

ASSOCIATION OF SOCIAL WORK BOARDS

Storm Clean Up:
Immediate Solutions and Outcomes

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1:30-3:45pm

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 - MACTE
 - JRCERT
 - FARB
 - NMTCB
 - OTHERS.....

Objectives

- Storm Clean Up: Immediate Solutions and Outcomes
 - Alternatives to the formal disciplinary hearing
 - Steps that lead to a “successful” final order
 - What is a successful order???

Agenda

- Alternatives to a formal/contested hearing
- Who makes the decision?
- Role of Board/Committee/Staff/Attorney
- Consent Orders/Settlement Agreements
- Admissions
- Collateral Consequences/Reciprocal Discipline
- What about licensure renewals?

Alternatives to Formal/Contested Hearing

- Negotiated resolution
 - Consent/Settlement
- No response
 - Respondent fails to reply/attend
 - Default judgment
 - Was there proper notice?
- Contested without hearing
 - Evidence, documentation submitted and considered

Who makes the decision?

- Who decides to resolve a matter short of a hearing?
 - Process
- What are the options?
 - List
- When is such a decision made?
- Why is such a decision made?
- What factors are considered?
 - Resources
 - Severity of allegations
 - Harm
 - History
 - Facts
 - Witnesses

Role of.....

- Role of the various players....
 - Board
 - Subcommittee of board
 - Separate committee
 - Attorney
 - Administrator/Executive Director
 - Board staff
 - Investigators/others from agency

- Role of respondent/licensee
- Role of respondent/licensee's attorney

Consent Orders/Settlement Agreements

- Consent Orders/Settlement Agreements
 - Contractual understanding between the parties
 - Anything goes??..almost...subject to contract laws
 - “Consent”
 - Elements of a contract
 - **Offer**
 - **Acceptance**
 - **Consideration**
 - **Meeting of the minds/Intent**

- Voluntary Surrender of License
(not recommended)
 - Is it a disciplinary action?
 - Final Order

Previous Settlement Agreement 27-2013

- ***Horrigan v. The Department of Financial and Professional Regulation*, 2013 IL App (1st) 121186-U; 2013 Ill. App. Unpub. LEXIS 1008 (App. Ct. IL 2013)** The Appellate Court of Illinois affirmed the circuit court and held that the **statute mandating that a healthcare professional's license automatically be permanently revoked if the professional was ever convicted of certain crimes was constitutional**. The statute applies to crimes that a) require the individual to be registered as a sex offender; b) constitute criminal battery against a patient in the course of treatment; or c) constitute a forcible felony. **A pharmacist filed suit after his license was revoked based upon a 25 year old conviction and after he had entered into a 2008 consent order with the Dept. whereby the Dept. agreed to grant him a license after he met all necessary criteria.** The pharmacist argued that the law is unconstitutional as it is retroactive, ***violated the obligations of the parties' contract***, and is contrary to due process. The court essentially relied on its prior rulings that the act is not retroactive in nature, nor is it punitive, without engaging in extensive analysis. (nurse, prior conviction, permanent revocation, constitutionality)

Second Thoughts

- ***Reddy v. Catone*, 105 A.D.3d 1164; 963 N.Y.S.2d 435; 2013 N.Y. App. Div. LEXIS 2373; 2013 NY Slip Op 2434 (Supreme Ct. NY 2013)** The Supreme Court of New York’s Appellate Division affirmed the decision of the State Education Department Office of Professional Discipline’s Board of Regents (Board) to deny a dentist’s request for reconsideration of a sanction it imposed after charging her with gross incompetence and negligence in her practice. The dentist, represented by legal counsel, entered into a consent order agreeing that she practiced with negligence on more than one occasion and entered into a three year probationary period, \$1,000 fine and partial suspension of her license prohibiting her from practicing endodontics and oral surgery until the completion of relevant coursework. After completing the coursework, paying the fine and serving one year of probation, she applied for reconsideration, requesting that the misconduct charge be removed as well as the penalties. The Board denied her request and she appealed the matter in court. The court sided with the Board, finding that the dentist’s assertions regarding bias and lack of expertise by the doctors who opined as to her conduct go to the adequacy of proof of the charges. Being that she signed the consent order, she waived the right to contest such adequacy. **Furthermore, she was represented by counsel at such time, thus her claims of coercion lacked any supporting evidence. “[n]either her retrospective regret with her own decision to enter into the consent order – thereby waiving the opportunity to defend herself against the charges and challenge the process employed by [the Board] – nor the negative impact of the consent order on her reputation and livelihood, nor her belief that the negotiated penalty was excessive provides a legal basis for reconsideration.”** (dentist, negligence, consent order, fine, partial suspension, denial of reconsideration, waiver)

62-2013 Settlement Negotiations Inadmissible

- ***Demesa v. Adams*, 2013 IL App (1st) 122608; 2013 Ill. App. LEXIS 509 (App. Ct. IL 2013)** The Appellate Court of Illinois reversed the circuit court and held that the circuit court abused its discretion when it remanded to the Department of Financial and Professional Regulation (Department) a matter involving a nurse who was sanctioned by the Department for failing to inform it that she had pled guilty to a felony. The Department filed a complaint against the nurse alleging that she pled guilty to criminal neglect of a person with a disability and did not inform the Department of such pleading. The parties entered into a consent order years earlier whereby the nurse acknowledged the conduct underlying the criminal conviction and pursuant to which she received a reprimand. The nurse claimed that she informed the Department's attorney that a criminal prosecution was ongoing and that therefore she assumed her obligation to inform the department at such time as the criminal matter was concluded were satisfied. She did not reference the conviction when she renewed her license and the Department assessed a small fine and placed the nurse's license on indefinite suspension with no opportunity for reinstatement for one year. In its opinion, the Appellate Court addressed 3 issues. **First, the ALJ did not abuse its discretion when it ruled that the Department's attorney could not be called to testify as to the consent order negotiations because, under the advocate-witness rule, an attorney cannot act as both an advocate and a fact witness in the same case. Regardless, settlement and negotiation matters are generally inadmissible.** The Appellate Court held that the lower court abused its discretion by remanding that issue to a new hearing allowing such testimony. Second, the nurse demanded that the Department provided five years' worth of its decisions involving similar circumstances, an argument that the circuit court agreed to hear. The Appellate Court held that such argument was forfeited by the nurse because she failed to raise it in proceedings before the Department. Therefore, the circuit court abused its discretion by hearing the argument. Last, the Appellate Court declined the Department's request to affirm the Department's suspension decision without further remand to the circuit court because such issues were not fully argued before it. Therefore, the circuit court's order was vacated and the matter remanded to it for a new hearing consistent with the above rulings. (nurse, felony conviction, consent order, renewal application, discovery)

65-2013 License Conditioned on Good Standing

- *Trimmier v. SC Department of Labor, Licensing and Regulation, State Board of Dentistry*, 2013 S.C. App. LEXIS 179 (App. Ct. SC 2013) **The S. Carolina Court of Appeals affirmed the Administrative Law Court (ALC) and held that the Board acted within its authority when it granted a dentist's request for relicensure, conditioned upon his provision of written evidence that his Georgia license was in good standing.** The dentist was licensed in multiple states and was previously disciplined in S. Carolina after being convicted of Medicare fraud. The S.C. Board of Dentistry (Board) entered into a consent agreement with which the licensee complied, but he subsequently moved to Georgia and ceased practicing in S.C.. **Shortly thereafter, the Georgia board entered into a consent agreement with the licensee suspending his license when it discovered that he falsely indicated that he had never been convicted of a crime on his application for a sedation permit.**

3-2013 Default Judgment--Notice

- The Superior Court of Rhode Island denied the plaintiff insurance claim adjuster's appeal and **held that the Department acted properly in permanently revoking his license because of numerous consumer complaints and criminal indictments.** The licensee had been charged with eight felonies involving larceny and insurance fraud and the **Department sent him notice of hearing via both certified and regular U.S. mail. The licensee failed to appear at the hearing and a default judgment was entered against him revoking his license.** He appealed, claiming that notice was not properly effectuated because he did not receive it. **The court dismissed his claims because he never claimed that the notice was mailed to the wrong address or person and the Department followed its procedures in properly serving such notice.**

20-2014 Default Judgment--Notice

- The **Commonwealth Court of Pennsylvania affirmed the State Board of Accountancy's revocation of an accountant's license** because of his failure to promptly file tax returns for a client, paying himself more from the client's account than what was agreed to, and subsequently failing to repay the entire amount and penalties assessed by the IRS. The Bureau of Professional and Occupational Affairs filed an order to show cause, alleging that the licensee violated the practice act. **The order was returned because of an expired address and the Bureau sent it again a year later.** The licensee did not respond on 2 occasions and the Board consequently **entered a default judgment and revoked his license**, assessing investigation costs and a civil penalty against him. The licensee filed a petition in the instant court, alleging that the Bureau's year long delay in serving the order the second time prejudiced him because the client passed away during said period, prohibiting the licensee from raising affirmative defenses against the client's allegations. **The Court sided with the Board, finding that both the Bureau's order to show cause and its notice clearly state that if the licensee did not respond within a certain period of time, disciplinary action could be taken against him without a hearing.**

5-2013 RN vs. LPN – Notice—Really??

- 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 Default Judgment-- Notice

- 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.

Elements of a consent order....

- *Essential to the authority of the board to enforce the sanctions...*
- **Elements**
 - Jurisdiction
 - Stipulated facts
 - Acknowledgement and waiver of procedural rights
 - Admissions/Culpability
 - Consent to judgment
 - Reservation
 - Circumstances in mitigation
 - Contingency
 - Disciplinary Order

Elements of Consent Order

- **Jurisdiction**

- Board regulates the practice
- Respondent is subject to the provisions of the act and Board authority...

Elements of Consent Order

- **Stipulated Facts**

- If applicable, reference licensee and license number with specifics (date of issuance etc..)
- Date of complaint
- “If allegations proven...such violates the laws/rules governing license and would subject Respondent to discipline
- Respondent agrees to

Elements of Consent Order

- **Acknowledgment and waiver of procedural rights**
 - Read and understand
 - Discussed with legal counsel
 - Right to
 - Hearing
 - Present witnesses
 - Subpoena
 - Appeal to court
 - Application of APA
 - Enabling Board to impose penalties/sanctions
 - Full disclosure/Publicity
 - Resolution of case
 - Entire agreement

Elements of Consent Order

- **Admission of Wrongdoing**
 - Controversial
 - Assess circumstances and severity of charges
 - Is this non-negotiable?

- **Consequences of admission/no admission....**
 - **Collateral consequences ...**

Elements of Consent Order

- **Agreed upon Penalties/Discipline**

AND Reinstatement

- Revocation
- Suspension
- Limited
- Supervision
- Probation
- Education
- Fines
- Costs
- Others.....

Elements of Consent Order

- **Violation of Consent Order**
 - Understand agreement
 - Understand compliance
 - Understand non-compliance consequences
 - Basis for further discipline
 - Assessment of fees/costs/attorney's fees
 - Procedures for "Motion to Enforce"
 - Failure to respond to Motion to Enforce shall result in admissions of allegations

Elements of Consent Order

- **Presentation to the Board**
 - Subject to presentation to Board
 - Board may accept, reject, modify,
 - Waiver of right to contest objectivity of Board if rejected and future settlement/hearing occur
 - If rejected, agreement is null and void

Elements of Consent Order

- **Miscellaneous Provisions**
 - Full resolution of charges
 - Others.....

Elements of a consent order....

- *Sanctions, with specificity*
- *Reinstatement rights, if any*
- **It is imperative that these elements be specified.**
- *The key to post discipline success is to appropriately draft the order determining the sanctions in the first place and the consequences of compliance and non-compliance....*

Elements of a consent order...

- What else can/should be included?

FARB Model Consent Order

- Available to FARB Members
 - www.farb.org

25-2014 Gambree Previous Consent Order

- The **Court of Appeals in Oregon reversed and remanded the Board's order revoking physician's license because the Board erred in determining that the licensee violated prior Board orders in his treatment of two patients.** The Board revoked the license 20 years earlier after finding that the physician committed unprofessional conduct. His license was later reinstated pursuant to a stipulated order which included limitations on his practice. Over the next several years, the Board conducted 2 more investigations related to the licensee's use of thyroid medications, amending its order accordingly. **In 2010, the Board determined that the licensee was not in compliance with the consent order and that his thyroid treatment of five patients posed an immediate danger to the public warranting an emergency suspension of his license.** At a contested case hearing, an ALJ concluded that the licensee violated the practice act and recommended that the Board revoke his license, which it did.
- The Court agreed with the Board's finding that the licensee's alternative treatment put his patients at risk of harm greater than the standard treatment and therefore such treatment did not qualify as acceptable "alternative medical treatment" under the practice act. However, it **held that the Board erred in concluding that the licensee's treatment of two patients violated the prior board order and therefore the matter was remanded to the Board to consider the appropriate sanction.**
(physician, board order, unprofessional conduct, emergency suspension, revocation)

Alternatives – Voluntary Surrender

- Does your Board accept a voluntary surrender?

Elements of a final order....

- *Essential to the authority of the board to enforce the sanctions...*
- Elements
 - Findings of fact
 - Conclusions of law
 - Burden of proof
 - ***Sanctions, with specificity***
 - ***Reinstatement rights, if any***
 - Publicity
 - Right to appeal

24-2014 Final Order - Reinstatement

- A Louisiana Court of Appeals affirmed the trial court and **upheld a Board's order revoking a nurse's license for nine months and imposing certain reinstatement conditions** **The Board ordered that her license be suspended for at least nine months and that reinstatement was conditioned on a number of factors including a fine and restitution to the patient. Additionally, the Board ordered that she refrain from any involvement or relationship with the patient thereafter.** The lower court affirmed the Board's order with the exception of the last condition and the appellate court agreed, **holding that the Board cannot infringe upon the nurse's constitutional right to associate with whom she chooses when not regulated by the Board. However, the court did note that the Board could choose to limit such association as a condition for licensure reinstatement.** The appellate court also affirmed the lower court's holding that the assessment of costs was an arbitrary amount and that such issue be remanded to the Board for a hearing on the evidence to establish the appropriate amount.

22-2007 Final Order – Attend Meetings

- *Romano v. Department of Business and Professional, etc.*, 948 So.2d 938 (App. Ct. FL 2007)
Court upheld findings of board related to felony guilty pleas of real estate agent and discipline for failure to report convictions as required by law along with a five year suspension and fine. Court rejected arguments by licensee that guilty plea was not required to be reported, citing the language of the statute. However, **court held that sanction requiring the licensee to attend the Florida Real Estate Commission meetings was beyond the scope of the board authority and reversed that portion of the sanction.** (real estate agent, guilty plea, sanction-attend bd meeting)

Collateral Consequences

- Reciprocal discipline
- Eligibility for reimbursement/insurance
- Eligibility for federal/state programs
- Other licenses
- Employment
- More.....

Now what?????

- How does board enforce the terms of the final order/consent agreement? What do you do??
- Consequences of non-compliance
- Questions to ponder...and answer!!!

Thank you.....

- Additional Questions...