

## **THURSDAY, SEPTEMBER 30, 2021**

### **Ethics in an Administrative Law Setting (Optional Session)**

**3:00 p.m. - 6:30 p.m.**

This interactive session titled “Ethics in an Administrative Law Setting” is designed as a refresher on legal ethics for regulatory attorneys and approval is being sought for Professional Responsibility (Ethics) CLE credits. This course includes an analysis of the Rules of Professional Conduct as they relate to the government attorney or the attorney who represents a government agency. The content also focuses on court cases involving the Rules of Professional Conduct as they relate to the duties of attorneys to the judicial system, the public, clients, and other attorneys.

## **FRIDAY, OCTOBER 1, 2021**

### **State of Judicial Deference**

**8:15 a.m. - 9:15 a.m.**

Licensing boards and other state agencies serve an important role in the Executive Branch, particularly in light of their independence and expertise in the matters they oversee. For these and other reasons, when agency actions are challenged in court, the courts historically have deferred to agency decision making and interpretations of law in many circumstances. But not everyone favors this concept of “judicial deference,” with some arguing that it represents an abdication of judicial authority or gives agencies too much power and leeway in a dispute. In recent years, some courts and state legislatures have begun to chip away at the deference that is typically afforded to state agencies. Building on Ms. Semko’s prior FARB RLS sessions covering judicial deference, this session will provide a refresher on the concept of judicial deference and an update on the latest court rulings and legislation in this area. Providing both an historical perspective and a glimpse into the future, this session will give those who serve on regulatory boards a clearer understanding of this important issue.

### **A Dialectical Method of Fact-Finding in Administrative Hearings**

**9:15 a.m. - 10:15 a.m.**

Ideally, adjudicatory fact-finding—whether by judges or by ALJs—requires impartial consideration of an entire litigation record. This presentation will describe the dialectical method expert fact-finders actually use, if only in part and without realizing it, to accomplish this goal. Practice tips suggested by this method that regulatory board attorneys can use to prepare, present, and argue a persuasive case will be highlighted.

### **Immediate Temporary Suspensions**

**10:30 a.m. - 11:30 a.m.**

Today’s diverse, fast-changing, administrative law environment involves the state’s authority and power over the licensed professional that are not easy to navigate. State agencies routinely handle, investigate, and dismiss -- or prosecute -- alleged violations of law that can be career ending for the licensee if pursued. But that process takes time with many steps necessary for due process of law.

One of the most severe actions the state may take is to issue an immediate, temporary suspension of a professional license in order to prevent an immediate harm to the public. Unlike the usual administrative process that takes time, once issued, the practitioner is left with an uncertain process to challenge the state action -- all the while he or she is stopped from practicing. Learn to identify the legal authority for this drastic state action. Seek to understand and prosecute or defend against such state actions because they may result in ruinous practice and career consequences for the professional.

This program offers an objective, thorough review of the powers of the state over an individual practitioner to take immediate action to stop the practice of that professional. This program also compares and contrasts the law of various states to point out the strengths and weaknesses in each state’s process. Find out so you can examine your jurisdictions own strengths and weaknesses.

---

## **FRIDAY, OCTOBER 1, 2021 (CON'T.)**

### **Strategies for When Legislators Want to Change Licensing Laws and Best Practices for Updating Model Laws** 11:30 a.m. - 12:30 p.m.

State legislatures have been increasingly focused on efforts to reduce barriers to licensure and increase the portability of professional and occupational licenses. As a result, state regulatory boards and affiliate stakeholders have been drawn into the fray of updating occupational and professional licensing laws and regulations. Join this one-hour session for practical tips on legislative and regulatory drafting to modernize your profession's model licensure framework, as well as strategies for navigating legislative challenges to current professional licensing standards.

### **COVID19: Occupational Licensing During Public Emergencies** 1:15 p.m. - 2:15 p.m.

During the pandemic, how did states adapt their occupational licensing policies in response to heightened demand for healthcare workers? Learn that and more as policy experts from The National Conference of State Legislatures and the Council of State Governments walk through state actions in 2020 and discuss legislative trends in professional licensing from 2021.

### **Validation of Exams with Respect to Diversity** 2:15 p.m. - 3:15 p.m.

This session will cover three main areas of assuring fairness in the psychometric process. Section 1 will discuss how to manage SMEs throughout the process to mitigate any potential for bias in the exam development process. Section 2 will discuss what statistical techniques can be used to assist with determining exams or specific items exhibit any differential item functioning (methods to detect item bias). The last section will discuss some of the seminar legal cases with respect to bias challenges.

### **In Defense of Licensure** 3:30 p.m. - 4:30 p.m.

Based upon a law review article authored by the presenter (Jeffrey P. Gray, In Defense of Occupational Licensing: A Legal Practitioner's Perspective, 43 Campbell L. Rev. 423 (2021)) this session first provides a primer on occupational licensing nationally, which is intentionally brief in light of the audience being attorneys who practice in this area. This primer includes common misleading and erroneous comparisons as well as distinguishing "title acts" from licensing acts, then the legal concept of "public health, safety and welfare" and its progenitor cases from the U.S. Supreme Court (and a few state court cases) is then discussed.

The nationwide anti-licensing trend is then explained, including an overview of the opponents, a debunking of oft-quoted data and statistics, and an explanation of the seminal 2018 U.S. Supreme Court opinion *State Board of Dental Examiners v. FTC*, which arose out of the presenter's home state of North Carolina. This portion includes an inside view of the various ruminations of the case, and the Board's view of the law, leading up to the Court's opinion. The "active state supervision" component of this opinion is discussed later in the presentation as a defense.

The presentation then covers the defenses to the anti-licensing argument, both legal and practical, and gives an overview of what states are doing to address shortcomings and the practical issues raised by Dental Examiners.

Although it was signed some four months after the publication of the law review article, an update is included which discusses President Joe Biden's Executive Order "encouraging" the FTC to ban unnecessary occupational licensing restrictions that impede economic mobility and some recent state legislation.

The rising voice nationally in defense of occupational licensing, with resources, concludes the presentation.

## Session Summaries

### **SATURDAY, OCTOBER 2, 2021**

#### **Administrative Hearings : Lessons Learned from the Pandemic** 8:45 a.m. - 10:15 a.m.

This interactive session titled “Administrative Hearings-Lessons learned from the Pandemic” is designed to inform regulatory attorneys about lessons we as Judges and Attorneys learned during the pandemic. This course will provide insight to due process concerns, considerations for in person, hybrid and virtual hearings, and viewpoints from the judicial perspective for best practices going forward. The panel will review pre-pandemic and post-pandemic procedures utilized by states and provide helpful tips for moving cases through the ever changing new normal of administrative hearings.

#### **The Debate over Criminal History Records Checks** 10:30 a.m. - 11:30 a.m.

Regulators are the gate keepers to practicing a profession. Regulators are charged with registering competent, knowledgeable and ethical practitioners. Regulators are expected to only register practitioners who have demonstrated that they will not be risk to the public. Traditionally, evidence of a criminal background has been used by regulators as evidence that the practitioner is not qualified to be registered. But in some jurisdictions, that viewpoint is changing. An overview of the requirement will be discussed and then the speakers will debate how America and Canada (and other international jurisdictions) have taken different approaches and the rationale for doing so.

#### **Preparing for a Review of Agency Rules** 12:45 p.m. - 2:00 p.m.

State agencies rarely draft rules in a silo, and agency rules seldom become law without the knowledge, recommendations, and feedback of actors outside the agency playing a role. While the agency rulemaking process differs from state to state (and agency to agency), rules promulgated by one agency are increasingly subject to review by another state governmental actor external to the agency before they may be finally adopted or implemented. Drawing from the legal, policy, and efficacy concerns of these rule reviewers, this session will highlight six considerations for a drafting attorney to consider during rule implementation.

### **SUNDAY, OCTOBER 3, 2021**

#### **Recreational Marijuana & Drug Decriminalization & Addiction Treatment Initiatives** 8:30 a.m. - 9:30 a.m.

This session will review the pioneering implementation of legalized marijuana by Washington State, federal response, the state’s strict regulatory system, particular regulatory challenges, administrative appeals of license denials and enforcement actions, and significant state litigation.

#### **Regulatory and Legislative Update** 9:30 a.m. - 10:15 a.m.

Occupational licensing will continue to be at the forefront of a busy 2022 election year, especially as jurisdictions look to bring back workforce and the economy. As we all look ahead to 2022 and what the legislative environment may bring, this presentation will provide an overview of legislative and regulatory issues to expect in the new year.

#### **Top Regulatory Cases** 10:15 a.m. - 11:15 a.m.

This session will provide an overview of national, key opinions in the area of professional regulation and administrative law that reflect current trends and legal theories, or potential emerging issues. The course will highlight relevant factual scenarios applicable to issue identification for regulatory board counsel and assess examples of unusual or complex cases for insight into regulatory analysis. At the conclusion of this session, attendees will be able to identify the important case holdings and articulate the implications these legal theories may have on a regulatory board’s policy development, daily operation, and enforcement proceedings.