

**Legal Issues Update
ASPPB Annual Meeting**

October 21-23, 2004

RULES AND REGULATIONS

Standing to Challenge Agency Rules and Regulations . . .

In a New York case, decided in 2003, an appellate court held that the New York State Association of Nurse Anesthetists, which represented over 750 certified registered nurse anesthetists (CRNA's) practicing in that state, was entitled to a declaration that an ad hoc Committee on Quality Assurance in Office-Based Surgery Clinical Guidelines for Office-Based Surgery were null and void. The court noted that the Association had asserted that the aforementioned guidelines would adversely impact their practice by essentially eliminating their ability to render services in private offices without direct supervision by anesthesiologists. Additionally, the court said the guidelines were not promulgated as mere suggestions, but as a practical matter, were intended to dictate the conduct of professionals conducting surgery in private offices. And, this court said the state's legislature had specifically prohibited the defendant Commissioner of Health from promulgating any rules or regulations concerning practice by essentially eliminating their ability to render services in private offices without direct supervision by anesthesiologists. *New York State Ass'n of Nurse Anesthetists v. Novello*, 753 N.Y.S.2d 615 (A. D. 3 Dept. 2003).

Proper Promulgation . . .

In this Missouri case, United Pharmacal, a retail store that sold veterinary drugs to animal owners who had a veterinarian's prescription for the drug, brought a declaratory judgment action against the Missouri Board of Pharmacy (board) after the board issued the store a cease and desist letter demanding that it stop selling veterinary drugs without a pharmacy license. The lower court entered a summary judgment in favor of the store and the board appealed.

On appellate review, the appeals court reviewed the statutes which define the scope of practice of pharmacy and also a question and answer in the Frequently Asked Questions (FAQ) section on the board's website, which stated that veterinary drugs could not be sold to a consumer who had a prescription unless the seller was a licensed pharmacy. Although the board argued that the FAQ was not a rule, but only a way to provide general information to the public, it believed entities had an obligation to comply with the statement in the FAQ. Ultimately, the court found that the board had misinterpreted the statutes regarding scope of practice and also found that the FAQ had the effect of and was a rule, but that it was not promulgated according to statute. Thus, the court found the rule to be invalid and affirmed the lower court's judgment in favor of the retail store. *United Pharmacal v. Missouri Board of Pharmacy*, WD 62214 (Mo. App. W.D. 2004).

APPLICATION AND INITIAL GRANT OF LICENSE

Character and Fitness . . .

This is a review of the Wisconsin Board of Bar Examiners' (board) refusal to certify that a bar applicant, Littlejohn, had satisfied the character and fitness requirements for admission to the Wisconsin Bar. The board's refusal was based primarily on the applicant's conduct and actions during his 24 years of practicing dentistry in Minnesota, during which he was subject to 25 dental board complaints and ultimately was suspended from the practice of dentistry. The court noted that although the applicant had been found by the Minnesota Bar Examiners to possess the requisite character and fitness and was ultimately admitted to practice in that state, this court was not required to follow suit. The court went on to explain that it was troubled by the applicant's attempt to renounce his stipulations with the Minnesota Dental Board, in which he stipulated to committing fraud, misrepresentation and the performance of unnecessary services. The court underscored the fact that the applicant had stipulated to these acts and that these acts reflected poorly on his character and fitness for the practice of law. The court also noted that it did not believe, unlike the Minnesota Bar, that the applicant had been rehabilitated. Accordingly, the court affirmed the board's refusal to certify the applicant's character and fitness and denied his application for admission to the state bar. *Bar Admission of Littlejohn, 661 N.W.2d 42 (Wis. 2003).*

In a 2002 decision, the Kansas Supreme Court reversed a ruling by the Kansas Real Estate Commission denying a license to an applicant (Gates) for a real estate salesperson license. In its opinion, the court makes it clear that although Gates once held a real estate salesperson license, that license lapsed around the time period when Gates pleaded guilty to a felony and was incarcerated. The Real Estate Commission, according to this opinion, erroneously treated Gates' application as one for reinstatement and thereby applied the wrong law in making its decision.

This court said the Commission, according to Kansas law, was required to consider more than the fact that Gates had been convicted of a felony, and that granting of a license cannot be denied solely on the seriousness of the offense. The court particularly noted the Commission's finding that Gates was not rehabilitated, but pointed out that there was no evidence in the record to substantiate such a determination. *In Re Appeal of Gates From Kansas Real Est. Commission, 46 P.3d 1206 (Kan. 2002).*

Licensure by Reciprocity or Endorsement . . .

In a decision rendered in 2003, a Florida District Court of Appeal reviewed a decision of the Florida Board of Architecture and Interior Design (board) denying an architect (Ellinwood) a license by reciprocity or endorsement. Ellinwood held licenses in Georgia, Virginia and Pennsylvania and received his bachelor's degree in architecture from the University of Florida in 1977. Ellinwood obtained a four-year degree and the board took the position that a more recent five-year degree requirement precluded him from licensure.

The appellate court disagreed. The court acknowledged that an agency's interpretation of a statute it administers is entitled to deference but noted that, the court can overturn the agency's

interpretation if it is clearly erroneous. It then held the board's application of the five-year degree requirement to both paragraphs (b) and (c) of the endorsement statute was clearly erroneous. It noted the language of paragraph (c) stating the five-year degree applied to "this paragraph and that paragraph (b) was separated from (c) with the disjunctive >or=."

Further, the court said the use of a disjunctive in a statute indicates alternatives and requires that those alternatives be treated separately. Consequently, the court reasoned, the five-year degree requirement plainly applied only to paragraph (c) and the board's denial of Ellinwood's application must be reconsidered under paragraph (b) of the statute. *Ellinwood v. Bd. of Architecture*, 835 So.2d 1269 (Fla. App. 1 Dist. 2003).

Effects of Sanctions Issued in Another Jurisdiction . . .

A physician filed a new application to practice medicine in the state of Delaware in 2001. He had previously been licensed there, but let his license lapse in 1993.

His license application revealed that he had voluntarily surrendered his medical license in Kentucky although that agreed order stated he had not violated Kentucky law. He also held licenses in Pennsylvania and New Jersey and both jurisdictions suspended or revoked those licenses for violations of their practice acts.

The applicant contended the Kentucky order should not be the basis for denial of a Delaware license, since it did not find him guilty of violating a Kentucky law. The Delaware State Board of Medical Practice disagreed and denied the application. On appeal, the Delaware Superior Court upheld the denial. The court agreed the applicant did not meet the qualifications for licensure in that state, in that, he could not validly submit an affidavit that he has not violated the Medical Practice Act of another state since he did not appeal the sanctions in either Pennsylvania or New Jersey. *Pravetz v. State Bd. of Med. Prac.*, 2003 WL 21203304 (Del.Super. 2003).

EXAMINING THE CANDIDATES

Discretion to Choose Appropriate Examination . . .

In a 2003 decision, the Commonwealth Court of Pennsylvania considered a case in which an organization, the National Association of Forensic Counselors sued the state's Social Workers Board for its decision to exclude that certification group and its exam from those recognized credentialing agencies which entitled certificate holders to become licensed without examination by the board. This court agreed with the board's determination that the examination at issue did not cover the breadth of practice of professional counselors to merit a waiver. The court also rejected claims that the statute was vague or that the agency was held to a different standard than other recognized entities. *National Association of Forensic Counselors v. State Board of Social Workers*, 814 A.2d 815 (Pa. 2003).

In a somewhat similar case, the Iowa Supreme Court upheld a lower court ruling which affirmed the state engineering board's denial of licensure without examination of a mechanical engineer. The court held that the "examination" process in the United Kingdom was not equivalent, to or more stringent than, the examination required by Iowa law. Therefore, the application was properly denied and the court referenced the requisite deference to the board in making such difficult determinations. *Al-Khattat v. Engineering and Land Surveying Examining Board of Iowa*, 644 N. W. 2d 1 (Iowa 2002).

DISCIPLINARY ACTIONS INVOLVING LICENSED PROFESSIONALS

Due Process Requirements in General. . .

A Florida District Court of Appeal, in a 2002 opinion, reversed a board's finding that subjected a social worker to discipline for revealing confidential information. This court found several board errors including failure to grant a short continuance, failure to enter a final order within the 90-day statutory period, and failure of the board to establish that confidential information was revealed. *Kasdaglis v. Dept. of Health of the State of Florida*, 827 So.2d 328 (Fla. App. Ct. 2002).

The Court of Appeals of Wisconsin, in a 2002 decision, held that the record of a chiropractor's disciplinary hearing, did not show any due process violation by the Wisconsin Chiropractic Examining Board (board). This board had entered an order suspending the chiropractor's license for six months. The court said the board's decision was reasonable based on the facts before it, and accordingly the appellate court reversed the order of the circuit court and reinstated the order of suspension. *Riegleman v. State of Wisconsin Chiro. Exam. Bd. & Dept. of Reg. & Lic.*, 650 N.W.2d 559 (Wis. App. 2002).

Notice . . .

In a 2003 decision, the Pennsylvania Commonwealth Court issued a decision involving a psychologist who was brought before the board on charges of failing to obtain the appropriate consent in order to evaluate a child who was the subject of ongoing custody litigation. The case contains a rather lengthy discussion of the ability of a psychology board to adopt American Psychological Association guidelines such as the 1994 Guidelines for Child Custody Evaluations. In its decision, the Court holds that the board properly adopted the guidelines and they were applicable to Pennsylvania psychologists at the time of the alleged misconduct. The court affirms the Board's order finding the respondent guilty of evaluating a child without the proper custodial consent; however, it reversed the board on the issue of whether or not the respondent was properly notified of what was perceived as improper testimony during the hearing on custody. More specifically, while the respondent was not notified that his testimony would be scrutinized, he was found guilty of expressing an opinion about an individual he had not actually evaluated. Since the second charge was not contained in the Notice and Order to Show Cause, the court reversed that finding of guilt and the fine of \$1000 imposed by the board.

Grossman v. State Bd. of Psychology, 825 A.2d 748 (PA. Commw. 2003).

Form of the Hearing. . .

The Idaho Supreme Court, in a 2003 opinion, reviewed a decision of the Idaho Board of Professional Discipline to revoke a physician's license to practice medicine. The court said the evidence supported the findings of the hearing officer regarding drugs supplied through prescriptions to a mistress. The court considered, but clearly rejected, the argument that the physician was entitled to a hearing before physicians rather than a lawyer serving as a hearing officer. *Suits v. Idaho Board of Professional Discipline*, 64 P.3d 323 (Id. 2003).

A Fair and Impartial Tribunal . . .

A number of questionable decisions by the Maryland State Board of Pharmacy (board) led to the reversal of a decision to sanction a pharmacist's license for practicing pharmacy with an expired license. Eventually, the Court of Special Appeals of Maryland upheld the reversal by a lower court which determined that the board was not a fair and impartial tribunal since two members of the board were involved in unsuccessful settlement negotiations and they refused to recuse themselves and sat as part of the tribunal at the formal hearing. There was also much discussion by the court regarding the actions of another board member who engaged in a debate with the licensee's attorney and called him a "bold face liar" which the court considered a clear demonstration of bias. Additionally, board members were observed reviewing potential evidence in the hearing room prior to the beginning of the hearing. However, the court did reject the argument of the licensee that the renewal of her license during the investigation precluded the board from pursuing a disciplinary action against her. *Maryland State Bd. of Pharmacy v. Spencer*, 819 A.2d 383 (Md. Ct. Spec. App. 2003).

In affirming the lower court's reversal, the intermediate appellate court, remanded the case to the board, directing the board to delegate its authority to conduct the hearing and issue a final decision to the Office of Administrative Hearings (OAH). The pharmacist appealed to the state's highest appellate court arguing that the special appeals court's remedy of sending the case to OAH was erroneous. That court reversed the lower appellate court only as to its sending the case to OAH, explaining that boards have discretionary authority to send cases to OAH and that there was not sufficient reason to reverse the board's decision not to initially send the case to OAH. The court provided that the proper course was to remand the case to the board with instructions to cure the defects the reviewing court found at the original hearing, and, thus, this court remanded the case with such instructions to the board. *Spencer v. Maryland State Bd. of Pharmacy v. Spencer*, 846 A.2d 341 (Md. 2004).

DISCOVERY IN PROFESSIONAL DISCIPLINARY CASES

Subpoenas. . .

The Rhode Island Supreme Court, in a 2003 opinion, held that there was no merit to a physician's contention that a defendant hospital breached a confidentiality agreement between the parties when it responded to a subpoena duces tecum issued by the state's Board of Medical Licensure and Discipline and produced documents pertaining to her application for staff privileges. This court said the physician failed to prove that a confidentiality agreement existed between the parties nor had she produced any evidence tending to show that these records were otherwise privileged from disclosure or defamatory. *Mills v. Rhode Island Hosp., No. 2002-446BAppel.*

Witness Lists and Statements. . .

In a 2004 decision of the Alabama Supreme Court, an issue on appeal was whether the state's Medical Licensure Commission denied a physician due process of law by not requiring the medical board to produce written statements taken by the board's attorney during an investigation. In resolving this issue, the court first stated the general rule that there is no basic constitutional right to prehearing discovery in administrative proceedings. Because the record revealed that the doctor was aware of the identity of the complaining witnesses, and had had an opportunity to depose them, the doctor had ample opportunity to obtain the substantial equivalent of the statements without undue hardship, and, thus, the doctor's due process rights were not violated. *Ex parte Medical Licensure Commission of Alabama, [1022156, May 14, 2004], __ So. 2d __ (Ala. 2004).*

ADMINISTRATIVE SEARCH AND SEIZURE

Administrative Searches in Closely Regulated Professions. . .

The issue of the search of a public official's drug prescription records and the disclosure of those records to law enforcement authorities by the Washington State Pharmacy Board (board) was the subject of a lawsuit resulting in a 2003 decision of the Court of Appeals of Washington. Generally speaking, after a pharmacist notified the board's Executive Director that she suspected a county Sheriff of being addicted to painkillers, for which he had multiple prescriptions, an investigation ensued in the county's 39 pharmacies. The results of the investigation revealed that the sheriff had filled 265 prescriptions at eight pharmacies over a 17-month period. The prescriptions were written by ten different prescribers for opioid narcotics, muscle relaxants and anti-depressants. The results of the investigation were turned over to the county prosecutor's office and charges were filed against the sheriff. The criminal case was subsequently dismissed because the trial court ruled that the board's actions violated the Sheriff's right to privacy since there was no search warrant.

A civil suit was then filed by the Sheriff and his family members who sued the pharmacy board on a number of theories. A trial court jury awarded them over \$3 million. On appeal, however,

the Court of Appeals reversed finding the board had statutory authority to conduct a warrantless search of an individual patient's prescription information. The court then went on to further hold that the pharmacy statute allowing the board warrantless access to prescription information did not violate the privacy protections of the federal and state constitutions. Finally, the court held that the disclosure of the prescription information to the county prosecutor was not improper. *Murphy v. State*, 115 Wn.App. 297 (Wash. Ct. App. 2003).

EVIDENTIARY MATTERS

Hearsay Evidence . . .

The District of Columbia Court of Appeals has recently reversed a decision to revoke a D.C. psychologist's license. The case involved a claim by a former patient that the psychologist had engaged in numerous aspects of sexual misconduct. The case is somewhat unusual in that the government relied on a deposition taken in a civil suit to establish, on direct examination, the alleged facts surrounding the sexual misconduct. At the same time, after the respondent testified and contradicted the evidence admitted by deposition testimony, the government then called the complainant as a live witness on rebuttal.

The Administrative Law judge found the deposition testimony to be reliable evidence although much of it was hearsay and recommended the revocation of the psychologist's license. The board affirmed the recommendation and the case went to the District of Columbia Court of Appeals for review. That court reversed, after a lengthy discussion of the admissibility and reliability of hearsay testimony. The court found the testimony in this case to be too insubstantial to support the revocation order. The court, in conclusion, held that in the absence of corroboration strong enough to overcome the inference of unreliability flowing from the complainant's availability to testify, and the petitioner's direct contradiction of her allegations against him, and the centrality of these hearsay allegations to the agency's decision, the hearsay deposition in the case did not constitute evidence sufficiently substantial to support the revocation of a professional license to practice psychology. *Compton v. Dist. of Columbia Bd. of Psych.*, 02-AA-1416 (D.C. 9-23-2004).

Necessity for Expert Testimony . . .

The North Carolina Supreme Court, in a recent 2004 decision, reversed the state's Court of Appeals and held that the North Carolina State Board of Dental Examiners (board) was authorized to determine the appropriate standard of care for an orthodontist's treatment of a patient without expert testimony from an orthodontist. The court so held saying (1) there is no per se rule that expert testimony is required to establish the standard of care in disciplinary hearings conducted by professional licensing boards; and (2) the fact that the state's General Assembly did not see fit to make any special provisions for disciplinary actions involving orthodontists suggests that it deemed the standards of care governing the practice of orthodontics to be within the kin of licensed dentists. The court also said that a licensee is not denied meaningful judicial review when a licensing board cannot base its findings or conclusions on facts outside the record, but has a statutory obligation to reach a reasoned decision based on

substantial evidence in view of the entire record. *Watkins v. State Board of Dental Examiners*, 593 S.E.2d 764 (N.C. 2004).

Sufficiency of the Evidence . . .

The New York Supreme Court, Appellate Division, in a 2002 opinion, held that the evidence, taken as a whole, was sufficient to support the inference of fraud; namely that a surgeon knew that he had removed the wrong kidney and, instead of taking steps to rectify that situation, intentionally concealed his mistake. Therefore, the disciplinary board's determination suspending the physician's license would be affirmed. *In re Muncan*, 745 N.Y.S.2d 304 (A. D. 3 Dept. 2002).

Harmless Error Rule. . .

In a 2003 decision, the Mississippi Court of Appeals affirmed a lower court's decision which held that the state's Board of Nursing Home Administrators (board) did not have grounds to discipline a nursing home administrator. The court rejected the argument of the board that the exclusion of expert testimony was prejudicial to the board's case. The court said that if that ruling was in error, it was harmless error. And, the court noted that the administrative law judge excluded expert testimony from both sides. *Missouri Board of Nursing Home Administrators v. Stephens*, 2003 WL 1960608 (Mo. App. W. D. 2003).

Drawing an Adverse Inference . . .

In this case, an orthopaedic surgeon was charged with 28 counts of misconduct relating to 10 patients. After his license to practice was revoked, he appealed to this court. On appeal, the court found that it was not erroneous for an adverse inference to be drawn from the surgeon's failure to testify as to two patients. The court noted that an adverse inference may be drawn when a physician charged with professional misconduct neither appears, testifies nor offers evidence on his behalf, even in the absence of the assertion of a 5th amendment privilege. The court also found that the surgeon's claims that the penalty of a revocation was harsh and excessive were without merit, given the surgeon's negligent behavior, poor record keeping and fraud. The court explained that the penalty of license revocation was not so incommensurate with the offenses as to shock one's sense of fairness. *Matter of Youssef*, 775 N.Y.S.2d 395 (N.Y. Sup. Ct. 3d Dept. 2004).

GROUNDS FOR DISCIPLINARY ACTIONS

Negligence, Incompetence, Malpractice . . .

According to a New York appellate court, a determination finding a physician guilty of professional misconduct and revoking his medical license was certainly rationally based. The court pointed out, that according to the only witness who testified at the hearing, a physician, board certified in orthopedic surgery who had reviewed the petitioner's records for five subject patients, found that the respondent physician had incorrectly diagnosed each of the patients and

had deviated from acceptable standards of medicine by excessively treating each of them. And, it was noted, the record further confirmed that he had then billed insurance companies for those unwarranted services. *Bazin v. Novello*, 754 N.Y.S.2d 446 (A. D. 3 Dept. 2003).

This is an appeal from the decision of the Idaho State Board of Medicine (board) to permanently restrict a physician from prescribing, administering or dispensing injectable hormone therapy to female patients, the imposition of \$20,000 fines and the assessment of costs and attorney fees. The court reversed the imposition of the fines, finding that under the state code, the board lacked authority to impose the fine in this case and the court also reversed the assessment of costs and attorney fees, finding that the board had failed to provide the physician adequate due process on this issue. The court, however, affirmed the permanent restriction of his license.

In restricting his license, the board had found that it was reasonable to conclude that the physician would not voluntarily accept the fact that his practice of routinely prescribing injectable hormone therapy for females had been found by the hearing officer and the board to violate the community standard of care, in light of his testimony that he did not believe that there was any medical reason for him to change or alter his use of injectable hormone therapy for females. In affirming the restrictions, the appellate court provided that the board may discipline

a physician for providing health care that fails to meet the applicable standard of care even if it cannot prove that the physician's patients have yet suffered any physical harm. *Haw v. Idaho State Board of Medicine*, 29566, April 22, 2004 (Idaho 2004).

Revocations Involving Substance Abuse. . .

In a 2004 decision, a Florida District Court of Appeal, agreed that substantial evidence supported the Department of Health, Board of Medicine's finding that an orthopaedic surgeon's mental condition and non-compliance with the conditions of the Physician's Recovery Network contract demonstrated that he was unable to safely and skillfully practice medicine. *Luskin v. Dept. of Health, Bd. of Med.*, 866 So.2d 733 (Fla. App. 4 Dist. 2004).

In a 2003 Ohio Supreme Court decision, that court agreed that an indefinite license suspension was the appropriate sanction for an attorney, also a licensed pharmacist, who misappropriated controlled substances for his own personal use while employed as a pharmacist. The court noted that the licensee was convicted of five felony counts and had his pharmacist license permanently revoked. The court also approved the condition of the indefinite suspension that the attorney submit to random periodic drug screens. *Office of Disciplinary Counsel v. Garrity*, 784 N.E.2d 691 (Ohio 2003).

Sexual Intimacies with Clients or Patients. . .

In this appeal, the court considered whether a physician commits immoral or unprofessional conduct in the practice of medicine by engaging in consensual sexual activity with a patient concurrent with the existence of a physician-patient relationship, in the absence of evidence that such activity occurred while the physician was actually engaged in the treatment and care of the patient. The court found that a parallel sexual relationship between a physician and a patient

compromises the physician-patient relationship, violates the ethics of the medical profession, and poorly reflects on the fitness of the physician to practice medicine. The court found that even if they facially consented to the sexual relationship, the physician had used his professional skills and knowledge of the three female patients' personal and familial situations to play upon their emotional vulnerabilities. Thus, the court found that a physician who enters into such a dual relationship commits unprofessional conduct in the practice of medicine. *Finucan v. Board of Physicians*, 846 A.2d 377 (Md. Ct. App. 2004).

The Arkansas State Board of Physical Therapy properly suspended a physical therapist's license to practice physical therapy for a period of three months and placed his license on probation for a period of nine months after the completion of the active suspension.

The Arkansas Supreme Court noted that during the hearing, there was evidence presented that the therapist and patient had engaged in kissing, hugging, and heavy petting during the course of her treatment. Further, there was testimony that the physical therapist made very intimate and personal comments to her during her treatment, and the two had intercourse within at least two weeks of her final therapy session. *Williams v. Arkansas State Bd. of Physical Therapy*, No. 02-1117 (Ark. 2003).

Unethical, Immoral or Unprofessional Conduct. . .

A legally complex decision involving a disciplinary sanction issued to an Oregon psychologist was rendered by the Court of Appeals of Oregon in 2004. The case involved a psychologist who was seeing two minor children of a couple whose marriage would ultimately end in divorce.

When the divorce occurred, the mother and father received "joint legal and physical custody of the parties' minor children." The father then had his attorney write the psychologist directing her to stop treating the children. The mother's attorney told the psychologist she could continue to treat the children.

The psychologist sought opinions from various individuals and entities in Oregon and Washington and received conflicting advice. Eventually the father filed a complaint with the Oregon Board of Psychologist Examiners. In essence, the board took the view that the matter of discipline hinged on the interpretation to be given to Ethical Principle Rule 4.02 regarding whether the psychologist should have continued treatment when instructed not to by the former husband, since the children were unable to consent due to their ages.

The board agreed with its expert that the psychologist breached the Rule and discredited the contradictory opinion of the psychologist's expert. The case went to the Court of Appeals of Oregon.

That court said that even if the board applied the correct interpretation of Rule 4.02 (b), it did not apply to the circumstances of the case. This court held the mother had lawfully initiated the therapy with the children and, that pursuant to a decree vesting joint legal and physical custody with both parents, the father could not unilaterally terminate therapy without consultation and agreement with the mother, which clearly had not occurred. Consequently, this court said there

was no valid withdrawal or termination of informed permission and it reversed the decision of the board and remanded for reconsideration. *Miller v. Board of Psychologist Examiners*, 193 Or. App. 715 (2004).

Disciplinary Sanctions in Another Jurisdiction . . .

In a 2002 decision, the Alabama Court of Civil Appeals, considered the issue of the finality of a disciplinary sanction in another jurisdiction. The court first noted that the Georgia Medical Board had imposed a sanction against a physician's license which was based on acts similar to those acts described in Code of Alabama 1975, Section 34-24-360. And, the court acknowledged that decision was on appeal and the appeal had yet to be decided. However, this court said nothing in Code of Alabama 1975, Section 34-24-360 (15) could be construed to require the Alabama Medical Licensure Commission to await the outcome of the Georgia appeal before instituting disciplinary proceedings in Alabama. Further, the court held that all that was required to discipline this physician's license was a showing by substantial evidence that a disciplinary action had been taken by another state against that physician for acts similar to those described in Section 34-24-360. *Barngrover v. Medical Licensure Commission of Alabama*, 852 So.2d 147 (Ala. Civ. App. 2002).

According to the Court of Appeals of Tennessee, after a physician lost his license to practice medicine in the state of Maine, and he later relocated to Tennessee and filed an application for a license to practice medicine, the Tennessee Board of Medical Examiners properly denied his application based on the disciplinary action taken against him in the state of Maine.

This court said it was undisputed that the physician had lost his license to practice in Maine and from the order in that proceeding it was clear that the false statements made in his application to renew his license formed a basis for the action taken by the Maine board.

Moreover, this court said, such false statements or representations were also grounds for discipline under Tenn. Code Ann. Section 63-6-214 (b) (3); and it was clear that the Tennessee board had a rational basis for its decision to deny the physician a medical license; therefore the board did not act arbitrarily or capriciously or abuse its discretion. *Chagrasulis v. Tennessee Bd. of Med. Exam=rs*, No. M2001-01595-COA-R3-CV.

In this case, the Massachusetts Supreme Court considered whether a physician who entered into a consensual discipline order in another jurisdiction, pursuant to which he did not admit to any wrongdoing, but did agree not to contest certain factual allegations and further agreed that those allegations constitute grounds for discipline, is subject to reciprocal discipline in Massachusetts. The court ultimately affirmed the reciprocal discipline, finding that by acquiescing to the temporary and permanent restrictions on his license to practice in Connecticut, he voluntarily placed himself in the same position as a physician against whom actual findings had been made. Additionally, the court found that the conduct alleged in Connecticut established grounds for which discipline is authorized in Massachusetts. *Ramirez v. Board of Registration in Med.*, 806 N.E.2d 410 (Mass. 2004).

Various Other Grounds . . .

Deceptive or Misleading Advertising . . .

A denturist in Maine, who was working under a temporary permit, was properly enjoined from the practice of denturism until licensed by the Maine Board of Dental Examiners, and his right to practice denturism or apply for licensure was properly suspended for a period of 90 days. The reviewing court said the record indicated that the denturist had engaged in deceptive and misleading advertising since being sanctioned; that he had improperly used the appellation "doctor" and "DDM" to engage in misleading and deceptive marketing practices, that he had repeatedly and incorrectly advertised that a dentist and another denturist were associated with him when they were not, and he had failed to keep required client records. *State v. Dhuy, 2003 Me. 75 (Me. 2003)*.

Practicing Without a Valid License . . .

The Montana Supreme Court held that a trial court erred when it affirmed the state's Board of Chiropractor's (board) decision that a chiropractor failed to renew her license on time and practiced chiropractic without a license. Further, the court said the board failed to adequately rebut the presumption that her renewal application was mailed on time and received in the regular course of business. *Baldwin v. Board of Chiropractors, 2003 Mt. 306 (Mont. 2003)*.

DEFENSES TO DISCIPLINARY ACTIONS

Double Jeopardy . . .

A previously unreported case in the Quarterly, *Ohio State Board of Pharmacy v. Dick's Pharmacy*, 780 N. E. 2d 1075 (Ohio App. Ct. 2002) is instructive. Here a Ohio appellate court upheld a lower court ruling and a board order imposing a \$25,000 fine on the terminal distributor license of a pharmacy. The pharmacist in charge, who also owned the sole proprietorship, also had his license suspended for two years and received a \$42,500 fine. The courts rejected the arguments that the sanction against the distributor license for the same conduct leading to the sanction of the pharmacist license constituted double jeopardy and held that the doctrine did not apply to civil and administrative proceedings.

Mitigation . . .

In an Ohio case, the Ohio Supreme Court declined to follow the state's Board of Commissioners on Grievances and Discipline=s recommendation to suspend a lawyer from the practice of law and instead disbarred the lawyer. In reviewing the case, the court found that the lawyer had committed fifteen violations pertaining to her representation of an estate in probate court. As the violations included misappropriation of client funds, the court stated that it would begin its consideration of the case with the presumption of disbarment. The lawyer argued that due to several mitigating factors, including her mental condition, the court should only suspend her

license and also allow her to seek reinstatement, before the required two year waiting period, through the determination of a mental health provider as to her ability to return to practice. The court found that her mental condition which included personality and interpersonal relationship difficulties did not have a causal link to her misappropriation of over \$250,000. The court weighed her misconduct and failure to cooperate with the investigation with the mitigating factors of her mental condition, restitution and her remorse and found that the mitigating factors in the case failed to warrant a lesser sanction than disbarment. *Cleveland Bar Assn. v. Dixon*, 769 N.E.2d 816 (Ohio 2002).

SANCTIONS IMPOSED FOR PROFESSIONAL MISCONDUCT

The General Rule. . .

And in another 2002 attorney discipline case, the Minnesota Supreme Court upheld a 90-day suspension of an attorney's license for failure to timely file federal and state individual income tax returns. *In re Bailey*, 649 N.W. 2d 140 (Minn. 2002).

In a 2002 case, the Nebraska Supreme Court upheld the disbarment of an attorney for failure to keep a client informed on the status of a case and attempting to forge the signature of a judge in an attempt to persuade the client a lawsuit had been filed. *In re: Counsel for Discipline of the Nebraska Supreme Court v. Rickabaugh*, 647 N. W. 2d 641 (Neb. 2002).

In a 2002 decision, the New York Supreme Court, Appellate Division, said that after a physician was charged with violating the terms of his disciplinary suspension based upon a positive urine test, a five-year license suspension penalty was not unduly harsh. Further, the court said that based upon a review of the record as a whole, and taking into consideration the physician's prior disciplinary record, it could not be said that the penalty imposed by the board was so disproportionate to the underlying offense as to shock the court's sense of fairness. Moreover, to the extent that the physician argued that his conduct "pales in comparison" to the misconduct at issue in various disciplinary proceedings cited in his brief, and, hence, should be subject to a lesser penalty, "penalties in other cases were irrelevant because each case was to be judged on its own peculiar facts and circumstances." *In re Lucas*, 745 N.Y.S.2d 299 (A. D. 3 Dept. 2002).

In this case, an orthopaedic surgeon was charged with 28 counts of misconduct relating to 10 patients. After his license to practice was revoked, he appealed to this court. On appeal, the court found that it was not erroneous for an adverse inference to be drawn from the surgeon's failure to testify as to two patients. The court noted that an adverse inference may be drawn when a physician charged with professional misconduct neither appears, testifies nor offers evidence on his behalf, even in the absence of the assertion of a 5th amendment privilege. The court also found that the surgeon's claims that the penalty of a revocation was harsh and excessive were without merit, given the surgeon's negligent behavior, poor record keeping and fraud. The court explained that the penalty of license revocation was not so incommensurate with the offenses as to shock one's sense of fairness. *Matter of Youssef*, 775 N.Y.S.2d 395 (N.Y. Sup. Ct. 3d Dept. 2004).

Issuance of a Permanent Sanction . . .

A reviewing appellate court in Ohio in a 2004 opinion, said the State Medical Board of Ohio did not err when it issued an order permanently revoking a physician's medical license. This court said that based on the physician's four felony convictions and one misdemeanor conviction committed in the course of his practice, the board had within in its discretion the power to permanently revoke his license to practice medicine and surgery in Ohio. *Urban v. State Med. Bd. of Ohio, 2004-Ohio-104.*

APPEALS FROM DISCIPLINARY SANCTIONS

Availability of Review . . .

The New York Supreme Court, Appellate Division, held that a physician's voluntary surrender of his license, while he was facing charges of misconduct resulting in an order accepting the surrender of his license, was equivalent to a waiver of adjudication on the merits and a stipulation to a disciplinary order, thus precluding review. *D'Ambrosio v. Dept. of Health of State of New York, 769 N.Y.S.2d 917 (N.Y. Sup. Ct. 3d Dept. 2004).*

The New York Supreme Court Appellate Division, in a 2003 decision, held that there was no merit to a physician's complaint seeking to annul a disciplinary consent decree. This court said the record indicated that the physician had executed a consent agreement limiting his license to practice medicine and the state's medical board subsequently issued a consent order to that effect. The court noted that while the physician had thereafter commenced a CPLR article 78 proceeding seeking to annul the consent order, inasmuch as the underlying order was rendered on consent, the physician was not an aggrieved party and therefore his appeal would not lie. The court also stated that the physician's remedy was an application to set aside the consent order, the denial of which would be subject to the court's review. *In re Bloom, 752 N.Y.S.2d 923 (A. D. 3 Dept. 2003).*

Perfecting an Appeal . . .

A physician's appeal of a decision suspending his license to practice medicine was properly denied where he waited more than seven years to appeal the suspension decision. The board's decision indefinitely suspended the physician's license to practice medicine, but indicated that the board would consider staying the suspension if certain evidence were presented to it and various requirements were fulfilled. The reviewing court said filing in the Supreme Judicial Court within 30 days for judicial review was a jurisdictional requirement and not susceptible to extension except in limited circumstances as provided in statute. *Ramaseshu v. Board of Registration in Med., 804 N.E. 2d 334 (Mass. 2004).*

Scope of Review . . .

In a 2004 Alabama Supreme Court case, the court reversed the Alabama Court of Civil Appeals' decision affirming a lower court's reversal of the Alabama Medical Licensure Commission's revocation of a gynecologist's license to practice. The gynecologist had been charged with sexual misconduct with patients, after several patients filed complaints with the state's medical board. At the hearing on the charges, the former patients testified that he had engaged in various forms of sexual misconduct with them during exams and during his rendering of services. On appellate review, the supreme court first noted that the Commission's order revoking the doctor's license was to be taken as prima facie just and reasonable and the reviewing court should not substitute its judgment for that of the Commission. The court reviewed the evidence that was presented to the Commission and found that the Commission's order was supported by substantial evidence. In doing so, the court provided that the Commission had heard days of testimony from several former patients and two experts and that although there were inconsistencies in the testimonies, it was within the exclusive province of the Commission to resolve the conflicts. The court also noted that "the members of the Commission not only observed the proceedings, they engaged in the proceedings by rigorously questioning the witnesses." *Ex parte Medical Licensure Commission of Alabama*, [1022156, May 14, 2004],

So.2d (Ala. 2004).

REINSTATEMENT OF A LICENSE

Burden of Proof . . .

The Texas State Board of Medical Examiners suspended the license of an anesthesiologist, Dunn, to practice medicine in Texas, after his patient, a pregnant woman, went into cardiac arrest and died along with her unborn child after the doctor administered an epidural. Following a year of suspension, the doctor sought to have the suspension lifted. An administrative law judge (ALJ) found that he was competent to practice medicine and that the suspension should be lifted. However, the board rejected this recommendation and the doctor appealed. On appeal, the appellate court found that the board does not have unlimited discretion to change an ALJ's findings of fact and conclusions of law. The court further found that the doctor had met his burden of proof and that the board had failed to articulate a reasonable evidentiary basis for rejecting the ALJ's decision. *Texas State Board of Medical Examiners v. Dunn*, 2003 Tex. App. Lexis 9833, Tex. Ct. App. No. 03-03-00180-CV, November 20, 2003.

COLLATERAL ATTACKS IN STATE AND FEDERAL COURTS

Absolute and Qualified Immunity for Board Members Performing Quasi-Judicial Functions . . .

In this case, the plaintiff was a licensed radiologist who was hired by another radiologist who contracted with a women's medical group to provide breast cancer screening for its patients. Two years later, the New York State Department of Health started an investigation of the employer radiologist's billing practices. From this initial investigation, the department also reviewed his cancer detection rate which was sufficiently low enough to conclude that investigation. However, the department also investigated the plaintiff and ultimately a department fraud investigator recommended that the plaintiff's license be temporarily suspended. Thereafter, the defendant Commissioner summarily suspended his license and further posted a press release on the department's website announcing that the plaintiff's license had been suspended and also made assertions regarding his incompetence as a radiologist. Two months later, a hearing committee evaluated the plaintiff's suspension and found no basis for the suspension. However, the Commissioner rejected the recommendation and continued the suspension. After a final review, the hearing committee dismissed all the charges of misconduct. Thereafter, the plaintiff sued the department officials in their individual capacities, alleging several due process claims and a claim for "stigma plus" (a claim for injury to his reputation (the stigma) coupled with the deprivation of some "tangible interest" or property right (the plus)). The trial court dismissed his claims, finding that the officials were shielded from liability by absolute immunity. The plaintiff then appealed to this court.

On appellate review, this court provided that absolute immunity is accorded to judges and prosecutors functioning in their official capacities and, under certain circumstances, is also extended to officials of government agencies "performing certain functions analogous to those of a prosecutor" or a judge. The court reviewed the New York State's procedures governing summary suspensions and found that it lacked the hallmarks and safeguards of a judicial proceeding that would render absolute immunity for those officials involved. Additionally, it found that, even if the summary process itself shared more characteristics with a judicial proceeding, neither the Commissioner or the investigator's roles in the summary suspension were sufficiently analogous to that of a judge or prosecutor, respectively, to warrant absolute immunity from suit. The court ultimately vacated the lower court's dismissal and held that the plaintiff's due process claims were not barred by absolute immunity and that the district court erred in dismissing the "stigma plus" claims.

The public officials appealed this decision to the U.S. Supreme Court, which on April 19th, 2004, declined to review the case. Novello v. DiBlasio, U.S., 03-1137, 4/19/04. DiBlasio v. Novello, 334 F.3d 292 (2nd Cir. 2003).

UNAUTHORIZED PRACTICE OF A PROFESSION

Criminal Charges . . .

The New York Supreme Court, Appellate Division, in a 2003 decision, determined that the dismissal of various counts based on legally insufficient evidence that an unlicensed "physician" engaged in the unauthorized practice of medicine was in error. The court said it was well established that on a motion to dismiss an indictment, the trial court was limited to determining "whether the evidence viewed in the light most favorable to the People, if unexplained and uncontradicted, would warrant conviction by a petit jury." The court also said that "legally sufficient" was "competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof." Additionally, the court noted the documentary evidence in the form of insurance claim forms submitted by the physician for reimbursement, buttressed in most instances with testimonial evidence by patients, showed that he engaged in conduct ranging from performance of routine gynecological examinations to performances of elective abortion and the grand jury could certainly have concluded from this evidence that he had engaged in the unauthorized practice of medicine. *People v. Mayer, No. 2002-08/03 (N.Y. App. Div. 2003)*.

A defendant therapist was treating a patient and her husband for alcoholism. The patient also suffered from depression and an eating disorder. The patient and her husband jointly saw the therapist together for a short period and then began seeing him separately, with the patient seeing the therapist several times a week at evening appointments. During the last four to five years of therapy, the patient met the therapist in various hotels to have sex with him. The evidence showed that the therapist had wanted her to meet with him at these hotels because he wanted to teach her how to have sex with men, because he believed that the "failures" in her life stemmed from the fact that she "wasn't doing the right things for men to make them happy." She also testified that once the therapist gained her trust, he began to control her. The victim denied that she had any romantic feelings toward the therapist while in therapy with him, but stated that she believed that the defendant had romantic feelings toward her.

The patient reported the therapist's conduct to the state police and a licensing agency. As a result of the reports, the therapist was charged and convicted by a jury of two counts of sexual intercourse under the pretext of medical treatment, and two counts of second-degree criminal sexual conduct. He was sentenced to concurrent terms of two to fifteen years imprisonment for the convictions.

On appeal, the appellate court affirmed the therapist's convictions of second-degree criminal sexual conduct, finding that the coercion element was satisfied because the therapist had engaged in sexual contact with the patient through the use of an unethical or unacceptable manner of treatment. The court reversed his convictions of sexual intercourse under the pretext of medical treatment on procedural grounds. *People v. Alter, 659 N.W. 2d 667 (Mich. App. 2003)*.

Advisory Opinions . . .

In this case, the Supreme Court of Georgia reviewed the Georgia Bar's Standing Committee's opinion that the preparation and execution of a deed of conveyance on behalf of another was the unlicensed practice of law. The court noted that it was within its exclusive authority to determine the scope of the practice of law and also noted that since 1932 it had been the statutory policy in the state that only licensed attorneys were authorized to close real estate transactions. The court then approved the UPL Advisory Opinion of the Standing Committee stating that it was not persuaded that the time had come to change that current policy. *In Re UPL Advisory Opinion*, 277 Ga. 472 (Ga. 2003).

Declaratory Judgment Actions . . .

In South Carolina, before selling a property at a tax foreclosure sale, tax collectors must provide notice to the property owner and any lien holders. In order to determine who is entitled to notice, tax collectors often hire title abstractors, who generally are not licensed attorneys, to review and examine public records and report the status of title to each such property.

According to the Supreme Court of South Carolina, tax collectors and county attorneys throughout the state disagree as to whether title abstractors, when performing the aforesaid duties, are engaged in the unauthorized practice of law. To find an answer to the question, the County Attorney for Greenwood County, sought a declaratory judgment on the issue.

The court noted three previous rulings in similar cases all holding the real estate activities involved were the practice of law. In one such case, the court upheld a disciplinary sanction against an attorney for authorizing his paralegal to conduct a real estate closing in the attorney's absence. Thereafter, the court said that given its prior decisions, the acts of examining titles and preparing title abstracts constitute the practice of law. The court concluded that these activities were not unlawful if a licensed attorney reviews the title abstractor's report and vouches for its legal sufficiency. *Ex Parte Watson*, 589 S.E.2d 760 (S.C. 2003).

CRIMINAL ACTIVITIES

Generally . . .

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Scope of Trial Court Authority . . .

The Court of Appeals of Tennessee, in a 2004 decision, held that after a pharmacist pleaded guilty to five counts of unlawful disbursement of controlled substances, in the event the state's Board of Pharmacy did not suspend his license, the trial court's ban on the practice of pharmacy during a four-year probationary period was punitive and not rehabilitative, was not based on concerns of future criminality, was unnecessary and overbroad in light of the regulatory authority of the Tennessee Board of Pharmacy, and was unduly restrictive in preventing lawful employment. *State v. Robinson*, 139 S.W. 3d 661 (Tenn. Crim. App. 2004).