

## Discussion items for additions to Enforcement Panel Manual:

1. Board Members may not discuss complaints with any other Board member or with the complainant or defendant before or during the entire complaint process either verbally, or through electronic communications, including up to and through a Hearing, if so requested. (\*ex parte) Doing so, would jeopardize the fair process for the complainant and the defending party, and could place the Board in a compromising position, including potential legal consequences.

\*Ex parte communication is defined as “an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by 5 USCS §§ 551.” (5 USCS § 551) US Legal.com.

2. Board member companies have a legal right to file complaints and to defend themselves, if a complaint is filed against them, however, Board members themselves should not be named on the complaint form or be the respondent to a complaint. This could be construed to be a conflict of interest for Enforcement Panel members in the deliberation process.

### 3. Hearing process

Executive Session vs. Open Meeting to discuss merits of a case during the Hearing Process after the parties make their case. -- Chairman discretion (per Kara Semmler, December 15, 2011, after discussion with Rolayne Weist, PUC Atty, and Diane Best, Attorney General’s Ofc). (Nothing in SD law, but from a federal case).

Deliberative decision process:

At the conclusion of the evidentiary portion of the hearing the Board attorney would turn it back to the Chairman. The Chairman could announce, “we will now exercise the deliberative decision process and go into closed session...unless either party has an objection to our use of that process, I ask the parties to please step out of the room.”

If there are no objections we proceed into closed session.

If there are objections, those objections and arguments must be made on the record.

The attorney would overrule the objections and advise board it may use the process and why.....

“The privilege serves to protect the deliberative PROCESS ITSELF, not merely documents containing deliberative material.” It goes on to say.... “and prevents injury to the quality of agency decisions by allowing government officials freedom to debate alternative approaches in private.”

Parties to the proceeding to have a right to object to a private “deliberative process” meeting.

The objecting party must prove the material (or discussion) is necessary for their case due to:

- 1) the relevance of the material
- 2) the availability of other evidence
- 3) the government’s role in the litigation and
- 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.

If an objection is made, it can be overruled because:

- 1) The board discussion will not prohibit either party from defending or prosecuting its case. The discussion will not be relevant to effective representation. The board discussion will merely be reactions, clarifications, etc....
- 2) No new evidence or material will be discussed...the only material discussed will be what all parties had access to at the hearing itself.
- 3) The government does not have a role in the litigation....one of the compelling reasons to allow a private discussion in the attached case was because the government was actually a party to the case.
- 4) A private setting will encourage better discussion, and a better decision.

The PUC does not use deliberative process exception. The PUC chooses the most conservative route. There are no SD cases on the subject and to be on the safe side they have all their discussions publically.

The One Call Board could use it despite the lack of SD cases to affirm its appropriateness.

Per Diane Best, Attorney General's Office

**Subject:** RE: Open MeBoards sometimes deliberate in private under a common law "deliberative process privilege." This privilege is widely recognized in federal court. I'm attaching a copy of a decision (the front page is just a cover sheet since I attached it in a report for something else). On that basis is argued that it applies under state law as well. There aren't good SD state court cases on this.

To the extent that the deliberative process privilege applies, then there is a sentence in SDCL 1-25-1 that would accommodate it. " Nothing in § 1-25-1 or this section may be construed to prevent an executive or closed meeting if the federal or state Constitution or the federal or state statutes require or permit it."

1-25-2. Executive or closed meetings--Purposes--Authorization--Misdemeanor. Executive or closed meetings may be held for the sole purposes of:

- (1) Discussing the qualifications, competence, performance, character or fitness of any public officer or employee or prospective public officer or employee. The term "employee" does not include any independent contractor;
- (2) Discussing the expulsion, suspension, discipline, assignment of or the educational program of a student;
- (3) Consulting with legal counsel or reviewing communications from legal counsel about proposed or pending litigation or contractual matters;
- (4) Preparing for contract negotiations or negotiating with employees or employee representatives;
- (5) Discussing marketing or pricing strategies by a board or commission of a business owned by the state or any of its political subdivisions, when public discussion may be harmful to the competitive position of the business.

However, any official action concerning such matters shall be made at an open official meeting. An executive or closed meeting shall be held only upon a majority vote of the members of such body present and voting, and discussion during the closed meeting is restricted to the purpose specified in the closure motion. Nothing in § 1-25-1 or this section may be construed to prevent an executive or closed meeting if the federal or state Constitution or the federal or state statutes require or permit it. A violation of this section is a Class 2 misdemeanor.

