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Message from the Chair

James F. Horan

In my column for this issue of the *Government, Law and Policy Journal*, I'll discuss the subject matter of the issue, some recent and upcoming education programs the Committee on Attorneys in Public Service (CAPS) has conducted or will conduct, the most recent CAPS Award for Public Service, an update on a case discussed widely in the previous issue of the *GLP Journal*, the appreciation that CAPS feels for our NYSBA Staff Liaison, and a transition in the *GLP Journal*'s leadership.

"In this issue, the GLP Journal *focuses on the diverse administrative regulatory and hearing systems through which New York State regulates professions and certain occupations. . . . The variations within the disciplinary systems can be confusing or intimidating."*

Policing the Professions: In this issue, the *GLP Journal* focuses on the diverse administrative regulatory and hearing systems through which New York State regulates professions and certain occupations. New York disciplines attorneys and judges through administrative processes in the Office of Court Administration, physicians through the Department of Health, and other licensed professionals through the Board of Regents and the State Education Department (e.g., accounting, engineering, nursing, dentistry, architecture). The Department of State handles licensing and disciplining of a number of occupations, such as real estate agents and appraisers; private investigators/security; barbers/cosmetologists; and hearing aid dispensers. The State Education Department certifies teachers in New York, but most teacher disciplinary hearings take place at the school district level, with some limited appeals to the Commissioner of Education.

I've worked in the physician disciplinary system for fourteen years as an Administrative Law Judge at the Health Department, with responsibility for the administrative appeals process at the end of the physician disciplinary hearings. My colleagues at the Health Department conduct the physician disciplinary hearings and sit with a hearing panel from the Board for Professional Medical Conduct, which renders final decisions in the hearings. A similar system exists for professional disciplinary cases at the Education Department, although the decisions in those hearings constitute recommended decisions to the State Board of Regents. My colleagues at the Health Department and I also conduct hearings in which we make findings and recommended decisions in cases involving licensed nursing home administrators, emergency medical technicians and vendors in the Special Supplemental Food Program for Women, Infants and Children (WIC). That hearing model exists in other professional disciplinary agencies in which administrative law judges or hearing officers make recommended decisions to a final administrative decision maker, such as the Appellate Division, an agency commissioner, or a regulatory board. The rules for each system differ and the rules may also differ within an agency that conducts different categories of administrative hearings.

The variations within the disciplinary systems can be confusing or intimidating. I hope that this issue of the *GLP Journal* will impress upon any attorney new to professional disciplinary practice the need for preparation in the rules and hearing models that exist in the practice before the relevant agencies. Counsel should never assume that they have adequate preparation because they litigate in the civil or criminal courts.

In addition to the information about professional regulation in this issue, NYSBA Sections and Committees also conduct continuing education programs on administrative hearings relevant to the work of the Sections or Committees. One of the CAPS Sub-Committees plans such a program in the near future.

Educational Programs: The CAPS Administrative Law Judge Sub-Committee is currently planning a statewide continuing education program on New York Administrative Law, with general information on administrative hearings, but with emphasis on administrative hearings in agencies with high profile and/or high volume hearings. I thank the Sub-Committee's Chair James McClymonds and the Sub-Committee's Members for the work they are undertaking. Further information on this program will appear in the next issue of the *GLP Journal* and on the CAPS page on the NYSBA Web Site.

In addition to that upcoming program, CAPS provides continuing education on various other subjects relevant to government policy and government agencies. At the NYSBA Annual Meeting this past January, the CAPS Education Sub-Committee presented a full day continuing education program. In the morning ses-

sion, a discussion took place on civil liberties in the era of terrorism. The members of the distinguished panel were: United States District Judge Shira Scheindlin; and Law Professors Susan Herman of Brooklyn Law; Erwin Chemerinsky of Duke; William Banks of Syracuse; and John Eastman of Chapman University. In the afternoon, we offered concurrent programs. In one program, Professors Herman and Chemerinsky presented their well-received and now annual round up on the previous year's decisions from the United States Supreme Court. The other afternoon session dealt with Current Issues in Procurement Law, Lobbying and Ethics. The CAPS Vice-Chair, Professor Patricia Salkin, chaired this session and made the Ethics presentation. Former CAPS Chair Barbara Smith moderated a panel on Procurement Law with attorneys Anne Phillips and Lisa Fox from the New York State Office of General Services. Barbara also moderated a panel on Lobby Law reform that included States Lobbying Commission Executive Director David Grandeau and attorneys James Featherstonhaugh of Featherstonhaugh, Wiley and Clyne in Albany and Stephen Younger from Patterson, Belknapp, Webb and Tyler in New York City.

I'd like to thank Patty Salkin and Barbara Smith for their work in planning the Procurement Law, Ethics and Lobbying session. I'd also like to thank Donna Case for chairing the morning session and Jim Costello for chairing the Supreme Court session.

For the past several years, CAPS has presented some of the most interesting and informative programs at the NYSBA Annual Meeting. The CAPS Annual Meeting Program began through the efforts of CAPS Member Marjorie McCoy. We owe Marge our gratitude for all her work in establishing and producing the Meeting Program.

Award: In addition to the Program at the Annual Meeting, CAPS also presents our annual Award for Excellence in Public Service. This year CAPS named co-recipients of the Award: our colleague Robert Freeman from the Committee on Open Government at the New York Department of State and Walter Mugdan from the United States Environmental Protection Agency. The NYSBA President Ken Standard presented the Award at a reception at the Marriott Marquis in the evening following the program. The evening provided a celebration of attorneys who work in public service, with emphasis on the distinguished careers of our two very worthy recipients.

Update: In the *GLP Journal*'s prior issue on Gaming and the Law, several authors wrote about Chapter 383 of the Laws of New York, 2001, a statute authorizing the State of New York to enter into compacts with New York Indian Tribes to operate casinos, to participate in the Mega Millions multi-state lottery, and to license the operation of video lottery terminals at certain pari-mutuel racetracks. As the prior issue went to press, a legal challenge to Chapter 383 was about to be argued before the New York Court of Appeals. Within the last month, the Court of Appeals, in a split decision, held that the New York Constitution permitted the Indian Casino Compacts, the participation in Mega Millions, and the provisions on Video Lottery Terminals. (*See Dalton v. Pataki*, __N.Y.3d__ [May 3, 2005]). Press coverage following the decision indicated that the statute's challengers were considering an appeal to the United States Supreme Court to review the provisions in Chapter 383 authorizing the Indian Casino Compacts.

Staff Liaison: The Chair's columns in the *GLP Journal*, both by my predecessors and myself, tend to devote a great deal of space to saying thank you to the people who help advance the Committee's work, run programs and contribute to this journal. I assume that all the other NYSBA Committee or Section Chairs also spend a good deal of their time saying thank you to essential people who make the Committees or Sections successful. I am sure that any Committee or Section Chair will tell you that a person essential to the Section's or the Committee's work and success is the NYSBA Staff Liaison assigned to the Committee or Section. As that is true for NYSBA in general, it is especially true for CAPS. Since the Committee's inception, we have been extremely fortunate that Patricia Wood, the NYSBA Membership Director, has served as our Staff Liaison. Everything CAPS does and everything that I do as Chair depends in large part on Pat's talent, hard work, diplomacy and skill. I don't take enough time in saying my thank yous, to thank Pat and her staff, especially Maria Kroth, for all that they do to make CAPS such a successful Committee and to help me as Chair.

Transition: This marks the final *GLP Journal* issue for which Professor Vincent M. Bonventre will serve as the Editor-in-Chief. Vin has served as the Editor-in-Chief since the *GLP Journal*'s inception and he has built it into the successful and respected publication that it has become today. The *GLP Journal* is second in circulation only to the State Bar *Journal* itself in journals published by the NYSBA. We thank Vin for all he has done to establish and advance the *GLP Journal*. Despite the many demands on Vin's time, he has agreed to remain on the Editorial Board and he will receive recognition hereafter as the *GLP Journal*'s Founding Editor-in-Chief. With his assistance, the *GLP Journal* will continue as an outstanding publication.

Hon. James F. Horan, Chair of the NYSBA Committee on Attorneys in Public Service, serves as an Administrative Law Judge with the New York State Department of Health. He is a past President of the New York State Administrative Law Judges Association.

Editor's Foreword

By Vincent Martin Bonventre

Vincent M. Bonventre

Medicine and law, the ancient professions. Teachers, architects, engineers, accountants, notaries, real estate brokers, private investigators, bail enforcers, cosmetologists, and a host of others constitute the modern list of occupations that share the attributes that mark a profession. Among those attributes are standards for licensure, a code of regulations, enforcement and discipline. This issue of the *Government, Law and Policy Journal* is devoted to exploring the licensing and regulating of professions by government agencies, including a look at the investigation and prosecution of disciplinary complaints, the characteristics of the relevant administrative hearings, and the special rules and difficulties involved in licensure and disciplinary litigation.

"This issue of the Government, Law and Policy Journal *is devoted to exploring the licensing and regulating of professions by government agencies . . ."*

Donald Berens, General Counsel of New York State's Health Department and a previous *GLP* contributor, weighs in on the discipline of physicians. He provides an enlightening overview of the entire process, including some historical and comparative context. Elizabeth Dears Kent, Counsel to the Division of Governmental Affairs at the Medical Society of the State of New York, takes us through the maze of government agencies that regulate the medical profession. From licensing to narcotics enforcement to Medicaid and insurance fraud control, to patient reporting and tracking, etc., she makes a strong case that there is a "plethora of public entities" overseeing the conduct of physicians.

Turning to attorneys, David Edmunds, who is the Chief Counsel for the Attorney Grievance Committees of New York's Fourth Appellate Division Department, outlines the state's measures for insuring the competence and character of members of the bar. He guides us through the governing codifications, enforcement agencies and procedures, and he reminds us of the overriding duties and responsibilities of attorneys, the enforcement and fulfillment of which is ultimately what justifies the profession's self-regulation. Barbara Smith, the Executive Director of New York's Law Assistance Trust, as well as a former Chair of the Committee on Attorneys in Public Service and a continuing member of the *GLP* Board, addresses alcohol and drug abuse in the legal profession and the assistance afforded in the state by the Bar Association's Lawyer Assistance Program. She reviews the operation of LAP in New York, the activities of the American Bar Association in encouraging such programs, and she urges use of LAP as a valuable resource for lawyers, their families and friends, and law firms.

Dana L. Salazar

Bruce Stuart, an Associate Counsel with New York's Department of State, looks at the department's oversight of more than thirty different professions and occupations. He focuses on complaint hearings and surveys the relevant statutes and regulations and the complaint process from consumer filing through investigation, review and hearing, to administrative disposition and judicial review. Two articles that follow provide valuable guidance and insight for attorneys representing clients in professional licensure and misconduct litigation. Dennis Spillane, who serves as Prosecuting Attorney for the Office of Professional Discipline of New York's Education Department, takes us step-by-step through the process of professional misconduct litigation in that department which regulates twenty-eight licensed professions. Several thousand cases are processed each year by the Education Department. Attorneys representing professionals regulated by that department must, of course, be familiar with the applicable administrative process. Brian Bégué, a solo practitioner who has spent a career litigating in administrative proceedings involving professional licensure and is currently the Chair of the Louisiana Bar Association's Administrative Law Section, offers some suggestions for attorneys representing clients whose license is at risk. His recommendations range from the formally legal to the extremely practical and politic.

The two remaining articles offer provocative insights into two very different yet equally difficult problems that have been receiving increased attention. Alan Bayer, Professor of Sociology at Virginia Tech Uni-

versity, and John Braxton, Professor of Education at Vanderbilt, tackle the question of faculty misconduct in the classroom. Particularly, they provide a prescription for addressing and deterring the in-class misbehavior of faculty that have contributed to the apparent "surge" in the same by students. Robert Felton, a partner at McGuire Woods, LLP in Chicago, zeroes in on "rogue" medical experts. He urges the medical profession to adopt concrete disciplinary measures to deal with physicians who sell—and fashion—their testimony to the highest bidder.

Like every preceding issue of the *Government, Law and Policy Journal*, this one reflects the efforts and contributions of a host of people. In addition to our authors, the student editors are most responsible for what is good about this issue. They did the tedious work that insures that each article is ready for publication. Dana Salazar, this academic year's student Executive Editor, supervised all their work; she has been extraordinary the entire year and, because she has graduated while publication of this issue was pending, she will be missed. Shortly, she will be clerking for Judge Susan Read of the New York Court of Appeals—her judge and the court will be the next beneficiaries of Dana's uncommon intelligence, competence, dedication, loyalty and friendship. I must also mention my Albany Law School colleagues, Patty Salkin and Rose Mary Bailly; the *GLP* Board; Pat Wood and the publication staff at the Bar Association—they have, once again, contributed indispensably.

* * *

This is my final issue as *GLP* Editor-in-Chief. It has been six years and it is time to move on—a conclusion I am confident is sound, despite my inevitably mixed feelings. I will always be grateful to the members of the Board, to CAPS, and to the Bar Association itself for listening to my proposal nearly seven years ago to establish a *Government, Law and Policy Journal*, and for their decision to sponsor and fund it and permit me to serve as Editor-in-Chief. I also want, one more time, to thank our student editors over the years; my Associate Editors, Patty and Rose Mary; and Pat Wood at the Bar Association, together with Lyn Curtis, Wendy Pike, and Pat Stockli of the publication staff, who have done such magnificent work with each issue. Despite leaving my current position, I am very pleased that I will remain with *GLP* as a member of the Board and thus will continue to work with such wonderful professionals.

Finally, I think we have created a superb product. Indeed, in all candor and modesty, I believe the *GLP Journal* is one of the premiere bar publications in this state and across the country. I am particularly proud of issues such as "Religion and the Law," "Judicial Selection," "Corporate Accountability" and "Ethics for Government Lawyers," where we tackled controversial issues head on. We did so from multi-disciplinary perspectives, and our authors and their viewpoints were ideologically and geographically diverse. I hope that the effort will be made to insure that the *GLP Journal* remains true to that tradition.

Vincent Martin Bonventre, Editor-in-Chief of the *Government, Law and Policy Journal*, is a Professor of Law at Albany Law School. He received his law degree from Brooklyn Law School and his Ph.D. in government from the University of Virginia. He is also the Editor of the annual *State Constitutional Commentary* and Director of The Center for Judicial Process.

Dana L. Salazar, Albany Law School class of 2005, was the Executive Editor of the *GLP Journal* for the 2004-2005 academic year. She worked for 15 years in business management prior to law school, where she was an Associate Editor of the *Albany Law Review*.

Discipline of Physicians in New York

By Donald P. Berens, Jr.

This article presents a general overview of the procedures of the New York State Department of Health for the professional discipline of physicians. This article also compares these procedures to those for the discipline of other health care professionals in New York, as well as to the procedures in other states for physician discipline.

History of New York's Physician Discipline Process

Most health care professionals are licensed and disciplined by the State Education Department (SED) pursuant to procedures similar for all such professions.[1] SED used to discipline physicians, but it no longer performs this function. Instead, the New York State Department of Health (DOH) now disciplines physicians pursuant to unique statutory procedures.[2] SED continues to license them. The definitions of professional misconduct applicable to physicians continue to be found in the Education Law.[3]

"Fifteen years of experience showed that the use of multiple reviews and divided responsibility between SED and DOH caused undue delay and expense to all involved. It also diminished public accountability, and threatened the integrity, quality and substance of the ultimate decision."

The SED Office of Professional Discipline (OPD) investigates cases of reported professional misconduct. If, after consultation with a member of the board for the profession of the licensee under investigation, OPD believes further proceedings are warranted, it will arrange for counsel to serve a Statement of Charges (SOC) and Notice of Hearing (NOH). In contested cases, any hearing is conducted before a panel of at least three board members. These panels include professional members and the hearings are made on a stenographic record. At this time, the licensees are entitled to appear personally or be represented by an attorney. They are entitled to cross-examine witnesses and examine the evidence offered by the State, and to produce witnesses and evidence. The panel is not bound by the rules of evidence. Its determination of guilt must be based on a preponderance of the evidence. The panel makes findings of fact and a determination of guilty or not guilty on each charge. If the determination is guilty, the board will offer a recommendation of penalty.[4]

The hearing panel report is reviewed at a meeting of a Regents Review Committee (RRC) at which the licensee may appear, personally or by counsel, as of right or by requirement of the RRC. Next, the Board of Regents (BOR) considers the transcript and the reports of the hearing panel and the RRC, decides whether the licensee is guilty or not guilty on each charge, and decides what statutory penalties, if any, to impose.[5] Decisions of the Board of Regents may be reviewed pursuant to CPLR Article 78.[6]

Physicians used to be subject to the same SED procedures applicable to other health professions, but no longer. Beginning in 1975, separate procedures were created for physicians.[7] A Board for Professional Medical Conduct (BPMC) was created within DOH. BPMC committees of four physicians and one lay member, assisted by DOH staff, investigated cases of suspected professional misconduct. If the committee determined that a hearing was warranted, an SOC/NOH would be served and a hearing conducted before a different BPMC committee. The hearing committee's report was sent to the Commissioner of Health (COH) whose recommendation in turn was sent to the BOR for final administrative determination.

Fifteen years of experience showed that the use of multiple reviews and divided responsibility between SED and DOH caused undue delay and expense to all involved. It also diminished public accountability, and threatened the integrity, quality and substance of the ultimate decision. A bill to expedite the disposition of cases and increase public health protection without jeopardizing the ability of physicians to contest charges against them was enacted in 1991.[8] Reviews by the RRC, the BOR and the COH were eliminated. Final administrative responsibility for discipline of physicians[9] was committed to the BPMC by its Investigation Committees (ICs), Hearing Committees (HCs) and Administrative Review Board (ARB). Procedural protections were guaranteed by the amended Public Health Law, the State Administrative Procedure Act, DOH regulations, and case law interpreting the constitutional requirements of due process.[10] From time to time, addi-

tional procedural protections (some of those unique to physicians) have been added, notably in 1996.[11]

Comparison of New York Discipline of Physicians with Discipline of Other Health Professionals in New York and of Physicians in Other States

General Matters

Professional discipline by DOH of New York physicians, physician assistants and specialist assistants shares many characteristics with discipline by SED of other professionals, including other health care professionals, such as nurses, chiropractors, dentists, physical therapists, pharmacists, midwives, podiatrists, optometrists, and others. However, there are some differences.

Discipline of physicians, etc., is overseen by the BPMC and DOH staff in the Office of Professional Medical Conduct (OPMC) pursuant to Public Health Law (PHL) §§ 230 to 230-c. Discipline of nurses, etc., is overseen by the BOR assisted by a board for each profession and SED staff in OPD. For both groups, professional misconduct is defined in the Education Law, at Articles 131-A (§§ 6530 to 6532) and 130 (§§ 6509 to 6509-c), respectively.

Neither the Commissioner of Education, the BOR, nor the COH may promulgate rules or regulations concerning the definitions of misconduct applicable to physicians.[12] Thus, there is no code of professional conduct or standard of practice set forth in regulation. Instead, the standard of medical practice is determined on a case-by-case basis, in consultation with appropriate experts, by OPMC investigators and, if a case is to proceed to charges, by BPMC panels composed mostly of physicians assigned to particular cases. This enables DOH to keep pace with developments in medicine better than would be possible under a regulatory code of professional practice.

Both DOH and SED must investigate all complaints received, and are permitted to consult experts on issues of professional expertise or clinical practice.[13] Any statement of charges must set forth the alleged misconduct and the material facts, but not the evidence, by which the charges will be proved.[14]

In both processes, the licensee is entitled to a hearing on the charges on a stenographic record. He or she may appear personally or by an attorney, cross-examine the witnesses and examine the evidence offered by the State and produce witnesses. The rules of evidence are not binding, and the standard of proof is a preponderance of the evidence.[15] The preponderance of evidence standard for proof of physician misconduct is used in most United States jurisdictions. A significant minority of them require the misconduct be proven by clear and convincing evidence, and a very small minority requires proof beyond a reasonable doubt.[16]

Both processes offer the licensee a form of administrative review of the initial decision or recommendation, at which the licensee may again appear.[17] In both forums, there are alternate procedures for minor or technical violations, or for charges based on the conviction of crimes, out-of-state professional discipline, or imminent danger to the health of the people.[18] Possible penalties for misconduct established after contested hearings include censure and reprimand, revocation, annulment or limitation of the license, retraining, public service, and fines.[19] It is also possible to impose suspension of a license, in whole or in part, with or without certain conditions, to stay penalties, or to impose probation.[20]

Board Composition

Admission to and regulation of the professions is supervised by the BOR and, except for discipline of physicians, administered by SED and assisted by a state board for each profession.[21] Those boards must each include at least one "public representative," defined as a person who is a consumer of the services provided by those regulated by the respective board, and who shall not be, nor within five years have been, a person either subject to the board's regulation or a major contractor of such a licensee.[22]

Physician discipline is overseen by the BPMC and OPMC. The BPMC consists of over 165 members about two-thirds of whom are physicians appointed by the COH or the BOR.[23] It is the largest board of its kind in the world.[24] By law, any BPMC committee on professional conduct "shall consist of two physicians and one lay member."[25] Since there is no statutory definition of "lay member," and the statute makes a simple distinction between physicians and lay members, the most logical view of the distinction is between those who are physicians and those who are not. Therefore, the Court of Appeals has held that a physician's assistant may serve as the lay member of a committee hearing charges of misconduct against a physician or other licensee subject to BPMC jurisdiction.[26]

Investigation and Preliminary Review

Similar to SED (by OPD), the BPMC (by OPMC) may investigate on its own any suspected professional misconduct and must investigate each received complaint.[27] In a typical year, OPMC receives about 6,650 complaints.[28] Also, OPMC must make a preliminary review of certain required reports made to DOH by hospitals, physicians, medical malpractice liability insurance carriers, and health maintenance organiza-

tions to determine if those reports warrant further investigation.[29]

Most complaints received by OPMC come from the public (57%), government agencies (16%) and out-of-state disciplinary boards (12%); only 2% come from physicians.[30] Complaints from the last three sources lead to referral for charges more often than those from the first.

After appropriate review or investigation, OPMC closes the vast majority of these matters, either because it lacks jurisdiction, or because the allegations—even if credited—do not indicate misconduct, or because the credible facts do not support a charge. OPMC presents about 600 cases per year to ICs of the Board. For minor or technical violations, or for substandard medical practice which does not constitute professional misconduct (for example, a single instance of negligence or incompetence, which is not gross), if the IC concurs, OPMC arranges for a confidential administrative warning or consultation with one or more experts.[31] Such consultation is often used when OPMC and the IC have reason to believe that the licensee may be impaired by alcohol, drugs, physical disability or mental disability.[32] If an IC concurs that a hearing is warranted, OPMC refers it to the DOH Division of Legal Affairs to prepare charges and prosecute them at a hearing.[33] With IC concurrence, OPMC refers about 360 cases per year for charges and hearings. Nearly 300 of those are settled on consent without the completion of a hearing.

Whether on settlement or after hearing, BPMC annually issues about 140 administrative warnings and takes about 330 other disciplinary actions.[34] The most common grounds for final disciplinary actions are: negligence or incompetence (30%); fraud (20%); practice while impaired (11%); failure to keep adequate records (9%); sexual misconduct (8%); and inappropriate prescribing (6%).[35] The most common specialties of licensees disciplined are: internal medicine (21%); surgery (16%); family practice (14%); psychiatry (11%); obstetrics-gynecology (7%); and anesthesiology (6%). Physician assistants comprise about 4% of the cases of final disciplinary action by the BPMC.[36]

Before OPMC presents a case to an IC, it must offer the licensee, who may have counsel present, an opportunity to be interviewed in order to provide an explanation of the issues under investigation. OPMC must give written notice to the licensee of issues identified after the interview; the licensee may submit written comments or expert opinion to OPMC at any time.[37] SED need not do so. These interview rights appear to be unique in the United States and among New York health care professionals.

The PHL requires that an IC be convened within 90 days after the interview.[38] The physician may enforce this or other time limits in a CPLR Article 78 proceeding if the failure to comply was not caused by the physician. Without a showing of prejudice, any due process claim arising from a delay in convening an IC must fail.[39]

In both SED and DOH, there is some peer review of the investigation before a licensee may be charged. Before a licensee may be charged, the SED professional conduct officer must consult with a single professional member of the applicable board, while OPMC must obtain the concurrence of a majority of an IC, which includes two physicians, and must consult with the BPMC's executive secretary, who must be a physician.[40]

At any time, if the BPMC or OPMC determines that "there is a reasonable belief that a criminal offense has been committed by the licensee," it shall notify "the appropriate district attorney."[41] DOH has interpreted this to require the report of reasonably suspected felonies and misdemeanors, but not violations, to the appropriate prosecutor, even if it is not a district attorney. This is without necessarily waiting until the completion of a DOH investigation or resolution of the administrative case.

Charges, Hearings and Disposition of Contested Matters

In cases charging negligence or incompetence in the practice of medicine by a specialist physician, OPMC often includes on the hearing committee a physician practicing in the same specialty; however, it is not required to do so. Although OPMC is permitted to consult non-conventional medical experts in its investigations of the clinical practice of non-conventional physicians, it is not required to do so.[42] Notwithstanding the difference in treatment regimens between conventional and unconventional medicine, all licensed physicians are held to the same basic standards of care which, among other things, require the physician to obtain an adequate medical history, perform and document an adequate physical examination, form and document an accurate initial and working diagnosis, document adequate medical indications for any prescribed medications, and maintain accurate medical records.[43]

Nurses, etc., must receive at least fifteen days' notice of a hearing on charges, while physicians, etc., are entitled to at least twenty days' notice.[44] Physicians are required to file a written answer prior to the hearing; nurses are not.[45] Licensees subject to DOH discipline have statutory time limits, extendable for good cause, on the periods between service of the statement of charges and the commencement of the hearing,

between the first and last days of the hearing, and between the last day of hearing and the decision, while SED discipline has no such limits.[46] A licensee may seek a judicial stay or dismissal for failure to comply with PHL time limits, but relief may be granted only if the failure was not caused by the licensee and has caused substantial prejudice to the licensee.[47]

New York's use of a panel of board members (including two physicians and one lay member of the BPMC), assisted by an administrative officer (who does not vote), convened for a particular case (to determine charges of physician misconduct), coupled with administrative review by the ARB (including three physicians and two lay members of the BPMC), is at least rare and perhaps unique among United States jurisdictions. Most states use some combination of a hearing officer and full board which may or may not include physicians.[48]

Administrative review procedures differ for SED and DOH discipline. The hearing panel in SED cases cannot be the final decision-maker; it sends a recommendation to the RRC and the BOR.[49] In a DOH case, the hearing committee can be the final decision-maker, but the licensee may appeal to the ARB; moreover, OPMC may appeal to the ARB.[50]

Penalties

The penalties which the BPMC may impose for misconduct are set forth in statute. They include suspension of license, either wholly or partially, but only for a fixed period of time, for a specified period, or until the licensee completes a course of retraining, therapy, or treatment.[51] Thus, the BPMC is not permitted to suspend a physician's license until he submits to a comprehensive medical review (CMR), or until 60 days after she submits to a CMR.[52]

Although many penalties are available both to the BOR for nurses, etc. and to the BPMC for physicians, etc., there are two forms of license suspension available only to the BPMC. The BPMC may suspend a license: wholly except to the limited extent required for the licensee to complete a course of retraining; or partially for a specified period.[53] Also, while the Regents may require a licensee to perform up to 100 hours of public service, the BPMC may impose up to 500 hours.[54] After three years, the BOR may restore a license which has been revoked, even a license revoked not by the BOR, but by the BPMC.[55] For licensees subject to PHL § 230, the Regents must notify the OPMC that they are considering restoration.[56]

Most of the penalties available to the BPMC for discipline of physicians are widely available to virtually all the comparable bodies in other United States jurisdictions. Only a minority use private reprimands or in person administrative warnings as New York does. A majority permit letters or decrees of censure and collection of the costs of the proceedings, which New York does not.[57]

Publication of Final Administrative Decision

The Court of Appeals in 1993 interpreted the PHL to require that disciplinary proceedings brought against physicians must remain confidential until finally determined.[58] Last year, it held not only that where proceedings are decided in a physician's favor the requirement of confidentiality continues after the determination, but also that where proceedings produce a mixed result, DOH has discretion to decide whether its published records should be redacted to keep material relating to charges that were not sustained confidential.[59] That discretion may be exercised after consideration of: the extent to which public knowledge of the dismissed charges would aggravate damage to the physician's reputation that is done when the sustained charges are publicized; the administrative difficulty of redaction; the importance of making the proceedings that resulted in discipline comprehensible to the public; the relationship of the charges dismissed to those sustained; and their relative severity.[60]

Conclusion

Professional discipline of physicians, physician assistants and specialist assistants is unique in New York. It is handled, not by SED, but by DOH which has considerable expertise, not only in medicine, but in the oversight of the environment where medicine is practiced. It includes more peer review and more procedural due process protection than discipline of other health care professions. It protects not only the public's health, but the physician's privilege to practice medicine as well.

Endnotes

1. New York Education Law, Title 8 (Articles 130 to 166, §§ 6500 to 8709).
2. New York Public Health Law, Article 2-A (§§ 230 to 230-c).
3. New York Education Law, Article 131-A (§§ 6530 to 6532).
4. New York Education Law §§ 6510(1), 6510(3).
5. New York Education Law §§ 6510(4), 6511.
6. New York Education Law § 6510(5).
7. L. 1975, ch. 109, §§ 28-35.
8. Memorandum of State Executive Department on L. 1991, ch. 606.
9. The definition at New York Public Health Law § 230(7) of licensees subject to DOH discipline is broader than physicians, notably including physician assistants and specialist assistants, among others. However, for simplicity, reference often is only to physicians or licensees.
10. L. 1991, ch. 606.
11. L. 1996, ch. 599; L. 1996, ch. 627.

12. New York Education Law § 6532.
13. New York Education Law § 6510(1)(b); New York Public Health Law § 230(10)(a)(i).
14. New York Education Law § 6510(1)(c); New York Public Health Law § 230(10)(b).
15. New York Education Law § 6510(3)(c); New York Public Health Law § 230(10)(f).
16. "The Exchange, Volume One: Licensing Boards, Structures and Disciplinary Functions," The Federation of State Medical Boards of the United States, Inc., 2003, Table 28.
17. New York Education Law § 6510(4); New York Public Health Law § 230-c(4)(a).
18. New York Education Law § 6510(2), 8 NYCRR § 17.9; New York Public Health Law §§ 230(10)(m), 230(12).
19. New York Education Law § 6511; New York Public Health Law § 230-a.
20. New York Education Law § 6511; New York Public Health Law § 230-a.
21. New York Education Law § 6504.
22. New York Education Law § 6508.
23. New York Public Health Law § 230(1).
24. OPMC materials, March 2005, p. 4, (Board for Professional Medical Conduct).
25. New York Public Health Law § 230(6).
26. *Orens v. Novello*, 99 N.Y.2d 180 (2002).
27. New York Education Law § 6510(1)(b); 8 N.Y.C.R.R. § 17.1; New York Public Health Law § 230(10)(a)(i).
28. OPMC materials, March 2005, p. 40, (OPMC Statistics).
29. New York Public Health Law § 230(10)(a)(i).
30. OPMC materials, March 2005, p. 27, (Source of Complaints – 2004).
31. New York Public Health Law §§ 230(10)(m)(i), 230(10)(m)(ii).
32. New York Public Health Law § 230(7).
33. New York Public Health Law § 230(10)(a)(iv).
34. OMPC materials, March 2005, p. 40, (OPMC Statistics).
35. OPMC materials, March 2005, p. 42, (Final Disciplinary Actions by Type of Misconduct - Year 2004).
36. OPMC materials, March 2005, p.43, (Final Actions by Selected Specialty Year 2004).
37. New York Public Health Law § 230(10)(a)(iii).
38. *Id.*
39. New York Public Health Law § 230(10)(j); *Ostad v. DOH*, 309 A.D.2d 989 (3d Dep't 2003).
40. New York Education Law § 6510(1)(b); New York Public Health Law § 230(10)(a).
41. L. 2003, ch. 542, adding New York Public Health Law § 230(9-a), effective September 17, 2003.
42. New York Public Health Law § 230(10)(a)(ii); *Gant v. Novello*, 302 A.D.2d 690 (3d Dep't 2003), *lv. denied*, 100 N.Y.2d 502 (2003).
43. New York Public Health Law § 230(1); *Gant*, 302 A.D.2d 690.
44. Education Law § 6510(1)(d); New York Public Health Law § 230(10)(d).
45. New York Education Law § 6510(3)(a); New York Public Health Law § 230(10)(c).
46. New York Public Health Law § 230(10)(f).
47. New York Public Health Law § 230(10)(j).
48. "The Exchange, Volume One: Licensing Boards, Structures and Disciplinary Functions," The Federation of State Medical Boards of the United States, Inc., 2003, Table 37.
49. New York Education Law § 6510(4).
50. New York Public Health Law § 230-c(4).
51. New York Public Health Law § 230-a.
52. *Daniels v. Novello*, 306 A.D.2d 644 (3d Dep't 2003), *lv. denied*, 100 N.Y.2d 514 (2003); *Ostad v. DOH*, 309 A.D.2d 989, 991 (3d Dep't 2003).
53. New York Public Health Law §§ 230-a(2)(b), 230-a(2)(e).
54. New York Public Health Law § 230-a(9).
55. 8 N.Y.C.R.R. § 24.7(2).
56. New York Education Law § 6511.
57. "The Exchange, Volume One: Licensing Boards, Structures and Disciplinary Functions," The Federation of State Medical Boards of the United States, Inc., 2003, Table 39.
58. *Doe v. BPMC*, 81 N.Y.2d 1050 (1993) (interpreting New York Public Health Law § 230(9)).
59. *Anonymous v. BPMC*, 2 N.Y.3d 663 (2004).
60. *Anonymous*, 2 N.Y.3d at 671.

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Policing the Medical Profession in New York State

By Elizabeth Dears Kent

The medical profession, to a far greater extent than most others, is highly regulated and is subject to review at both the federal and state level.

At the federal level, the Health and Human Services, Office of Inspector General (OIG) and the United States Attorney General are principally responsible for the oversight and prosecution of crimes or other unlawful acts involving services provided to beneficiaries of Medicare or Medicaid. The U.S. Drug Enforcement Administration, working closely with state and local law enforcement agencies, is principally responsible for the investigation and prosecution of crimes involving the diversion of controlled substances. The Health and Human Services Office for Civil Rights (OCR) is responsible for assuring compliance with the Health Insurance Portability and Accountability Act (HIPAA).

"[T]he civil justice system, largely viewed by the medical profession to be an extremely dysfunctional process, also exists as a mechanism, faulty as it may be, through which the conduct of the profession is reviewed and influenced, if not regulated."

State oversight bodies empowered to license and review the conduct and quality of care provided by members of the medical profession include the State Education Department; various departments within the State Department of Health (the Office of Professional Medical Conduct (OPMC); the Bureau of Narcotics Enforcement and the New York Patient Occurrence Reporting and Tracking System (NYPORTS)); and the Committee on Physicians' Health (CPH). Other public bodies primarily responsible for the oversight and prosecution of crimes or other unlawful acts involving services provided to the public through commercial insurance or governmentally sponsored programs include: the New York State Medicaid Fraud Control Unit and the Health Care Bureau within the State Attorney General's Office; the New York Insurance Frauds Bureau; the New York Insurance Health Care Bureau; and the offices of the local District Attorney.

This article will discuss several of the public entities on the state level that oversee and regulate the conduct of the medical profession. It is important to note, however, that there exist many other systems intrinsic to the practice of medicine. This includes practices related to the conferral of professional credentials and the regulation of medical practice, including state licensing boards, specialty medical boards and examination boards. These boards determine candidates for licensure or professional certification and re-certification.

Importantly, there also exist other non-governmental affiliations and relationships through which physicians are subject to broad control. These include affiliation relationships with article 28 institutions (hospitals, clinics or nursing homes) or participating provider relationships with health plan associations and insurers which enable physicians to provide services to plan or insurer enrollees and subscribers pursuant to article 44 of the Public Health Law or articles 32, 42 or 43 of the Insurance Law. These affiliation or participation arrangements effectively circumscribe certain practices of the medical profession and therefore operate to regulate the conduct and quality of medical practice in this state.

Finally, the civil justice system, largely viewed by the medical profession to be an extremely dysfunctional process, also exists as a mechanism, faulty as it may be, through which the conduct of the profession is reviewed and influenced, if not regulated. New York State recently established a system through which the public may individually track the credentials, performance and disciplinary/medical liability status (including the disposition of finalized disciplinary actions and certain medical liability judgments and settlements) of members of the medical profession through a web-based profiling system maintained by the State Department of Health. Many of these review and information systems do not exist in any form for other licensed professionals practicing in the state of New York

Office of Professional Medical Conduct (OPMC)

Oversight for licensure and discipline of the medical profession reposed until the mid-1970s with the New York State Department of Education. In 1976, the legislature bifurcated these responsibilities and vested within the Department of Health responsibility for physician discipline, including responsibility for license

revocation. Licensure itself remains within the Education Department. The Board for Professional Medical Conduct (BPMC) was created in 1976 in the Department of Health and has since served as the principal state agency involved in the state's disciplinary process. The Board is comprised of both physician and lay members. Each investigative committee or hearing committee must be comprised of three members: two physicians and one lay member of the Board. Section 230 of the Public Health Law sets forth the processes and procedures which must be followed when an allegation of professional medical misconduct has been filed.[1]

Every complaint filed with OPMC must be investigated by BPMC investigative staff, which is highly professional and includes attorneys as well as former law enforcement officials. The licensee is offered an interview. After an investigation, when sufficient evidence exists to indicate that misconduct has occurred, an investigative committee (IC) is convened to review the matter further. If the IC also finds sufficient evidence to substantiate the matter, charges are drawn by DOH General Counsel's office and a hearing committee (HC) is empanelled. There are statutory time constraints within which a case must be heard and concluded. The hearing committee can make one of several determinations: dismiss some or all of the charges or sustain some or all of the charges. Penalties can range from censure or reprimand to licensure suspension or outright revocation. Appeals of the hearing committee's decision (either by the state or by the respondent) can challenge either the determination or the penalty. Appeals are taken to the Appeal Review Board (ARB), which is composed of three physicians and two lay members from the BPMC. Either the hearing committee's decision or the ARB's decision can be appealed through an article 78 proceeding to the Appellate Division.

The physician discipline process in New York State and, indeed, nationally has been monitored closely by independent academic and consumer-oriented organizations. Their data demonstrate that the physician discipline process in New York State has improved significantly over the years. In a comparison conducted by the Public Citizen's Health Research Group, which compares the rates of serious disciplinary actions taken by states nationwide, New York State has gone from 29th in the nation in 1995 to 14th in the nation in 2003.[2] Moreover, New York ranks 2nd among the nation's 17 largest states (those with 15,000 or more physicians). To a very significant degree, medical professional associations, led by the Medical Society of the State of New York (MSSNY), initiated the call for the changes. This in turn led to improvement through doubling of the physician registration fee (to $600/biennially) to assure that adequate resources are made available to support the work of the OPMC.

The Bureau of Narcotics Enforcement

The Bureau of Narcotics Enforcement (BNE or Bureau) is within the Department of Health. BNE is responsible primarily for the implementation of and adherence to prescribing requirements for controlled substances as well as the oversight of prescribing practices. The goal is preventing and reducing drug diversion and fraud. The Bureau has been the oversight body for the implementation of the New York State official prescription program which required the use of special, serialized prescription forms for certain schedule II, III and IV drugs, including benzodiazepines. The program has been modified over the years and will soon be further altered effective April 19, 2006, to require that all prescriptions written in New York (for both controlled and non-controlled substances) be issued on an official forge-proof New York State prescription form. This is the same form that is currently required for prescribing and dispensing schedule II and benzodiazepine controlled substances.[3] The Bureau is responsible for both the development and implementation of this new law. Emergency regulations, effective October 28, 2004, are in place and mechanisms have been established to register prescribers and begin to supply them with the new forge-proof prescription forms.[4]

The New York Patient Occurrence Reporting and Tracking System (NYPORTS)

The New York Patient Occurrence Reporting and Tracking System (NYPORTS), created in the mid-1980s pursuant to section 2805-*l* of the Public Health Law, is a reporting system which tracks adverse events (defined as "patients' deaths or impairments of bodily functions in circumstances other than those related to the natural course of illness, disease or proper treatment in accordance with generally accepted medical standards").[5] Adverse events are reportable to the NYPORTS system by anyone associated with the event. Notably, adverse events are not always medical errors. Most occurrences that are reported are tracked and trended in the aggregate. Serious occurrences are investigated individually by the hospital, which is required to conduct a root cause analysis (RCA). Confidentiality requirements of section 2805-m generally prevent the disclosure of incident reports and other peer review and quality assurance committee analysis unless the individual who makes an admission during such committee meeting becomes the subject of a medical liability lawsuit.[6] Where the party to the peer review proceeding does become a party in a subsequent civil liability proceeding deriving from the conduct reviewed, any statements made by such party during the peer review meeting are discoverable if the statement is directly related to the underlying cause of action.[7]

The Committee for Physicians' Health

The Committee for Physicians' Health (CPH) has been operated since 1980 by the Medical Society of the State of New York. It is a confidential, educational, and outreach program designed to offer physicians impaired by alcoholism, chemical dependency or mental illness an opportunity for treatment and rehabilitation. It is an alternative to formal disciplinary processes conducted by OPMC for the physician who has not committed an act of professional misconduct.[8] Importantly, however, a physician is obliged to report to the OPMC any information that reasonably demonstrates that a licensee is guilty of professional misconduct.[9] Failure to do so will itself constitute professional misconduct. A physician is not absolved of such a charge by reporting information to the CPH instead of OPMC.

The New York State Medicaid Fraud Control Unit

The New York State Medicaid Fraud Control Unit (MFCU) within the State Attorney General's Office was originally formed in the mid-1970s in response to scandals involving individual seniors and investments they made/lost acquiring nursing home care. It is the state's primary body for enforcement of laws involving care provided to the state's Medicaid population and has jurisdiction over physician conduct relating to that population.

The New York Insurance Frauds Bureau and New York Insurance Health Care Bureau

There are two bodies within the State Insurance Department that may be involved in review of physician conduct. The New York State Insurance Frauds Bureau has as its primary mission the detection, investigation and prevention of insurance fraud, including fraud involving the delivery of health care services.[10] The Health Care Bureau has responsibility for review and approval of accident and health insurance forms and rate adjustment filings made by any insurer. The Bureau also, however, oversees the External Appeal program which provides health care consumers and their providers (including physicians) a right to obtain an independent, impartial review when health plans deny services as not medically necessary, experimental or investigational.[11]

Offices of the District Attorney

Local District Attorneys have recently increased criminal action in response to certain medical practices. Most of the time, these matters involve non-physicians posing as physicians. However, there have been a few instances of action taken against physicians directly. The legislature recently re-emphasized the importance of local District Attorney action when alleged criminal conduct involving a physician has occurred. Chapter 542 of the Laws of 2003 requires the OPMC to inform the appropriate District Attorney's office if it determines that there is a reasonable belief that a criminal offense has been committed by a physician.[12]

Conclusion

As shown, a plethora of public entities exist on the state level to oversee, review and regulate every aspect of the medical profession's practices. As extensive as these controls are—and they are unparalleled in any other profession or occupation—there are also federal entities that review and regulate physicians. Moreover, a great deal of physician oversight finds its genesis in the private sector as well. Most notable are insurance companies, hospitals and other institutional care providers. These entities, like the public authorities, regulate both the quality and economic aspects of a physician's practice. The medical profession not only accepts this extensive regulatory oversight but welcomes it provided that it is meaningful, fair, and as minimally intrusive as possible into the physician's time available for patient care.

Endnotes

1. N.Y. Pub. Health Law § 230(10) (McKinney 2005).
2. Public Citizen, *Table 1: Ranking of Serious Doctor Disciplinary Actions by State Medical Licensing Boards – 2003*, *available at* http://www.citizen.org/publications/release.cfm?ID=7308&secID=1158&catID=126.
3. *See* Bureau of Narcotics Enforcement, Department of Health, *Important Notice to Pharmacists: Expansion of the Official Prescription Program*, *at* http://www.health.state.ny.us/nysdoh/narcotics/notice_pharmacists.htm.
4. *See id*.
5. N.Y. Pub. Health Law § 2805-*l*(2)(a) (McKinney 2005).
6. N.Y. Pub. Health Law § 2805-m(2) (McKinney 2005).
7. *Id*.
8. *See generally* Committee for Physicians' Health, Medical Society of New York, *at* http://www.mssny.org/res_ctr/cph.htm.
9. N.Y. Pub. Health Law § 230(11)(a) (McKinney 2005).
10. *See* New York State Insurance Department, *About the Insurance Fraud Bureau*, *at* http://www.ins.state.ny.us/fd1abouc.htm.
11. *See generally* New York State Insurance Department, *Frequently Asked Questions, Instructions, and Applications for Requesting an External Appeal*, *available at* http://www.ins.state.ny.us/extappqa.htm.
12. *See* N.Y. Pub. Health Law § 230(9-a) (McKinney 2005).

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On Our Honor: Policing Ourselves in the Legal Profession

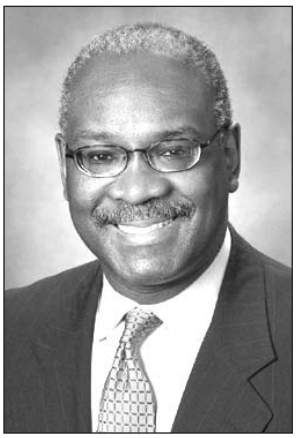
By David L. Edmunds, Jr.

> *On a day it was revealed that Barry Bonds might be called to testify at a House committee hearing investigating steroid use in baseball, Commissioner Bud Selig hinted he might at some point do his own investigation of past steroid use.*[1]

The controversy in major league baseball over the use of steroids recently took center stage at a congressional hearing. At the heart of the discussions was the century-old question about whether the Commissioner of Baseball and the team owners have the power and responsibility to discipline players for violating rules of the game. Underlying the dialogue was another issue: whether the players themselves have a duty to disclose the use of performance-enhancing substances by other players.

"The legal profession is in fact unique, not only for its rich history, many traditions and impact on people's lives, but also because it is the only profession in New York that has been given the privilege and awesome responsibility of 'self regulation.'"

While the American public has been given an opportunity to view how baseball deals with rule violators, our citizens know little if anything about the process of disciplining professionals for inappropriate conduct. Doctors, nurses, pharmacists, therapists, engineers, architects, accountants, attorneys and other professionals are all expected to meet certain standards of practice. In New York, as in other states, a licensed professional's failure to meet the expected standards of practice is considered "professional misconduct."[2] It is here that the legal profession differs from other disciplines in New York State. The legal profession is in fact unique, not only for its rich history, many traditions and impact on people's lives, but also because it is the only profession in New York that has been given the privilege and awesome responsibility of "self regulation." For most professions in New York, professional misconduct is investigated and prosecuted by the New York State Education Department's Office of Professional Discipline (OPD). Medicine is one exception. Misconduct by physicians and physician assistants is investigated and prosecuted by the Office of Professional Medical Conduct (OPMC) of the Department of Health.[3] Law is another exception.



In New York, the practice of law and the court system are governed primarily by the provisions of Article 4 of the New York Judiciary Law. The court system is divided into four areas or departments, known as the First, Second, Third and Fourth judicial departments.[4] Within each department appeals are handled by the Supreme Court, Appellate Divisions, which embrace various counties.[5] The conduct of attorneys is also governed by Article 15 of the Judiciary Law. Specifically, the Legislature, through the Judiciary Law, gives to each Appellate Division authority to determine standards for admission to the bar, ethics for the practice of law and discipline for professional misconduct.[6]

Guarding the Gate

At the core of our legal system is the belief that every individual, regardless of means, is entitled to representation in both civil and criminal matters by a competent attorney in good standing with the courts. Any person who desires to practice before the New York courts must be examined and licensed pursuant to the provisions of the Judiciary Law.[7]

The threshold determination for competency and admission actually requires a two-step process. First, an individual must pass a comprehensive examination given by the New York State Board of Law Examiners.[8] This exam also includes a professional responsibility component.[9] The bar exam is designed to not only ensure the competence of newly admitted lawyers, but also to ensure that new attorneys are fully prepared to handle the challenges of legal practice and to meet the needs of the public. In 1999, the Board of Law Examiners reviewed the bar examination to determine whether the passing standard accurately represented the current standards for the minimum competence to practice law. After extensive debate by both the bench and the bar, the Board announced in September 2004 its intention to raise the passing score. The new score becomes partially effective with the July 2005 exam and the increase will be phased in over a three-year period.[10]

Additionally, after an individual passes the bar exam, he or she must also file with the Committee on Character and Fitness. This application includes affidavits stating that the applicant has the moral character and general fitness required to be an attorney and counselor-at-law.[11] Each Appellate Division appoints its own committee on character and fitness.[12] It is only after the Board of Law Examiners certifies to each Appellate Division that an individual has passed both the bar and the professional responsibility examinations and after the character and fitness committee approves the applicant, that an individual may take the oath for admission to the bar.

Lawyers are also required to regularly demonstrate that they possess the competence and skill required to practice in New York. Every two years each attorney must file a registration statement with the Chief Administrator of the Courts, pay a fee of $350.00 and most important, certify that the attorney has taken a minimum of 24 hours of accredited continuing legal education courses during the preceding two-year period. Four hours of that course work must be in the area of ethics and professionalism.[13]

Looking Within

In New York, the professional and ethical conduct of attorneys is governed by the Judiciary Law and by the Lawyer's Code of Professional Responsibility. In 1990, the Appellate Divisions jointly adopted the Code as the standard for regulating the professional conduct of attorneys. The Code was originally adopted by the New York State Bar Association in 1970, but has been revised on several occasions since its adoption. It is now codified in Title 22 of the Official Compilation of Codes, Rules and Regulations of the State of New York, Part 1200.

The Code is divided into three main areas which contain nine Canons, 156 Ethical Considerations, and 51 Disciplinary Rules. The Code governs an attorney's relationship with clients, the public, the courts and other attorneys. The Canons function as chapter headings and are statements of axiomatic norms and generally define the standards of professional conduct expected of lawyers.[14] Two examples are the bookends of Canons 1 and 9. Canon 1 states that a "lawyer should assist in maintaining the integrity of the legal profession," while Canon 9 states that a "lawyer should avoid even the appearance of impropriety." The Ethical Considerations contain standards to which lawyers should aspire. However, they are "aspirational" only.[15]

The Disciplinary Rules are considered the heart and soul of the Code and the New York disciplinary process. The Rules are the only part of the Code that is followed by the courts. Every attorney in New York is obligated to both know and follow the rules, which represent the minimum requirements that every lawyer must meet. When a lawyer's conduct falls below the standards in the Rules, the attorney may be subject to disciplinary action.[16] The Canons, the Ethical Considerations and the Disciplinary Rules also represent the standard that the public can expect of lawyers and their employees.[17]

Judiciary Law Section 90 gives each Appellate Division authority to establish its own rules and procedures to handle allegations of attorney misconduct, including the circumstances under which sanctions may be imposed. Thus, in order to enforce the provisions of the Code each of the four departments has adopted its own rules governing attorney conduct. The rules address notice of charges of misconduct, the opportunity to be heard, service of process, hearing and appeal rights, resignation, and the reinstatement to practice among other matters.[18]

A close examination and comparison of the rules of each of the four appellate departments reveals that they vary in many regards but share a clear commonality. Each set of rules truly encompasses the public policy desires and needs that are shared equally by both bench and bar. In particular, they create a means for individuals to seek redress for attorney misconduct. At the same time, the rules vary in their definitions of misconduct, grounds for discipline, handling of serious cases and the procedures for imposing discipline. Further, the rules vary with respect to the procedures followed by each disciplinary office as they relate to the processing, investigation, evaluation and disposition of complaints of attorney misconduct.

Each Judicial Department's rules provide for a departmental disciplinary committee, usually identified as the "Attorney Grievance or Disciplinary Committee."[19] The structure of these committees is also unique in each department and again reflects the unique aspects of the practice of law in each of these departments. The committees are composed of attorneys and a limited number of non-attorneys appointed by the respective courts. Each committee is assisted by a chief attorney, also appointed by the court. The chief attorney and a professional staff are responsible for investigating complaints referred to the committee or otherwise brought to its attention.

Both the First and Third Departments have a single committee. The Second Department has three separate committees for the Second and Eleventh Judicial Districts, the Ninth Judicial District and the Tenth Judicial District. Within the Fourth Department, there are also three separate committees for the Fifth, Seventh, and Eighth Judicial Districts.[20] When an investigation is completed dispositions range from dismissal, to consid-

eration by a committee for non-public discipline, to commencement of formal disciplinary proceedings before a judicial hearing officer or the court.[21] When a matter is brought before the Appellate Division sanctions may include censure, suspension or disbarment.[22] When an attorney is suspended or disbarred, courts will consider a request for reinstatement at the conclusion of the suspension or seven years after disbarment.[23]

Fundamental to the process is the attorney's right to privacy. Only when charges of misconduct are sustained by the court and discipline is imposed will the records of a disciplinary proceeding be considered a public document. In all other cases, the investigation files and other proceedings are deemed confidential, and the records are sealed.[24]

I Am My Brother's and Sister's Keeper

Cain, the Old Testament's first murder defendant, was asked where his brother Abel could be found. He replied, "I am not my brother's keeper."[25] Lawyers in New York and in a great majority of other states are indeed their brothers' and sisters' keepers, as they have a duty to report the misconduct of another attorney. The idea of the law being a self-policing profession is rooted in the democratic principle of separation of powers, which makes the Judiciary, the Executive Branch, and the Legislature separate and equal branches of government. In New York, the Legislature, through the Judiciary Law, assists the courts in regulating the legal profession. However, the courts still have the final say over who will be "Officers of the Court."[26]

New York Disciplinary Rule 1-103(A) requires attorneys in certain instances to report another attorney to the appropriate disciplinary authority. Disciplinary Rule 1-103(B) requires attorneys to respond to requests from disciplinary authorities during an investigation into another attorney or a judge. The current version of Disciplinary Rule 1-103 can be traced back to 1908 when the American Bar Association first adopted an ethical code, known as the Canons of Professional Ethics. According to Canon 29 of the 1908 Code, "lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his clients."[27]

The duty to report is essential to a self-policing profession. In *Weider v. Skala*, the New York Court of Appeals determined that Disciplinary Rule 1-103(A) is critical to the unique function of self-regulation belonging to the legal profession.[28] Although the bar admission requirements provide some safeguards against enrollment of unethical applicants, the Legislature has delegated the responsibility for maintaining the ethical standards to the Departments of the Appellate Divisions.[29]

To assure that the legal profession fulfills its responsibility of self-regulation, Disciplinary Rule 1-103(A) requires each lawyer and judge to report to the disciplinary committee of the specific Appellate Division any potential violations of these rules that raise a "substantial question as to another lawyer's honesty, trustworthiness or fitness in other respects." Indeed, one commentator has noted that, "[t]he reporting requirement is nothing less than essential to the survival of the profession."[30]

Disciplinary Rule 1-103 is titled "Disclosure of Information to Authorities." It contains two sub-paragraphs, the first of which concerns an attorney's duty to report another attorney while the second governs an attorney's duty to respond to inquiries from disciplinary authorities about other attorneys or judges.

Disciplinary Rule 1-103(A) reads as follows:

> (a) A lawyer possessing knowledge, (1) not protected as a confidence or secret, or (2) not gained in the lawyer's capacity as a member of a bona fide lawyer assistance or similar program or committee, of a violation of section 1200.3 of this Part that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

Disciplinary Rule 1-103(B) reads as follows: "A lawyer possessing knowledge or evidence, not protected as a confidence or secret, concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges."

A clearer analysis of the lawyer's duty to report requires an examination of two Disciplinary Rules. First, Disciplinary Rule 1-102 is a broad, all encompassing rule which applies to both the individual attorney and to law firms. According to Professor Roy Simons, it governs every aspect of a lawyer's professional, business, social and personal life.[31] It prohibits lawyers from engaging in conduct that is prejudicial to the administration of justice or engaging in conduct that adversely reflects on the lawyer's fitness as a lawyer.[32]

We then turn our attention to the requirements of Disciplinary Rule 1-103. The threshold issue for report-

ing is whether the knowledge of misconduct raises a substantial question regarding another attorney's honesty, trustworthiness or fitness as a lawyer. If this test is passed, the reporting lawyer must then determine whether the information is protected as a confidence or secret or whether it was gained in the lawyer's capacity as a member of a bona fide lawyer assistance or similar program or committee. These entities include lawyer assistance programs operated by bar associations to assist attorneys with alcohol, substance abuse and other personal problems.

Thus, an attorney must report unprivileged, actual knowledge to an authority. An attorney's duty to report is brought into clearest focus by listing the areas where the reporting attorney is not required to report conduct set forth in Disciplinary Rule 1-102. In particular, if the information does not raise a substantial question about the lawyer's fitness, is unrelated to the lawyer's honesty, trustworthiness or fitness, is protected as a confidence or is based upon mere suspicion or belief, there is no duty to report.[33]

However, Disciplinary Rule 1-103(B) also discusses an attorney's responsibility to report information to authorities when requested to do so. Under this section, when an attorney possesses knowledge or has evidence of misconduct by another lawyer or judge, the attorney must reveal that knowledge or evidence when requested to do so by a tribunal or authority investigating the conduct provided the information is not protected as a confidence or secret.

Significantly missing from an attorney's duty to report misconduct is the obligation to self report. Disciplinary Rule 1-103 only applies to violations that raise questions about the honesty, trustworthiness and fitness of other attorneys. However, the New York Judiciary Law requires an attorney who has been convicted of a crime of any kind in any state or in federal court to file the record of the conviction with the appropriate Appellate Division within 30 days of the conviction.[34]

Helping the Least

The legal profession is also unique for another very different reason. Commensurate with the duty to self regulate and the duty to report misconduct, is the inherent duty to aid and assist other lawyers and judges in times of trouble and need. The legal profession does so through the work of bar foundations organized by the state bar association and several county bar associations. Bar foundations are dedicated to aiding charitable and educational projects in order to meet the law-related needs of the public and the legal profession. A foundation's work is made possible through the contributions of attorneys and other individuals. In addition, the New York Lawyer Assistance Trust, New York State Bar Association and a number of county bar associations operate lawyer assistance programs that are specifically designed to provide education and confidential assistance to lawyers, judges, law school students and their immediate family members who are affected by alcohol and substance abuse, and stress or depression.

In 2003, the Appellate Division, Fourth Department was the first court in New York to implement an attorney diversion program to address instances of misconduct that occurred while an attorney suffered from alcohol, substance abuse or other dependency. The Third Department has also amended its rules to create a monitoring program.[35] In each program, the specific court must approve an application by an attorney or by the grievance committee for program participation during the monitoring period. If the application is approved, the court may stay the disciplinary proceedings during a period when the attorney is monitored by a member of an approved lawyer assistance program. The monitor then determines whether the lawyer is complying with a recovery effort. These courts have recognized that in appropriate circumstances it is in the public interest to provide the attorney with an incentive to recover from alcoholism or substance abuse and ultimately restore the attorney's fitness to practice law.

Lastly, bar associations across the state, through what are known as law practice continuity committees, address the needs of the clients of solo and small firm practitioners when attorneys die, becomes disabled or otherwise cannot attend to the affairs of their law practice. The Appellate Divisions may appoint a caretaker attorney or receiver to help clients find substitute counsel or to perform necessary services for the client so that the client's interests are protected.

Conclusion

The integrity of the legal profession can only be maintained when violations of the disciplinary rules are brought to the attention of the proper officials.[36] Attorneys, bar associations, the public, and grievance committees all play a vital role in the New York legal community and in the disciplinary process. The profession is indeed privileged to have the responsibility of policing itself. Not only is the profession better served, but the public is protected and the integrity of the profession is preserved. In the legal profession the duty to report is truly critical and essential to our right and responsibility to police our conduct. We are indeed the keeper of our brother and sister attorneys. The legal community, both bench and bar, has met the challenge and exceeded the responsibility placed upon it to regulate the profession. We can be assured that the profession will continue to do all that it can to maintain the highest levels of ethics and professionalism in the practice of law for years to come.

Endnotes

1. John Shea, S.F. Chron. 14, 2005.
2. N.Y. Educ. 6509–6511 (McKinney 2005).
3. Sections 6510, 6511.
4. N.Y. Jud. § 70 (McKinney 2005).
5. Sections 70, 71, 75.
6. Section 90.
7. Section 460.
8. Section 56, N.Y. Comp. Codes R. & Regs. tit. 22, § 520.8 (2005).
9. N.Y. Comp. Codes R. & Regs. tit. 22, § 520.9.
10. Press Release, New York State Board of Law Examiners (Sept. 24, 2004).
11. N.Y. Comp. Codes R. & Regs. tit. 22, § 520.12.
12. Sections 602.1(b), 690.6, 805 (1)(b), 1022.34.
13. N.Y. Jud. §§ 468, 468-a; N.Y. Comp. Codes R. & Regs. tit. 22, Parts 118, 1500.
14. Roy Simons, *New York Code of Professional Responsibility Annotated*.
15. *Id.*
16. New York State Bar Assoc., *The Lawyers Code of Professional Responsibility*.
17. *New York Code of Professional Responsibility Annotated*.
18. N.Y. Comp. Codes R. & Regs., tit. 22, §§ 603, 605, 690, 691, 806, 1022.
19. Sections 605.1, 691.4, 806.3, 1022.
20. Sections 605.6, 605.22, 691.4, 806.4, 806.5, 1022.19, 1022.20.
21. *Id.*
22. N.Y. Jud. § 90 (2).
23. N.Y. Comp. Codes R. & Regs., tit. 22, §§ 605.10, 691.11, 806.12, 1022.28.
24. N.Y. Jud. § 90 (10).
25. 4 *Genesis* 9.
26. N.Y. Const. art VI; N.Y. Jud. § 70.
27. Ronald D. Rotunda, *The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel*, 1988 U.Ill.L.Rev. 977.
28. 80 N.Y.2d 628 (1992).
29. *Id*. at 636; see N.Y. Jud. § 90 (2); *see also* N.Y. Comp. Codes R. & Regs., tit. 22, § 603.2.
30. *Professional Responsibility – Reporting Misconduct By Other Lawyers*, N.Y.L.J., 1984, at 1.
31. Simons, *supra* note 14.
32. Lawyers Code of Professional Responsibility; DR 1-102(a)(5), (7).
33. New York State Bar Association, Opinions 480, 650.
34. N.Y. Jud. 90 (4)(c); Simons, *supra* note 14.
35. N.Y. Comp. Codes R. & Regs., tit. 22, §§ 806.4(g), 1022.19(d)(2)(iii).
36. Lawyer's Code of Professional Responsibility EC 1-4 (2005).

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Hope, Health and Healing

By Barbara F. Smith

"Hope, health and healing"[1] may not be the first words that come to mind when you think of alcoholic or addicted lawyers.

Many lawyers are unaware of the problem that alcohol abuse or drug addiction poses for the legal profession or of the response that the organized bar, particularly in New York State, has made to address the issue. This article is a step to filling that gap.

I. The Problem

> No one disputes that the profession has changed dramatically during the past 20 years. More lawyers are chasing basically the same amount of business, invariably resulting in greater competition and more stress. Both new and established lawyers and law firms find themselves working an ever-increasing number of hours, often for fewer dollars, at the expense of their personal and family lives. The demands and expectations placed on them by their clients, colleagues, and judges have never been higher and are often unrealistic and unobtainable. This is a guaranteed recipe for stress, burnout, depression, and substance abuse.[2]

Most authorities agree that about 10% of the general population has problems with alcohol abuse. However, surveys performed in the last decade in Arizona and Maryland indicate that 15-18% of the lawyer population battles the same problem. A Washington study found that

> eighteen percent of lawyers who practiced anywhere between two and twenty years had developed a problem with alcohol and that number increased to twenty-five percent among lawyers who practice more than twenty years. Statistics also show that one in five lawyers has a problem with substance abuse and one in every eight graduating law students exhibits signs of chemical dependency.[3]

Tremendous stigma still attaches to being a user or an addict. Many people view addicts as weak or bad people, unwilling to lead moral lives and to control their behavior.

The problem is exacerbated for lawyers. Alcoholism or drug addiction can directly and adversely affect the ability of an attorney, a firm or legal department to provide quality legal services and can lead to exposure to professional liability, to the violation of ethical conduct standards, to loss of public esteem and even to criminal law violations.

"An attorney who ends up before a disciplinary panel typically is middle-aged, behind in his bills, with a declining law practice, a deteriorating marriage, and has a problem with alcohol or drugs. . . . The most difficult problem for the troubled lawyer is to identify that a problem exists, and to recognize that help is needed."[4]

"Many lawyers are unaware of the problem that alcohol abuse or drug addiction poses for the legal profession or of the response that the organized bar, particularly in New York State, has made to address the issue."

"While the ABA has estimated that forty to sixty percent of disciplinary proceedings involve substance abuse, other estimates have found that an even greater percentage of cases—fifty to seventy percent—involve substance abuse."[5] Disciplinary action may be inevitable if a problem remains untreated; suspension or disbarment is the ultimate penalty to protect the public from a lawyer's incompetence or dishonesty, whatever the cause.

But the disciplinary process addresses only the results, not the cause of the problem. Better to detect a problem at an early stage and divert the person to treatment.

II. Addiction Is a Disease

For more than fifty years, the American Medical Association has classified alcoholism and drug addiction as diseases, characterized by genetic, social and psychological factors.[6] An addiction is a chronic, relapsing disease, which affects the brain in three ways: (1) it immediately alters perceptions or emotions; (2) after

repeated use, it produces symptoms of tolerance and withdrawal; and (3) after chronic use, it results in neurological damage.[7] The disease of addiction appears to develop as a result of both genetic and environmental factors. The "natural history of the disease includes periods of abstinence and relapse."[8]

The disease of addiction is treatable, although there is no cure. "Addiction is very comparable to other chronic diseases in terms of treatment compliance and outcome."[9]

III. Lawyer Assistance in New York State

Since 1990, the New York State Bar Association has had a Lawyer Assistance Program (NYSBA LAP), under the direction of Ray Lopez, a licensed social worker with more than twenty years experience in substance abuse education and intervention services.[10] The LAP works with the NYSBA Committee on Lawyer Alcoholism and Drug Abuse, with active members comprised of lawyers and judges from all parts of the state, as well as several hundreds of additional volunteers. Thanks to these resources, the LAP can reach members of the profession in need anywhere in the state very quickly.

The NYSBA Lawyer Assistance Program provides confidential assistance to attorneys, judges, law students and family members affected by alcohol, drugs, stress or depression. Importantly, the LAP educates the legal profession about the effects of substance abuse.

In 2000, the Lawyer Assistance Program of the Association of the Bar of the City of New York joined the effort. Under the direction of Eileen Travis, a licensed clinical social worker with extensive experience in drug and alcohol issues, the New York City Lawyer Assistance Program (NYC LAP) provides free, confidential services to any attorney, judge, law student or family member, in New York City, who is struggling with an alcohol, drug abuse, depression or other mental health problem.[11]

As does its statewide counterpart, the NYC LAP offers consultation and evaluation, counseling, intervention, referral, peer support, monitoring, outreach and education. It works in conjunction with the Association of the Bar's Committee on Alcoholism and Substance Abuse to provide peer assistance and education to the legal community.

Similar services are provided on a part-time basis by Kathy Devine, LAP Director for the Nassau County Bar Association.

In addition, eleven County Bar Associations, from Buffalo to Montauk, have volunteer committees that provide a strong network for attorneys in need.[12] Hundreds of volunteers, many of whom are in recovery themselves, provide a network of local support. Whether they are called a "lawyer assistance program" or "lawyers helping lawyers committee" or "lawyers concerned for lawyers," they provide front-line help.

If you call to refer someone to one of these volunteer Lawyer Assistance Committees, a fellow lawyer who is in recovery and a member of the state or local LAP will try to contact the lawyer about whom concern has been expressed. They will tell the lawyer that someone who cares about him or her has expressed concern about the lawyer's drinking habits or drug use. If the person thinks there is no problem, the committee member will leave his or her name and express a willingness to speak should alcohol or drugs ever become an issue. If the prospect agrees that there already is a problem, the committee member will arrange a meeting to discuss ways that people have found helpful in continuing recovery from alcoholism or drug use. The committee member will not report back to the referring person other than to say that the contact was made. All communications are confidential. If the situation is desperate and the prospect has refused help, then a member of the state or local committee may arrange an intervention.[13]

Lawyer assistance programs deliver the message of recovery through educational programs for the profession-at-large and for bar association meetings, presentations in law school classes and in the law firm setting. For the individual attorneys who need help, they also provide assessment, counseling, intervention and referrals. They monitor attorneys referred through the disciplinary process, including overseeing random drug testing.

Individual attorneys, law students or judges need not be bar association members to access LAP services. Typically, the LAP Director will have an initial telephone conversation with the individual, which may lead to an in-person meeting. Once the director determines the nature of the problem, he or she will refer the lawyer to an appropriate medical professional or treatment provider. For example, the next step might be detoxification, inpatient rehabilitation or possibly outpatient treatment. There may be a referral to a psychiatrist for medical evaluation and a therapist for treatment or an inpatient psychiatric unit; or connection with other lawyers in recovery for involvement in a twelve-step program such as Alcoholics Anonymous.

IV. Confidentiality

Section 499 of the Judiciary Law, adopted in 1993, expressly provides that all information furnished to members of the state or local lawyers assistance program committees or their agents, enjoys the same privi-

lege as attorney-client communications.[14] Under section 499, the LAPs are prohibited from disclosing information about any person who called to convey a concern about a particular lawyer, without the express consent of the referring party. Section 499 also confers immunity on people who provide information in good faith to the committees.

Furthermore, a LAP volunteer or staff member need not refer possible violations of the Code of Professional Responsibility to a grievance committee. Disciplinary Rule 1-103 expressly provides that members of state and local lawyer assistance committees who receive information in connection with their work on the LAP need not disclose instances of violations which may otherwise be required to be reported.[15]

V. Other Help for the Absent Attorney

One ramification for an attorney being absent from work because he or she may be receiving treatment for their alcoholism or addiction is abandonment of his or her workload. The NYSBA Special Committee on Law Practice Continuity will be issuing its report this year, which will contain recommendations, particularly geared for solo practitioners, urging them to plan ahead and make decisions about such contingencies.[16] The report will likely contain a recommendation that court rules be adopted which would formalize a process for appointing caretaker attorneys who would step in on a temporary basis to manage the practices for absent attorneys (whatever the cause). Currently, such "caretaker" work is being performed on an ad hoc basis around the state by volunteer attorneys.

VI. The Lawyer Assistance Trust

In 1999, Chief Judge Judith S. Kaye appointed the Commission on Alcohol and Substance Abuse in the Profession, chaired by then Associate Court of Appeals Judge Joseph W. Bellacosa, to "get ahead of the problem."[17] After a year of study and hearings, the Commission issued its Action Plan, which called for: (1) the creation of the Lawyer Assistance Trust to provide statewide leadership and financial assistance to programs for treatment and prevention of alcohol and substance dependency among lawyers and judges; (2) the financing of the Trust by the profession through a portion of the attorney registration fee; (3) the creation of special educational programs designed specifically for law students, practicing lawyers and judges in the field of alcohol and substance dependency; and (4) the modification and supplementation of court rules and procedures to facilitate the early detection of alcohol and substance dependency, intervention and referral to needed treatment of those experiencing alcohol and substance dependency.[18]

In 2001, the Trust was established with the appointment by the Chief Judge of twenty-one Trustees, including judges, lawyers, LAP Program directors, volunteers, law school administrators, treatment providers and disciplinary system representatives. Staff was retained and projects undertaken. The Trust enhances and supplements the work of the existing lawyer assistance programs run by the State and New York City Bar Associations and the County volunteer programs.

Under the leadership of Chair James C. Moore, of the Rochester firm Harter, Secrest & Emery, and for the first time in New York, the Trust created a grant program with law schools and bar associations eligible to apply for funding for education, research and efforts at prevention in relation to alcohol and substance abuse among judges, lawyers and law students.

In addition, the Trust has sponsored a first-ever conference concerning alcoholism and substance abuse at law schools and developed a core curriculum for informing law students on the issue.

Other outreach efforts have included an insert that appears in each attorney's registration renewal mailing; advertisements that appear in legal periodicals; development of a website (http://www.nylat.org); quarterly newsletters; and brochures to encourage bar association related activities.

In the policy arena, the Trust has worked for the adoption of changes to court rules governing the disciplinary process that, under certain circumstances, permit the diversion of attorneys with alcohol or substance abuse problems to a court-approved monitoring program. Successful completion of the program may result in the dismissal of the charges. The Fourth Department was the first to adopt such rules in 2003, and the Third Department did so in September of 2004. The Second Department has such rules under consideration at this time. [See Appendix I, "Comparison of Diversion-to-Monitoring Rules" on page 24.]

In January 2005, Chief Judge Judith S. Kaye named David R. Pfalzgraf, of the Buffalo firm Pfalzgraf, Beinhauer & Menzies, to succeed Mr. Moore as Chair of the Trust. Mr. Pfalzgraf has been involved in lawyer assistance efforts on the local, state and national levels.

VII. American Bar Association Commission on Lawyer Assistance Programs

In 1988, the American Bar Association created the Commission on Impaired Attorneys, the name of which changed in 1996 to the Commission on Lawyer Assistance Programs (CoLAP) in order to better describe the Commission's expanded objectives including the furnishing of resources relating to stress, depression, and other mental health problems.

CoLAP's primary goal is to advance the legal community's knowledge of impairments facing lawyers and its response to those issues. The Commission consists of ten members, more than half of whom are recovering from chemical dependency. Thus far, the Commission has been quite successful in aiding the introduction and support of programs on both the state and local bar levels. Whereas only twenty-six state bar lawyer assistance programs existed in 1980, today all fifty states have developed programs or committees focused on quality of life issues. These programs employ the use of intervention, peer counseling, and referral to 12-step programs to assist in the lawyer's recovery process.

"[I]f you recognize alcohol or substance abuse in a colleague, you should avoid enabling the situation by making excuses, covering up, doing work or avoiding confrontation of the problem."

CoLAP's priorities are: (1) education concerning lawyer addiction, depression, and mental health problems, and means of treatment; (2) development and maintenance of a national clearinghouse on lawyer assistance programs and the case law about addiction, depression, and mental health problems; (3) collection of state rules and opinions on confidentiality and immunity; and (4) development of a national network of lawyer assistance programs.

VIII. You Can Help, Too

On an individual level, if you recognize alcohol or substance abuse in a colleague, you should avoid enabling the situation by making excuses, covering up, doing work or avoiding confrontation of the problem. Depending on where you are, your best solution would be to contact the New York State or New York City Lawyer Assistance Programs, or one of the local volunteer committees, and ask for assistance in dealing with the individual.

If you are a manager at a law firm, government office or other legal setting, you can invite LAP staff or volunteers to make a presentation concerning the hazards of alcohol and drug abuse. Your firm could consider adopting a model policy that provides a supportive atmosphere where attorneys can seek help or express concern about colleagues or their own circumstances. Importantly, the American Bar Association developed a model law firm policy that you may consider.

Remember, treatment works; there is hope.

Endnotes

1. With a nod to the new theme of an ad campaign by the Partnership for a Drug-Free America. The new campaign takes a different approach to the drug problem: encouraging people with addictions to get treatment, and those who love them to intervene to get help for addicted family members or friends.
2. Myer J. Cohen, *Bumps in the Road*, July/August 2001, at 18.
3. Nathaniel S. Currall, *The Cirrhosis of the Legal Profession—Alcoholism as an Ethical Violation or Disease within the Profession,* 12 Geo. J. Legal Ethics 739 (1999), citing G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 Int'l J.L. & Psychiatry 233, 241 (1990) and the Report of the AALS Special Committee on Problems of Substance Abuse in the Law Schools, 44 J. Legal Educ. 35, 43 (1994).
4. Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is it Time for a New Approach?* 61 Temple L. Rev. 1409 (1988).
5. Currall, *supra* note 3, citing Linda Himelstein, *Defense for Misconduct: Addiction to Legal Drugs*, Legal Times, Jan. 15, 1990, at 1; and, the AALS Report, *supra* note 3, at 36; Richard M. Marano, *Appropriate Discipline for the Attorney-Addict*, 68 Conn. B. J. 368-69 (1994); and G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 L. & Psychol. Rev. 113,118 (1992).
6. The American Psychiatric Association's Diagnostic and Statistical Manual (DSM IV) defines "substance dependence" as a pattern of substance use leading to clinically important distress or impairment during a single 12-month period, shown by three or more of the following: tolerance; withdrawal; the amount or duration of use is often greater than intended; repeated attempts without success to control, reduce or stop using the substance; an increasing amount of time spent using the substance, recovering from its effects or trying to obtain it; the reduction or abandonment of important social, occupational or recreational activities because of substance use; and continuing use of the substance, despite the knowledge that it probably has caused physical or psychological harm.
7. Hazelden Foundation Butler Center for Research, *Alcohol, Drugs and the Brain,* Research Update: July 2001.
8. Hazelden Institute Butler Center for Research and Learning, *Addiction: A Disease Defined*, Research Update: August, 1998.
9. *Id.* Despite the fact that the occurrence rate of the disease is very high among professionals, the recovery rate is also much higher (90%) than among members of the general population (40-60%). John V. McShane, *Disability Probation and Monitoring Programs*, 55 Tex. B. J. 273, 274 (1992).
10. Mr. Lopez, to the dismay of his colleagues and hundreds of lawyers who have received his help, recently announced his retirement, effective in May 2005. A search for a new director was underway as this article was written. The LAP confidential hotline number is (800) 255-0569; the email address is lap@nysba.org.
11. NYC LAP's confidential hotline is available 24 hours a day, seven days a week: (212) 302-5787.
12. Brooklyn Bar Association Lawyers Helping Lawyers Committee, Sarah Krauss (718) 243-2474

    Bar Association of Erie County Lawyers Helping Lawyers Committee, Katherine S. Bifaro (716) 852-8687

    Monroe County Bar Association Lawyers Concerned for Lawyers Committee, John Crowe (585) 234-1950

    Nassau County Bar Association Lawyer Assistance Program Committee, Henry Kruman (516) 599-6420

Kathy Devine, 24-hour crisis hotline (888) 408-6222

Oneida County Bar Association Lawyer Assistance Committee, Tim Foley (315) 733-7549

Onondaga County Bar Association Lawyer to Lawyer Committee, Kenneth Ackerman (315) 233-8203 or Noreen Shea (315) 476-3101 Family Service Associates (315) 451-3886

Queens County Bar Association Committee on Alcohol and Substance Abuse, David Dorfman (917) 256-0355 or Lori Zeno (718) 261-3047, ext. 517

Rockland County Bar Association Lawyer Helping Lawyer Committee, Benjamin Selig (845) 942-2222 or Barry Sturtz (845) 369-3000

Schenectady County Bar Association Lawyer Assistance Program Committee, Vincent Reilly (518) 388-4350

Suffolk County Bar Association Committee on Alcohol and Substance Abuse, Richard Reid (631) 286-3560

Westchester County Bar Association Committee on Alcohol and Substance Abuse, John Keegan, Jr. (914) 949-7227

13. Bar Association of Erie County Lawyers Helping Lawyers Brochure.

14. N.Y. CLS Jud. Law § 499. Lawyer Assistance Committees.

> (1) Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privilege may be waived only by the person, firm or corporation which has furnished information to the committee. (2) Immunity from Liability. Any person, firm or corporation in good faith providing information, or in any other way participating in the affairs of, any of the committees referred to in subdivision one of this section shall be immune from civil liability that might otherwise result by reason of such conduct. For the purpose of this proceeding, the good faith of any such person, firm or corporation shall be presumed. *Id*.

15. DR 1-103 states:

> Disclosure of Information to Authorities. A. A lawyer possessing knowledge, (1) not protected as a confidence or secret, or (2) not gained in the lawyer's capacity as a member of a bona fide lawyer assistance or similar program or committee, of a violation of DR 1-102 (1200.3) that raises a substantial question as to another lawyer's honesty, trustworthiness or fitness in other respects as a lawyer, shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation. B. A lawyer possessing knowledge or evidence, not protected as a confidence or secret, concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges. DR 1-103.

16. For more information about this project, contact Terry Brooks, the staff liaison to this committee at the New York State Bar Association, tbrooks@nysba.org.

17. Chief Judge Judith S. Kaye concept paper on the appointment of the Commission on Alcohol and Substance Abuse in the Profession, September 16, 1999.

18. Commission on Alcohol and Substance Abuse in the Legal Profession, Action Plan, Executive Summary, December 15, 2000.

Barbara F. Smith is the Executive Director of the New York State Lawyer Assistance Trust.

APPENDIX I

Comparison of Diversion-to-Monitoring Rules

"Model" Rule	Fourth Department Effective January 9, 2003	Third Department Effective September 20, 2004
During the course of a disciplinary proceeding or investigation, the Appellate Division may defer disposition of the matter and divert the Respondent to a monitoring program if a Respondent claims disability due to alcohol or other substance dependency and the Appellate Division finds that: (a) the alleged misconduct, if proven, would not result in the disbarment or suspension of the Respondent from the practice of law; and (b) the alleged misconduct is sufficiently related to an alcohol or substance dependency problem on the part of the Respondent; and (c) the diversion is in the best interests of the public, the legal profession and the Respondent. The monitoring program selected for this diversion option must be sponsored by a lawyers' assistance program approved by the Appellate Division.	When an attorney who is the subject of a disciplinary investigation or proceeding raises in defense of the charges or as a mitigating factor alcohol or substance abuse, or, upon the recommendation of chief counsel or a designated staff attorney pursuant to 22 NYCRR 1022.19 (d)(2)(iii), the Appellate Division may stay the matter under investigation or the determination of the charges and direct that the attorney complete a monitoring program sponsored by a lawyers' assistance program approved by the Appellate Division upon a finding that: (i) the alleged misconduct occurred during a time period when the attorney suffered from alcohol or other substance abuse or dependency; (ii) the alleged misconduct is not such that disbarment from the practice of law would be an appropriate sanction; and (iii) diverting the attorney to a monitoring program is in the public interest.	During the course of an investigation or disciplinary proceeding, when the attorney raises alcohol or other substance abuse or dependency as a mitigating factor, or upon recommendation of the committee, the Court may, upon application of the attorney or committee, stay the investigation or disciplinary proceeding and direct the attorney to complete a monitoring program sponsored by a lawyers' assistance program approved by the Court. In determining whether to divert an attorney to a monitoring program, the Court shall consider: (i) whether the alleged misconduct occurred during a time period when the attorney suffered from alcohol or other substance abuse or dependency; (ii) whether the alleged misconduct is related to such alcohol or other substance abuse or dependency; (iii) the seriousness of the alleged misconduct; and (iv) whether diversion is in the best interests of the public, the legal profession, and the attorney
Upon confirmation by the lawyers' assistance program that Respondent has successfully completed the monitoring program, the underlying disciplinary matters or investigation may be dismissed by the Appellate Division.	Upon submission of written proof of successful completion of the monitoring program, the Appellate Division may dismiss the disciplinary charges.	Upon submission of written proof of successful completion of the monitoring program, the Court may direct discontinuance or resumption of the investigation or disciplinary proceeding, or take other appropriate action.
The Respondent shall be responsible for any costs associated with his or her diversion to the monitoring program.	Any costs associated with the attorney's participation in a monitoring program pursuant to this section shall be the responsibility of the attorney.	Any costs associated with the attorney's participation in a monitoring program pursuant to this subdivision shall be the responsibility of the attorney.
The diversion to monitoring option is not available under circumstances governed by those sections of these rules relating to proceedings to determine incapacity or that may result in disbarment or suspension.		

Licensing and Regulating Professionals Before the N.Y.S. Department of State

By Bruce Stuart

General

The New York State Department of State regulates more than 30 different professions and occupations.[1] Currently, more than 750,000 individuals and businesses are under its jurisdiction and they are subject to various statutes and regulations which are aimed at protecting the public.[2] The Department of State determines whether a license should be awarded to an applicant and investigates complaints against licensees and unlicensed practitioners. It also "may revoke a license after a hearing or by consent or may refer complaints to the Attorney General for civil or criminal prosecution."[3] In fulfilling its regulatory duties, the Department of State conducts more than 5,000 inspections and investigations and more than 1,000 licensing hearings each year.[4]

"[M]ore than 750,000 individuals and businesses are under [the] jurisdiction [of the Department of State] and they are subject to various statutes and regulations which are aimed at protecting the public."

The Department holds two types of licensing hearings: application hearings and complaint hearings. An application hearing is held upon request of the applicant when the Department proposes to deny an applicant's license application or renewal application.[5] In an application hearing, the applicant has the burden of proving that he or she is qualified by training, experience and character to receive the license for which he or she has applied.[6] In a complaint hearing, the Department of State's Division of Licensing Services alleges that a licensee has engaged in some type of misconduct, and the Division of Licensing Services has the burden of proving the alleged misconduct[7]. Penalties for misconduct, generally, include a fine, suspension of license or revocation of license.[8]

This article focuses on complaint hearings. However, the rules for application hearings are generally the same except that the burden of proof shifts to the applicant in an application hearing.

The professions and businesses licensed by the Department of State include the following:

- Real estate broker—Article 12-A of the Real Property Law
  - (1) broker [9]
  - (2) salesperson [10]
- Real estate appraiser—Article 6-E of the Executive Law
  - (1) certified general or residential real estate appraiser[11]
  - (2) licensed residential real estate appraiser[12]
  - (3) licensed real estate appraiser assistant[13]
- Notary public—sections 130 *et seq*. of the Executive Law[14]
- Private investigator—Article 7 of the General Business Law[15]
- Watch, guard or patrol agency—Article 7 of the General Business Law[16]
- Security guard—Article 7-A of the General Business Law[17]
  - (1) unarmed guard
  - (2) armed guard
- Bail enforcement agent—Article 7 of the General Business Law[18]
- Athlete agent—Article 39-E of the General Business Law[19]
- Apartment information vendor—Article 12-C of the Real Property Law[20]
- Appearance enhancement—Article 27 of the General Business Law
  - (1) shop license[21]
  - (2) cosmetology[22]
  - (3) esthetics[23]
  - (4) natural hairstyling[24]
  - (5) waxing[25]
  - (6) nail specialty[26]
- Barber—Article 28 of the General Business Law[27]
  - (1) master barber[28]
  - (2) barber apprentice[29]

- Armored car—Article 8-B of the General Business Law[30]
  - (1) armored car carrier[31]
  - (2) armored car guard[32]
- Security & fire alarm installer—Article 6-D of the General Business Law[33]
- Telemarketer—section 399-pp of the General Business Law[34]
- Coin processor—Article 27-A of the General Business Law[35]
- Bedding—Article 25-A of the General Business Law
  - (1) manufacturer of new bedding[36]
  - (2) renovator of used bedding[37]
  - (3) seller of used bedding[38]
- Central dispatch facilities——Article 6-F of the Executive Law[39]
- Hearing aid dispenser—Article 37-A of the General Business Law[40]
  - (1) individual practitioner[41]
  - (2) business[42]

Although the Department regulates some 30 license categories, some general principles apply to the licensing hearings for all categories so that research and preparation for hearings are not as daunting as it might first appear.

Procedural issues are governed by three principal sources:

(1) State Administrative Procedure Act, Article 3 (Adjudicatory Proceedings) and Article 4 (Licenses);[43]

(2) 19 N.Y.C.R.R. Part 400 (Hearing Rules of Procedure for the Department of State); and

(3) Specific licensing statute.[44]

The New York State Constitution and the New York Civil Practice Law and Rules may be applicable as well.[45]

Substantive questions are governed by two principal sources:

(1) Specific licensing statute governing the occupation or profession; and

(2) Department of State rules for that license.[46]

For each license the Department of State has prepared a "license law booklet," which contains the licensing statute and regulations for the license. These booklets are readily available from the Department.[47]

The Consumer's Complaint

Individuals and businesses licensed by the Department of State are subject to various statutes and rules intended to protect the public. Anyone who believes that a licensee has acted improperly may file a complaint with the Department of State. Complaint forms are available on the Department's Web site[48] or by calling any office of the Department of State.

Once a complaint is received, it is reviewed by the Department's Complaint Review Unit to ensure that the complaint involves a license matter that is under the jurisdiction of the Department of State. If it does not, the complainant is informed, and, if appropriate, the complainant will be referred to another federal, state or local agency for assistance. If the matter is within the Department's jurisdiction, a copy of the complaint is mailed to the licensee, who is asked to respond to the complainant's allegations.[49] Often, a licensee is not aware that a problem exists, and, once the matter is brought to the licensee's attention, the matter can be resolved quickly and informally. If the Complaint Review Unit cannot resolve the matter informally, the complaint is assigned for investigation.[50]

Investigation

The Department's investigator will interview all of the possible witnesses, including the complainant and the licensee. In addition, the investigator will gather documents relevant to the transaction. After the investigation is complete, the investigator will prepare a report and make a recommendation to his or her supervisor. The supervisor reviews the file and determines whether the matter should be resolved informally, referred for further administrative action, or closed for lack of merit.[51]

If the matter can be resolved informally to the satisfaction of the complainant, the licensee and the Department, the matter will be settled without imposing a penalty or fine. If the matter cannot be resolved informally and it is determined that the complaint has merit, the case will be referred to the Department's chief investigator, who will review the file and decide whether the matter should be handled as a ticket violation or forwarded for a formal administrative hearing.

Ticket Violations

If the chief investigator determines that the licensee has committed one or more minor violations of the licensing law or rules, the investigator will refer the matter to the Department's Discipline Unit to be handled as a ticket violation.[52] The Discipline Unit then prepares the "ticket," which is in the form of a letter setting forth the alleged violations and the proposed fine. In addition, the

letter informs the licensee that he or she can settle the matter by paying the proposed fine or, in lieu thereof, may request a formal hearing before an administrative law judge. If the licensee elects to pay the fine, the matter is settled quickly and efficiently. However, if the licensee requests a hearing, the matter is forwarded to the Department of State's legal staff along with the licensee's request for a hearing.

Legal Review of Case

Following completion of an investigation, a case can be referred for an administrative hearing in either of two ways. First, if the matter had been referred to the Discipline Unit to be handled as a ticket violation and if, after the ticket was issued, the licensee did not respond to the ticket or, alternatively, the licensee requested a hearing, the matter will be assigned to a Department of State attorney to prepare a formal complaint and to schedule a hearing. On the other hand, if the investigation had revealed serious misconduct by the licensee, the chief investigator may refer the matter directly to the Department's legal staff with a recommendation that a hearing be scheduled.[53]

When the matter has been assigned to an attorney, that attorney will, thereafter, represent the Department's Division of Licensing Services (DLS), which is the office of the Department of State responsible for the administration and enforcement of the various licensing statutes.

Once the file has been reviewed, the DLS attorney has four options:

(1) close the file for lack of merit;

(2) request additional investigation;

(3) contact the licensee to explore the possibility of settlement; or

(4) prepare a statement of charges, i.e., the complaint.

Consent Order

If the settlement option is chosen, the licensee will be advised of his or her right to counsel and will be encouraged to exercise that right.[54] If the parties can reach a satisfactory settlement, the terms of the settlement will be memorialized in a formal "consent order."[55] Generally, the consent order will identify the parties, indicate whether or not the licensee was represented by counsel, recite the misconduct alleged by the Division of Licensing Services, and provide for an agreed penalty, which may be a fine, suspension of the license, surrender of the license and/or payment of restitution to an injured third party or parties. The consent order will be signed by the licensee and by the Department of State. Execution of the consent order will settle the matter subject, of course, to the licensee's compliance with the terms of the order.

Complaint and Notice of Hearing

If the case is not settled by consent order, the DLS attorney will prepare a statement of charges or complaint. A complaint consists of a concise statement of the alleged facts and the charges. The statement must be sufficient to give the licensee notice of the alleged misconduct and the resulting charges.[56] Once the complaint has been prepared, it will be sent to the Department's Office of Administrative Hearings.[57] The Office of Administrative Hearings will assign the case to an Administrative Law Judge (ALJ), who sets a date for the hearing. The complaint then will be returned to the DLS attorney to be served on the licensee. The DLS attorney will prepare a notice of hearing, which advises the licensee of the time, date and place of the hearing; the name and address of the assigned ALJ; and the name and address of the DLS attorney. The notice of hearing, the complaint and the Department's "Guide to Statutes and Rules Relating to Hearings" will be served on the licensee in the manner prescribed by the appropriate licensing statute.[58] The usual method of serve is by certified mail or registered mail, as prescribed by the licensing statute.

The Department's "Guide to Statutes and Rules Relating to Hearings" can be viewed on the Department of State's Web site.[59] The individual licensing statutes and regulations are also available in pamphlet form on the Department's Web site.[60]

After the notice of hearing has been served, the licensee may serve an answer but is not required to do so. If the licensee does not serve an answer, all charges are deemed to have been denied, and all procedural and substantive rights are preserved.[61]

Representation

Every licensee is entitled to representation.[62] Most commonly, a licensee will appear either *pro se* or by an attorney-at-law. However, in addition, a licensee may be represented by a non-lawyer as long as the representative is not being compensated for the appearance. In either case, the representative must file a notice of appearance with the DLS attorney of record.[63] The prescribed form for the notice of appearance accompanies the notice of hearing and is also available from the DLS attorney of record. Once a representative has appeared in a case, the DLS attorney will address all correspondence to and serve all papers on the representative. Prior to the filing of a notice of appearance, the DLS attorney will correspond directly with the licensee.

Discovery

Discovery rights are limited as set forth in section 401(4) of the State Administrative Procedure Act, which provides that either party shall, upon demand at least seven days prior to the hearing, disclose the evidence

that the party intends to introduce at the hearing, including documentary evidence and identification of witnesses. This provision is commonly employed by both sides when the licensee is represented by an attorney. Of course, if after disclosure, either party finds that he or she will rely on other witnesses or documents, the party must disclose that information to the other side as soon as practicable. Failure to comply with a disclosure demand may result in the preclusion of documents or testimony. Although the Department's rule authorizes the assigned ALJ to direct additional disclosure, in practice, an ALJ will not direct additional disclosure absent compelling need shown by the party making the request.[64]

Subpoenas

Subpoenas for witnesses or documents can be issued by any attorney.[65] Subpoenas are to be served in any manner permitted by the CPLR. In the interest of justice, the assigned ALJ may issue subpoenas for a licensee who is appearing *pro se*. A request to withdraw or modify a subpoena must be presented to the party who issued the subpoena. If the parties cannot agree, the party who was subpoenaed may move in Supreme Court to have the subpoena quashed or modified.[66] The party who issues a subpoena is responsible for its enforcement by moving in Supreme Court to compel compliance.[67]

Motion Practice

Motion practice is strictly limited. The only motion authorized by the Department's rules is a motion to dismiss made at the close of the Division of Licensing Services' case. Accordingly, the assigned ALJ will not entertain pre-hearing motions.[68] The restriction on motion practice is intended to speed up the hearing process and to avoid the delays that sometimes accompany motion practice in trial courts.

Adjournments

Adjournments of the scheduled hearing will be granted only for good cause, and no party may be granted more than two adjournments. Requests for adjournments must be made by written affidavit addressed to the assigned ALJ and must be received no later than three business days prior to the scheduled date of the hearing. The affidavit must contain sufficient detail to enable the ALJ to determine whether there is a good-cause need for the adjournment.[69]

The Hearing

The hearing will normally be scheduled at an office of the Department of State in New York City, Albany, Syracuse, Binghamton or Buffalo. The hearing will be presided over by the assigned ALJ and the proceeding will be recorded by the court reporter. As previously noted, the Division of Licensing Services has the burden of proving its case.[70] Accordingly, the DLS attorney will present the Division's case by calling witnesses and introducing documentary evidence. The licensee, of course, has the right to cross-examine witnesses and to object to documents offered into evidence. After the DLS attorney has presented the Division's case, the licensee will present the licensee's defense by calling witnesses and introducing documents. With permission from the ALJ, either side may present rebuttal evidence at the conclusion of the other party's case. At the conclusion of the hearing, either party may present a closing argument.

Evidence

The strict rules of evidence do not apply in administrative hearings.[71] The two most important exceptions to the strict rules of evidence are the admission of hearsay and photocopies. Generally, speaking hearsay testimony will not be excluded, and the parties may submit photocopies rather than original documents. Although hearsay testimony is generally admissible, the ALJ is not required to admit all evidence. The ALJ may exclude "irrelevant and unduly repetitious" evidence.[72] However, in practice, nearly all relevant and non-repetitious evidence will be admitted, and it will fall to the ALJ to determine the weight to be given to each evidentiary offer. Accordingly, both parties should present the most reliable and trustworthy evidence available without undue concern for the strict rules of evidence.

ALJ's Decision

After the conclusion of the hearing and after having received a copy of the transcript from the court reporter, the ALJ will prepare a decision. The decision will be in writing and will include findings of fact and conclusions of law.[73] The decision must be based solely on the record of the hearing, which will include the transcript of the hearing and documents submitted in evidence.[74] If the ALJ determines that the Division of Licensing Services has not proved its case, the decision will dismiss the complaint. If the ALJ determines that the Division of Licensing Services has proved one or more of the acts of misconduct alleged in the complaint, the ALJ has discretion to impose a fine, suspend the license or revoke the license depending on the seriousness of the violation. In appropriate cases, the ALJ may also order restitution to persons injured by the licensee's wrongful conduct. A copy of the ALJ's decision will be mailed to the respective parties. Copies of past decisions can be viewed on the Department of State's Web site.[75]

Appeals

Either party may appeal an ALJ's decision to the Secretary of State. The appeal must be filed within 30 days

after receipt of the decision.[76] In addition, either party may immediately apply to the Secretary of State for an order staying enforcement of the ALJ's decision pending the appeal.[77] An appeal is commenced by serving a written memorandum of appeal stating the appellant's arguments and reasons for the appeal. The memorandum of appeal must be served on the Secretary of State and on the opposing party. The other party may serve a memorandum in opposition to the appeal and/or a cross appeal. Service is normally effected by personal service, certified mail, or private delivery service such as UPS or FEDEX, for example. In any case, the appellant may use any convenient method that will provide proof of delivery. If a cross appeal has been served, the appellant has 15 days in which to respond. However, failure of a party to respond to an appeal or cross appeal is not deemed a waiver or admission. If a party needs additional time to file an appeal or to serve a response, a request must be made to the Secretary of State in writing, with notice to the other side. An extension will normally be granted for good cause.

The Secretary of State's decision on appeal will be based on the record on appeal, which includes the record of the hearing plus the appeal papers. The Secretary of State's decision may confirm the ALJ's decision, may make a superceding decision that modifies or reverses the ALJ's decision, or may remand the cases to the ALJ for additional proceedings.[78] Copies of past appeal decisions by the Secretary of State can be viewed on the Department of State Web site.[79]

Judicial Review

Unless the Secretary of State remands the case back to the ALJ for further proceedings, the Secretary of State's decision on the appeal is the final decision of the agency. The Division of Licensing Services is bound by the Secretary's decision and has no right to seek judicial review. The licensee, however, may seek judicial review of the Secretary's appeal decision by commencing an action pursuant to Article 78 of the CPLR.[80] However, a licensee is precluded from seeking judicial review if the licensee has failed to exhaust the licensee's administrative remedies.[81] Since an appeal to the Secretary of State is an administrative remedy available to the licensee, the licensee must pursue an appeal to the Secretary of State before seeking judicial review. Failure to do so will result in dismissal of an Article 78 proceeding.[82]

Conclusion

This introductory guideline has presented a brief description of how the Department of State investigates licensing complaints and then proceeds to an administrative hearing. The guidelines are intentionally general in scope and, therefore, should be supplemented, where necessary, by reference to other sources for detailed commentary on specific issues. However, the Department of State invites questions and comments, which should be addressed by e-mail to counsel@dos.state.ny.us.

Endnotes

1. These include: alarm installer, apartment information vendor, apartment sharing agent, armored car carrier, armored car guard, athlete agent, bail enforcement agent, hearing aid dispenser, notary public, private investigator, real estate appraiser, real estate broker, and security guard. A more complete list of occupations and professions regulated by the Department of State is available at http://www.dos.state.ny.us/lcns/licensing.html.
2. *About the Department of State*, *available at* http://www.dos.state.ny.us/about/aboutus.htm.
3. Legal Memorandum L 102, The Department of State Licensing Complaint Resolution Process, Counsel's Office of the New York State Department of State, *available at* http://www.dos.state.ny.us/cnsl/complain.html.
4. Information provided by the Division of Licensing Services.
5. 19 N.Y. Comp. Codes R. & Rules § 400.4(b).
6. *See* State Administrative Procedure Act, § 306(1). *See also Mayflower Nursing Home v. Department of Health*, 59 N.Y.2d 935 (1983) and Conway v. Regan, 211 A.D.2d 913 (3rd Dep't 1995).
7. *See* State Administrative Procedure Act, § 306(1). *See also Tumminia v. Kuhlmann*, 527 N.Y.S.2d 673 (1988).
8. Legal Memorandum L 102, The Department of State Licensing Complaint Resolution Process, Counsel's Office of the New York State Department of State, *available at* http://www.dos.state.ny.us/cnsl/complain.html.
9. A real estate broker is "any person, firm, limited liability company or corporation, who, for another and for a fee, commission or other valuable consideration, lists for sale, sells, at auction or otherwise, exchanges, buys or rents, or offers or attempts to negotiate a sale, at auction or otherwise, exchange, purchase or rental of an estate or interest in real estate, or collects or offers or attempts to collect rent for the use of real estate, or negotiates or offers or attempts to negotiate, a loan secured or to be secured by a mortgage, other than a residential mortgage loan, . . . or is engaged in the business of a tenant relocator, or who, . . . performs any of [these] functions with respect to the resale of condominium property. . . ." N.Y. Real Property Law § 440(1). The term also includes "any person, partnership, association or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission, or otherwise, to sell such real estate, or any parts thereof, in lots or other parcels, and who shall sell or exchange, or offer or attempt or agree to negotiate the sale or exchange, of any such lot or parcel of real estate." N.Y. Real Prop. L. § 440(1).
10. A real estate salesperson is "a person associated with a licensed real estate broker to list for sale, sell or offer for sale, at auction or otherwise, to buy or offer to buy or to negotiate the purchase or sale or exchange of real estate, or to negotiate a loan on real estate . . . or to lease or rent or offer to lease, rent or place for rent any real estate, or collects or offers or attempts to collect rent for the use of real estate for or in behalf of such real estate broker, or who, . . . performs any of [these] functions with respect to the resale of a condominium property . . . " N.Y. Real Prop. L. § 440(2).
11. A state certified real estate appraiser is "a person who develops and communicates real estate appraisal and who holds a current, valid certificate issued to him or her for either general or residential real estate . . . " N.Y. Executive Law § 160-a(6)(a).
12. A state licensed real estate appraiser is defined as "a person who develops and communicates real property appraisals and who holds a current valid license issued to him or her for residential real property. . . . "N.Y. Exec. L. § 160-a(6)(b).

13. A licensed real estate appraiser assistant is "a person who assists and is supervised by a state licensed real estate appraiser or state certified real estate appraiser and who holds a current valid license issued to him or her. . . ."N.Y. Exec. L. § 160-a(6)(c).

14. A notary is appointed for a four-year term. N.Y. Exec. L. § 130. At the time of the appointment, the individual must be a United States citizen and "either a resident of the state of New York or have an office or place of business in New York state." *Id*.

15. The activities of a private investigator include conducting an investigation to obtain information regarding "crimes . . .; the identity, habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation or character of any person, group of persons, association, organization, society, other groups of persons, firm or corporation; the credibility of witnesses or other persons; the whereabouts of missing persons; the location or recovery of lost or stolen property; the causes and origin of, or responsibility for fires, or libels, or losses, or accidents, or damage or injuries to real or personal property; or the affiliation, connection or relation of any person, firm or corporation with any union, organization, society or association, or with any official, member or representative thereof; or with reference to any person or persons seeking employment in the place of any person or persons who have quit work by reason of any strike; or with reference to the conduct, honesty, efficiency, loyalty or activities of employees, agents, contractors, and sub-contractors; or the securing of evidence to be used before any authorized investigating committee, board of award, board of arbitration, or in the trial of civil or criminal cases." N.Y. General Business Law § 71(1). The business of private investigator is also defined. *See* N.Y. Gen. Bus. L. § 71(3).

16. "A watch, guard or patrol agency is the business of furnishing . . . watchmen or guards or private patrolmen or other persons to protect persons or property or to prevent the theft or the unlawful taking of goods, wares and merchandise, or to prevent the misappropriation or concealment of [property]." N.Y. Gen. Bus. L. § 71(2). The statute permits a licensed private investigator to also act as "a watch, guard or patrol agency or bail enforcement agent." *See* N.Y. Gen. Bus. L. § 70.

17. N.Y. Gen. Bus. L. § 89-f. The Department maintains a registry of security guards and applicants. *See* N.Y. Exec. L. § 99(1). For more details on the registry, see N.Y. Exec. L. § 99(1).

18. A bail enforcement agent engages "in the business of enforcing the terms and conditions of a person's release from custody on bail in a criminal proceeding, including locating, apprehending and returning any such person released from custody on bail who has failed to appear at any stage of a criminal proceeding to answer the charge before the court in which he may be prosecuted." N.Y. Gen. Bus. L. § 71(1-a).

19. An athlete agent is "an individual who enters into an agency contract with a student-athlete or, directly or indirectly, recruits or solicits a student-athlete to enter into an agency contract." N.Y. Gen. Bus. L. § 899-a(2). The "spouse, parent, sibling, grandparent or guardian of the student-athlete, or an individual acting solely on behalf of a professional sports team or professional sports organization" are not included within the definition. *Id.* This statute is based on the Uniform Athlete Agent Act which was developed at the urging of the NCAA and several academic institutions, *available at* http://www1.ncaa.org/membership/enforcement/agents/uaaa/history.html.

20. Apartment information vendor engages in the business of "furnishing information concerning the location and availability of real property, including apartment housing, which may be leased, rented, shared or sublet as a private dwelling, abode, or place of residence." N.Y. Real Prop. L. § 446-a(2).

21. N.Y. Gen. Bus. L. § 401(2).

22. Cosmetology includes "providing service to the hair, head, face, neck or scalp of a human being, including but not limited to shaving, trimming, and cutting the hair or beard either by hand or mechanical appliances and the application of antiseptics, powders, oils, clays, lotions or applying tonics to the hair, head, or scalp, and . . . , services for the application of dyes, reactive chemicals, or other preparations to alter the color or to straighten, curl, or alter the structure of the hair of a human being." N.Y. Gen. Bus. L. § 400(7).

23. Esthetics are "services to enhance the appearance of the face, neck, arms, legs, and shoulders . . . by the use of . . . makeup, eyelashes, depilatories, tonics, lotions, waxes, sanding and tweezing, whether performed by manual, mechanical, chemical or electrical means and instruments but shall not include the practice of electrology." N.Y. Gen. Bus. L. § 400(6).

24. Natural hair styling is "providing . . . . shampooing, arranging, dressing, twisting, wrapping, weaving, extending, locking or braiding the hair or beard by either hand or mechanical appliances." N.Y. Gen. Bus. L. § 400(5).

25. Waxing is "the removal of hair by the use of depilatories, waxes or tweezing but shall not include the practice of electrology." N.Y. Gen. Bus. L. § 400(10). This is a relatively new category of license which permits a person to conduct this type of business without obtaining a license for cosmetology or esthetics. *See* Legal Memorandum LI07, *Practice of Waxing*, Counsel's Office of the New York State Department of State, *available at* http://www.dos.state.ny.us/cnsl/waxing.html.

26. Nail specialty is a service that deals with "the appearance of the nails of the hands or feet." N.Y. Gen. Bus. L. § 400(4). It includes "the application and removal of sculptured or artificial nails." *Id*.

27. The business of barbering includes: "(a) shaving or trimming the beard or cutting the hair of humans; (b) giving facial or scalp massage with oils, creams, lotions or other preparations, either by hand or mechanical appliances; (c) singeing, shampooing, arranging, dressing or dyeing the hair or applying hair tonic; (d) applying cosmetic preparations, antiseptics, powders, oils, clays or lotions to scalp, face or neck." N.Y. Gen. Bus. L. § 431(4).

28. N.Y. Gen. Bus. L. § 432.

29. *Id*.

30. Armored car services include "engaging in the business of providing secured transportation, protection and safeguarding of valuable cargo from one place or point to another, including the provision of cash services for automated teller machines, by means of specially designed and constructed bullet-resistant armored vehicles and armored car guards." N.Y. Gen. Bus. L § 89bbb(7). The key to the definition is the "bullet-resistant armored vehicle." Companies who transport goods in non-armored vehicles, such as moving companies, are not covered. Legal Memorandum Li06, *Licensing of Armored Car Carriers and Registration of Armed Guards*, Counsel's Office of the New York State Department of State, *available at* http://www.dos.state.ny.us/cnsl/armopn.html. As part of regulating armored car guards, the Department maintains a registry for armored car guards and applicants. *See* N.Y. Exec. L. § 100(1). For more details on the registry, *see* N.Y. Exec. L. § 100(1).

31. An armored car carrier provides armored car services for hire." N.Y. Gen. Bus. L. § 89bbb(6).

32. An armored car guard is an "individual employed by an armored car carrier to provide armored car services and who carries a firearm or is authorized by the employer to access a firearm when providing armored car services . . . " N.Y. Gen. Bus. L. § 89ppp(8). An unarmed person who drives or accompanies the vehicle is excluded from the licensing requirements. Legal Memorandum Li06, *Licensing of Armored Car Carriers and Registration of Armed Guards*, Counsel's Office of the New York State Department of State, *available at* http://www.dos.state.ny.us/cnsl/armopn.html.

33. A person engaging in the installation of fire alarm and security systems "holds himself out directly or indirectly, as being able, or who offers or undertakes, by any means or method, to install, ser-

vice or maintain a security or fire alarm system to detect intrusion, break-in, movement, sound or fire." N.Y. Gen. Bus. L. § 69-l.

34. A telemarketer engages in "any plan, program or campaign which is conducted to induce payment or the exchange of any other consideration for any goods or services by use of one or more telephones and which involves more than one telephone call by a telemarketer in which the customer is located within the state at the time of the call." N.Y. Gen. Bus. L. § 399-pp.

35. N. Y. Gen. Bus. L § 419(2). Coin processing services "means the taking in, holding and counting of coins received by other businesses and exchanging such coins for an equivalent amount of money, currency, coins or negotiable instruments for a negotiated service fee." N. Y. Gen. Bus. L. § 419(3). It does not involve businesses that are subject to the banking law, or other laws governing processing of money. *Id.*

36. N.Y. Gen. Bus. L. § 384. Manufacturers of new bedding sold in New York must file an annual notice with the Department of State affirming that the bedding is new. *Id.*

37. N.Y. Gen. Bus. L. § 385. Manufacturers and renovators of used bedding must a file an annual notice with the Department of State affirming that the bedding has been sanitized as required by Department of Health standards. *Id.*

38. N.Y. Gen. Bus. L. § 386. A person who sells used bedding, including mattresses and box springs, must file a notice with the Department of State that the bedding has been sanitized as required by Department of Health standards. *Id.* These regulations do not apply to a person holding a garage sale or transacting other private sales. *Id.*

39. A central dispatch facility is "a central facility, wherever located, that (a) dispatches the registered owners of for-hire vehicles, or drivers acting as the designated agent of such registered owners, to both pick-up and discharge passengers in the state, and (b) has certified to the satisfaction of the Department of State that more than ninety percent of its for-hire business is on a payment basis other than direct cash payment by a passenger." N.Y. Exec. L. § 160-cc(3). This oversight is conducted in conjunction with oversight of the New York black car operators' injury compensation fund. N.Y. Exec. L. § 160-dd The sole purpose of the fund is to provide Workers' Compensation coverage for "black car" operators in New York. *See History of the Fund, available at* http://www.newyorkblackcarfund.org/index.cfm?pgid=about.

40. A hearing aid dispenser is a "person twenty-one years of age or older or an audiologist licensed under . . . the Education Law who is engaged in the dispensing of hearing aids who is registered and dispensing hearing aids. . . ." N.Y. Gen. Bus. L. § 789(8). Dispensing hearing aids includes a broad range of activities. *See* N.Y. Gen. Bus. L. § 789(6).

41. N.Y. Gen. Bus. L. § 790(1).

42. N.Y. Gen. Bus. L. § 790(5).

43. 19 N.Y. Comp. Codes R. & Rules § 400.3 (Conduct of Hearings).

44. *Id.*

45. *Id*.

46. *See* 19 Comp. Codes R. & Rules, Chapter V (Division of Licensing Services).

47. The law booklets can be viewed on the Department of State's web site *available at* http://www.dos.state.ny.us/lcns/licensing.html. Follow the link to the appropriate license.

48. http://www.dos.state.ny.us/lcns/pdfs/1507.pdf.

49. Legal Memorandum L 102, The Department of State Licensing Complaint Resolution Process, Counsel's Office of the New York State Department of State, *available at* http://www.dos.state.ny.us/cnsl/complain.html.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *See* 19 Comp. Codes R. & Rules § 400.10.

55. *See* N.Y. A.P.A. § 301(5).

56. *See* 19 N.Y. Comp. Codes R. & Rules § 400.4.

57. *See* 19 N.Y. Comp. Codes R. & Rules § 400.2.

58. *See* 19 N.Y. Comp. Codes R. & Rules §§ 400.3, 400.9.

59. http://www.dos.state.ny.us/ooah/guide1.html. The pamphlet contains a simplified summary of hearing procedures; Articles 3, 4 & 5 of the State Administrative Procedure Act; and 19 N.Y.C.R.R. Part 400 (Department of State Hearing Rules of Procedure).

60. http://www.dos.state.ny.us/lcns/licensing.html. The site has links to the various license categories and additional useful information regarding each of the licenses.

61. *See* 19 N.Y. Comp. Codes R. & Rules § 400.4(a).

62. *See* 19 N.Y. Comp. Codes R. & Rules § 400.10.

63. *Id.*

64. *See* 19 N.Y. Comp. Codes R. & Rules § 400.3.

65. *See* 19 N.Y. Comp. Codes R. & Rules § 400.5.

66. *See* N.Y. CPLR 2304.

67. *See* N.Y. CPLR 2308(b).

68. *See* 19 N.Y. Comp. Codes R. & Rules § 400.6.

69. *See* 19 N.Y. Comp. Codes R. & Rules § 400.11.

70. *See* N.Y. A.P.A. § 306(1).

71. *See* N.Y. A.P.A. § 306(1); 19 N.Y. Comp. Codes R. & Rules § 400.8.

72. *See* N.Y. A.P.A. § 306(1).

73. *See* N.Y. A.P.A. § 307; 19 N.Y. Comp. Codes R. & Rules § 401.2(j).

74. *See* N.Y. A.P.A. § 302.

75. http://www.dos.state.ny.us/ooah/ooahwww.html.

76. *See* 19 N.Y. Comp. Codes R. & Rules § 400.2(k).

77. *See* 19 N.Y. Comp. Codes R. & Rules § 400.2(l).

78. Legal Memorandum L 102, The Department of State Licensing Complaint Resolution Process, Counsel's Office of the New York State Department of State, *available at* http://www.dos.state.ny.us/cnsl/complain.html.

79. http://www.dos.state.ny.us/cnsl/appeals.html.

80. Legal Memorandum L 102, The Department of State Licensing Complaint Resolution Process, Counsel's Office of the New York State Department of State, *available at* http://www.dos.state.ny.us/cnsl/complain.html.

81. Legal Memorandum L 102, The Department of State Licensing Complaint Resolution Process, Counsel's Office of the New York State Department of State, *available at* http://www.dos.state.ny.us/cnsl/complain.html.

82. *See Jardim* v. *PERB*, 177 Misc. 2d 528, 677 N.Y.S.2d 693 (Sup. Ct., Kings County 1998).

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Representing a Licensed Professional in Administrative Disciplinary Proceedings

By Dennis K. Spillane

Many attorneys have clients that are architects, engineers, chiropractors or some other of the 28 professions that are licensed by the New York State Education Department. These clients may come to the attorney with a letter from the Education Department that indicates professional misconduct charges are being contemplated and contains an offer of a conference. The purpose of this article is to inform attorneys of the basic steps in proceeding to assist these clients.

This article provides the practitioner with an introduction to the process of professional misconduct litigation. This understanding is necessary in order to enable him or her to intelligently represent clients facing professional misconduct charges.

Prior to discussing the above "conference letter," a brief overview of the administrative process is helpful. The State Education Department is charged with investigating and prosecuting charges of professional misconduct through its Office of Professional Discipline.[1] Two divisions, the Investigations Division and the Prosecutions Division, make up this Office. Generally, the process begins with the receipt of a complaint about a licensed professional. This complaint is numbered and forwarded to the Investigations Division where an investigator is assigned. This Investigations Division has offices in major cities such as Buffalo, Syracuse, Albany and Rochester along with New York City and Long Island because of its state-wide jurisdiction. In 2003-04, approximately 7,000 cases were processed.[2]

Jurisdiction

The administrative investigator will examine the allegations to determine if the Education Department has jurisdiction. The allegations must fit into the statutorily prescribed definition of professional misconduct, which is set out in Section 6509 of the Education Law, in order to fit within the jurisdiction of the agency. If the allegations do not fit in under Section 6509, such as a fee dispute between a licensed professional and a client, then the case is closed. Conversely, if the complaint alleges fraud or negligence and is within the jurisdiction, the investigation begins.

Investigation

The investigation that follows begins with a determination of the presence of sufficient evidence to support a charge. A conference is held with an attorney from the Prosecutions Division once the investigator believes the case has been adequately developed. If the prosecuting attorney decides the case is prepared to be prosecuted, he or she makes a recommendation to the executive director for Office of Professional Discipline. After consulting with a member of the appropriate State Board, if the executive director, also known as the Professional Conduct Officer, agrees with the recommendation, the case is transferred to the Prosecutions Division. It is here where the conference letter is generated.[3]

The Conference Letter

Prior to the filing of charges, the conference letter offers the professional the option of a conference with the assigned Prosecutions Division. If a professional approaches his or her attorney with this letter asking for advice, the first action the attorney should take is to telephone the Prosecutions Division attorney. The prosecuting attorney will explain the complaint's allegations to the professional's legal representative. Additionally, the prosecuting attorney may communicate the Department's settlement offer. This offer is analogous to a plea bargain in a criminal case. The penalties are limited to sanctions against the professional's license. The range of penalties is contained in Section 6511 of the Education Law.

Settlement and Consent Agreement

Should the professional decide to accept the settlement offer, a consent agreement (formally known as an Application for Consent Order) is submitted to the Education Department. If this agreement is approved by the applicable State Board, the Committee on the Professions, a single member of the Board of Regents, and then receives separate, final approval by the full Board of Regents—an Order of the Board of Regents is issued embodying the terms of the agreement, thereby ending the case.

Settlement Conference

If the licensee rejects the settlement offer, then the licensee has the option of attending an Informal Settlement Conference (ISC). In addition to the licensee, a prosecutor from the applicable State Board and a conference facilitator from the Department attend as well. This facilitator is the Department's Professional Conduct Officer (presently the Director of the Office of Professional Discipline or a designee). The ISC represents a last attempt to settle the case prior to a disciplinary hearing. At the conference, there is an off-the-record discussion of the case between the parties. The principal benefit for a licensee attending such a conference is the chance to have an informal dialogue directly with a member of the State Board concerning the merits of his or her case. After the dialogue is concluded and the Board member and the facilitator have a brief private exchange, the facilitator will announce to the parties a final settlement offer. In certain rare instances, the facilitator may recommend to the prosecutor that the case be closed if the discussion convinced a Board member and the facilitator of the insufficiency of the case. If a final settlement offer is communicated, then the licensee is given one week to accept or reject the ISC's final offer. If the final offer is accepted, then a consent agreement will be entered into and the case will proceed as outlined above.

Administrative Hearing-Procedure

If the licensee rejects the ISC's offer, then the case must proceed to an administrative hearing before the State Board for the licensee's profession. For example, if the licensee is a CPA, then the hearing will be held before members of the State Board for Public Accountancy. The hearing panels must contain three members of the applicable State Board, one of whom must be a public representative.

Next, the prosecuting attorney is required to draft charges and request a hearing date from the appropriate State Board. On receipt of a hearing date, the prosecuting attorney must serve the charges on the professional at least 15 days before the hearing or, if personal service cannot be effected by due diligence, then service by mail must be made at least 20 days before the hearing.[4] These hearings are generally conducted at a location close to where the licensee practices. Additionally, these hearings are usually closed to the public.

Pre-hearing discovery is governed by Section 401(4) of the State Administrative Procedure Act. This act limited discovery to the names of witnesses and the documents that will be introduced into evidence. These discovery demands must be in writing and are reciprocal in nature.

The Administrative Hearing

Once the hearing begins, the prosecution presents its case first. The prosecution also has the burden of proving the charges by a preponderance of the evidence.[5] The Legal Services Division of the State Education Department provides an Administrative Officer to preside over the hearing. This Administrative Officer is responsible for all legal rulings, including evidentiary issues.[6] However, the Administrative Officer has no power beyond this, and does not make the ultimate determination on issues such as innocence, guilt and penalty. These decisions rest exclusively with the hearing panel. Like other administrative hearings, the rules of evidence are relaxed and hearsay is admissible.

The defense is offered an opportunity to present a case after the prosecution concludes its direct case.[7] When both sides have rested, summations conclude the hearing. Afterwards, the hearing panel votes on innocence or guilt in private and determines a penalty if guilt is established. Four votes from members of the panel are necessary in order to determine guilt.[8]

A written report of the hearing panel's decision is prepared by the Administrative Officer. This report, containing findings of fact, conclusions of law, determinations of guilt or innocence and a penalty, is signed by all the panel members.[9]

Administrative Review

Once the report is complete, a copy is sent to both sides. Additionally, the Regents Review Committee conducts a mandatory review.[10] The Committee is comprised of a three-member panel consisting of a sitting member of the Board of Regents and two others, usually former judges. The Committee is empowered to recommend to the Board of Regents that the finding of innocence or guilt be reversed or that the penalty be modified. The Board of Regents will consider both the hearing panel report and the Regents Review Committee report. At the meeting of the Regents Review Committee, briefs and testimony addressing innocence, guilt and penalty will be considered.

If the Board of Regents decides to reverse a hearing panel determination of innocence, it must then remand the matter to the original panel for reconsideration or to a new panel for a rehearing.[11] After the Board of Regents makes its decision, it will instruct the Commissioner of Education to implement that decision by issuing an order. This order, served on both sides, constitutes a final administrative decision for Article 78 purposes. Appeals by licensees wishing to challenge the petition under Article 78 are directed to the Appellate Division, Third Department.[12]

Variation in Process

If the underlying allegation is a conviction of a state or federal crime or a finding of professional misconduct by an out-of-state disciplinary body, there is a variation from the regular process. These cases are not heard by a Board hearing panel even though they are *per se* professional misconduct under Section 6509;[13] instead, they go directly to the Regents Review Committee for a determination of a proper penalty because innocence or guilt has already been determined.[14] Nevertheless, the licensee still has the opportunity to enter into a consent agreement prior to the Regents Review Committee hearing.

If the licensee decides to reject the settlement offer, the only issue before the Committee will be the appropriate penalty. In this type of case, the Committee usually wants to hear the professional's own views. Preparation for this stage of the hearing is vital, and the attorney representing the professional should stress that both remorse and mitigation can be major mitigation issues. Also, mitigation can consist of written recommendations or testimony from colleagues and friends regarding the professional's standing in the community along with any other facts that would reduce the impact of the finding or conviction and its underlying facts.

Professional misconduct allegations persist, so too will administrative litigation. It is unlikely the trend will stop and a prepared attorney will be equipped to help guide a licensed professional through the administrative process.

Endnotes

1. N.Y. Educ. Law § 6507(4)(h), Note that all misconduct charges against physicians, physicians' assistants and specialists' assistants are handled by the Office of Professional Medical Conduct.
2. New York State Education Department, Office of the Professions, 2003-04 Annual Report.
3. N.Y. Educ. Law § 6510(1)(b).
4. N.Y. Educ. Law § 6510(1)(d).
5. N.Y. Educ. Law § 6510(c)(3).
6. *Supra* note 4.
7. N.Y. Educ. Law § 6510(3)(c) and (a).
8. N.Y. Educ. Law § 6510(3)(d).
9. N.Y. Educ. Law § 6510(3)(d) and (b).
10. N.Y. Educ. Law § 6510(4)(a).
11. N.Y. Educ. Law § 6510(4)(c).
12. N.Y. Educ. Law § 6510(5).
13. N.Y. Educ. Law § 6509(5).
14. N.Y. Educ. Law § 6510(2)(d).

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Professional/Occupational License Litigation

By Brian M. Bégué

Whether an architect, physician, nurse, cosmetologist, engineer, or any other specified profession or occupation, one must be duly licensed. For the last thirteen years, I have prosecuted administrative proceedings and to those of you who may be engaged in the defense of those in danger of loss of professional or occupational licensure, I offer the following suggestions:

First, there are three sets of laws which apply to one's fitness to receive, and retain, a license: (1) a practice act, which is applicable to a particular profession or occupation; (2) an administrative code, which contains the rules adopted by those agencies; and (3) the model Administrative Procedure Act (MAPA), which sets forth in most states the procedure applicable to the adoption of rules and the conduct of adjudication proceedings. Together, these comprise Administrative Law. Just because the licensing agency has the power to adopt and promulgate rules (which, as long as they are not in conflict with a higher (statutory) authority, have the force of law) does not mean they, like statutes, are presumptively valid. Make sure they were correctly created. It is surprising how often licensees are represented by lawyers who are not familiar with the administrative law applicable to administrative proceedings.

When researching, the rules are often more difficult to find than the statutory practice acts. Some agencies post them on Web sites, but these are often inaccurate, as are those Web pages containing links to the rules of certain agencies. The agencies themselves will sell you a copy of their rules, but, again, these are sometimes out-of-date and unreliable. In some states, the only sure way to locate current, accurate rules is to read the state publication in which the Administrative Code is located. But this too presents problems, the most significant of which is that it is often arranged in chronological order and *not* according to the agency which adopted them. Thus, slogging through Department of Public Safety, Cosmetology Board and other agency rules to determine the completeness of the agency rules in which you are interested may be unavoidable.

Be aware of these administrative law anomalies:

(1) Hearsay is *admissible* in administrative proceedings, although in some jurisdictions it may not be the only evidence in support of an adverse finding.[1] So, objecting to it may reveal a lack of familiarity with Administrative Law.

(2) Administrative adjudications are quasi-criminal and incorporate some, but not all elements of criminal law; i.e., there is a right to avoid self-incrimination.[2] However, if it is exercised, failure to testify is usually construed adversely (but the exclusionary rule does apply).

(3) In many jurisdictions the rules of civil, not criminal, procedure apply.[3] Filing a motion for a bill of particulars (per local criminal procedure rules when not required in civil suits) reveals one's lack of preparation.

(4) The standard of proof varies from one jurisdiction to another—some requiring proof by a preponderance of the evidence and others by clear and convincing evidence.[4] Know which one applies.

(5) In some jurisdictions, the MAPA acts as a procedural safety net; i.e., it is only in effect where a particular practice act is silent on the particular procedure at issue.[5] Make sure you know which procedural rules apply.

To avoid mistakes, you should read the jurisprudence, too.

"It is surprising how often licensees are represented by lawyers who are not familiar with the administrative law applicable to administrative proceedings."

So, you have located, read and digested the troika of administrative law and the jurisprudence interpreting them, and are now able to perfect a strategy regarding the defense of your client's license, without which he or she has no livelihood. How should you best approach your adversary?

Most agencies are comprised of persons engaged in the profession or occupation they regulate.[6] So, whether a private detective, cosmetologist, civil engineer or psychologist, your client is subject to the judgment of his or her peers. However, the members of the boards of these agencies are not involved in the day-to-day activities of the agency; these are usually performed by the agency

staff, who are not members of the profession or occupation the agency regulates. Because these individuals regularly communicate with those who sit in judgment, the impression made on them is important. Should you antagonize the agency staff, you may be facing a hostile tribunal down the road.

I suggest ardent cooperation is the best approach, especially in those cases where the client's misconduct is clear. Yet even where it is not clear that the client has violated his practice act, a conciliatory approach is still the best one. Remember, in most licensing situations the opponent is also the judge, so this is no place for provocative aggression. If you cooperate sincerely, you may make a better deal for your client and avoid the dangers of an administrative adjudication proceeding. Often, admitting your client's culpability, whereby he or she accepts responsibility, can mean a much better deal.

If your attempts to resolve the matter at the staff level fail, your next contact will be with the prosecutor, who is probably experienced and knowledgeable in the law as well as the profession or occupation. This, too, is someone you do not wish to alienate, especially if you still have hope of a favorable informal resolution.

Mentioning friends in high places does not work here, nor does threatening the agency staff or counsel with job loss. Taking that approach may doom your client.

Should a trial become unavoidable, you must make a record without antagonizing the agency members appointed to sit in judgment. A key point: none of the architects judging your architect are accustomed to this role, nor do they relish it. They see themselves in the defendant's place and empathize with him. However, as the defendant or his lawyer insults, harasses, disdains, or otherwise offends those reluctant judges, they become more and more comfortable doing their duty, even if it means dropping a load of bricks on their colleague. So, make a record and do it politely, even if the tribunal or agency counsel attempts to provoke you.

Should the trial decision be adverse, you should be aware that the appeals process is *not* a trial *de novo*; judicial review must be conducted solely on the record made before the administrative body. These appeals are hard to win because (1) the district courts give deference to the agency's decision and the review of it, whether by a preponderance or clear and convincing standards, usually are in favor of the agency; and (2) the size of the record leads one to only wonder who fights his way through hundreds of pages of testimony and exhibits. My recommendation: Make the best deal you can immediately before or during the trial, for at these times the agency professionals would rather be somewhere else. Of course, if you have previously insulted the integrity of the agency, its staff, or counsel; announced, loudly and often, the inevitable dismissal of the complaint; bragged about friends in high places whose ears are always available to you; or, worst of all, involved politicians in the agency's affairs, then any such compromise effort is a waste of time because all involved will be eager to see that your client receives all of the justice you both deserve.

Endnotes

1. For example, at administrative proceedings in New Mexico hearsay is admissible. However, it must be commonly relied upon in the field and nonhearsay evidence must also be introduced. N.M. ADMIN. CODE, tit. Occupation and Professional Licensing, § 16.12.1.9(f)(5)(b)(i), (ii) (2004).
2. In the District of Columbia an individual may claim a right against self-incrimination but may also be compelled to testify about the matter to which the right is being asserted. Should this occur, that individual may not be prosecuted for testifying or bringing forth evidence on the matter to which the right has attached. 47 D.C. Reg. 7837, § 601(d).
3. *See*, N.D. ADMIN. CODE § 81-01.1-02-03.1 (2005).
4. *Compare*, ARIZ. ADMIN. CODE § R2-19-119 (2004) *with* 25 Ind. Reg. 803, 844 IAC 13.
5. One such example is found in the Georgia Real Estate Commission regulations, which state that, "Before imposing sanctions . . . a hearing must be held in accordance with the 'Georgia Administrative Procedural Act'. . . ." Ga. Comp. R. & Regs. r. 520-2-.16(3).
6. Under the Rules for Enforcement of Lawyer Conduct 2.4(b), review committees consist of three members, two of whom are lawyers.

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Addressing Classroom Incivility in Academe

By Alan E. Bayer and John M. Braxton

Seasoned professors bemoan how college students are much worse today than their predecessors were. Faculty members are quick to report that contemporary students are inattentive, insolent, disrespectful, and demonstrate a host of other uncivil behaviors in the classroom.

Alan E. Bayer

What the faculty fails to see is that instructors often foster these incidents of student incivility in their own classes. Further, students are reticent to report misbehavior by the person at the head of the class because of both the power differential and a general lack of knowledge about appropriate role performance expectations.

Only the most egregious instances of classroom misconduct by a faculty member will generate a complaint to a faculty mentor or administrative official. Because of student resignation, or the fear to complain, only rare instances of misconduct that reach crisis proportions are acted upon by students. Then organized mobilization is often enacted, yielding a security-in-numbers approach. For instance, when one of the authors was a department chair, a delegation of students arrived *en masse* to lodge complaints about the severe authoritarian posture and close-mindedness of a particular senior faculty member. When the faculty member was subsequently counseled, her immediate response was indignation. She said it was inappropriate to allow students to meet with the chair and said the chair was foolish to listen to the "whining children" when she had already proven herself by her standing as a full professor and her designation by the university as a distinguished professor. Obviously, the response quickly validated the students' concerns.

These faculty behaviors and attitudes are the under-reported and under-perceived side of the classroom incivility coin. There is a synergistic interplay between student (mis)behavior and faculty (mis)conduct. Student incivility is often modeled after the incivility of the instructor. Almost a decade ago, Robert Boice published the article "Classroom Incivilities," which was based on weekly observations over a three-year period in a variety of classes at his institution. He reported not only that classroom incivilities were more common than uncommon, but also that the teachers were generally the initiators.[1] More recent evidence from a cross-section of American colleges and universities supports Boice's observations. Moreover, our own research indicates that both student classroom incivilities and faculty classroom misconduct negatively impact student academic progress, retention and intellectual development.[2]

John M. Braxton

Unlike formal policies addressing misconduct *outside* of the classroom, policies addressing classroom incivilities are generally lacking. For example, federal agencies, professional associations, and academic institutions often have enforcement divisions, ethical codes or policies that address faculty misconduct in research, including plagiarism and fabrication or falsification of research data. In regard to teaching performance there is little codified policy even at the institutional level (except perhaps for sexual harassment of students and issues of moral turpitude).

Similarly, for student misconduct, academic institutions often promulgate formal policies for hazing, alcohol and drug abuse, propagation of computer viruses, behavior at sporting events, and other student behaviors that are external to the classroom. With regard to misconduct directly related to instruction, institutional policy seldom extends beyond addressing student cheating and plagiarism.

There is widespread acknowledgement by the professoriat that there is a growing surge in instances of student classroom incivility. Also, there is increasing evidence of professorial contribution to an uncivil classroom environment. In light of this, institutions might well consider new and extended policies to address these issues. It is crucial that any action involve the faculty and that academic freedom, faculty autonomy, and the sanctity of the college classroom be preserved. But within these broad parameters, a more proactive approach could nevertheless be instituted to address incivility in the classroom at virtually every U.S. college and university. Illustrative approaches are provided below.

- **Code of conduct for instructional faculty.** Our research has shown that there is a broad normative consensus among faculty on a number of teaching behaviors and these might be codified as institution-wide standards.[3] Such a document might, for example, articulate expectations for preparation of a syllabus, principles of fair and objective grading practices, standards of course planning and course organization, as well as outline the responsibility of

the instructor to foster positive classroom climate, and maintaining the accessibility of instructors to students outside of the classroom.[4]

- **Code of conduct for students.** At present, student codes or student handbooks that pertain to the classroom setting largely focus on cheating and plagiarism. Attendance policies are also included at some institutions. These codes and handbooks should be extended to address aspects of classroom decorum and courtesies, such as turning off cell phones, allowing others to speak, not being disruptive when entering the classroom late or leaving early, and an array of other general expectations upon which virtually all faculty agree.[5]
- **A statement of student rights in the learning environment.** If students are unaware of basic pedagogical principles and these principals are not codified at their institution, then students cannot be expected to know that they may act to correct a hostile classroom environment that is perpetrated by an instructor. Examples of these rights include entitlement to a just, fair, respectful, and non-authoritarian classroom; the right to receive substantive course content consistent with published course descriptions; the right to be given assignments and reading materials that facilitate the learning process in relation to course objectives; the right to confidentiality; the right to know the grading system and to be fairly rewarded for mastery of the course materials; freedom to express one's own opinion; and the right to evaluate their course and instructor.[6]
- **Written behavior expectations for students by their individual instructors.** The syllabus is increasingly viewed as a tool for instructors to outline behavioral expectations in addition to the usual assignments and design mechanics of the course. Indeed, some instructors now prepare "contracts" identifying behavioral expectations of students (and sometimes the corresponding expectations that students might have of them) to be signed by all on the first day of class.
- **Reform of student course-rating instruments.** While now broadly used across academe, student evaluation forms should contain options that readily allow students to provide information on specific, perceived, inappropriate behaviors by the faculty member in their teaching roles because students are generally in the best position to observe or experience gross incidents of misfeasance or malfeasance. In conjunction with such revisions of evaluation content, many institutions require a clearer process to assure that there is conscientious and objective administrative review of the students' input offered through these teaching evaluation tools.[7]
- **Establishment of standing committees on teaching integrity.**[8] The creation of a standing committee on campus formalizes both the institution's and the faculty's commitment to good teaching. It facilitates a learning environment in a way that positively impacts more people than teaching awards (which are the principal means of reinforcing good teaching practice today). Formal organizational entities also support reporting of improper incidents by individual students and by faculty colleagues who may be aware of significant improprieties by a colleague in relation to his or her students.

Reports of classroom incivilities are growing, whether emanating from students or from the instructor. Consequently, new institutional infrastructure is necessary to address all incidents. The multitude of conscientious, dedicated, and ethical faculty members deserve it—and optimal student learning depends on it.

Endnotes

1. Robert Boice, *Classroom Incivilities*, *Research in Higher Education*, 453-485 (1996).
2. Amy S. Hirschy & John M. Braxton, *Effects of Student Classroom Incivilities on Students*, *in Addressing Faculty and Student Classroom Improprieties:* New Directions for Teaching and Learning, 67-76 (John M. Braxton & Alan E. Bayer eds., 2004); John M. Braxton, Alan E. Bayer, & James A. Noseworthy, *The Influence of Teaching Norm Violations on the Welfare of Students as Clients of College Teaching*, *in Addressing Faculty and Student Classroom Improprieties:* New Directions for Teaching and Learning, 41-46 (John M. Braxton & Alan E. Bayer eds., 2004).
3. John M. Braxton & Alan E. Bayer, *Faculty Misconduct in Collegiate Teaching* (1999).
4. John M. Braxton & Alan E. Bayer, *Toward a Conduct of Conduct for Undergraduate Teaching*, *in Addressing Faculty and Student Classroom Improprieties:* New Directions for Teaching and Learning, 47-55 (John M. Braxton & Alan E. Bayer eds., 2004).
5. Alan E. Bayer, *Promulgating Statements of Student Rights and Responsibilities*, *in Addressing Faculty and Student Classroom Improprieties:* New Directions for Teaching and Learning, 77-87 (John M. Braxton & Alan E. Bayer eds., 2004).
6. *Id*.
7. Braxton & Bayer, *supra* note 3.
8. *Id*.

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The Need for Organized Medicine to Police Rogue Expert Witnesses

By Russell M. Pelton

With the current malpractice crisis ravaging the medical community, little attention has been given to one of the major contributing factors: rogue plaintiffs' expert medical witnesses. These are the physicians, who for the proper fees, will misstate their credentials, misstate the standard of care or express views that are far outside the mainstream in their specialty, while asserting that they represent the norm. While questionable testimony is no doubt occasionally given on both sides in medical malpractice cases, rising evidence suggests that the problem is far more prevalent among plaintiffs' experts than defense experts. One recent study reported that in only one out of six medical malpractice complaints filed was there an injury caused by demonstrable medical negligence.[1] Yet in essentially all of those cases there was a physician serving as a plaintiff's expert witness or medical consultant willing to swear under oath that the patient had suffered an injury as a direct result of medical negligence.

Organized medicine has not only the self-interest, but also the duty to identify and police those rogue experts. Indeed, the medical profession is uniquely positioned to do so.

It is not sufficient to say that unethical or unsubstantiated expert testimony is best addressed at the trial level and that, if proper objections are raised, a good trial judge will keep such testimony out. In the recent landmark case of *Donald Austin v. American Association of Neurological Surgeons*,[2] the Seventh Circuit Court of Appeals upheld the right of medical associations to police their ranks of unprofessional expert witness members. Chief Judge Richard Posner stated as follows:

> It is no answer that judges can be trusted to keep out such testimony. Judges are not experts in any field except law. Much escapes us, especially in a highly technical field, such as neurosurgery. When a member of a prestigious professional association makes representations not on their face absurd, such as that a majority of neurosurgeons believe that a particular type of mishap is invariably the result of surgical negligence, the judge may have no basis for questioning the belief, even if the defendant's expert testifies to the contrary.[3]

Supporting Judge Posner's view, a recent study done of District Court Judges in Florida found that 83% were unable to distinguish between junk science and real science.[4]

Contributing to the problem is the vast majority of states giving qualified immunity to expert witnesses.[5] Even if a rogue expert is caught and discredited through effective cross-examination, he or she in most cases can simply walk away with impunity. There is little financial down-side risk and considerable up-side potential for physicians willing to sell their expertise to the highest bidder.

"Organized medicine has not only the self-interest, but also the duty to identify and police those rogue experts. Indeed, the medical profession is uniquely positioned to do so."

Likewise, state licensing boards have been particularly ineffective in this area and a recent study showed that 72% have *never* disciplined a medical licensee for giving false or fraudulent expert testimony.[6] Part of the problem is that there is great ambivalence among state licensing boards as to whether or not expert testimony constitutes the practice of medicine, thereby warranting their intervention. Earlier judicial decisions went both ways on that issue,[7] but the more recent decision of the Seventh Circuit Court of Appeals in the *Austin* case included Judge Posner's conclusion that Dr. Austin's service as an expert witness did in fact constitute the practice of medicine with respect to the patient/plaintiff.[8]

In May 2004 the Federation of State Medical Boards adopted a resolution urging individual state boards to adopt consistent standards, language, and definitions making it clear that "false, fraudulent or deceptive testimony given by a medical professional while serving as an expert witness should constitute unprofessional conduct, as defined in the Act."[9] The American Medical Association has long taken a similar view,[10] as has the

California Attorney General.[11] Some state licensing boards have in recent years been taking a more proactive role in this area, notably those in North Carolina and Maryland. But the fact remains that as a general proposition, state licensing boards have been doing very little to police rogue medical licensees.

The responsibility then falls on the shoulders of organized medicine to identify and police these rogue experts. The longest established program designed to do so is that administered by the American Association of Neurological Surgeons (AANS), which was begun in 1983 and has successfully withstood three judicial challenges, most recently and notably in the *Austin* case.[12]

The long history of the AANS's Professional Conduct Program provides some evidence, as suggested above, that the problem of rogue experts is more pronounced on the plaintiff side than on the defense side. Under the AANS program, complaints of unprofessional or unethical conduct can be initiated by members against other members. The Association itself does not initiate complaints. The complaints are reviewed impartially by a panel of neurosurgeons and, if a hearing appears to be warranted, the respondent is given every opportunity to submit his or her evidence, to confront the accuser, to be represented by counsel, and to have two levels of appeal of any adverse decision. Discipline can include censure, suspension or expulsion from the Association. In the 22 years in which the AANS's program has been successfully operating, over 90% of the complaints filed have involved alleged unprofessional testimony by plaintiffs' experts; and in a majority of those cases the charges have been substantiated. Virtually every medical malpractice case against a neurosurgeon must have a neurosurgeon serving as a plaintiffs' expert, and 95% of all board-certified neurosurgeons in the United States are members of the AANS. Plaintiffs' experts are certainly also free to file complaints against any defendant or defense expert whom they believe has testified unethically or unprofessionally. Yet, the fact that very few plaintiff's experts have filed such complaints is stark evidence of the imbalance in rogue testimony in such litigation.

In recent years, a number of other medical specialty societies have adopted programs similar to the AANS's, including the North American Spine Society, the Society for Vascular Surgery, the American Academy of Neurology, the American Association of Oral and Maxillofacial Surgeons, the American College of Obstetrics and Gynecology and, most recently, the American Academy of Orthopaedic Surgeons. A number of other specialty societies are actively considering the adoption of similar programs and it is predicted that within a relatively short period of time most, if not all, specialty societies will have active programs designed to identify and police their members who serve as rogue experts.

In the long run, other solutions to the medical malpractice crisis might be developed, perhaps including the creation of expert Medical Courts as urged by Senate Majority Leader Frist.[13] But in the meantime, it is the responsibility of organized medicine to proactively police those who debase their medical licenses by selling their services to the highest bidders.

Endnotes

1. Presentation of Professor Barry Furrow at the Loyola University of Chicago School of Law Health Law Colloquium, Chicago, IL (Nov. 14, 2003).
2. *Austin v. American Association of Neurological Surgeons*, 253 F.3d 967 (7th Cir. 2001), *cert. denied*, 534 U.S. 1078 (Jan. 7, 2002).
3. *Austin*, 253 F.3d at 972.
4. Margaret Bull Kovera & Bradley D. McAuliff, *The Effects of Peer Review and Evidence Quality or Judge Evaluations of Psychological Science: Are Judges Effective Gatekeepers?* 85 Journal of Applied Psychology 4, 574 (2000).
5. Mary Virginia Moore, Gary G. Johnson & Deborah F. Beard, *Liability in Litigation Support and Courtroom Testimony: Is it Time to Rethink the Risks?* 9 J. Legal Econ. 53 (1999); Leslie R. Masterson, *Witness Immunity or Malpractice Liability for Professionals Hired as Experts*, 178 Rev. Ligit. 393 (1998).
6. Douglas R. Eitel, Robert J. Hegemen & Eric R. Evans, *Medicine on Trial: Physicians' Attitudes about Expert Medical Witnesses*, 18 J. Legal Med. 345, 350 (1997).
7. *Joseph v. Dist. Of Columbia Bd. of Med.*, 587 A.2d 1085 (D.C. 1991), holding that expert testimony constitutes the practice of medicine. *Contra*, *Missouri Bd. of Registration for the Healing Arts v. Levine*, 808 S.W.2d 440 (Mo. App. 1991).
8. *Austin*, 253 F.3d at 974.
9. FSMB Resolution 04-4; May 10, 2004.
10. AMA Policy H-265.993, *available at* http://www.ama-assn.org/apps/pf_new/pf_online?f_n=result.
11. Opinion of Cal. Attorney General Bill Lockyer, #03-1201 (April 28, 2004).
12. *Id*.
13. Statement by Sen. Bill Frist at the National Press Club (July 12, 2004).

Russell M. Pelton is a partner in the Chicago office of McGuireWoods, LLP and has been the General Counsel of the American Association of Neurological Surgeons (AANS) since 1983.

GLC Endnote

Patricia E. Salkin

The wide range of professions and occupations licensed and regulated by the State of New York, from physicians, teachers, lawyers, and barbers, to cosmetologists, private investigators as well as many others, may suggest that the government attorneys practicing in the various agencies with oversight have little in common aside from their government service. The outstanding articles contributed to this issue dispel this notion by demonstrating that the legal issues in licensing and regulation, oversight and investigation, and enforcement and discipline of the individual professionals, follow similar rules and procedures and that government lawyers face similar challenges and litigate similar issues in serving the public's interest. Like the common threads that mark the professions, the practices and procedures of licensing and regulation brings disparate government lawyers together in pursuit of the common good. Many thanks to our authors for their fine work in guiding us to a better understanding of how policing the professions works.

"Like the common threads that mark the professions, the practices and procedures of licensing and regulation brings disparate government lawyers together in pursuit of the common good."

Rose Mary K. Bailly

A final word in grateful thanks to our editor Vin Bonventre for his tireless efforts over these past several years in guiding the *Government, Law and Policy Journal* through the maze of soliciting authors, collecting articles, reviewing them, offering editorial suggestions, proofing galleys, selecting covers and shepherding the final product through the production process. Vin has been enthusiastic and committed to creating a professional journal on behalf of CAPS and the Bar which government attorneys will find useful and thought provoking. The *Government, Law and Policy Journal* is all that and more thanks to Vin's vision. Under his leadership, the *Journal* has explored a wide range of topics beginning with the everyday thorny issues of ethical rules for government lawyers, to cutting-edge issues such as the public sector's technological revolution, and concluding with this issue's examination of the complexities involved in policing professions in New York. Thank you, Vin, for your endurance and your humor in service to the *Government, Law and Policy Journal*.

Patricia E. Salkin
Director, Government Law Center
Associate Dean and Professor of Government Law
Albany Law School

Rose Mary K. Bailly
Associate Editor, *GLP Journal*
Special Counsel, Government Law Center

CAPS Annual Meeting
Educational Program and Awards Ceremony

Former NYSBA President A. Thomas Levin, Secretary Kathryn Grant Madigan and Executive Director Patricia K. Bucklin

Slade Metcalf, member of the Media Law Committee (nominator) with Award winner Robert Freeman

Award winner Walter Mugdan and nominator Lucille Helfat.

On January 25, 2005, the New York State Bar Association's Committee on Attorneys in Public Service sponsored their Annual Meeting Educational Program and Awards Ceremony.

Three educational programs were held, attracting 100 participants. The seminars included, "Safeguarding Civil Liberties in the Era of Terrorism: the Dialogue Continues";The Big Picture: Current issues in Lobbying, Procurement and Ethics Laws"; and "Supreme Court Review: Another Blockbuster Year?" Donna Case, James Costello and Patricia Salkin served as program chairs.

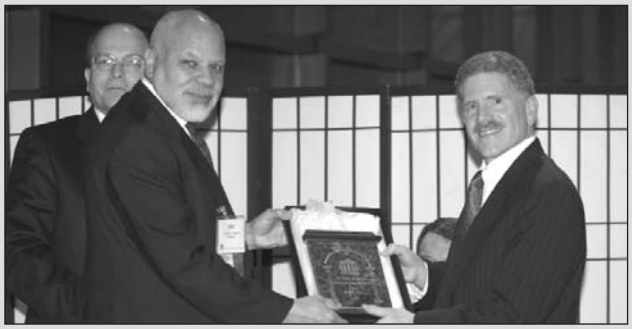
For the 2005 Awards for Excellence in Public Service, Robert Freeman of the Committee on Open Government and Walter Mugdan of the U.S. Environmental Protection Agency were honored for their contributions to public service. The Honorable James Horan, ALJ, chair of the Committee on Public Service, served as master of ceremonies for the event.

NYSBA Executive Committee members Sharon Stern Gerstman and Rachel Kretser with CAPS Chair James Horan

NYSBA (then) President-Elect A. Vincent Buzard and (then) President Kenneth G. Standard

Kenneth Standard, Lucille Helfat and Walter Mugdan

Award winner Walter Mugdan, Lucille Helfat, Robert Freeman, Kenneth Standard, James Horan and Slade Metcalf



Robert Freeman accepts his award from Kenneth Standard

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