

Association of Social Work Boards

*Disaster Preparedness:
Weathering the Disciplinary Storm*

Saturday, May 10, 2014
10:30 am

8:30 am –

Facilitators

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Disaster Preparedness: Weathering the Disciplinary Storm

- Objectives:
 - This session will use scenarios and case examples to provide attendees with examples of "The Good, The Bad, and The Ugly" of legal and practical issues facing regulators in the complaints and disciplinary context. The presenters will use a North American perspective and encourage attendee participation as the disciplinary process is analyzed, from complaints through disposition.
 1. Assess the complaint process and various approaches to investigating and prosecuting administrative matters; and
 2. Understand the various approaches to administrative / disciplinary prosecutions and dispositions of complaints.

Agenda

- Terminology
- Complaints
- Probable cause
- Investigations
- Formal charge
- Hearings
- Final orders
- Appeals

Format

- Use agenda to set stage for topic
- Use scenario to provide a basis for legal and practical issue recognition
 - Identify issues
 - Discuss legal analysis
 - Tie a few cases to issues and answers
- All with active attendee participation
- Please ask questions and participate as we go...

Terminology

- Regulator

Preponderance
Balance of probabilities

- Board

Due process
Natural justice/procedural
fairness

- Department

- Agency

- College

Probable cause committee
Complaints committee
Screening committee

- Association

- Ordre

Discipline committee

- License/licensee

- Registration/registrant

- Certificate/certificate
holder

- Administrative law judge

- Hearing officer

- State

- Commonwealth

- Province

- District

- Territory

- Statutes

- Rules

- Regulations

- Bylaws.....

Complaints

- The Board/College receives via email an anonymous complaint alleging a government social service agency is hiring and allowing unlicensed persons to undertake social work services and calling the employees “social work assistants”. The complaint also states that a licensed clinical social worker (referenced by name) is supervising these assistants and aiding and abetting the unlicensed practice of social work. In addition, the complaint states that the licensed clinical social worker is always late for work, has been absent for inordinate amount of work time, is extremely rude to most clients and employees, and has been seen drunk and socializing with agency staff and clients in a local tavern.

Complaints

- The Board receives **via email** an **anonymous complaint** alleging a **governmental social service agency** is hiring and allowing **unlicensed persons** to undertake **social work services** and calling the employees “**social work assistants**”. The complaint also states that a **licensed clinical social worker** (referenced by name) is supervising these assistants and **aiding and abetting the unlicensed practice of social work**. In addition, the complaint states that the licensed clinical social worker is always **late for work**, has been **absent for inordinate amount of work time**, is **extremely rude to most clients and employees**, and has been seen **drunk** and **socializing with agency staff and clients** in a local tavern.

Complaints

- What are the issues re the complaint?
- What are the next steps?
- Who makes some of these initial decisions? Do you have a screening committee?
- Can staff dismiss the complaint?
- Does the agency receive notice of this complaint?
- Does the licensed clinical social worker receive notice of this complaint?

Tran v. Board of Chiropractic Examiners

1-2013

- The Court of Appeals of Oregon affirmed the lower court and held that the Board had the authority to discipline the plaintiff and impose a penalty of more than \$200,000 for more than 800 violations of the practice act, mostly related to unlicensed practice.
- The Court interpreted the statute to allow the Board to impose a \$10,000 penalty per violation.

Aylward v. LSNL, 2013 NLCA 68

- Allegedly false statements made to a Judge
 - Caution upheld
- No need to interview parties or hold hearing
- … the objective of a professional discipline process is not the vindication of the complainant's rights, but the regulation of the profession itself and that the decision of the disciplinary body does not affect the right of the complainant to lodge a criminal complaint or pursue civil proceedings.

Moore v. CPSBC, 2013 BCSC 2081

- Prison MD changes pain killer after gov't memo
 - Conflicting version of events
 - Registrar summarily dismissed complaint
- In screening complaint, look to
 - Seriousness of allegations
 - Context of complaint
 - Reasonableness of decision
- Bill 117 – take no action where complaint does not warrant further investigation or it is not in the public interest to investigate the complaint

Probable Cause/Authorizing the Investigation

- Staff determines the complaint to be within the authority of the board and refers it to the complaints subcommittee. The subcommittee is staffed by board personnel and made up of 3 (out of 9) current board members. The subcommittee has access to the board attorney. Staff provides the subcommittee with information that the licensed clinical social worker has been subject to two (2) previous private disciplinary actions/undertakings and cautions related to inadequate supervision of personnel, both while working for a different private employer. Those complaints were resolved with “private orders”/ undertakings and cautions and the subcommittee is not provided with copies of them. Staff refuses to provide additional information regarding the private orders/ undertakings and cautions. Staff also provides the subcommittee with information regarding 3 other complaints from more than 5 years ago that were dismissed as not within the purview of the board.

Probable Cause

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Probable Cause

- Who determines if a complaint meets the criteria for further investigation?
- What type of complaints are not subject to the authority of the board?
- What is the test for referral to administrative action/initiating an investigation?
- What extraneous information is relevant to this probable cause determination?
- What role does staff play in providing information to the subcommittee?
- Is alternative dispute resolution available at this or any other stage?
- At this stage, what information is public?

Investigation

- Based upon a determination of probable cause, the subcommittee instructs the staff to send a letter to both the agency and the licensee providing a summary of the complaint and asking both the agency and the licensee to reply in writing within 30 days. The letter also asks the agency to submit with its response letter a copy of the licensee's personnel file. Both the agency and licensee refuse to cooperate.

Investigation

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Investigation

- Does your board have investigators? Who investigates?
- Are the investigators experienced in social work/mental health practice?
- What evidence can/must be gathered?
- How long ago did the events occur?
- What if new “wrongdoings are discovered?
- How are administrative investigations coordinated with criminal investigations?
- Does the board have subpoena/summonsing power?
- What other investigative techniques might be available?
- What if a licensee refuses to cooperate with an investigation?
- At this stage, what information is public?

INVESTIGATION

Jones v. State of Washington Department of Health

- Washington State Supreme Court reversed the lower court and held that pharmacist whose personal and facility licenses were suspended had a due process right in such licenses not to be revoked due to fabricated emergency which resulted in the summary suspensions without notice or hearing. The Court found that there was a genuine issue of material fact, in that evidence suggested that inspections carried out by the same inspectors at different times were arbitrarily scored in order to create a perceived emergency, thus inducing the Board to summarily suspend the licenses. The pharmacist opted at that time to negotiate a settlement that would prevent permanent revocation and waived his right to a full hearing, but not his right to sue for constitutional violations of due process and monetary damages for various torts. Also, the court found that the inspectors were not entitled to qualified immunity because a reasonable official could determine that they were prohibited from knowingly and arbitrarily changing inspection scores in order to fabricate a sense of emergency.

Formal Charge

- After some preliminary investigation (and an inability to resolve the matter through a consent/settlement order), the subcommittee determines that formal charges/referral to discipline are justified. With the help of the board attorney, the formal charge/allegation is drafted and accuses the licensee of violating the practice act and having engaged in unprofessional conduct. The formal charge/allegation is general and cites only the general practice act, but not any specifics. It is sent to the licensee via regular mail.

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Formal Charge

- When does a complaint ripen into a formal charge/referral to discipline? What is the test?
- Are there alternatives to taking no action and initiating formal charges/referral to discipline?
- How are mental illness/incapacity concerns addressed?
- How are formal charges/allegations phrased/written?
- What constitutes grounds for discipline?
- What type of complaints are not subject to the authority of the board?
- At this stage, what information is public?

5-2013

NOTICE – charges

Richmond v. Ohio Board of Nursing

- The Court of Appeals in Ohio affirmed the Court of Common Pleas and held that the Board could permanently revoke a nurse's license after she violated the terms of a prior consent order with the Board. The consent order mandated that, while the license was indefinitely suspended, she must refrain from alcohol and drug use and that she submit periodic urine samples. She failed to provide urine samples on numerous occasions and tested positive for cocaine. The nurse signed for certified mail delivery of the Board's notice that it intended to revoke her license, but she did not request a hearing on the matter. She did not appear at hearing and the Board revoked the license. On appeal, the nurse claimed that the notice served on her was insufficient in that it incorrectly referred to her license as an "RN" as opposed to an "LPN". The court held that there was no due process violation because the notice was reasonable calculated to apprise the nurse of the board's proposed action, particularly because the prior consent order was attached and references thereto were included in the notice.

29-2013 NOTICE – process

Coleman v. Ohio Board of Nursing

- The Ohio Court of Appeals affirmed the lower court and the board's order suspending a nurse's license after he failed to respond to a notice of disciplinary action. The nurse provided false information in his renewal application when he failed to disclose a no contest plea he entered for a misdemeanor. **The board sent notice by way of certified mail to his last known address and such notice was returned as undeliverable.** The Board subsequently suspended his license for at least one year and, again, the notice of such was returned. Shortly thereafter, the licensee discovered his license was suspended when his employer fired him as a result. **The court upheld the board's decision, finding that the licensee did not receive notice of the disciplinary proceedings because he failed to update his address on file with the board.** Such was the fault only of the licensee, thus the order was affirmed.

6-2013 *NOTICE—Registered mail*

Lundeen v. State Medical Board of Ohio

- The Court of Appeals of Ohio affirmed the judgment of the lower court and found that the Board's use of certified mail to serve notice of charges on a physician, as opposed to registered mail, did not invalidate the subsequent actions it took against the physician's license, including permanent revocation of his license. The Board found that over a 24 year period, the licensee violated the standard of care with respect to 26 patients by the improper treatment and prescribing of controlled substances, among other offenses. **The bottom line was that the term "registered mail" in state law includes certified mail and vice versa,** and the licensee had no other claims it could argue.

125-2013 EXPUNGEMENT, NOTICE

Poskin v. State Board of Nursing of the Commonwealth of Pennsylvania

- The Commonwealth Court of Pennsylvania vacated the order entered by the court of common pleas and ordered that claims brought by a registered nurse against the state Board of Nursing be transferred to it for original jurisdiction. **The nurse failed to renew his license after he did not receive the application because he moved and the Board did not have his current address.** He became aware of the lapsed license when his employer terminated him as a result. The Board issued a citation for unlicensed practice and imposed a \$1,000 fine.

SM v RE, 2013 CanLII 78068 (ON HPARB)

- Counselling for Coptic couple by Coptic physician
- Expert report raises serious concerns about psychiatric diagnoses, pharmacotherapy and polypharmacy, mandatory reporting obligations, and medical record-keeping
- Gender bias issue not “unequivocally found”
- HPARB says a reasonable basis for remedial action to be sensitive to perception of gender bias

Conduct in One's Private Life

- *Rathe v. CPSO*, 2013 ONSC 821
 - Extreme rudeness at school concert & road rage assault
 - Did reflect on suitability to be a member of the profession

- *Fountain v. BCCT*, 2013 BCSC 773
 - Shooting gun in air during dispute with sons
 - DC found this an inappropriate form of conflict resolution
 - Court held no evidence reflected on suitability

Hearings

- After an administrative/discipline hearing before a Hearing Officer/Panel, the board (minus the 3 probable cause subcommittee members) considers the recommendation of the HO to issue a private reprimand to the clinical social worker license. The board agrees with the findings of fact and conclusions of law, but decides to revoke the license.

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Hearings

- Who are the parties to the hearing?
- What kind of process is used to adjudicate a matter not previously settled?
- Who makes the final determinations as to administrative guilt or exoneration?
- What procedural rules apply?
- What rules of evidence apply (including burden of proof)?
- Who presides over a formal hearing?
- What reasons for decision are required?
- Are Boards required to accept the recommendations of a hearing officer?
- Can an appearance of bias arise?
- At this stage, what information is public?

110-2012

BIAS

Haygood v. Louisiana State Board of Dentistry

- The Court of Appeals of Louisiana reversed the trial court and held that the Board's revocation of a dental license was arbitrary and capricious, based upon the dual functions taken on by its general counsel. The Board revoked the license based upon complaints filed by patients related to their treatment plans. The Court found that the Board's independent counsel's sole role during the administrative hearing was to serve as an unbiased hearing officer who would rule on evidentiary matters. Instead, he participated in the hearing in a prosecutorial role, even ruling on his own objection at one point, violating the licensee's due process rights.

Yazdanfar v. CPSO, 2013 ONSC 6420

- Liposuction death of realtor case
- College knew how she practised
- Whether a standard was acceptable
- Compelled PIA statements are admissible
- Can be expert and investigator
- Misleading ad if implies one does a procedure
- Advertising rules comply with *Charter*
- Severe sanction is reasonable in circumstances

4-2013 CONSISTENCY IN SANCTIONS

Iowa Supreme Court Attorney Disciplinary Board v. Henrichsen

- The Iowa Supreme Court suspended an attorney's license for a minimum of three months with reinstatement conditioned on a showing that he has not practiced during that time. The attorney self-reported to the Board that he had failed to deposit client fees into his law firm's general account as was required in his employment. He parted ways with the firm and the two parties had settled this and all other financial issues before he self-reported. The Grievance Committee recommended a public reprimand, but the Court felt that such was too lenient. It looked to how it has sanctioned attorneys in similar situations, considered mitigating circumstances and imposed the suspension.

Final Orders

- The board votes to revoke the clinical social worker license and assess administrative costs and a \$10,000 fine.

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Final Orders

- Who drafts final orders?
- What sanction options are available?
- What are mitigating circumstances?
- What are the elements of a final order/decision and reason?
- At this stage, what information is public? Is there a positive duty to publish decisions or put them on the website? Prohibition?
- Can costs be imposed upon the board/regulator?

25-2013 RECIPROCAL DISCIPLINE
Texas State Board of Pharmacy v. Witcher

- The Texas Court of Appeals affirmed the lower court and upheld a remand to the Texas board to determine the appropriate sanction against a Texas licensed pharmacist whose license in North Carolina was suspended for issues related to alcohol abuse. The Texas board, in keeping with previously articulated policy that a pharmacist with an active suspension in another state cannot practice pharmacy in Texas, determined an indefinite suspension against the Texas license pending the successful completion of rehabilitation program in North Carolina and reinstatement of practice privileges in North Carolina. **The court held that such a policy was actually a rule in that it applied not just to the licensee at issue, but to all pharmacists licensed in more than one state.** The court noted that the licensee was not seeking to evade compliance with the NC imposed sanction, but merely returned to Texas, her home state, upon the death of her husband.

Zakhary v CPSA, 2013 ABCA 336

- Could Registrar publish reprimand?
 - Legislation was ambiguous
- “Besides, a secret “reprimand” is close to an oxymoron. The *Shorter Oxford Dictionary* says “especially one given by a person or body having authority, or by a judge or magistrate to an offender” The connotation is publicity. A rebuke administered secretly is really just advice, and no punishment or penalty at all.”

Appeals

- The licensee appeals the matter to the appropriate court. He argues that the board violated his rights to due process/fundamental fairness. He also argues that the evidence does not support the findings, and that the sanctions are overly harsh and inconsistent with previous board actions. In addition, the licensee files a lawsuit in federal/civil court arguing a violation of his rights and claiming defamation. He seeks an award in the millions.

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Appeals

- What are common themes on appeal?
- Upon what are some of the judicial reversals/remands based?
- Who has the right to appeal?
- What are the possible financial implications to the board?
- At this stage, what information is public?

JC v. Health Professions Review Board, 2014 BCSC 372

- MD wanted pseudonym while challenging complaint
- “In my view, it has not been shown that this petition involves any extraordinarily sensitive personal information or that disclosure would undermine the very purpose of the petition. To be sure, there are potentially embarrassing allegations that have not been confirmed, but that could be said of almost any litigation. Most litigants would probably prefer to remain anonymous, and most litigation involves matters that could cause potential embarrassment, but I am not persuaded that this case involves matters of such sensitivity as to require an exception to the general presumption of openness.”

Hanif v. CVO, 2013 HRTO 1454

- Veterinarian facing discipline
- HRT complaint re: race, colour, ethnicity and creed
- HRT dismissed complaint
 - Discipline Committee enjoyed adjudicative immunity
 - Collateral attack on the disciplinary proceedings
- “the significant line of cases... stand for the proposition that the decisions and actions of adjudicators taken while performing an adjudicative function are beyond the jurisdiction of the Tribunal.”

A Few Final Cases

- *Alsager v. Board of Osteopathic Medicine and Surgery, Washington State Department of Health*, 2013 U.S. Dist. LEXIS 32569 (U.S. Dist. Ct. WA 2013) See also 87-2010
The U.S. District Court for the Western District of Washington dismissed the claims brought against the board, its members, and the state by a physician whose license was under investigation for claims related to inappropriate contact with a patient who he went on to have a personal and sexual relationship with. During the investigation, the licensee filed suit in federal court claiming that certain state laws were unconstitutional under the U.S. Constitution as applied to disciplinary proceedings that are “quasi-criminal actions of state government.” The court dismissed the state and the board as defendants because they are protected by immunity principles. As for the individual board members, the court dismissed the claims against them because the disciplinary proceedings were ongoing, therefore the court will not intervene until such matter is complete and appealable. (physician, inappropriate conduct, sexual relationship with client, abstention, immunity)

- *Dakshinamoorthy v. National Association of Boards of Pharmacy (NABP)*, No. 11-1644, 12a0369n.06; 2012 U.S. App. LEXIS 6987; 2012 FED App. 0369N (6th Cir.) (U.S. App. Ct. 2012) **United States Court of Appeals for the 6th Circuit affirmed summary judgment ruling in favor of exam owner (NABP) and it's Executive Director regarding invalidation of exam score based upon score anomaly and evidence of potential imposter having taken the exam on behalf of now licensed pharmacist in Michigan.** Candidate failed the exam on 2 previous occasions with very low score and subsequently passed the exam with a very high score and was issued a license. Based upon NABP report to Michigan Board of Pharmacy, Board summarily suspended the license and subsequently reinstated it. Licensee sued NABP for defamation, breach of contract and other causes of action. Appellate Court affirmed summary judgment finding **defendants immune as a good faith complainant.** (pharmacists, defamation, 3rd party immunity, exam score anomaly, summary suspension) See also 64-2011 and 9-2010

- *The North Carolina State Board of Dental Examiners v. Federal Trade Commission (FTC)*, 2013 U.S. App. LEXIS 11006 (U.S. App. Ct. 4th Cir. 2013) See also 55-2011, 55A-2011, 55B-2011 **The 4th Circuit Court of Appeals affirmed the FTC administrative ruling against the North Carolina State Board of Dental Examiners and held that Board, as a self-governing agency made up of practitioners elected by the licensees is a “private” entity and was not entitled to antitrust immunity.** The FTC alleged that the position taken by the Board finding that teeth-whitening was within the scope of practice and, thus, limited to licensed dentists was anti-competitive. **The court held that the Board was required to meet both prongs of the test for private actors to enjoy immunity from antitrust liability. The prongs include both a clearly articulated state policy *and* sufficient oversight by the state.** The court noted the oversight by the state was not sufficient to justify immunity from antitrust scrutiny.

- *Edwards v. Gerstein*, 2012 Mo. App. LEXIS 121 (App. Ct. MO) **Missouri Court of Appeals affirmed \$6M jury verdict against Board of Chiropractic Examiners and in favor of licensee who sued board for gross negligence related to administrative prosecution of licensee.** Board filed and pursued complaint against licensee, after withdrawal of patient complaints, against licensee for alleged violation of law related to treatment of HIV patient and family. Lower court rejected Board motion for Judgment Notwithstanding the Verdict. **Court of appeals rejected 6 points argued by board, including lack of duty owed by board to patient, jury instructions, exclusion of board evidence, board member testimony re duty owed, and award of attorney fees to licensee.** (Chiropractic board, gross negligence, immunity, liability of board, investigation) See also 96-2007

Thank You.....