

NASBA Annual Meeting
Case Law Update – Nov. 1 - 4, 2009
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I. Introduction

In the past year, U.S. state and federal courts have issued a small number of reported decisions dealing directly with accountancy regulation or involving state boards of accountancy. These opinions mainly addressed procedural issues. There are also some cases of note concerning accountancy issues other than regulation, such as tax preparation and various Constitutional issues. Note: These are limited summaries. Every case involves not only particular facts but also unique statutes and rules. Additionally, some of these cases have been designated by a court as “unpublished” and might not be limited as legal precedent; some might be subject to further appeal.

II. Table of Recent Cases

Ake v. Bureau of Prof'l & Occupational Affairs, 974 A.2d 514 (Pa. Commw. Ct. 2009), *pet. for re-argument denied*, No. 1103 C.D. 2008, 2009 Pa. Commw. LEXIS 776 (Pa. Commw. Ct. July 16, 2009).

Doe v. Washington State Bd. of Accountancy, No. 61905-5-1, 2009 Wash. App. LEXIS 1370 (Wash. Ct. App. June 8, 2009). [unpublished]

Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 537 F.3d 667 (D.C. Cir. 2008).

Guzman-Rivera v. Lucena-Zabala, No. 08-1897, 2009 U.S. Dist. LEXIS 56558 (D.P.R. July 1, 2009), *reconsideration denied*, No. 08-1897, 2009 U.S. Dist. LEXIS 68226 (D.P.R. Aug. 5, 2009). [unpublished]

Henss v. Iowa Accountancy Examining Bd., No. 8-562/07-1638, 2008 Iowa App. LEXIS 570 (Iowa Ct. App. Aug. 13, 2008). [unpublished]

In re Parmalat Securities Litigation, No. 04CIV0030, 2009 U.S. Dist. LEXIS 6329 (S.D.N.Y. Jan. 27, 2009). [unpublished]

In re Texas State Bd. of Pub. Accountancy, No. 03-09-00280-CV, 2009 Tex. App. LEXIS 6374 (Tex. App. Aug. 14, 2009). [unpublished]

Jingyun Qi v. Comm’r, 96 T.C.M. (CCH) 112, 2008 Tax Ct. Memo LEXIS 196 (2008).

Kaplan v. Board of Registration in Pub. Accountancy, 452 Mass. 1026, 897 N.E.2d 67 (2008).

State Board of Accountancy v. Integrated Financial Solutions, L.L.C., 256 S.W.3d 48 (Mo. 2008), *rev'g* No. WD68035, 2007 Mo. App. LEXIS 1477 (Mo. Ct. App. Oct. 30, 2007).

Walsh v. State ex rel. State Bd. of Pub. Accountancy of the State of Neb., 276 Neb. 1034, 759 N.W.2d 100 (2009), *aff'g* No. CI 06-4180 (Lancaster County Dist. Ct. Sept. 18, 2007).

III. Legal Developments Highlights (by subject)

A. Grounds for Discipline

Ake v. Bureau of Prof'l & Occupational Affairs, 974 A.2d 514 (Pa. Commw. Ct. 2009), *pet. for re-argument denied*, No. 1103 C.D. 2008, 2009 Pa. Commw. LEXIS 776 (Pa. Commw. Ct. July 16, 2009).

Kaplan v. Board of Registration in Pub. Accountancy, 452 Mass. 1026, 897 N.E.2d 67 (2008). Massachusetts accountant was properly suspended from the practice of public accountancy for three years.

B. Constitutional Challenges

Guzman-Rivera v. Lucena-Zabala, No. 08-1897, 2009 U.S. Dist. LEXIS 56558 (D.P.R. July 1, 2009), *reconsideration denied*, No. 08-1897, 2009 U.S. Dist. LEXIS 68226 (D.P.R. Aug. 5, 2009). [unpublished] Puerto Rico Board and its members had immunity under the Eleventh Amendment, and individual members had absolute immunity due to the quasi-judicial functions performed by them in service to the Board.

C. Procedural Issues

Doe v. Washington State Bd. of Accountancy, No. 61905-5-1, 2009 Wash. App. LEXIS 1370 (Wash. Ct. App. June 8, 2009). [unpublished] CPA who filed a complaint against the Washington Board for violation of the Americans with Disabilities Act had prematurely sought relief from the courts.

Henss v. Iowa Accountancy Examining Bd., No. 8-562/07-1638, 2008 Iowa App. LEXIS 570 (Iowa Ct. App. Aug. 13, 2008). A former CPA's tort claims against the Iowa Board based on the revocation of his CPA license were barred by the applicable statute of limitations. [unpublished]

In re Texas State Bd. of Pub. Accountancy, No. 03-09-00280-CV, 2009 Tex. App. LEXIS 6374 (Tex. App. Aug. 14, 2009). [unpublished] CPAs could not conduct discovery in their judicial review actions.

Kaplan v. Board of Registration in Pub. Accountancy, 452 Mass. 1026, 897 N.E.2d 67 (2008). Massachusetts accountant was properly suspended from the practice of public accountancy for three years.

D. Other Issues Involving a Board

State Board of Accountancy v. Integrated Financial Solutions, L.L.C., 256 S.W.3d 48 (Mo. 2008), *rev'g* No. WD68035, 2007 Mo. Ct. App. LEXIS 1477 (Mo. Ct. App. Oct. 30, 2007). Missouri Board had the discretion to deny a firm permit based on the criminal conviction of a CPA holding a 49% ownership in the firm when that conviction occurred prior to the firm's formation.

Walsh v. State ex rel. State Bd. of Pub. Accountancy of the State of Neb., 276 Neb. 1034, 759 N.W.2d 100 (2009), *aff'g* No. CI 06-4180 (Lancaster County Dist. Ct. Sept. 18, 2007). Nebraska Board had subject matter jurisdiction over an inactive registrant and was authorized to promulgate rules in order to ensure the competency of accounting practitioners.

E. Other Accountancy Cases Not Directly Involving a Board

Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 537 F.3d 667 (D.C. Cir. 2008). The creation and existence of the Public Company Accounting Oversight Board does not violate the U.S. Constitution since Board members are not required to be appointed by the President of the United States. Also, the President has sufficient control of the Board via the Securities and Exchange Commission so as to not violate the constitutional principle of separation of powers.

In re Parmalat Securities Litigation, No. 04CIV0030, 2009 U.S. Dist. LEXIS 6329 (S.D.N.Y. Jan. 27, 2009). The plaintiff investors' claims were based on evidence sufficient to reach a finding that a global network of accounting firms and a U.S. affiliate controlled the Italian affiliate that was alleged to have committed fraud. [unpublished]

Jingyun Qi v. Comm'r, 96 T.C.M. (CCH) 112, 2008 Tax Ct. Memo LEXIS 196 (2008). A taxpayer could not avoid an IRS penalty for underreporting her taxable income where she failed to provide her CPA with necessary and accurate information and failed to examine her return.

IV. Case Analyses in Alphabetical Order

Ake v. Bureau of Prof'l & Occupational Affairs, 974 A.2d 514 (Pa. Commw. Ct. 2009), *pet. for re-argument denied*, No. 1103 C.D. 2008, 2009 Pa. Commw. LEXIS 776 (Pa. Commw. Ct. July 16, 2009). The Pennsylvania Board abused its discretion

when it revoked a CPA's license and certificate for a criminal harassment conviction that occurred nearly seven years earlier in another state.

The Pennsylvania Board revoked Ake's accountant license and CPA certificate for a 2002 criminal harassment conviction in Illinois. His act of harassment was leaving a telephone message indicating his disagreement with homosexuality on the answering machine of an individual who was the executive director of a community organization. The Board's decision was based on the risk of harm to those with whom Ake might have professional dealings, deterrence, and the necessity for good moral character in the practice of public accounting. Ake appealed the licensure revocation.

On appeal, Ake contended that the Board abused its discretion by imposing the maximum penalty of revocation of his CPA credentials. He also maintained that the Board erred by finding that he was not rehabilitated from his offending conduct. The court observed that if the prior convictions of a licensee or applicant do not reflect upon the individual's current ability to properly discharge the responsibilities required by the position, those convictions cannot provide a basis for the revocation of a license. Under Pennsylvania case law, "the nature of the offending conduct and its remoteness in time must be considered where an agency seeks to revoke a professional license on the basis of a conviction."

The court also noted that the Pennsylvania General Assembly drafted 63 Pa. Stat. Ann. § 9.9a "with an eye toward ferreting out the types of misconduct that are anathema to the accounting profession." There was no requirement in the accountancy act that an individual be rehabilitated from a prior crime in order to be licensed as an accountant. Finally, the Pennsylvania Board was "not vested with authority to look into the hearts of those licensees who appear before them. The Board members may not assume the role of the proverbial thought police and require Ake or any other accountant to change his beliefs to conform to those of the Board's members."

The court held that the Board had grounds to impose a sanction upon the accountant for violating 63 Pa. Stat. Ann. § 9.9a (a)(5). However, the Board had abused its discretion by imposing the most drastic available sanction. The court opined that complete revocation of a CPA's credentials should be a sanction reserved for the worst offenders. A lesser sanction, such as a short-term suspension of the accountant's license or imposition of a civil penalty, was more appropriate. Such sanctions should not exceed the severity of the criminal sanctions imposed for the conviction. The court vacated the Board's order and remanded the matter to the Board for imposition of a lesser sanction.

NOTE: The Pennsylvania Board filed a petition for allowance of appeal to the Supreme Court of Pennsylvania on August 17, 2009.

Doe v. Washington State Bd. of Accountancy, No. 61905-5-1, 2009 Wash. App. LEXIS 1370 (Wash. Ct. App. June 8, 2009). [unpublished] CPA who filed a

complaint against the Washington Board for violation of the Americans with Disabilities Act had prematurely sought relief from the courts.

Members of the plaintiff CPA's accounting firm reported his alleged misappropriation of over \$500,000 in client funds to the Washington Board. The Board began an investigation, notified the plaintiff of the allegations, and requested a response. He filed a complaint against the Board and its executive director, which alleged that he suffered from a mental health disorder covered under the Americans with Disabilities Act (ADA) and that the disorder caused the alleged misconduct. He also claimed that he tried to provide the Board with medical records to substantiate his condition, but the Board refused to protect the information from public disclosure. The Board's position was that the ADA did not apply to disciplinary processes "whether prosecutorial, investigatory, or adjudicatory." The trial court granted the Board's motion to dismiss, and the plaintiff appealed.

The main issue on appeal was whether the matter was ripe for judicial resolution, or, whether the issues were primarily legal rather than those requiring further factual development, and whether the challenged action was final. The appellate court determined that the plaintiff failed to establish that the matter was ripe for judicial resolution. First, his brief did not set out the test for determining ripeness. The court also found the plaintiff's arguments unpersuasive. The Board was still conducting its investigation and had not determined whether the plaintiff would be charged with misconduct, i.e., no final administrative action had been taken.

As to the medical records issue, the court observed that the Board had not yet decided whether charges should be filed; therefore, the provision of records or an accommodation may not be necessary. Also, the Board was governed by the Public Records Act (PRA), and nothing in the Act or Title 2 of the ADA required public agencies to maintain the confidentiality of medical records. There was a provision in the PRA; however, that would permit a person to enjoin the release of his medical records if a request was made to the Board for disclosure of the records. The decision of the trial court was affirmed.

Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 537 F.3d 667 (D.C. Cir. 2008). The creation and existence of the Public Company Accounting Oversight Board does not violate the U.S. Constitution since Board members are not required to be appointed by the President of the United States. Also, the President has sufficient control of the Board via the Securities and Exchange Commission so as to not violate the constitutional principle of separation of powers.

The plaintiff public interest group and one of its members (an accounting firm subject to an investigation) challenged the constitutionality of the creation and existence of the Public Company Accounting Oversight Board (PCAOB). They claimed that Title I of the Sarbanes-Oxley Act (SOX), 15 U.S.C. §§ 7211-19, violated the Appointments Clause of the U.S. Constitution because PCAOB board members, as "officers of the United States," must be appointed by the President with the advice and consent of the U.S. Senate, or, in

the alternative, by the head of a department. (Members are currently appointed by a majority of the Securities and Exchange Commission.) The plaintiffs also maintained that the PCAOB violated the Constitution's separation of powers principles by enabling the SEC Commissioners, rather than the President, to remove PCAOB board members and then only for cause. In other words, in order to exercise influence and control over the PCAOB, the President would have to act through the SEC Commissioners. The U.S. District Court for the District of Columbia granted summary judgment in favor of the PCAOB, and the plaintiffs appealed.

In a split decision, the U.S. Court of Appeals for the District of Columbia affirmed the district court's grant of summary judgment. The appellate court found that the SOX did not impinge on the Appointments Clause for the following reasons. The SEC had comprehensive control of the PCAOB, and the Board's members were inferior officers who were not required to be appointed by the President. Due to the nature of the Board's work, it was necessarily directed and supervised by the SEC. It was appropriate, then, to delegate the appointment of PCAOB board members, as inferior officers, to the department head rather than the President. Further, the SEC "is a Department whose Head" consisted of "the several Commissioners," and thus there was no violation of the Appointments Clause for the PCAOB board members to be appointed by the collective department "Head."

As to the separation of powers argument, the court noted that the President's powers of control over administrative officers was not absolute. The for-cause limitations found at 15 U.S.C. §§ 7211(e)(6) and 7217(d)(3) on the Commission's power to remove Board members and the President's power to remove Commissioners did not strip the President of sufficient power to influence the PCAOB. Therefore, the separation of powers was not contravened since that principle embraced independent agencies like the Commission and their exercise of broad authority over their subordinates. The PCAOB was subject to statutorily-defined jurisdictional boundaries, and the Commission was empowered to further limit the Board's functions pursuant to 15 U.S.C. § 7217(d)(2). Due to the constitutionality of independent agencies and the comprehensive control exercised by the Commission over the Board, the plaintiffs could not show that the statutory scheme restricted the President's control over the Board.

NOTE: A petition for a writ of certiorari was granted on May 18, 2009. NASBA is filing an amicus brief in support of the PCAOB.

Guzman-Rivera v. Lucena-Zabala, No. 08-1897, 2009 U.S. Dist. LEXIS 56558 (D.P.R. July 1, 2009), *reconsideration denied*, No. 08-1897, 2009 U.S. Dist. LEXIS 68226 (D.P.R. Aug. 5, 2009). [unpublished] Puerto Rico Board and its members had immunity under the Eleventh Amendment, and individual members had absolute immunity due to the quasi-judicial functions performed by them in service to the Board.

The plaintiff, a CPA, was required to submit to an involuntary practice review by the Puerto Rico Board. He failed to appear at a hearing that he had requested before the Board, which indefinitely suspended his CPA license. A subsequent hearing was held by the Board, but the notice of hearing did not contain any information about the purpose of the hearing, alleged violations, his right to counsel, or consequences for failure to appear. Plaintiff was informed at the hearing that his suspension would remain in place until his practice review was completed. After the practice review was completed, the Board notified plaintiff that another hearing would be required. The notice for the second hearing also did not contain any pertinent information as to the nature or purpose of the hearing, alleged violations, his right to counsel, or consequence for failure to appear. Following the hearing, the Board revoked the plaintiff's license for failure to follow professional standards.

The CPA filed a complaint against the Board and its members. He claimed that he had suffered damages as the result of the alleged deprivation of his property interests with due process. Following judicial review, the Board's ruling was revoked, and the Board was ordered to reinstate plaintiff's license. The Board and its members filed a motion for dismissal. They maintained that all claims should be dismissed because 1) a final administrative decision was still pending, thus the Younger abstention doctrine applied, 2) they were entitled to 11th Amendment immunity in their official capacities, and 3) they were entitled to absolute immunity in their individual capacities.

The court found that the Younger abstention did not apply because there was no ongoing administrative proceeding; any proceedings effectively concluded when the plaintiff's license was reinstated and the Board did not pursue the matter further. Also, plaintiff's claim for monetary damages related to the time that he did not have his license, and the monetary damages issue was never before the Board. The Court also determined that the Board and its members were "an arm or alter ego of the state" and thus were entitled to protection under the Eleventh Amendment. The Eleventh Amendment barred suits for monetary damages against the state and its officers in their official capacities.

Regarding absolute immunity for the individual board members as the result of the quasi-judicial functions performed by them in service to the Board, the court applied a three-part test. The Court had to determine whether the Board members performed traditional adjudicatory functions, whether the controversial nature of the Board members' decisions would expose them to numerous lawsuits, and whether multiple safeguards were in place to protect an individual's constitutional rights. The court concluded that,

the allegedly deficient manner in which the members of the Board presided over these administrative hearings is irrelevant, insofar as the tasks they performed were in fact adjudicatory in nature, are functionally comparable to those of a judge, and thus entitles them to the absolute immunity that is vested upon judges. Specifically, any individual before the Board is protected by certain procedural safeguards, including the right to appeal the Board's decision *via* judicial review.

Here, Guzman-Rivera had exercised his right to appeal, and his license was subsequently reinstated. Thus, his right to seek judicial review had protected him from any possible error or wrongdoing by the Board and safeguarded his constitutional rights. The motion to dismiss by the Board and its members was granted.

Henss v. Iowa Accountancy Examining Bd., No. 8-562/07-1638, 2008 Iowa App. LEXIS 570 (Iowa Ct. App. Aug. 13, 2008). [unpublished] A former CPA's tort claims against the Iowa Board based on the revocation of his CPA license were barred by the applicable statute of limitations.

The Iowa Board revoked Henss's CPA license in 1994. Henss subsequently filed a tort action against the Board in 2007 based on alleged improprieties during the hearing process that led to the revocation of his license. Specifically, Henss claimed: he was denied procedural due process; his counsel conspired with another party; the hearing was fatally defective; and the Board engaged in selective enforcement. The Board filed a motion to dismiss which the trial court granted on the following grounds: 1) claim preclusion; 2) exclusivity of judicial review; 3) failure to state a claim upon which relief can be granted; 4) sovereign immunity; 5) quasi-judicial immunity; and 6) statute of limitations. Henss appealed.

On appeal, the Iowa Court of Appeals held that Henss's claims were barred by the applicable statute of limitations and affirmed the trial court's dismissal of his action. Iowa had a two year statute of limitations for tort actions. However, Henss's claims were based on events that allegedly occurred 13 years before he filed suit.

In re Parmalat Securities Litigation, No. 04CIV0030, 2009 U.S. Dist. LEXIS 6329 (S.D.N.Y. Jan. 27, 2009). [unpublished] The plaintiff investors' claims were based on evidence sufficient to reach a finding that a global network of accounting firms and a U.S. affiliate controlled the Italian affiliate that was alleged to have committed fraud.

Plaintiffs, investors in the Italian corporation Parmalat, sought damages from the global network of accounting firms Deloitte Touche Tohmatsu, of which Parmalat's accountants, Deloitte and Touche, S.p.A., were an Italian affiliate. Plaintiffs also sought damages from the global network's U.S. affiliate, Deloitte and Touche L.L.P. Plaintiffs alleged that Parmalat's accountants committed fraud by helping Parmalat conceal a Ponzi-type scheme. Plaintiffs claimed that the global network and its U.S. affiliate were vicariously liable for the Italian affiliate's alleged fraud. Defendants Deloitte Touche Tohmatsu (the global network) and Deloitte and Touche L.L.P. (the U.S. affiliate) sought summary judgment.

The U.S. District Court for the Southern District of New York denied the defendants' motion for summary judgment. The court found that the global network was not entitled to summary judgment with regards to the plaintiffs' claims that it violated section 10(b) of the Exchange Act under a *respondeat superior* theory. Plaintiffs' claims were based on

evidence that the global network exercised substantial control over the professional activities of its member firms through the promulgation of standard operating procedures. The court found this evidence “sufficient to permit the conclusion, under even the most stringent standard,” that the global network controlled the Italian affiliate.

The same evidence could also support a finding that the global network was a "controlling person" of its member firms for purposes of Exchange Act section 20(a) liability. Further, Deloitte and Touche L.L.P., the U.S. affiliate of the global network, could be liable for the global network's violations under section 20(a) as a "controlling person" where the evidence showed that most leadership positions in the global network were occupied by partners of the U.S. affiliate and the global network received the bulk of its financial support from the U.S. affiliate. In short, a global network of accounting firms could be held liable to investors for damages where a member firm helped conceal the fraudulent activities of a corporate client.

In re Texas State Bd. of Pub. Accountancy, No. 03-09-00280-CV, 2009 Tex. App. LEXIS 6374 (Tex. App. Aug. 14, 2009). [unpublished] CPAs could not conduct discovery in their judicial review actions.

Three CPAs sought judicial review of the Texas Board’s disciplinary proceedings against them. They were granted permission by the trial court to conduct discovery in their suits for judicial review. The Board sought mandamus relief, maintaining that discovery should not be permitted on judicial review.

The Texas Court of Appeals determined that the statutes governing judicial review of agency proceedings did not provide for the application of general rules of discovery to administrative proceedings. The trial court could have permitted the parties to introduce evidence outside of the record that was related to the CPAs’ allegations of procedural irregularities. However, Tex. Gov’t Code Ann. § 2001.175(e) did not authorize the application of the Texas Rules of Civil Procedure so as to allow a party to develop or discover that evidence. Allowing such discovery would have circumvented the limitations placed on the standard and scope of judicial review. It would have also expanded the otherwise restricted waiver of governmental immunity. The Administrative Procedure Act specifically contemplated that parties to contested cases should use the Texas Rules of Civil Procedure, but no mention of the rules of civil procedure was made in the section of the Act regarding judicial review. It was clear to the court that the Texas Legislature did not intend to make the Rules of Civil Procedure applicable to a suit for judicial review.

Jingyun Qi v. Comm’r, 96 T.C.M. (CCH) 112, 2008 Tax Ct. Memo LEXIS 196 (2008). A taxpayer could not avoid an IRS penalty for underreporting her taxable income where she failed to provide her CPA with necessary and accurate information and failed to examine her return.

A taxpayer filed a federal income tax return prepared by her CPA for the 2004 tax year. The IRS issued her a notice of deficiency for the 2004 tax year based on unreported gambling income, dividends, and interest income. The taxpayer was assessed an accuracy related penalty pursuant to IRC § 6662 on the grounds that she was negligent in failing to report all of her income. The taxpayer petitioned the U.S. Tax Court for review, contending that she was not liable for the penalty because she reasonably relied on the advice of her CPA. Following an evidentiary hearing, the Tax Court took judicial notice of the records of the California Board, which showed the taxpayer's CPA was licensed in California since 1991 and was a competent professional who had sufficient expertise to justify reliance. However, the Tax Court ruled that the taxpayer could not avoid the accuracy related penalty for underreporting her taxable income where the evidence showed she did not provide her CPA with necessary and accurate information and failed to examine her return to ensure all income items were included. The assessment of an accuracy related penalty was affirmed.

Kaplan v. Board of Registration in Pub. Accountancy, 452 Mass. 1026, 897 N.E.2d 67 (2008). Massachusetts accountant was properly suspended from the practice of public accountancy for three years.

The Massachusetts Board suspended the plaintiff's license for three years based on his felony larceny conviction, a pattern of "similar financial misconduct," and a false statement on his renewal application. The matter reached the state supreme court, which affirmed the Board's suspension. The court found that the Board was statutorily authorized to suspend the plaintiff's license for up to five years and was not in error when it sanctioned the plaintiff. The Board's decision was supported by substantial evidence since the conviction and the plaintiff's denial of the conviction on the renewal application were not in dispute. A consent judgment in which the plaintiff agreed to terminate certain activities without admitting wrongdoing and criminal charges other than the larceny conviction were properly considered by the Board under Mass. Gen. Laws ch. 30A, § 11(2), which excuses agencies from strict adherence to the rules of evidence observed by courts. Procedural challenges to the hearing were also rejected.

State Board of Accountancy v. Integrated Financial Solutions, L.L.C., 256 S.W.3d 48 (Mo. 2008), *rev'g* No. WD68035, 2007 Mo. Ct. App. LEXIS 1477 (Mo. Ct. App. Oct. 30, 2007). Missouri Board had the discretion to deny a firm permit based on the criminal conviction of a CPA holding a 49% ownership in the firm when that conviction occurred prior to the firm's formation.

The defendant accounting firm applied to the Missouri Board for a firm permit. The Board denied the application on the ground that Kossmeyer, a CPA who held a 49% ownership interest in the firm, entered a guilty plea to one count of felony wire fraud in federal court several years earlier. (Kossmeyer was involved in a marketing scheme and used his CPA title to promote materials promising to teach buyers how to acquire businesses without spending their own money.) Prior to the revocation of Kossmeyer's

license by the Board, he and two other CPAs formed the defendant firm and applied for a firm permit. The Missouri Administrative Hearings Commission subsequently granted the firm a permit to practice as a newly incorporated firm, and the Circuit Court affirmed the Commission's decision. The Missouri Court of Appeals also found for the firm, holding that the Commission was correct when it refused to impute the misconduct of a minority shareholder to an entity in which he was not a member when he committed the felony that eventually led to the revocation of his license.

The matter reached the Supreme Court of Missouri, which reversed the court of appeals decision and found for the Board. Examining the relevant statutes, the Court found that under the "plain language" of Mo. Rev. Stat. § 326.289, the Board may issue a permit but was not required to do so. Use of the word "may" in the statute conferred some discretion on the Board to grant or refuse to issue a permit. Furthermore, the use of the word "notwithstanding" in § 326.289.4(1) was intended to avoid a conflict with the law of professional corporations. In the defendant's case, as a limited liability company it would be required to have all members licensed as CPAs, but the "notwithstanding" clause served to override that necessity so that only a majority of the LLC members needed to be CPAs.

The Court also discounted the firm's argument that the Board did not have statutory authority to impute Kossmeyer's actions to the firm unless those actions were taken on behalf of the firm. The Court said, "[t]his reasoning is flawed because a new firm applying for an initial permit has no history and, so, to require the Board to issue the permit, regardless of the background and character of the corporate owners, would frustrate the intent of section 326.310 [citing reasons for denying a permit]. Reading the statutes together, the authority of the Board to deny a permit under section 326.310 by imputing the past misconduct of the owners to the new firm is at least implicit, if not express." It was immaterial that Kossmeyer did not hold a majority interest in the firm – he did not meet the "fitness factors" in § 326.310.

The firm contended that the only reason for the denial of its application for a firm permit was Kossmeyer's criminal conviction, which was contrary to Section 314.200 (prohibiting the denial of a license to applicants "primarily upon the basis that a felony or misdemeanor conviction of the applicant precludes the applicant from demonstrating good moral character"). The Court found other reasons in the record. In addition to the criminal conviction, the Board's denial letter cited Kossmeyer's holding out as a CPA in furtherance of a criminal activity, his licensure revocation, and the Board's serious concerns about moral character. "The felony conviction, itself, was merely 'some evidence of an absence of good character.'"

Finally, a statement made by the Board in Kossmeyer's revocation proceedings about his qualifications would not estopp the Board from denying the firm permit. The revocation of Kossmeyer's individual CPA license was based on his criminal conduct and not on any theory that he might practice accounting under a firm permit. The Board merely stated that a non-licensee could be the owner of a CPA firm, but it did not draw any conclusions that Kossmeyer could be such an owner.

Walsh v. State ex rel. State Bd. of Pub. Accountancy of the State of Neb., 276 Neb. 1034, 759 N.W.2d 100 (2009), *aff'g* No. CI 06-4180 (Lancaster County Dist. Ct. Sept. 18, 2007). Nebraska Board had subject matter jurisdiction over an inactive registrant and was authorized to promulgate rules in order to ensure the competency of accounting practitioners.

Walsh had an inactive registration status as a CPA in Nebraska for several years. In his applications for inactive status, he had variously represented that he did not hold himself out as a practicing CPA or as an active/practicing CPA. The Board became aware of a telephone directory listing for Walsh under the heading “Accountants – Certified Public” and sent him a cease and desist notice in 2004. Although Walsh sent a certified letter to the telephone directory company requesting that his name be removed from the CPA listings, he renewed and paid for the advertising for the next two years. Walsh also used the designations “CPA” or “Certified Public Accountant” on his letterhead, business cards, and checks. In addition, Walsh impersonated his brother-in-law in a telephone call and used the brother-in-law’s social security number in order to get insurance policy information from an insurer.

The Board brought a complaint against Walsh for holding himself out to the public as a permit holder when he was an inactive registrant and for engaging in discreditable acts. Walsh was reprimanded and placed on probation for three years provided that he ceased using the “CPA” or “Certified Public Accountant” designation on any material unless it was accompanied by an “Inactive Registrant” disclaimer. He was also ordered not to renew or take out new advertising in the telephone directory unless it was accompanied by the same disclaimer. As to his telephone call to the insurance company, Walsh was reprimanded, placed on probation for three months, and ordered to take four hours of ethics education. Walsh appealed the Board’s decision.

The District Court held that “[n]otwithstanding his handwritten representations in his applications when he requested inactive registration that he was not holding himself out ‘as a practicing’ or ‘as a[n] active/practicing’ CPA in the State of Nebraska, through his advertisements under the ‘Accountant-Certified Public’ category, Walsh, contrary to the Board’s rules and regulations, held himself out as a permit holder, when, in fact, he was not.” Walsh’s use of the CPA designation without the “Inactive Registrant” disclaimer also violated the Board’s rules. “While the Act does provide that an inactive registrant ‘... shall be styled and known as a certified public accountant and may also use the abbreviation C.P.A.’, that right is not unfettered.” The Board had a legitimate interest in protecting the public by insuring the competency of persons regulated under the Act.

As to the discreditable acts, the Court noted that there was some dispute about whether Walsh had indeed impersonated his brother-in-law or had permission to make the call to the insurer. Although there were no examples in the Board’s rules about conduct that would adversely reflect on a person’s fitness to practice public accountancy, it was apparent to the Court that “evaluating the fitness of a person to engage in the practice of

public accountancy includes, in addition to a person's proficiency and competency in the profession, an assessment of whether the person's conduct demonstrates a high standard of moral and ethical integrity." The Court found that Walsh's conduct adversely affected his fitness as a CPA. "It is virtually impossible to fathom that a person could not know that knowingly impersonating another and making false statements would not only taint his reputation as a certified public accountant, regardless of the reason(s) for the deception, but could also taint the reputation of the profession of public accountancy as a whole." The decision of the Board was affirmed.

Walsh sought further review from the Nebraska Supreme Court, and NASBA submitted an amicus curiae brief on behalf of the Board. Walsh argued that because the only service that he provided to clients was tax return preparation, the Board did not have subject matter jurisdiction over him. The state supreme court held that Walsh had submitted himself to the Board's jurisdiction when he used the "CPA" designation in his advertising. Also, the Board's rules did not have the effect of modifying or enlarging the Public Accountancy Act. The Board was authorized to promulgate rules in order to ensure the competency of practitioners. In addition, the Board provided Walsh with sufficient notice of the rules he allegedly violated. Finally, Walsh's argument that his actions were not related to the practice of public accountancy had no merit. A person could not knowingly impersonate another and make false statements without tainting his/her reputation as a CPA and the reputation of the profession as a whole. The decision of the district court was affirmed.