Setting Precedents: Top Ten Cases You Need to Know About

Presenters:
Julie Maciura
Steinecke Maciura LeBlanc
Amigo Wade
Senior Attorney, Principal
Virginia Division of Legislative Services
Bernie LeBlanc
Steinecke Maciura LeBlanc

Promoting Regulatory Excellence

Glossary of Terms
- Licensee=registrant=member
- TCL - Terms, Conditions, Limitations
- College=Agency=Board
- Discipline Committee=Adjudicative Body
- NOH - Notice of Hearing
- ILC - Independent Legal Counsel (Lawyer for the Discipline Committee)
- ALJ - Administrative Law Judge

Nowoselsky v. Alberta College of Social Workers
- Standard of review by court of tribunal decision is reasonableness
Nowoselsky

• “The role of the courts in reviewing the decisions of the disciplinary tribunals of the College is limited. It is not our function to re-weigh the evidence, nor to second-guess the decisions of those tribunals. This Court can only intervene on appeal if the appellant can demonstrate that the decisions of the disciplinary tribunals are unreasonable.”

Nowoselsky

• Tribunal entitled to disregard positive performance review - general skills not in issue here
• Tribunal has expertise to determine boundaries and scope of professional activities

Nowoselsky

• Employment sphere separate from regulatory sphere
**College of Physicians and Surgeons of Ontario v. Rudinskas**

- Discipline Committee had jurisdiction to consider all patients referenced in material referred by the screening committee even if not specifically named in NOH
- Administrative NOH not to be interpreted or drafted in same way as criminal indictment

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**Rudinskas**

- ILC permitted to give advice to improve quality of Discipline Committee reasons
- Not appropriate to look beyond principles of deliberative secrecy to evaluate exact contributions of ILC to reasons

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**Wilcox v. New Mexico Board of Acupuncture and Oriental Medicine**

- Scope of authority to promulgate regulations
- Amended several regulations pertaining to standards of practice and continuing education
- Distinction between legislative and adjudicatory functions
**Wilcox- Board Position**

- No law requiring the Board to provide reasoning for adopting regulations
- Existing legal requirement for a state agency to include a statement of reasons for its decisions does not apply to legislative functions

**Wilcox- Decision**

- The record must disclose the Board’s reasoning and the basis on which it adopted regulations - why the Board deemed it necessary to amend its regulations
- The record is replete with conflicting points of view, but nowhere does the Board explain how it resolved those conflicts

**Burns v. Heyrich and New Jersey State Board of Architects**

- Scope of Board’s discretion regarding whether or not to investigate alleged violations; right of the complainant to appeal Board’s action
- Complaint filed alleging incompetence, professional misconduct, and improper billing practices
Burns- Board Action

- Board concluded there was insufficient cause to support filing of formal disciplinary charges
- Complainant contended that the Board’s procedures did not afford her a fair hearing or answer the questions she raised

Burns- Decision

- Legislature has given professional boards broad discretion to decide whether and how to investigate allegations that are brought to its attention
- Complainant does not have a right to judicial review of the Board’s decision not to proceed with an investigation

Ritter v. Bd. of Reg. for Professional Engineers and Land Surveyors

- Authority of the Board to take disciplinary action based on a criminal conviction
- Licensee convicted on three counts of first degree child molestation involving a family member; offenses were not committed in the workplace or otherwise in any professional capacity
Ritter - Board Action

- Disciplinary proceedings based solely on the molestation convictions
- Determined that the convictions are inconsistent with statutory requirements for good character and reputation and constituted unprofessional conduct
- License suspended for a minimum of five years

Ritter - Decision

- To suspend the license based on unprofessional conduct the Board must first establish a nexus between the conduct and the profession
- The Board misinterpreted and misapplied the law when it suspended the license based solely on the conviction for child molestation without establishing a relation or nexus to the practice of his profession

Grogg v. Illinois Division of Professional Regulation

- Authority of the Board to impose sanctions deemed appropriate
- Chiropractor convicted of misdemeanor driving under the influence of alcohol and attempted obstruction of justice
Grogg-Board Action

- Board initiated disciplinary proceedings based on the convictions
- Determined that the acts which the convictions were based upon were grounds for revocation or suspension of the license
- License suspended for a minimum of three years

Grogg- Decision

- Nothing in the record regarding explaining the basis or rationale for the sanctions
- Indefinite suspension for misdemeanor convictions not previously imposed
- Sanctions were unduly harsh and against the manifest weight of the evidence

Georges v. Florida Department of Health

- Authority of the Board to impose sanctions deemed appropriate
- Nurse employed by a rehabilitation center accused by a patient of stealing a wallet containing $10
- When confronted, the nurse became belligerent and had to be escorted from the center
Georges- Board Action

- Disciplinary proceedings initiated citing unprofessional conduct
- At hearing, ALJ determined that nurse was guilty of unprofessional conduct and recommended $250 fine and probation
- Board rejected the recommendation and imposed license revocation and costs of over $15,000

Georges- Decision

- Statutory guidelines establish maximum penalty for first offense of a $150 fine, a reprimand, and suspension/probation
- Deviation allowed if aggravating factors established, however, no such factors established
- The license revocation and imposition of costs were not authorized and constituted a violation of the nurse’s due process rights

Gore v. College of Physicians and Surgeons of Ontario

- Scope of authority of investigators
- Trends: narrow v. liberal interpretations
- Can investigators
  - require surgeons to be interviewed?
  - observe cosmetic surgeries?
• Survey blitz followed death after cosmetic surgery

• Physician investigators
  - Investigator as expert

• Investigators may issue summonses

Gore

• Investigators have the power to:
  - "inquire into and examine the practice of the member to be investigated"
  - enter into members' places of practice, examine things found there, summons evidence, make copies of documents, remove original items from the member's place of practice

Gore - Decision

• Purpose of legislation to protect public

• Ordinary meaning of examining “practice” permits observing surgeries

• Authority to issue summonses permits interviews (although extent of subsequent use is questionable)
Yazdanfar v. College of Physicians and Surgeons of Ontario

- Three complaints regarding liposuction surgeries performed with Dr. Yazdanfar (including death of one patient)

- Chart review showed three areas of concern: informed consent, large volume, poor practice standards and insufficient follow up

Yazdanfar

- College investigated and referred allegations of professional misconduct and incompetence to the Discipline Committee

- Screening Committee may suspend or issue TCLs if of opinion that conduct of member exposes or is likely to expose his or her patients to harm or injury

Yazdanfar

- Screening Committee imposed the series of restrictions, including a restriction from performing all surgery except as surgical assistant

- Extensive reasons for decision provided
Yazdanfar - Decision

- Standard of judicial review: reasonableness (not correctness)
- Reasonableness = some evidence, transparency, within a range of dispositions
- Don’t substitute opinion, re-weigh evidence or retry the case

Leering v. College of Chiropractors of Ontario

- Chiropractor and complainant meet in December 2004, later start sexual relationship, move in together in March 2005
- April 2005: complainant began regular chiropractic treatments; received 28 treatments between April and October 2005

Leering

- Leering billed her but she did not pay. He marked bills as paid and she submitted them to her insurer for reimbursement, giving money to him
- Personal relationship ends October 2005
Leering

- Leering tries to collect the balance owing for his services of $567
- She refuses to pay, he refers account to collection agency (doh!)
- Complainant complains to College, which charges Leering with sexual abuse

Leering

- Legislative regime: “Zero tolerance” for sexual abusing patients/clients
- Revocation: minimum of five years
- No spousal/partner exceptions

Leering - Decision

- Question is whether spouse is a “patient”
- “Incidental” care does not constitute patient relationship
- Courts will defer to Discipline Committee’s interpretation of practitioner/patient relationship
Leering - Decision

• Test is not whether sexual relationship arose out of spousal relationship or professional relationship

• Power imbalance unnecessary

• Legislative changes likely

Speaker Contact Information

• Bernie LeBlanc, Steinecke Maciura LeBlanc
  bleblanc@sml-law.com

• Julie Maciura, Steinecke Maciura LeBlanc
  jmaciura@sml-law.com

• Amigo Wade, Virginia Division of Legislative Services
  awade@dls.virginia.gov