



**Top Disciplinary Cases You Need to Know About**

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**CARE CONFERENCE 2019**  
*Compliance and Regulatory Education: Best Practices for Athletic Training*

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## Landscape

- A regulatory board is a creature of statute
- Delegated authority to
  - Establish minimum standards of care and practice
  - Investigate alleged violations of those standards
- Judicial review provides remedies to parties aggrieved by regulatory board decisions

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2

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## Workplan

- Seven cases appealing regulatory board decisions
  - Background
  - Board finding
  - Court decision
- Discussion



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3

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### Michael v. Delaware Board of Nursing

- Convicted in 2008 of Obtaining Controlled Substances by Fraud
- License suspended for 5 years in 2011 based on the conviction
- License permanently revoked based on Michael's failure to comply with suspension order by continuing to practice
- In 2015 the Governor pardoned Michael's criminal conviction

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4

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### Michael v. Delaware

- Michael's application for reinstatement denied based on the permanent revocation
- Michael asserts the pardon for the root crime (i) overrides the Board's revocation and (ii) restored her ability to seek a new license
- The Board maintains the revocation was based on Michael's practicing without a license during the suspension

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5

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### Michael v. Delaware Decision

- The pardon would require consideration of Michael's application if the conduct underlying the conviction was the sole basis for the Board's determination
- The decision to permanently revoke not based on the same conduct underlying the conviction that was pardoned
- Rather, it was based on Michael's defiance of the Board's suspension order and practicing nursing without a license

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### Melton v. Indiana Athletic Trainers Board

- Hired as an athletic trainer by a hospital's sports medicine department
- Began a consensual sexual relationship with a nineteen-year-old male high school student
- Board initiated action against Melton alleging that she engaged in
  - a course of lewd or immoral conduct in connection with the delivery of services to the public
  - sexual contact with an athlete in her care

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7

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### Melton v. Indiana

- Board scheduled a hearing on the charges with proper notice being provided to Melton
- Appearance made on Melton's behalf by legal counsel; cited embarrassment and possible display of nude photographs
- Did not dispute underlying facts
- Board found Melton in default and placed her on indefinite suspension

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### Melton v. Indiana

- Melton appealed
  - Attorney's appearance was sufficient
  - Procedures did not provide basic due process
- Board asserted the plain language of the statute requires physical attendance of the defending party

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9

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### Melton v. Indiana

Decision

- Statute’s reference to “party” includes counsel
- Board erred in entering its Notice of Proposed Default
  - Opportunity to be heard is a fundamental requirement of due process
  - Entry of the Order deprived Melton of opportunity to be heard

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10

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### Alsager v. Washington Bd. of Medicine

- Alsager sanctioned in 2008 for prescribing without examinations; prohibited from prescribing controlled substances
- In 2012 Board receives complaint against Alsager
- Investigator requested copy of prescription records and a written statement responding to the complaint; Alsager did not respond

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11

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### Alsager v. Washington

- Investigator searched the State’s prescription monitoring program database
- Search uncovered records showing Alsager prescribed in violation of 2008 order
- Final Order; repeated violation of 2008 order and refusing to cooperate with the investigation

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12

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### Alsager v. Washington

Argument on Appeal

- Fifth Amendment right against self-incrimination
  - Argued against being required to cooperate in the investigation citing the quasi-criminal nature of the disciplinary proceeding
- Fourth Amendment right against unlawful search and seizure
  - Search of the prescription monitoring program

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### Alsager Decision

Fifth Amendment

- Disciplinary proceedings are considered civil actions, not quasi-criminal
- Such proceedings do not trigger constitutional protections against self-incrimination
- Board is free to draw adverse inferences from the refusal to testify or produce requested documents, so long as the inferences are supported by other evidence

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### Alsager Decision

Fourth Amendment

- Records of prescriptions are subject to legitimate oversight by the state that is reasonably tailored to enforcement of state law
  - The history of scrutiny over prescriptions
  - No special privacy interests in such records
- Board did not violation Fourth Amendment by examining records kept under prescription monitoring program

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### Flynn v. State Medical Bd. of Ohio

- After several incidents of “erratic” behavior, reason to believe doctor was impaired due to mental illness
- Ordered to submit to a psychiatric examination
- Board determined unable to continue practicing safely; cited impaired concentration, difficulty multitasking, and history of giving incorrect orders

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16

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### Flynn v. Ohio

- Board Finding: Flynn unable to practice according to acceptable and prevailing standards of care as a result of her mental illness
- Sanctions:
  - License placed on probation for three years
  - Required to submit to Board-monitored psychiatric treatment

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17

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### Flynn v. Ohio - Argument on Appeal

- Board violated the state anti-discrimination law and the American with Disabilities Act (ADA)
  - Board could not take action against Flynn for his mental illness
  - No evidence that the disability posed a danger to the public
- Insufficient evidence that Flynn was impaired; the list of incidents prompting the psychiatric evaluation was unreliable

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18

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**Flynn v. Ohio**  
Decision

- The ADA does not prevent the discipline of licensees with disabilities
  - Flynn's mental illness renders her unable to practice medicine according to acceptable and prevailing standards
- Flynn did not meet the essential eligibility requirements for practicing medicine
- Therefore, she was not qualified for protection under the ADA

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**Hunsicker v. Board of Education of the High Point Regional High School**

- Athletic trainer license and educational services certificate required for employment
- In 2001 Hunsicker employed as athletic trainer for High Point Regional High School by Board of Education (BOE); 2004 obtained tenure
- Athletic trainer license expired in January 2009
- Did not notify the Board and continued to work

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**Hunsicker v. Board of Education**

- On August 28, 2013, the Board of Medical Examiners (BME) notified the school's principal of license status
- Subsequently removed from position based on failure to hold valid license
- Hunsicker reinstated license three weeks after removal and cited personal circumstances as the cause failure to renew

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21

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### Hunsicker v. Board of Education

- Hearing held before Administrative Law Judge, who upheld the decision to dismiss
- Position on appeal:
  - Despite not having a valid athletic license, he maintained a valid educational services certificate continuously over the period employed by the BOE
  - He was tenured, which provided protected status

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22

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### Hunsicker v. Board of Education Decision

- Limited scope of review
- Reversal of decision if it is
  - arbitrary, capricious, or unreasonable, or
  - clearly inconsistent with agency's mandate
- Considerable weight given to agency's interpretation of statutory scheme

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23

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### Hunsicker v. Board of Education Decision

- Lack of a valid license rendered the certificate invalid
- Hunsicker lack of license made him
  - ineligible for employment as an athletic trainer
  - ineligible for tenure protections, and
  - subject to mandatory removal

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24

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### Medical Board of California v. Superior Court of San Francisco

- The Medical Board initiated complaint against Dr. Alfred Eugene Adams alleging
  - (i) self-prescribed controlled substances,
  - (ii) failed to participate in an interview with the board, and
  - (iii) failed to provide the board with an accurate address
- Three documents including the Notice of Default sent by certified mail to the address of record

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25

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### Medical Board v. Superior Court

- [9/28/16](#): accusations served by certified mail on address of record; returned stamped "Return to Sender, Unable to Forward"
- [11/1/16](#): notice of default served by certified mail to same address; also returned
- [11/30/16](#): accusations sent to another address; also returned
- [1/20/17](#): Board issued a default decision

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26

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### Medical Board v. Superior Court

- Adams appealed contending that there was no evidence of receipt of either the accusations or decision revoking his license.
- The trial court agreed with Adams
  - Service of documents by certified mail is ineffective without proof of service
  - Proof of service in the form of a return receipt signed by the party is required if the notice is sent by certified mail

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27

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### Board v. Superior Court

Decision

- Mailing of any notice or other communication by certified mail deemed to be a sufficient
- Relevant statute does not require proof of service or some other acknowledgement of receipt by the party
- No proof of service in the form of a return receipt signed by the party is required if the notice is sent by certified mail

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28

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### Owens v. Missouri Board of Nursing

- Owens plead guilty to DWI, a Class B misdemeanor
- Owens failed to note the conviction on two license renewal applications
- Charged with committing offense involving moral turpitude related to duties as a nurse; failing to notify

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29

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### Owens v. Missouri

- BON determined the conviction was for a crime of moral turpitude reasonably related to her qualifications as a nurse; license revoked
- Owens appealed maintaining the conviction was neither a crime of moral turpitude nor related to her work as a nurse
- Circuit Court reversed revocation; BON appealed

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30

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### Owens v. Missouri Decision

- DWI not a crime of moral turpitude, especially when a first offense and misdemeanor conviction
- Does not involve qualifications, functions or duties of a nurse
- BON without authority to revoke license; reversal of revocation affirmed

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31

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32

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**BOC** BOARD OF CERTIFICATION  
FOR THE ATHLETIC TRAINER

**Thank you!**

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33

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