

## **Legal Overview for Medical Cannabidiol Board Members**

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This overview incorporates portions of an outline prepared by Pamela Griebel and Emily Willits, Directors of the Licensing and Administrative Law Division. This outline provides a general overview of laws related to the Board and is not intended to cover all applicable laws or the nuances of applicable laws. Specific questions should be directed to Board staff and AAG Heather Adams.

Last Updated February 2022

## **Mission and Authority**

1. The Medical Cannabidiol Board (Board) was created in 2017 by a statute enacted by the Iowa General Assembly – the Medical Cannabidiol Act at Iowa Code chapter 124E – to advise the Iowa Department of Public Health’s medical cannabidiol program and perform other statutory duties.
2. The Board is comprised of nine members appointed by the Governor – eight health care practitioners representing a variety of disciplines and one representative from law enforcement. The medical practitioner Board members must be licensed in Iowa, board certified in their area of specialty, and knowledgeable about the use of medical cannabidiol. The Board is required by statute to meet at least twice annually.
3. All state boards and commissions, including this Board, may not expand their authority beyond that granted by law. The duties of the Board are contained in Iowa Code chapter 124E.5. The Board is charged specifically with the following duties:

- a. Accept and review petitions to add medical conditions, medical treatments, or debilitating diseases to the list of debilitating medical conditions for which the medical use of cannabidiol would be medically beneficial under this chapter.

Note: The Board’s rules include the form petition which may be filed by any person or entity seeking to add to the list of debilitating medical conditions for which medical cannabidiol would be medically beneficial. (641 IAC 154.65).

- b. Make recommendations relating to the removal or addition of debilitating medical conditions to the list of allowable debilitating medical conditions for which the medical use of cannabidiol would be medically beneficial.

Note: Any such Board recommendations must be forwarded to the Board of Medicine for consideration, and if approved must be adopted by the Board of Medicine in rule. (653 IAC 13.15)

- c. Work with the Department regarding the requirements for licensure of medical cannabidiol manufacturers and dispensaries, including licensure procedures.

- d. Advise the department regarding the location of medical cannabidiol manufacturers and dispensaries throughout the state.
- e. Make recommendations relating to the form and quantity of allowable medical uses of cannabidiol.

Note: Any such Board recommendations must be forwarded to the Board of Medicine for consideration, and if approved must be adopted by the Board of Medicine in rule. The Department is also required to adopt rules which establish the form and quantity of medical cannabidiol allowed to be dispensed subject to recommendations from this Board and approval by the Board of Medicine. (124E.11(2)(c), 641 IAC 154.14, 653 IAC 13.15(3))

4. The Board is required to submit an annual report to the General Assembly detailing the activities of the Board.
5. New members should read - and reread - the laws governing the Board.
6. Department staff, other Board members, prior minutes of meetings, and websites are good sources of information, but Board terms are staggered for a reason: new Board members bring a new perspective and vitality.
7. A Board's mission is always serving a public purpose. When serving on the Board, you are representing the citizens of Iowa; always make decisions with the Board's public purpose in mind.

## **Rulemaking**

1. The State Board of Health has rulemaking authority for this Board. This Board's rules are contained in the Iowa Administrative Code at 641 – chapter 154.
2. Rules are in a very real way the Department and the Board's laws – administrative rules have the force and effect of law.
3. Rules must be authorized by and consistent with statutes.
4. Rulemaking is a powerful authority. Rules:
  - a. Describe the organization and procedures of the Board.
  - b. State how the Board and the Department will implement the Medical Cannabidiol Act.
  - c. Inform patients, caregivers, manufacturers, and dispensaries about guidelines and standards that impact their legal rights and duties under the Medical Cannabidiol Act.
5. The Governor, Legislature, Attorney General, and the public all have a role to play when Boards adopt rules -- there are many checks and balances. All boards and other agencies are required to review rules on a five-year rolling cycle.
6. In addition to consistency with statutes, rules should be:
  - a. Easy to read and understand.
  - b. Tied to specific needs and objectives.
  - c. Sensitive to costs - benefits should outweigh costs.
  - d. Effective.
  - e. Developed with input by those affected.
  - f. Fair - use rulemaking power wisely.

## **Decision making**

1. No single member makes decisions for the Board.
2. Boards make decisions by taking votes at Board meetings.
3. A “quorum” of the Board is needed to conduct business of the Board. A majority of the Board members (5 of 9) constitutes a quorum for conducting business of the Board. An affirmative vote of the majority of Board members present at a meeting is required for a motion to pass.
4. Once a quorum is attained, most Board action is taken upon a majority vote of those participating – but there are important exceptions. For example, boards may only go into closed session upon a public vote by two-thirds of the members or all members present.

Tip: Before you vote, determine if there is a quorum and how many “aye” votes are required to take the particular action.

The votes of all members must be public and clear during the meeting and in the minutes. No secret voting allowed!

## Board Meetings – Open Meetings Law

1. The Board is governed by the Open Meetings Law at Iowa Code chapter 21. The law requires: (1) providing public notice of the Board's meetings, (2) posting an agenda of the meeting, (3) the keeping of minutes, and (4) allowing the public to be present.
2. Board members have the option of participating in meetings via teleconference. In 2019, the General Assembly enacted a requirement that all statutorily established boards, councils, and commissions under the purview of the Department must provide a teleconference option for members to participate in meetings. (Iowa Code § 135.12). Telephone or other electronic modes of participation constitute presence at the meeting for all legal purposes.
3. Count Heads! If a majority of the Board is present (in person or electronically), do not discuss Board business unless you are at a Board meeting preceded by proper notice to the public and a posted agenda.
4. Purely social or ministerial gatherings are not meetings as long as no Board business is discussed - but be careful to avoid even the appearance of holding an illegal meeting.
5. Agendas are a Board's invitation to the public to watch the Board in action.
  - a. Post agendas at least 24 hours in advance.
  - b. Identify all topics on which votes will be taken and matters that will be discussed.

Tip: Read the agendas posted for your Board over the past year. Can you tell what the Board planned to vote on or discuss? If not, advocate more detail in your Board's agendas.
6. Stick to the posted agenda. If a new idea comes up at a meeting and there is no emergency requiring immediate action, place the topic on the agenda for the next meeting.

7. Lights! Cameras! Action! The public has a right to observe the open sessions of your Board meetings and may record them or take photographs, unless use of a camera or recording device obstructs the meeting.
8. The public does not have the right to participate in your meetings, but Boards may provide an opportunity for public comment at meetings.

## **Board Meetings - Minutes**

1. Minutes of Board meetings create a permanent record of who met, when they met, what they discussed, what they decided, and by what votes.
  2. Accurate minutes are a key tool for conducting the public's business in an open and accountable way.
    - a. Minutes are a vital organizational tool for boards.
    - b. Minutes are a crucial way for citizens to review public action taken on their behalf.
  3. Minutes of open sessions must always include:
    - a. The date, time, and place of a meeting.
    - b. Which members were present.
    - c. Actions taken, with sufficient information to reflect members' votes.
- Tip: Read your Board's minutes for the past year. Can you tell what the Board voted on or discussed? If not, advocate more detail in your Board's minutes.

4. If a closed session is held, the minutes of the open session must include the legal grounds for a closed session, the vote of each member on whether to go into closed session, and any final action taken – no final votes may be taken in closed session.
5. When applicable, minutes must also explain the legal basis for holding a telephonic meeting, an emergency meeting (less than 24 hours notice), or a meeting at a time or place not reasonably accessible to the public.

## **Board Meetings - Closed Sessions**

1. Closed sessions are serious business! Never ask the public to leave the meeting so the Board can talk in private – unless the Board has a legal basis to hold a closed session.
2. In order to go into closed session, a board must first meet in open session with proper advance notice and posted agenda.
3. A board can only close an open session if expressly authorized by statute. For example, a board is authorized to go into closed session to discuss confidential records, pending litigation with counsel, certain personnel matters, or the decision to be issued in a contested case.

Tip: You should always ask your Board's assigned AAG for legal advice if you are not confident you have grounds to vote to go into closed session. Get the advice in writing or make sure the advice is reported in the minutes of the meeting.

4. After announcing the legal basis for a closed session, take a roll call vote. Remember, a Board can only close a session upon an affirmative vote of two-thirds of the members or all members present.
5. While in closed session, Boards must:
  - a. Record the session (and keep the recording at least a year).
  - b. Take detailed minutes.



- c. Limit the discussion to the announced basis for the closed session.
- 6. Final action must be taken in open session. When the closed session discussion is finished, return to open session and allow those who left the room for the closed session to return. Then make a motion and take a vote on any final action in open session.

## Board Records - Public Records Law

1. The Board is subject to the Public Records Law at Iowa Code chapter 22. Board records are open to public examination unless specifically made confidential under law.
2. Public records can be in any form, including e-mail. Board members should not commingle official Board business emails with personal emails. Your Board's staff or AAG can advise on methods of separating emails.
3. Assume any record you create or receive as a Board member is a public record that may be open to the public upon request.  
  
Tip: Practice that old adage – only say what you would be comfortable reading on the front page of your local newspaper!
4. The public records contact for your Board is the Department's public information officer.
  - a. Requests for public records should be referred to your Board's public records contact.
  - b. The public records contact is familiar with the law and can assure proper response to requests for public records.
5. Be aware of any Board records you create or receive which may be confidential – but note it is rare for Board members to receive confidential information.
  - a. There may be severe penalties for releasing some types of confidential records -- another good reason to refer all requests for records to the Board's public records contact!
  - b. Examples of records that may be fully or partially confidential include applications containing social security numbers or credit card numbers, mental health or other health records, complaints against licensees, and criminal history background reports.

## Sunshine Law Enforcement

1. Actions to enforce Iowa's Open Meetings and Public Records Laws can be brought by a citizen of Iowa, a person who pays taxes of any type to the state of Iowa, a person individually aggrieved by a violation, a county attorney, and the Attorney General. Such actions may be brought in court or before the Iowa Public Information Board.
2. Complaints about alleged violations may be made directly to the Board, its staff or counsel, or to the Ombudsman's Office, Attorney General, the Governor's Office, the Iowa Public Information Board or legislators.
3. Take all alleged violations seriously.
4. Remedies include removal from office upon a second violation, damages (up to \$2,500 for a knowing violation), expenses and attorney fees, and injunctive relief.

Tip: Iowa public officials, by and large, will comply with Iowa's Sunshine laws when they know what they are. Educate yourself and ask staff or the AAG assigned to the Board if you are unsure.

5. Even an honest mistake can be a violation of Iowa's Sunshine laws, but individual Board members can avoid personal liability when they rely upon the advice of counsel, formally given in writing or provided orally and memorialized in the minutes.
6. Attorney General Tom Miller has issued dozens of "Sunshine Advisories" to educate public officials and the public about Iowa's Open Meetings and Public Records Laws. The advisories (with index) are found at: <https://www.iowaattorneygeneral.gov/about-us/sunshine-advisories/>. You may also wish to consult the web page of the Iowa Public Information Board at: <https://www.ipib.iowa.gov>.

## **Additional Laws Governing Board Members**

1. Gift Law. Board members may not accept gifts (i.e., receiving something for free or for less than it is worth) from those they regulate or contract with. Ask your AAG, Board staff, or the Ethics and Campaign Disclosure Board <http://www.iowa.gov/ethics> for guidance on gift law compliance.
2. Sales or leases of goods or services. If you sell or lease goods or services to those regulated by your Board, ask the Board's AAG, Board staff, or the Ethics and Campaign Disclosure Board for guidance on applicable laws.
3. Lobbyist. The Department has a designated, registered lobbyist who represents the Board. Individual Board members should not lobby legislators on behalf of the Board or the Department. Seek advice from the Board's AAG if you have specific lobbying questions.
4. Conflicts of interest. Conflicts of interest should be avoided, but how and when they arise can be unique to certain boards, especially because the law often requires the appointment of at least some persons who are regulated by the Board. Anytime your objectivity may be impaired or there is an appearance of impropriety, seek advice from your Board's AAG.
5. Judicial review. All Board action (or inaction) is subject to review in court on a variety of grounds including whether the action is:
  - a. Compliant with the U.S. or Iowa Constitution, statutes or rules.
  - b. Consistent, nonarbitrary, logical, and reasonable.
  - c. Supported by the facts and law.
6. Litigation. If the Board or its individual members are sued related to Board action, Board members acting in good faith in their official Board capacity are generally defended by the Attorney General and indemnified by the State.