referred to the SOAH through a request for assignment of an ALJ.

SOAH rules provide that requests for relief not made during the hearing or at a prehearing conference must be in writing, filed with the SOAH (and the referring agency, if the rules for that agency so provide) and served on all parties.32 Service should be made and response time allowed before a ruling is expected.

An ALJ has the authority on his/her own motion or on motion of a party, after notice and hearing, to impose sanctions in certain instances.33 Sanctions can be imposed for discovery abuses, pleading abuses and failure to obey certain ALJ orders.34

The APA allows an occupational licensing agency, by rule, to have the ALJ render the final decision in a contested case brought by the agency.35 For these agencies, the ALJ is required to render a decision within 60 days after the close of the hearing or deadline for filing briefs or other post-hearing documents.36 The decision deadline may be extended only with the consent of all parties.

For other agencies as well as occupational licensing agencies that retain the power to render the final decision, the ALJ issues a written Proposal for Decision (PFD) for consideration by the referring agency.37 The ALJ issues a PFD after hearing the evidence and final oral or written arguments by the parties.

The Licensing and Enforcement Team of SOAH conducts contested cases involving agency actions against licensees including proposed suspension or revocation of a license or seeking administrative penalties. Agencies that refer these cases include: the Texas Medical Board, State Board for Educator Certification, Department of Health Services, the Racing Commission and the Board of Public Accountancy, to name a few.

The Tax Team of SOAH adjudicates cases referred by the Comptroller, which include, tax protest hearings, property value study hearings and hearings on forfeiture of rights to do business.

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The SOAH Alternative Dispute Resolution (ADR) Team handles cases in which an agency seeks to reach a mediated resolution to an enforcement case. The ADR Team resolves nursing home enforcement cases brought by the Department of Aging and Disability Services through binding arbitration. It also resolves contract claims brought against state agencies, including universities pursuant to chapter 2260 of the Government Code.

## Discovery in Contested Cases

The APA provides for discovery once the Notice of Hearing has been issued. Under SOAH rules, discovery is available once SOAH acquires jurisdiction (when an agency files a Request to Docket Case form).38 Discovery is the process by which parties in a contested case obtain information from each other about the matters at issue. The Texas Rules of Civil Procedure govern the discovery process for litigation in trial courts and are followed to some extent in contested cases.39

The APA and SOAH rules provide parties with a broad range of discovery tools. First, an agency may issue a subpoena upon a showing of good cause and, where non-parties are involved, the deposit of specified amounts of money.40 The subpoena is to ensure that a witness, either a party or a non-party, comes to the hearing. The subpoena may also require that the witness bring specified documents or things to the hearing. Unless the SOAH's rules specify otherwise, the state agency issues the subpoena, not the SOAH ALJ.41

Parties may also take the deposition of a witness. The state agency, and not the SOAH ALJ, may issue a commission to take a deposition upon the motion of any party to a contested case.42 [See Figure 16: Commission for Deposition.] The APA specifies the format for the commission. Both parties and non-parties may be deposed upon the issuance of a commission; however, fees must be paid to depose non-parties.43 The issuance of a commission is a ministerial task; an agency has virtually no discretion not to issue a properly filed commission. If the agency objects to the taking of a deposition, the attorney representing the agency in the case may file a motion to quash with the ALJ. Depositions may be used in the contested case hearing.44

The third type of discovery authorized by the APA is production of documents by parties to a contested case.45 The party requesting production files a motion with notice to all parties. The agency has discretion to order or refuse to order production of documents. A request for production is the vehicle for parties to obtain the identities of parties or witnesses and reports of expert witnesses. The APA further authorizes a party to file a motion, similar to a motion for production of documents, to enter onto property to gather information material to the issues in a 46 case.

Finally, a person (party or non-party) may obtain an order compelling a party to disclose a previously made statement.47 The APA also allows parties to discover documents that may name possible parties, witnesses and reports made by experts.48

By rule, the SOAH has provided to parties in contested cases other methods of discovery that are permitted under rules of civil procedure. Parties may obtain discovery by requests for disclosure, as described by Rule 194 of the Texas Rules of Civil Procedure; oral or written depositions; written interrogatories to a party; requests of a party for admission of facts and the genuineness or identity of documents or things; requests and motions for

production, examination, and copying of documents and other tangible materials; motions for mental or physical examinations; and requests and motions for entry upon and examination of real property.49

Rules of privileges recognized by law may be asserted in contested cases to avoid discovery, such as the privileges provided in the Texas Rules of Civil Procedure and the Rules of Evidence.50 The exceptions to disclosure of information in the Public Information Act are not privileges from discovery and may not be used to avoid producing otherwise discoverable matters.51

## The Contested Case Hearing

Prior to proceeding on the merits of a complaint in a contested case hearing, proof of notice of the hearing must be established in the hearing record.52 The agency must prove its compliance not only with the APA, but also with any additional requirements of the SOAH's and the agency's own statute or rules. For this reason, the Notice of Hearing should be sent by certified mail, with return receipt requested. At the start of the hearing, the agency should offer the "green card," which enters the receipt of the mail into evidence. If the "green card" is not available, the agency should be prepared to offer testimony or an affidavit proving that the notice was sent. Though parties should use certified mail whenever possible, SOAH rules set out acceptable methods of service and presumptions of receipt.53 SOAH rules also set out specific requirements for the filing of documents and maintenance of pleadings on the SOAH Case Information System.54

The agency's enabling statute or rule will establish the burden of proof on the issues before the ALJ. For denial or revocation of a license, the burden of proof is on the agency to establish, based on a preponderance of the evidence, the factual and legal basis for the action the agency wishes to take.55 The agency need not prove its case "beyond a reasonable doubt," the standard in criminal cases.56 Parties have the right to be represented by an attorney if they so choose.57

Agencies often ask whether an application for the renewal of a license should be considered during the pendency of a contested case regarding that license. The APA indicates that it is not necessary to consider an application for renewal of a license when there is a pending proceeding because the existing license remains in effect until the case is finally determined.58

## Default Judgments

If a party without the burden of proof fails to appear in person, or by telephone as allowed by the SOAH procedural rules, the ALJ may, on motion of the other party, recommend to the referring agency the entry of a default judgment. A default judgment will be considered under this section only when the moving party can prove that proper notice of the hearing under the APA and the SOAH rules was given to the party that failed to appear. The notice must include a disclosure in at least 12-point bold type of the fact that on the failure of a party to appear, the factual allegations in the notice may be deemed admitted as true, and the relief sought may be granted by default.59

## Evidence

All parties in a contested case are entitled to an opportunity to present and respond to evidence and argument.60 The ALJ's decision is based on the facts proven through evidence admitted at the administrative hearing.61 The form of evidence ordinarily includes

documents, photographs, tangible objects and the testimony of witnesses, either live or by teleconference or videoconference, at the hearing or through depositions taken prior to the hearing. Typically, agencies offer certified copies of documents in an agency's files that were created in the course of an investigation leading up to a hearing.

Expert testimony is necessary to establish certain record evidence, such as a standard of care and whether a certain act or omission falls below the standard of care.62 The professional staff of a state agency may provide this testimony. Generally, board members should not participate as witnesses in the hearing.63 The ALJ resolves objections about whether any particular evidence is admissible.

## Ex Parte Communications

An ex parte communication is a direct or indirect communication between a decision-maker in a contested case and any other person without giving all parties to the contested case notice and an opportunity to participate in the communication. The APA provides a general prohibition on ex parte communication.64

Unless required for the disposition of an ex parte matter authorized by law, a member or employee of a state agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case may not directly or indirectly communicate in connection with an issue of fact or law with a state agency, person, party, or representative of those entities, except on notice and opportunity for each party to participate. 65

The policy behind the prohibition on ex parte communication arises from the parties' rights to an unbiased decision-making process. Ex parte communications deprive the parties of a contemporaneous opportunity to communicate with the decision-maker. The ex parte prohibition reflects the requirement that decisions be based only on evidence in the administrative hearing record by limiting communications with decision-makers outside that record.66 It is imperative, therefore, that no person, including the licensee or agency staff, contact the SOAH ALJ or board members who will be making the decision in a contested case.67

## Findings of Fact and Conclusions of Law

The APA provides that a decision or order that may become final and that is adverse to a party in a contested case be in writing or stated in the record. It must include findings of fact and conclusions of law, separately stated.68

The APA's requirement for findings of fact and conclusions of law serves three primary purposes. First, the requirement encourages the decision-maker to fully consider the evidence. It acts as a check on agency action that might otherwise be based on a careless or arbitrary decision-making process. Second, the requirement for findings and conclusions ensures that parties who may be adversely affected by an action are apprised fully of the facts upon which the action is based. If they are so informed, they may better prepare for and pursue an appeal. Finally, the findings and conclusions in final orders enable the courts to properly review such orders on appeal.69 Findings of fact should be such that a court, on reading them, could fairly and reasonably say that the findings support the conclusions of law contained in the final order.70

Findings of fact and conclusions of law must be based only on record evidence or matters officially noticed.71 Certain enabling statutes set forth criteria that must be met before the agency can take action in particular instances; these criteria must be reflected in findings of fact and conclusions of law.72

## Proposal for Decision

Following the close of the record, the ALJ will prepare a Proposal for Decision (PFD). [See Figure 18: Proposal for Decision.] In a contested case not heard by the SOAH, the agency's hearings examiner will usually issue a PFD. A PFD must be issued if the board members have not heard the case or read the hearing record and the decision is adverse to a party other than the 73 agency.

The PFD must contain a statement of the reasons for the decision and each finding of fact and conclusion of law necessary to support the proposed decision. The PFD may contain a procedural and factual history of the case, an analysis of the evidence and a summary of the ALJ's recommendation.

After the PFD has been served on all parties, the parties may file exceptions to the PFD and replies to exceptions to the PFD. The ALJ may amend the PFD in response to exceptions and replies to the exceptions.74 At a public meeting, the board must consider the PFD and decide whether to accept the recommended findings of fact and conclusions of law, and when applicable, the sanction to be imposed. At the meeting, the board may invite the ALJ to present the final PFD to the governing body of the agency.

## Changing an ALJ's Proposed Findings of Fact and Conclusions of Law

The APA sets out the parameters of an agency's discretion to change the findings of fact and conclusions of law proposed by an ALJ.75 When an agency seeks to change an ALJ's finding of fact or conclusion of law, it must state in writing its reasons for each change and the legal basis for it, usually in the final order.76

A state agency is not prevented from rejecting an ALJ's recommended sanction, but it does need to adhere to section 2001.058(e) of the APA and explain why the agency chooses not to follow the recommendation if it is set out as a conclusion of law.77 Within the bounds of its statutory authority, an agency has broad discretion to determine the appropriate sanction when a violation of the licensing statute or rule has been established.78 The agency is the decision-maker concerning sanctions for violations of the law or its rules. For this reason, agencies may impose a sanction not recommended by the ALJ. An agency is not required to give presumptively binding effect to an ALJ's recommendations regarding sanctions in the same manner as with other findings of fact and conclusions of law.79 The APA does allow an occupational licensing agency, by rule, to delegate to the SOAH ALJ the authority to make the final decision in a licensing case.80 An agency should also ensure that the penalty is assessed in accordance with its own statutes and rules, including an applicable penalty matrix.

## Final Order

As previously discussed, the final order rendered in a contested case must be in writing or stated in the record.81 The final order must contain findings of fact and conclusions of law, separately stated.82 If the order requires the respondent to perform a certain act, the effective date of that performance should be clearly spelled out in the order. For instance, the beginning date of a license suspension should be separately stated from the effective date of the order. A contingency clause, in case the order is appealed, should also be included. All board members voting in favor of the order should sign a written order. [See Figure 19: Final Order.] All parties to a contested case must be notified of the final order, either in person or by first class mail.83

## Motion for Rehearing and Judicial Review of Contested Cases

The APA states:

> A person who has exhausted all administrative remedies available within a state agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter.84

A party who wishes to challenge a final decision must first file a motion for rehearing with the agency, which the agency may grant or deny.85 [See Figure 20: Receipt of Motion for Rehearing and Figure 21: Board Action on Motion for Rehearing.] A party has 20 days from the date of notification of the agency's decision or order.86 A party or attorney of record notified by mail of the agency's final action is presumed to have been notified on the third day after the date on which the notice is mailed.87 A party may rebut the presumption of notice with contrary evidence, which may render the motion for rehearing timely.88 Unless acted on by the agency, the motion for rehearing is overruled by operation of law 45 days after the date of notification.89 An agency is not required to notify a party that the motion for rehearing has been overruled by operation of law. Lack of notice that a decision is overruled by operation of law does not toll the deadline for filing an appeal.90 An agency has no power to act on a motion for rehearing that has been overruled by operation of law.91

The motion for rehearing is one last opportunity for the agency to correct any errors a party brings to the agency's attention. The agency has no authority to rehear a case on its own motion after overruling a motion for rehearing or after an order is final by operation of law.92 An agency's refusal to grant a rehearing does not constitute arbitrary and capricious action warranting a reversal by a district court, unless a clear abuse of discretion is demonstrated.93

An appealing party has 30 days from the date the motion for rehearing is overruled to file a lawsuit in district court to review the agency's decision.94 The procedural prerequisites to an appeal of a final order are mandatory and jurisdictional; they cannot be waived and must be strictly followed.95 For example, the appealing party must have filed a motion for rehearing, and an appeal is limited in court to matters raised in the motion for rehearing.96 A motion for rehearing must notify the agency of the error claimed so that the agency can either correct or defend the error.97 A motion for rehearing can be "so indefinite, vague and general as to constitute no motion for rehearing at all."98 Under these circumstances, the agency may be able to get an appeal of its order dismissed on the grounds that the plaintiff has failed to invoke the jurisdiction of the court. In most cases where the appealing party has filed any motion for rehearing, the court will find jurisdiction and then reach the question whether the motion preserves the issues raised on appeal. If an appealing party files its suit for judicial review before the motion for rehearing is overruled, the court will lack jurisdiction over the appeal.99

Absent specific legislative authority, there is no inherent right to judicial review unless an agency's decision adversely affects a constitutional right.100 The APA grants a right to judicial review, and an agency's enabling statute may also expressly provide a right of judicial review.101

Once an appeal of an administrative order is filed in the district court, the court or a party may, by motion, ask that the case be transferred to the Third Court of Appeals for review, without a decision from the district court. In order for a transfer to be granted, the district court has to find that the public interest requires a prompt, authoritative ruling on the legal issues and that the case ordinarily would be appealed. Both courts must concur in the transfer. Once the court of appeals grants transfer, the decision of the agency is subject

to review by the court of appeals, and the administrative record and the district court records are filed with the appellate court. 102

## Substantial Evidence Review Versus De Novo Review

Judicial review of agency actions subject to the APA are of two types: substantial evidence review and de novo review. Substantial evidence review requires that the court determine whether the evidence as a whole is such that reasonable minds could have reached the same conclusion the agency reached.103 In de novo review, the reviewing court tries all issues of fact and law as if the agency had not acted.104 An agency's enabling statute specifies which of these two standards of review is applicable. If the enabling statute is silent, the APA provides for substantial evidence review.105

In a substantial evidence appeal, the reviewing court may affirm the final order in whole or in part. The reviewing court shall reverse or remand the case to the administrative agency if:

> . ..
> (2) . . . substantial rights of the [plaintiff] have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> (A) in violation of constitutional or statutory provision;
> (B) in excess of the agency's statutory authority;
> (C) made through unlawful procedure;
> (D) affected by any other error of law;
> (E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or
> (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.106

Substantial evidence review requires that the agency transmit an original or certified copy of the administrative record to the reviewing court.107 [See Figure 22: Affidavit Certifying Administrative Record.] The record in a contested case contains, among other things, the hearing record, including all evidence admitted and matters officially noticed, the pleadings filed by the parties, the PFD and the final order.108 The agency is required to prepare and file either the original record or a certified copy with the clerk of the district court. The record filed with the clerk may be shortened by agreement.109

Under the substantial evidence standard of review, the court may not hear new evidence, except in the most limited circumstance.110 The appealing party has the burden of proof to demonstrate invalidity of the final order or an absence of substantial evidence.111 The court, therefore, must presume that the agency's final order is valid and supported by substantial evidence.112

De novo review, in contrast to substantial evidence review, authorizes the reviewing court to conduct an evidentiary hearing on the very same issues presented at the administrative hearing. The administrative record in a de novo appeal is not required except to show that the district court has jurisdiction to hear the case.113 The reviewing court will essentially decide the case anew by hearing evidence from all parties.114

Suits for review under the substantial evidence rule do not affect the enforcement of an agency's final order.115 Therefore, when an agency has revoked or suspended a professional license, the licensee seeking judicial review of the final order may seek an injunction to prevent the enforcement of the final order.116 Some enabling statutes set out the circumstances under which a court may enjoin the agency's order pending appeal. On the other

hand, under de novo review, filing an appeal vacates the agency's final order, and thereby vacates an agency's decision revoking or suspending a license. 117

## Judicial Enforcement Remedies

### Responding to Violations of Agency Statutes, Rules and Orders

What if, after an agency renders a final order affecting a person, the person refuses to comply with the final order? What if an agency revokes a license, but the licensee continues to practice the profession? In these instances, the agency may seek further administrative or judicial remedies to enforce its final orders.

An agency's enabling statute often provides specific requirements for enforcement proceedings. The enabling statute may specify that enforcement of the enabling statute be through the attorney general or, alternatively, through the county or district attorney.

### Legal Basis for Enforcement Actions by the Attorney General

In addition to specific authority granted in any particular agency's enabling legislation, the attorney general is authorized to bring enforcement actions under both the APA and the Texas Constitution. Under the APA, the attorney general may bring an action in district court upon the request of the agency whose orders or rules are to be enforced.

The Attorney General, on the request of a state agency to which it appears that a person is violating, about to violate, or failing or refusing to comply with a final order or decision or an agency rule, may bring an action in a district court authorized to exercise judicial review of the final order or decision or the rule to:

(1) enjoin or restrain the continuation or commencement of the violation; or

(2) compel compliance with the final order or decision or the rule.118

Frequently, before a lawsuit is filed, the agency or the attorney general will send the offending party a Cease and Desist Order. [See Figure 23: Cease and Desist Order.] The purpose of the Cease and Desist Order is to obtain voluntary compliance with the law and to formally advise the individual that further legal action will be taken by the agency unless the individual complies with the agency's order or rules.

If the individual continues to violate the agency statute or rules, the agency may seek an injunction to permanently enjoin the action. Injunctions authorized by statute will be granted so long as the agency shows that a statute is being violated.119 Suits for injunctive relief will often include a request for civil penalties and attorney's fees when authorized by an agency's enabling statute.120 If an individual violates the injunction, the agency may seek to have the individual held in civil or criminal contempt.

## Endnotes:

3 TEX. GOV'T CODE §§ 552.001-.353.
4 TEX. GOV'T CODE § 2001.003(1).
5 TEX. GOV'T CODE § 2001.003(6)(A).
6 TEX. GOV'T CODE § 2001.003(2).
7 TEX. GOV'T CODE § 2001.003(1).
8 Tex. Dep't of Ins. v. State Farm Lloyds, 260 S.W.3d 233, 243-44 (Tex. App.—Austin 2008, no pet.).
9 Tex. Dep't of Ins. v. State Farm Lloyds, 260 S.W.3d at 243-44; Tex. Logos, L.P. v. Tex. Dep't of Transp., 241 S.W.3d 105, 123 (Tex. App.—Austin 2007, no pet.).
10 Best & Co. v. Tex. State Bd. of Plumbing Exam'rs, 927 S.W.2d 306 (Tex. App.—Austin 1996, writ denied).

11 See, e.g., Appraiser Licensing and Certification Board rule, 22 TEX. ADMIN. CODE § 153.20(f) (two-year limitation on prosecution).
12 Granek v. Tex. Bd. of Med. Exam'rs, 172 S.W.3d 761, 775 (Tex. App.—Austin 2005, no pet.).
13 TEX. GOV'T CODE § 2001.054(c).
14 Guerrero-Ramirez v. Tex. State Bd. of Med. Exam'rs, 867 S.W.2d 911, 917-18 (Tex. App.—Austin 1993, no writ).
15 TEX. GOV'T CODE § 2001.056.
16 The agency should also review its enabling statute because the agency's requirements for notice of hearing may be more extensive than those of the APA.
17 TEX. GOV'T CODE § 2001.052.
18 1 TEX. ADMIN. CODE § 155.401(a).
19 TEX. GOV'T CODE § 2001.051.
20 Tex. State Bd. of Pharmacy v. Seely, 764 S.W.2d 806, 813-15 (Tex. App.—Austin 1988, writ denied).
21 Madden v. Tex. State Bd. of Chiropractic Exam'rs, 663 S.W.2d 622, 626-27 (Tex. App.—Austin 1983, writ ref'd n.r.e.).
22 TEX. GOV'T CODE § 2001.052(b).
23 Tex. State Bd. Dental Exam'rs v. Silagi, 766 S.W.2d 280, 284 (Tex. App.—El Paso 1989, writ denied).
24 TEX. GOV'T CODE § 2001.051; Gibraltar Sav. Ass'n v. Franklin Sav. Ass'n, 617 S.W.2d 322, 325 (Tex. App.—
Austin 1981, writ ref'd n.r.e.). The 10 days referenced is generally counted as 10 calendar days.
25 Silagi, 766 S.W.2d at 284.
26 Gibraltar Sav. Ass'n v. Franklin Sav. Ass'n, 617 S.W.2d 322, 328 (Tex. App.—Austin 1981, writ ref'd n.r.e.).
27 State v. Crank, 666 S.W.2d 91 (Tex. 1984).
28 TEX. GOV'T CODE §§ 2003.001-.916.
29 TEX. GOV'T CODE § 2003.050; see 1 TEX. ADMIN. CODE § 155.1-.507.
30 TEX. GOV'T CODE §§ 2003.050, 2001.058(c).
31 A contract between SOAH and the agency may be required. See TEX. GOV'T CODE § 2003.024.
32 1 TEX. ADMIN. CODE §§ 155.301, .305.
33 TEX. GOV'T CODE § 2003.0421.
34 TEX. GOV'T CODE § 2003.0421(a).
35 TEX. GOV'T CODE § 2001.058(f).
36 TEX. GOV'T CODE § 2001.058(f)(1).
37 TEX. GOV'T CODE § 2001.063; Suburban Util. Corp. v. Pub. Util. Comm'n, 652 S.W.2d 358, 361 (Tex. 1983); Tex. Health Enter. v. Tex. Dep't of Health, 925 S.W.2d 750, 756 (Tex. App.—Austin 1996), rev'd
per curiam, 949 S.W.2d 313 (Tex. 1997).
38 TEX. GOV'T CODE §§ 2001.091-.093; 1 TEX. ADMIN. CODE §§ 155.51(a), .251.
39 TEX. GOV'T CODE § 2001.091(a); 1 TEX. ADMIN. CODE §§ 155.3(g), .251.
40 TEX. GOV'T CODE § 2001.089.
41 TEX. GOV'T CODE § 2003.050.
42 TEX. GOV'T CODE § 2001.094.
43 TEX. GOV'T CODE § 2001.103.
44 TEX. GOV'T CODE § 2001.102.
45 TEX. GOV'T CODE § 2001.091.
46 TEX. GOV'T CODE § 2001.091.
47 TEX. GOV'T CODE § 2001.093.
48 TEX. GOV'T CODE § 2001.092.
49 1 TEX. ADMIN. CODE § 155.251.
50 TEX. GOV'T CODE § 2001.083.
51 TEX. GOV'T CODE § 552.005(b).
52 Tunnell v. Tex. Real Estate Comm'n, 761 S.W.2d 123, 124 (Tex. App.—Dallas 1988, no writ).
53 1 Tex. Admin. Code § 155.103.
54 1 Tex. Admin. Code § 155.101.
55 Beaver Express Serv., Inc. v. R.R. Comm'n, 727 S.W.2d 768, 775 n.3 (Tex. App.—Austin 1987, writ denied).
56 Tex. State Bd. of Dental Exam'rs v. Sizemore, 759 S.W.2d 114, 116-17 (Tex. 1988).
57 TEX. GOV'T CODE § 2001.053.
58 TEX. GOV'T CODE § 2001.054(b).
59 1 TEX. ADMIN. CODE § 155.501(b).
60 TEX. GOV'T CODE § 2001.051(2).
61 R.R. Comm'n v. Lone Star Gas Co., 611 S.W.2d 908, 910 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.).

62 E.I. du Pont de Nemours & Co., Inc. v. Robinson, 923 S.W.2d 549 (Tex. 1995).
63 Rogers v. Tex. Optometry Bd., 609 S.W.2d 248 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).
64 Acker v. Tex. Water Comm'n, 790 S.W.2d 299, 300 (Tex. 1990).
65 TEX. GOV'T CODE § 2001.061(a).
66 Cnty. of Galveston v. Tex. Dep't of Health, 724 S.W.2d 115, 119-24 (Tex. App.—Austin 1987, writ ref'd n.r.e.).
67 See also TEX. GOV'T CODE § 2003.0412 (extending ex parte communication prohibition to SOAH matters).
68 TEX. GOV'T CODE § 2001.141.
69 Tex. Health Facilities Comm'n v. Charter Med.-Dallas, Inc., 665 S.W.2d 446, 452 (Tex. 1984).
70 Tex. Health Facilities Comm'n v. Presbyterian Hosp. N., 690 S.W.2d 564, 567 (Tex. 1985).
71 TEX. GOV'T CODE § 2001.141(c); State Banking Bd. v. Allied Bank Marble Falls, 748 S.W.2d 447 (Tex. 1988).
72 Tex. Health Facilities Comm'n v. Charter Med.-Dallas, Inc., 665 S.W.2d 446, 452 (Tex. 1984); Prof'l Mobile Home Transp. v. R.R. Comm'n, 733 S.W.2d 892, 897 (Tex. App.—Austin 1987, writ ref'd n.r.e.).
73 TEX. GOV'T CODE § 2001.062.
74 TEX. GOV'T CODE § 2001.062(d); 1 TEX. ADMIN. CODE § 155.507.
75 TEX. GOV'T CODE § 2001.058(e); see also F. Scott McCown and Monica Leo, When Can an Agency Change the Findings or Conclusions of an Administrative Law Judge, Part Two, 51 Baylor L. Rev. 63 (Winter, 1999); When Can an Agency Change the Findings or Conclusions of an Administrative Law Judge, 50 Baylor L. Rev. 65 (Winter 1998).
76 Tex. State Bd. of Dental Exam'rs v. Brown, 281 S.W.3d 692, 701-04 (Tex. App.—Corpus Christi 2009, pet. denied).
77 Tex. State Bd. of Dental Exam'rs v. Brown, 281 S.W.3d at 697-98.
78 Tex. State Bd. of Dental Exam'rs v. Brown, 281 S.W.3d at 697-98; Froemming v. Tex. State Bd. of Dental Exam'rs, 380 S.W.3d 787, 791-92 (Tex. App.—Austin 2012, no pet.); Fay-Ray Corp. v. Tex. Alcoholic Beverage Comm'n, 959 S.W.2d 362, 369 (Tex. App.—Austin 1998, no pet.) ("[A]n agency has broad discretion in determining which sanction best serves the statutory policies committed to the agency's oversight.") ("An agency's decision in determining an appropriate penalty will not be reversed unless an abuse of discretion is shown."); Firemen's & Policemen's Civil Serv. Comm'n v. Brinkmeyer, 662 S.W.2d 953, 956 (Tex. 1984) ("The propriety of a particular disciplinary measure . . . is a matter of internal administration with which the courts should not interfere . . . .").
79 Granek v. Tex. State Bd. of Med. Exam'rs, 172 S.W.3d 761, 781 (Tex. App.—Austin 2005, no pet.); Grotti v. Tex. State Bd. of Med. Exam'rs, No. 03-04-00612-CV, 2005 WL 2464417 (Tex. App.—Austin Oct. 6, 2005, no pet.) (mem. op.).
80 TEX. GOV'T CODE § 2001.058(f).
81 TEX. GOV'T CODE § 2001.141(a).
82 TEX. GOV'T CODE § 2001.141(b).
83 TEX. GOV'T CODE § 2001.142(a).
84 TEX. GOV'T CODE § 2001.171.
85 TEX. GOV'T CODE § 2001.145.
86 TEX. GOV'T CODE §§ 2001.142, .146.
87 TEX. GOV'T CODE § 2001.142(c).
88 Temple Indep. Sch. Dist. v. English, 896 S.W.2d 167, 169 (Tex. 1995).
89 TEX. GOV'T CODE §§ 2001.142, .146(c).
90 Hernandez v. Tex. Dep't of Ins., 923 S.W.2d 192 (Tex. App.—Austin 1996, no writ).
91 Jones v. State Bd. for Educator Certification, 315 S.W.3d 237 (Tex. App.—Austin 2010, pet. denied).
92 Young Trucking, Inc. v. R.R. Comm'n, 781 S.W.2d 719, 720 (Tex. App.—Austin 1989, no writ); Sexton v. Mount Olivet Cemetery Ass'n, 720 S.W.2d 129, 145-46 (Tex. App.—Austin 1986, writ ref'd n.r.e.).
93 R.D. Oil Co. v. R.R. Comm'n, 849 S.W.2d 871, 875 (Tex. App.—Austin 1993, no writ.); Tex. State Bd. of Dental Exam'rs v. Silagi, 766 S.W.2d 280, 285 (Tex. App.—El Paso 1989, writ denied).
94 TEX. GOV'T CODE §§ 2001.144, .176.
95 TEX. GOV'T CODE § 311.034; Prairie View A&M Univ. v. Chatha, 381 S.W.3d 500, 514-15 (Tex. 2012).
96 Hill, 40 S.W.3d at 679; Burke v. Cent. Educ. Agency, 725 S.W.2d 393 (Tex. App.—Austin 1987, writ ref'd n.r.e.).
97 Suburban Util. Corp. v. Pub. Util. Comm'n, 652 S.W.2d 358, 365 (Tex. 1983); Hamamcy v. Tex. State Bd. of Med. Exam'rs, 900 S.W.2d 423, 425 (Tex. App.—Austin 1995, writ denied).
98 Hamamcy, 900 S.W.2d 423, 425; Burke, 725 S.W.2d at 397.
99 Lindsay v. Sterling, 690 S.W.2d 560, 563 (Tex. 1985); Marble Falls Indep. Sch. Dist. v. Scott, 275 S.W.3d 558 (Tex. App.—Austin 2008, pet. denied).

100 Continental Cas. Ins. Co. v. Functional Resoration, 19 S.W.3d 393, 404 (Tex. 2002); Burkhalter v. Tex. State Bd. of Med. Exam'rs, 918 S.W.2d 1 (Tex. App.—Austin 1996, no writ).
101 TEX. GOV'T CODE § 2001.171; Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc., 145 S.W.3d 170 (Tex. 2004); West v. Tex. Comm'n on Envtl. Quality, 260 S.W.3d 256, 260-61 (Tex. App.— Austin 2008, pet. denied) (APA gives independent right to judicial review when the agency's statute is silent on the issue).
102 TEX. GOV'T CODE § 2001.176(c).
103 Dotson v. Tex. State Bd. of Med. Exam'rs, 612 S.W.2d 921, 922 (Tex. 1981); Tex. State Bd. of Dental Exam'rs v. Sizemore, 759 S.W.2d 114, 116 (Tex. 1988).
104 TEX. GOV'T CODE § 2001.173; PR Invs. & Specialty Retailers, Inc. v. State, 251 S.W.3d 472, 476 (Tex. 2008).
105 TEX. GOV'T CODE § 2001.174.
106 TEX. GOV'T CODE § 2001.174(2).
107 TEX. GOV'T CODE § 2001.175(b).
108 TEX. GOV'T CODE § 2001.060.
109 TEX. GOV'T CODE § 2001.175.
110 TEX. GOV'T CODE § 2001.175(c), (e). The court may consider evidence of procedural irregularities that are not reflected in the agency record. The court may remand the case to the agency to allow the presentation of additional evidence on the substance of the case if the evidence is material and there was good cause for not offering it at the original administrative hearing.
111 Vandygriff v. First Sav. & Loan Ass'n of Borger, 617 S.W.2d 669, 673 (Tex. 1981); Auto Convoy Co. v. R.R. Comm'n, 507 S.W.2d 718, 722 (Tex. 1974).
112 State v. Pub. Util. Comm'n, 883 S.W.2d 190, 204 (Tex. 1994).
113 TEX. GOV'T CODE § 2001.173.
114 Commercial Life Ins. Co. v. Tex. State Bd. of Ins., 808 S.W.2d 552, 554 n.3 (Tex. App.—Austin 1991, writ denied).
115 TEX. GOV'T CODE § 2001.176(b)(3); Tex. State Bd. of Pharmacy v. Seely, 764 S.W.2d 806, 815 (Tex. App.—Austin 1988, writ denied).
116 Generally, the district court will grant a temporary injunction to enjoin the effect of the final order entered by the agency in a substantial evidence review case if the party seeking judicial review of the final order can show a probable right to recover the relief sought and a probable irreparable injury if the relief sought is not granted. Transp. Co. of Tex. v. Roberston Transps., Inc., 261 S.W.2d 549, 552 (Tex. 1953). A temporary injunction's purpose is to maintain the status quo during the pendency of litigation, until further order of the court or an adjudication of the case by a trial on the merits. Davis v. Huey, 571 S.W.2d 859, 862 (Tex. 1978).
117 TEX. GOV'T CODE § 2001.176(b)(3).
118 TEX. GOV'T CODE § 2001.202(a).
119 State v. Tex. Pet Foods, Inc., 591 S.W.2d 800, 804 (Tex. 1979); Gulf Holding Corp. v. Brazoria Cnty., 497 S.W.2d 614, 619 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.); Priest v. Tex. Animal Health Comm'n, 780 S.W.2d 874, 876 (Tex. App.—Dallas 1989, no writ).
120 TEX. GOV'T CODE § 402.006(c).