

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY, ALABAMA

Scott A. Whisenant, CPA, §
d/b/a/ Whisenant & Associates §

Plaintiff, §

vs. §

Alabama State Board §
of Public Accountancy §

Defendant. §

03-CV-2010-900736.000

BRIEF FOR AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF STATE
BOARDS OF ACCOUNTANCY IN SUPPORT OF DEFENDANT

Counsel for Amicus Curiae
National Association of State Boards of Accountancy:

Noel L. Allen
N.C. State Bar No. 5485
Catherine E. Lee
Brenner A. Allen, of counsel
Allen and Pinnix, P.A.
Post Office Drawer 1270
Raleigh, N.C. 27602
Phone: 919-755-0505
Fax: 919-829-8098
Email: nla@allen-pinnix.com

Local Counsel:

William D. Little
Assistant Attorney General
Office of the Attorney General
500 Dexter Avenue
Montgomery, AL 36130

Identity of *Amicus Curiae* and Its Interest in the Case

The National Association of State Boards of Accountancy (“NASBA”) is a non-profit corporation with its headquarters in Nashville, Tennessee. Its members are all of the state boards of accountancy of the fifty states, as well as the District of Columbia and the territories of Puerto Rico, Guam, the Northern Mariana Islands, and the Virgin Islands. For over a hundred years, NASBA’s primary mission has been to enhance the effectiveness of these state boards of accountancy. NASBA also is concerned with effective public protection through state regulation of public accounting. The goals of NASBA include, among other things, the administration of the Uniform CPA Examination in all states, and support of the prerogatives of its Member Boards to protect the public through the state regulation of accountancy. NASBA has developed and published the Model Accountancy Rules, and, in conjunction with the American Institute of Certified Public Accountants, had developed and the promoted the Uniform Accountancy Act. A key component of the Act is the peer review requirement, which has been adopted in almost all states.

At issue in this case is the enforcement by the Alabama State Board of Public Accountancy (“ASBPA”) of its peer review requirements against the Plaintiff, an Alabama CPA. ASBPA, like almost all other state boards of accountancy, generally requires CPA firms to undergo a peer review in connection with their application for renewal of their permit to engage in the practice of public accountancy. ALA. CODE § 34-1-2(9) defines “peer review” as “[t]he study, appraisal, or review of one or more aspects of the professional work of a licensee or firm that performs attest or compilation services, by a person or persons who hold licenses and who are not affiliated with the licensee or

firm being reviewed.¹ The Alabama legislature has provided that ASBPA may revoke, suspend or refuse to renew a CPA permit for “[f]ailure to comply with the provisions and requirements of [ASBPA’s] peer review program.” ALA. CODE § 34-1-12(a)(13).

The purpose of Alabama’s peer review requirements is to protect members of the public who rely on the accuracy and quality of accounting and auditing services provided by CPAs, and to allow ASBPA to assess and ensure the quality of accounting and auditing services provided by licensed CPA firms. NASBA has a strong interest in defending the ASBPA’s actions and peer review requirements, in support of its goal of ensuring that state boards of accountancy are empowered to protect members of the public by enforcing peer review requirements.

Procedural History

Plaintiff Scott A. Whisenant (“Plaintiff”) is an individual who, prior to May 10, 2010, was doing business as a Certified Public Accountant firm licensed by ASPBA. On November 23, 2009, ASBPA filed a complaint against Plaintiff, alleging that he had failed to comply with ASBPA’s peer review requirements. On May 10, following a hearing on the matter, ASBPA issued an Order containing certain Findings of Facts and Conclusions of Law. In pertinent part, ASBPA found that:

- Documentary evidence presented at the hearing established that [Plaintiff] failed to complete the requirements of the Peer Review Program established

¹ The definition of “peer review” under Ala. Code § 34-1-2(9) is substantially similar to the definition of “peer review” adopted by the American Institute of Certified Public Accountants and NASBA’s Uniform Accountancy Act, which provides “peer review” is:

a study, appraisal, or review of one or more aspects of the professional work of a certificate holder or CPA firm that issues attest or compilation reports, by a person or persons who hold certificates and who are not affiliated with the certificate holder or CPA firm being reviewed.

Uniform Accountancy Act § 3(o).

by the Board as specifically set forth in Board rules and regulations, Sections 30-x-8.01 et seq. (Finding of Fact No. 6);

- [Plaintiff] has failed to satisfy the Peer Review requirements set forth in Board Rule 30-X-8-.03(5) by failing to notify the Board that a Peer Review was completed not less than each third fiscal year since the last submission (Conclusion of Law No. 1);
- Respondent's failure to satisfy the requirements of the Peer Review Program constitute a violation of the rules and regulations of the Board, specifically, Board Rules 30-X-8-.01, et seq. (Peer Review Program), in violation of Section 34-1-12(a)(13), Code of Alabama 1975 (Conclusion of Law No. 2);
- The acts of the [Plaintiff] constitute a violation of the rules of professional conduct established by the Board, specifically, Board Rule 30-X-6-.05(8), in violation of Section 34-12(a)(4), Code of Alabama 1975 (Conclusion of Law No. 3).

Under ASBPA rules, Petitioner was required to engage a Board-qualified peer reviewer to perform a review of his firm's professional work at least once every three years. ALA. ADMIN. CODE r. 30-X-8-.03(3) Upon obtaining this peer review, Petitioner was required to submit to the ASBPA's Peer Review Committee a copy of the peer reviewer's peer review report acceptance letter, along with his application for renewal of his permit to engage in the practice of public accountancy. Board Rules Sect. 30-X-8.03(5). Petitioner's failure to do so constituted grounds for ASBPA to suspend Petitioner's license to practice public accountancy for one (1) year and to fine Petitioner two thousand dollars (\$2,000.00). *See* ALA. CODE §§ 34-1-12(a)(4) and 12(a)(13); ALA. ADMIN. CODE r. 30-X-6-.05(8)

On June 8, 2010, Plaintiff brought this action against ASPBA, asserting that ASBPA's May 10, 2010 Order :

- "was arbitrary and capricious in nature, and not tied to any ascertainable standard or methodology" (Compl., ¶ 7);

- the requests that formed the basis for ASBPA’s Order were “ambiguous, unrealistic, and arbitrary” (Compl., ¶ 12); and
- ASBPA’s Order was “based on a Technicality of the Rules of the Board rather than any substantive issue.” (Compl., ¶ 10.)

On October 22, 2010, in its response to Plaintiff’s above-listed complaints, the ASBPA explained how the specific circumstances and facts of the case refute Plaintiff’s assertions of unreasonableness. To those arguments, *Amicus* adds its unique perspective: regulating peer review is a critical aspect of accountancy regulation. ASBPA’s Peer Review Program is comparable to the peer review programs of almost all other states, and the peer review methodology set forth in well-developed and thoroughly vetted sources, such as the Uniform Accountancy Act. The State Board’s peer review program and the disciplinary sanctions that resulted from a violation of the peer review rules were not arbitrary or capricious; instead, they were part of a well-established and widespread system for the regulation of accountancy and the protection of the public.

ARGUMENT

I. Alabama’s Peer Review Requirements Are Substantially Similar to Those Set Forth in the Uniform Accountancy Act and Have Been Similarly Implemented and Interpreted Throughout the United States.

The ASBPA’s peer review requirements are based on a well-developed and widely accepted regulatory framework, which is set forth in the Uniform Accountancy Act (“UAA”). The UAA is a set of model accountancy standards that forms the basis for many regulations contained in states’ accountancy laws and rules. The UAA was created over twenty-five years ago by NASBA and by the primary voluntary private accountant membership organization in the United States, the American Institute of Certified Public Accountants (“AICPA”). In the decades following its initial drafting, the UAA has been

revised by AICPA and NASBA to provide greater assurance of professionalism, audit quality, and public protection. The UAA is intended to eliminate some of the differences between state accountancy laws, and the barriers such differences pose to the practice of public accountancy in a national and global economy. UAA, Introductory Comments. As such, UAA peer review standards are followed by a number of state boards of accountancy; therefore, as discussed in Section II herein, the ASBPA's peer review standards and its methods for enforcing those standards are similar to rules put in place by a number of other state boards.

The ASBPA's peer review requirements are modeled after those established by the UAA.² Like the ASBPA's peer review rules, the UAA requires CPA firms performing attest services to undergo peer review no more frequently than once every three years, "as a condition to renewal of permits" to practice public accountancy. UAA, § 7(h). The UAA delegates to the state boards the decision on how peer review should be conducted, providing that a board's peer review rules "shall include a verification that individuals in the firm who are responsible for supervising attest and compilation services and sign or authorize someone to sign the accountant's report on the financial statements on behalf of the firm meet the competency requirements set out in the professional standards for such services..." UAA, § 7(h). Further, the UAA, like the ASBPA, considers failure to meet peer review requirements to be a ground for "revocation and suspension" of a CPA's certificate or license. UAA §§ 10-1, 10(e)(7). Such disciplinary

² As are a number of other states. *See, e.g.*, NORTH CAROLINA ADMINISTRATIVE CODE 08M.0106(d) (requiring peer review periodically; consequences for failure to satisfy peer review requirements include a suspension of the CPA's certificate and a penalty of \$500); *see also, e.g.*, MINNESOTA ADMINISTRATIVE RULES 1105.4800, 1105.5600, 1105.7100, 1105.7800(C) (requiring peer review every three years for most licensed firms; failure to comply with peer review requirements is a grounds for disciplinary action and for denial of renewal of a firm license).

actions are appropriate, in light of the AICPA and NASBA's agreement that "periodic peer reviews are an important means of maintaining the general quality of professional practice." UAA, § 7(h) cmt.

II. Peer Review Regulations Similar to Alabama's Peer Review Requirements by the Courts in Other States.

As set forth in Section I, a number of state boards, including ASBPA, have adopted peer review requirements that are similar to those set forth in the UAA, in accordance with the applicable provisions of their respective state statutes.³ From time to time, various courts and various states' offices of the attorneys general have recognized the propriety and the importance of such peer review requirements. Some instructive examples are set forth below.

A. South Dakota

Generally, CPAs in South Dakota are required to undergo peer review as a condition of renewal of their permits to practice accountancy once every three years. S.D. CODIFIED LAWS § 36-20B-36 (providing that the South Dakota Board of Accountancy ("SDBA") may require CPA applicants to undergo peer review as a condition of their firm permit renewal); S.D. ADMIN. R. 20:75:07:14. CPAs who fail to meet peer review program requirements may be subject to disciplinary action, including license revocation for up to five years and a fine of up to \$1,000. S.D. CODIFIED LAWS § 36-20B-40; S.D. ADMIN. R. 20:75:07:17. In *Boever v. South Dakota Bd. of Accountancy*, the South Dakota Supreme Court affirmed a lower court's decision that South Dakota's

³ According to the NASBA, fifty-one (51) out of fifty-five (55) total U.S. licensing jurisdictions currently condition renewal of a permit to practice accountancy upon certain peer review requirements. NASBA, [http://www.nasba.org/nasbaweb/NASBAWeb.nsf/PS/B832DC5219EF7261862577350064B5CA/\\$file/Revised%20Peer%20Review%20Oversight%20\(Ken%20Odom-Edwin%20Jolicoeur\).pptx.pdf](http://www.nasba.org/nasbaweb/NASBAWeb.nsf/PS/B832DC5219EF7261862577350064B5CA/$file/Revised%20Peer%20Review%20Oversight%20(Ken%20Odom-Edwin%20Jolicoeur).pptx.pdf) (last visited Nov. 5, 2010).

delegation of authority to the SDBA to determine peer review requirements was constitutional. 561 N.W.2d 309 (S.D. 1997). Specifically, the Court provided:

Accountancy is an exacting profession. Its specific requirements to achieve and maintain that status are properly left to the domain of its professional supervisory board after receiving appropriate policy standards from the legislature. The above statutes show a sufficient legislative intent to protect the public interest by a peer review board requiring renewal affirmations of an accountant's expertise in that profession in part through the use of a quality review program. If the contrary were correct, the next step mandated of the Legislature in order to pass constitutional muster would be to require it to enact highly specific requirements for each regulated profession which are more appropriate to administrative regulations. Must the Legislature now expend its valuable time in pursuit of the adoption of statutes so specific that they are comprehensible only by those who practice in that profession? *See* ARSD 20:37:13:09, the administrative rules implementing the quality review program. In the execution of its public policy, the Legislature can call to its aid boards to do that which it could not conveniently do for itself.

Id. at 314-15 (internal citations omitted). In sum, the Court established the legitimacy of the legislature's and the SDBA's authority in promulgating and enforcing peer review requirements. Further, the Court noted the necessity of allowing professional licensing agencies to determine which technical requirements must be met in order to ensure the highest quality of professional services and public protection.

B. Nebraska

Like Alabama CPAs, Nebraska CPAs are generally subject to peer review through the Nebraska Board of Public Accountancy ("NBPA")'s Quality Enhancement Program Procedures every three years. 288 NEB. ADMIN. CODE Ch. 4, § 006.07A; *see also* Nebraska Board of Public Accountancy, Quality Enhancement Program Procedures, Section IV, <http://www.nbpa.ne.gov/pdf/qepinfo.pdf> (last visited Nov. 5, 2010); 288 NEB. ADMIN. CODE Ch. 4, § 006.07A3. This program has been in existence for over two

decades, and was created based on the Nebraska Attorney General's finding that such a program was both legal and necessary.

In January of 1986, in response to a request from the NBPA, the Nebraska Attorney General issued an opinion letter providing that NBPA has the authority "to adopt rules and regulations establishing a quality review program requiring submission and review of reports as a condition for licensure." *See* Op. Att'y Gen. Neb. No. 86004 1986 Neb. AG LEXIS 3 (Jan. 14, 1986). Specifically, the Nebraska Attorney General provided that NBPA's contemplated quality review program was consistent with its statutory authority to promulgate rules to "establish and maintain a high standard of integrity and dignity in the profession of public accountancy." *Id.* at *2. The Nebraska Attorney General also provided that the proposed program was consistent with NBPA's general statutory purpose, which is to certify and license qualified individuals and to monitor the requirements for continued certification and licensure." *Id.* The Attorney General's conclusion, like the findings of the South Dakota Supreme Court, recognize not just the legality of peer review programs, but their necessity to ensuring the quality of the accountancy profession.

C. Missouri

Missouri CPAs are required by the Missouri state legislature to undergo the Missouri State Board of Accountancy (MSBA)'s peer review program every three years. MO. REV. STAT. § 326.289 (9) (providing that the MSBA "shall require by rule, as a condition to the renewal of permits, that firms undergo, no more frequently than once every three years, peer reviews conducted in a manner as the board shall specify").

Given the Missouri legislature's express statutory mandate that the MSBA implement a peer review program, the propriety and importance of such peer review programs is clear.⁴ However, even prior to the enactment of Missouri Revised Statute § 326.289 (9), the Missouri Attorney General had issued an opinion in December 1986, providing that the MSBA could implement a peer review program by rule, in accordance with its delegated authority to promulgate "rules of professional conduct for establishing and maintaining high standards of competence and integrity in the profession of public accountancy." Op. Att'y Gen. Mo. No. 125-86, 1986 Mo. AG LEXIS 3 (Dec. 3, 1986). Specifically, the Missouri Attorney General opined that "[t]he proposed positive enforcement program is designed to enhance the standards of competence in the profession of public accountancy and is clearly related to providing a meaningful peer review program." *Id.* at *8. This example of legislative and executive branch recognition of the importance of peer review, combined with the courts' acceptance of the practice in South Dakota, provides strong evidence of the importance of such programs.

III. Peer Review Requirements Are Critical to Protecting the Public in Alabama and Allowing Alabama CPAs to Practice Beyond State Borders.

The peer review requirements set forth in the UAA and in the rules of numerous state boards across the United States are of critical importance to the regulation of accountancy. Specifically, peer review programs help to ensure that: 1) CPA licensees have developed appropriate procedures to maintain quality control over their work; 2) CPA licensees are following quality control procedures in practice; and 3) CPA licensees

⁴ Illinois is another example of a state that has required by law that CPAs complete peer reviews every three years. ILLINOIS PUBLIC ACCOUNTING ACT § 16(e) and (g) (requiring peer review every three years for most licensed firms; failure to comply with peer review requirements resulting in a hearing).

are complying with professional and ethical standards. Therefore, requiring a CPA to submit to peer review is not an arbitrary requirement, and is not just a “technicality” of the rules. As demonstrated by the laws and rules of a number of other states, and as recognized by all three branches of government, peer review is critical to public protection. ASPBA, like many state boards throughout the United States, has been tasked with promulgating rules “to establish and maintain a high standard of integrity in the profession of public accountancy.” ALA. CODE § 34-1-3 (m). Without such peer review programs, the ability of state boards to do would be significantly hindered.

If Alabama’s peer review program is weakened so that it does not include its current requirements and sanctions for violations, Alabama would risk becoming a last refuge for CPA firms that do not want to demonstrate their competency. The New York State Board for Public Accountancy (NYSBPA)’s experience provides an example of what happens when a state becomes a haven for firms that do not wish to undergo peer review. Friehling & Horowitz, CPAs, P.C., was the New York-based accountancy firm that audited the now infamous Bernard L. Madoff Investment Securities L.L.C. Prior to 2009, the NYBPA was one of the few state boards of accountancy that did not require firms to complete mandatory periodic peer review. Therefore, Friehling & Horowitz did not undergo any state reviews of its practices; the Securities and Exchange Commission brought charges against the firm in 2009. Another result of the fallout over the Madoff Ponzi scheme has been the enactment of a New York state law to create a mandatory peer review program. Richard Stolz, *In Need of Review? Madoff Ponzi Revives Push for Peer Review*, *Accounting Today* (Apr. 20, 2009), <http://www.allbusiness.com/government/government-bodies-offices-legislative/12514102-1.html> (last visited Nov. 8,

2010); *Regulations of the Commissioner, Proposed Amendment to the Regulations of the Commissioner of Education*, NYSED.gov (Oct. 6, 2010), <http://www.op.nysed.gov/prof/cpa/part70-10-proposed.htm> (last visited Nov. 8, 2010). If Alabama's mandatory periodic peer review program was overturned, Alabama would risk increasing violations of its accountancy statutes and rules. As is demonstrated by the prevalence of peer review programs in the United States, peer review is an important step to protect the public and the integrity of the accountancy profession.

In addition to potentially harming the quality and trustworthiness of accountancy firms within Alabama, overturning Alabama's peer review requirements could seriously impair the ability of Alabama CPA firms to offer or render attest services in other states. One of the main objectives of the UAA is to increase the uniformity of state accountancy rules. In an increasingly mobile economy, there is a "compelling need for the enactment of uniform state accountancy laws that foster rather than inhibit interstate professional practice." UAA, Preface at ii. Forty eight jurisdictions have adopted the UAA's mobility provisions. These provisions permit CPA firms to offer and render attest services in other states, so long as their home jurisdictions' peer review requirements match the UAA peer review requirements. UAA § 7(a)(2)(A). If the ASBPA is no longer permitted to enforce its peer review requirements, it would appear that ASBPA's firm requirements might no longer comport with requisites for CPA firm mobility in the majority of other states. UAA § 7(a)(2)(A); see, also, UAA § 23(a)(1). Therefore, its firms may no longer be able to take advantage of other states' mobility provisions to automatically offer or render review services in other states without registering in each state. UAA § 23(a). *See, e.g.*, GA. CODE ANN. § 43-3-21 (b)(2)(A) (Georgia); W. VA.

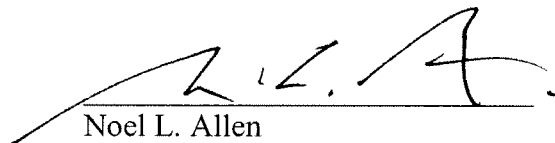
CODE § 30-9-17 (c) (West Virginia); ARK. CODE ANN. § 17-12-401(b)(2) (Arkansas); MISS. CODE ANN. § 73-33-1(3)(b) (Mississippi); MO. REV. STAT. § 326.289(1)(2) (Missouri).

If Alabama's peer review requirements are overturned, there will be serious consequences for both the public and Alabama CPAs. If Alabama is one of only a handful of states without peer review, it will be more vulnerable to the types of problems that peer review requirements have been enacted to prevent. Further, if Alabama does not require mandatory periodic peer review, its CPAs and CPA firms might no longer benefit from mobility rules that currently allow them to practice in other states without registration in a number of circumstances.

Conclusion

For the reasons detailed above, *Amicus* NASBA urges this Court to find in favor of the Defendant in the matter of *Whisenant v. Alabama State Board of Public Accountancy*.

Respectfully submitted this 8th day of November, 2010.



Noel L. Allen
N.C. State Bar No. 5485
Catherine E. Lee
Brenner A. Allen, of counsel
Allen and Pinnix, P.A.
Post Office Drawer 1270
Raleigh, N.C. 27602
Phone: 919-755-0505
Fax: 919-829-8098
Email: nla@allen-pinnix.com

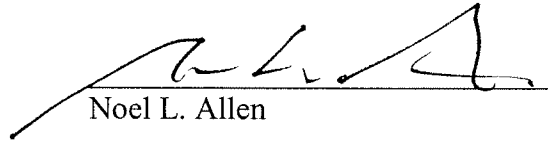
Attorneys for Amicus Curiae
National Association of State Boards
of Accountancy

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing upon:

E. Kenneth Aycock
E. Kenneth Aycock, P.C.
Post Office Box 21134
Tuscaloosa, Alabama 35402

By placing a copy of the same in the U.S. Mail, properly addressed with postage prepaid
this 8th day of November, 2010.


Noel L. Allen