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Expungement of Disciplinary Orders

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Should a member who has had a clean record for ten or twenty years be able to put a discipline finding behind them? That was the issue discussed at the CLEAR[1] Conference in Nashville earlier this month. Sandra Johanson and Scott Majors of the Kentucky Board of Nursing would say yes.

The Kentucky Board of Nursing permits a member to obtain the removal of their disciplinary findings ten years afterwards if it resulted in only a reprimand and twenty years afterwards for all other findings. So long as the member has had no disciplinary history since the finding (including those dealt with informally), the member will be able to clear his or her record. The expungement provision is intended to promote fairness to members and to facilitate rehabilitation. This approach is similar to that taken by some US states in criminal courts.

Expungement is far reaching. Not only is the information removed from the public registry, it is removed from all files held by the regulator. This involves some administrative effort to locate all paper and electronic references to the finding. One copy of the finding is put in a sealed envelope in a secure location and cannot be opened, even by the regulator, without a court order.

The Kentucky Board of Nursing advises members that expungement means the member is in the same position as if the finding had never been made. If the member is asked on an application or renewal form if they have ever been the subject of a finding, they can answer “no”.

One problem that has not yet been resolved is that a federal database refuses to remove the information about the finding. Discussions are still ongoing.

[1] Council on Licensure, Enforcement and Regulation

Expungement is rare, and may even be non-existent, in Canada. In fact, the trend among many Canadian regulators is to put more, not less, information about disciplinary findings in increasingly accessible media (e.g., websites) for longer periods of time (often forever). A few regulators permit the removal of some findings from the public register after a suitable period of time. In fact, as recently as September 29, 2010, the Professional Regulation Committee of the Law Society of Upper Canada saw no need to introduce a system of pardons for its members.

Generally where pardons are offered in Canada, it is usually restricted to the less serious matters and often still leaves some discretion in the regulator to decline the request. Even then, the finding is still usually publicly accessible (e.g., if one searches the newsletters or databases of previous decisions). Such “pardons” do not involve the removal of the information from the regulator’s files, which may still be used if a similar concern arises in the future. And such pardons do not change the fact that a finding was made.

There are a number of reasons for the Canadian approach. Transparency of the disciplinary process is an important value. Public access to findings helps ensure informed client choice of practitioners. Indeed, many members of the public would view themselves as having a “right” to this information. It is difficult to remove all records of the finding, particularly in the internet age.

It is interesting to see regulators from different jurisdictions take completely different approaches to the same regulatory issue. Ms. Johanson and Mr. Majors were proud of the Kentucky Board of Nursing approach and eagerly defended it as being appropriate and just.

This issue demonstrates that regulatory policy choices can be varied and reasonable people can disagree. By the way, if a Canadian regulator does disagree with the Kentucky Board of Nursing, it might reconsider the wording of the questions on its application form, particularly for applicants from expungement jurisdictions.

FOR MORE INFORMATION
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