

 Council on Licensure, Enforcement and Regulation
2011 Annual Educational Conference



**Making Disciplinary
Decisions - Common
Post-Hearing Issues**

Pittsburgh Pennsylvania

Presenters: Bruce G. Matthews
Deputy Registrar
Real Estate Council of Ontario

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**Findings vs Sanctions:
Differing Decision
Paradigms**

Pittsburgh Pennsylvania

Presenter: Bruce G. Matthews
Real Estate Council of Ontario


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Overview

- Decisions re: Findings
- Decisions re: Sanctions / Penalty
- Potential Problems
- Avoiding the Problems
- Reasons, reasons, reasons...


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Decisions re: Findings

- During the hearing
 - Listen, observe, take notes
 - Accumulate the evidence
- After the hearing
 - Assess / weigh the evidence
 - Reach conclusions
 - Make findings


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Decisions re: Findings

- Evidence (fact vs opinion/expert)
 - Testimony
 - Documents
 - Things
- Credibility of witnesses
- Argument by representative counsel
 - What can be inferred from the evidence etc.


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Decisions re: Findings con't

- Interpretation of statute / rules / etc.
 - Subjective language in the statute
 - "reasonable and prudent practitioner"
 - "lack of knowledge, skill or judgment"
 - "best efforts"
 - "ought to have known"
 - Evidence re: standard of practice

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Decisions re: Findings con't

- Findings of fact
- Standard of proof
- Role of precedent decisions
- The "So what?" factor
 - Technical violations vs. substantive ones
- Plea scenario vs. contested hearing


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Decisions re: Sanctions

- Statutory violations proven
- Penalty principles
 - the "So what?" factor, part II
- Mitigating factors
- Aggravating factors
- Available sanctions


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Decisions re: Sanctions con't

- Role of precedent decisions
- Other considerations
- Plea scenario vs. contested hearing


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Potential Problems

- Panel members applying their own expertise as evidence
- Sanction factors influencing the decision re: finding
- Evidence unrelated to the finding influencing the decision re: sanction
- Desire to be appeal-proof


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Avoiding the Problems

- Training panel members
- Appoint independent legal counsel
- and use him / her!!
- Publication of Decisions & Reasons


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Reasons, reasons, reasons...

- Structured, comprehensive and articulate reasons are the best way to make the decision appeal-proof
- Structured: Reasons should be organized in a way that mirrors the rationale and logic used by the panel. It should not be a "Readers' Digest version" of the hearing itself.

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Reasons, reasons, reasons... con't

- Comprehensive: Address all of the issues that influenced the decisions (both finding and sanction)
- Articulate: Make the reasons easy to read and understand.

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External Influences in
Discipline Decision
Making

Presenter : Jim Anliot
Affiliated Monitors, Inc.


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Factors “Outside” the Record

- The law - only evidence in the record may be considered
- The reality - other factors do play a role
- Decisions must be defensible to many constituencies
- What factors should we consider?
- What factors must we ignore?


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The Principle of Consistency

- Similar situations should be treated similarly
- Protects integrity of discipline process
- U.S. courts - “arbitrary and capricious” = reversal
- Decision based on personal bias or retribution undermines respect for process


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The Principle of Consistency

- Problem: Lack of sources of precedent
 - Many boards lack records of prior decisions, “institutional history”
 - Analogy to present case can be tough
- Can “sentencing guidelines” help?
 - Certainly worth considering, BUT
 - Application can be difficult
 - Mathematical “formulas” don’t work well


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The Principle of Individual Fairness

- Premise: Every case is unique - must give proper weight to individual circumstances
- Problem: Often conflicts with need for consistency
- Need discretion - mechanical application of rules/formulas can produce “unfair” results


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The Principle of Proportionality

- Premise: “Penalty” should fit the “crime”
- U.S. courts
 - Regulatory agency’s role is not to punish, but
 - Agency decisions about penalty are not often overruled
- Nature and severity of sanction can still affect public confidence


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External Influences - Elected Officials

- Direct intervention in specific case - rare
- Impact tends to be more indirect
 - Perceptions about agency fairness or effectiveness affect future resource levels
 - Quantitative measures (e.g., number of revocations) - not always the best measures


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External Influences - Elected Officials

- These considerations can affect our choice of sanctions
 - May trigger choice of “simpler” but less effective sanctions
 - “Traditional” sanctions (e.g., revocation, suspension, fines) have certain disadvantages
 - Have we helped the injured party?


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External Influences - Elected Officials

- Direct attempt to influence decision generally violates “ethics” laws
 - Know your jurisdiction’s ethics laws
 - Not sure? Seek competent advice (agency counsel, AAG, state ethics agency)
 - Trust your instincts (Would Mom approve?)


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External Influences - Elected Officials

- Dependence on elected officials for resources is more difficult to ignore
- Be clear about case objectives
- Educate elected officials about best measures of agency “success”
 - Improving quality of services and/or responding to needs of harmed consumer = improved public satisfaction with agency


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External Influences - The Media

- Rarely seek to influence outcome directly
- But be careful about answering questions
 - May lead to charges of bias or pre-judgment
- Negative media stories may drive us to be inconsistent or unfair


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External Influences - The Media

- Need clear policies about response
 - Use “open meeting” and “public records” laws as a starting point
 - Can you close doors during deliberations?
 - “No comment” policy on pending cases
 - Avoid case-related communications outside of official meetings
 - Press releases need to be carefully drafted


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Ex Parte Communications

- Definition
 - Communication to the decision-maker (NOTE: Might not be one of the parties!)
 - Attempts to influence the decision-maker
 - Other parties are not present or able to respond
- Must be avoided at all costs - grounds for reversal


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Ex Parte Communications

- Potential problem areas
 - Communications about settlement proposals while case is pending
 - May be difficult to “unring the bell” if negotiations fail
 - Presenter needs both parties’ permission
 - Consider using intermediary (counsel, ED)
 - Board member contacts with outside parties (the “party conversation” problem)


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Have We Solved the Real Problem?

- Evidentiary record may not tell us
 - We might know what happened, but
 - The record may not tell us why it happened
- Additional information may be needed in order to solve the problem
 - Pre-hearing investigation should address this
 - Assessment before final sanction is imposed?


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Finding the “Right” Remedy

- Some cases involve lack of necessary knowledge or skill
 - Remedial education may help here
 - But how will we know that new knowledge is being applied?
- Other cases, however, present problems that retraining cannot cure


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Finding the Right Remedy

- Do we have the right tools?
 - Will the remedy we have chosen solve the problem?
 - Do we have the legal authority to require it?
 - Do we have the resources to enforce it?


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The Agency Resource Problem

- In “umbrella” agencies - competition for scarce resources
- For “autonomous” boards - can our licensees bear the costs?
- Issue: We end up balancing what should be done against what we are able to do


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The Agency Resource Problem

- Consider use of external resources
 - Treatment programs for impaired practitioners
 - Professional skills assessment programs
 - External monitoring and oversight providers


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Who Will “Mind the Store”?

- Using internal agency resources for oversight
 - Advantages: familiarity, subject to direct agency control, availability (maybe)
 - Possible issues: lack of time or availability, questions about sufficiency of expertise, questions about impartiality


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Who Will “Mind the Store”?

- Advantages of Using External Oversight
 - May offer higher degree of impartiality
 - May have greater expertise
 - May enable agency to focus its limited resources on other higher priorities
 - May reduce strain on agency budgets


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Who Will “Mind the Store”?

- Using external oversight - possible issues
 - Criteria for selection - level of knowledge; avoiding conflicts of interest
 - Nature and scope of responsibilities - “monitor” vs. “mentor”; reporting duties
 - What type of oversight and how much?
 - How long is long enough?
 - Payment of oversight costs
 - Public records and competitive bidding laws


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How Do We Help Ourselves?

- Establish criteria which can help you balance consistency with fairness
 - Know what your Board has done in similar cases
 - Sentencing guidelines can help here
 - Remember that guidelines must be flexible
 - Be prepared to explain reasons for variations


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How Do We Help Ourselves?

- Establish clear policies about case-related communications
 - Designate single person to handle elected officials and media
 - Clearly define when something can be said about a case - and what can be said
 - Look to “open meetings” and “public records” laws - but don’t stop there
 - Avoid case communications outside meetings


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How Do We Help Ourselves?

- Ensure effective training of Board members
 - Subtle “niceties” of due process can elude us
 - Make use of available legal expertise
 - No communications with outside parties while case is pending
 - Report attempted ex parte communications
 - Avoid discussions of case outside Board meetings


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How Do We Help Ourselves?

- Define case objectives clearly
 - What is the real source of the problem?
 - What do we really want to accomplish?
 - What strategies or approaches will best accomplish those goals?
 - Do we have the resources to do it?


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How Do We Help Ourselves?

- Know what's in the disciplinary "toolbox"
 - What does our enabling legislation allow?
 - Don't be afraid to be creative
 - Starting premise - do what you need to do to produce necessary changes
 - Draft decisions, orders and settlements carefully - be clear about what you expect


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How Do We Help Ourselves?

- Consider using external resources
 - May be invaluable in terms of expertise, objectivity and cost control
 - Use treatment programs when they exist
 - Establish criteria and standards for individuals and companies who oversee compliance
 - Define role and expectations of outside resources clearly

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THANK YOU FOR YOUR ATTENTION!

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