

---

—

## LEGAL ISSUES UPDATE

*Nancy Jo Rainer, J.D.*  
ASPPB 2005 Annual Meeting  
Philadelphia, PA

---

—

### RULEMAKING & RELATED MATTERS

This case is an appellate challenge to the New Jersey State Board of Medical Examiners' rulemaking authority related to a rule promulgated by the Board regarding administration of anesthesia during surgery performed in a physician's office. As the new rule limited the practice of certified nurse anesthetists (CNAs), CNAs in the state argued that the rule had a significant effect on their autonomy and economic life and that the consequences of the new rule outweighed the Board's underlying goals and reasoning for the new rule.

On appellate review, the court noted that when it comes to cases on appeal from the promulgation of a rule by an administrative agency, it is important to understand that the court is not called upon to assess the wisdom of the agency's decision, but only to address the legality of it. Thus, the court provided that its mission in the case was to determine whether the challenged rule fell within the legal authority of the Board and whether there was a basis for its enactment. The court found that the challenged rule fell squarely within the Board's jurisdiction as its authority included providing licensing and qualifications of physicians and how they perform their professional services. The court ultimately found that there was testimony at the Board's hearing that supported the need for enhanced education and oversight.

N.J. A.N.A. v. N.J. State Board of Medical Examiners, A-92-04, June 29, 2005 (N.J. 2005).

In a factually similar case, the North Carolina Board of Nursing (Nursing Board) appealed an order denying its motion for enforcement of a consent order against the North Carolina Medical Society, North Carolina Medical Board and North Carolina Society of Anesthesiologists (herein collectively referred to as Medical Board). The case stems from a proposed amendment to an administrative rule by the Nursing Board in 1992. The amendment would have expanded the scope of practice of certified nurse anesthetists (CNAs) by changing the relationship between CNAs and physicians in which their relationship of physician supervision would be changed to a collaboration between the two. The Boards entered into an agreement regarding the scope of practice. Years later, the Medical Board initiated a disciplinary action against a licensed physician for failing to adequately supervise a CNA. The Medical Board forwarded the information about the case to the Nursing Board for it to take appropriate action against the CNA. The Nursing Board, however, relying on the agreement, claimed that CNAs in the state were only required to work in collaboration with physicians, not under their supervision. The Medical Board disagreed, as it interrupted the consent agreement differently. This appeal follows the disagreement between the Boards regarding the consent agreement and the proper standard of

care.

On appeal, the court found that physician supervision of nurse anesthetists providing anesthesia care, when that care includes prescribing medical treatment regimens and making medical diagnoses, is a fundamental patient safety standard required by North Carolina law. The court continued that the 1994 consent agreement had not changed the statutory requirement of when physician supervision is necessary. The Nursing Board argued that the Medical Board must follow the 1994 agreement regardless of whether the 1994 agreement could be read to impede its obligation to regulate the activities of its licensee physicians. However, the court provided that even assuming the 1994 agreement could be read as evidencing an intent by the Medical Board to acquiesce in a collaboration standard, the Medical Board cannot be forbidden from advising its licensees on the standard of care in medical practice in order to protect the public interest. The court noted a case that held that administrative boards, exercising public functions, cannot by contract deprive themselves of the right to exercise the discretion delegated by law, in the performance of public duties. Further, the court held that the Medical Board, as an administrative board, cannot be estopped from exercising its duty to regulate the practice of medicine in the interest of the public. Moreover, the court added that a state agency is prohibited from adopting a rule that enlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required.

North Carolina Medical Society v. North Carolina Board of Nursing, COA 04-684, March 15, 2005 (N.C. 2005).

In a related case, several California Chiropractors brought an action against the state Chiropractic Board alleging that a new regulation, which defines the scope of chiropractic practice, impermissibly narrows the scope of practice for chiropractors and was unenforceable as it was inconsistent with and in conflict with the practice rights granted chiropractors under the state Chiropractic Act. They also made several constitutional arguments. The trial court dismissed their case and, thereafter, they appealed to the state court of appeals.

The amendment at issue explicitly did not allow chiropractors to practice surgery or to sever or penetrate tissues of human beings, including, but not limited to severing the umbilical cord or to use any drug or medicine. On appellate review, the court reviewed previous cases that examined the scope of practice of chiropractors in the state. The court provided that chiropractors are confined to the established measures of adjusting the joints by hand, and to incidental mechanical and hygienic measures that do not invade the field of medicine and surgery. Further, the court stated that there was nothing in the record that would suggest that the scope of the new section did not reflect the Act's scope of practice of chiropractic.

The chiropractors' basic argument was that the use of acupuncture fell within their scope of practice as schools of chiropractic were now teaching such methods of healing. The court noted a similar case and provided that the attempts of chiropractic schools or colleges to extend the scope of practice by teaching other subjects must fail.

As to the chiropractors' constitutional arguments, the court stated that although the chiropractors state that they possess fundamental rights to fully develop their own medical/ chiropractic paradigms and to realize their own individual identity within their chosen vocation and the full economic benefits of their profession, they failed to cite authority or present argument as to why the court should establish these rights as fundamental. The court provided, to the contrary, that it was well established that the right to a professional license or to continue practice

pursuant to that license did not constitute a fundamental right. Thus, although possession of a license is a right that conveys on the holder certain rights of due process, the right is not a fundamental right, such as the right to privacy.

Tain v. State Board of Chiropractic Examiners, A106656, June 22, 2005 (Cal. Ct. App. 2005).

Often times in appeals of administrative cases, a disciplined licensee will not only assert that a Board's decision is not supported by the evidence, but also that the alleged violated statute is unconstitutional for various reasons. In a 2005 Delaware case, an optometrist claimed that the statutory scheme underlying the Board's determination was void for being impermissibly vague.

In reviewing the statute, the court stated that a statute, which imposes a standard of conduct for the breach of which an individual will be held responsible, must define the conduct with sufficient particularity to enable the person to make his or her conduct conform. The court continued that if people of common intelligence must, of necessity, guess at its meaning, the statute is unconstitutionally vague. In its review of a constitutional vagueness challenge, the court must determine whether the challenger should have known that his or her actions violated the statute. The statute at issue proscribes an optometrist from allowing his or her name or professional title to be used by or in conjunction with an association or unlicensed person in any advertising.

The court found that Pearl Vision's signs and website, which advertised the optometrist's name, was advertising with an association or unlicensed person and that, although the statute was not perfectly drafted, it was sufficient to put the optometrist on notice. The court addressed other statutes as well, making this an excellent resource for a statutory construction issue.

Bristow v. Delaware Board of Examiners in Optometry, 20241, February 8, 2005 (Del. 2005).

Although professional licensing boards look to caselaw involving other professions and boards, this case shows us that varying professions need not be treated alike by the courts. In this case, a chiropractor challenged the state's ban on chiropractors' solicitation of recent traffic accident victims as unconstitutional, claiming that other professions, such as medical doctors, are not subject to the ban. The court found the ban constitutional, holding that the Equal Protection Clause did not require that the state treat all persons alike, but that it requires only that the state treat similarly situated persons alike.

The court explained that when the state distinguishes between classifications of persons, the distinction must have some relevance to the purposes for which the classification is made. Here, the court found the statute validly distinguished between medical professionals who have a record of engaging in a particular conduct that generates complaints, and medical professionals who do not.

Capobianco v. Paul Summers, Attorney General & Tennessee Board of Chiropractic Examiners, 04A0237(6<sup>th</sup> Cir. 2004).

In a 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).

The case was then appealed to the state supreme court. In April of 2005, that court held that the FAQ was in fact a rule, but that it was a procedurally invalid one because it was not properly promulgated. United Pharmacal v. Missouri Board of Pharmacy, 159 S.W.3d 361 (Mo. 2005).

Cases against a licensing board do not always include a disciplined licensee, as in the following case. In this case, the Board's executive officer sued the Board for back pay. The retired executive officer sued the Board alleging she was entitled to over \$42,000 in raises and back pay. The Board's statutory authority provided that the Board may employ an executive director and the Board may establish the executive director's responsibilities and compensation. The executive director's case was based upon the Board's action of voting her a six percent raise in 1988. However, as payroll allotments were insufficient to cover the raise, the increase never went into effect. The Board requested appropriations to cover the raise and back pay, however, due to fiscal shortfalls, the legislature denied the Board's request. The Board made several efforts over the years attempting to secure the funds to pay the executive director.

The trial court reviewing the case, found that the Board's actions of formally recommending and approving salary increases constituted a promise to pay the executive director and that it was reasonable for the executive director to have relied upon the Board's promises. The court found the executive director was entitled to recover the stipulated amount of back pay.

The appellate court, however, disagreed, finding that no state agency could incur an obligation which exceeded the agency's current appropriation authority and that the general assembly never approved a specific appropriation to fund the executive director's back pay. Thus, the appellate court found that the executive director failed to demonstrate that the Board had authority to enter into a contract to award back pay, unless approved by the General Assembly and made part of the appropriation. Additionally, the court held that the executive director's contention that the Board had unfettered discretion to transfer funds from other accounts into an account to fund her back pay lacked merit.

The executive director also claimed that she had relied upon the assurances by some of the individual board members that the Board would pay her. As to this contention, the court stated that she, as the executive director knew or should have known that an individual member of the Board could not, acting unilaterally, have bound the Board absent approval by a majority vote of the Board at a formal public meeting. Additionally, the court noted, under the law, the state cannot be estopped by acts of its agents not within their actual authority, even if such acts, under similar circumstances, might be within the implied or apparent authority of the agent of a private person. The court remanded the case for proceedings in line with its opinion.

Raabe v. Ohio Board of Speech Language Pathology & Audiology, 2005 Ohio 2335, May 12, 2005 (Ohio Ct. App. 2005).

A pharmacist brought an action against the British Columbia College of Pharmacists, alleging that the College was failing to properly interpret and enforce the Bylaw, which required that a prescription be authentic. Specifically, the pharmacist claimed that certain pharmacists in British Columbia engaged in an internet pharmacy enterprise by advertising the availability of discounted prescription drug products to consumers in the United States and that the clients who respond to such advertising, obtain prescriptions signed by their physicians in the United States and deliver them to pharmacists in British Columbia for dispensing. However, the Bylaw at issue, requires that pharmacists ensure that all prescriptions are authentic and contain certain required information, including the signature of a physician, licensed to practice medicine in Canada. The pharmacist alleged that in order to meet this latter requirement, pharmacists arrange for the authorizations of practitioners who are strangers to these patients so that the prescriptions may be filled and delivered back to their clients in the United States and that the pharmacists who do so are aware that no professional relationship arises between the patient in the United States and the practitioner in Canada.

On review, the court found that the pharmacist had no standing to pursue his case. The court provided that he does not own, manage or work in a pharmacy providing internet pharmacy services and that his legal rights have not been infringed in any way. The court dismissed his case, holding that it is the court's role to decide matters in dispute between the parties adverse in interest and not to give advisory opinions.

Behr v. College of Pharmacists of British Columbia, 2005 BCSC 879, June, 13, 2005.

#### **CHALLENGES TO AUTHORITY**

An accountant whose license was suspended for leaving her husband's name on her insurance after they were divorced was disciplined by the state Accountancy Board. The accountant argued on appeal that the Board did not have authority to discipline her license for her actions involving her insurance company. The court found, however, that her act of intentionally leaving her husband's name on her insurance as her spouse for years after they were divorced was a breach of professional conduct, which the Board had authority to issue discipline.

Greenen v Washington State Board of Accountancy, 110 P.3d 224 (Wash. Ct. App. 2005).

In this case, a radiologist challenged the Kentucky Board of Medical Licensure's decision to discipline her license based, in part, upon a finding that she had forged letters of recommendation for herself. The radiologist argued on appeal that the Board did not have authority to discipline her for this act of misconduct, and, thus, its decision was beyond the scope of the medical practice act. The court, however, pointed to the statutory language permitting revocation if a licensee knowingly makes a false statement in any document executed in connection with the practice of the profession. Thus, the court found the Board had not exceeded its statutory authority.

Parrish v. Kentucky Board of Medical Licensure, June 18, 2004 (Ky. Ct. App. 2005).

A disciplined dentist appealed the order of the Board of Dentistry that revoked his license to practice, claiming that the Board could not revoke his license, when the Administrative Hearing Officer recommended a lesser penalty, a suspension. The court found, however, that the Board

had discretion to revoke his license, even if the AHO recommended only a suspension. Phillips v. Board of Dentistry, Department of Health, No. 4D01-4581, April 14, 2004 (Fla. Ct. App. 4<sup>th</sup> Dist. 2004).

## **INITIAL LICENSURE**

This is an appeal from the Psychology Board's decision denying an applicant provincial registration as a psychologist in the Province of Newfoundland. The applicant claims the Board was unreasonable in deciding that her Master's Degree in Marital and Family Therapy from Loma Linda University in Alberta (a satellite campus of the California University) did not meet the requirements of the Psychologists Act and Regulations. She also argues the Board was unreasonable in refusing to recognize that the standards of registration in Alberta, where she holds provisional registration, are equivalent to the standards under this Province's Act and Regulations. The court remanded the case finding that from the brief statement of the Board that her degree was not equivalent to a Master's Degree in Psychology, the court was unable to conclude that the Board has acted reasonably and that the Board had an obligation to provide adequate reasons for arriving at its conclusion. The court examined similar cases and found that those authorities also stressed the need for adequate reasons where, as here, the consequences of the decision will significantly affect the applicant's livelihood and career.

The court held that the Board's decision must be set aside and the matter remitted back to the Board for further consideration and decision with tenable reasons. At a minimum, the Board must explain how the emphasis upon substantive matters of content and training in its governing legislation authorizes it to utilize guidelines requiring labeling of courses as "psychology" or having courses taught by "Licenced Psychologists", which appear to put form before substance or titles before content. Also, the court provided the Board should explain where the applicant's courses were deficient with respect to the core program required by the Board. Ultimately, the court found that the Board had not provided adequate explanation to show it acted reasonably in concluding the applicant's Master's Degree in Marital and Family Therapy was not equivalent to a Master's Degree in Psychology and also that the Board had not provided adequate explanation to show it acted reasonably in concluding that the standards of the College of Alberta Psychologists are not equivalent to the standards required by this Province's Psychologists Act and Regulations. Burge v Newfoundland Board of Examiners in Psychology, 2005 NLTD115, July 5, 2005.

## **EXAMINATIONS**

This is an appeal of the Vermont Board of Bar Examiners' decision that an applicant does not qualify for admission to practice law in Vermont without the required examination. The principal question on appeal was whether, at the time of application, the applicant was actively engaged in the practice of law for five of the preceding ten years in one or more jurisdictions as is required for admission without examination. The court found that the facts from the record support the Bar's decision that the applicant did not meet the five year requirement. Additionally, the court added that the focus on the ten year period, immediately preceding an application, serves the important public interest of ensuring that applicants remain currently competent and in good standing, not only through active practice, but also through compliance with any continuing legal education requirements and disciplinary rules of the other jurisdictions.

Parks v. Board of Bar Examiners, 2005 VT 66, June 22, 2005 (Vt. 2005).

After concluding that the entire podiatry examination in New York had been compromised, the scores of all New York College of Podiatric Medicine's students were invalidated. The students appealed and the court found that the actions of the testing agency were in line with that of other agencies who had evidence that exams had been compromised. The agency had received an anonymous mailing that contained printouts of five emails students had sent during the exam, transmitting test content they recalled to an email listserv that included the entire NYCMP class. Although the agency did not know which students were guilty or innocent, it concluded from its hearing that the entire class devised a scheme or at least participated in misconduct relating to the exam.

Doe et al v. National Board of Podiatric Medical Examiners et al., February 15, 2005 (S.D. N.Y. 2005).

A similar case was decided in July of 2003, in which a U.S. District Court dismissed a case filed by a student of Barry University in Miami, whose scores on the National Board of Podiatric Medical Examiners' test was invalidated. The test scores of several students had been invalidated based upon evidence that significant numbers of students had unauthorized access to test questions before the exam. The court ruled that the Chauncey Group, the testing agency that invalidated the scores, had not breached its contract with the students, and that NBPME had acted in good faith by providing the students an opportunity to retake the examination at no cost. Further, the court found both had acted reasonable in light of the evidence that the security of the examination had been compromised. The court held that standardized tests for licensure hold a special place in the public trust as they are used as the basis for qualifying professionals who are responsible for aspects of public health and public safety.

An applicant appealed the decision by the Arkansas State Board of Acupuncture and Related Techniques that he did not have a valid state license and was not eligible for licensure for failure to take the national examination given by the National Certification Commission for Acupuncture and Oriental Medicine (NCCAOM). The applicant had been issued a provisional license to practice. In order to obtain a license, once the provisional license expired, the applicant was required to sit for the national exam. The applicant failed to take the exam and the Board found his license had expired. The applicant explained to the Board that NCCAOM would not allow him to sit for the exam because he had failed to provide the required number of affidavits and there was an outstanding complaint filed against him. He requested that the Board allow him to sit for a different examination or that the Board issue its own exam to him. The Board refused and the applicant sought appellate review.

On review, the court concluded that under statutory authority, the Board may use a nationally recognized examination if it deems the national exam is sufficient to qualify a practitioner for licensure and, here, the Board had chosen the NCCAOM exam. The court affirmed that the Board was under no duty to issue a different exam to him and, in order for him to be licensed, he would have to comply with the Board's requirements, including the NCCAOM exam.

Otte v. Arkansas State Board Acupuncture/ Related Tech., 04-901 March 31, 2005 (Ark. 2005).

## **RECIPROCITY**

An attorney licensed to practice in Minnesota and Massachusetts applied for admission to

the South Dakota Bar without examination based upon her two state memberships and twenty years of experience. The South Dakota Bar denied her “admission without examination,” stating that the Minnesota and Massachusetts reciprocity provisions did not allow South Dakota attorneys substantially similar admission without examination. As both states required the national professional ethics examination, some South Dakota attorneys, who were admitted to South Dakota without taking the exam or who did not meet those states’ higher passing score, would have to take the ethics exam before being admitted to Minnesota or Massachusetts. The applicant appealed the Bar’s decision.

On appellate review, the court stated that the exclusion of some South Dakota applicants due to the state’s particular history regarding admission without the ethics exam, or an individual’s particular circumstances, did not change the fact that the language of the Massachusetts admission without examination provision was almost identical to South Dakota’s and that the Minnesota provision was identical, besides having a required score of 85, instead of 75, to pass the ethics exam. The court further provided that the South Dakota reciprocal admission provision did not intend to require all South Dakota attorneys to be eligible, but only that the other state have a substantially similar provision. As the term “substantially similar” was not defined in the statutes, the court provided that “substantially” means relating to, and “similar” means alike, though not identical. Thus, the court held that the language of the Minnesota and Massachusetts admission without examination provisions were substantially similar to South Dakota’s within the plain meaning of the words in that they contain the essential particulars of the rule.

In the Matter of Application of Yanni, 2005 SD 59, May 11, 2005 (S.D. 2005).

## **ADMINISTRATIVE HEARINGS**

In this Tennessee case, an administrative complaint was filed against a psychologist, alleging a breach of confidentiality. An administrative hearing was held and the Board ultimately found the psychologist had committed two breaches of confidentiality and placed his license on probation for two years, ordered continuing education and fined him \$1,000. The psychologist appealed the Board’s decision to circuit court, where it was affirmed. The psychologist then appealed to the state’s appellate court. On appellate review, the psychologist argued several points of error, including that the Board acted arbitrary and capricious, that the Board failed to provide an adequate policy justification for its actions, and that he was biased due to an ex parte communication. The court disagreed with the psychologist on all his arguments and affirmed the order.

An interesting point in the case is the psychologist’s argument regarding the ex parte communication. The psychologist claimed that during the break in the Board’s deliberations, the administrative law judge had an ex parte communication with the Board members. He pointed to language in the record that provided that there was a break in the proceedings and then the first testimony begins with “[t]he judge informed us that, in fact, we need to be probation rather than reprimand. Correct me if I’m wrong.” In reviewing the issue of ex parte communications, the court provided that, “the party claiming bias as a result of ex parte communications must prove both the existence and content of the alleged communication, and the record may negate any claim that the communication created undue bias in the decision-maker.” The record included the

discussion before the break, which included the judge explaining what the Board had been saying was “probationary as opposed to a reprimand.” The court found that the record revealed that the Board members merely took up the same topic mentioned by the administrative law judge prior to the break. Wright v. Tennessee Board of Examiners in Psychology, m2003-01654-coa-r3-cv, December 28, 2004 (Tenn. Ct. App. 2004).

This North Dakota case brings forth the issue of denial of an opportunity to orally address the Board. In this case, a doctor, licensed to practice in North Dakota, in addition to private practice, also served as a medical director of NET Doctor International. Net Doctor was a physician-designed web site that collected patient information and medical history relevant to prescribing certain prescription drugs. An undercover agent with the North Dakota Bureau of Criminal Investigation, using a fictitious name, completed a questionnaire for Net Doctor and placed an Internet order for the prescription drug Cipro. The prescription the agent received was filled by a drugstore in Pennsylvania, and was prescribed by the doctor. Thereafter, an administrative complaint was filed against the doctor, alleging that he had repeatedly written prescriptions for patients over the Internet without first examining them or obtaining appropriate information from them and, thus, had engaged in the performance of dishonorable, unethical, or unprofessional conduct likely to deceive, defraud, or harm the public.

A hearing was held, and the doctor failed to attend. The ALJ found that he had violated two ethical statutes and recommended that his license be revoked, and the Board adopted the recommendation. The doctor appealed and requested leave to offer evidence and the matter was remanded to the Board to give him an opportunity to offer evidence. Another hearing was held before the same ALJ. This time, the doctor was present, represented by an attorney and offered evidence. The ALJ again found that the doctor had violated practice rules, but instead recommended he be fined and censured. The board adopted the ALJ's recommended findings of fact and conclusions of law, but rejected the recommended sanction, and revoked his license to practice medicine.

On appeal, the doctor argued that the Board erred in not allowing him to personally appear before the full Board prior to their deliberations. The court found that under the relevant law, the Board "may allow petitions for review of a recommended order and may allow oral argument pending issuance of a final order." The court provided that when the word “may” is used in a statute, it ordinarily creates a directory, non-mandatory duty. Therefore, the court found that the Board was not required by the statute to allow oral argument pending issuance of the final order, and its refusal to allow the doctor to appear personally cannot be considered in violation of any statutory right. The doctor also argued that the Board erred in rejecting the ALJ's proposed sanction and in rendering a discipline contrary to the ALJ's recommendation, without any explanation in its order. On this issue, the court agreed with the doctor and reversed the Board's decision finding that the Board's conclusions of law and order did not sufficiently explain the Board's rationale for adopting a decision contrary to the recommendation the administrative law judge. The court remanded the case to allow the Board to explain its reasons for rejecting the ALJ's recommended sanction.

Jones v. N.D. State Board of Medical Examiners, 691 N.W.2d 251 (N.D. 2005).

## **NOTIFICATION**

Disciplined veterinarians challenged the Veterinary Board's disciplinary actions claiming that the Board violated the state statute that requires the Board to give five days written notice before inspecting a place of business. The appellate court stated that the Board has only those powers explicitly delegated by its enabling statute and upon a review of the statute at issue and the statutes regarding investigations, the Board did not have authority to conduct an inspection without providing five days written notice. The Board argued that it was not required to give notice of an inspection that was related to an investigation, because under the investigation statutes, the Board clearly does not have to give notice of an investigation. The court, however, found that there was no exception to the five day written notice for inspections, regardless if the inspection was related to an investigation.

Shell v. Veterinary Medical Licensing Board, 105 Ohio St.3d 420 (Ohio 2005).

On an appeal from a disciplinary public reprimand by the Missouri Board of Registration for the Healing Arts, a physician claimed that the administrative complaint failed to give adequate notice of all charges against him. He alleged that the complaint failed to state that the Board was seeking to discipline him based upon "any conduct or practice which was or might have been harmful to the patient" and that the complaint did not allege that he had failed to obtain an adequate patient history. Both of which the Board found to be grounds for discipline. Under the law, the Board is required to set forth any conduct that the licensee has committed that is cause for discipline with sufficient specificity to enable the licensee to defend against the charge. The Board did not set out these allegations, however, the court found that the physician had notice of the charges.

The court provided that in his own pleadings, the physician showed that he knew what allegations he was defending against in that he pleaded as an affirmative defense to the complaint and argued at trial that any harm the patient may have suffered was the result of the patient's own conduct for failing to give a full and complete history. The court further stated that from his pleadings and arguments at trial, it was evident that he was fully aware of the link between the failure to obtain an adequate medical history and the possibility of harm to the patient. Moreover, the court found he was aware that he would need to defend against the charge that his failure to properly assess the patient's condition was detrimental to the welfare of the patient.

Moheet v. Board of Regis. For Healing Arts, No. WD 63543, February 1, 2005 (Mo. Ct. App. 2005).

## **INVESTIGATIONS**

In this civil action, the defendant, the College of Dental Surgeons of British Columbia (the "College") sought to have a case dismissed, in which a plaintiff filed a claim alleging that the College was negligent in its investigation of one of its licensees and that the College had made statements that were libelous. The College moved to have the case dismissed, claiming that the plaintiff had no standing to bring the action, as she was not a "person aggrieved" within the meaning of that phrase in the Dentists Act. Moreover, the College argued that the plaintiff's pleadings did not disclose any reasonable cause of action in negligence or libel.

The dispute began with the plaintiff submitting a complaint to the College regarding alleged misconduct of a licensee. The matter was reviewed and investigated, and based on that investigation, the College determined it would take no further action and informed the plaintiff to

this effect through a letter. In the letter, the College explained that after an investigation, it could not conclude that the treatment provided by the licensee was substandard or inappropriate. Several letters were exchanged between the plaintiff and defendant thereafter.

In reviewing the matter, the court addressed the issue of whether the plaintiff had standing to bring an appeal under the Dentists Act, which depended on a finding that she was a “person aggrieved.” The Act provides that: A person aggrieved by an order, determination, finding, action or decision of the council, the registrar, a committee, a panel or a board of examiners, other than a decision refusing registration as an academic member under section 26(2) or as a limited member under section 26(3), may appeal to the Supreme Court within 45 days from the date of the order, determination, finding, action or decision.

The plaintiff submits that she is a person aggrieved because she initiated a complaint which, in her opinion, was not properly investigated by the College. Counsel for the College submits that individual members of the public, even those who initiate complaints, do not have a legally recognized interest in the investigation and discipline process of the governing bodies of self-governing professions. The court provided that the Act makes it clear that the disciplinary process is a matter between the Association and the individual member whose conduct has been questioned.

Additionally, the court noted that there was nothing in the Act to suggest that a member of the public who brings a complaint to the College thereby becomes a party to any investigation or proceedings which the College subsequently undertakes. Thus, the court found the plaintiff did not have standing to bring the appeal. As to the plaintiff’s claims, the court further noted that the plaintiff had not alleged any actual loss or damage as a result of any alleged negligent act or omission by the College in its investigation of her complaint and that her alleged claim of libel did not disclose any cause of action.

Allen v. College of Dental Surgeons of British Columbia, 2005 BCSC 842, June 9, 2005 (CanLII).

The physician in this case sought a judicial order to prevent the College of Physicians and Surgeons of Ontario from continuing with an investigation of his practice. On review, the lower court found that there was no serious issue to be tried and that nothing had happened other than an order to investigate and, thus, no decision has been made that would support a request for judicial review. The court continued that no irreparable harm could be caused by the investigation and that the doctor would not lose his livelihood as a result of an investigation. On appeal, the court found that the lower court was correct to refuse the relief sought.

Bhardwaj v. College of Physicians and Surgeons of Ontario, 2005 CanLII 16615, May 2, 2005 (ON S.C.D.C.).

In this British Columbia case, the applicant requested copies of a letter sent to a psychologist by the Inquiry Committee of the College of Psychologists of B.C. and the psychologist’s reply to that letter. The letter was sent and the reply made pursuant to an investigation following a complaint to the College regarding the psychologist’s conduct. Although the records contain some personal information about the applicant, the court found, this to be incidental to what was in substance personal information of the psychologist relating to her occupational history. As such, under s. 22(3)(d), there is a presumption that disclosure of the records would constitute an unreasonable invasion of the psychologist’s personal privacy. The

applicant provided no evidence to rebut this presumption. Therefore, the court found the College was required to withhold the records.

College of Psychologists of British Columbia, Re, 2005 CanLII 24734, June 29, 2005 (BC I.P.C.)

## **DISCIPLINARY ACTIONS**

### **Sexual Misconduct**

The Massachusetts Board of Registration in Medicine revoked a physician's license, finding he had engaged in a sexual relationship with a patient. On appeal, the physician made several arguments. First, he argued that his right to due process had been violated because Massachusetts law did not explicitly state that engaging in sexual relations with a current patient was prohibited, and, thus, he lacked fair warning that his conduct was grounds for discipline. The court, however, provided that disciplinary proceedings are not criminal in nature and the statutes and regulations guiding them need not be drawn as precisely as statutes that touch upon criminal acts. Additionally, the court stated that the Board was empowered to investigate any complaint that a physician was practicing in violation of good and accepted medical practice and, the court stated, there was no doubt that sexual relations with a current patient was forbidden by professional ethics. The physician also argued that the disciplinary action infringed upon his constitutional right to privacy. As to this argument, the court noted that the physician was not before the court as a citizen entitled to the full range of individual rights available to all citizens, but rather, he was before the court as a licensed physician whose professional conduct was subject to state regulation.

Weinberg v. Board of Registration in Medicine, 443 Mass. 679 (Mass. 2005).

### **Unlawful Practice**

The Supreme Court of Arkansas affirmed the Arkansas State Board of Chiropractic Examiners' finding that a physical therapist performed treatment on two patients that could only be performed by a licensed chiropractor, thus, a violation of the statute prohibiting practicing chiropractic without a license. The Board rendered a civil penalty against the physical therapist in the amount of \$10,000. Although the Physical Therapy Board investigated the matter and determined that his actions were within the scope of practice of a physical therapist, the Chiropractic Board found, and the court affirmed, that there was substantial evidence that he had performed maneuvers on a patient that resulted the moving of joints beyond their normal range of motion, a maneuver that falls within the scope of chiropractics.

The physical therapist claimed that he fell under the physical therapist exemption to the unlicensed practice statute. However, the court held that there was substantial evidence to support the Board's conclusion that he was practicing chiropractics, and thus, it necessarily followed that he was not practicing physical therapy. The physical therapist also argued that there was not substantial evidence to support the Board's finding, because, he argued, he presented testimony of several physical therapists who testified that his actions were within their line and scope of practice and was not chiropractics. However, there was contrary testimony by chiropractors that testified that his actions were chiropractics. The court noted that the question was not whether the testimony would have supported a contrary finding, but whether it supported

the finding that was made.

Teston v. Arkansas State Board of Chiropractic Examiners, No. 04-420, April 7, 2005 (Ark. 2005).

### Moral Turpitude

A physician assistant plead guilty in federal court to forging or altering a prescription. Thereafter, based upon the federal criminal case, the Maryland Board of Physicians, which granted the physician assistant's license, filed an administrative complaint seeking to revoke his license. After a hearing, the Board revoked his license and he, thereafter, appealed. The appeals court affirmed the Board's revocation.

The facts establish that the physician assistant was a Navy retiree, and as such, he and his family received free medical care and prescriptions. His children were covered under the medical care policy until they were reached twenty-one years of age. After his son turned twenty-one, the physician assistant continued to obtain Ritalin for him through the Navy and even altered prescriptions by changing the name on the prescriptions from his son's name to his name, which allowed his coverage to cover the costs of the medication. The physician assistant was charged with a misdemeanor in federal court for forging or altering a prescription or written order, by fraud, deceit, misrepresentation and subterfuge, and concealing material facts in order to obtain and attempt to obtain prescription drugs. The physician assistant plead guilty.

The Board's revocation was based upon the physician assistant's commission of a crime that constituted a crime of moral turpitude. On appeal, the physician assistant argued that the Board erred in finding his crime was a crime of "moral turpitude." In reviewing the case, the court first noted that the term "moral turpitude" in the context of a licensing board's review of the conduct of its licensees, is rather broad, and, the court concluded, that even if the conduct at hand was not subject to a broad definition, it was nonetheless a crime of moral turpitude. The court explained that the physician assistant's plea to a misdemeanor, instead of a felony, did not mean the offense was not one of moral turpitude. The court noted that the physician assistant had explicitly acknowledged that he obtained prescriptions by fraud and that he had done so over a period of three years deliberately and had intentionally engaged in dishonest conduct for personal gain.

Oltman v. Maryland State Board of Physicians, No. 97, June 2, 2005 (Maryland Ct. App. 2005).

### **EVIDENTIARY MATTERS**

The issue presented in this appeal was whether the circuit court erred in affirming the decision of the Maryland State Board of Dental Examiners. The Board had entered an order finding a dentist's misconduct violated the state Dentistry Act. On appeal, the dentist argued that the finding was without substantial evidence and that the Board's decision was based upon the Administrative Law Judge's proposed decision that included errors of law. The appellate court found that the ALJ, in fact, had not committed any errors of law and that sufficient evidence was presented to support the Board's decision.

The misconduct in the case involved violations of the Center for Disease Control Guidelines. At the hearing, evidence was presented that the dentist had accidently stuck his assistant with a needle and then proceeded to use the same needle to inject his patient.

Approximately twenty other CDC violations were found. On appeal, the dentist argued that the ALJ erred in admitting the Board's investigator's report which contained interviews from several witnesses and documents related to the needle stick incident. The dentist argued that it was error to rely on these statements, because his attorney was not present during the interview and did not have an opportunity to cross examine. The court, however, found that there was no requirement that compelled the Board or any administrative agency to include a person under investigation or his or her attorney in its interview process. The court also noted that there were safeguards in place to protect the dentist, such as, each witness was under oath and that the dentist had the right to cross-examine at the hearing.

The dentist also argued that the report should not have been admitted because the investigator was not present at the hearing and concludes that the entire case was presented by a "phantom." The court dismissed the argument, finding that the dentist was not deprived of the opportunity to cross-examine the investigator by the Board or the ALJ, but by his own failure to subpoena the investigator and compel her attendance at the hearing. Finding that the Board's decision was supported by the evidence, the court affirmed.

Rosov v. Maryland State Board of Dental Examiners, No. 540, July 6, 2005 (Md. App. 2005).

After a psychologist's license to practice was revoke by the Board, the psychologist appealed to a trial court and then to the state court of appeals. On appeal, the psychologist claimed that she had been denied an opportunity to participate in her hearing. The record reveals that she requested a hearing and subsequently rescinded her request. The Board notified the psychologist of the hearing date and a hearing was held. However, the psychologist failed to attend. The appellate court noted that, under the rules, a licensee must file a written request for a hearing in order to participate in the hearing and that the psychologist's subsequent rescission of her request for a hearing waived her right to a hearing and the opportunity to participate in the hearing, just as if she had not requested a hearing. Additionally, the psychologist argued that the Board erred in relying on hearsay evidence. The appellate court dismissed this claim by stating that administrative agencies are not bound by the rules of evidence. Thus, the court concluded, that hearsay evidence is not precluded in administrative hearings and the Board did not err in its consideration of evidence that was in essence hearsay.

Black v. State Board of Psychology, 160 Ohio App. 3d 91, March 29, 2005 (Ohio 2005).

Following the Ohio Veterinary Medical Licensing Board's decision to discipline a veterinarian's license, the veterinarian appealed claiming that the Board's order should be reversed because there was no expert testimony at the Board hearing. The hearing revolved around an incident at the veterinarian's office in which the veterinarian sedated a cat, began a procedure and left the office to obtain a needed item to conclude the procedure. The veterinarian left the cat in the care of an office assistant. While he was out of the office, the cat died.

On appellate review, the court provided that the testimony of an expert at administrative hearings is unnecessary, as administrative agencies are not bound by the rules of evidence. Moreover, the court provided that the veterinarian testified at the hearing and he himself stated that trained veterinary technicians are not even qualified to handle all emergencies. The court concluded, from his own testimony, that obviously an office aide would not be qualified. The court stated, that from his own admission, the Board could conclude that his decision to absent himself from the premises, leaving an anesthetized cat in the care of an office aide for over fifteen

minutes was gross negligence.

Coy v. Ohio Veterinary Medical Licensing Board, 2005-Ohio-773, February 24, 2005 (Ohio Ct. App. 2005).

After the Oregon Board of Nursing suspended a licensee's nursing license for two years, the nurse appealed, alleging the Board erred in modifying certain findings made by the Administrative Law Judge. The appellate court affirmed some of the Board's modifications, however, as to the Board's finding regarding sexual misconduct, the court reversed holding there was not a preponderance of the evidence to support the Board's finding.

As to the allegation of sexual misconduct, the court provided that the case was basically a swearing match, in which there was no reliable evidence on either side. The court stated that because there was no reliable evidence on either side, it could not find by a preponderance of the evidence that the alleged misconduct occurred. The court reached the same determination as to the allegation of financial misconduct. The court provided that the Board's modification of the ALJ's order, in which the Board found the nurse had asked a patient for funds to help pay for equipment and rent, was not supported by the evidence. The court held that as there was no reliable evidence to support the Board's modification, the Board's modified finding of financial misconduct should be reversed.

Corcoran v. Oregon Board of Nursing, 107 P.3d 627 (Oregon Ct. App. 2005).

In this case, the Board of Physical Therapy found a physical therapist guilty of unprofessional conduct, and issued a reprimand against his license. The physical therapist appealed, claiming the Hearing Officer overlooked material evidence and misconstrued the testimony before her. In reviewing the proceedings, the court stated that it was clear that the hearing officer was presented with testimony from adverse witnesses who offered conflicting testimony regarding all of the physical therapist's arguments, and specifically conflicting expert testimony about whether notes taken at each office visit constituted a proper re-evaluation. The court further stated that when a hearing officer is presented with adverse witnesses offering conflicting testimony, the hearing officer must sift through the testimonial evidence and select which facts carry the greatest weight. Moreover, the court provided that credibility determinations are necessarily implicated in the hearing officer's decision. In this case, the court found that the hearing officer was faced, in essence, with a battle of experts, and after she heard the conflicting testimony, she made a credibility-based determination in reaching her final conclusion. Thus, the court ultimately found the physical therapist's arguments to be without merit.

Charlwood v. Department of Health, Health Services Regulation Board of Physical Therapy, No. 03-4766, June 13, 2005 (R.I. Super. 2005).

A licensed accountant challenged the state Accountancy Board's finding that he had engaged in conduct discreditable to the public accounting profession. The Board disciplined his license because it found that one of his employee's (a non-licensed individual) had engaged in misconduct. That employee had been sued individually by a client for negligence and breach of contract. The Board based its decision upon the findings in that civil case. The accountant appealed the Board's decision and the court found in his favor, holding that although there was reliable, probative, and substantial evidence in the record that the employee failed to give proper advice to a client, such negligence, without more, was insufficient to find that the accountant had offended the integrity and dignity of the accounting profession. The Board appealed that decision

and the state appellate court agreed with the lower court and found that there was no evidence that the accountant had committed any violations- personally. The court further provided that there was no evidence that the accountant knew the employee would give faulty advice when he hired him and pointed out that immediately after learning of his actions, he fired him. As there was no evidence that the accountant himself had committed any wrongful acts, there was no evidence to support the Board's decision.

Accountancy Board of Ohio v. Hattenbach, 2005 Ohio 2430, May 19, 2005 (Ohio Ct. App. 2005).

The Montanan Board of Outfitters disciplined the license of an outfitter for hiring an unlicensed outfitter. The employee had submitted his documentation to obtain a license, but had not been licensed by the Board at the time he was employed and began guiding a hunt. The Board placed the outfitter's license on probation for 18 months and fined him \$1,000. The outfitter appealed. On appeal, he argued that the Board's decision should be reversed because he had not been informed, prior to the hearing, that the employee had submitted his application for licensure. The court found that there was no reason why, or logical explanation of how this information would have made a difference in the outcome of the hearing. It was undisputed that the employee was not licensed and that the outfitter had not fulfilled his duty of signing the employee's license upon hiring him. Ultimately, the court found the outfitter had not been denied due process of law by not being informed of this information prior to the hearing.

Crismore v. Montana Board of Outfitters, 2005 MT 109, May 4, 2005 (Mont. 2005).

## **SETTLEMENT AGREEMENTS**

The New York Office of Professional Medical Conduct (OPMC) brought charges against a licensed physician for various disciplinary violations. The physician's attorney negotiated with OPMC's staff attorney to create a consent decree. Both sides agreed to all the terms of the consent decree, however, they disagreed as to whether that decree would be made public. Based upon the disagreement regarding publication, the physician filed a motion seeking a ruling ordering that the decree would not be publicized. OPMC, in turn, withdrew the drafted consent agreement. The physician thereafter brought this action to force OPMC to execute the consent agreement.

On appeal, the physician argues that, although the agreement was not signed, there was a valid agreement between the two sides because all the terms had been agreed to. The court dismissed this claim, finding that the draft actually included language indicating that final signatures from OPMC were necessary for the agreement to be binding. In denying the physician's motion, the court provided that OPMC had no obligation to enter into consent agreements to settle pending charges. The court further stated that the physician lost no substantive rights due to the withdrawal of the offer of settlement. The court continued that the physician still had the right to a hearing and the right to contest publication thereafter. Anonymous v. Commissioner of Health, 25088, March 8, 2005 (N.Y. Sup. Ct. 2005).

The Ohio State Dental Board initiated a disciplinary proceeding against a dentist and ultimately revoked his license. The dentist appealed alleging that he had not received a fair hearing. A new hearing was granted upon appeal and the Board, thereafter, filed an appeal. While the appeal was pending the Board and the dentist entered into a consent agreement which

provided that the Board would dismiss its appeal and the dentist would not seek to have his license reinstated, as he had not held a license for several years. A few years later, the dentist filed a declaratory judgment seeking to have the Board ordered to provide him with a reinstatement application, as the Board had refused to do so.

On appellate review, the court found that the consent agreement was valid and that the dentist had lost his right to have his license reinstated. The court provided that in the consent agreement, the dentist agreed not to apply for reinstatement and agreed that any attempts of reinstatement would be considered null and void. The court stated that consent agreements serve the interests of the public and, additionally pointed out that the dentist was represented by counsel when he entered into the consent agreement. Moreover, the court held that the agreement was supported by consideration by both sides, in that, the Board entered into the agreement to avoid further costs and efforts in attempting to revoke his license and the dentist entered into the agreement to avoid the professional stigma of a revocation. Ultimately, the court held that the agreement was valid and enforceable and, thus, the dentist could not seek a reinstatement.

State Ex Rel. Mathur v. Ohio State Dental Board, 2005-Ohio-1538, March 31, 2005 (Ohio Ct. App. 2005).

## **SANCTIONS**

In this disciplinary case, a lawyer admitted to the alleged violations and stipulated to the Office of Disciplinary Counsel's recommended sanction. However, the Hearing Panel Subcommittee imposed the recommended sanction and additionally permanently barred the lawyer from accepting any medical malpractice cases in the state. The lawyer appealed the decision, but only as to the additional sanction, arguing that the sanction was too harsh, and that a less severe punishment could provide adequate discipline. The appellate court modified the panel's decision to exclude the malpractice bar. In determining what sanctions to impose, the court provided that the court must consider not only what steps would appropriately punish the attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession.

Lawyer Disciplinary Board v. Harbin, No. 31678, June 23, 2005 (W.Va. 2005).

In assessing an appropriate sanction for misconduct, the court, in this case, provided that it should consider mitigating and aggravating factors. The court provided that "Mitigating factors which may be considered in determining the appropriate sanction to be imposed against a lawyer for violating the Rules of Professional Conduct include: (1) absence of a prior disciplinary record; (2) absence of a dishonest or selfish motive; (3) personal or emotional problems; (4) timely good faith effort to make restitution or to rectify consequences of misconduct; (5) full and free disclosure to the disciplinary board or cooperative attitude toward proceedings; (6) inexperience in the practice of law; (7) character or reputation; (8) physical or mental disability or impairment; (9) delay in disciplinary proceedings; (10) interim rehabilitation; (11) imposition of other penalties or sanctions; (12) remorse; and (13) remoteness of prior offenses."

The court found that the attorney, in this case, had practiced law since 1977 and had not received any prior discipline. Additionally, she was suffering from both physical and psychological stress due to certain personal situations, and that this condition was a contributing

cause of her actions. Specifically, she had a series of five surgeries, during a period of years, leaving her with pain and discomfort that created a physical and emotional impact on her ability to practice law. Additionally, it was shown that she had sought treatment from psychologists to enable her to better deal with stress, chronic pain, and other related effects.

In consideration of these factors, the court set aside some of the recommended sanctions. Additionally, the court struck from the recommended sanctions that her willful failure to fully and timely respond to ethics complaints during her two years of supervised practice would result in an immediate ninety-day suspension. The court found that that particular sanction amounted to a prospective sanction and that the attorney, or any attorney for that matter, who fails to respond to an ethics complaint at a future indeterminate date, is well aware of the potential sanctions for such conduct. Thus, the court stated that imposing a sanction on an event which may never occur is completely unnecessary.

Lawyer Disciplinary Board v. Roberts, No. 31511, May 31, 2005 (W.Va. 2005).

In the following case, the court looked at aggravating circumstances. In this attorney disciplinary case, the court found that only one mitigating factor could possibly apply: personal or emotional problems. During his sworn statements, the attorney testified that he was going through a bitter divorce and that he was considering professional help to assist him in recovering from the divorce proceedings. However, the court found he had been presented with ample opportunity to seek professional assistance and failed to do so and that he also failed to take advantage of a support service that he was directed to by the Bar. Moreover, the court found that the timing of the divorce was significant, in that, many instances of misconduct occurred prior to the divorce. The court ultimately found that while a bitter divorce can, in some circumstances, qualify as a mitigating factor in determining appropriate attorney sanctions for misconduct, it did not serve as a mitigating measure in this case. In addition to the lack of mitigating factors, the court found that several aggravating factors existed. The court provided that aggravating factors in a lawyer disciplinary proceeding are any considerations or factors that may justify an increase in the degree of discipline to be imposed. The court provided that the attorney had prior disciplinary proceedings against him, and with this past history with proceedings, he still failed to cooperate with the Bar. Additionally, the court provided that he had failed to respond to written requests for responses, and had appeared for his sworn statements only when subpoenaed by the court. The court further stated that he accepted legal fees for services which he never performed, and that he had exhibited a pattern of failing to communicate with his clients, making material misrepresentations to his clients, and failing to diligently pursue cases on behalf of his clients. The court found that the lack of mitigating factors

and the presence of substantial aggravating factors lead to the conclusion that the recommended sanction of revoking his license was appropriate.

Lawyer Disciplinary Board v. Wade, No. 31613, May 26, 2005 (W.Va. 2005).

The Ohio State Medical Board revoked the license of a pain management specialist for her alleged improper administration of drugs to various patients. Several arguments were raised on appeal, such as, the Board erred in determining that the specialist was not amenable to re-education. The specialist argued that her testimony as to the significant improvements she

made to her practice over the years should have been accepted by the Board as clear evidence showing that she was amenable to re-education. However, the hearing officer found that she had demonstrated a reckless and unjustifiable disregard of her patients' obvious drug seeking behavior. A review of the Board deliberations show that only one Board member thought she could be rehabilitated, whereas, the other members plainly believed her license should be revoked. Further, the members discussed the lack of evidence that she had made changes to her practice and pointed out the fact that she continued to claim that her actions had not deviated from the standards of care. Additionally, the members determined that her violations were so severe that she could not be rehabilitated.

Dahlquist v. Ohio State Medical Board, No. 04AP-811, May 10, 2005 (Ohio App. Ct. 2005).

This is an appeal from an order of the Discipline Committee of the College of Physicians and Surgeons. The physician admitted he had committed professional misconduct because of loans that he had taken from patients, but argued that the penalty ordered by the Committee should be modified. On this appeal, the physician sought an order to set aside the Committee's order in part and to vary the penalty by substituting a one month suspension to begin on a date to be fixed by the Registrar and a second five month suspension, twelve months after his discharge from bankruptcy and permitted by law to make restitution to two of the patients.

In reviewing the penalty, the court provided that the discipline committee of a professional body is charged with a public responsibility to ensure and maintain high standards of professional ethics and practice and that the penalty imposed by it against a member for professional misconduct, is not to be lightly interfered with. Additionally, the court provided that the committee in the proper discharge of its function is best able to assess the gravity of the misconduct and its consequences to the public and the profession.

The physician argued that the Committee failed to consider mitigating factors: the admission of professional misconduct, the fact that most patients were paid back, and the lengthy period of membership in the College without any prior finding of professional misconduct. As well, he argued that the penalty was too harsh in relation to similar cases. The court dismissed his appeal, finding that the Committee found that the appellant abused his position of power with respect to his patients and exploited them to their financial detriment, and that he did so over a period of four years and that the breach of trust was extraordinary, in that he had borrowed money from an elderly couple, one of whom was on disability pension, and the other on a fixed income. Additionally, the court provided that the Committee had found that the physician was not a credible witness, and that he lacked genuine remorse and failed to accept responsibility and that he used large sums of borrowed money to support an extravagant lifestyle. Given these factors, the court found no error in the Committee's penalty.

Singh Dhaliwal v. College of Physicians and Surgeons of Ontario, 2005 CanLII 12850, April 6, 2005 (ON S.C.D.C.)

## **ADMINISTRATIVE FINES**

The Construction Industry Licensing Board of the Florida Department of Business & Professional Regulation initiated an action against a general contractor. Ultimately, the Board adopted the Administrative Hearing Officer's findings and conclusions, including one particular count violation which the Board had previously withdrawn. The Board rejected the AHO's

recommended fine and imposed a substantially higher fine.

On appeal, the appellate court reversed, in part, finding that the Board erred in including a count that had been withdrawn. The court also reversed as to the fine, finding that there was no reasoning as to how the Board arrived at the fine and that it was unable to determine what the fine might have been had the erroneous count not have been included. The court ordered the Board to strike the erroneous count from its order and to reconsider the fine in light of one less count.

Midgett v. Department of Business & Professional Regulation, No. 2D04-1748 (Fla. App. 2 Dist. 2005).

## **ATTORNEY FEES**

After the disciplinary decision by the Texas State Board of Examiners of Psychologists was reversed, the disciplined psychologist brought an action against the Board seeking attorney fees and costs. The psychologist's case was dismissed and the appellate court affirmed the dismissal finding that the psychologist's new case for attorney fees was barred. The court found that the psychologist had filed a motion for attorney fees in the initial disciplinary action and the Board had denied his motion and ultimately, upon remand of the reversal, dismissed the action. The psychologist, however, had failed to appeal the issue of attorney fees. As he had failed to appeal that issue, the court found he was barred from asserting that same claim by bringing a new case.

Wawrykow v. Texas State Board Examiners of Psychologists, No. 03-03-00692-CV, May 5, 2005 (Tex. App. 3<sup>rd</sup> Dist. 2005).

The Ohio State Dental Board filed a disciplinary complaint against a dentist alleging he had obtained money or a thing of value by an intentional misrepresentation or material deception in the course of his practice. The Board found he had committed the alleged violation and disciplined his license. On appeal, the court reversed the Board's order finding there was not substantial evidence to support the Board's decision. The dentist, thereafter, filed a motion seeking attorney fees under a state statute that affords a prevailing party the right to recover attorney fees as a way to protect citizens from unjustified state action and to censure frivolous governmental action. The court granted the motion and the Board appealed to the state appeals court. That court reversed, finding that the lower court erred in reviewing whether the Board had substantial evidence to find the dentist guilty of the charges, instead of reviewing whether the Board had before it probable cause to initiate the charges.

The court held that the test to be employed was whether the Board's action in initiating the matter in controversy was based upon an articulated rationale supported by evidence from which a reasonable person could find that the Board was substantially justified. The court held that the lower court erred in not allowing the Board to introduce evidence related to the information it had before it initiated the charges. The lower court had held that only evidence introduced at the administrative hearing was relevant at the hearing on attorney fees. However, the appeals court found that that evidence was not relevant, but only the information the Board held before it initiated charges, such as the investigator's report.

Gilmore v. Ohio State Dental Board, 2005 Ohio 2856, June 10, 2005 (Ohio Ct. App. 2005).

## **PUBLIC NOTIFICATION OF DISCIPLINE**

A California physician filed a petition for a writ of mandamus asking the court to order the California Medical Board to remove from its website the notification that the physician had completed his probation. The physician had been accused of several acts of misconduct. A stipulated settlement was reached and the physician received three years of probation. Upon the complete of his probationary period, “probation completed” was placed under his listing on the Board’s website. In denying his mandamus, the court found that the Board was ordered by statute to provide the public with information regarding its licensees, including disciplinary actions. The court found that stating that a physician had completed probation was within the requirements of the statute. Also, the court rejected the physician’s argument that the listing on the website was a breach of the Board’s promise to fully restore a licensee’s license upon complete of probation, finding that the listing did not affect the licensee’s license to practice. Additionally, the court rejected the argument that the Board’s reference that he had completed probation, without a further explanation, was vague and misleading.

Szold v. Medical Board of California, 127 Cal. App. 4<sup>th</sup> (Cal. App. 2005).

## **EXPUNGMENTS**

The Ohio State Medical Board suspended a licensee’s license for thirty days due to her failure to report a complaint against her by another state licensing board. The licensee appealed the decision claiming that she did not have to report the complaint because the matter had been expunged from the National Practitioner Data Bank. The court found that whether or not the case was expunged was not the material issue in the disciplinary case at bar, but the material issue was whether she had failed to disclose the existence of the complaint to the Board as required on the Board’s renewal application. The court ultimately upheld the Board’s decision to suspend her license for thirty days.

Instanbooly v. Ohio State Medical Board, 2004-Ohio-3696 (Ohio Ct. App. 10<sup>th</sup> Dist. 2004).

## **REINSTATEMENT**

A year after the Ohio Medical Board revoked a medical doctor’s license, the doctor wrote the Board a letter asking it to reconsider the permanent revocation of his license. The Board responded that its time to reconsider the revocation had expired. Thereafter, the doctor sought an application for a new license, however, the Board refused to send him the forms. The doctor then filed a complaint for a declaratory judgment seeking a declaration that the Board should send and consider his application for a new license.

On appeal, the Board argued that the doctor had no right to a licensure application because his license to practice had been permanently revoked. The issue before the appellate court was whether the Board had the authority to permanently revoke the doctor’s license and impose a lifetime ban from medicine. The court found that the Board did have authority to permanently revoke a license. However, reviewing past caselaw, the court noted that some revocations are subject to reinstatement and under some circumstances, a new license may be obtained following revocation. The court ultimately held that the doctor was entitled to apply for a new license and

the Board was obligated to provide him the forms and process his licensure application. Richter v. State Medical Board of Ohio, 2005 Ohio 2995, June 16, 2005 (Ohio Ct. App. 2005).

In this appeal of a denial of an application for reinstatement of a CPA certificate, the applicant argued, among other claims, that he was a victim of selective prosecution. He claimed that other public accounting firms had committed dishonest and disreputable acts within the state, yet their bad acts had gone unpunished. In dismissing this claim, the court noted that the applicant had failed to show any similarly situated CPA's who had been treated disparately by the agency. In affirming the agency's denial of his application for reinstatement, the court noted that there was sufficient evidence that he had not complied with the requirements for reinstatement. The court provided that his failure to comply coupled with his failure to present any real proof of disparate treatment by the agency, forced the conclusion that his claim of selective prosecution was without merit.

Henss v. Iowa Accountancy Examining Board, No. 5-333/04-1551, June 29, 2005 (Iowa App. 2005).

In this 2005 reinstatement case, a lawyer sought to have his license to practice law reinstated. His license was revoked upon a finding of eight counts of professional misconduct associated with his attorney trust account. At the reinstatement hearing, the attorney presented seven witnesses who attested to his honesty and trustworthiness. In his order recommending reinstatement, the hearing referee noted that in order to have a license reinstated, the petitioner must show by clear, satisfactory and convincing evidence that he or she has the moral character to practice law, that his or her resumption of the practice of law will not be detrimental to the administration of justice or subversion of the public interest, and that he or she has complied with the terms of the suspension. The referee found that the petitioner had met the requirements for reinstatement in that he had complied with his suspension and had not practiced during that time and that he had presented sufficient evidence through character witnesses. The Wisconsin Supreme Court agreed and granted the reinstatement.

In the Matter of Carroll, No. 200AP1426-D, 2005 WI 101 (Wis. July 6, 2005). See also In the Matter of Disciplinary Proceedings Against Selmer, No. 1998AP886-D, 2005 WI 91 (Wis. June 24, 2005).

In this case the court found that the state Pharmacy Board was not required to grant a hearing to a pharmacist whose license had been permanently revoked upon his application for licensure. In its opinion, the court set out that the term revocation was defined as permanent against the license and the licensee.

Poignon v. The Ohio Board of Pharmacy, No. 2004-Ohio-2709, May 27, 2004 (Ohio Ct. App. 10<sup>th</sup> Dist. 2004).

## **APPELLATE REVIEW**

In appeals from an administrative ruling, or any other case for that matter, the appellate court first determines if it has jurisdiction and authority to review the case. As appellate courts

are not courts of original jurisdiction, they can only hear matters that have been brought before the lower court, thus, issues that are preserved for appeal. An example to look at is an Oregon Court of Appeals case, in which the Board of Examiners for Engineers found that an individual had engaged in the unauthorized practice of engineering and assessed a civil penalty of \$1,000.

The Administrative Law Judge issued a proposed order and the Board amended that proposed order and notified the individual of his opportunity to file exceptions and present arguments to the amended proposed order. The individual in this case, did not file any exceptions and never argued that the Board lacked authority to make additional findings in the amended order. In fact, he never raised that issue until the first time on appeal. The court found that even assuming for the sake of argument that the Board erred in making additional findings, the individual never gave the Board the opportunity to avoid that error before it adopted the final order. As the issue was never advanced until on appeal, the court found it was not preserved and, thus, the court refused to address it. The court did review whether there was evidence to support the Board's amendment, and found substantial evidence supported the Board's action. Becklin v. Board of Examiners for Engineering, 97 P.3d 1216 (Or. App. 2005).

An ophthalmologist appealed an order of the Texas State Board of Medical Examiners, finding he had breached his duties by abandonment. On appeal, he claimed that the Board violated due process in prosecuting the disciplinary complaint against him when some of the allegations were more than a decade old and that the Board erred by including certain commentary in its order. The ophthalmologist claimed that in prosecuting the old claims, he was prejudiced because some of the witnesses had problems remembering the events at issue. The court found that he failed to show actual prejudice and that the Administrative Law Judge was in the position to hear the witnesses' testimony and assess memory and other factors bearing on credibility and that the ALJ did not appear to regard the delay as creating a staleness problem.

As to the Board's commentary in the final order, the court reversed. The Board had modified the ALJ's order to include that the ophthalmologist had engaged in conduct of fondling and molesting patients while performing exams and that he had engaged in this behavior for many years. The court found that these representations were not supported by the Board's findings and were flatly contradictory. The facts showed that he intentionally touched only one patient and there was no evidence he had engaged in this conduct over a period of years. The Board's order also required him to provide a copy of the order to all health care facilities where he had or sought privileges. The court found that by including these unfounded assertions in the final order, the Board acted arbitrary and capricious and reversed and remanded the case. Granek v. Texas State Board Medical Examiners, No. 03-03-00698, May 5, 2005 (Tex. App. 2005).

In an appeal to the Alabama Court of Civil Appeals, the Alabama Medical Licensure Commission asked the appellate court to review the lower trial court's reversal of the Commission's revocation of a physician's license. The Commission argued that the lower court erred in finding the evidence did not support the Commission's decision. The appellate court reversed the trial court's reversal of the Commission's order.

This case shows the deference appellate court's give to decisions by lower tribunals when the lower proceedings involve live testimony. In reviewing the trial court's judgment, the court noted that the Commission had made several factual findings, and the trial court had disagreed with each of those findings of fact. The record established that every allegation and charge at

issue in the case was disputed by evidence. In fact, the Commission heard three days of testimony in the case. Finding the trial court erred, the appeals court stated that, it, like the trial court, reviewed only the cold record of the proceedings conducted before the Commission. Thus, the court noted, it was in no better position, as was the trial court, in determining credibility of the witnesses and assigning weight to testimony.

Medical Licensure Commission of Alabama v. Herrera, No. 2030977, May 6, 2005 (Ala. Civ. App. 2005).

After the Virginia Board of Medicine informed a licensee by letter that the Department of Health Professions was obligated by federal law to report her prior administrative adjudication to the Healthcare Integrity and Protection Data Bank, the licensee filed an action in state circuit court seeking an appellate review under the Virginia Administrative Process Act. The circuit court dismissed the appeal, holding the VAPA did not apply because the board's letter regarding its own reporting obligations under federal law did not constitute a "case decision" concerning the licensee. The court explained that the letter only advised that the board had a reporting duty under federal law, and did not include any decision that she had violated any law. The appellate court agreed that the letter was not a decision by the board that would afford an appellate review. Giannoukos v. Virginia Board of Medicine, No. 0457-04-2, January 11, 2005 (Va. App. Ct. 2005).

## **COLLATERAL ATTACKS**

The U.S. Court of Appeals held that a psychologist does not have the right to appeal to the federal court a disciplinary action after the state court has dismissed the appeal of the case. After the Board entered an order against the psychologist, he appealed to the state appellate court claiming the Board had violated an ex-post facto clause and failed to properly carry out certain disciplinary procedures. Thereafter, the psychologist and the Board entered into an agreement reinstating his license on the condition that he refrain from using non-credentialed personnel to conduct psychological tests. The psychologist then brought an action in federal court alleging that the regulation regarding non-credentialed personnel was unconstitutional and requested that the Board decision be expunged. The psychologist further sought an award of monetary damages. The federal court provided that litigants can choose whether to pursue their challenges of the constitutionality of a state agency determination in state or federal court, however, once a party has litigated the issue in a state court, he must follow the appellate procedure therein, as seeking a review before the state appellate court and supreme court. Prince v. Arkansas Board of Examiners in Psychology, No. 03-3524 (8<sup>th</sup> Cir. 2004).

An engineer's federal case against the Missouri Board for Professional Engineers, which alleged that the Board was arbitrary and irrationally enforcing the licensure requirements, was dismissed by the U.S. Court of Appeals for the Eighth Circuit. The appellate court found that the engineer had erroneously failed to name the Board members as parties to the case. Thus, the court remanded the case giving the engineer the opportunity to amend his complaint to add the board members as parties.

Rucci v. Missouri Board for Architects, Professional Engineers, Professional Land Surveyors and Landscape Architects, No. 04-2342, February 5, 2005 (8<sup>th</sup> Cir. 2005).

## **Americans with Disabilities Act**

After a doctor's license was revoked by the New Mexico Board of Medicine, he sought review through the state courts and then sought relief in federal court, alleging violations of Title II

of the Americans with Disabilities Act. The facts establish that in 1993 his medical license was given with restrictions due to his history of depression and post-traumatic stress disorder. In 1995, the restrictions were lifted by the Board. However, in 1999, the Board suspended his license, after receiving numerous complaints regarding his abusive and disruptive behavior toward patients and medical staff. In 2001, the Board revoked his license, finding he could not be effectively monitored and would be unable to practice safely. The doctor appealed the revocation claiming it violated the ADA. He was unsuccessful in his state court appeals. Thereafter, he filed a claim in federal court.

The federal court dismissed the case finding his case was barred by what is called the Rooker-Feldman doctrine, which bars any suit that seeks to disrupt or undo a prior state-court judgment. It does not bar a federal suit where a state court did not address and decide a federal claim on the merits, but to the extent that a claim, such as an ADA claim, is raised in state court and is inextricably intertwined with the state court's judgment, the case is barred. The court noted that even if the Rooker-Feldman doctrine did not bar the action, the issue would then be whether the immunity under the Eleventh Amendment was applicable. Guttman v. Khalsa, No. 03-2244, March 17, 2005 (10<sup>th</sup> Cir. 2005).

## **CRIMINAL LIABILITY**

In March, 2005, a Florida psychologist pleaded no contest to charges of perjury for making false statements against her neighbor to have him involuntarily committed to a mental health facility. The psychologist was sentenced to 10 weekends in jail and six months probation. It was alleged she and her neighbor were having a feud over streetlights and their pets.

## **CIVIL LIABILITY**

The family of a 36 year old wife and mother who committed suicide sued the deceased's psychiatrist. The psychiatrist moved to have the case dismissed asserting that he was immune from liability under the state's statute that shields mental health professionals from liability for their actions in cases where there is a duty to warn or protect. That statute shields mental health professionals from liability for a patient's violent act against another person or against himself unless the practitioner has incurred a duty to warn or protect the potential victim. Under the statute, a mental health practitioner who incurs a duty to warn or protect can be liable for failing to discharge the duty. The psychiatrist argued and the lower court agreed that the statute shielded mental health professionals from liability for deviations from the standard of care in all instances, except where the patient's suicide is imminent. In cases where the suicide is imminent, the statute sets forth the practitioner's duty of care. The evidence did not establish that her suicide was imminent. Thus, the lower court found the psychiatrist immune from liability. The appellate court disagreed, finding that in drafting the statute, the Legislature had not intended to sweep as broadly as the psychiatrist argues and eliminate all liability for suicide for any reason when the threat of suicide is not imminent. The court found that the duty to warn and protect statute did not bar ordinary malpractice claims.

Marshall v. Klebanov, No. A-2237-03T5, June 22, 2005 (N.J. Super. 2005).

For some recent Tarasoff related cases see: Ewing v. Goldstein, 120 Cal. App. 4<sup>th</sup> 807 (Cal. App. 2004), Ewing v. Northridge Hospital Medical Center, 120 Cal. App. 4<sup>th</sup> 1289 (Cal. App. 2004).

Marks, a patient of Dr. Tenbrunsel, a psychologist, sued him after the Doctor disclosed information Marks told him during a therapeutic session. Before the session began, the doctor informed the patient that all information shared would be confidential and would remain confidential. Thereafter, the patient told the doctor that he had molested two girls. The doctor

consulted with a colleague and, thereafter, filed a report of suspected child abuse with the appropriate county department of human resources. The patient sued the doctor for malpractice, misrepresentation of material facts, fraud and fraudulent deceit, and sought monetary damages. The trial court dismissed the case, finding the doctor was afforded immunity under the child protection statutes that require reporting of child abuse. The appellate court agreed.

On appeal, the court explained that the immunity under the child abuse reporting statute is afforded only to those who make such a report in good faith. The issue then was whether the doctor acted in good faith. The court found that a person who has reasonable cause to suspect that a child is being abused or neglected acts in good faith in making a report. The court found that because the patient admitted to abuse of two children, the doctor had reasonable cause to suspect that children were being abused. The court additionally held that the psychotherapist-patient privilege must yield to child abuse reporting laws. The court also noted that the patient presented interesting policy arguments dealing with the incentive of sex offenders to seek treatment and the importance of protecting confidential communications in general, however, the court stated that these arguments should be directed to the legislature, instead of the court.

Marks v. Tenbrunsel, No. 04-953, April 22, 2005 (Ala. Civ. App. 2005).