



Enforcement Core Concepts

Kurt Heppler
Senior Staff Counsel

Important Concepts



- ▶ Due Process
- ▶ Consumer Protection
- ▶ Statutes and Regulations

Due Process



▶ What is Due Process?

- Something a lawyer says has been violated or argues for more of for his or her client
- An Imaginary Concept
- I don't know. Can I phone a friend?

Due Process is a Limitation on Governmental Action

Due Process Defined

- ▶ At its core, due process is two things:
 - Notice
 - Opportunity to Be Heard

Due Process requirements are triggered when the Government intends to impair life, liberty or property rights.



More Due Process



The United States Supreme Court opined that 'due process' is the opportunity to be heard at a meaningful time and in a meaningful manner.
(*Matthews v. Eldridge* (1976) 424 U.S. 319.)

Still More Due Process



- ▶ Two Types of Due Process
 - Procedural

 - Substantive
 - Involves Policy Enactments
 - Not Processes

Return to Basics



- ▶ What the Board does:
 - Licenses qualified applicants
 - Carries out disciplinary actions
 - Promulgates regulations

- ▶ What we do NOT do:
 - Determine civil liability
 - Award monetary damages

Definition of a License



- ▶ Generally speaking, a license is a grant of permission to do a particular thing, carry on a particular business, or pursue a given occupation.
- ▶ License also means a certificate or registration.

Kurt's Rules of Three



- ▶ Administrative Agencies like the Board:
 - Investigate
 - Prosecute
 - Adjudicate – This is the part of the process when Board Members become involved

The Second Rule of Three



- ▶ In Real World Terms, Boards:
 - In developing licensing standards, reviewing applications and issuing licenses, determine who gets into the profession
 - In developing regulations and policies, direct the actions of a licensee
 - In pursuing disciplinary actions, may determine how a person leaves the profession or if his or her license is restricted

Reviewing an Agency's Act

- ▶ Statutes
- ▶ Regulations
- ▶ Disciplinary Guidelines
- ▶ Business and Professions Code
- ▶ Administrative Procedures Act



Statutes



- ▶ Title Act

- Kurt Heppler, M.D.

- ▶ Practice Act

- Can't do this or that without a license. This means that I can't perform open heart surgery
- Can't repair motor vehicles for compensation
- Can't dispense spectacle lenses

More Statutes



▶ Consumer Protection

- Protection of the public shall be the highest priority for the Medical Board of California in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount. (Bus. & Prof. Code, § 2001.1)

Even More Statutes



- ▶ Critically important because they authorize agencies like the Board to discipline licenses and specify the causes to take such actions:
“The [Agency] shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

More Statutes – Continued



Gross negligence.

Repeated negligent acts.

Incompetence.

The commission of any act involving dishonesty or corruption which is substantially related to the functions of a licensee.”

Statutes Yet Again



- ▶ Why are statutes so important?

Because administrative agencies only have limited powers:

- Those conferred upon the agency by the law creating it.
- Implied powers necessary to carry out and administer the conferred powers.

Regulations



- ▶ Adopted by the Board
- ▶ Fill the gaps in statute
- ▶ Nuts and Bolts, Forms, and Procedures are found in regulation
- ▶ Key concept – a standard of general application

Officially, regulations interpret, implement, make specific or otherwise carry out the provisions of statute. (See Gov. Code, § 11342.2)

Why Are Regulations Important?



State law provides that a board may deny a license on the grounds that the applicant has been convicted of a crime substantially related to the qualifications, functions or duties for business or profession for which application is made.

OK, but what are those crimes?

More Regulations



- ▶ Regulations adopted by the agency answer that question, as follows:

“Such crimes or acts ... shall include, but not be limited to, the following:

- (1) Fiscal dishonesty
- (2) Fraud
- (3) Theft
- (4) Violations relating to the misuse of pesticides.”

Disciplinary Guidelines



- ▶ Model Orders
- ▶ Maximum and Minimums
- ▶ Standard and Optional Terms of Probation
- ▶ Incorporated by Reference into Regulation

MBC/DCA Attorney's Role

- ▶ Conflicts
- ▶ Communication
- ▶ Consumer Protection



Critical to Remember



- ▶ Board Counsel Not Attorney General Counsel
 - We Don't Do Investigations or Prosecutions

Back to Due Process



- ▶ Another Concept of Due Process
 - Fair Play

This is especially important in administrative proceedings where certain *fair play* rules apply

The Rules of the Game (Administrative Procedure Act)



- ▶ The right to Due Process
- ▶ The right to Counsel
- ▶ The right to offer evidence and call witnesses
- ▶ The right to be heard before an impartial decision maker
- ▶ The right to no Ex Parte Communications

The Rules of the Game (APA) (cont.)



- ▶ The right to a written decision that bridges the analytical gap between the raw evidence and the decision
- ▶ The right to a judicial review of the Board's decision

Possible Outcomes of Formal Discipline



- ▶ Revocation of a license
- ▶ Suspension of a license – not more than a year
- ▶ Probation following an actual or stayed (halted) suspension or stayed revocation
- ▶ Public Reprimand
- ▶ Dismissal of the Accusation

Bus. & Prof. Code, § 2227

Consumer Protection, Not Punishment



The purpose of such a [disciplinary] proceeding is not to punish but to afford protection to the public upon the rationale that respect and confidence of the public is merited by eliminating from the ranks of practitioners those who are dishonest, immoral, disreputable, or incompetent.” (Fahmy v. Medical Bd. of California (1995) 38 Cal. App. 4th 810.)

Formal Licensing Actions



- ▶ Denial of a license (Business & Professions Code § 485)
 - When a license is denied, the applicant must receive notification or a Statement of Issues that explains the reason(s) for denial. The applicant has a right to a hearing in order to contest the denial.
- ▶ Issuance of a probationary license
 - The applicant may be issued a license with certain provisions (i.e. biological fluid testing, completion of an ethics class, etc.) Generally, issuing a probationary license is not considered discipline.

Other Formal Actions



- ▶ Interim Suspension Order
- ▶ A Penal Code 23 Action
- ▶ Acceptance of the surrender of a license