

The background is a solid purple color with a pattern of white confetti. The confetti consists of various shapes: wavy lines, small squares, and small triangles, scattered across the entire page.

ADMINISTRATIVE HEARINGS

DUE PROCESS

- ◉ Due process—The 14th Amendment of the US Constitution prohibits a state from depriving any person of life, liberty, or property, without due process of law
- ◉ Individuals have a property right interest in the licenses that they hold and as such, due process protection applies to license revocation actions
- ◉ Two concepts of due process—substantive and procedural

SUBSTANTIVE DUE PROCESS

- ◉ Substantive Due Process is a concept that applies the due process requirements to unenumerated rights
- ◉ For example, the property right that a person holds in a license is not specifically called out in the US Constitution, but through the process of substantive due process, Courts have determined that due process rights apply to the revocation of a professional license

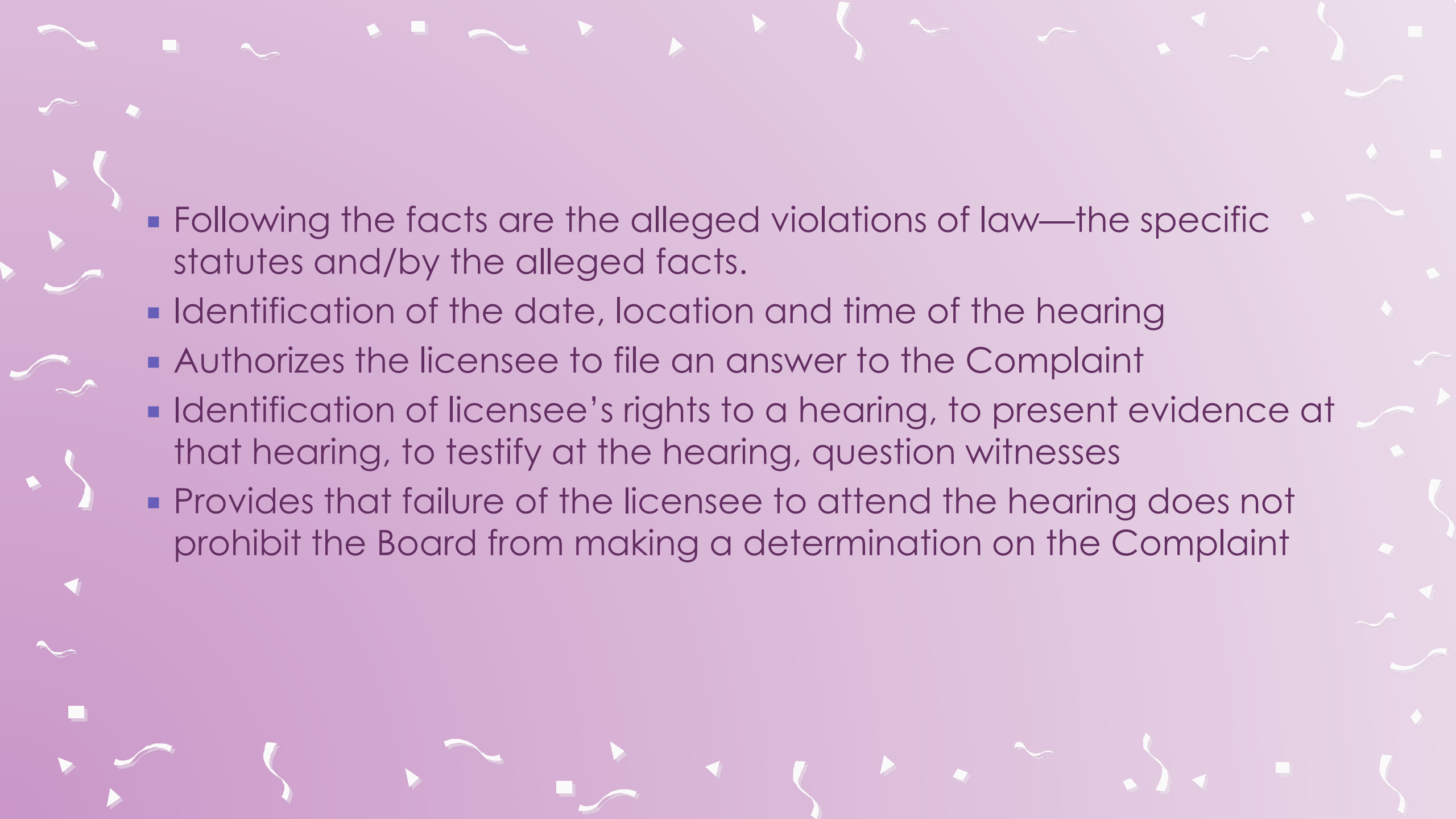
PROCEDURAL DUE PROCESS

- ◉ Procedural Due Process requires governments to follow a fair procedure before depriving someone of life, liberty or property
- ◉ In the case of a professional license, this procedural due process is notice and a hearing
- ◉ NRS 233B.032 defines a “contested case” as a proceeding in which the legal rights, duties or privileges of a person are required by law to be determined by an agency after an opportunity for hearing, or in which an administrative penalty may be imposed.

- NRS 640C.710 requires this Board to provide notice and a hearing before it may impose disciplinary action
- NRS 622A.300 requires the charging document (Complaint Notice of Hearing) be filed with the Board and served on the licensee
- NRS 233B.121 sets forth what the notice must contain
 - Statement of the time, place and nature of the hearing
 - Statement of the legal authority and jurisdiction
 - Reference to particular statutes or regulations involved
 - Short plain statement of matter asserted

WHAT DOES THIS MEAN?

- Complaint and Notice of Hearing
 - Caption identifies the licensee name, license number and case number
 - Opening paragraph sets forth brief statement of what is happening and why the Complaint Notice of Hearing is being sent
 - Identifies the jurisdiction of the Board and that licensee is subject to the Board's jurisdiction
 - Followed by alleged facts—these are the facts which the prosecuting attorney must prove during the hearing through various forms of evidence—testimony, documents etc

- 
- Following the facts are the alleged violations of law—the specific statutes and/by the alleged facts.
 - Identification of the date, location and time of the hearing
 - Authorizes the licensee to file an answer to the Complaint
 - Identification of licensee's rights to a hearing, to present evidence at that hearing, to testify at the hearing, question witnesses
 - Provides that failure of the licensee to attend the hearing does not prohibit the Board from making a determination on the Complaint

SERVING THE COMPLAINT NOTICE OF HEARING

- ◉ Once the Complaint Notice of Hearing is drafted, it must be served upon the licensee.
- ◉ NRS 241 (as revised by AB52) requires the Board to serve the Complaint Notice of Hearing either in person or through certified mail
- ◉ If the Board serves the licensee in person, it must be done not later than 7 calendar days before the hearing
- ◉ If the Board serves the licensee through certified mail, it must be done not less than 14 calendar days before the hearing

ANSWERING THE COMPLAINT

- ◉ The Complaint is “filed” with the Board. This means that it becomes a public document and each member of the Board receives a copy of the Complaint in their Board packet. Board members are charged with reading the Complaint, reviewing the statutes and/or regulations that have been allegedly violated
- ◉ Licensee may, but is not required to, file an Answer within 20 days of receiving the Complaint (NRS 622A.320)
- ◉ Once a licensee responds, it becomes a public document and this document is also included in the Board packet and the Board is charged with reviewing it

DISCOVERY

- NRS 622A.330 authorizes the licensee to engage in limited discovery
 - Can request all documents and other evidence intended to be presented by the prosecuting attorney in support of the Complaint
 - Investigative file is not subject to discovery unless the prosecuting attorney intends to use materials from the file as evidence to support the Complaint. Only those materials would be subject to discovery
 - No interrogatories or depositions are authorized unless the Board has authorized them through a regulation

COMMUNICATIONS

- ◉ The Board is comprised of licensees, because of this, Board members may know the licensee or was involved with the filing of the complaint against the licensee
- ◉ Board members must not communicate with the licensee about the Complaint. (NRS 622A.340, 233B.126)

THE HEARING

- Chair opens the hearing by calling the agenda item—for example, “Next we will move to agenda item 6, administrative hearing, the Board of Massage Therapists v. Licensee, case number NVMT-C-1234”
- Chair will ask if all parties are present and take the appearances of the parties and any representatives
- Once appearances have been taken, Chair should ask if there are any matters that must be taken up before the presentation of the case—any motions that have been filed, agreements between counsel

MOTIONS

- If a motion has been filed, the Chair must open the floor to the party who first made the motion.
 - The party who made the motion has an opportunity to argue the merits of the motion
 - Opposing party has an opportunity to argue against the motion
 - Chair is the deciding person in the motion, but may open it up to discussion by the other members.
 - Chair may seek guidance from Board Counsel in making a decision on the motion
 - NRS 622A.360 limits the types of motions that may be filed

PRESENTATION OF THE CASE

- Prosecuting attorney for the Board presents the case first
 - May provide an opening statement
 - Will seek introduction of evidence, including testimony
 - Witnesses must be administered an oath by the Chair—"do you solemnly swear that the testimony you are about to give the truth, the whole truth and nothing but the truth?" Witnesses may be excluded from the hearing
 - If seeking introduction of documentary evidence, say a report or other document, the prosecuting attorney must lay the foundation for that document. The foundation is presented through oral testimony, generally by the person who created the document
 - If there is an objection to the admissibility of the evidence, the objection must state the reason why and the prosecuting attorney is afforded an opportunity to rebut that argument
 - Chair is the deciding person in such an objection

- Once a document is admitted, it must be marked—for example, Board Exhibit A, Respondent Exhibit A
- Once document is admitted, Board members may review that document and review the Complaint and Answer, if any
- Licensee and Board members have the opportunity to ask the witnesses who the prosecuting attorney has called questions
- Once Prosecuting Attorney has put on all evidence, the Licensee has an opportunity to put on evidence in defense of his or her action
- Irrelevant, immaterial or repetitious evidence may be excluded (NRS 233B.123)
- Closing statements after Licensee has presented his or her case

BURDEN AND STANDARD OF PROOF

- ◉ The Burden of Proof lies with the prosecuting attorney. This means that the prosecuting attorney bears the burden of proving the alleged facts and violations of law. If the prosecuting attorney fails to prove any alleged facts, that may impact whether the Board can find a violation of law (NRS 622A.370)
- ◉ The Standard of Proof for the hearing is a preponderance of the evidence which means evidence that enables a trier of fact to determine that the existence of the contested fact is more probable than the nonexistence of the contested fact

DISCUSSION AMONG BOARD MEMBERS

- ◉ Once the prosecuting attorney and licensee have presented their respective cases and the Board heard any closing arguments, the Board then discusses the evidence
- ◉ If the Board determines that the alleged facts have been proven by a preponderance of the evidence, a member should make a motion identifying which alleged facts have been proven. If none of the facts have been proven, a Board member may make such a motion
- ◉ After the Board has determined that the alleged facts have been proven by a preponderance of the evidence, it must then determine which alleged violations of law are supported by those facts

- ◉ The Board members should review the alleged violations of law and determine which, if any, are supported by the proven facts
- ◉ Even if a Board member feels that a violation does not rise to the level of discipline or is a minor violation, the member should still find that the violation did occur (if the facts support such a violation)
- ◉ Once the Board determines which violations of law have been proven, it should make a motion to set forth those proven violations

DISCIPLINE

- ◉ Once the facts and violations of law have been determined to be proven, the Board discussion turns to the imposition of discipline
- ◉ Board can ask the prosecuting attorney and/or staff for any recommendations regarding discipline
- ◉ Recall the types of discipline you can impose (NRS 640C.710, 640C.712)
- ◉ If the Board determines revocation is appropriate, can revoke for not less than 1 year and no more than 10 years (NRS 622A.410)

- ◉ If the Board feels that a violation does not rise to requiring discipline or is a minor violation, may take that into account when imposing discipline
- ◉ Once the hearing is concluded, the prosecuting attorney will craft an Order outlining what the Board determined. This is sent to the Chair for signature and sent to the licensee
- ◉ Licensee may request a rehearing NRS 622A.390, 233B.130 which must be filed within 15 days of the Order
- ◉ Board may hear the request at a Board meeting. If Board grants the rehearing, may grant partial rehearing or whole rehearing or reconsider findings of facts and conclusions. Rehearing is limited to those issues determined by the Board

JUDICIAL REVIEW

- ◉ Once the Board renders its final decision, the licensee has 30 days to appeal the decision to the district court
- ◉ Burden shifts to licensee to show that the Board acted in violation of the law by ruling in the way it did.