

## **Essay Question No. 8**

### **Answer question in booklet No. 8**

An Alaska statute authorizes the Alaska State Medical Board (the Board) to sanction a physician when the Board determines that the physician has demonstrated professional incompetence. In a properly enacted regulation, professional incompetence is defined by as “lacking sufficient knowledge, skills, or professional judgment ... to a degree likely to endanger the health of his or her patients.” The Board is authorized to suspend or revoke a physician’s license as sanctions.

Dr. Preston is a physician in Alaska. The Board filed an Accusation against Dr. Preston alleging that he prescribed morphine for hangnails, that such treatment was not indicated in standard medical practice, was likely to endanger the health of his or her patients, and that it amounted to professional incompetence.

The Board held a hearing on the allegations. At the hearing presided over by an administrative law judge, both parties were permitted to present and cross-examine witnesses and make arguments. The hearing officer recommended that Dr. Preston’s license be suspended for one year. The Board adopted the hearing officer’s recommendation. The case represents the Board’s first suspension of a physician’s license. Dr. Preston appealed the Board’s decision to the superior court, arguing that the statute is unconstitutionally vague, particularly in light of his fundamental right to practice his chosen profession.

Discuss Dr. Preston’s claim and its likelihood of prevailing in the superior court.

**Essay Question No. 8**  
**\*\*\*Graders' Guide\*\*\***  
**Constitutional Law**

This question tests the examinee's knowledge of the procedural due process doctrine of vagueness. The examinee should be given credit for familiarity with the doctrine and applicable test, and for application of the facts of this case to the tests. The ultimate conclusion is less important than the quality of the analysis.

**A. Procedural Due Process and Vagueness Test. (30%)**

According to the fourteenth amendment to the United States Constitution, “[n]o state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law.” The Alaska Constitution contains a similar provision, stating “[n]o person shall be deprived of life, liberty, or property, without due process of law.”<sup>1</sup>

Due process is offended when a law is stated “in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.”<sup>2</sup> According to the void for vagueness doctrine, a statute is unconstitutionally vague and violates due process when “the statutory language is so indefinite that the perimeters of the prohibited zone of conduct are unclear.”<sup>3</sup>

A vague statute violates the due process clauses of the state and federal

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<sup>1</sup> ALASKA CONST., art. I § 7.

<sup>2</sup> *State v. Martushev*, 846 P.2d 144, 148 (Alaska App. 1993) (quoting *Fishing Vessel American Eagle v. State*, 620 P.2d 657, 665 (Alaska 1980) (quoting *Stock v. State*, 526 P.2d 3, 8 (Alaska 1974))). See also *Conally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

<sup>3</sup> *Pastos v. State*, 194 P.3d 387, 393 (Alaska 2008) (holding that defendant did not have constitutionally adequate notice that cashing a check would constitute “contact” with victim in violation of domestic violence restraining order); *Myers v. Municipality of Anchorage*, 132 P.3d 1176, 1181-83 (Alaska App. 2006) (ordinance outlawing drug paraphernalia unconstitutionally vague); *Williford v. State*, 674 P.2d 1329, 1332 (Alaska 1983) (holding that statute prohibiting driving while under combined influence of intoxicating liquor and “another substance” was unconstitutionally vague); *Crutchfield v. State*, 627 P.2d 196, 201 (Alaska 1980); *Brown v. Municipality of Anchorage*, 584 P.2d 35, 38 (Alaska 1978) (holding that ordinance prohibiting loitering for the purpose of prostitution was void for vagueness); *Marks v. City of Anchorage*, 500 P.2d 644, 646, 653 (Alaska 1972) (holding that ordinance prohibiting disorderly conduct was void for vagueness); *Harris v. State*, 457 P.2d 638, 647 (Alaska 1969) (“crime against nature” unconstitutionally vague).

constitutions “because it fails to give notice to the ordinary citizen of what is prohibited and because it’s indefinite contours confer unbridled discretion on government officials and thereby raise the possibility of uneven and discriminatory enforcement.”<sup>4</sup>

When the constitutionality of a civil law or regulation is at issue, the law must be understandable to “men of ordinary or common intelligence.”<sup>5</sup> And, civil enactments are not subject to the same scrutiny as are criminal laws, because the consequences of imprecision are less severe.<sup>6</sup> Courts therefore apply a more flexible vagueness scrutiny to civil enactments.

When Alaska courts consider whether a statute is unconstitutionally vague, it examines three factors: first, whether it is so imprecisely drawn and overbroad that it chills the exercise of First Amendment rights;<sup>7</sup> second, whether the statute gives adequate notice of the conduct prohibited;<sup>8</sup> third, whether the imprecise language encourages arbitrary enforcement by allowing “prosecuting authorities undue discretion to determine the scope of its provision.”<sup>9</sup>

#### **B. The Statute Does Not Implicate First Amendment Concerns and Is Not Overbroad (30%)**

The over breadth doctrine has evolved to give adequate breathing room to specific First Amendment freedoms; a statute violates the doctrine when constitutionally-protected conduct as well as conduct which the state can legitimately regulate are included within the ambit of the statute's prohibition.<sup>10</sup> Courts are reluctant to hold economic statutes or others not involving inhibition of First Amendment rights to be void for vagueness.<sup>11</sup>

Dr. Preston’s claim of a fundamental right to practice his profession does not give rise to a claim for over breadth. The right he claims is not protected by the First Amendment. Although the right to practice one’s profession is protected by the due process clause, it is not “fundamental,” and it may be

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4 *Pastos*, 194 P.3d at 393.

5 *Storrs v. State Medical Board*, 664 P.2d 547, 551 (Alaska 1983).

6 *Id.* at 549 (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (498-99) (1982)).

7 *Summers v. Anchorage*, 598 P.2d 863, 866 (Alaska 1979).

8 *Id.* at 866-67.

9 *Id.*

10 *Holton v. State*, 602 P.2d 1228, 1232-33 (Alaska 1979).

11 *Stock v. State*, 526 P.2d 3, 18 (Alaska 1974)

regulated so long as those regulations are reasonably related to a legitimate purpose.<sup>12</sup>

Dr. Preston's vagueness claim must therefore be considered based on whether the statute gives adequate notice of the conduct prohibited and whether the imprecise language encourages arbitrary enforcement.

### **C. The Term "Professional Incompetence" Gives Adequate Notice. (20%)**

Here, while "professional incompetence" is a broad term, it is probably not so vague that the administrative agency responsible for implementing the statute cannot formulate standards for professionals subject to its dictates. Read together, the statute and administrative regulation are not so ambiguously drawn that a qualified practitioner with ordinary intelligence and knowledge of professional ethics would be deprived of fair notice of the minimum standard of competence required.<sup>13</sup>

When faced with an unconstitutionally vague statute, Alaska courts may apply a limiting construction to the statute to render it constitutional.<sup>14</sup> Courts will also consider whether regulations further define the term.<sup>15</sup> Any potential vagueness in the term here is arguably cured by the regulations, which further define the term.

### **D. There Is No History of Arbitrary Enforcement. (20%)**

In addition, the statute and regulations do not give rise to a claim of arbitrary enforcement. Alaska courts will not invalidate a statute on vagueness grounds "absent evidence of a history of arbitrary or capricious enforcement."<sup>16</sup> Here, Dr. Preston can not point to a history of arbitrary enforcement. The fact that Dr. Preston is the first physician whose license has been revoked does not, without reliable evidence showing arbitrary or selective enforcement, establish a constitutional violation not demonstrated by the

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<sup>12</sup> *Squires v. Alaska Bd. of Architects, Engineers & Land Surveyors*, 205 P.3d 326, 340 (Alaska 2009).

<sup>13</sup> *Storrs v. State Medical Board*, 664 P.2d 547, 550 (Alaska 1983).

<sup>14</sup> *See, eg., Halter v. State, Dept. of Commerce and Economic Development, Medical Bd.*, 990 P.2d 1035, 1037-38 (Alaska 1999) ("professional incompetence" not unconstitutionally vague when it was defined.). *State v. Rice*, 626 P.2d 104, 109-110 (Alaska 1975) (construing crime of violation of game regulation to require mens rea of "knew or should have known" to render statute constitutional); *see also State v. Martin*, 532 P.2d 316, 321-22 (Alaska 1975) (disorderly conduct statute not unconstitutionally vague when construed narrowly).

<sup>15</sup> *Id.*

<sup>16</sup> *Summers v. Anchorage*, 589 P.2d 863, 869 (Alaska 1979) (collecting cases).

statutory language.

In conclusion, because there are no First Amendment rights at stake, because the statute and regulations give sufficient notice of the conduct required, and because there is no history of arbitrary or capricious enforcement, Dr. Preston's claim will likely fail.