
 Council on Licensure, Enforcement and Regulation



2012 Annual Educational Conference - September 6-8
San Francisco, California

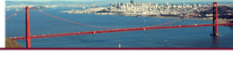
**Setting Precedents:
Top Ten Cases You
Need to Know About**

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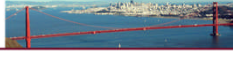
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Promoting Regulatory Excellence

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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

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Nowoselsky v. Alberta College of Social Workers

- Standard of review by court of tribunal decision is reasonableness


3

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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.”

4

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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


5

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Nowoselsky

- Employment sphere separate from regulatory sphere


6

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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

7

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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


8

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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


9

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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


10

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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


11

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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


12

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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


13

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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


14

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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


15

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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


16

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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


17

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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


18

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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


19

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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


20

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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


21

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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


22

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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


23

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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?


24

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Gore

- Survey blitz followed death after cosmetic surgery
- Physician investigators
 - Investigator as expert
- Investigators may issue summonses


25

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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


26

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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)


27

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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


28

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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


29

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Yazdanfar

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


30

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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


31

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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


32

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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


33

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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


34

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Leering

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


35

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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

36

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Leering - Decision

- Test is not whether sexual relationship arose out of spousal relationship or professional relationship
- Power imbalance unnecessary
- Legislative changes likely

37

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38
