



# Top Recent Regulatory Cases



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- ▶ AAVSB
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- ▶ JRCERT
- ▶ NABP
- ▶ NABPF
- ▶ NMTCB
- ▶ Others...

# Burden of Proof/Evidentiary Standard

## *Sternstein v. CT Medical Examining Board et al.*

- ▶ Citation: 2013 Conn. Super. LEXIS 2136 (Superior Ct. CT 2013)
- ▶ Court: Superior Court of Connecticut
- ▶ Disposition: Affirmed (Appeal dismissed)
- ▶ Decision Date: September 18, 2013
- ▶ Profession: Physician
- ▶ Write-up: Superior Court of Connecticut affirmed the ruling of the medical board in revoking the license of a physician for substandard care of patients related to prescription practices, lack of adequate records, failure to inform patients, issuing prescriptions that were contraindicated, and failure to coordinate treatment with other healthcare providers. The court held that the board properly applied a preponderance of the evidence standard and rejected arguments of the licensee to apply a clear and convincing standard. The court also held that the revocation was appropriate in spite of the failure of the board to issue its proposed order within the 120 day period set forth in statute. The court distinguished between directory and mandatory compliance and held that the 120 period was directory in that it was not substantive but rather designed to secure order in the proceedings. Indeed, the court noted that the time period was stated in affirmative terms unaccompanied by negative words or consequences.

# Burden of Proof/Evidentiary Standard

## *Friedman v. Kansas State Board of Healing Arts*

- ▶ Citation: 294 P.3d 287; 2013 Kan. LEXIS 59
- ▶ Court: Supreme Court of Kansas
- ▶ Disposition: Affirmed.
- ▶ Decision Date: February 15, 2013
- ▶ Profession: physician, medicine, medical doctor
- ▶ Write-up: The Supreme Court of Kansas affirmed the lower court and held that the Board had jurisdiction to take disciplinary action against a physician who was licensed by the Board at the time of the underlying conduct at issue, but not at the time when the disciplinary action was commenced. The physician was charged with five counts of misconduct arising from patient care including falsification of records and a count that he surrendered medical privileges while under investigation. The Board subsequently revoked his license, the physician appealed, the district court affirmed and the next appeal was transferred to the Supreme Court. The court held that the Board had jurisdiction because it had issued the license pursuant to the practice act and that the acts that gave rise to the disciplinary proceedings occurred while the physician was licensed. Also, the physician argued that a new evidentiary standard should be applied, one that requires the court to review all evidence supporting and contradicting the Board's findings, the hearing officer's credibility determinations and the Board's explanation of why the evidence supports its findings. The court disagreed because the new standard was not adopted when the Board entered its order. Instead, the standard to be used was that in effect at the time of the order—whether a determination of fact is supported by evidence that is substantial when viewed in light of the record as a whole.

# Burden of Proof/Evidentiary Standard

## *Jones v. Connecticut Medical Examining Board*

- ▶ Citation: 2013 Conn. LEXIS 270
- ▶ Court: Supreme Court of Connecticut
- ▶ Disposition: Affirmed.
- ▶ Decision Date: August 13, 2013
- ▶ Profession: Medical
- ▶ Write-up: The Supreme Court of Connecticut affirmed the appellate court and held that the preponderance of the evidence is the appropriate standard to apply in disciplinary proceedings before the Medical Board, as the Board is an administrative agency subject to the Administrative Procedures Act which defaults to such standard. A physician was brought before the Board which found that he violated the standard of care for two pediatric patients. The Board imposed a fine of \$10,000 and placed the licensee on a two year probation with monitoring required. The physician appealed the matter up to the instant court, arguing that the standard that should have been used in the disciplinary proceedings was the more stringent clear and convincing evidence. The Court looked to case precedent and applied a three part test regarding the constitutional adequacy of administrative procedures. It found that while the physician enjoyed a property interest in his medical license, such interest does not rise to the level of those cases for which the Court has mandated a higher standard of proof. Also, the procedures employed in the administrative process contained adequate safeguards for the protection of due process rights and that the governmental interest weighs in favor of the preponderance standard because a heightened standard renders it more difficult for the state to protect the public from unsafe medical practitioners.

# Ex Post Facto

## *Jamerson v. Department of Children & Families and Wisconsin Department of Administration*

- ▶ Citation: 2013 WI 7; 2013 Wisc. LEXIS 6
- ▶ Court: Supreme Court of Wisconsin
- ▶ Disposition: Affirmed.
- ▶ Decision Date: January 10, 2013
- ▶ Profession: caregiver, child care
- ▶ Write-up: The Supreme Court of Wisconsin affirmed the appellate court and held that a child care giver had a right to a hearing when the Department permanently revoked her license under a new law. The law requires permanent revocation when a child care giver has been convicted of specific predicate crimes. The plaintiff was convicted 20 years earlier of an offense related to food stamps and the bulk of the Court's opinion discussed whether such offense involved fraud so as to satisfy an element of the predicate offense law. Regardless, and while the Court accorded due deference to the Department, the plaintiff was entitled to a hearing as in a contested case, which the Department had denied. The case was remanded to the Department for a hearing to determine whether or not the 20 year-old offense involved fraudulent activity.

# Ex Post Facto

## *Horrigan v. The Department of Financial and Professional Regulation*

- ▶ Citation: 2013 IL App (1<sup>st</sup>) 121186-U; 2013 Ill App. Unpub. LEXIS 1008
- ▶ Court: Appellate Court of Illinois, First District, First Division
- ▶ Disposition: Affirmed.
- ▶ Decision Date: May 13, 2013
- ▶ Profession: pharmacy
- ▶ Write-up: The Appellate Court of Illinois affirmed the circuit court and held that the statute mandating that a healthcare professional's license automatically be permanently revoked if the professional was ever convicted of certain crimes was constitutional. The statute applies to crimes that a) require the individual to be registered as a sex offender; b) constitute criminal battery against a patient in the course of treatment; or c) constitute a forcible felony. A pharmacist filed suit after his license was revoked based upon a 25 year old conviction and after he had entered into a 2008 consent order with the Dept. whereby the Dept. agreed to grant him a license after he met all necessary criteria. The pharmacist argued that the law is unconstitutional as it is retroactive, violated the obligations of the parties' contract, and is contrary to due process. The court essentially relied on its prior rulings that the act is not retroactive in nature, nor is it punitive, without engaging in extensive analysis.

# Ex Post Facto

## *Wilson v. Department of Financial and Professional Regulation*

- ▶ Citation: 2013 IL App (1<sup>st</sup>) 121509; 2013 Ill. App. LEXIS 328
- ▶ Court: Appellate Court of IL, First District, Fifth Division
- ▶ Disposition: Affirmed
- ▶ Decision Date: May 24, 2013
- ▶ Profession: Mortgage Loan Officer
- ▶ Write-up: Illinois Court of Appeals affirmed lower court and upheld dismissal of case filed by mortgage loan officer who challenged Department's denial to renew license in 2010 based upon a 2006 felony tax fraud convictions and as provided for in newly enacted Illinois statute. Licensee disclosed his 2006 criminal convictions on his 2007 renewal application and the Department and Licensee entered into a consent agreement resulting in licensure renewal, 30 day suspension and 2 years of probation. His license was also renewed in 2008 and 2009. A new statute effective July 2009 precluded the Department from issuing a license to persons convicted of a felony within the last 7 years or if ever convicted of a felony involving the act of fraud. In 2010, the Licensee's renewal application was denied. On appeal the court rejected arguments of the Licensee related to differentiating between issuance of a new license and renewal of an existing license, retroactive/ex post facto law, and res judicata. Under the ex post facto analysis, the court considered the 7 factors of double jeopardy in finding that the law was not punitive and, thus, not subject to ex post facto scrutiny.

# Ex Post Facto

## *Consiglio v. Department of Financial and Professional Regulation*

- ▶ Citation: 2013 IL App (1<sup>st</sup>) 121142; 2013 Ill. App. LEXIS 215
- ▶ Court: Appellate Court of IL, First District, First Division
- ▶ Disposition: Affirmed
- ▶ Decision Date: April 8, 2013
- ▶ Profession: Physician
- ▶ Write-up: Illinois Court of Appeals affirmed lower court and upheld the dismissal of consolidated litigation filed by numerous physicians seeking a declaratory judgment that new Illinois statute mandating the revocation of physician licenses without a hearing for certain delineated crimes, regardless of the date of conviction, could only be applied prospectively and not retroactively. The Plaintiffs also sought injunctive relief prohibiting the revocation of their licenses. The Healthcare Worker Self Referral Act, effective August 2011, calls for the automatic permanent revocation of healthcare workers licenses if such licensees have ever been subject to certain criminal convictions that require registration on the sex offender list, that involve battery of a patient in the course of treatment, or that involve forcible felony. In consolidating the appeals, the court summarized the combined arguments of the Licensees as violating substantive and procedural due process, violating double jeopardy, violating ex post facto prohibitions, offensive of the separation of powers, impairing the obligations of contracts between the Department and licensees in violation of contracts clause of the Illinois Constitution, as imposing excessive penalties, precluded by res judicata, and deprives the Licensees of vested limitations and repose defenses. First the court concluded that the Act was intended to apply to convictions that occurred prior to its enactment. The court rejected due processes arguments as to both substantive and procedural issues finding that revocation by operation of law and with no hearing was sustainable. Next the court rejected double jeopardy arguments finding that the Act was not punitive under the applicable 7 factors. Finally, the court rejected the remaining arguments of the Licensees in affirming the dismissal of the case.

# Criminal Activity

## *Bresette v. State of Rhode Island and Providence Plantations Department of Business Regulation*

- ▶ Citation: 2013 R.I. Super. LEXIS 9
- ▶ Court: Superior Court of Rhode Island, Kent
- ▶ Disposition: Denied Plaintiff's claims.
- ▶ Decision Date: January 7, 2013
- ▶ Profession: insurance adjustor
- ▶ Write-up: The Superior Court of Rhode Island denied the plaintiff insurance claim adjuster's appeal and held that the Department acted properly in permanently revoking his license because of numerous consumer complaints and criminal indictments. The licensee had been charged with eight felonies involving larceny and insurance fraud and the Department sent him notice of hearing via both certified and regular U.S. mail. The licensee failed to appear at the hearing and a default judgment was entered against him revoking his license. He appealed, claiming that notice was not properly effectuated because he did not receive it. The court dismissed his claims because he never claimed that the notice was mailed to the wrong address or person and the Department followed its procedures in properly serving such notice.

# Criminal Activity

## ***Barbera v. Bureau of Professional and Occupational Affairs, State Board of Vehicle Manufacturers, Dealers and Salespersons***

- ▶ Citation: 2013 Pa. Commw. Unpub. LEXIS 92
- ▶ Court: Commonwealth Court of Pennsylvania
- ▶ Disposition: Affirmed.
- ▶ Decision Date: January 30, 2013
- ▶ Profession: vehicle manufacturers, dealers, and salespersons
- ▶ Write-up: The Commonwealth Court of Pennsylvania affirmed the hearing examiner's suspension of a vehicle salesperson's license following his guilty plea in criminal court for filing false tax returns. Because the licensee had served as the Board's immediate past chairperson, the Board recused itself and assigned the matter to a hearing examiner. Between the time that the state filed the order to show cause with the Board and the licensee responded, his license expired. In his answer to the state, he denied having a salesperson license. The hearing examiner concluded that his criminal conduct involved moral turpitude thus implicating the practice act, and suspended his license for three years with reinstatement conditioned upon proving good moral character and rehabilitation. The licensee argued that his license should not be suspended because it expired prior to the hearing, thereby rendering the state without jurisdiction over him. The Court, however, found that an individual has a property interest in an expired license, because such may be renewed by merely paying a renewal fee. Therefore, the state could discipline his license.

# Criminal Activity

## *Kleier v. Tennessee Board of Medical Examiners*

- ▶ Citation: 2013 Tenn. App. LEXIS 12
- ▶ Court: Court of Appeals of Tennessee, at Nashville
- ▶ Disposition: Judgment reversed and decision of the Board affirmed.
- ▶ Decision Date: January 9, 2013
- ▶ Profession: physician, medicine
- ▶ Write-up: The Appellate Court reversed the lower court and affirmed the Board's decision to discipline a physician for unprofessional conduct related to his DUI conviction. The physician was convicted in another state and the Board held that such was evidence of unprofessional, dishonorable or unethical conduct and therefore in violation of the practice act. The Board placed the license on probation and ordered the licensee to obtain treatment and counseling. The lower court held that the statute was unconstitutionally vague absent a definition of the standard of care or a violation thereof. The Appellate Court reversed, noting that a statute authorizing discipline for unprofessional conduct contemplate acts that are likely to jeopardize the interest of the public and that such conduct need not have occurred during professional practice. Accordingly, it was reasonable for the Board to consider the DUI as an act that could jeopardize the public interest and be an indicator of unfitness to practice. Therefore, notifying the physician of charges related to "unprofessional, dishonorable or unethical conduct" was adequate to advise the licensee that a DUI conviction could subject him to discipline. Also, the Board did not need to present evidence related to the standard of care because the conduct involved was unrelated to patient treatment.

# Criminal Activity

## ***Duck v. Board of Registered Nursing, Department of Consumer Affairs***

- ▶ Citation: 2013 Cal. App. Unpub. LEXIS 2059
- ▶ Court: Court of Appeal of California, First Appellate District, Division Three
- ▶ Disposition: Affirmed.
- ▶ Decision Date: March 21, 2013
- ▶ Profession: nursing
- ▶ Write-up: Court of Appeals of California affirmed the lower court that had upheld a three (3) year probation sanction of a nurse requiring supervised practice and a prohibition from him acting as a supervisor, along with completion of a college course and reimbursement of administrative costs. Discipline was based upon a DUI conviction (guilty plea) based upon erratic driving and a blood alcohol content of .20. Practice act provides for discipline based upon criminal conviction if crime substantially related to qualifications, functions, or duties of profession for which license is issued. Court noted that the issue is one of law—not fact—and agreed with ALJ determination that a DUI is substantially related to the qualifications, functions, or duties of a registered nurse and also citing a previous opinion that “convictions involving alcohol consumption reflect a lack of sound professional and personal judgment that is relevant to a physician’s fitness and competence to practice medicine.” The court rejected the nurse’s arguments that merely one DUI does not reflect such a lack of judgment as well as his arguments to overturn the previous judicial decisions. The court also rejected equal protection, abuse of discretion, and excessive penalty arguments of the licensee.

# Criminal Activity

## *Demesa v. Adams*

- ▶ Citation: 2013 IL App (1<sup>st</sup>) 122608; 2013 Ill. App. LEXIS 509
- ▶ Court: Appellate Court of Illinois, First District, Second Division
- ▶ Disposition: Reversed and Remanded.
- ▶ Decision Date: July 30, 2013
- ▶ Profession: Nursing
- ▶ Write-up: The Appellate Court of Illinois reversed the circuit court and held that the circuit court abused its discretion when it remanded to the Department of Financial and Professional Regulation (Department) a matter involving a nurse who was sanctioned by the Department for failing to inform it that she had pled guilty to a felony. The Department filed a complaint against the nurse alleging that she pled guilty to criminal neglect of a person with a disability and did not inform the Department of such pleading. The parties entered into a consent order years earlier whereby the nurse acknowledged the conduct underlying the criminal conviction and pursuant to which she received a reprimand. The nurse claimed that she informed the Department's attorney that a criminal prosecution was ongoing and that therefore she assumed her obligation to inform the department at such time as the criminal matter was concluded were satisfied. She did not reference the conviction when she renewed her license and the Department assessed a small fine and placed the nurse's license on indefinite suspension with no opportunity for reinstatement for one year.

In its opinion, the Appellate Court addressed 3 issues. First, the ALJ did not abuse its discretion when it ruled that the Department's attorney could not be called to testify as to the consent order negotiations because, under the advocate-witness rule, an attorney cannot act as both an advocate and a fact witness in the same case. Regardless, settlement and negotiation matters are generally inadmissible. The Appellate Court held that the lower court abused its discretion by remanding that issue to a new hearing allowing such testimony. Second, the nurse demanded that the Department provide five years worth of its decisions involving similar circumstances, an argument that the circuit court agreed to hear. The Appellate Court held that such argument was forfeited by the nurse because she failed to raise it in proceedings before the Department. Therefore, the circuit court abused its discretion by hearing the argument. Last, the Appellate Court declined the Department's request to affirm the Department's suspension decision without further remand to the circuit court because such issues were not fully argued before it. Therefore, the circuit court's order was vacated and the matter remanded to it for a new hearing consistent with the above rulings.

# Criminal Activity

## *Hearn v. City of Woodbury*

- ▶ Citation: 2013 Minn App. Unpub. LEXIS 458
- ▶ Court: Court of Appeals of Minnesota
- ▶ Disposition: Affirmed.
- ▶ Decision Date: May 20, 2013
- ▶ Profession: Massage Therapy
- ▶ Write-up: Minnesota Court of Appeals affirmed Hearing Officer decision and upheld the denial of licensure of an applicant as a massage therapist based upon misrepresentation on the application regarding criminal conviction/charge. City ordinance requires massage therapists to be licensed and ordinance mandates licensure denial under certain circumstances related to criminal convictions within the last 5 years, including charged with certain crimes but convicted of a lesser charge. The applicant argued that his charge of theft but later guilt plea of disorderly conduct did not constitute a lesser charge of theft. The court noted that the application for licensure asks if such applicant has ever been convicted of or charged with a felony, crime or violation of any ordinance other than a minor traffic offense. Because the applicant answered no to this inquiry, such misrepresentation justified denial of licensure. The court rejected arguments related to due process, equal protection and right to pursue employment.

# Sanctions

## *Richmond v. Ohio Board of Nursing*

- ▶ Citation: 2013 Ohio 110; 2013 Ohio App. LEXIS 77
- ▶ Court: Court of Appeals of Ohio, Tenth Appellate District, Franklin County
- ▶ Disposition: Judgment affirmed.
- ▶ Decision Date: January 17, 2013
- ▶ Profession: nursing (licensed practical nurse)
- ▶ Write-up: The Court of Appeals in Ohio affirmed the Court of Common Pleas and held that the Board could permanently revoke a nurse's license after she violated the terms of a prior consent order with the Board. The consent order mandated that, while the license was indefinitely suspended, she must refrain from alcohol and drug use and that she submit periodic urine samples. She failed to provide urine samples on numerous occasions and tested positive for cocaine. The nurse signed for certified mail delivery of the Board's notice that it intended to revoke her license, but she did not request a hearing on the matter. She did not appear at hearing and the Board revoked the license. On appeal, the nurse claimed that the notice served on her was insufficient in that it incorrectly referred to her license as an "RN" as opposed to an "LPN". The court held that there was no due process violation because the notice was reasonable calculated to apprise the nurse of the board's proposed action, particularly because the prior consent order was attached and references thereto were included in the notice.

# Sanctions

## *Lundeen v. State Medical Board of Ohio*

- ▶ Citation: 2013 Ohio 112; 2013 Ohio App. LEXIS 72
- ▶ Court: Court of Appeals of Ohio, Tenth Appellate District, Franklin County
- ▶ Disposition: Judgment affirmed.
- ▶ Decision Date: January 17, 2013
- ▶ Profession: medicine, doctor, physician
- ▶ Write-up: The Court of Appeals of Ohio affirmed the judgment of the lower court and found that the Board's use of certified mail to serve notice of charges on a physician, as opposed to registered mail, did not invalidate the subsequent actions it took against the physician's license, including permanent revocation of his license. The Board found that over a 24 year period, the licensee violated the standard of care with respect to 26 patients by the improper treatment and prescribing of controlled substances, among other offenses. The bottom line was that the term "registered mail" in state law includes certified mail and vice versa, and the licensee had no other claims it could argue.

# Sanctions

## ***Raines v. Louisiana State Nursing Board***

- Citation: 2012 1831 (La. App. 1 Cir. 07/06/12); 2013 La. App. Unpub. LEXIS 385
- Court: Court of Appeal of Louisiana, First Circuit
- Disposition: Affirmed.
- Decision Date: June 7, 2013
- Profession: Education
- Write-up: A Louisiana Court of Appeals affirmed the lower court and held that the Board's vote to permanently revoke nurse's license was lawful, that the Board properly considered evidence before it, and that the Board did not need to apply an adverse presumption to testimony due to intentional destruction of evidence. The Board summarily suspended the nurse's license after he was arrested for sexual battery of a patient. It then filed a formal complaint accusing him of patient abuse and other charges including incompetence by reason of negligence and moral turpitude. Following a hearing, the Board permanently revoked his license, ordered that he refrain from working in any nursing capacity, pay a fine of \$4,000 and costs of \$6,000. The licensee appealed to the lower court, arguing that because the Board's rules do not contain the number of votes required to discipline a license, the Board's revocation was unlawful. The Court disagreed, holding that neither the practice act nor the administrative procedures act mandated such a rule and that a majority of the Board members voting on the matter voted to revoke the license.  
Also, the Court rejected the licensee's motion seeking to exclude the testimony and written statement of an investigator with the District Attorney's office. The licensee argued that any statement he made to the investigator should not have been considered by the Board because the investigator failed to advise him of his constitutional rights before a confession occurred. The Court found that such *Miranda* rights were not applicable in a scenario where the licensee telephoned the investigator (a former co-worker and fellow church member) and spoke freely about the investigation.  
Last, the Court found no evidence to substantiate licensee's assertion that the investigator intentionally destroyed his handwritten notes of the telephone call for the purpose of depriving him of its use, particularly because he typed up more detailed notes beforehand.

# Sanctions

## *Schumer v. Lee*

- ▶ Citation: 2013 Mo. App. LEXIS 884
- ▶ Court: Court of Appeals of Missouri, Western District, Division Three
- ▶ Disposition: Reversed
- ▶ Decision Date: July 30, 2013
- ▶ Profession: Public Safety
- ▶ Write-up: A Court of Appeals in Missouri reversed the trial court and upheld the Director of the Dept. of Public Safety's decision to permanently revoke a peace officer's license after finding that he committed a criminal offense while on duty. A citizen filed a complaint with the Dept. alleging that the officer mistreated him during a traffic stop, a complaint that was supported by a second officer's testimony at the administrative hearing. The Administrative Hearing Commission found that the officer was subject to discipline and a "Director's Hearing" was conducted by the Deputy Director, where in the Deputy issued a decision adopting the Commission's findings of fact and permanently revoking the license. The officer appealed and the circuit court reversed. The Appellate Court held that state courts have repeatedly determined that the Commission is constitutionally able to determine whether a crime has been committed which subjects a professional licensee to discipline. Also, the officer's claim that the criminal statute of limitations expired prior to the administrative action was dismissed, given that underlying action was an administrative matter with a longer statutory period. Furthermore, the fact that the victim did not testify at trial did not deprive the Commission of substantial evidence, given that the victim was upset enough to file a complaint to begin with and another officer present during the incident testified at the hearing.

The officer also argued that the Director could not take action against his license without having first made findings of fact and conclusions of law to support the permanent revocation. The Court disagreed, holding that the Director has the discretion to make *additional* findings (beyond those of the Commission), but isn't required to. Lastly, the dentist claimed that the Deputy Director did not have the authority to conduct the hearing, but the Court held that such delegation from the Director is allowable, particularly since the officer did not object when the Deputy was conducting the Director's Hearing.

# Out of State Acts

## *Sharaf v. Bureau of Professional and Occupational Affairs, State Board of Medicine*

- ▶ Citation: 2013 Pa. Commw. Unpub. LEXIS 142
- ▶ Court: Commonwealth Court of Pennsylvania
- ▶ Disposition: Affirmed.
- ▶ Decision Date: February 20, 2013
- ▶ Profession: physician, medical doctor
- ▶ Write-up: The Commonwealth Court affirmed the Board's order reprimanding a physician for failing to disclose an out of state disciplinary action that occurred four years after his PA license expired. The Licensee moved to Arizona, practiced there and had no intention of returning to PA. His license was disciplined in AZ and the PA Board found him in violation of its practice act for failing to disclose the AZ action. The court expressed understanding of the licensee's arguments that he never had and never intended to practice in PA and that his license had expired years earlier after he finished a fellowship there. However, it recognized the Board's authority in imposing the reprimand, holding that the licensee still has a property interest in an expired license, therefore the Board has authority over such license.

# Reciprocal Discipline

## *Texas State Board of Pharmacy v. Witcher*

- ▶ Citation: 2013 Tex. App. LEXIS 5482
- ▶ Court: Court of Appeals of Texas, Third District, Austin
- ▶ Disposition: Affirmed
- ▶ Decision Date: May 3, 2013
- ▶ Profession: pharmacy
- ▶ Write-up: The Texas Court of Appeals affirmed the lower court and upheld a remand to the Texas board to determine the appropriate sanction against a Texas licensed pharmacist whose license in North Carolina was suspended for issues related to alcohol abuse. The Texas board, in keeping with previously articulated policy that a pharmacist with an active suspension in another state cannot practice pharmacy in Texas, determined an indefinite suspension against the Texas license pending the successful completion of rehabilitation program in North Carolina and reinstatement of practice privileges in North Carolina. The court held that such a policy was actually a rule in that it applied not just to the licensee at issue, but to all pharmacists licensed in more than one state. The court noted that the licensee was not seeking to evade compliance with the NC imposed sanction, but merely returned to Texas, her home state, upon the death of her husband.

# Reciprocal Discipline

## *Lundeen v. Kelly*

- ▶ Citation: 2013 U.S. App. LEXIS 1673
- ▶ Court: United States Court of Appeals for the Seventh Circuit
- ▶ State: IN Indiana
- ▶ Disposition: Affirmed.
- ▶ Decision Date: January 23, 2013
- ▶ Profession: doctor, medicine
- ▶ Write-up: The Seventh Circuit Court of Appeals affirmed the District Court and held that the Board had the authority to suspend a physician's license based on discipline in another state. The Board suspended a physician's license indefinitely after the Ohio board issued an emergency order summarily suspending his license to practice in that state following allegations that he was excessively and inappropriately prescribing narcotics and failing to perform medical exams. The licensee filed for injunctive relief challenging the constitutionality of the statutes used by the Board to revoke his license and requesting an injunction. He also claimed that the Board could not discipline licensee for out of state conduct if they did not receive their license through reciprocity. The District Court dismissed his claim and the Seventh Circuit affirmed, holding that he did not meet his burden of showing that he would suffer irreparable harm if his license was revoked, given that his employment history was spotty and his DEA registration had already expired. Also, he was unable to point to any provision of the practice act to support his argument that the method one uses to obtain a medical license in the state has any bearing on how the Board disciplines the individual.

# Reciprocal Discipline

## *Trimmier v. SC Department of Labor, Licensing and Regulation, State Board of Dentistry*

- ▶ Citation: 2013 S.C. App. LEXIS 179
- ▶ Court: Court of Appeals of South Carolina
- ▶ Disposition: Affirmed
- ▶ Decision Date: April 11, 2013
- ▶ Profession: Medical
- ▶ Write-up: The S. Carolina Court of Appeals affirmed the Administrative Law Court (ALC) and held that the Board acted within its authority when it granted a dentist's request for relicensure, conditioned upon his provision of written evidence that his Georgia license was in good standing. The dentist was licensed in multiple states and was previously disciplined in S. Carolina after being convicted of Medicare fraud. The S.C. Board of Dentistry (Board) entered into a consent agreement with which the licensee complied, but he subsequently moved to Georgia and ceased practicing in S.C.. Shortly thereafter, the Georgia board entered into a consent agreement with the licensee suspending his license when it discovered that he falsely indicated that he had never been convicted of a crime on his application for a sedation permit. Within a year, the Georgia board revoked the license when it discovered the dentist had performed sedation dentistry on a patient after the probationary sedation permit he was issued had lapsed. The dentist appealed the revocation and the circuit court ordered the Georgia board to lessen its sanction. The license was placed on indefinite suspension with opportunity for reinstatement after 2 years. The licensee instead voluntarily surrendered his license and moved to S.C. The dentist petitioned the Board for reinstatement in S.C., but his long absence mandated that he seek relicensure as his license had effectively lapsed. The Board issued an order that it would grant the license but only with written evidence that the dentist's licenses from Georgia, New York, and anywhere else he might be licensed were in good standing, whether active or inactive. The dentist appealed the order to the ALC which affirmed. The Court held that the Board had the discretion to condition licensure on a showing of good standing in other jurisdictions and it acted reasonably given the dentist's prior sanctions. While the dentist argued that he could not comply with the condition imposed, the Court found that he could apply for reinstatement in Georgia and that the burden of doing so did not make it impossible.

# Reciprocal Discipline

## *Oni v. Tennessee Dept. of Health & Tennessee Board of Medical Examiners*

- ▶ Citation: 2013 Tenn. App. LEXIS 467
- ▶ Court: Court of Appeals of Tennessee, at Nashville
- ▶ Disposition: Reversed in Part, Affirmed in Part and Remanded.
- ▶ Decision Date: April 11, 2013
- ▶ Profession: Physician
- ▶ Write-up: The Tennessee Court of Appeals upheld the grounds for the board to render reciprocal discipline (reversing the lower court) but remanded the matter back to the board to determine if revocation was appropriate sanction (affirming the lower court) of a physician found to have made false statements on his New York licensure renewal form. The physician was licensed in TN, GA, and NY. In 2003 he was subject to criminal charges in GA. And subsequently answered “no” to a NY renewal application that asked about criminal charges pending. The NY board disciplined the physician, in part for a previous TN discipline, as well as for false statements on his NY renewal (in spite of the fact that he was exonerated from the criminal charges). As a result of the NY revocation (and because part of the financial obligations of the 2007 TN sanction were not paid) the TN board revoked his license. On appeal, the court upheld the reciprocal discipline authority of the board, but reversed the revocation determination finding that the board may have merely “mirrored” the sanction of the NY board. Thus, the court reversed and remanded the matter back to the board to assess the sanction. The court upheld the previous imposition of administrative costs and assessed costs against the board/department for the appeal.

# Immunity

## *Alsager v. Board of Osteopathic Medicine and Surgery, Washington State Department of Health*

- ▶ Citation: 2013 U.S. Dist. LEXIS 32569
- ▶ Court: United States District Court for the Western District of Washington
- ▶ Disposition: Defendants' motion to dismiss is granted, this case is dismissed, and all other motions are stricken as moot.
- ▶ Decision Date: May 8, 2013
- ▶ Profession: physician, medicine
- ▶ Write-up: The U.S. District Court for the Western District of Washington dismissed the claims brought against the board, its members, and the state by a physician whose license was under investigation for claims related to inappropriate contact with a patient who he went on to have a personal and sexual relationship with. During the investigation, the licensee filed suit in federal court claiming that certain state laws were unconstitutional under the U.S. Constitution as applied to disciplinary proceedings that are "quasi-criminal actions of state government." The court dismissed the state and the board as defendants because they are protected by immunity principles. As for the individual board members, the court dismissed the claims against them because the disciplinary proceedings were ongoing, therefore the court will not intervene until such matter is complete and appealable.

# Open Records

## ***Texas State Board of Chiropractic Examiners v. Abbott***

- ▶ Citation: No. 03-11-00736-CV, 2013 Tex. App. LEXIS 566
- ▶ Court: Court of Appeals of Texas, Third District, Austin
- ▶ Disposition: Reversed and rendered.
- ▶ Decision Date: January 16, 2013
- ▶ Profession: chiropractic
- ▶ Write-up: The Texas Appellate Court reversed the trial court and held that certain documents in the Board's possession are exempt from disclosure under the state Public Information Act (Act). The Board received a request from an individual related to the individual's complaint against a chiropractor. The Board provided some of the requested documents, but withheld others on the basis that such were part of the Board's investigation file and therefore confidential and not subject to disclosure under the Act. The Board sought a declaration from the Attorney General's (AG) Open Records Division which issued a statement holding that while the contents of an investigation file are typically confidential, a provision of the Act allows a patient a special right of access to his or her own medical and chiropractic records. Therefore, the requesting individual's records were excepted from the investigation file privilege that the Board relied on in withholding such records. The Board filed suit against the AG and the trial court ruled that the AG acted properly. On appeal, however, the appellate court held that "because the investigation file privilege relied on by the Board is one intended to protect the integrity of the Board's regulatory process, rather than the requestor's privacy interests, the Board could withhold the [records] despite the special right of access that is statutorily granted to a requestor for his personal information held by a government body."

# Open Records

## *Johnson v. Broussard, Finalet and the Louisiana Board of Pharmacy*

- ▶ Citation: 2012 1982 (La. App. 1 Cir. 06/07/13); 2013 La. App. LEXIS 1175
- ▶ Court: Court of Appeal of Louisiana, First Circuit
- ▶ Disposition: Amended; Affirmed as Amended.
- ▶ Decision Date: June 7, 2013
- ▶ Profession: pharmacy
- ▶ Write-up: The Court of Appeals for the Fourth Circuit of Louisiana affirmed the lower court and ordered the Board to comply with a public records request made by the President of the state's Independent Pharmacy's Association (Johnson). The request was for disclosure of a list of pharmacies, their owners and addresses, permit numbers and more. The Board and Johnson communicated back and forth in response to his request, with the Board finally informing Mr. Johnson that such process of providing the documents with confidential information redacted would take as long as months to complete and requesting that he clarify his needs. Johnson filed for a writ of mandamus and the Board defended itself by claiming that the records sought did not exist (not contained in the format requested) and therefore not public records that could be produced. Alternatively, the Board argued that such production would be overly burdensome such that Johnson should be required to inspect them after hours and may be charged reimbursement fees. The Court held that simply because material requested may contain non-public records does not mean that access can be restricted, nor can the different format of information be interpreted to mean that such information does not exist. The Court ordered Johnson to reimbursement fees for the production not to exceed \$4,200 and ordered the Board to comply with the request and pay costs of \$1,360.

# Unlicensed Practice

## *Missouri Veterinary Medical Board v. Gray*

- ▶ Citation: 397 S.W. 3d 479; 2013 Mo. App. LEXIS 206
- ▶ Court: Court of Appeals of Missouri, Western District, Special Division
- ▶ Disposition: Affirmed
- ▶ Decision Date: February 19, 2013
- ▶ Profession: Veterinarian
- ▶ Write-up: Missouri Court of Appeals affirmed circuit court order enjoining the respondent from performing teeth floating/equine dentistry services in Missouri for compensation. The Respondent was not a licensed veterinarian and dentistry and drug administration are included in the statutory definition of veterinary medicine when applied to animals. The court recognized the right of the state to impose occupational regulations designed to protect the public welfare finding the legislature has a legitimate state interest in establishing a high level of competence in veterinarians. The court rejected the constitutional arguments of the respondent that such restrictions violated her right to work and pursue her chosen profession and that engaging in such acts, with or without compensation is unlawful.

# Unlicensed Practice

## *Cooksey v. Futrell*

- ▶ Citation: 721 F. 3d 226; 2013 U.S. LEXIS 13232
- ▶ Court: United States Court of Appeals for the Fourth Circuit
- ▶ State: North Carolina
- ▶ Disposition: Vacated and remanded
- ▶ Decision Date: June 27, 2013
- ▶ Profession: dietetics/nutrition
- ▶ Write-up: United States Court of Appeals for the Fourth Circuit vacated and remanded the District Court's dismissal of Plaintiff's First Amendment challenge to the North Carolina Board's enforcement of the dietetic/nutrition act enforcement against his website. Plaintiff operated a website promoting the "caveman" diet and other dietary and lifestyle advice. The Board warned Plaintiff of the practice act and unlicensed practice issues and Plaintiff modified his site. Thereafter, he filed suit arguing his First Amendment rights and the lower court dismissed the matter finding no harm to the Plaintiff. On appeal, the 4<sup>th</sup> Circuit vacated addressing the justiciability of the allegations or standing. It held the Plaintiff satisfied the threshold of injury in fact as the Board action had a chilling effect on Plaintiff's speech. With injury in fact met, the court noted Plaintiff easily satisfied the remaining 2 issues related to standing, causation and redressibility. The court also held the matter to be ripe as such an inquiry is inextricably related to standing. The court noted the relaxation of the standing and ripeness criteria when addressing First Amendment cases.

# Unlicensed Practice

## *Rawdon v. Tennessee Board of Medical Examiners*

- ▶ Citation: 2013 Tenn. App. LEXIS 715
- ▶ Court: Court of Appeals of Tennessee, at Nashville
- ▶ Disposition: Affirmed.
- ▶ Decision Date: October 30, 2013
- ▶ Profession: pharmacist
- ▶ Write-up: The Court of Appeals of Tennessee affirmed the lower court and remanded back to the Board of Medical Examiners the civil penalty imposed upon a pharmacist for practicing medicine and naturopathy without a license. The Board originally levied a civil penalty of one million dollars and the matter was remanded back to the Board. Upon review, the Board noted over 12,000 incidents of unlicensed practice and then imposed civil penalty of \$6,355,000 (\$500 per occurrence). Again on appeal, the court of appeals determined that the number of incidents was not appropriately calculated in that the evidence did not support that number. Further, the court noted that the Board did not cite the factors for determining the penalty as set forth under Tennessee law.

# Civil Forfeiture

## *\$132,265.00 in U.S. Currency v. The State of Texas*

- ▶ Citation: 2013 Tex. App. LEXIS 7121
- ▶ Court: Court of Appeals of Texas, First District, Houston
- ▶ Disposition: Affirmed.
- ▶ Decision Date: June 11, 2013
- ▶ Profession: pharmacy
- ▶ Write-up: Texas Court of Appeals affirmed lower court and upheld civil forfeiture judgment against a pharmacist for \$132,265 as proceeds from activities related to dispensing of controlled substances (hydrocodone and Xanax) without a valid medical purpose. Law enforcement set up a sting operation based upon a confidential informant and secured the purpose of significant tablets of hydrocodone and Xanax. With search warrants, \$132,265 was found in the pharmacist's home that was the eventual target of a civil forfeiture proceeding. The court outlined the tests for forfeiture and how currency is determined to be contraband.

# Exam Attempts

## *Jenkins v. Missouri Veterinary Medical Board*

- ▶ Citation: 397 S.W.3d 54; 2013 Mo. App. LEXIS 492
- ▶ Court: Court of Appeals of Missouri, Western District, Division One
- ▶ Disposition: Affirmed
- ▶ Decision Date: April 23, 2013
- ▶ Profession: Veterinarian
- ▶ Write-up: Missouri Court of Appeals affirmed trial court decision and upheld Administrative Hearing Commission decision to deny her application for licensure by reciprocity based upon failed exam attempts. The applicant was licensed in two other states, but had failed the licensure examination on four occasions, passing it on the 5<sup>th</sup> attempt. The court rejected arguments related to the failure of the reciprocity statute to specify a limit on exam attempts, due process, and statutory interpretation. The judicial opinion cites a memorandum provided to all parties and does not contain the analysis of the arguments.

# Statute of Limitations

## *Alabama Board of Examiners of Psychology v. Hamilton*

- ▶ Citation: 2013 Ala. Civ. App. LEXIS 214
- ▶ Court: Alabama Court of Appeals
- ▶ Disposition: Reversed.
- ▶ Decision Date: September 27, 2013
- ▶ Profession: Psychology
- ▶ Write-up: Alabama Court of Appeals reversed circuit court and reinstated discipline rendered by the Board to a psychologist for boundary acts that occurred more than 28 years ago. After entering a stay on the sanctions, the circuit court reversed the Board action finding that the rule of repose and/or the statute of limitations barred the administrative action. The court of appeals reversed the circuit court holding that the defense of laches was not substantiated by the licensee who argued destruction of records and witness credibility. It noted that the voluminous administrative record that does exist leads the court to conclude that “it was not too late to ascertain the merits of the controversy.” Further, the court found that the rule of repose is a creature of common law and that failure to apply the doctrine cannot be held to be an error of law, the standard by which appellate review is judged. Finally, the rejection of the common law rule of repose did not implicate any constitutional due process rights. Thus, the court of appeals reversed the lower court and reinstated the Board sanctions.

# Antitrust

## *The North Carolina State Board of Dental Examiners v. Federal Trade Commission*

- ▶ Citation: 2013 U.S. App. LEXIS 11006
- ▶ Court: United States Court of Appeals for the Fourth Circuit
- ▶ State: NC North Carolina
- ▶ Disposition: Petition denied.
- ▶ Decision Date: May 31, 2013
- ▶ Profession: dentistry, dentist, teeth whitening
- ▶ Write-up: The 4<sup>th</sup> Circuit Court of Appeals affirmed the FTC administrative ruling against the North Carolina State Board of Dental Examiners and held that Board, as a self governing agency made up of practitioners elected by the licensees is a “private” entity and was not entitled to antitrust immunity. The FTC alleged that the position taken by the Board finding that teeth-whitening was within the scope of practice and, thus, limited to licensed dentists was anti-competitive. The court held that the Board was required to meet both prongs of the test for private actors to enjoy immunity from antitrust liability. The prongs include both a clearly articulated state policy *and* sufficient oversight by the state. The court noted the oversight by the state was not sufficient to justify immunity from antitrust scrutiny.

# Antitrust

## *FTC v. Phoebe Putney Health Systems, Inc.*

- ▶ Citation: 133 S. Ct. 1003; 185 L. Ed. 2d 43; 2013 U.S. LEXIS 1064; 81 U.S.L.W. 4075; 2013-1 Trade Cas. (CCH) P78,269; 24 Fla L. Weekly Fed. S 8
- ▶ Court: U.S. Supreme Court
- ▶ Disposition: Reversed
- ▶ Decision Date: February 19, 2013
- ▶ Profession: Hospital
- ▶ Write-up: The United States Supreme Court reversed the 11<sup>th</sup> Circuit Court of Appeals and overruled the “foreseeability test” previously used to substantiate state actor immunity from the antitrust laws in a case involving a state hospital in GA acquiring the only other county hospital. The FTC alleged anticompetitive activity and the District Court dismissed the case and the 11<sup>th</sup> Circuit agreed. In reversing, the Supreme Court narrowed the state action defense test to asking whether the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. The court also emphasized that state action immunity is disfavored.