

**Succeeding at Self-Regulation: an Analysis of the Legal and Cultural Principles Applicable to the Effective Promulgation and Enforcement of Professional Standards by the Actuarial Profession**

Lauren M. Bloom, J.D., LL.M.

American Academy of Actuaries  
1100 17th Street, N.W.  
Washington, D.C. 20036  
United States of America  
01-202-223-8196 (telephone)  
01-202-872-1948 (fax)  
[bloom@actuary.org](mailto:bloom@actuary.org)

Abstract

This paper addresses the legal and cultural principles that apply to the design and operation of successful standard-setting and discipline processes. Using the U.S. actuarial profession's standard-setting and discipline process as a model, the paper defines the purposes of self-regulation by professions and discusses how self-regulation differs from outside oversight. It analyzes the relationship between the member and the profession and describes the legal principles that apply to standard-setting and discipline, explaining how they differ between the two functions. The paper also discusses the cultural factors that usually affect a standard-setting and discipline process, and identifies factors that an association might choose to consider when establishing or modifying a standard-setting or discipline process.

Keywords:

**Actuary's responsibility, Discipline, Governance, Professionalism, Self-Regulation, Standards**

# **Succeeding at Self-Regulation: an Analysis of the Legal and Cultural Principles Applicable to the Effective Promulgation and Enforcement of Professional Standards by the Actuarial Profession**

Lauren M. Bloom, J.D., LL.M.

*“Self-reverence, self-knowledge, self-control, —  
These three alone lead life to sovereign power.”  
Alfred Lord Tennyson*

## ***Introduction***

One characteristic that distinguishes a profession from a trade is specialized knowledge obtained through training and experience. Education alone, however, does not suffice to make a professional; any tradesperson has to receive at least some training to gain the necessary skills to pursue his or her trade. In order for a skilled individual to qualify as a *professional*, that individual must work in an occupation that involves a significant element of public trust.

In the United States, courts originally recognized only three professions: doctors, lawyers and clergy.<sup>1</sup> Each of those professions not only called for specialized training, but also involved a significant element of trust, both on the part of the immediate user of the professional’s services and on the part of society as a whole. Doctors who could not be trusted to practice skillfully could decimate whole communities. Lawyers who failed to serve competently and honestly as officers of the court could put the integrity of the entire judicial system, an essential element of an ordered society, into question. Clergy who abused their trusted position could put the spiritual well-being of not only individual parishioners, but of complete congregations, in peril.

As society became more sophisticated and scientific advances provided more opportunities for individuals to attain and apply expert knowledge, the U.S. courts came to recognize other vocations as professions, among them, actuaries.<sup>2</sup> Actuaries provide professional services to insurers, employee benefit plans and social benefit programs, applying their exceptional skills at identifying, quantifying and managing financial risk to the ultimate benefit of policyholders, plan participants and program beneficiaries. The public’s interest in the financial security of society as a whole is well served by the actuarial profession and, therefore, the public interest in the profession’s work is apparent.

Society’s recognition of and reliance on professions made it beneficial for individual professionals to come together into associations to establish, maintain and enforce requirements for entry into the profession as well as standards for individual practitioners’ professional conduct, practice and qualification. In the absence of such standards, individuals lacking the necessary expertise to practice appropriately might misrepresent themselves to the public as “qualified professionals,” or qualified members of the profession might practice without appropriate attention to their duties of competence and integrity. Either result could reduce the public’s trust in the profession, harming the profession’s collective reputation and potentially

reducing employment opportunities for its members. Thus, even professions that are regulated and licensed by the government (*e.g.*, accountants, attorneys, physicians, etc.) have established their own private associations to set and enforce professional standards in addition to the requirements of law.<sup>3</sup>

If a profession is to succeed at self-regulation, it must establish an effective process for setting and enforcing standards of conduct, practice and qualification (referred to hereinafter as “standards of professionalism”). That process should strike an appropriate balance between protecting the users of the profession’s services as well the public while safeguarding the rights and legitimate interests of individual professionals. If the process is too lax, the public interest and users of professional services may suffer. If it is too strict, members of the profession may be harmed unfairly and, in extreme cases, the membership of an association may collectively reject the standards the association attempts to establish.

This paper will analyze legal and cultural principles that apply to the design and operation of successful standard-setting and discipline processes. Using the U.S. actuarial profession’s standard-setting and discipline process as a model, the paper will define the purposes of self-regulation by professions and discuss how self-regulation differs from outside oversight. It will analyze the relationship between the member and the profession and describe the legal principles that apply to standard-setting and discipline, explaining how they differ between the two functions.<sup>4</sup> The paper will also discuss the cultural factors that usually affect a standard-setting and discipline process and offer thoughts on how to address them. Finally, the paper will identify factors that an association might choose to consider when establishing or modifying a standard-setting or discipline process.

## ***Discussion***

### *I. The Purposes of Self-Regulation*

Self-regulation can be understood as the process by which a profession oversees and manages the professional conduct of its individual members. When effectively conducted, self-regulation serves several important purposes. It protects the public interest by providing a mechanism for professions to set and enforce appropriate limits on the professional conduct of their members. If effectively implemented, self-regulation enhances the reputation of a profession by demonstrating that the profession cares about the quality of its members’ work and, therefore, holds them to high standards and disciplines members whose work falls short of those standards. Perhaps most important, self-regulation by a profession provides individual professionals with the necessary tools to provide services consistent with the high standards of their peers, enhancing the quality of their work.

Self-regulation differs from outside oversight in several respects. First, outside oversight is normally provided by a governmental entity (*i.e.*, legislators, regulators, law enforcement officials and courts), or by a quasi-governmental body (*e.g.*, accounting standards boards that are authorized by law to issue binding rules). Self-regulation, by contrast, is imposed by the

profession itself through a private process. Second, outside oversight bodies normally derive their authority from law and, therefore, frequently enjoy the right to exercise powers that private professional associations may not. For example, an outside oversight body may have the power to issue subpoenas or command production of evidence, to exercise police powers when investigating wrongdoing, and to impose penalties such as incarceration or fines. Professional associations rarely have such authority. Third, outside oversight frequently supports public policy or other objectives that may or may not be consistent with the standards of a regulated profession. (For example, U.S. federal law, as a matter of social policy, has long prohibited pension plans from distinguishing between male and female participants on the basis of gender for contribution purposes, even though such distinctions are consistent with actuarial principles of risk classification.<sup>5</sup> As a result, U.S. pension actuaries are prohibited by law from applying actuarial risk classification principles as they otherwise likely would when calculating plan liabilities and contribution requirements.)

Self-regulation and outside oversight frequently coexist. The fact that a profession regulates the conduct and practice of its members does not guarantee that governmental or quasi-governmental bodies will refrain from doing so as well. Quite the contrary, outside overseers may appreciate the merits of self-regulation by a profession, but they usually continue in the belief that outside oversight is essential and are reluctant to surrender their oversight role. Given that the two systems serve somewhat different purposes, however, the existence of outside oversight does not render self-regulation redundant. A private standard-setting process can support professionals in their efforts to practice in a way that is consistent with their peers' legitimate expectations, enhancing practice beyond the minimum requirements set by law. A private discipline process can publicly express a profession's disapproval if a member violates the profession's standards or otherwise inflicts harm on a principal or the public even if the member's conduct does not violate the strictures of law. Concern for the good opinion of colleagues, as articulated in a standard-setting and discipline process, can provide added incentive for professionals to practice with integrity and competence. Ideally, a private standard-setting and discipline process coordinates with and enhances outside oversight, so that the two systems work harmoniously to the good of the profession, its members, the users of the profession's services and society as a whole.

## *II. The Relationship Between the Member and the Profession*

Where outside oversight exists in the form of government licensing, an individual who wishes to practice as a member of a profession must obtain a license to do so but need not necessarily join the profession's membership organization. Nevertheless, most professionals join membership organizations for several reasons: the pleasure of interacting with their peers; the professional prestige and business opportunities that frequently accompany membership in a professional association; access to continuing education and other services that professional associations routinely offer to their members; and the opportunity to further the interests of their professions by working within an association.

In the United States, the courts treat membership in a professional association as an essentially contractual relationship between the member and the organization. The organization provides the member with certain benefits in exchange for which the member pays dues and agrees, implicitly or explicitly, to abide by the association's rules, including its standards of professionalism.<sup>6</sup> Breach of the rules provides a basis for the organization to either terminate the "contract" by expelling the member or maintain the "contract" while imposing whatever lesser discipline the organization's governing documents authorize.<sup>7</sup>

Thus, in the United States, the actuarial profession's standard-setting and discipline process is created by an agreement between the profession and its individual members. Although the Actuarial Board for Counseling and Discipline ("ABCD") and the Actuarial Standards Board ("ASB") both operate independently, they were established by the amendments to the bylaws of the American Academy of Actuaries (the "Academy") and were approved by a vote of the Academy's membership.<sup>8</sup> The requirement that the membership vote to approve any significant changes to the authority, structure or operations of both boards ensures that neither board is authorized to function in a way that is fundamentally contrary to the wishes of a majority of the members of the U.S. profession. Membership approval of the establishment and operations of a standard-setting or discipline process increases the likelihood that the members will accept and comply with the standards set by the profession and cooperate with the discipline process, to the ultimate good of the profession and the public. In the absence of membership approval, practitioners may feel that a standard-setting and discipline process has been forced upon them by the association and, therefore, may be less likely to accept and submit to the process.

### *III. Legal Requirements*

Laws differ between countries, but any private standard-setting and discipline system must meet the legal requirements of the jurisdiction in which it operates. In the United States, the actuarial profession's standard-setting and discipline functions must satisfy principles of due process and antitrust prohibitions, both of which apply to the two processes, albeit somewhat differently between them.

#### *A. Standard-setting*

The U.S. actuarial profession has adopted standards of conduct, practice and qualification.<sup>9</sup> While the three types of standards differ in kind, the principles of due process that apply to their promulgation do not. Two aspects of due process must be satisfied: procedural due process and substantive due process.

Procedural due process requires a standard-setting body, at a minimum, to provide individuals who will be required to satisfy a proposed standard with *notice* of the proposed standard and a *meaningful opportunity to comment* on it before it is adopted. This means the comment period should be of reasonable length; it should be reasonably easy to comment; the standard-setting body should grant comments fair consideration and make changes to a proposed standard if appropriate; and dissenting comments should be addressed when the standard is adopted.

Substantive due process is an equally important concept, essentially, a requirement that the standard-setting process be equitable. The standard-setting body should be honest in describing its proposal; open-minded in evaluating comments; willing to change a proposed standard in response to persuasive comments; and straightforward in responding to comments, both positive and negative. Substantive due process speaks to the intent and conduct of the standard-setting body and its willingness to engage in meaningful dialogue with its constituents.

If a standard-setting body has established procedures to govern its operations, that body is required substantially to comply with those procedures as it develops its standards, in addition to meeting the requirements of due process. The concept of *substantial* compliance is important, particularly if an action of a standard-setting body is subsequently challenged in court. A minor deviation from the standard-setting body's procedures normally will not violate due process, particularly if subsequent action is taken to rectify any significant harm caused by the deviation. Thus, for example, a standard-setting body might set a comment period for an exposure draft of a standard that was shorter than the minimum period required by its published procedures, but then issue a second exposure draft with a longer comment period and duly consider the comments received before issuing a final standard. In that case, the standard-setting body would be out of compliance with its published procedures with the first exposure, but the second exposure would rectify that non-compliance and bring the standard-setting body back into substantial compliance with its procedures and, therefore, with the requirements of the law.<sup>10</sup>

Please note that neither procedural nor substantive due process prevents the standard-setting body from exercising professional judgment in determining whether a standard should be issued or what it should contain. If a standard-setting body has been duly established and empowered under an association's bylaws or other governing documents, the standard-setting body can and should exercise its collective judgment to develop appropriate standards. Commentators will inevitably disagree about various aspects of a proposed standard, and the standard-setting body is responsible for deciding, after due consideration of comments from all interested parties, what standards would best serve the needs of practitioners and the public.

U.S. antitrust law also prevents private standard-setting bodies from imposing unreasonable restraints on practitioners' professional activities. The law entirely prohibits standards that require: price fixing (*i.e.*, agreement by competitors on the prices to be charged for goods or services); market division (*i.e.*, agreement by competitors to divide the market for goods or services by geography, class of potential customer or other means); group boycott (*i.e.*, agreement by competitors to refuse to deal with providers of goods or services); and tying (*i.e.*, agreement by competitors to provide particular goods or services only if customers also agree to purchase other goods or services).

All standards limit professionals' actions to at least some degree, so even standards that do not require practitioners to engage in any of the four *per se* violations enumerated above have the potential to run afoul of antitrust laws. Fortunately, U.S. courts have recognized that standards of professionalism have significant social benefit and, therefore, should be permitted notwithstanding any incidental anticompetitive impact they may have. The courts evaluate

standards that do not require practitioners to engage in any of the four *per se* violations under the “Rule of Reason,” balancing the social benefits of standards against whatever anticompetitive impact they may have. Such standards are struck down only if they *unreasonably* limit professionals’ freedom to practice.<sup>11</sup>

In the United States, standards of practice are promulgated by the ASB. The ASB operates in accordance with duly adopted and published procedures that are available to all interested parties.<sup>12</sup> Any individual may submit to the ASB a proposal for a new standard of practice. If the ASB, upon considering the proposal, agrees that a standard should be developed, the proposal is assigned to one of the ASB’s five operating committees (Casualty, Health, Life, Pension or General, *i.e.*, a committee to draft standards of general application), or a special task force is established to draft the standard. Working with professional editorial staff, the operating committee prepares a first exposure draft of the standard. The writing process is usually time-consuming, involving many drafts and extensive rewriting as the committee seeks to codify what it believes to be acceptable actuarial practice in the area to be addressed by the standard. The proposed exposure draft is reviewed by legal counsel<sup>13</sup> and then submitted to the ASB, which carefully reviews the draft, edits it as needed and then approves the draft for exposure.

After the ASB approves the draft, it is published and released to the members of the actuarial profession, other interested parties and the public, and comments are invited. Frequently, ASB representatives will also present the exposure draft at actuarial meetings or discuss it with interested regulators as a way to encourage commentary. If a proposed standard is believed to be particularly controversial, the ASB may also hold a public hearing to give interested parties an opportunity to comment on the exposure draft.

The ASB allows an appropriate time for comment and accepts comments by mail, facsimile or electronic mail. At the end of the comment period, the drafting committee carefully considers all of the comments received and makes appropriate edits to the proposed standard. The drafting committee also prepares a written summary of the comments received and its responses, which is published as an appendix to the proposed standard. The revised document is then submitted to the ASB, again accompanied by a legal opinion, with a request that the proposed standard either be re-exposed or adopted. It is not uncommon for the ASB to edit and re-expose a proposed standard once, or even twice, in order to develop a final standard that appropriately reflects accepted practice.<sup>14</sup> Once the ASB is satisfied that the proposed standard is acceptable, it adopts the proposed standard, which is then posted online and included in the *Actuarial Standards of Practice*.<sup>15</sup>

The five major membership organizations for actuaries in the United States have all adopted common standards of conduct for their members that are embodied in the U.S. *Code of Professional Conduct* (the “Code”). The *Code* is maintained by a joint committee of the five U.S.-based actuarial organizations; the committee is housed in the Academy and supported by the Academy’s professional staff. When changes to the *Code* are under consideration, the joint committee works with legal and editorial staff to develop an exposure draft. The five Boards of the U.S.-based actuarial organizations review the exposure draft and authorize its circulation for comments to all of the members of their organizations. The joint committee carefully considers

all of the comments received and makes appropriate edits to the exposure draft, again working with legal and editorial staff. The joint committee also prepares a written summary of the comments received on the exposure draft and its responses. The joint committee may then seek permission from the five Boards to re-expose the proposed revisions to the *Code* (as occurred when the *Code* was last amended, effective January 1, 2001). Ultimately, all five Boards must adopt the amended *Code* and distribute the amended *Code* to their members.<sup>16</sup>

The *Code* requires actuaries, when practicing in the United States, to satisfy the *Qualification Standards for Prescribed Statements of Actuarial Opinion* (the “*Qualification Standards*”) promulgated by the Academy. The *Qualification Standards* are maintained by the Academy’s Committee on Qualifications, which periodically develops proposed amendments to the *Qualification Standards* (again working with legal and editorial staff) and submits them to the Academy Board for approval. As with the *Actuarial Standards of Practice* and the *Code*, the revisions are exposed in draft to the actuarial profession and other interested parties, comments are carefully considered, and revisions are made before the revised *Qualification Standards* are adopted by the Academy Board.

All of these processes satisfy the fundamental requirements of due process even as they differ slightly to accommodate the structure and operations of the standard-setting body. They all involve giving interested parties fair notice that a standard is under consideration and what the content of the standard is expected to be; ample opportunity to comment concerning the proposal; and open-minded review of comments as the standard is put into final form. The minor variations in the U.S. processes demonstrate that an organization wishing to put a standard-setting process in place can design a process that is consistent with its structure and the intended purpose of its standards and still meet the due process obligations that are fundamental to successful standard-setting.

## ***B. Discipline***

Under United States law, professional associations must provide their members with due process prior to imposing discipline. The process that is “due” in a discipline setting is somewhat different from that required for standard-setting, but the fundamental concepts of notice and opportunity for a fair hearing are almost identical between the two functions. These requirements apply in the discipline context as follows.

Any practitioner who is potentially subject to discipline is entitled to procedural due process in the form of clear and fair notice of the standards to which the practitioner will be held; the substance of any charge that the practitioner failed to meet those standards; any factual allegations underlying the charge; and what procedures the disciplinary body will follow to resolve any question concerning the practitioner’s compliance with standards.<sup>17</sup> The practitioner is also entitled to one or more reasonable opportunities to tell his or her version of how events transpired, or to argue that discipline would be unfair, inappropriate or excessive. The practitioner should have the right to the advice of legal counsel, although the organization is not required to pay for the member’s attorney or permit the attorney to speak in the member’s stead.

The practitioner is also entitled to a timely outcome; the disciplinary body should not take so long to reach a decision or to impose discipline that the delay unreasonably harms the member.

Additionally, a practitioner is entitled to substantive due process, *i.e.*, the right to fair and unbiased evaluation of the practitioner's conduct. Although a professional discipline action is not a criminal trial, it is normally preferable for a membership organization to start from the presumption that the member complied with the profession's standards of professionalism and to reach a contrary conclusion only after reviewing the relevant evidence in a careful and unbiased manner. Independent review of the facts is important; the disciplinary body should not simply accept a complainant's allegations at face value, but should make a reasonable effort to verify what actually occurred, taking the practitioner's representations into account. The individual or group of individuals who serve on the disciplinary body should be impartial; an individual whose interests conflict with those of the practitioner normally should not participate. The outcome of the process should be reasonable, based on and supported by the evidence developed through the investigative process. An outcome that reflects a failure on the part of the disciplinary body to base its decision on the record before it rather than outside considerations (*e.g.*, a practitioner's "bad reputation" within the profession) will be particularly vulnerable to legal challenge.

In addition to meeting the requirements of due process enumerated above, a disciplinary body is required to comply substantially with whatever published procedures it has adopted. Again, *substantial* compliance is key. Minor deviations from published procedures are permitted, and inadvertent procedural breaches can usually be corrected before disciplinary action is finally imposed.

A duly authorized disciplinary body has discretion, just as a standard-setting body does, to exercise its judgment in deciding whether and how severely to discipline a member. U.S. courts are usually reluctant to substitute their own judgment for that of an association's disciplinary body. Consequently, if a practitioner's sole basis for claiming unfair treatment was that the disciplinary action taken against the practitioner was too harsh, a court would normally have to be satisfied that the action was so disproportionate to the member's offense as to "shock the conscience" before ruling against the association.

The existence of five major membership organizations for U.S. actuaries created a need for a single body to investigate complaints against practitioners; otherwise, an actuary who was a member of more than one organization might be subject to multiple investigations that could yield conflicting factual findings. To avoid this outcome, the U.S. actuarial profession established the ABCD to investigate all complaints and inquiries concerning the professional conduct of U.S. actuaries.<sup>18</sup> Like the ASB, the ABCD operates pursuant to published procedures that were developed with considerable input from the U.S. actuarial profession.<sup>19</sup>

When the ABCD receives a complaint, it contacts the actuary who is the subject of the complaint (referred to in the ABCD's Rules of Procedure as the "subject actuary") and invites a preliminary response. The complaint and any response from the subject actuary are considered by the Chairperson and two Vice-Chairpersons of the ABCD. They decide whether to dismiss the complaint outright, offer guidance to the actuary, or investigate the complaint (dismissal or

guidance ends the ABCD's inquiry). If the Chairperson and Vice-Chairpersons choose to investigate, an appropriately qualified actuary is selected to look into the complaint.<sup>20</sup> Normally, the investigator gathers documentation and talks to the complainant, the subject actuary, and anyone else who may have relevant information, and then prepares a written report of findings and conclusions. The investigator's report is provided to the subject actuary, who is invited to submit a written response.

The entire ABCD then reviews the complaint and investigator's report, as well as any material submitted by the subject actuary. The ABCD can decide to dismiss the complaint or offer counseling to the actuary (either of which ends the ABCD's inquiry). If, however, the ABCD determines that it needs additional information or that the subject actuary's conduct appears to warrant discipline, the ABCD schedules an investigatory hearing.

ABCD hearings are conducted in person. The investigator is asked to attend, and the subject actuary is invited to attend. The subject actuary is permitted to make a written submission prior to the hearing and to have the advice of legal counsel.<sup>21</sup> At the hearing, the subject actuary is invited to make both an opening and closing statement, and the ABCD questions both the subject actuary and the investigator. The purpose of the hearing is to determine what occurred and whether the actuary complied with applicable standards of professionalism.

After the hearing, the ABCD meets in executive session and considers the entire record. The ABCD can dismiss the case, counsel the subject actuary (either of which, again, concludes the matter) or recommend that the subject actuary be disciplined. If the ABCD concludes that discipline is appropriate, it prepares detailed written findings and recommendations, summarizing its understanding of the events that occurred, explaining how the actuary apparently breached applicable standards of professionalism, and recommending a particular disciplinary sanction. All of the organizations of which the subject actuary is a member receive a set of the ABCD's findings and recommendation, as well as a full set of the documents in the ABCD record and a transcript of the investigatory hearing.<sup>22</sup>

The ABCD's activities are conducted in confidence, absent a written waiver of confidentiality from the subject actuary. Even recommendations for discipline are conveyed on a confidential basis to the membership organizations, which then determine whether to discipline the member as described below. The confidential nature of the ABCD's activities has two benefits. First, it protects the subject actuary's professional reputation from harm until such time as the membership associations have determined that the subject actuary's conduct merits discipline.<sup>23</sup> Second, it encourages the subject actuary to cooperate with the ABCD, because any admission by the subject actuary of less than perfect practice will not become a matter for public discussion.

Each of the U.S.-based actuarial organizations has its own process for addressing recommendations for discipline from the ABCD. The Academy, for example, convenes from current and former members of the Board of Directors six qualified and disinterested individuals to become a Disciplinary Committee. The role of the Disciplinary Committee is not to recreate the ABCD's investigation but, rather, to review the factual record assembled by the ABCD,

consider whether the ABCD correctly applied the *Code* to the facts and determine whether and how to act on the ABCD's recommendation for discipline.

The subject actuary is notified of which individuals comprise the Disciplinary Committee and is given an opportunity to make a written submission to the committee and participate in the open portion of the committee's meeting to review the ABCD's recommendation. The subject actuary's presentations are to be limited to why discipline is inappropriate (*e.g.*, the ABCD disregarded or misunderstood factual evidence, there was a material, unrectified breach of due process during the ABCD investigation or discipline would be excessive). The subject actuary is permitted the advice of counsel (although, as with the ABCD, the roles of counsel to the Disciplinary Committee and the subject actuary are limited to providing confidential advice and articulating appropriate legal objections). At the Disciplinary Committee meeting, the subject actuary is permitted to make an opening and closing statement, to submit any new evidence, and to respond to questions from the committee. The open portion of the meeting is transcribed, and a copy of the transcript is provided to the subject actuary.

The Disciplinary Committee meets in executive session to determine whether and how to act upon the ABCD's recommendation for discipline. Once the committee has voted, notice of its action (and an explanation of the reasons for its decision) is conveyed to the subject actuary in a letter signed by the Chairperson of the Disciplinary Committee. Unless appealed by the subject actuary, the committee's action becomes final and is reported in the Academy's monthly newsletter.

If the subject actuary requests an appeal of the Disciplinary Committee's action, the disciplinary action is stayed pending appeal and no notice of the action is published. The Academy convenes from current and former members of the Board of Directors six qualified and disinterested individuals to serve as an Appeal Panel. The role of the Appeal Panel is to review the Disciplinary Committee's action to determine whether it was supported by the ABCD's factual record, whether the *Code* was correctly applied to the facts and whether the Disciplinary Committee imposed an appropriate penalty.

The Chairperson of the Disciplinary Committee serves as one member of the panel, and a senior officer serves as its Chairperson. The subject actuary is notified of which individuals comprise the Appeal Panel and is afforded an opportunity to make a written submission to the Appeal Panel and to attend the Appeal Panel meeting. There, the subject actuary is invited to make an opening and closing statement, respond to any questions from the members of the Appeal Panel, and submit any new evidence (which rarely occurs at this stage in the proceeding). The open portion of the meeting is transcribed, and a copy of the transcript is provided to the subject actuary.

The Appeal Panel meets in executive session to decide whether to affirm or reduce the penalty imposed by the Disciplinary Committee. Once the panel has voted, notice of its action (and an explanation of the reasons for its decision) is conveyed to the subject actuary in a letter signed by the Chairperson of the Appeal Panel. The panel's action becomes final, and any discipline is reported in the Academy's monthly newsletter.

Please note that the subject actuary is never *required* to attend any ABCD, Disciplinary Committee or Appeal Panel meeting, and the various bodies can proceed even if the subject actuary elects not to attend. It is usually preferable for the subject actuary to participate because it permits the ABCD and the Academy's disciplinary bodies to obtain a clearer picture of events. However, due process is satisfied if the subject actuary receives adequate opportunity to participate, even if the subject actuary does not take advantage of that opportunity. The approach taken by the ABCD and the Academy's disciplinary bodies satisfies due process while preventing subject actuaries from paralyzing the process through non-participation.

#### *IV. Cultural Considerations*

Every association has its own culture, and the cultural expectations of an association's members can play a critical role in the success or failure of its standard-setting and discipline process. It would, of course, be inappropriate for an association to allow peer pressure within its membership to force the adoption of inadequate standards or to hamper the effectiveness of its discipline process. However, standards that appropriately reflect the profession's culture and collective thinking are more likely to be received by members with willing compliance, which enhances the collective quality of the profession's work and can reduce the burden on the profession's discipline process.

For purposes of standard-setting, it can be useful to consider several questions. Is there a demonstrated need for the proposed standard? Is the proposed standard reasonable? Can a practitioner who practices in good faith satisfy it? Does it represent what a significant segment of the profession would consider to be appropriate practice? Does the proposed standard purport to make the practitioner responsible for matters outside his or her control, such as the conduct of another individual or someone else's understanding of the practitioner's work? (If so, it may place an unreasonable burden on the practitioner.) Is the proposed standard clear? Is the guidance that it offers useful? Does the proposed standard offer reasonable flexibility for the practitioner to exercise professional judgment? With respect to the standard-setting process, does it satisfy the requirements of law and due process? Will comments be taken into account? Will commentators know how their comments were addressed?

For purposes of discipline, it can be useful to consider comparable questions. Allowing for the fact that no professional enjoys being second-guessed, would the parties tend to agree that the process is fair? Does it treat all members equally? Is the process too harsh or too lenient? (Members are likely to resent an unduly harsh discipline process and to lose respect for an overly lenient one.) Is the process effective? Does it deal swiftly and surely with genuine misconduct? At what point does the discipline become a matter of public record? Are disciplinary actions communicated appropriately and in a timely manner to the membership as a whole? Does the organization support its members in practicing in an ethical and competent way, so that they can avoid being disciplined?

The members of a professional association may have divergent views, but a consensus of opinion among the members can usually be discerned. Particularly in instances where membership in an association is not a legal prerequisite to practice, appropriate recognition of the shared views of the members can be essential to the success of a standard-setting and discipline process. Failure to accommodate the reasonable opinions and shared concerns of members can lead to disrespect for a standard-setting or discipline process. Potentially, dissatisfied members may choose to withdraw from membership in the association while continuing to practice as professionals, rendering the association's efforts to self-regulate less effective.

#### *V. Designing a Standard-setting and Discipline Process*

When an association starts work on a standard-setting and discipline process, it can be helpful to begin by agreeing on the basic principles underlying the process and the purposes it is intended to fulfill. Committing the agreed-upon principles and purposes to writing can be an excellent way to refine them and resolve any differences of opinion among the individuals designing the process. Additionally, a written record of the intended principles and purposes of a process can be a useful reference for the designers as their work moves forward.

When designing a standard-setting process, several questions are typically relevant. What kinds of standards (qualification, conduct or practice) are to be developed? Are they intended primarily as advisory guidance for the practitioner, as a reference for the users of practitioners' services, or as a guide to regulators who oversee practitioners' work? How prescriptive are they intended to be? How much discretion should be given to the practitioner to exercise professional judgment? If deviation from the standards is to be permitted, what limits should be placed on deviation, and how should it be documented? Are the standards intended to codify accepted practice within the profession, or are they intended to elevate practitioners' work to a higher, "best practice" level?

Structural questions are also important. How many people should be on the standard-setting body, and what types of expertise should they have? Should the standard-setting body be made up entirely of members of the profession, or should one or more members of the body be non-practitioners who can represent the broader interests of the public? How should the members of the standard-setting body be selected, and how long should they serve? To whom should the standard-setting body be accountable, and how should its performance be evaluated? What professional staff, if any, should support the standard-setting body, and in what capacity? What appeal process, if any, from a decision of the standard-setting body should be available?

Similar questions pertain to the design of a discipline process. Is the process intended primarily to punish bad practice, or to provide errant practitioners with remedial guidance? What types and levels of discipline should be available? Expulsion and suspension from membership are common forms of discipline, as is public reprimand. Some associations also reserve the right privately to reprimand their members. (Additionally, an association might consider assessing fines, directing a member to obtain continuing education or perform community service or dunning the member for some or all of the cost of the disciplinary proceedings. Courts tend to

be leery of such penalties, however, making it particularly important for the members of an association to have authorized the association to take such action through an appropriate vote.) What should the role of legal counsel be, if any? What steps should be followed to provide the member with due process? What level of confidentiality is desired? At what phase should the discipline process be opened to the public?

Structural questions are also relevant to the establishment of a disciplinary body. How many people should be on the disciplinary body, and what types of expertise should they have? Should the disciplinary body be made up entirely of members of the profession, or should it include one or more non-practitioner members to represent the broader public interest? How should the members of the disciplinary body be selected, and how long should they serve? To whom should the disciplinary body be accountable, and how should its performance be evaluated? What professional staff, if any, should support the disciplinary body, and in what capacity? What appeal process from an action of the disciplinary body should be available?

In designing, implementing or refining a standard-setting or discipline process, an association is usually wise to involve its membership from the start. Early notice and opportunity for members to participate actively in the development of the process increases the likelihood that the profession will support the process once it is in place. Additionally, members of the profession who are active in practice typically can offer valuable insights on the practical problems they encounter in their everyday work. Without such insight, the leaders of an association may design a system that meets their loftiest aspirations but that establishes unintended traps for the member who operates in good faith but has to satisfy the practical requirements of real-world practice.

Typically, an association will create a committee of members to develop a standard-setting or discipline process. This practice can be beneficial, because it tends to enhance the likelihood that the process will meet the needs of the association and its members. It is usually important, however, to ensure that the committee comprises a reasonable cross-section of the membership. Otherwise, a single member or small group of members may have a disproportionate impact on the design of the system, disadvantaging others. It is also preferable in most instances to obtain periodic review and comment from the broader membership at various points in time during the development process. Member comment frequently raises issues and concerns that might otherwise be overlooked but, when addressed, result in a stronger and more workable system.

Associations will likely find it helpful to involve non-member professionals in the development of a standard-setting and discipline process. An attorney can help an association satisfy applicable law, build appropriate due process protections into the process and develop procedural documents that are clear and internally consistent. Not all attorneys are equally expert in the design and implementation of standard-setting and discipline processes, however, so it may be prudent for an association to make some preliminary inquiries to identify an attorney with appropriate qualifications. A professional editor can assist in refining both procedural documents and actual standards as they are developed. (If standards are to achieve their maximum value, consistent use of clear language is important.) A professional editor, while not necessarily proficient in the techniques underlying a standard, can identify ambiguities and inconsistencies in word use, helping to produce a standard that is of greater benefit to the

membership. Again, however, different editors have different levels of expertise in technical writing, so an association is usually wise carefully to determine its editorial needs and then to select an editor with appropriate care.

An association may wish to invite commentary from legislators, regulators, public interest groups and other interested parties as it develops its standard-setting and discipline process. Professions usually have a well-developed appreciation of the unique challenges their members face in daily practice, and that appreciation may lead to the development of a standard-setting or discipline process that does not take appropriate account of the broader public interest. Moreover, outside overseers who regulate the practice of an association's members frequently have first-hand knowledge of problems that regularly arise in members' practice and can offer valuable advice on necessary standards or potential disciplinary concerns. Thus, commentary from outside the profession can bring a fresh perspective that enhances the profession's ability effectively to regulate itself.

It is usually wise for the representatives of standard-setting and discipline bodies to communicate broadly and frequently with members of the profession, public policy makers and other interested parties once the processes are in place. Regular communications reduce the risk that members will misconstrue the requirements they are expected to follow, over- or underestimate the potential risks of professional misconduct or misunderstand the goals and actions of the standard-setting and discipline bodies. Communications are also a crucial means to notify policy makers and the public that the profession takes self-governance seriously.<sup>24</sup>

Finally, a profession is usually well advised to review its standard-setting and discipline processes every few years. As any process is used, circumstances will inevitably arise that call aspects of the process into question and suggest the need for clarification or change. Outside events (*e.g.*, the publicized failure of a major insurance company) or changes in culture (*e.g.*, the increased attention being paid to corporate governance throughout the United States) can also suggest the desirability of modifications to a standard-setting or discipline process. Periodic review of a standard-setting and discipline process can help ensure that the process continues to meet the needs of the profession and the interests of the public. Moreover, periodic review demonstrates to all parties that the profession cares enough about the quality of its standard-setting and discipline process actively to manage and improve it.

### *Conclusion*

Professionals take just pride in their own work and in the quality of services that their colleagues provide to their principals and the public. If a professional association establishes a standard-setting and discipline process that is perceived by its members to operate fairly and effectively, it can enhance the culture of the profession, encouraging all members to achieve and maintain a high level of professionalism in their individual practices. If outside overseers of the profession and representatives of the public share the profession's confidence in its standard-setting and discipline process, the reputation of the profession can only be enhanced.

## Endnotes:

<sup>1</sup> Black's Law Dictionary at 1210 (6th Ed. 1990).

<sup>2</sup> The U.S. Supreme Court expressly recognized actuaries as professionals in *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993).

<sup>3</sup> In the United States, actuaries who provide professional services to tax-exempt pension plans pursuant the Employee Retirement Income Security Act, 29 U.S.C. § 1101 *et seq.* are licensed by the federal government. Actuaries who serve insurance companies or other entities are required to comply with regulations governing their industries, but their entry into the profession is governed by the profession itself, not by an outside authority.

<sup>4</sup> The legal principles in the United States that apply to standard-setting and discipline by professional associations are established primarily by common law decisions rendered by state or federal courts. Such decisions are normally based on precedent, *i.e.*, legal principles and rules articulated in previous court rulings. The United States is a former British colony and, therefore, U.S. common law is derived from British common law and is grounded in British principles of justice. *See Black's Law Dictionary, supra*, at 276. To the extent that the law in another country rests on British common law, many of the principles described in this paper may be applicable in that country, but every country has its own legal system that must be accommodated by the local standard-setting and discipline process.

<sup>5</sup> *See, e.g., City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), in which the U.S. Supreme Court ruled that the Civil Rights Act of 1964, as amended, prohibited a public pension plan from requiring female employees to make larger contributions to the plan than male employees. The Court found that, even though women, as a class, live longer than men, the rights of individual employees would be compromised if their obligations were determined based on gender.

<sup>6</sup> *E.g., Gaston Board of Realtors v. Harrison*, 306 S.E. 2d 809 (N.C. App. 1983).

<sup>7</sup> When a member fails to comply with the U.S. actuarial profession's standards of professionalism, the member's conduct is referred to as a "breach" of those standards, reflecting the contractual nature of the relationship between the member and the U.S. professional associations. The member is not referred to as being "guilty" of violating the standards of professionalism. Guilt and innocence are concepts that derive from criminal law, not from civil law governing contracts. A member's misconduct may violate the law as well as the profession's standards, but a member's conduct can breach professional standards without being illegal. An association is, therefore, free to discipline its members for conduct that violates the association's standards even if the conduct did not result in a criminal conviction, which gives the association more latitude than if only criminal conduct by its members were subject to discipline.

<sup>8</sup> The Academy is one of five major actuarial membership organizations in the United States, representing approximately 86% of U.S. actuaries. The United States is also the domiciliary country of the Society of Actuaries and the Casualty Actuarial Society, both of which are responsible for administering the U.S. actuarial profession's private examination system; the Conference of Consulting Actuaries, which provides continuing education and other services to actuaries working as consultants; and the American Society of Pension Professionals and Actuaries, a membership organization for professionals (including actuaries, attorneys, accountants and plan administrators) who provide services to tax exempt pension plans.

For additional information on the history of actuarial professionalism in the United States, *see Structural Framework of U.S. Actuarial Professionalism* (October 2004), a discussion paper published by the Council on Professionalism of the Academy and available online at [www.actuary.org/pdf/prof/framework\\_04.pdf](http://www.actuary.org/pdf/prof/framework_04.pdf).

<sup>9</sup> The U.S. actuarial profession's standards of conduct are set forth in the *Code of Professional Conduct*. The U.S. profession's practice standards are the *Actuarial Standards of Practice*, promulgated by the ASB. The U.S.

---

profession's qualification standards are the *Qualification Standards for Prescribed Statements of Actuarial Opinion*, promulgated by the Academy through its Committee on Qualifications.

<sup>10</sup> The U.S. courts also require standard-setting bodies to act with due care. Careless preparation of a standard can lead to a negligence claim. In most instances, however, if a standard-setting body meets the requirements of procedural and substantive due process and complies substantially with its own procedures, it will have exercised sufficient care to defeat a negligence claim. This is particularly true because courts rarely question the substance of a profession's standards. If the standard-setting body satisfied due process and other requirements of law (e.g., antitrust requirements), courts are reluctant to substitute their own judgment for that of the standard-setting body concerning the content of a standard, absent compelling evidence that the standard failed to reflect appropriate practice.

<sup>11</sup> See, e.g., *Heary Bros. Lightning Prof. Co. v. Lightning Prof. Inst.*, 287 F. Supp. 2d 1038 (D. Ariz. 2003).

<sup>12</sup> The ASB's operating procedures are published in its Procedures Manual, available online at [www.actuarialstandardsboard.org/pdf/procedures\\_079.pdf](http://www.actuarialstandardsboard.org/pdf/procedures_079.pdf).

<sup>13</sup> The ASB's Procedures Manual requires every proposed exposure draft or final standard submitted to it to be accompanied by a memorandum from its counsel opining that the document 1) has been prepared in accordance with ASB procedural requirements; 2) does not appear to pose any significant threat of violating antitrust laws; and 3) complies with applicable law and regulations. ASB Procedures §§ IV(C) and VI (C).

Due to the litigious nature of U.S. society, the ASB's counsel also opines on whether the proposed exposure draft is susceptible to unfair misuse by plaintiffs' attorneys in lawsuits against actuaries. Counsel considers and comments on questions such as whether the proposed standard demand a significantly higher level of practice than is generally accepted in the profession; whether the proposed standard unfairly makes the actuary responsible for the actions of third parties; whether the proposed standard requires the actuary to opine on areas outside traditional actuarial expertise; whether the proposed standard uses absolute language, requiring the actuary to be *entirely* certain of something, take into account all conceivable alternatives or disclose all possible information, however immaterial; whether the proposed standard makes adequate provision for the exercise of professional judgment; and whether the proposed standard demands more of the actuary than can, as a practical matter, be provided or than the actuary's principal will accept. Counsel also reviews and opines on clarity and consistency of language, both in the individual standard and among standards published by the ASB.

<sup>14</sup> The purpose of the *Actuarial Standards of Practice* is "to provide actuaries with a framework for performing professional assignments and to offer guidance on relevant issues, recommended practices, documentation, and disclosure." *Introduction to the Actuarial Standards of Practice*, § 3.1.1 (Doc. 096 2004). The ASB normally writes its standards to reflect "generally accepted practice, i.e., practices that are broadly accepted by qualified actuaries as appropriate to the proper performance of a particular type of professional assignment or aspect of professional practice." *Id.* at § 3.1.2. In rare instances, the ASB determines that current practice should be elevated or changed to raise it to an appropriate level or to incorporate practices based on recent advancements in actuarial science. The ASB may also be called upon to issue a standard in an area of practice that is new to the actuarial profession. In these instances, the ASB seeks to define an appropriate level of practice, recognizing that the adoption of an ASOP and its subsequent use by practitioners and enforcement by the U.S.-based actuarial organizations will have the effect of rendering practices described in the ASOP "generally accepted." *Id.* at § 3.1.3.

<sup>15</sup> Members of the Academy receive printed sets of the *Actuarial Standards of Practice* as a benefit of membership. The ASB also periodically compiles the most recent versions of the *Actuarial Standards of Practice* and other relevant documents onto a CD that is distributed to the profession and maintains a complete standards library online at [www.actuarialstandardsboard.org](http://www.actuarialstandardsboard.org).

---

<sup>16</sup> Each of the organizations' Boards must separately adopt the *Code* because the *Code* is the codification of the agreement between each organization and its members concerning the members' conduct. Absent such adoption, the organization arguably could not require members to comply with the *Code*'s requirements.

<sup>17</sup> The practitioner is not necessarily entitled to know the identity of the person who alleged that the practitioner breached professional standards *if* the membership association's duly adopted discipline procedure provides for anonymous complaints and authorizes the association to initiate investigations without first receiving a complaint. However, members tend to be leery of anonymous complaints, so it is usually beneficial to have a discipline process that allows for anonymous complaints approved by membership vote.

<sup>18</sup> The five U.S.-based organizations look to the ABCD to investigate complaints against their members practicing both inside the United States and elsewhere in the world, except in Canada. There, the U.S. organizations have delegated to the Canadian Institute of Actuaries authority to investigate complaints against their members arising out of practice in Canada pursuant to a cross-border discipline agreement, although they retain the right to determine whether and how to discipline their members who breach Canadian standards of professionalism.

In addition to conducting investigations, the ABCD counsels actuaries in good professional practice and mediates disputes between actuaries and their colleagues or other parties.

<sup>19</sup> The ABCD's Rules of Procedure are available online at [www.abcdboard.org/pdf/rules.pdf](http://www.abcdboard.org/pdf/rules.pdf).

<sup>20</sup> The ABCD has published a handbook to guide its investigators that is available online at <http://www.abcdboard.org/pdf/handbook04.pdf>.

<sup>21</sup> The ABCD has legal counsel present at all investigatory hearings. The role of counsel for both the subject actuary and the ABCD is limited to providing confidential advice and stating objections for the record. *ABCD Rules of Procedure* §§ VII (C) (1) and (2). Unless the subject actuary is incapacitated, counsel may not appear or speak in the subject actuary's place. *Id.*, §VII (C) (2).

<sup>22</sup> It is at the point where the organizations receive a recommendation for discipline from the ABCD that U.S. antitrust law becomes particularly relevant. In general, a discipline process might violate antitrust law if it permitted an actuary or group of actuaries unreasonably to harm the professional interests of a competitor. These concerns are usually readily resolved by preventing individuals who are in competition with a member who is subject to discipline from participating in the discipline process. More specifically, however, membership in each of the U.S.-based actuarial organizations carries commercial benefits with it. If the organizations were all to agree to discipline a member in the same way (for example, by expelling the member), the member would suffer a significant blow to professional reputation that could violate antitrust law. For this reason, each of the organizations decides separately whether and how to act upon a recommendation for discipline from the ABCD, and the outcomes of organizations' proceedings can and do differ with respect to the same member.

<sup>23</sup> More than 90% of the ABCD's cases are resolved on a confidential basis. It therefore seems reasonable to presume, at the point when most cases are initially received, that they will not result in public discipline. If an actuary's conduct does not warrant public sanction, there seems to be little reason to embarrass the actuary by advertising the fact that an unproven accusation of misconduct has been made.

<sup>24</sup> The ASB has developed a list of legislators, regulators, special interest groups and other interested parties to whom it sends exposure drafts of proposed standards, accompanied by invitations to comment. It also communicates regularly with members of the U.S. actuarial profession through its newsletter, the *ASB Boxscore*. Proposals for new standards or existing ones are frequently presented at actuarial meetings, which provides members with an opportunity to speak directly with the individuals who author the standards about areas of concern.

The confidential nature of the ABCD's operations makes public communications more challenging. To avoid disclosing facts that could identify an actuary who had been the subject of an ABCD inquiry but not publicly

---

disciplined, the ABCD carefully excises all identifying information from cases before presenting them as case studies. It also presents mock hearings (using fictional cases) to demonstrate how its process operates, publishes a regular column in the Academy's magazine, *Contingencies*, and holds regular meetings with regulators who oversee the work of actuaries.