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Tech in a Hearing: Discipline & Due Process in a Digital Age

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Purpose of this presentation:

- To discuss the public policies and statutory schemes that allow for the use of technology in board hearings.
- To discuss specific problems that may arise due to Board members' and the public's use of technology during Board meetings, focusing on such use during quasi-judicial or administrative hearings.
- To provide points of comparison and reference for those working in the area to improve their practice

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Where tech comes in...

- In the Board's communication with the public—and vice versa
- In the Board's communication with the licensee—and vice versa
- In the Board's communication with staff—and vice versa

When tech comes in…

1. Pre-hearing
2. During hearing
3. Post-hearing

Why this matters…

- States are now confronting new questions raised by the use of technology in Board meetings and hearings, often under a statutory framework that was set up before much of the tech's existence.

Historical setting

Professional/occupational license disciplinary hearings are modern creatures of statute and rule

- Some of the rights commonly associated with courts do not apply
  - But…
- Some of the rights commonly associated with court do apply

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Historical setting

- Generally speaking, states allow the public to attend professional disciplinary hearings
  - Several sources of authority

1. “Sunshine” or “Open Door” Laws

- Starting in the 1950s and into the mid 1970s, the states responded to a nation-wide call for more transparency in government by enacting so called ‘Sunshine Laws.”
- Generally speaking, these laws allowed the public:
  - To attend meetings of government bodies; and
  - To obtain documents generated by the government.

But do they apply?

- In *Spray v Board of Medical Examiners* (1981) 51 Or App 773, 627 P2d 25, the court held that the Oregon open meetings law did not apply to deliberations of the board of medical examiners' meeting to decide whether a physician's license should be revoked, and that therefore the meeting did not have to be open to the press and public. The court pointed out that Or Rev Stat 192.690 provided, in pertinent part, that the open meetings law should not apply to deliberations of state agencies conducting hearings on contested cases in accordance with the provisions of the administrative procedures act, the review of the workers' compensation board of similar hearings in contested cases, or to any judicial proceeding.

2. State constitution

- Your state's constitution may specifically allow the public to attend
  - Or
- Your state's constitution may have been interpreted to allow the public to attend

3. Specific statutory authority

- Some states have specific statutory authority *allowing* the public to attend a professional licensing disciplinary hearing
- Some states have specific statutory authority *disallowing* the public to attend a professional licensing disciplinary hearing
- Some states put the discretion to have a hearing be public or not in the hands of the licensee or the board

Example of choice of holding the hearing in public being in the discretion of the board

- In Coe v. U.S. Dist. Court for Dist. of Colorado, 676 F.2d 411, 417 (10th Cir. 1982) the court held that the Board's determination not to proceed with the formal proceeding against Dr. Coe under circumstances closed to the public was not violative of his due process rights and certainly not an abuse of the Board's discretion. Further, the Board's offer to close the proceedings to public scrutiny subject to Dr. Coe's voluntary suspension of the practice of medicine pending the proceeding was generous and designed to protect the public. No licensee has a "right" to a secret, closed nonpublic hearing before the Board. This is a matter within the Board's statutory authority, subject to its sound discretion in the balancing of public and private interests.

Example of hearing being required to be public

- Ind. Code § 4-22-3-1 “It is hereby declared to be the public policy of the state of Indiana that there shall be no secrecy in the conduct of the public hearings of the administrative bodies of the state of Indiana.”

Examples of discretion of whether the hearing is held in public or not in the hands of the licensee

- The New Hampshire Supreme Court has held that the state legislature has specifically provided that a physician is entitled to an open disciplinary hearing, if he requests one pursuant to RSA 329:17. *See Appeal of Plantier*, 494 A.2d 270, 276 (1985)
- The Court of Appeals of New York held that "because there is no suggestion that professional disciplinary hearings have any tradition of being open to the public and no showing that the public access plays "a significant positive role" in the functioning of the proceedings there is no First Amendment right of access…" and further held that there was no state constitution right of access to disciplinary hearings, as the confidentiality policy protects complainants and reputations that might otherwise be tarnished—unless the licensee requests an open proceeding. *Johnson Newspaper Corp. v. Melino*, 564 N.E.2d 1046, 1049 (1990)

So, how does this affect tech in your hearing?

- Is your hearing being recorded for later viewing in the course of a open meeting?
- Is your hearing being broadcast or streamed?

➢ The rules governing the public nature of the hearing may affect how and when you use technology

Consider

1. The public's right to access the hearing, and
2. Who has the right to decide if this should be a closed proceeding…

Before you broadcast or record

May Board members participate in hearings via electronic communications?

- Is there any specific statutory provision for allowing “electronic participation” or remote participation in quasi-judicial or administrative proceedings by the Board members, the State, or the licensee?
  - Does your state have specific provision for any of this?
  - Does your state’s Sunshine Laws allow it?

Some states have addressed this expressly in code.

- Ala. Code § 36-25A-6.1(d) "The members of the following governmental bodies *are prohibited from participating in meetings and deliberation via electronic communications* as otherwise authorized by this section:… any state board, agency or other governmental body *conducting a hearing* which could result in loss of licensure or professional censure,…"
- Nev. Rev. Stat. Ann. § 241.016 (1) "The meetings of a public body that are quasi-judicial in nature are subject to the provisions of this chapter."
- S.C. Code Ann. § 30-4-20(d) '"Meeting" means the convening of a quorum of the constituent membership of a public body, *whether corporal or by means of electronic equipment*, to discuss or act upon a matter over which the public body has supervision, control, *jurisdiction* or advisory power.'

Some states have allowed their courts to address this issue

- In Tuzeer v. Yim, LLC, 471, 29 A.3d 1019 (2011), Maryland's Court of Special Appeals interpreted the Open Meetings Act to allow a voting member to participate by telephone as long as the conference call is audible to members of the public. The court held that "the lack of specific authorization" to use telephone conference or other technology to conduct meetings "does not mean that it is prohibited."

- But this wasn't just a meeting, it was a hearing. True, Maryland's Open Meetings Act expressly applied to zoning matters, which was the nature of the dispute, but I've not found where Maryland's Open Meetings Act—as they were then or as they are now—expressly address the difference between a meeting and a hearing.

Why is this important?

- Basic Due Process protections are to be provided during a quasi-judicial or administrative proceeding
  - Notice
  - An opportunity to be heard in a meaningful time and a meaningful manner
  - Fair and impartial decision maker
- How are these protections impacted by Board members remote electronic participation?

Opportunity to be heard in a meaningful time and a meaningful manner

- Electronic communications may make holding the proceeding in a meaningful time A LOT easier.
  - But
- do electronic communications make holding the proceeding in a meaningful manner easier?

Evidentiary concerns

- Two-dimensional evidence?
- Three-dimensional evidence?
- What about demeanor evidence?
- What about using tech as the mode of delivery of evidence?
- ➢ What does the “informal” nature of administrative hearings allow for? What do your statutes say?

Demeanor evidence problems

- In Long v. Bureau of Prof'l & Occupational Affairs, 112 A.3d 671, 677 (Pa. Commw. Ct. 2015), the Petitioner argued that the Board denied him due process when it denied his motion to permit the telephonic testimony of six additional character witnesses who lived in Western Pennsylvania and for whom it was impractical to travel and he claimed he would have retained his podiatrist license had they been allowed to testify. The Court held that:
  - There was no regulatory scheme relating to telephonic testimony in this context.
  - Lacking that scheme, and concerns such as witnesses fraudulently misrepresenting their identities or referring to documents that had not been admitted into evidence, and, the difficulty in evaluating the demeanor of witnesses over the telephone, the hearing officer did not abuse her discretion in denying Petitioner's motion.

Practical concerns if your board member is participating remotely

- Is there anything specific in your law that you must follow? Do that. If questions arise, consult counsel.
- Practically speaking, how do you make this work?
  - Teleconferencing or Videoconferencing—is your state statute specific?
  - I like Videoconferencing—
    - Everyone pays better attention when they're being watched
    - Less chance of monkey business on the part of the Board members
    - Better chance of maintaining proper decorum

Voting

- Even if it's not expressly required, roll call voting is good idea.
- However, if you use roll call voting, you may have to determine the order of voting if that matters to your state or your Board.
- Your state's Sunshine Laws can provide guidance

Quorum issues

- You can’t take any action unless you have a quorum, so you need to be conscious of what your statutes or case law say about the composition of a quorum if some members are participating in a hearing electronically.

Connectivity can affect quorum

- You need to make sure that you are maintaining the connection so you maintain your quorum.

Public attendance via tech

- Does your state have a provision specifically covering hearings?
- Does there have to be two-way communication?

The public's use of tech during the hearing…

- By the public's use of tech during the meeting I mean the fact that they are playing with their smartphones, working on laptops, and possibly recording the hearing via tech…
- If the public is allowed to attend, is there any reason why they should not be able to record the proceedings either by voice recording or video? Possible sources of authority are
    1. Sunshine laws
    2. Specific Statutes
    3. Rules of court decorum
    4. Press rules

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Public and the press

- Both the public and the press must understand that the recording they make with tech is not the official record of the Board.
- Some states have adopted provisions that the governmental body may pass rules for reasonable governance of the proceedings while allowing recording.
  - Ind. Code § 4-22-3-2 "In order to facilitate the public policy so declared, all administrative bodies of the state of Indiana conducting public hearings shall allow the use of either recorded or live broadcasts of such hearings, subject to such reasonable rules and regulations as may be adopted by the administrative body holding and conducting such public hearings."

Recordings and retention schedules

Two types of recordings:

1. Recording for future legal proceedings
2. Every other type of recording

Recordings and retention schedules

- If your hearing is being recorded by tech, you need to be conscious of your state's retention schedules for recordings of hearing, any general broadcast of a hearing, as well as the necessity of transcription or preservation for future appeal—all can apply
- Be aware that States may have general retention schedules—or it may have specific ones under judicial codes, administrative law codes, and state board codes.

Board members using tech during the meeting…

- Access to electronics is essential to effective Board work for distribution of materials and other information.
- How to balance every American's right to have 24/7 access to their email and whatnot with the Board's function?

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Board members using tech during the meeting…

- Good reference points when talking to Board members:
  - Differentiate between what creates a record and what does not.
  - Differentiate between Board member's personal opinions and those of the Board.
  - Consider what the Board is doing at the time tech comes in…

If Board members are using tech during the meeting…

- Be aware that
  - the time of the communication,
  - the manner of the communication, and
  - the place of the communication

  may all be factors in whether electronic communications are
  - Actually proper or improper
  - Create the appearance of impropriety
  - Subject to state Sunshine Laws.

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Board members using tech during hearings

- How are due process concerns impacted by Board members use of tech during the hearing?
  - Board members must observe and evaluate the evidence and testimony from both parties. The Board must decide the matter on the evidence presented and cannot rely on *ex parte* communications.
  - If Board members are seen using electronics during a hearing, the concern immediately arises that they may be receiving or otherwise engaged in *ex parte* communication, i.e. the appearance of impropriety.
  - If Board members are participating remotely, the Board member may necessarily be using a device—how can you provide the parties adequate assurance that the Board member is receiving only evidence or only participating?

Improper research

- During a hearing, board members must determine the board's decision based *solely* on the evidence presented by the parties.
- Conducting independent research on the matter before the board either before or during the hearing is actual impropriety and may result in reversible error upon judicial review.
- Takeaway: stop the Googling!

Improper communication

- It is improper to have a private conversation among board members about the matter before the board that the entire board is not privy to.
- Private consultation on the matter before the board either before or during the hearing is actual impropriety and may result in reversible error upon judicial review.
- Takeaway: stop texting, instant messaging, and emailing other board members during the hearing

Improper distraction

- Board members who are staring at their electronic devices create the impression they are not attentive to the matter in front of the board
- The mere appearance of impropriety may constitute reversible error on judicial review.
- Takeaway: put the electronic devices away

So when Board members use tech during hearings ask them to consider…

- Actual impropriety
- The appearance of impropriety
- Efficiency
- Whether the material they are generating is subject to disclosure under your state's Sunshine Laws

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Board members using tech during hearings

- Can these hurdles be overcome? Not easily if your Board members need to use tech.
- If there is no reason—or no good reason—for your Board members to need to use tech during the meeting have your Board members close their laptops and turn off their phones. If the Board member cannot access electronic communication during the hearing almost all concern is just…gone.

Social Media & Discipline

What about the Board member's Twitter accounts, Facebook pages, personal blogs?

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It is improper to comment on an active case in social media

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Example…

After the first day of trial, a judge posted the following comment on Facebook:

- "Some things I guess will never change. I just love doing the stress of jury trials. In a Felony trial now State prosecuting a pimp. Cases are always difficult because the women (as in this case also) will not cooperate. We will see what the 12 citizens in the jury box do."

In granting a new trial, the reviewing court held that

- "The posting at 7:57 pm in the evening which followed jury selection and opening statements . . . imply the premise [that] the defendant is guilty of the charge and the corollary that the woman involved is a prostitute. They imply a pre-judgment of the case before any evidence is heard. . . . The court will vacate the verdict and order a new trial.

Minnesota Board On Judicial Standards, *In the Matter of Senior Judge Edward W. Bearse*, Amended Public Reprimand, File No. 15-17

Outreach to parties via social media can be reversible error

- ***Chace v. Loisel***, 2014 WL 258620 (Fla. Ct. App., January 24, 2014). Where the grounds asserted in the Motion to Disqualify are legally sufficient to create well-founded fear in mind of a party that he or she will not receive a fair trial, it is incumbent upon a judge to disqualify himself or herself. Mere subjective fear is insufficient. An *ex parte* social media communication by a judge to a party before her, inviting the party to "friend" the judge on Facebook, states a legally sufficient claim for disqualification, especially where the party's disinclination to respond to the "friend" request created a reasonable fear of retaliation from the soliciting judge. Although the trial court judge denied the Motion, the appellate court granted it, noting that efforts to initiate *ex pate* communications with a litigant—by any means—is prohibited by the Code of Judicial Conduct and undermines confidence in a judge's neutrality.

Facebook and other “friendly” media

- A judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge’s independence, integrity, or impartiality, or create an appearance of impropriety.
- AMERICAN BAR ASSOCIATION, Formal Opinion 462 February 21, 2013 “Judge's Use of Electronic Social Networking Media”

How close of a “Friendship” is too close?

- What weight does the Facebook friendship have?
- How does it relate to real life interaction?

Disclose when in doubt

- If there is any known “social media” relationship between a board member and a licensee appearing at a disciplinary hearing before the board, that should be disclosed and may be grounds for recusal.
- If there is no known authority that can provide guidance, use common sense and ethical guidelines on a case-by-case basis.

How close of a relationship is too close?

- Does a board member's "following" a licensee on Twitter create an appearance of impropriety?
- What if the licensee "follows" the board member?
- What if one or both parties aren't aware they are connected?

Blogs can be tricky

- *Luu v. Astrue*, 2009 WL 2462571 (W.D. Pa., August 10, 2009). Plaintiff challenged negative administrative determination, claiming ALJ demonstrated bias toward similar claimants through comments the ALJ made in a blog posting. The court noted the comments were not directed specifically at this claimant or this case. There is no showing of subjective bias by the ALJ toward the claimant. The ALJ did not engage in any intimidating behavior during the hearing nor did he question the claimant in a coercive manner or interfere with the introduction of evidence regarding claimant's condition. The ALJ's views as expressed in the blog, especially when considered in its entire context and not selectively, indicate a balanced perspective on the process by which claims are decided. "[T]he statements had nothing to do with the Plaintiff or the case at hand." *Id*. at *5. *See also Fasciano v. Commissioner of Soc. Sec.*, 2009 WL 765175 (W.D. Pa. 2009) (same ALJ, same blog post, same outcome).

Takeaway

- Tech at a hearing may or may not be guided by statute or rule and caution should be used when approaching its use without clear guidance in light of the nature of the proceeding

Takeaway

- Board members use of tech during a hearing must be carefully thought out to avoid both actual impropriety and the appearance of impropriety—both of which may constitute reversible error on appeal

Takeaway

- Social media is a ethical minefield for the unwary. Board members must be made aware of these issues and keep them in mind as they conduct hearings