Top Ten Regulatory Disciplinary Cases Regulators Need to Know About

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Background

• Ten decisions from jurisdictions in the United States and Canada

• Different regulatory bodies

• Variety of regulatory actions

• Poll question for each case

• PLEASE RAISE YOUR HAND!!!

2. Kelly v. Ontario College of Physicians and Surgeons, 2014 ONSC 2824


4. Yazdanfar v. Ontario College of Physicians and Surgeons, 2013 ONSC 6420

5. Hagen v. Iowa Dental Board, 839 N.W.2d 676 (2013)


7. Oni v. Tennessee Department of Health and Tennessee Board of Medical Examiners, 2013 Tenn. App LEXIS 467

8. Sobeys West v. College of Pharmacists of British Columbia, 210 BCSC 1414


10. Barletta v. Harry Rilling, Chief of Police for the City of Norwalk, Case No. 3:11-cv-00990
North Carolina Dental Examiners v. FTC

• Board composed of six dentists in active practice, one hygienists, and one public member

• Dentist members are elected by dentists

• Board received complaints regarding non-dentist providing teeth whitening services

• Issue-> unauthorized practice of dentistry?
North Carolina Dental Examiners v. FTC

• After investigation, sent “Cease and Desist” letters to the teeth whiteners, their suppliers, and mall owners
• Also had the Cosmetology Board inform its licensees
• FTC brought an action alleging violation of antitrust laws
Session Poll Question #1

Should state professional licensing boards that include a controlling number of active market participants be subject to federal antitrust laws?

- A – Yes
- B – No
- C – Should be decided on a case-by-case basis
North Carolina Dental Examiners v. FTC

• Certain forms of state actions have immunity from antitrust laws

• When a controlling number of a board consists of active market participants the board must be actively supervised by the state

• Dissent- professional regulation is exclusively the purview of sovereign state governments
Kelly v. Ontario

• Wanted to use a copy of an illegally obtained hard drive containing child pornography in the possession of the police at a discipline hearing.

• Police seized hard drive on basis of invalid warrant. For that reason, criminal charges were withdrawn.

• Kelly went to court to have the drive destroyed or declared inadmissible.
Session Poll Question #2

Should illegally obtained evidence be admissible at a regulatory board hearing?

• A – Yes
• B – No
Kelly v. Ontario

- The Court refused to order the destruction of the evidence because it could be admissible in the discipline proceeding.

- The Court held it was for the Discipline Committee to decide whether the evidence should be admitted.
Jain v. Delaware Board of Nursing

- Charged with failing to properly assess the medical condition of a patient
- Found that although the nurse’s actions did not contribute to the patient’s death, she was negligent
- Position: Board rules, unlike common law negligence, do not require causation as an element of negligence.
Session Poll Question #3

Should every finding of negligence be required to include evidence that the negligent conduct caused harm?

• A – Yes
• B – No
Jain v. Delaware Board of Nursing

• The record establishes that under the Board's rules, Jain had a duty to her patient that was breached when she failed to physically examine the patient.

• The failure to act was sufficiently negligent to be a professional violation without a showing that the conduct resulted in harm to the patient.

• Board decision upheld.
Yazdanfar v. Ontario

- Family medicine physician performing cosmetic surgery prosecuted following the death of a patient after a liposuction procedure.

- Case raises numerous issues, including use of compelled statements and whether the penalty was appropriate.
Session Poll Question #4

Can a compelled statement obtained during the investigation be used against the regulant in a subsequent board disciplinary hearing?

• A – Yes
• B – No
Yazdanfar v. Ontario

- Physician found in violation; decision upheld by Court
- A compelled statement obtained in the course of investigation by a regulator can be used in the ultimate discipline hearing
- Treating discipline hearing as separate proceeding would undermine purpose of regulatory framework
Hagen v. Iowa Dental Board

• Initially issued license in 1996

• Dental licenses expire on 8/31 in even numbered years; sixty day grace period

• After grace period, the board considers a license lapsed and invalid

• Hagen asserts renewal mailed on 8/30; Board had no record of receiving renewal
Session Poll Question #5

Should a regulant with a lapsed license be charged with engaging in unlicensed practice if the regulant believed the license had been validly renewed and can produce evidence supporting that belief?

• A – Yes
• B – No
Hagen v. Iowa Dental Board

- Board required to find only two elements, that Hagen engaged in the practice of dentistry after failing to renew his license

- Board not required to find that Hagen subjectively knew that he failed to renew his license

- Hagen violated the law whether he knew it or not
Merchant v. Law Society of Saskatchewan

- Lawyer represented client in settlement of a civil claim; also represented client in a child support matter.

- Court order required client and firm to pay portion of settlement funds into court to cover child support.

- Lawyer set up a scheme to side step order- funds paid directly client and no money paid into court.
Session Poll Question #6

Is mens rea (intent) required to prove offence of professional misconduct?

• A – Yes
• B – No
• Sometimes
Merchant v. Law Society of Saskatchewan

- Lawyer found in violation; finding upheld on appeal.

- Professional misconduct is generally a strict liability offence- not required to establish intent.

- Regulations may provide for intent (i.e. that conduct was done “knowingly,” “willfully,” or “intentionally”)
Oni v. Tennessee Department of Health

• Licensed in Tennessee and New York

• New York license revoked
  — Information provided on renewal application
    ✓ Disciplinary action in another state
    ✓ Willfully making or filing a false report

• Tennessee license revoked based on the New York disciplinary action; Oni appealed

• Lower court vacated revocation
Session Poll Question #7

If a professional license is revoked in one state, should it automatically be revoked in all other states in which the individual is licensed?

- A – Yes
- B – No
Oni v. Tennessee Department of Health

- The board did not articulate why revocation was appropriate.

- By simply mirroring the New York board’s choice of discipline, the decision was arbitrary and capricious.

- Remanded to the Board to reconsider the sanction.
Sobeys v. College of Pharmacists of B.C.

- College of Pharmacists established a rule prohibiting customer incentive programs as not in the public interest
- Sobeys West, Inc. is a retail grocery chain
- Challenged the provision
Session Poll Question #8

Should pharmacies be permitted to offer customer incentive programs?

• A – Yes
• B – No
Sobeys v. College of Pharmacists of B.C.

- The Court struck down the rule as unreasonable
- The Court also held that the rule was overly broad
- Effect of the rule is actually harmful to the public interest in obtaining pharmacy services and prescriptions at the lowest price”
Denuit v. Ohio State Board of Pharmacy

- Board disciplined Denuit for fondling a female co-worker
- Behavior constituted “gross immorality”
- Denuit appealed; Court found Board’s standard for defining "gross immorality” was impermissibly vague
- Board appealed
Session Poll Question #9

Should a statute or regulation making gross immorality a cause for disciplinary action include a specific definition of “gross immorality”?

• A – Yes, without a definition it would be too vague

• B – No, the determination should be left to the Board
Denuit v. Ohio State Board of Pharmacy

• A statute is not unconstitutional because it does not define a relevant statutory phrase

• In this case the meaning is clear and can be ascertained from a dictionary

• Board finding that Denuit’s actions constituted gross immorality is supported by the evidence
Barletta v. The City of Norwalk

• Convicted of dealing narcotics in 2006, served three years of sentence

• Applied for license as a precious metals dealer in 2009

• License denied based on state law barring convicted felons from holding a license as a precious metals dealer
Session Poll Question #10

Should an individual with a past criminal record be prohibited from receiving a professional license?

A- Yes

B- No

C- Yes, if the previous criminal activity has a connection to the regulated activity
Barletta v. The City of Norwalk

- Appealed alleging due process and equal protection violations

- Holding: Unconstitutional
  - No rational connection to the stated purpose of the law, which is the prevention of fraud
  - Cannot substitute a felony conviction for individualized consideration
Thank You!

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