

**SUGGESTIONS FOR REVIEWING THE RECORD
AND PREPARING TO DISCUSS AND RENDER
A DECISION AFTER NONADOPTION**

(February 1, 2005)

Background:

When Board members question the factual or legal findings of the administrative law judge (ALJ) and nonadopted the proposed decision, the following suggestions are intended to assist you in reviewing the case record in an efficient and more effective manner:

Read the Administrative Record (in the following order)

1. The Accusation
 - A. Make written notes of the code sections charged and brief description of what they cover. (B&P Section 2234(b) - gross negligence; B&P Section 2242 - prescribing w/o medical exam.)
 - B. Read the facts that are alleged to prove the code violations. The burden to prove the violations by "clear and convincing evidence to a reasonable certainty" is on the Board.

2. The Proposed Decision

If "gross negligence," "repeated negligent acts," or "substantially-related" conduct is alleged, expert testimony is necessary to prove the violations.

 - A. Factual findings
 - Did the ALJ find the facts were proven by clear and convincing evidence? If not, why not?
 - Was sufficient evidence introduced to prove the facts?
 - Did the witnesses' testimony prove the facts?
 - Did the ALJ find some witnesses more credible than others? If so, why?
 - To which expert's testimony did the ALJ give the most weight?
 - Was any evidence of mitigation introduced by the respondent?
 - Pay close attention to the ALJ's factual findings as you will need to evaluate them when you read the transcript.**
 - B. Legal conclusions (determination of issues)
 - Do the facts proven constitute a violation of the code section?
 - C. Order
 - Does the Order contain the appropriate penalty given the violations found?
 - Is the Order consistent with the Disciplinary Guidelines and, if not, is there a basis in the record for deviating from the guidelines?

3. The Transcript

Make frequent notes – "Is the evidence introduced proving the facts and the violations alleged?"

 - A. Sufficiency of the Evidence
 - Has "clear and convincing evidence to a reasonable certainty" been introduced to prove each factual allegation? You must be able to identify clear and convincing evidence in the record to support a finding.

B. Lay Witnesses

- Does the witness testimony prove the facts (keep in mind the ALJ's credibility findings)?
- If not, what evidence supports your conclusion as to who is more credible?

C. Expert Witnesses

- Which expert's testimony was given the most weight by the ALJ? Why or why not?
- If you do not agree, what evidence in the record supports your conclusion?

Preparation before the Oral Argument hearing:

1. Written Arguments

- A. The Deputy's argument will contend the facts are clearly proven and constitute a violation of the law. The burden of proof is on the Board. Has that burden (clear and convincing evidence) been met?
- B. The Respondent's argument will likely focus on the weaknesses of the Board's case and the strength of the respondent's case. It will force you to answer the hard questions whether (a) the facts were proven, (b) the law was violated, and (c) the penalty is appropriate.

2. Again Review the Proposed Decision

You should now have a complete picture of the case. Make notes on the proposed decision where you agree and disagree with the ALJ as to the factual findings, the legal conclusion, and the proposed penalty. If you disagree, note the specific evidence in the record that supports your conclusion. *You should also note the volume and page number of the transcript.* You must cite "clear and convincing evidence to a reasonable certainty" to make a finding.

3. Oral Arguments (Medical Board and Board of Psychology)

The oral arguments made by respondent's attorney and DAG typically highlight points made in the written argument. Board members may ask questions to clarify matters that may be confusing. ***You may not ask questions that seek information that is not part of the existing record.***

4. Summary and Conclusion

During your review, keep in mind the code sections alleged to have been violated and the facts alleged to have occurred. If you keep this as your focus, your evaluation of all the elements of the case should make your decision much easier. This will also help your decision withstand judicial scrutiny.