

## **CHAPTER 9**

### **LICENSING**

#### Table of Contents

Section 9.1	Scope of this Chapter
Section 9.2	General Description
Section 9.3	Entry Requirements
9.3.1	Education and Experience
9.3.2	Examinations
9.3.3	Character
9.3.4	Licensing by Reciprocity and Endorsement
Section 9.4	Issuing or Denying the License
9.4.1	Applications and Screening Methods
9.4.2	Licensing Time Frames
9.4.3	Issuance of the License
9.4.4	Denial of the License
Section 9.5	Licensing Regulation
Section 9.6	Disciplinary Actions
9.6.1	Actions by Agencies in Other Jurisdictions
9.6.2	Conviction of a Criminal Offense
9.6.3	Violation of Civil or Licensing Laws
9.6.4	Incompetence, Malpractice, and Negligence
9.6.5	Unprofessional Conduct
9.6.6	Misleading or Fraudulent Conduct

9.6.7	Alcohol or Substance Abuse
9.6.8	Failure to Comply with Continuing Education Requirements
Section 9.7	Cancellation or Surrender of License
Section 9.8	Renewal and Reinstatement
9.8.1	License Renewal
9.8.2	Reinstatement of License
Section 9.9	Other Legal Provisions Affecting Licensing Agencies
9.9.1	Effect of No Contest Pleas
9.9.2	Restoration of Civil Rights
9.9.3	Social Security Numbers
9.9.4	Access to Criminal History Record Information
Section 9.10	Antitrust Considerations for Licensing Agencies
9.10.1	Restrictions on Price Competition
9.10.2	Barriers to Entry
Section 9.11	Immigration-Related Laws

## CHAPTER 9

### LICENSING

**9.1 Scope of This Chapter.** This Chapter discusses the licensing function of administrative agencies and common grounds for agency disciplinary action. *See also* Agency Handbook Chapter 10 (Administrative Adjudications), Chapter 12 (Enforcement). This Chapter also provides general information concerning other laws that affect licensing, including laws governing the use of social security numbers, the effect of a restoration of civil rights, and the access to criminal history record information.

**9.2 General Description.** In Arizona, licensing is performed by those agencies responsible for regulating various professions, occupations, and businesses.<sup>1</sup> Most of these professions, occupations, and businesses are issued "licenses" or "permits," with the remainder being either "registered" or issued "certificates." For purposes of this Chapter, permits, licenses, registrations, and certificates are included within the definition and discussion of "license" and "licensing." *See also* A.R.S. § 41-1001(11) (defining "license"). Material distinctions among various licensing procedures are noted.

An agency authorized to issue a license usually grants to the person or entity the right to engage in a particular activity; unlicensed persons may not engage in that activity. An agency authorized to register or issue a certificate normally grants only the right to use a certain professional or occupational title (such as certified public accountants); others are free to engage in such professional activities provided they do not use the reserved title.

The statutes pertaining to a licensing agency generally prescribe or authorize the establishment of the following: qualifications necessary to engage in certain activities; procedures for screening applicants to determine whether they meet these qualifications; and procedures for issuing and denying licenses. In addition, the statutes authorize the regulation of all licensed persons, including the initiation of disciplinary actions. Statutory standards and directives are generally implemented through rulemaking. *See* Chapter 11.

Individuals seeking licensure are entitled to fair and open regulation by state agencies. In 1998, the Legislature created the regulatory bill of rights to codify the procedural rights individuals have in dealing with state agencies. *See* A.R.S. § 41-1001.01.

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<sup>1</sup> "'Agency' means any board, commission, department, officer or other administrative unit of this state...." A.R.S. § 41-1001(1).

**9.3 Entry Requirements.** An applicant must satisfy entry requirements in order to obtain a license to engage in a profession or occupation. Agencies are responsible for implementing and interpreting statutory entry requirements. However, agencies may not impose entry requirements not authorized by statute. *Bd. of Funeral Dirs. & Embalmers v. Perlman*, 108 Ariz. 33, 34, 492 P.2d 694, 695 (1972). *See also Bd. of Dental Exam'rs. v. Hoffman*, 23 Ariz. App. 116, 118, 531 P.2d 161, 163 (1975). Entry requirements typically include:

1. Education and experience requirements;
2. Examination requirements;
3. Character requirements; and
4. Minimum age requirements.

Each agency should examine its governing statutes to determine what entry requirements have been established for individuals seeking licensure.

The agency may not waive statutory entry requirements unless authorized by statute. *E.g.*, A.R.S. § 32-126(A). In rare instances when a profession is first regulated or is being re-regulated, entry requirements may be waived by "grandfather" clauses that allow persons previously engaged in that profession or occupation to continue their activities. *E.g.*, A.R.S. § 32-2212(C).

**9.3.1 Education and Experience.** An applicant may be required to satisfy specified education or experience requirements to qualify for licensure in a regulated profession or occupation. These requirements vary according to the particular statute involved.

Education requirements may include a specific degree from an accredited college or university, specific course studies as part of a degree program, specified hours of education in a prescribed course curriculum, or completion of a designated training program.

Experience requirements typically prescribe a specific number of months or years of experience as an employee, apprentice, or trainee of a licensee in a profession or occupation. When a certificate or registration grants the use of a specific title but practice in the profession or occupation is not restricted to licensed individuals, a specified amount of experience in the profession or occupation may be required for certification or registration.

**9.3.2 Examinations.** Where examinations are required by statute, agencies may be responsible for preparing, administering, or evaluating those examinations. In many cases, the statutes governing an agency authorize the use of national uniform examinations. *E.g.*, A.R.S. § 32-723(B) (uniform certified public accountants'

examination). Other licensing schemes merely require that the applicant pass written, practical, or oral examinations conducted by the agency. Where the agency develops its own examinations, the agency should carefully ensure that the content and structure of each question, the method of evaluating the answers, and the area of knowledge examined fulfill the statutory purpose of the examination.

To ensure the integrity of the examination process and to limit actions for administrative review, agencies should adopt written procedures for conducting and reviewing examinations and for resolving allegations that an examinee cheated. The procedures should be adopted in rules. See Agency Handbook Chapter 11.

Oral examinations, and practical examinations to a lesser extent, are extremely susceptible to challenge because of the subjectivity involved in asking questions and evaluating answers. The agency should institute uniform procedures for giving such examinations to ensure that an examiner's evaluation is not influenced by the examinee's demeanor, appearance, or confidence in responding to questions. An allegation that these factors actually influenced the examinee's grades may be difficult to refute as these factors may not be reflected in a recording or transcription of the oral examination.

The Americans with Disabilities Act ("ADA") requires that reasonable accommodations be made for the testing of disabled applicants. See Agency Handbook Chapter 15 for a discussion of the ADA. Agencies should consult with their legal counsel regarding the possible impact of the ADA on the examination process.

**9.3.3 Character.** Licensing statutes or regulations may require licensees to possess good moral character. The Legislature has given some agencies specific direction to determine the presence or absence of good moral character. For example, the statute governing contractors provides that "[l]ack of good character and reputation may be established by showing that a person has engaged in contracting without a license or has committed any act that, if . . . done by any licensed contractor," would be grounds to initiate disciplinary proceedings. A.R.S. § 32-1122(D). When no specific legislative direction is provided, agencies may adopt a rule requiring persons applying to practice in a profession or occupation to possess the requisite good moral character, provided the rule is consistent with the agency's statutory authority. *Grove v. Arizona Crim. Intelligence Sys. Agency*, 143 Ariz. 166, 170, 692 P.2d 1015, 1018 (App. 1984) (discussing authority to make rules relating to probationary status). If good moral character is a condition of licensure and not defined by statute or regulation, the agency should adopt rules that establish the standards used to evaluate moral character. Clearly delineating the standards for denying a license due to moral character will avoid constitutional challenges on the basis that the denial is arbitrary and capricious. See *Hide-A-Way Massage Parlor, Inc. v. Bd. of Cnty. Comm'rs.*, 597 P.2d 564, 566 (Colo. 1979). If a license is denied for lack of good character, the agency should articulate the factual basis for its finding.

**9.3.4 Licensing by Reciprocity and Endorsement.** If authorized by statute, applicants who currently hold valid licenses in other states or jurisdictions may be granted licenses without satisfying certain entry requirements. These licensing procedures are commonly referred to as reciprocal licensing or licensing by endorsement.

Under either procedure, certain minimum licensing qualifications, such as age and good character, generally must be satisfied; but some entry requirements, most typically the written examination, may be waived for those licensed elsewhere. In addition, an applicant for reciprocal or endorsement licensing frequently must meet other statutorily prescribed standards. For example, several statutes require that the licensing requirements of the state in which the applicant already is licensed be substantially similar to those established by Arizona law. *E.g.*, A.R.S. §§ 32- 922.01(A)(1)(chiropractic examiners), -1683(5)(a) (dispensing opticians). Other requirements for licensure by reciprocity or endorsement sometimes include passing a uniform national examination or examination of another state or jurisdiction, *e.g.*, A.R.S. § 32-1426(A) (medical doctors); a particular educational background or degree, *e.g.*, A.R.S. § 32-1922(B)(1) (pharmacists); or a minimum level of experience in the profession or occupation, *e.g.*, A.R.S. § 32-1523(3) (naturopathic doctors). Under reciprocal licensing, the state or jurisdiction in which the applicant is licensed must grant the holders of Arizona licenses waiver of entry requirements similar to those waived in Arizona. *E.g.*, A.R.S. § 32-322(C) (barbers).

The agency should examine its statutes to determine whether, and under what conditions, an applicant may be excused from satisfying specific entry requirements.

**9.4 Issuing or Denying the License.** An applicant who satisfies the experience, education, examination, age, and character qualifications for licensure nevertheless may be denied a license based upon other specific grounds listed in the agency's licensing statutes. These other grounds typically include prior revocation of a license in the same or a related profession or occupation in this or another state, disciplinary action taken against the applicant's license in another state or jurisdiction, and unlicensed practice of the profession by the applicant prior to issuance of the license. Voluntary surrender of a license in another state or jurisdiction may justify denial of a license. Agencies must look to the circumstances of the surrender to determine whether grounds exist to deny the license application.

**9.4.1 Applications and Screening Methods.** Agencies are responsible for ascertaining whether persons applying to practice in a profession or occupation meet the statutory entry requirements. This requires the review of educational credentials, personal background information, and previous experience. Adoption of well-drafted and complete application forms will help this process operate efficiently. The application form should be consistent with the statutory requirements for licensure.

The application form should require disclosure of information concerning all prior criminal convictions other than minor traffic offenses; any previous denials of application

for licensure; all prior disciplinary actions and sanctions; and any disciplinary actions pending against any licenses currently held by the applicant. The requested information regarding prior criminal convictions should include, at a minimum, the nature of the crime, the date of conviction, the name of the court and the case number, and the city and state of prosecution. The information regarding prior and pending disciplinary actions should be verified directly through the agency responsible for the disciplinary action. The application should contain a statement, requiring a notarized signature, that the applicant has read all questions and has provided true and complete answers, and should further contain a warning that false statements constitute serious criminal violations, which may constitute grounds for subsequent revocation of the license, with citation to the appropriate statutory authority. See A.R.S. § 13-2704. Agencies should encourage applicants to provide copies of court documents concerning the criminal conduct disclosed on the application. The agency, in turn, should not rely solely on statements made by the applicant because to do so may encourage false applications and penalize applicants who are candid. See Agency Handbook Section 9.9.4. Finally, if education is a requirement, the agency should obtain certified copies of transcripts.

Agencies should also adopt procedures to verify application information. For example, if the applicant has been licensed in another state, disclosure of available information concerning criminal or disciplinary matters should be requested from law enforcement and licensing agencies of that state. If appropriate, a copy of the license application on file in that state should be obtained for comparison. If the applicant has been licensed in another profession or occupation in Arizona, the files of that agency should be reviewed to verify information. See *also* Agency Handbook Section 9.9.4.

**9.4.2 Licensing Time Frames.** State agencies are required to complete their review of applications for licensure and to grant or deny the application within specific time frames established in the agency's administrative rules. The agency is subject to specific penalties if it fails to act on an application within its licensing time frames. See A.R.S. § 41-1077.

**9.4.3 Issuance of the License.** An applicant who meets all entry requirements established by law must be issued a license; the license cannot be withheld arbitrarily. See *Bd. of Funeral Dirs. & Embalmers v. Perlman*, 108 Ariz. 33, 492 P.2d 694 (1972). In the absence of specific statutory authority, the agency may not issue a conditional license placing restrictions on the licensee or the license.

**9.4.4 Denial of the License.** If an agency determines that the applicant does not meet the entry requirements, the agency may refuse to issue the license. An agency's decision to deny an application constitutes an appealable agency action, which may be challenged by the applicant in a formal administrative hearing. See A.R.S. §§ 41-1092(3) and -1092.02 through -09. See Agency Handbook Chapter 10 for a discussion of the hearing procedures.

In some cases, the denial of a license application has significant consequences. For instance, a contractor's license may not be issued to an applicant who has been

refused such a license within the preceding year. A.R.S. § 32-1122(E). Where such consequences attach, applicants may wish to withdraw their applications to avoid the taint of a denial. Although applicants do not have an absolute right to withdraw license applications (*Simms v. Napolitano*, 205 Ariz. 500, 505, 73 P.3d 631, 636 (App. 2003), an agency may wish to adopt rules governing the withdrawal of license applications to preclude controversies.

**9.5 Licensing Regulation.** The agency created to administer each profession or occupation generally has the authority to regulate licensees and licensed activities in accordance with applicable statutes and rules.

Statutes and rules establish specific duties and obligations of the licensee. For example, licensees may be required to maintain records, e.g., A.R.S. § 32-2151.01 (real estate brokers); to notify the agency of personal or professional address information or changes, e.g., A.R.S. §§ 32-923(A) (chiropractors), -1435(A) (medical doctors); to complete minimum continuing education as a requirement for renewing the license, e.g., A.R.S. §§ 32-1726(B) (optometrists), -1825(B) (osteopathic doctors); to obtain liability insurance or surety bonding, e.g., A.R.S. §§ 32-1152(A) (contractors), -2613(C)(2) (security guards); to possess identification documents, e.g., A.R.S. § 32-2425(B) (private investigators); to use seals, e.g., A.R.S. § 32-125 (board of technical registration); or to display a license or signboard, e.g., A.R.S. §§ 32-351 (barbers), -1262(C) (dentists), -2126(B) (real estate brokers).

Generally, an agency regulates activities within its jurisdiction and assures compliance with statutes and rules through investigations initiated upon receipt of a complaint or, if authorized, on the agency's own motion. Additionally, some agencies may conduct examinations of records and inspections of licensed activities or premises. E.g., A.R.S. §§ 4-213 (liquor licenses), 32-504(B) (cosmetologists), 32-1904(A)(4) (pharmacists). However, such inspections must be conducted within prescribed standards. See A.R.S. § 41-1009. Where violations are revealed and proved after appropriate administrative proceedings, the agency may impose enforcement sanctions.

Agencies typically are authorized to deny, refuse to renew, suspend, or revoke a license. Most agencies also may censure licensees, impose probation, or assess civil monetary penalties. Further sanctions available to agencies by specific statutory authority include reprimands, practice limitations or restrictions, and public reproof. See, e.g., A.R.S. §§ 32-1451(I) (medical doctors), -2081 (psychologists). Many agencies are authorized to petition the superior court for an injunction restraining or prohibiting violations of licensing laws or restraining unlicensed activities. See, e.g., A.R.S. §§ 32-1666.01 (nurses), -1995 (pharmacists). In addition, some agencies may issue cease and desist orders prohibiting unlicensed activities. See, e.g., A.R.S. § 32-3284 (behavioral health providers). More complete discussions of adjudicatory proceedings and enforcement activities are contained in Agency Handbook Chapters 10 and 12, respectively.



**9.6 Disciplinary Actions.** Administrative agencies are generally authorized by statute to take disciplinary actions against licensees to enforce regulatory laws. Where statutes or rules establish such responsibility, licensees also may be disciplined for acts or omissions of employees or supervised persons. *E.g.*, A.R.S. §§ 4-210(B)(2) (liquor licenses), 32-2043 (physical therapists). Because the grounds for such actions vary significantly among the agencies, each agency should examine its statutes and rules for specific guidance. Some of the more common grounds are discussed in the following paragraphs.

**9.6.1 Actions by Agencies in Other Jurisdictions.** An agency may be authorized to take disciplinary action against a licensee who has been subject to disciplinary action in another state or jurisdiction. The imposition of sanctions by another state or jurisdiction may itself suffice as a predicate for agency disciplinary action. *E.g.*, A.R.S. §§ 32-1601(22)(f) (nurses), -1901.01(B)(5) (pharmacists). Sometimes, however, to support disciplinary action, a denial, suspension, or revocation of a license by another state or jurisdiction must either relate directly to the ability to practice a particular profession or occupation or be based on conduct that would provide grounds for disciplinary action in this state. *See, e.g.*, A.R.S. § 32-1401(27)(o) (medical doctors).

Some statutes provide that the underlying enforcement sanction must have been imposed "for cause." *E.g.*, A.R.S. § 32-741(A)(10) (accountants). The phrase "for cause" requires that the foreign license was revoked or suspended because of misconduct or illegal activity. *See Johnson v. Mofford*, 193 Ariz. 540, 543, ¶12, 975 P.2d 130, 133 (App. 1998) ("'cause' implies some inability, incapacity or unfitness.") (relying on *Farish v. Young*, 18 Ariz. 298, 302, 158 P. 845, 847 (1916)).

A voluntary surrender of a license in another jurisdiction alone does not justify the initiation of disciplinary proceedings against a licensee. Agencies must look to the underlying circumstances of the surrender to determine whether grounds exist to initiate disciplinary proceedings.

Because agencies in this state and other states or jurisdictions have the authority to take action against a licensee disciplined in another jurisdiction, agencies should develop procedures to ensure the free flow of enforcement information among the jurisdictions.

**9.6.2 Conviction of a Criminal Offense.** Most licensing statutes identify conviction of a felony or of a crime involving "moral turpitude" as grounds for disciplinary action (or for refusal to issue or renew a license). *E.g.*, A.R.S. §§ 32-1401(27)(d) (medical doctors), -2153(B)(2) (real estate brokers), -2232(10) (veterinarians). Moral turpitude is broadly defined as "an act of depravity and baseness," *City Court of Tucson v. Lee*, 16 Ariz. App. 449, 452, 494 P.2d 54, 57 (App. 1972), and connotes a fraudulent or dishonest intent, *Howard v. Nicholls*, 127 Ariz. 383, 388, 621 P.2d 292, 297 (App. 1980); *see also In re Wines*, 135 Ariz. 203, 205, 660 P.2d 454, 456 (1983). Examples of crimes involving moral turpitude include kidnapping, sexual assault or abuse, theft,

fraud, embezzlement, and forgery. Conversely, the courts have held that offenses not significantly offensive to community moral standards do not constitute crimes involving moral turpitude. Examples of such offenses include reckless driving, simple assault, disorderly conduct, *State ex rel. Dean v. City Court of Tucson*, 141 Ariz. 361, 363, 687 P.2d 369, 371 (App. 1984), and possession of marijuana, *State ex rel. Dean v. Dolny*, 161 Ariz. 297, 778 P.2d 1193 (1989). Where it is unclear if a particular offense involves moral turpitude, agencies should consult with their legal counsel to resolve the issue.

The term "conviction" includes a conviction following a plea of *nolo contendere* or no contest and includes a conviction upon a plea or verdict of guilty. *Bear v. Nicholls*, 142 Ariz. 560, 691 P.2d 326 (App. 1984). See also Agency Handbook Section 9.9.1 for further discussion of no contest pleas.

**9.6.3 Violation of Civil or Licensing Laws.** Most agencies are authorized to take disciplinary action against any licensee who violates the agency's statutes or rules. Some agencies may also take disciplinary actions upon the violation of other federal, state, or local laws, or the rules applicable to the practice of the profession or occupation involved, whether or not the violation resulted in a sanction. *E.g.*, A.R.S. §§ 32-854.01(18) (podiatrists); -1401(27)(a) (medical doctors) (federal and state laws or applicable rules and regulations); -1301(54)(g) (funeral directors and embalmers); -1743(12) (optometrists) (statutes or rules); -1501(31)(s) (naturopathic doctors) (federal, state, county, or municipal laws).

**9.6.4 Incompetence, Malpractice, and Negligence.** Substandard performance or ability in the practice of a profession or occupation is frequently included in the licensing statutes as a ground for disciplinary action. The language used to describe this conduct varies among the agencies but generally contains in some form the terms "incompetence," "malpractice," or "negligence." For example, the phrase "malpractice or incompetency" appears in A.R.S. §§ 32-353(2) (barbers) and -572(A)(4) (cosmetologists). Gross or repeated malpractice is commonly used in the statutes governing health professionals. *E.g.*, A.R.S. § 32-1201(21)(d) (dentists). Some statutes contain provisions specifically defining malpractice within the regulated profession. *E.g.*, A.R.S. § 32-2201(15) (veterinarians). "Gross negligence" or "continuing negligence" is referred to in statutes governing such diverse professions as accountants (A.R.S. § 32-741(A)(4)) and funeral directors (A.R.S. § 32-1366(A)(2)). If an agency commences a disciplinary action based on malpractice, negligence, or gross negligence, it must provide notice to the professional of the applicable standard of care and how the professional's conduct deviated from that standard. See *Gaveck v. Ariz. Bd. of Podiatry Exam'rs*, 222 Ariz. 433, 438, 215 P.3d 1114, 1119 (App. 2009); *Webb v. Ariz. Bd. of Med. Exam'rs*, 202 Ariz. 555, 560, 48 P.3d 505, 510 (App. 2002). The agency must then make specific factual findings on both the standard of care and the deviation in its order. *Webb*, 202 Ariz. at 560, 48 P.3d at 510.

**9.6.5 Unprofessional Conduct.** Many regulatory statutes authorize disciplinary action for "unprofessional conduct," which is generally defined with particularity in statute or by agency rule. *E.g.*, A.R.S. §§ 32-1201(21) (dentists)

and -1401(27) (medical doctors). However defined, "unprofessional conduct" cannot be given any definition that would make it subject to constitutional attack on grounds of vagueness." *Ariz. State Bd. of Med. Exam'rs. v. Clark*, 97 Ariz. 205, 214, 398 P.2d 908, 915 (1965). These definitional provisions routinely encompass various proscribed acts, including some of those described immediately above. Many of these acts are general and are shared among several occupations or professions, while others are peculiar to the occupation or profession involved. Some examples of unprofessional conduct not already referred to include failing or refusing to maintain adequate records; representing or holding oneself out as being a professional when one is not; engaging in sexual conduct with a patient or client in the course of treatment; and having a professional connection with, or lending one's name to, an illegal practitioner. Each agency should consult its own statutes and rules to determine the definitional scope of "unprofessional conduct."

**9.6.6 Misleading or Fraudulent Conduct.** Most agencies have statutory authority to take disciplinary action against a license holder who engages in conduct tending to defraud or mislead the public, e.g., A.R.S. § 32-1601(22)(h) (nurses). This conduct may relate to the actual practice of a profession or occupation, e.g., A.R.S. § 32-1201(21)(l) (dentists) ("making any false or fraudulent statement . . . in connection with the practice of dentistry"), or to advertising connected with the practice, e.g., A.R.S. §§ 32-353(3) (barbers), -2232(9) (veterinarians). Often, misleading or fraudulent conduct is contained within the definition of "unprofessional conduct" upon which disciplinary action may be based. *E.g.*, A.R.S. §§ 32-1401(27)(c),(v) (medical doctors), -1501(31)(i), (o), (aa) (naturopathic doctors).

Many agencies have additional authority to initiate disciplinary action when a false or misleading statement is made in an application for a license, e.g., A.R.S. § 32-1391.15(4) (funeral directors and embalmers), a qualification examination, e.g., A.R.S. § 32-128(C)(1) (board of technical registration), or, more generally, in procuring or obtaining a license, e.g., A.R.S. §§ 32-741(A)(3) (accountants), -1601(22)(a) (nurses).

**9.6.7 Alcohol or Substance Abuse.** Many licensing statutes, particularly those regulating health professionals, permit disciplinary action based upon intemperance in the use of alcohol or the abuse of controlled substances. Prohibitions relating to these areas typically contain terms such as "habitual," "chronic," or "addiction" to describe the degree of use or consumption that will justify disciplinary action. *E.g.*, A.R.S. § 32-924(A)(4) (chiropractors). The Americans with Disabilities Act ("ADA") may have implications for agencies initiating disciplinary action against alcohol or substance abusers. Agencies should consult with their legal counsel regarding the possible impact of the ADA. See also Agency Handbook Chapter 15.

**9.6.8 Failure to Comply with Continuing Education Requirements.** Several agencies have requirements mandating continuing education within specific time limits. Failure to comply with these requirements may warrant disciplinary action. Some statutes specifically provide that noncompliance constitutes grounds for probation,

suspension, or revocation of a license. *E.g.*, A.R.S. §§ 32-741(D) (accountants), -1434(C) (medical doctors). In other cases, the agency may use the more general prohibition against violations of licensing laws, see discussion in Agency Handbook Section 9.6.3 above, as a ground for sanctions to enforce continuing education requirements. Most often, however, the issue of continuing education is addressed in connection with license renewal.

**9.7 Cancellation or Surrender of License.** In various circumstances, a licensee may wish to cancel or voluntarily surrender a license. However, a cancellation or surrender may be motivated by the licensee's desire to avoid possible sanctions by depriving the agency of jurisdiction to initiate or complete disciplinary action. If an agency terminates the investigation or disciplinary proceeding, the former license holder may seek to reapply for licensure or may apply for licensure in another state or country. To avoid this situation, some agency statutes provide that cancellation does not prevent the initiation or completion of disciplinary proceedings, *e.g.*, A.R.S. § 4-210(I) (liquor licenses), or that cancellation may be accepted only if no investigation has been initiated against a licensee, *e.g.*, A.R.S. § 32-1433 (medical doctors). Further, if a health professional who has been advised in writing that an investigation is pending fails to renew a license or certificate, the license or certificate does not expire or terminate but instead is suspended until the investigation is resolved. A.R.S. § 32-3202.

**9.8 Renewal and Reinstatement.** Most licensing statutes contain procedures for the regular renewal of active licenses and for the reinstatement of licenses that may have been suspended or revoked. Agencies should consult their specific laws for the particulars of these procedures.

**9.8.1 License Renewal.** Licensing statutes generally require that a license be renewed periodically and that an established fee be paid. The time period, renewal procedures, and the required fee vary among the agencies. Sometimes, a grace period is provided within which renewal must be made, although a financial penalty may be assessed.

Statutory provisions concerning the effect of a failure to renew and the procedures for reactivating a license also differ. Upon failure to timely renew, a license may be forfeited, voided, suspended, or deactivated, or it may simply expire. *Compare* A.R.S. § 32-1236(D) (dentists) *with* A.R.S. §§ 32-518(A) (cosmetologists), -1125(A) (contractors), -1331(D), *and* -1430(A) (medical doctors).

The requirements for reactivating or reissuing a license after a failure to timely renew also vary. Reactivation may occur upon payment of certain fees or penalties. *E.g.*, A.R.S. § 32-741(C) (accountants). Additionally, proof of qualifications or competence may be required. *E.g.*, A.R.S. § 32-1642(C) (nurses). Where the failure to renew extends over a considerable period (a year or years, depending on the particular statute involved), reexamination may be imposed or a reapplication, as if for original licensure, may be necessary. *E.g.*, A.R.S. §§ 32-1236(D) (dentists), -1430(D) (medical doctors).

**9.8.2 Reinstatement of License.** Where a license has been suspended or revoked as a result of disciplinary action by an agency, reinstatement is necessary if the licensee wants to reenter practice. Some statutes vest broad discretion in the agency to reinstate licenses. *E.g.*, A.R.S. §§ 32-1664(O) (nurses), -1928(D) (pharmacists). Other laws require a demonstration of "good cause," *e.g.*, A.R.S. § 32-741.03(D) (accountants), or verification that the licensee has removed the basis of the suspension or revocation. A.R.S. § 32-1552(A)(1) (naturopathic doctors). Several agencies are prohibited from granting reinstatement within a specified time (typically two years) following disciplinary action. *E.g.*, A.R.S. §§ 32-1693(C) (nurses), -1748(C) (optometrists). The statutes of some agencies are silent with respect to reinstatement, necessitating reapplication and full compliance with initial licensing provisions by persons who seek reinstatement.

## **9.9 Other Legal Provisions Affecting Licensing Agencies.**

**9.9.1 Effect of No Contest Pleas.** An agency may have the authority to take disciplinary action or to refuse to issue or renew a license if the licensee or applicant has been convicted of a felony or crime of moral turpitude. Convictions resulting from a plea of no contest or nolo contendere do not deprive an agency of authority to act. See *Bear v. Nicholls*, 142 Ariz. 560, 562, 691 P.2d 326, 328 (App. 1984). While a person who enters a no contest plea does not admit to the conduct resulting in the criminal charges, the conviction entered following the plea is no less a conviction than one entered after an admission of guilt or a jury verdict. *Id.* at 562, 691 P.2d at 328; see *also* A.R.S. § 32-572(D) (cosmetologists).

**9.9.2 Restoration of Civil Rights.** By statute, a felony conviction automatically results in the suspension of certain civil rights of the person convicted. A.R.S. § 13-904(A). However, in some cases, a person may have his civil rights restored or his conviction set aside. A.R.S. §§ 13-905 to -912.01.

If the statutes regulating the licensing functions of an agency list conviction of a felony as a disqualification, that agency should require persons applying for the issuance, renewal, or reinstatement of a license to disclose prior felony convictions, even if the person's civil rights have been restored or those convictions have been set aside. See Ariz. Att'y Gen. Ops. I78-181, I83-042; Agency Handbook Section 9.6.2.

When making a licensing decision, an agency may consider a conviction even if a person has had his civil rights restored. A.R.S. § 13-904(E). An agency may also consider a conviction which has been set aside or situations in which civil rights have been restored pursuant to A.R.S. § 13-907. Ariz. Att'y Gen. Ops. I78-181, I83-042.

However, if civil rights have been restored, the agency may not deny that person a license merely because the conviction exists. A.R.S. § 13-904(E). In this situation, the conviction can only be a basis for an agency's licensing decision if the offense has "a reasonable relationship to the functions of the . . . occupation for which the license

... is sought.” *Id.*; see also Ariz. Att’y Gen. Ops. 178-181, 183-042. Thus, when a conviction has been set aside or civil rights restored, conduct sufficient to deny one license may be wholly unrelated to the functions associated with another license. For example, a conviction for forgery, a class 4 felony, may support the refusal of a notary public commission by the Secretary of State, because the conduct underlying such a conviction bears a reasonable relationship to the functions a notary public is expected to perform. See Ariz. Att’y Gen. Op. 179-305. However, the same conviction may not support denial of a barber’s license, because there is no reasonable relationship between the forgery offense and hair cutting.

If a license is refused to a person whose civil rights have been restored, the agency should include in its decision or order a specific finding describing the relationship between the conduct underlying the conviction and the functions of the profession or occupation involved.

**9.9.3 Social Security Numbers.** Under federal law, most state agencies do not have the authority to require the disclosure of social security numbers as a condition of licensure or other benefits. Privacy Act of 1974, Pub. L. No. 93-579, § 7, 88 Stat. 1896 (1974). Federal law specifically provides that agencies whose functions involve the administration of taxes, benefit dispensation, driver’s licensing, or motor vehicle registration may require disclosure of social security numbers. 42 U.S.C. § 405(c) (2)(C). However, state agencies that issue professional, recreational, or occupational licenses may require that social security numbers be provided on their applications and may transmit that information to the Department of Economic Security to aid in child support enforcement. See A.R.S. § 25-320(P). In addition, state statutes or rules adopted prior to January 1, 1975 authorizing an agency to require the disclosure of social security numbers may be enforced. Privacy Act of 1974, Pub. L. No. 93-579, § 7, 88 Stat. 1896 (1974).

Those agencies that may not require the disclosure of a social security number may request its voluntary disclosure. The form requesting this disclosure must include written notice that the disclosure is voluntary, identifying the authority by which the number is solicited, and indicating the uses that will be made of the number. *Id.*; see Ariz. Att’y Gen. Ops. 78-185, 182-119.

Any wrongful disclosure, use, or request of a social security number may be prosecuted criminally. The penalty for a violation includes imprisonment up to one year, a fine of \$5,000, or both. See 5 U.S.C. § 552a(i)(1).

**9.9.4 Access to Criminal History Record Information.** The Legislature substantially changed the state law concerning criminal history record information, A.R.S. § 41-1750, in 1992 and again in 1993. See, e.g., A.R.S. § 41-1750(G)(2) (concerning agency access to criminal history records of applicants for licenses). Because of these changes and the possibility of future amendments to A.R.S. § 41-1750, agencies should consult with their legal counsel regarding access to criminal history record information. Agencies that have the authority to receive criminal history

record information from the Department of Public Safety ("DPS") or other criminal justice agencies should be aware of the following:

1. DPS restricts access to criminal history record information and the uses for such information are limited by statute. See A.R.S. § 41-1750. Consequently, any criminal history record information or "rap sheet" received from DPS or another criminal justice agency may be used only for the purpose of evaluating an applicant's fitness for a license or employment.
2. If, in the course of the processing of a license application, an agency must hold a public hearing, the criminal history record information obtained from DPS or another criminal justice agency may not be used or disclosed at the hearing. Instead, the agency must obtain certified copies of the conviction from the respective courts for use as evidence in the hearing.
3. An agency authorized to receive criminal history record information from DPS must enter into a "user agreement" with DPS. By the terms of the "user agreement," the agency must appoint a "system security officer" to control access to the criminal history record information files. Under this agreement, persons not involved in the evaluation process should not be permitted access to the files. These files should be maintained in separate and secure filing cabinets.
4. Criminal history record information obtained from DPS or another law enforcement agency should not be disclosed or provided to any person outside the agency or disseminated to unauthorized persons or the public.
5. Agencies and their employees should familiarize themselves with the provisions of A.R.S. § 41-1750 and the DPS user agreement. The wrongful release, procurement, or use of criminal history record information for an unauthorized purpose is a criminal offense. A.R.S. § 41-1756.

**9.10 Antitrust Considerations for Licensing Agencies.** Licensing agencies could restrain competition by unreasonably limiting entry into a trade or profession. Although such restraint may be compelled by an agency's statutory scheme, the agency and its employees are not entirely exempt from antitrust scrutiny. Licensing denials may be challenged based on allegations that the regulating agency is a party to a conspiracy with private parties to restrain trade. The agency decision, however, will be immune to challenge under the federal antitrust laws, unless the agency itself is acting as a commercial participant in a given market and not as a regulator. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 374-378 (1991). For additional discussion of the immunity under the antitrust laws for "state action," see Agency Handbook Sections 5.9.6, 5.9.6.1.

Like procurement officers, licensing employees have a responsibility to avoid actions that unnecessarily restrain trade. It is not the function of licensing officers to protect market positions of persons or firms within an industry, to regulate the number of competitors in a particular field, or, absent a clear statutory directive, to regulate prices. Any questions about antitrust laws should be directed to the Antitrust Unit of the Attorney General's office.

**9.10.1 Restrictions on Price Competition.** The antitrust laws may prohibit restrictions on price competition. The agency should request Attorney General review of any regulation that has a restrictive effect on price competition and that is not expressly required by statute. Examples of regulations that restrict price competition include fee schedule mandates, prohibitions against price advertising, and prohibitions against competitive bids.

**9.10.2 Barriers to Entry.** Entry requirements that must be satisfied in order to obtain a license to engage in a profession or occupation are called "barriers to entry." Because a requirement that unnecessarily restricts entry restrains competition and may violate antitrust laws, licensing agencies should ensure that the restraint imposed is no greater than necessary to protect the public. This is especially true if members of the licensing authority are also members of the regulated profession.

**9.11 Immigration-Related Laws.** The Legislature has enacted a number of laws that require agencies to consider immigration-related matters in carrying out licensing activities. See, e.g., A.R.S. § 41-1080. These laws change frequently and raise complicated issues involving an applicant or license holder's legal status under immigration law. Because of the possibility of future amendments to these laws and the complexity of the subject matter, agencies should consult with their legal counsel regarding the impact of such laws on the agencies' activities.

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