

# **BE PREPARED**

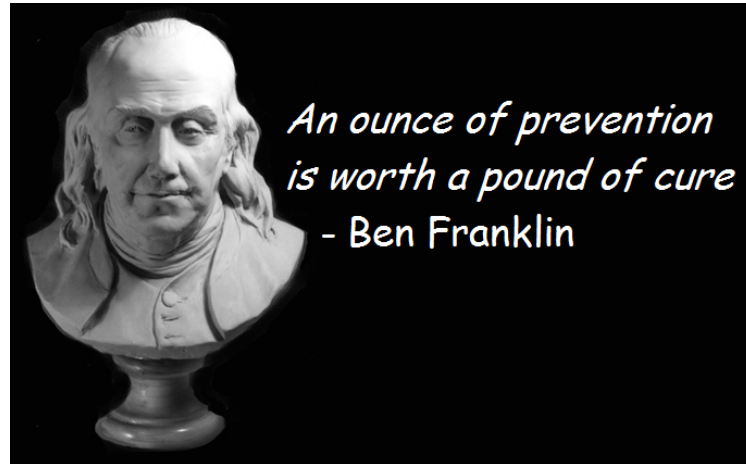
## **PROACTIVE STEPS TO STRENGTHENING YOUR RECORD ON APPEAL**

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# OLD SCHOOL MEMES:

Scout Motto  
"Be Prepared"



# **OBJECTIVES**

- **Review legal standards for judicial review of administrative disciplinary hearings.**
- **Examine common pitfalls that can harm a case on appeal.**
- **Discuss proactive steps attorneys can take at the beginning of any disciplinary case to protect and strengthen the record on appeal**

# JUDICIAL REVIEW OF ADMINISTRATIVE HEARINGS

- At the heart of our review of agency decisions is arbitrariness. We inspect the agency's action to determine "whether the action was taken in excess of granted powers, whether affected parties were afforded procedural due process, and whether decisions were supported by substantial evidence."
  - *Curd v. Ky. State Bd. of Licensure for Prof'l Eng'rs & Land Surveyors*, 433 S.W.3d 291, 303 (Ky. 2014)
- The Commonwealth Court's standard of review of a decision of an administrative board encompasses whether constitutional rights were violated, whether an error of law was committed or whether findings of fact are supported by substantial evidence.
  - *Telang v. Commonwealth Bureau of Prof'l & Occupational Affairs Appeal of State Bd. of Med.*, 561 Pa. 535, 540 (Pa. 2000)

# JUDICIAL REVIEW OF ADMINISTRATIVE HEARINGS

## Common themes across the United States:

- Agencies must respect due process rights of the licensee.
- Decisions must be supported by substantial evidence.

# DUE PROCESS

- In an administrative hearing, '[t]he fundamental requirement of procedural due process is notice and hearing, that is, an opportunity to be heard.'
  - Froehlich v. Ohio State Med. Bd., 2016-Ohio-1035, P19 (Ohio Ct. App., Franklin County 2016)
- [t]he constitutionally-guaranteed right to due process of law is, at its core, the right of notice and the opportunity to be heard.
  - Ga. Prof'l Stds. Comm'n v. Lee, 333 Ga. App. 60, 65 (Ga. Ct. App. 2015)

# NOTICE

- **Examine statutory requirements for notice including:**
  - Method of notice (certified mail, etc.).
  - Minimum/maximum days for hearing following notice.
- **Additional steps**
  - Work with licensee (or counsel) to try and choose a mutually convenient date for hearings.
  - Even if it meets statutory criteria, courts may not look kindly upon agencies that are indifferent to needs of the licensee.

# OPPORTUNITY TO BE HEARD

- **Provide witness and exhibit lists to licensee.**
  - Such lists are generally not required in administrative hearings.
  - However, proactively providing them to the licensee can reduce claims of due process violation.
- **Avoid objections to testimony or evidence if not material to the case.**
  - Many licensees will want to introduce character testimony or evidence that is wholly unrelated to the charges.
  - If evidence or testimony is unlikely to change the result, allowing it to be heard eliminates the argument that the licensee was unable to properly present a defense.



# SUBSTANTIAL EVIDENCE

- Substantial-evidence review is essentially a rational-basis test to determine, as a matter of law, whether an agency's order finds reasonable support in the record. "The true test is not whether the agency reached the correct conclusion, but whether some reasonable basis exists in the record for the action taken by the agency."
  - R. P. v. Tex. Dep't of Family & Protective Servs., 2017 Tex. App. LEXIS 297 (Tex. App. Austin Jan. 13, 2017)
- Substantial evidence is defined as evidence that a reasonable person would accept as sufficient to support the complainant's allegations and that "consists of more than a mere scintilla but may be somewhat less than a preponderance."
  - Young v. Ill. Human Rights Comm'n, 974 N.E.2d 385, 389 (Ill. App. Ct. 1st Dist. 2012)

# **SUBSTANTIAL EVIDENCE**

- **Review statutory requirements for disciplinary action to ensure that you will have either documents or testimony to cover each element of your case.**
- **Documents/Records**
  - Work with investigators or other board staff to insure that all records are certified or properly authenticated prior to introduction.
- **Testimony:**
  - Ensure that all testimony from hearing is recorded and preserved for appeal.
  - Options:
    - Court reporters, audio recording, video recording.

# FAIRNESS

- **Many states have licensing boards that both issue charges and preside over the hearings.**
- **Generally, this does not constitute a violation of due process rights in administrative hearings.**
- **Boards can still take steps to avoid appearance of bias:**
  - No direct contact between board members and licensee prior to hearing.
  - When engaging in pre-hearing settlement discussions, avoid words or phrases that suggests prejudice by the Board.
  - Do not allow prosecuting attorney to also serve as hearing officer.

**QUESTIONS?**