Overview

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

- During the hearing
  - Listen, observe, take notes
  - Accumulate the evidence

- After the hearing
  - Assess / weigh the evidence
  - Reach conclusions
  - Make findings

Evidence (fact vs opinion/expert)
- Testimony
- Documents
- Things

Credibility of witnesses

Argument by representative counsel
- What can be inferred from the evidence etc.

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
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

Decisions re: Sanctions

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

Decisions re: Sanctions con’t

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

Avoiding the Problems

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

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.
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  
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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?

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

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
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

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

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
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?

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?)

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
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
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)

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

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
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
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

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

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
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

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

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
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?

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

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
THANK YOU FOR YOUR ATTENTION!

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