

**Change the chapter heading for Opt 200 to read as follows:**

CHAPTER Opt 200 RULES OF PRACTICE AND PROCEDURE

**Repeal Opt 201 through Opt 215, effective 12/5/01 (Document #7608-A), as follows:**

~~[PART Opt 201 PURPOSE~~

~~— Opt 201.01 Purpose. The board shall conduct various proceedings for the purpose of acquiring sufficient information to make fair and reasoned decisions on matters within its statutory jurisdiction, including decisions on applications for licensure and complaints filed against licensees. These rules shall be construed to secure the just, efficient and accurate resolution of all board proceedings.~~

~~PART Opt 202 DEFINITIONS~~

~~— Opt 202.01 Definitions. Except where the context makes another meaning manifest, the following words have the meanings indicated when used in this chapter:~~

~~— (a) “Complaint” means a written allegation of professional misconduct against a licensee of the board.~~

~~— (b) “Data” means all information other than argument, including oral or written descriptions, reports, map, charts, drawings, photographs, audio or video recordings, computer programs, or computer printouts.~~

~~— (c) “File” means to place a document in the actual possession of the board.~~

~~— (d) “Hearing” means “adjudicative proceeding” as defined by RSA 541-A:1, I, namely “the procedure to be followed in contested cases, as set forth in RSA 541-A:31 through RSA 541-A:36.”~~

~~— (e) “Motion” means a request by a party to a proceeding for an order relating to that proceeding.~~

~~— (f) “Investigation” means a formal or informal search by the board for data concerning matters within its jurisdiction, the result of which is other than a final determination of a person's rights, duties or privileges.~~

~~— (g) “Order” means a document issued by the board:~~

~~(1) Establishing procedures to be followed in a hearing or investigation;~~

~~(2) Granting or denying a petition or motion; or~~

~~(3) Requiring a person to do, or to abstain from doing, some thing.~~

~~— (h) “Petition” means a request to the board seeking an order or any other action or relief, but does not include a license application, a complaint against a licensee, or a motion.~~

~~— (i) “Presiding officer” means presiding officer as defined by RSA 541-A:1,XIV, namely the individual to whom the board has delegated the authority to preside over some or all aspects of a hearing, if any. Otherwise it shall mean the president of the board.~~

~~— (j) “Rulemaking” means the statutory procedures for the formulation of a rule set forth in RSA 541-A:3.~~

~~-~~

#### ~~PART Opt 203 WAIVER OR SUSPENSION OF PROCEDURAL RULES~~

~~-~~

~~— Opt 203.01 Method of Waiver. The presiding officer, upon his or her own initiative or upon the motion of any party, shall suspend or waive any requirement or limitation imposed by this chapter upon reasonable notice to affected persons when the proposed waiver or suspension appears to be lawful, and would be more likely to promote the fair, accurate and efficient resolution of issues pending before the board than would adherence to a particular rule or procedure.~~

~~-~~

#### ~~PART Opt 204 APPEARANCE BEFORE BOARD~~

~~-~~

~~— Opt 204.01 Representatives.~~

~~-~~

~~— (a) A party appearing before the board may be represented by his or her appointed representative.~~

~~-~~

~~— (b) A party’s representative shall file an appearance that includes the following information:~~

~~-~~

~~(1) His or her business address and a daytime telephone number;~~

~~-~~

~~(2) A statement as to whether or not the representative is an attorney and if so whether such attorney is licensed in the state of New Hampshire; and~~

~~-~~

~~(3) A brief statement identifying the matter before the board and the person represented.~~

~~-~~

~~— (c) Nothing in this section shall be construed to permit the unauthorized practice of law.~~

~~-~~

~~— (d) The board shall, after notice and opportunity for hearing, prohibit or restrict an individual from acting as a representative upon a finding that the individual has engaged in willful misconduct relating to representation before the board which would be sanctioned by a court if committed by an attorney appearing before the court.~~

~~-~~

#### ~~PART Opt 205 TIME PERIODS~~

~~-~~

~~— Opt 205.01 Computation of Time. Any time period specified in this chapter shall begin with the day following the act, event, or default, and shall include the last day of the period, unless it is Saturday, Sunday, or state legal holiday, in which event the period shall run until the end of the next day which is not a Saturday, Sunday, or state legal holiday. When the period prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and state legal holidays shall be excluded from the computation.~~

~~-~~

~~— Opt 205.02 Change in Allowed Times.~~

~~-~~

~~— (a) Upon motion of either party requesting the extension of any time period governing a hearing, the board shall allow the requested extension of time provided that the presiding officer determines that good cause has been demonstrated.~~

~~-~~

~~— (b) Good cause shall include:~~

~~-~~

~~(1) The unavailability of parties, witnesses, or attorneys necessary to the hearing;~~

~~-~~

~~(2) The likelihood that a hearing will not be necessary because the parties have reached a settlement; or~~

~~-~~

~~(3) Any circumstances that demonstrate that an extension or postponement would assist in resolving the case fairly.~~

~~— (c) Except where a time period is fixed by statute, the board shall, enlarge or shorten the time provided for the filing of any document, or advance or postpone the time set for any oral hearing, prehearing conference, or other activity if the presiding officer determines good cause exists.~~

~~— Opt 205.03 Limitations. A motion to change time shall not be filed within 3 business days of the event in question.~~

## ~~PART Opt 206 FILING AND SERVICE OF DOCUMENTS~~

~~— Opt 206.01 Filing of Documents with the Board.~~

~~— (a) A document shall be considered filed when it is actually received at the board's office in Concord and conforms to the requirements of this chapter.~~

~~— (b) Documents filed with the board under these rules shall:~~

~~(1) Include the title and docket number of the proceeding, if known;~~

~~(2) Be typewritten or clearly printed on durable paper 8 ½ by 11 inches in size;~~

~~(3) Be signed by the party or proponent of the document, or, if the party appears by a representative, by the representative; and~~

~~(4) Include a statement certifying that a copy of the document has been delivered to all parties to the proceeding.~~

~~— (c) A document tendered for filing which fails to meet the requirements of the board's rules shall be returned to the sender and not accepted for filing. The board shall identify the rules to which the document failed to conform.~~

~~— (d) All correspondence to the board shall be addressed to the board's office in Concord in care of its administrative assistant.~~

~~— (e) All documents filed shall be filed with an original and 6 copies, except that only a single copy of correspondence other than correspondence related to a matter subject to hearing, license applications and complaints against licensees shall be filed.~~

~~— Opt 206.02 Subscription and Veracity of Documents.~~

~~— (a) All complaints, petitions, motions, and replies filed with the board shall be signed by the proponent of the document or, if the party appears by a representative, by the representative.~~

~~— (b) License applications shall be signed only by the applicant.~~

~~— (c) The signature on a document filed with the board shall constitute a certification that:~~

- - (1) ~~The signor has read the document;~~
  - 
  - (2) ~~The signor is authorized to file it;~~
  - 
  - (3) ~~To the best of the signor's knowledge, information, and belief, there are good grounds to support it; and~~
  - 
  - (4) ~~The document has not been filed for purposes of delay or harassment.~~
- 

~~— Opt 206.03 Service of Documents.~~

~~— (a) Complaints against licensees shall be filed with the board without service upon the licensee against whom the complaint has been filed.~~

~~— (b) Applications, petitions for rulemaking and petitions for declaratory rulings shall be filed with the board without service upon other persons.~~

~~— (c) All motions, replies, exhibits, memoranda, or other documents filed in an adjudicatory proceeding shall be served by the proponent upon all parties to the proceeding and any complainant or other interested person who has been granted intervenor status by the board using the following means:~~

- - (1) ~~Depositing a copy of the document in the United States mails, first class postage prepaid, addressed to the last address given to the board by the party being served, no later than the day the document is filed with the board; or~~
  - 
  - (2) ~~Delivering a copy of the document in hand on or before the date it is filed with the board.~~
- 

~~— (d) All notices, orders, decisions or other documents issued by the board in the course of an adjudicatory proceeding shall be served by the board upon all parties to the proceeding by either:~~

- - (1) ~~Depositing a copy of the document, first class postage prepaid, in the United States mails, addressed to the last address given to the board by the party being served; or~~
  - 
  - (2) ~~Delivering a copy of the document in hand to the party.~~
- 

~~— (e) When a party has appeared by a representative, service shall be upon the representative.~~

~~— (f) Except for exhibits distributed at a prehearing conference or hearing, every document filed with the board, and required to be served upon the parties to an adjudicatory proceeding, shall be accompanied by a certificate of service, signed by the person making service, attesting to the method and date of service, and the persons served.~~

~~PART Opt 207 PLEADINGS, COMPLAINTS AND MOTIONS~~

~~— Opt 207.01 Pleadings.~~

~~— (a) The only pleadings permitted shall be petitions and replies to petitions. Complaints against licensees are a particular type of petition and shall be governed by Opt 207.02. Applications for licenses shall not be considered pleadings.~~

~~— (b) All petitions shall contain:~~

~~-~~

~~(1) The name and address of the petitioner;~~

~~-~~

~~(2) The name and address of the petitioner's representative, if any;~~

~~-~~

~~(3) A concise statement of the facts which caused the petitioner to request the board to act;~~

~~-~~

~~(4) The action which the petitioner wishes the board to take; and~~

~~-~~

~~(5) A citation to any statutes, rules, orders, or other authority which entitles the petitioner to have the board act as requested.~~

~~-~~

~~— (c) All replies to petitions shall contain:~~

~~-~~

~~(1) The name and address of the respondent;~~

~~-~~

~~(2) The name and address of the representative of the respondent, if any;~~

~~-~~

~~(3) A statement addressing each fact alleged in the petition pursuant to Opt 207.01(b)(3);~~

~~-~~

~~(4) A statement addressing the authority identified by the petitioner pursuant to Opt 207.01(b)(5);~~

~~-~~

~~(5) A concise statement of each and every additional or different fact which causes the respondent to request the board not to act, or to act differently from that requested by the petitioner;~~

~~-~~

~~(6) A citation to any statutes, rules, orders, tariffs, or other authority, not identified in the petition, having a bearing upon the subject matter of the petition; and~~

~~-~~

~~(7) A description of the action which the respondent wishes the board to take.~~

~~-~~

~~— (d) Replies shall be filed within 45 days of the date of the petition.~~

~~-~~

~~— (e) Any fact contained in the petition which is not denied in the reply, shall be deemed admitted by the respondent. A statement that the respondent lacks sufficient knowledge to admit or deny shall be treated as a denial. The petitioner shall be presumed to deny all allegations in the reply, and no response shall be permitted to the reply.~~

~~-~~

~~— Opt 207.02 Complaints of Licensee Misconduct.~~

~~-~~

~~— (a) Any person may make a written complaint charging a person licensed by the board with misconduct under RSA 327:20 II. The person making the complaint shall file the complaint with the board.~~

~~-~~

~~— (b) The person making the complaint shall include the following information in the written complaint filed with the board:~~

~~-~~

~~(1) The name and address of the complainant;~~

~~-~~

~~(2) The name and business address of the licensee against whom the complaint is directed; and~~

~~(3) The specific facts and circumstances which are believed to constitute professional misconduct.~~

~~— (c) A complaint shall be treated as an ex parte request for the initiation of disciplinary proceedings by the board.~~

~~— (d) The board shall dismiss a complaint at any time for failure to specify the grounds therefor or for failure to allege misconduct as it is defined under RSA 327:20, II.~~

~~— (e) At any stage of the board's evaluation of the allegations in a complaint, the board shall, with the consent of the licensee, issue a final settlement decree or consent order which imposes discipline upon the licensee and terminates further disciplinary action in whole or in part under the following conditions:~~

~~(1) The board shall notify the complainant and offer the complainant the opportunity to submit written comments concerning the settlement decree or consent order; and~~

~~(2) The board finds that there are no material facts in dispute between the licensee and the complainant, or, that the complainant's view of the facts, if true, would not result in the imposition of a greater disciplinary sanction against the licensee than that imposed by the proposed settlement or consent decree.~~

~~— (g) Unless previously settled, a complaint which raises genuine issues of professional misconduct shall be granted by incorporating those issues into a notice of hearing which commences a disciplinary hearing pursuant to Opt 501.04. In which case, disciplinary action against the licensee shall be taken or not taken based upon the board's evaluation of the evidence of professional misconduct submitted during the hearing.~~

~~— Opt 207.03 Motions and Objections Thereto.~~

~~— (a) Unless presented during an oral session of a proceeding, all motions and replies shall be in writing.~~

~~— (b) All motions shall state clearly and concisely:~~

~~(1) The purpose of the motion;~~

~~(2) The relief sought by the motion;~~

~~(3) The statutes, rules, orders, or other authority authorizing the relief sought by the motion; and~~

~~(4) The facts claimed to constitute grounds for the relief requested by the motion.~~

~~— (c) Replies to motions shall state clearly and concisely:~~

~~(1) The defense of the party filing the reply;~~

~~(2) The action which the party filing the reply wishes the board to take on the motion;~~

~~(3) The statutes, rules, orders, or other authority relief upon in defense of the motion; and~~

~~(4) Any facts which are additional to or different from the facts stated in the motion.~~

~~— (d) An objection to a motion shall specifically admit or deny each fact contained in the motion. Failure to deny a fact contained in a motion shall constitute the admission of that fact for the purposes of the motion. In the event a party filing a reply to a motion lacks sufficient information to either admit or deny a fact contained in the motion, the party shall so state, specifically identifying each fact.~~

~~— (e) The board shall decide motions based upon the writings submitted unless the motion is presented during an oral session of the proceeding, in which case the board shall consider the oral argument and the writings in deciding a motion.~~

~~— (f) Unless the board grants a properly filed motion for extension of time, objections to motions shall be filed within 10 days after the filing of the motion. Failure to object to a motion within the time allowed shall constitute a waiver of objection to the motion.~~

~~— Opt 207.04 Failure to Comply with Rules. In the event a party to a proceeding fails to comply with these rules in presenting a motion or petition to the board, the board shall deny the requested action.~~

#### ~~PART Opt 208 ADJUDICATORY PROCEEDINGS~~

~~— Opt 208.01 Applicability. This part shall govern all hearings conducted by the board.~~

~~— Opt 208.02 Commencement.~~

~~— (a) The board shall commence a hearing by issuing a notice to the parties at least 15 days before the first scheduled hearing date or first prehearing conference. A docket number shall be assigned to each matter to be heard which shall appear on the notice of hearing and all subsequent orders or decisions of the agency.~~

~~— (b) The notice of hearing shall:~~

~~(1) Contain the information required by RSA 541-A:31, III, namely:~~

~~a. A statement of the time, place and nature of any hearing;~~

~~b. A statement of the legal authority under which a hearing is to be held;~~

~~c. A reference to the particular statutes and rules involved including this Part;~~

~~d. A short and plain statement of the issues presented;~~

~~e. A statement that each party has the right to have an attorney represent them at their own expense;~~

~~f. A statement that each party has the right to have the agency provide a certified shorthand court reporter at the party's expense and that any such request shall be submitted in writing at least 10 days prior to the hearing;~~

~~(2) Identify the parties to the proceeding as of the date of the order and specify a deadline for the submission of petitions to intervene or statements by complainants that they intend to participate as a party;~~

- 
- (3) ~~Specify the date by which, and the address where, appearances or motions by representatives shall be filed;~~
- 
- (4) ~~Specify the date, time, and location of an initial prehearing conference or dates for an oral hearing; and~~
- 
- (5) ~~Identify the presiding officer for the proceeding, if other than the president of the board.~~
- 

~~— Opt 208.03 Docketing, Service of Notice, Public Notice.~~

- 
- ~~(a) The board shall assign each adjudicatory proceeding a docket number, and serve the hearing notice upon all parties to the proceeding and the board's legal counsel in the civil bureau, department of justice. The hearing notice shall be served upon the respondent, and the complainant, if any, by means of certified mail.~~
- 
- ~~(b) Service of all subsequent orders, decisions and notices issued by the board, including any amendments to the hearing notice, shall be served upon the parties, including any intervenors, by regular mail.~~
- 
- ~~(c) Orders, notices, and decisions of the board, and motions, memoranda, exhibits, and other documents and data submitted to the board in a docketed case shall be kept in a docket file and made available for public inspection in the board's office.~~
- 

~~— Opt 208.04 Intervention.~~

- 
- ~~(a) Complainants and other non parties may petition the board for intervention at any time after the commencement of a proceeding.~~
- 
- ~~(b) The petition to intervene shall:~~
- 
- ~~(1) Be in writing; and~~
- 
- ~~(2) Include the following:~~
- 
- ~~a. The petitioner's interest in the subject matter of the hearing;~~
- 
- ~~b. Whether the petitioner appears in support of the complainant or the respondent, as well as for his or her own interest;~~
- 
- ~~c. Why the interests of the parties and the orderly and prompt conduct of the proceeding would not be impaired; and~~
- 
- ~~d. Any other reasons why the petitioner should be permitted to intervene.~~
- 
- ~~(c) The presiding officer shall grant a petition for intervention if the petitioner has an interest in the proceeding and has clearly stated that interest.~~
- 
- ~~(d) Persons filing a complaint which becomes the subject of a formal disciplinary hearing shall be served with the hearing notice and notified that he or she petition to intervene.~~
- 
- ~~(e) Once granted leave to intervene, an intervenor shall take the proceeding as he or she finds it and no portion of the proceeding shall be repeated because of the fact of intervention.~~



~~— Opt 208.05 Right to Counsel. Any party in an adjudicatory proceeding may be represented by counsel, but an attorney appearing on behalf of a party shall first file a letter announcing the fact of representation at the earliest date practical. Parties shall retain counsel at their own expense and requests for appointment of counsel shall not be entertained.~~

~~— Opt 208.06 Prehearing and Other Informal Conferences.~~

~~— (a) A prehearing conference in accordance with RSA 541-A:31, V shall be scheduled on the request of any party or intervenor or on the initiative of the presiding officer or panel if the presiding officer or panel determines that to do so would facilitate the proceedings or encourage resolution of the dispute. Such prehearing conference shall be held to consider:~~

- ~~(1) Opportunities and procedures for settlement;~~
- ~~(2) Opportunities and procedures for simplification of the issues;~~
- ~~(3) Possible amendments to the pleadings;~~
- ~~(4) Possible admissions of fact and of documents to avoid unnecessary proof;~~
- ~~(5) Possible limitations on the number of witnesses;~~
- ~~(6) Possible changes to the standard procedures which would otherwise govern the proceeding;~~
- ~~(7) The distribution of written testimony, if any, and exhibits to the parties;~~
- ~~(8) Possible consolidation of the examination of witnesses by the parties; and~~
- ~~(9) Any other matters which might contribute to the prompt and orderly conduct of the proceeding.~~

~~— (c) The board shall cause such conferences to be recorded unless all parties wish to discuss possible settlement off the record. Matters decided at an informal conference shall be reflected in an order.~~

~~— Opt 208.07 Discovery and Disclosure.~~

~~— (a) Upon the written request of a party, the board shall disclose to the parties to a proceeding any information, not privileged, in the possession of the board, which relates to the subject matter of the proceeding.~~

~~— (b) Each party shall attempt in good faith to make complete and timely response to requests for the voluntary production of information or documents relevant to the hearing.~~

~~— (c) Any party may make a motion requesting that the presiding officer order the parties to comply with information requests. The motion shall be filed at least 30 days before the date scheduled for the hearing, or as soon as possible after receiving the notice of hearing if such notice is issued less than 30 days in advance of the hearing.~~

~~— (d) The moving party's motion shall:~~

- 
- ~~(1) Set forth in detail those factors which it believes to justify its request for information; and~~
- 
- ~~(2) List with specificity the information it is seeking to discover.~~
- 

~~— (e) When a party has demonstrated that such requests for information are necessary for a full and fair presentation of the evidence at the hearing, the presiding officer shall grant the motion.~~

~~— Opt 208.08 Evidence.~~

~~— (a) Proceedings shall not be conducted under the rules of evidence, but, the evidentiary privileges recognized by the law of New Hampshire shall apply to proceedings under this chapter.~~

~~— (b) All information which will assist the board to arrive at the truth is admissible, but the presiding officer shall exclude irrelevant, immaterial or unduly repetitious evidence.~~

~~— (c) The board shall direct that evidence be submitted in written form unless the evidence is in the form or testimony of witnesses made under oath or affirmation.~~

~~— (d) If the board officially notices a fact, it shall so state, and permit any party or intervenor, upon timely request, the opportunity to show the contrary.~~

~~— (e) Witnesses appearing before the board shall testify under oath or affirmation administered by the presiding officer.~~

~~— (f) The board shall cause a tape recording or stenographic record to be made of hearings and prehearing conferences. At the request of a party to any proceeding involving disciplinary action, the record of the proceeding shall be made by a certified shorthand court reporter provided by the board at the requesting party's expense. A request for a certified shorthand court reporter shall be filed at least 10 days prior to the hearing. This record shall be transcribed if a request is made by a party who also agrees to pay the cost of transcription or upon the board's own initiative, in which case the board shall pay the cost of transcription. If a transcript is produced, the board shall maintain a copy of the transcript in the file of the matter.~~

~~— Opt 208.09 Continuances.~~

~~— (a) Any party to a hearing may make an oral or written motion that a hearing be continued to a later date or time.~~

~~— (b) If a continuance is requested by a party to the hearing, it shall be granted if the presiding officer determines that good cause has been demonstrated. Good cause shall include the unavailability of parties, witnesses or attorneys necessary to conduct the hearing, the likelihood that a hearing will not be necessary because the parties have reached a settlement or any other circumstances that demonstrate that a continuance would assist in resolving the case fairly.~~

~~— (c) If the later date, time and place are known at the time of the hearing that is being continued, the date, time and place shall be stated on the record. If the later date, time and place are not known at the time of the hearing that is being continued, the presiding officer shall issue a written scheduling order stating the date, time and place of the continued hearing as soon as practicable.~~

~~— Opt 208.10 Burden of Proof.~~

~~— (a) The party asserting the affirmative of a proposition shall have the burden of proving the truth of that proposition by a preponderance of the evidence.~~

~~-~~

~~— (b) Without limiting the generality of paragraph (a), above, all moving parties and all petitioners shall have the burden of persuading the board that their motion or petition should be granted.~~

~~-~~

~~— Opt 208.11 Methods of Proceeding. Where facts material to the subject matter of the proceeding are in dispute, and personal observation of witnesses or the immediate opportunity for cross-examination of witnesses is necessary or desirable, the proceeding shall, to that extent, consist of a trial-type evidentiary hearing with the subsequent submission of memorandum, or according to the order of the board as stated in the notice of hearing under Opt 208.02(b).~~

~~-~~

~~— Opt 208.12 Proposed Findings of Fact and Conclusions of Law.~~

~~-~~

~~— (a) Any party may submit proposed findings of fact and conclusions of law to the presiding officer prior to or at the hearing.~~

~~-~~

~~— (b) Upon request of any party, or if the presiding officer determines that proposed findings of fact and conclusions of law would serve to clarify the issues presented at the hearing, the presiding officer shall specify a date after the hearing for the submission of proposed findings of fact and conclusions of law.~~

~~-~~

~~— (c) In any case where proposed findings of fact and conclusions of law are submitted, the decision shall include rulings on the proposals.~~

~~-~~

~~— Opt 208.13 Ex Parte Communications. Unless required for the disposition of ex parte matters authorized by law, no board member, party, intervenor or party representative, shall communicate, directly or indirectly, in connection with any issue before the agency, with any party or person, except upon notice and opportunity for all parties to participate.~~

~~-~~

~~— Opt 208.14 Closing the Record.~~

~~-~~

~~— (a) After the conclusion of the hearing, the record shall be closed and no other evidence shall be received into the record, except as allowed by (b) below and Opt 208.16.~~

~~-~~

~~— (b) Before the conclusion of the hearing, a party may request that the record be left open to allow the filing of specified evidence not available at the hearing. If the other parties to the hearing have no objection or if the presiding officer determines that such evidence is necessary to a full consideration of the issues raised at the hearing, the presiding officer shall keep the record open for the period of time necessary for the party to file the evidence.~~

~~-~~

~~— Opt 208.15 Reopening the Record. At any time prior to the issuance of the decision on the merits, the presiding officer, on the presiding officer's own initiative or on the motion of any party, shall reopen the record to receive relevant material and non-duplicative testimony, evidence or arguments not previously received, if the presiding officer determines that such testimony, evidence or arguments are necessary to a full and fair consideration of the issues to be decided.~~

~~-~~

~~— Opt 208.16 Decisions.~~

~~-~~

~~— (a) A board member shall not participate in making a decision unless he or she personally heard the testimony in the case, unless the matter's disposition does not depend on the credibility of any witness and the record provides a reasonable basis for evaluating the testimony.~~

~~— (b) If a presiding officer has been delegated the authority to conduct a hearing in the absence of a majority of the members of the board who are to render a final decision, the presiding officer shall submit to the board a written proposal for decision, which shall contain a statement of the reasons for the decision and findings of fact and rulings of law necessary to the proposed decision.~~

~~— (c) If a proposal for decision in a matter not personally heard by all board members voting on the decision is adverse to a party to the proceeding other than the board itself, the board shall serve a copy of the proposal for decision on each party to the proceeding and provide an opportunity to file exceptions and present briefs and oral arguments to the board.~~

~~— (d) A proposal for decision shall become a final decision upon its approval by the board.~~

~~— (e) A board shall keep a decision on file in its records for at least 5 years following the date of the final decision or the date of the decision on any appeal, unless the board sets a different retention period pursuant to rules adopted under RSA 327:31.~~

#### ~~PART Opt 209 PRESIDING OFFICERS~~

##### ~~Opt 209.01 Designation.~~

~~— (a) Adjudicatory proceedings commenced by the board shall be conducted by a presiding officer.~~

~~— (b) The board shall appoint one of its members to serve as a presiding officer.~~

##### ~~Opt 209.02 Authority of Presiding Officer.~~

~~— (a) The presiding officer shall possess all authority with respect to the procedural aspects of adjudicatory proceedings including, but not limited to, the power to administer oaths and affirmations, direct the course of the proceeding, and decide procedural and discovery issues.~~

~~— (b) The presiding officer shall receive no testimony or oral argument on the merits of the case unless at least a majority of board members eligible to vote including the presiding officer are present. The presiding officer shall have the authority to conduct prehearing conferences, or hear arguments on procedural or discovery motions without requiring the presence of other members of the board.~~

~~— (c) The presiding officer shall, to the extent consistent with the fair and orderly conduct of the proceeding, permit board members who are present during any stage of an adjudicatory proceeding to make inquiries of the witnesses.~~

~~— (d) The presiding officer shall not accept final offers of settlement or impose consent decrees, but shall assist the parties in reaching settlements. When a settlement has been proposed in writing, the presiding officer shall refer it to the board for decision, but shall not stay the proceeding while the board is deliberating on the settlement proposal.~~

~~— (e) The presiding officer shall not decide motions or enter orders which finally resolve the proceeding or stay the proceeding. Potentially dispositive motions may be referred to the board.~~

~~— (f) If the presiding officer believes that a default or similar final order should enter against a party, the presiding officer shall issue a written recommendation to the board, with service on the parties and any~~

~~intervenors, if applicable. The board shall make the final decision with respect to such a recommendation after allowing the parties 10 days to file objections thereto.~~

~~-~~

~~— Opt 209.03 Exceptions to Rulings By The Presiding Officer.~~

~~-~~

~~— (a) There shall be no interlocutory appeal to the board of procedural or discovery orders made by the presiding officer. Contemporaneous exceptions to such rulings shall be unnecessary and shall not be made.~~

~~-~~

~~— (b) The parties may include objections to an adverse ruling of a presiding officer in any proposed decision under Opt 209.04. When a proposed decision is not issued, such objections shall be presented to the board as a motion or as part of a closing memorandum submitted within 10 days from the close of the hearing.~~

~~-~~

~~— Opt 209.04 Presiding Officer; Withdrawal. The board shall at any time, and without notice or hearing, replace the presiding officer if circumstances exist which would require the presiding officer to withdraw according to the following criteria:~~

~~-~~

~~— (a) Upon his or her own initiative or upon the motion of any party, a presiding officer or agency official shall, for good cause withdraw from any hearing.~~

~~-~~

~~— (b) Good cause shall exist if a presiding officer or agency official:~~

~~-~~

~~(1) Has a direct interest in the outcome of a proceeding, including, but not limited to, a financial or family relationship with any party; or~~

~~-~~

~~(2) Has made statement or engaged in behavior which objectively demonstrates that he or she has prejudged the facts of a case; or~~

~~-~~

~~(3) Personally believes that he or she cannot fairly judge the facts of a case.~~

~~-~~

~~— (c) Mere knowledge of the issues, the parties or any witness shall not constitute good cause for withdrawal.~~

~~-~~

#### ~~PART Opt 210 RECONSIDERATION AND STAY~~

~~-~~

~~— Opt 210.01 Motion for Reconsideration or Rehearing.~~

~~-~~

~~— (a) The rules in this section allow a person affected by a final decision of the board to request a rehearing of a decision prior to appealing the decision.~~

~~-~~

~~— (b) An adjudicatory order of the board, or an order denying a petition for declaratory rulings or rulemaking, shall not be final until the date it is served upon the parties pursuant to Opt 206.03(d).~~

~~-~~

~~— (c) A motion for rehearing shall be filed within 30 days of the date of an agency decision or order.~~

~~-~~

~~— (d) A motion for rehearing or reconsideration shall:~~

~~-~~

~~(1) Include any memorandum of law the petitioner wishes to submit;~~

~~-~~

~~(2) Identify each error of fact, error of reasoning, or erroneous conclusion contained in the final order which the moving party wishes reconsidered;~~

-  
~~(3) Describe how each error causes the agency's decision to be unlawful, unjust or unreasonable, or illegal in respect to jurisdiction, authority or observance of the law, an abuse of discretion or arbitrary unreasonable or capricious; and~~

-  
~~(4) Concisely state the correct factual findings, correct reasoning, and legal conclusion urged by the moving party.~~

-  
~~—— (e) A motion for rehearing shall be granted if it demonstrates that the board's decision is unlawful, unjust or unreasonable.~~

-  
~~PART Opt 211 CONSOLIDATION AND SEVERANCE~~

-  
~~—— Opt 211.01 Consolidation. Whenever it shall appear to the board, upon motion or its own initiative, that 2 or more proceedings involve substantially similar or substantially related issues, the board shall, as fairness and efficiency permit, consolidate those proceedings for hearing, or decision, or both.~~

-  
~~—— Opt 211.02 Severance. Whenever it shall appear to the board, upon motion or its own initiative, that injury to the substantial rights of a party or undue delay may be thereby avoided, the board shall, as fairness and efficiency permit, sever one or more issues from a proceeding, and dispose of those issues in another proceeding.~~

-  
~~PART Opt 212 INVESTIGATIONS~~

-  
~~—— Opt 212.01 Informal Investigations.~~

-  
~~—— (a) Notwithstanding any other provision of this title, the board, within the limits of its authority, and acting through its members, officers and employees, or through independent contractors, shall make inquiry of any person and otherwise gather data, and prepare reports describing the data obtained whenever:~~

-  
~~(1) It receives data which leads it to believe that a violation of any statute administered by the board, or of any rule of the board, has occurred, or is likely to occur; or~~

-  
~~(2) It desires to obtain data for any other lawful purpose.~~

-  
~~—— (b) Informal investigations shall as necessary include requests for additional information from the complainant such as requests for a release of relevant medical records belonging to or under the control of the complainant and face to face meetings with interested persons.~~

-  
~~—— Opt 212.02 Formal Investigations.~~

-  
~~—— (a) The board shall commence a formal investigation for the purpose of obtaining documents, recording testimony, and otherwise gathering information relevant to any matter within its jurisdiction.~~

-  
~~—— (b) Formal investigations shall be commenced by the issuance of an order of investigation containing:~~

-  
~~(1) The statutory or regulatory authority for the investigation;~~

-  
~~(2) Any statutes or rules believed to have been, or about to be, violated;~~

- ~~(3) The identity of the persons, or class of persons, which are the subject of the investigation;~~
- ~~-~~
- ~~(4) The general nature of the conduct being investigated;~~
- ~~-~~
- ~~(5) The identity of the investigating officer or committee; and~~
- ~~-~~
- ~~(6) The date upon which the investigating officer shall report his or her findings and recommendations to the board.~~
- ~~-~~

~~— (c) The issuance of an order of investigation shall not commence a disciplinary hearing and shall not constitute an allegation of misconduct against a licensee.~~

~~-~~  
~~— Opt 212.03 Investigators. The board shall appoint a member of the board, or its staff, or an attorney, to conduct a formal or informal investigation.~~

#### ~~PART Opt 213 RULEMAKING~~

~~-~~  
~~— Opt 213.01 How Adopted. A board rule, or any amendment or repeal thereof, shall be adopted by order after notice and opportunity for a legislative type hearing as provided by RSA 541-A:3 et seq. Rules shall be proposed by petition or by the board acting on its own motion.~~

~~-~~  
~~— Opt 213.02 Petition for Rulemaking. Any person may request the board to commence a proceeding for the purpose of adopting, amending, or repealing a rule by filing a petition which contains the following information which the board shall review in making a decision as to whether to grant the request:~~

~~-~~  
~~— (a) A statement of the petitioner's interest in the subject matter of the proposed rule;~~

~~-~~  
~~— (b) The text of the proposed rule or a statement of the particular results intended by the petitioner to flow from the implementation of the proposed rule;~~

~~-~~  
~~— (c) If the petitioner proposes to amend or repeal an existing rule, an identification of the particular rule sought to be amended or repealed; and~~

~~-~~  
~~— (d) Any data or argument the petitioner believes would be useful to the board in deciding whether to commence a rulemaking proceeding.~~

~~-~~  
~~— Opt 213.03 Disposition of Petition.~~

~~-~~  
~~— (a) The board shall, by order, grant or deny a petition for rulemaking.~~

~~-~~  
~~— (b) If the petition is denied, the board shall state the reason therefor in the order.~~

~~-~~  
~~— (c) The board shall deny the petition for rulemaking when the adoption, amendment or repeal sought would result in:~~

~~(1) A rule which is not within the rulemaking authority of the board;~~

~~-~~  
~~(2) Duplication of a rule or of a statutory provision;~~

~~-~~  
~~(3) Inconsistency between the existing rules and the statutory mandate of the board;~~

~~-~~

~~(4) Inconsistency of administrative rules one with another; or~~

~~-~~

~~(5) Excessive burden upon the board in terms of cost or a reduction in efficiency or effectiveness.~~

~~-~~

~~— (d) If the petition is granted, the board shall undertake to commence a rulemaking proceeding in accordance with RSA 541-A:4.~~

~~-~~

~~— Opt 213.04 Commencement of Rulemaking Proceeding. The board shall commence a rulemaking proceeding by following the procedures set forth in RSA 541-A:4 et seq.~~

~~-~~

#### ~~PART Opt 214 RULEMAKING HEARINGS~~

~~-~~

~~— Opt 214.01 Purpose. The purpose of this part is to provide a uniform procedure for the conduct of public hearings at which comment from the general public will be solicited for evaluation and consideration by the board relative to rulemaking.~~

~~-~~

~~— Opt 214.02 Scope.~~

~~-~~

~~— (a) These rules shall apply to all hearings required by state law to be conducted by the board at which public comment shall be solicited, except that they shall not apply to adjudicative hearings.~~

~~-~~

~~— (b) If any requirement set by these rules conflicts with an applicable statute, such other authority shall control.~~

~~-~~

~~— Opt 214.03 Notice.~~

~~-~~

~~— (a) A public comment hearing concerning rulemaking shall be commenced by placing notice of the hearing in the “Rulemaking Register” so that it shall appear at least 20 days prior to the hearing date.~~

~~-~~

~~— (b) Notice for rulemaking public comment hearings shall comply with RSA 541-A:6, I.~~

~~-~~

~~— (c) Nothing in these rules shall prohibit the board from giving greater notice than the minimums set out in this part.~~

~~-~~

~~— Opt 214.04 Media Access.~~

~~-~~

~~— (a) Public comment hearings shall be open to the print and electronic media.~~

~~-~~

~~— (b) The moderator shall place limits on the activities of the media to avoid disruption in the following ways:~~

~~-~~

~~(1) Limit the number of media representatives when their presence is disproportionate to the number of citizens present and shall cause citizens to be excluded;~~

~~-~~

~~(2) Limit the placement of television cameras to certain locations in the hearing room; and~~

~~-~~

~~(3) Prohibit interviews from being conducted within the hearing room during the hearing.~~

~~-~~

~~— Opt 214.05 Moderator.~~

~~-~~



~~— (a) The hearing shall be presided over by a moderator who shall be the board chairperson or a designee.~~

~~-~~

~~— (b) The moderator shall:~~

~~-~~

~~(1) Call the hearing to order;~~

~~-~~

~~(2) Cause a recording of the hearing to be made;~~

~~-~~

~~(3) Place limits on the media to avoid disruption as set out in Opt 214.04(b);~~

~~-~~

~~(4) Recognize those who wish to be heard and establish the order thereof;~~

~~-~~

~~(5) Limit the time for each speaker, as set out in Opt 214.06(b);~~

~~-~~

~~(6) Remove or have removed any person who disrupts the hearing;~~

~~-~~

~~(7) Adjourn the hearing; and~~

~~-~~

~~(8) Provide opportunity for the submission of written comments.~~

~~-~~

~~— Opt 214.06 Public Participation.~~

~~-~~

~~— (a) Any person who wishes to speak on the issue or issues which are the subject of the hearing shall place his or her name and address on a speakers' list before the last speaker on the list has finished speaking. All whose names appear on the speakers' list, as provided, shall be afforded reasonable time to speak at the hearing. Reasonable time shall be determined considering the number of people who wish to be heard, the time and the availability of the facility.~~

~~-~~

~~— (b) The board, through the moderator, shall:~~

~~-~~

~~(1) Refuse to recognize a person who refuses to give his or her full name and address;~~

~~-~~

~~(2) When a group or organization wishes to comment, limit the group to no more than 3 spokespersons, provided that the members who are present shall be allowed to enter their names and addresses into the records as supporting the position by the group or organization;~~

~~-~~

~~(3) Revoke recognition of a speaker who speaks or acts in an abusive or disruptive manner; or~~

~~-~~

~~(4) Revoke recognition of a speaker who refuses to keep his comments relevant to the issue or issues which are the subject of the hearing.~~

~~-~~

~~— (c) Written comments may be submitted any time from the time notice has been published until the record has been closed by the moderator, which shall not be less than 7 calendar days after the hearing.~~

~~-~~

~~— (d) In the event that the number of speakers who wish to give oral testimony relevant to the issue or issues involved exceed that number which can be heard within a reasonable period of time subject to facility availability and length of the hearing, the hearing shall be reconvened pursuant to applicable provisions in RSA 541-A to afford such persons the opportunity to be heard. Speakers may elect to submit written testimony in lieu of additional oral hearing.~~

~~-~~

~~PART Opt 215 DECLARATORY RULINGS~~

~~-~~

~~— Opt 215.01 Petitions.~~

~~-~~

~~— (a) Any person may request a declaratory ruling from the board on matters within its jurisdiction by filing an original and 6 copies of a petition pursuant to Opt 207.01(b).~~

~~-~~

~~— (b) Such a petition shall also set forth the following information:~~

~~-~~

~~(1) The exact ruling being requested;~~

~~-~~

~~(2) The statutory and factual basis for the ruling, including any supporting affidavits or memoranda of law; and~~

~~-~~

~~(3) A statement as to how and why the issuance of a ruling on this subject would benefit the petitioner.~~

~~-~~

~~— Opt 215.02 Action on Petitions.~~

~~-~~

~~— (a) The petitioner shall provide such further information or participate in such evidentiary or other proceedings as the board directs after reviewing the petition and any replies received.~~

~~-~~

~~— (b) The board shall deny a petition when:~~

~~-~~

~~(1) Other procedural options are available to the interested parties or the board;~~

~~-~~

~~(2) The board's budget or workload require other matters to take priority; or~~

~~-~~

~~(3) The ruling would impact inappropriately upon pending administrative, judicial or legislative proceedings.]~~

**Repeal Opt 216 and Opt 217, effective 9/16/17 (Document #12382), as follows:**

~~[PART Opt 216 WAIVER OF SUBSTANTIVE RULES~~

~~-~~

~~— Opt 216.01 Petitions for Waiver.~~

~~-~~

~~— (a) Any interested person may request the board to waive any rule not covered by Opt 203.01 by filing an original and 6 copies of a petition pursuant to Opt 207.01(b) which also identifies the rule in question and sets forth specific facts and arguments which support the requested waiver.~~

~~-~~

~~— (b) Petitions for waivers of substantive rules shall address whether:~~

~~-~~

~~(1) Adherence to the rule would cause the petitioner hardship;~~

~~-~~

~~(2) The requested waiver is necessary because of any neglect or misfeasance on the part of the petitioner;~~

~~-~~

~~(3) Waiver of the rule would be consistent with the statutes administered by the board; and~~

-  
~~(4) Waiver of the rule would injure third persons.~~

-  
~~—— (c) If examination of the petition reveals that other persons would be affected by the proposed relief, the board shall require service of the petition on each such persons and advise each that she or he may file a reply to the petition pursuant to Opt 207.01(e).~~

-  
~~—— (d) The petitioner shall provide further information or participate in such evidentiary or other proceedings as may be ordered by the board as necessary to complete action on the petition.~~

-  
~~—— (e) A petition for waiver of a rule which does not contain the information required in (b) above shall be denied without further notice or hearing.~~

-  
~~—— (f) The board shall waive a substantive rule either in response to a petition or upon its own motion after providing affected parties with notice and an opportunity to be heard.~~

-  
~~—— (g) The board shall issue an order waiving a substantive rule if it determines after a hearing that:~~

-  
~~(1) Adherence to the rule would cause personal or economic hardship to affected individuals;~~

-  
~~(2) There is no neglect or misfeasance on the part of the petitioner, if applicable;~~

-  
~~(3) Waiver of the rule would be consistent with the statutes administered by the board; and~~

-  
~~(4) Waiver of the rule would not injure third persons.~~

~~PART Opt 217 EXPLANATION AFTER ADOPTION~~

-  
~~—— Opt 217.01 Explanation after Adoption.~~

-  
~~—— (a) Any person may request an explanation regarding adoption of the rules pursuant to RSA 541-A:11, VII by submitting a request to the board.~~

-  
~~—— (b) The request shall be considered at the next scheduled board meeting and the board shall issue a response within 45 days after consideration.]~~

**Adopt Opt 201 to read as follows:**

**PART Opt 201 APPLICABILITY AND WAIVER OF SUBSTANTIVE RULES**

Opt 201.01 Rules of Practice and Procedure. The Plc 200 rules shall govern with regards to all procedures for:

(a) Adjudicatory proceedings;

(b) Rulemaking submissions, considerations, and dispositions of rule making petitions;

(c) Public comment hearings;

(d) Declaratory rulings;

- (d) All statements of policy and interpretation;
- (e) Explanation of adopted rules; and
- (f) Voluntary surrender of licenses.

Opt 201.02 Waiver of Administrative Rules.

(a) The board shall initiate a waiver of a substantive rule upon its own motion by providing affected parties with notice and opportunity to be heard, and issuing an order which finds that waiver would be necessary to advance the purpose of the rules of the board.

(b) Individuals who wish to request a waiver of a rule shall submit a written request to the board, which includes:

- (1) The rule for which a waiver is requested;
  - (2) The anticipated length of time the requested waiver will be needed;
  - (3) The reason for requesting the waiver;
  - (4) Evidence of how the waiver will provide for the health and safety of the consumer or licensee;
  - (5) A time-limited written compliance plan which sets forth plans to achieve compliance including an estimated date of compliance; and
  - (6) The signature of the applicant.
- (c) The board shall consider the following when determining whether to approve or deny a waiver:
- (1) If adherence to the rule would cause the petitioner unnecessary or undue hardship;
  - (2) If the requested waiver is necessary because of any neglect or misfeasance on the part of the practitioner;
  - (3) If enforcement of the rule would injure a third person(s); and
  - (4) If waiver of the rule would injure a third person(s).
- (d) The board shall approve a waiver of an administrative rule request only if:
- (1) Granting a waiver does not have the effect of waiving or modifying a provision of RSA 327;
  - (2) The petitioner has shown good cause exists pursuant to (c) above to waive the rule; and
  - (3) The board determines that the individual's plans for compliance with the rule includes an estimated date of compliance and eventual compliance.

(e) If the board, after receiving and reviewing a request for a waiver, requires further information or documentation to grant or deny the waiver, the board shall:

- (1) Notify the applicant in writing within 30 days; and
- (2) Specify the information or documentation the board requires.

(f) The board shall issue a written approval or denial of the waiver within 60 days of the date the request is received, unless additional information or documentation is required. If additional information and documentation is required, then the board shall issue a written approval or denial within 60 days of receiving the requested information or documentation.

#### **APPENDIX A - Statutes Implemented**

<b>Rule</b>	<b>Specific State Statute the Rule Implements</b>
Opt 201 - Opt 209 (repealed)	RSA 327:20; RSA 327:21; RSA 327:22; RSA 541-A:16, I(b)(2); RSA 541-A:30-a, I
Opt 210 (repealed)	RSA 327:22, II
Opt 211 (repealed)	RSA 541-A:16, I(c)
Opt 212 (repealed)	RSA 541-A:22, IV
Opt 213 (repealed)	RSA 541-A:16, I(d)
Opt 214 (repealed)	RSA 541-A:16, I(d)
Opt 215 (repealed)	RSA 541-A:16, I(d)
Opt 216 (repealed)	RSA 541-A:16, I(b) intro.; RSA 541-A:22, IV
Opt 217 (repealed)	RSA 541-A:11, VII
Opt 201.01	RSA 310:6, II
Opt 201.02	RSA 541-A:16, I (b)