

nara
Consumer Protection Through Prevention



**-Let's Talk Facts-
Create and Defend Effective
Enforcement Actions**

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Boston, Massachusetts
September 21 – September 23, 2015*

**National Association for
Regulatory Administration**
"consumer protection through prevention"

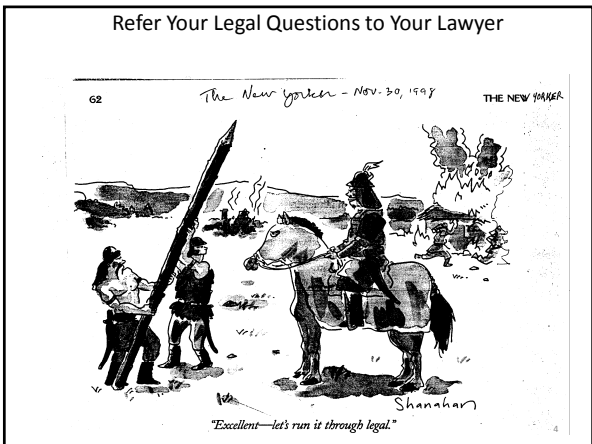
- **Legal & Enforcement** – From completing comprehensive inspections to ensuring victory in court, this track will provide regulators with basic tools they need to complete, finalize, and defend investigations and enforcement actions.
 - The regulatory investigation
 - Interviewing techniques
 - Burden of Proof
 - Complaint investigations
 - Testifying at a hearing

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Introduction and Purpose

- **To learn enforcement procedures that use a reasonable and consistent system of regulation and licensing**
- **To review definitions of “evidence” and “due process” as those terms relate investigation and issuance of enforcement actions.**
- **To learn basic methods of investigation, building a case for issuance of an effective enforcement action, and meeting the burden of proof at an administrative hearing.**

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Holmes Investigation

Sherlock Holmes and Dr. Watson went on a camping trip. After a good meal and a bottle of wine they laid down for the night, and went to sleep. Some hours later, Holmes awoke and nudged his faithful friend.

"Watson, look up at the sky and tell me what you see."

Watson replied, "I see millions and millions of stars."

"What does that tell you?"

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Watson pondered for a minute.

"Astronomically, it tells me that there are millions of galaxies and potentially billions of planets. Astrologically, I observe that Saturn is in Leo. Horologically, I deduce that the time is approximately a quarter past three. Theologically, I can see that God is all-powerful and that we are small and insignificant. Meteorologically, I suspect that we will have a beautiful day tomorrow. What does it tell you?"

Holmes was silent for a minute, then spoke.

"It tells me that someone has stolen our tent."

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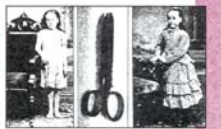
Early History of Care

- In the 19th century, disabled children were placed in almshouses.
- At a Massachusetts almshouse, 153 motherless infants were admitted in 5 years, ending in 1873, "all died but 15." Mary Ellen case.
- As the public became aware of abuses, demands increased for governmental oversight.

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In 1874, in New York City, some neighbors reported to church worker Etta Wheeler that a child was being tortured in a nearby house. Etta found a child who had been whipped daily, stabbed with scissors and tied to a bed. Her name was Mary Ellen.



Etta tried, but there was no lawful way to rescue the child. Desperate, she went to Henry Beugh of the New York SPCA for help. Because she was a member of the animal kingdom, Mary Ellen was rescued by the SPCA with a writ of habeas corpus. Mary Ellen was carried into court, pitifully thin, with a scissor's wound on her cheek. Her guardian was sentenced to a year in jail. Mary Ellen got a new home. Before and after pictures of Mary Ellen still hang at the New York SPCA. The following April, the New York Society for the Prevention of Cruelty to Children (NYSPPC) was incorporated. In 1877, the US Supreme Court ruled in *Nann v. Illinois* in favor of governmental regulation to protect the public good. In 1883, Pennsylvania enacted the first law to require the regulation of adult foster care facilities and the first human care licensing law in the U.S.

The National Association for Regulatory Administration, known as NARA, is an international organization whose mission is "Consumer protection through prevention." NARA's members include over 400 individuals and organizations from the US and Canada who are dedicated to promoting excellence in human care regulation and licensing through leadership, education, collaboration and services. NARA represents all human care licensing, including child welfare, adult part-day and residential, child care, drug and alcohol and disability licensing.

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Due Process Is Fair Play

- 14th amendment: "all persons born or naturalized in the United States...Are citizens of the United States.... No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law...."

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Canadian Charter of Rights and Freedoms, Section 7, Legal Rights

- Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice.
- Due process is fair play.

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Reprinted from *The Capital Times*, Madison, Wisconsin, 2002



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Evidence

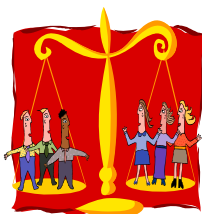
- Any information or proof which clarifies or helps establish the truth of the fact or point in issue.
- The means or process by which any matter of fact that is being investigated may be proved or disproved.

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Evidence and the Burden of Proof

In administrative hearings, both parties attempt to prove their positions by a preponderance of evidence.



- **100%** Complete, undisputed evidence.
- Beyond a reasonable doubt.
- Clear and convincing--Criminal.
- Preponderance--Administrative.
- **0%** No Evidence.

5 Types of Evidence



- **Testimonial-Statements**
- **Real-Physical Object**
- **Documentary-Paper and Electronic Data Trail**
- **Demonstrative-Charts, Maps, Diagrams**
- **Judicially-Noted-Law**
- Establish Foundation for admission of evidence

E-Mail—are you protected? *What's in your mailbox?*

- Write your e-mail as if might be tomorrow's headline
- Keep e-mail concise and factually correct
- Write e-mail in report form
- Avoid being "chatty"
- **TEXTING:** ensure accuracy



E-Mail—are you protected?



• White House Pledges Probe

– “White House staffers on Wednesday scoured their computer files and telephone logs for evidence that would aid a criminal investigation into an apparent leak of classified information. ... With the probe in its early stages, the White House was focused on ensuring that documents, emails, phone logs and other potential pieces of evidence were being preserved.”

Wisconsin State Journal, Curt Anderson, Associated Press, October 2, 2003, p. A3.

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E-Discovery

- Recent Federal Law clarifies and expands definition of data maintained on-line
- States are modifying their statutes and rules on “discovery” to follow federal guidelines
- E-mail and all public records maintained on-line in any format are subject to discovery regulations and must be made available to opposing party
- Records relied by State to take action, where action is appealed, may be reviewed by opposing party, whether or not record is public record

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E-Discovery Requests- Important Legal Concepts

- Many states have laws confirming that discovery of electronically stored information stands on equal footing with discovery of paper documents. Wisconsin Rules of Civil Procedure, Rule 3A(a), “New Electronic Discovery Rules,” Sankovitz, Grenig and Gleisner, *Wisconsin Lawyer*, July 2010, pp. 12.
- Electronically stored information is different than hard-copy documents or other identifiable objects that have potential evidentiary value. Electronic data can be destroyed or altered through the routine application of a document retention system that destroys data on a scheduled basis.
- Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents.
- States must guard against *spoliation*, which is the destruction or withholding of critically probative evidence resulting in prejudice to the opposing party.” *“Spoliation of electronic evidence,”* Edmunds, McAlvanah, *Wisconsin Lawyer*, November 2010, pp.8-9. *“All Emphasis supplied.”*

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DC Email Use Standard

- By using the email system, an individual consents to policy requirements, including reviews of email, to effect DC government policies concerning the email system; law-enforcement and auditing activities of federal and District of Columbia government agencies.
- Email systems and services are "DC government facilities" and any OSSE individual electronic mail address or account is the property of the District of Columbia and under management control of the Office of the Chief Information Officer.
- All policies relating to intellectual property protection, privacy, misuse of government resources, sexual harassment, data security, and confidentiality apply to use of OSSE email.
- Emails are the equivalent of letters sent on official letterhead, and must therefore be written in a professional and courteous tone.
- Email is public and the sender can have no expectation of privacy.
- Email is a public record and subject to public inspection and legal discovery, unless protected by DC or federal law.

Sandra Lee Esrael, NARA Consultant, for Office of State Superintendent of Education, Washington DC Training, July 2014 19

Social Networking—a New Issue for Regulators

- It is commonplace for people to publish information about themselves, their activities, their histories and their opinions on a variety of SNS platforms, including Facebook, MySpace, Twitter, and YouTube, as well as blogs, chatrooms and more.
- 75% of people ages 18 to 24 have a profile on online social networks.
- 1/3 of adults ages 35 to 44 are active on online social networks
- Nearly 20% of people ages 45 to 54 have profiles on a social network.

Wisconsin Lawyer, *Ibid.*, February 2011, p. 14.

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What's the Problem?


- People who use social networks might not consider that the information they post about themselves can be used against them or the organizations for which they work.
- We are wired, therefore adverse parties and state employees alike may be in the habit of posting experiences and opinions on SNS.
 - Consider: videos on YouTube, your/their comments on the videos, blogs and comments made about the blogs, chatting in classrooms, creating one's own webpage.
 - Adverse parties and state employees may not appreciate or acknowledge the degree to which their online disclosures may affect their cases or how that information may be "sprung on them in a deposition or trial."
 - Wisconsin Lawyer, *Ibid.*, February 2011, p. 14.

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Voluntary Witness Statement

- My name is _____. I am employed by _____ and work at _____ child care center.
- I am making a voluntary statement regarding an incident that occurred at the facility between ____ (day, month) and ____ (day, month) 2014.
- _____
- _____
- **Signature and Date**
- _____
- **Witness and Date**



**I watch *The Good Wife*;
What's the big deal about gathering evidence?**


- Department action must be based on facts.
- Hearsay: How does one "prove" a spoken fact?

Hearsay is considered trustworthy when supported by other evidence.

A former employee said a center fire escape was broken and exit lights were burned out on one floor of a group day care center.

Look for other supportive evidence:

A parent attempts to walk down the broken fire escape. He tells staff the fire escape has missing steps and takes a photograph. His statement and photograph corroborate the employee's statement and provide a legal basis for admitting "hearsay" into evidence.



**I watch *The Good Wife*;
What's the big deal about gathering evidence?**

- Hearsay is more trustworthy when supported by other evidence.
- Admission against interest-

A manager admits that he failed to have staff clean up urine puddles on the floor of a center for disabled children.

The statement is considered trustworthy because the manager knows the rules and knows that admitting the failure to clean may result in a citation of violation.

- Excited utterances-"Help, I've fallen and can't get up."
- Present Sense Impressions- "I just came out of work and saw the car come around the corner and skid off the road into the sign." (Statement was made while declarant was perceiving the event.)

Investigations and Gathering Evidence

- Review, copy and obtain certified records ASAP. Check criminal, civil and municipal rule violations.
- Take interview notes and have interviewee read, sign and date notes.
- Reduce notes to final **factual** file report, discard draft notes, unless signed.
- Take photographs to preserve evidence of injury, indoor and outdoor hazards....
- Match facts to rules carefully to produce legally sufficient action.
- Consult your department attorney.



TIPS FOR INVESTIGATION

Remember to use:



- Use all your senses
- Photographs
- Maps, diagrams, charts
- Business records, electronic data
- Other agency records: county, police, medical, financial ...
- List your state sources



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Observation Skills

- How many children?
- Where are they?
- What color is the ball?
- Is there a blanket?
- What object was white?

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Interviewing Children

Strategies for Questioning Children, Suzanne Sgroi, M.D.


- Use open ended probes- "Tell me about the picnic."
- Use open-ended sequencing probes- "What happened next?"
- Use neutral bridges-"I see, then what?" Not-"Good!" or "How awful."
- Use short, simple sentences.
- Focus when necessary: Who else was there? Give name.
- Use names, not pronouns. "What did Jason say?"
- Use place names, not pronouns. "Did Jason go into the bathroom." Not-"Did Jason go there?"
- Okay to say "I don't know."
- Understanding-"What did I just say?"
- Limit ideas in questions.
- Repeat-"Jason locked the door. What did you do?"
- Use simple words.

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Tips for Report Writing

- **Accurate; Objective.**
- **Relevant to the issue.**
- **Investigative Reports** - avoid conclusions; state facts.
- **Findings reports and non-compliance** - add conclusions. Rule is violated because...
- **Who, what, when, where, how do you know?**



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Objective/Subjective

Subjective	Objective
Hot	87 degrees F
Messy	Dried egg yolk on the table
Big hole in screen	8 inches in diameter
It happened "often."	Define "often." Three times in a morning?

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Report Writing Exercise

Clear writing and listening skills exercise

A businessman had just turned off the lights in the store when a man appeared and demanded money. The owner opened a cash register. The contents of the cash register were scooped up and the man sped away. A member of the police force was notified promptly.

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Adam . . .

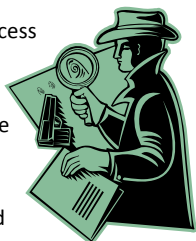


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Special Inspection Warrant

- Use when provider prohibits access to premises.
- Draft affidavit and warrant; have Judge sign documents.
- Revisit premises with police and documents permitting entry.



Warning Letters

- **Warning letters informally instruct a provider to correct violations.**
- **Warning letters may be based on statements of non-compliance.**
- **Warning letters are to obtain compliance without use of sanctions.**
-



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Orders to Correct

- Orders to correct order a provider to comply with the code.
- By statutory authority, orders specifically require correction of particular codes; i.e., care for 8 children or fewer, under the age of seven.
- Orders are an interim sanction intended to obtain correction without revoking a license or assessing a forfeiture.



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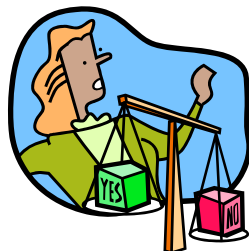
Forfeiture Assessment



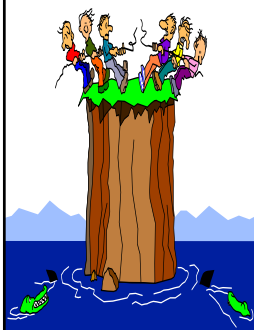
- Forfeitures are intended to obtain correction without loss of license.
- Stipulate that forfeitures be applied to training or equipment.
- Provider's pocketbook dictates prompt correction.

Denial of Application

- A denial of application is sent to providers who violate minimum standards prior to any licensure.
- Criminal background checks may provide automatic denial.
- Stipulations may resolve issues.



Summary Suspension



- Summary suspension immediately closes a center based on imminent danger to children.
- A hearing by rule is required within 10 days of the suspension; no appeal necessary.)
- Providers may agree to close temporarily without a hearing, pending result of investigation.

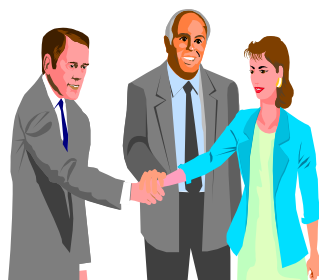
License Revocation

- Revocation may be based on direct threat to the health, safety and welfare of children in care or activities directly relating to day care activities.
- Revocation may be automatic, *i.e.*, based on criminal convictions or pending criminal charges that bar licensure.
- Revocation may result from cumulative violations.



Stipulation

- Stipulations are contracts between the parties and may require more action than the code.
- Stipulations provide direction for compliance.
- Stipulations make great hearing exhibits.



Court Imposed Injunction



- Use court ordered injunction to close illegal operations. *When?*
 - Unlicensed centers continue to operate.
 - Center fails to correct multiple orders; serious potential harm.
 - Administrative sanctions do not resolve problem.
 - Procedure?
 - Judge signs injunction supported by affidavit and documents of past action.
- Other: Referral to the Office of the District Attorney.

Illegal operations fall into two categories, according to the NARA Licensing Curriculum:

- 1) emergency situations where an illegal operation is discovered in which hazardous conditions exist or there is evidence that the health, safety or well-being of consumers is at serious risk or
- 2) non emergency situations where prior enforcement actions have failed to shut down the illegal operation.

Closure of Facility After Hearing

- The date of a final administrative hearing decision is the date a facility is to close.
- A final hearing decision provides for a rehearing request within a date certain and an appeal request to circuit court within another date certain after the final hearing decision.
- After an agency orders to stop operating or revocation or denial of license prove ineffective, the department may request the District Attorney to seek an injunction.
- The District Court may issue an injunction that stays the provider's activities and prohibits the provider from operating.

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NARA Conference, September 2015

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Importance of Suppressing Illegal Operations

- To support agency mission of public protection
- To assure equal protection under law to both consumers and licensees
- To demonstrate that the agency responsibly carries out the intent of the licensing statutes and rules
- Suppressing an illegal operation may be a civil or a criminal law procedure.
- A District Court Judge issues an order, an injunction, that stays the provider's activities and prohibits the provider from operating.

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DISCOVERY AND DEPOSITIONS

- Providers have a right to obtain information department relied on for its action.
- Depositions are question/answer sessions under oath.
- Discovery is obtained by request.



A DISCOVERY DEPOSITION MAY BE A FISHING EXPEDITION

- Evidence reasonably calculated to lead to admissible evidence at hearing may be the subject of questions in depositions even though that evidence is not directly on point.
- Depositions are nicknamed "fishing expeditions" because many areas of information may be probed as long as the evidence gathered "reasonably" leads to admissible evidence.



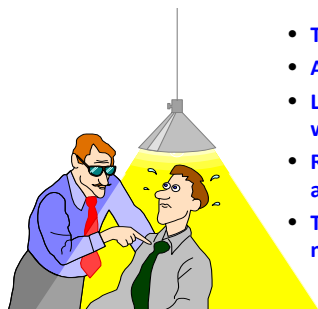


SUBPOENA DUCES TECUM

- A subpoena is a writ commanding a person to appear in court under penalty for failure.
- Employees who receive personal service of a subpoena are required to attend the proceeding.
- An employee is required to bring his or her records when served with a subpoena *duces tecum*. (*Bring with you.*)

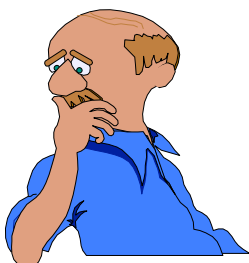


Witness Preparation



- Tell the truth.
- Ask clarifying questions.
- Listen to question; answer what was asked.
- Review exhibits, then answer.
- Tell examiner when you do not understand question.

Refreshing your Recollection



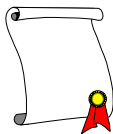
- If you forget, say so.
- You will be able to refresh your memory.
- Expert/lay witnesses.

The Hearing Room

- Physical setting may be informal.
- Hearing examiner sits at head; opposing counsel and witnesses across.
- Testimony recorded by tape recorder.
- Witnesses face examiner to testify.
- Informal setting, but dress professionally.
- Many states use formal setting.



Conclusion



- Investigate carefully.
- Record facts promptly.
- Match law to facts.
- Apply enforcement actions reasonably and consistently.
- Include law and facts in enforcement letters and as evidence at hearing.

Bibliography: Resource/Reference Materials

“Enforcement Actions and Procedures for Day Care Compliance-NARA Presentations”, October 1998 - September 2002, NARA presentations through 2010, by Sandra Esrael, Attorney; Wisconsin Department of Health and Family Services (WDHFS); “Training Services for the National Association for Regulatory Administration,” November 12, 2004 to present for various States; Canadian Provinces: Nova Scotia, Newfoundland-Labrador, and Luxembourg, Sandra Esrael, Attorney; Regulatory Investigation Materials; Wisconsin Bureau of Quality Assurance- Orientation 1998; Regulation and Certification Re-engineering Project :Evidence & Investigation Sections, Linda Dawson, Deputy Chief, Office of Legal Counsel, WDHFS; Investigation Fundamentals; “Enforcement Actions, Investigations, Collection of Evidence and Hearings”, Sandra Lee Esrael, Attorney, Maine, September 14-15, 2000, A Licensing Curriculum, National Association for Regulatory Administration, (sponsor), 2000, Rules & Regulations for Administrative Licensing Regulation; General Investigation Skills, WDHFS, 2002; 2005 Presenters Linda Dawson, J.D., Laurie Arkin, Phyllis Varsos, Marianne Missfeldt, 2005-2007 presenters L. Arkin, P. Varsos, M. Missfeldt, Sandra Esrael; General reference to rules of evidence, human care law and policy in Colorado, District of Columbia and Wisconsin; 2010-2015 Wisconsin Lawyer publications, NARA Tennessee Training, Sandra Esrael, Coordinator, Mary Stottlemire, Ph.D., October 2010, Victoria L. Flynn, MSW, Director, Office of Incident Management and Investigations, Georgia Department of Behavioral Health and Developmental Disabilities, Training Programs, 2014; Sandra Esrael, NARA Training, Washington DC, July 2014, NARA Conference, Orlando 2014.
