# Professional Licensing Report

Licensing, testing, and discipline in the professions

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***Highlights in this issue***



## Competition

### FTC: $10.5 million practice rule would promote contact lens sales competition

*Issue: Federal agencies promoting competition in professions*

The U.S. Federal Trade Commission (FTC) signaled the states that it won't back off its antitrust oversight of state professional regulation, in making a major proposal and several comments on state licensing laws during the last months of 2016.

Most significant was the FTC's publication, in a *Federal Register* notice December 7, of a proposed revision to the 2004 Eyeglass Rule, which opened competition among dispensers of eye products by requiring optometrists and other prescribers to release contact lens prescriptions to patients. Having requested public input and analyzed 660 comments from interested groups, the FTC announced it is proposing to add a requirement that prescribers obtain a signed acknowledgment after releasing a contact lens prescription to a patient.

The agency published an estimate of the total labor cost burden of the proposed change, which, when multiplied by the 41 million U.S. patients who use contact lenses, would amount to nearly $10.5 million. But the FTC believes the pro-competitive benefits of adding the signed acknowledgment requirement will make the proposal worthwhile.

*(See Federal File, page 15)*

## Discipline

### Overdue complaint probes, missing fingerprints, 60,000 manual IT overrides cited by California auditor

*Issue: State auditing of board application & complaint handling*

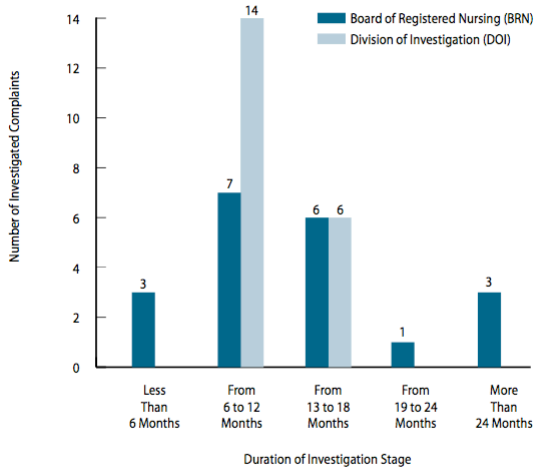
The California Board of Registered Nursing was the target of a critical review released December 13 by the state auditor, which accused the board of undue delays in its complaint handling and called for an action plan to resolve its deficiencies. The audit recommended that if the board does not develop and implement such an action plan by March 1, 2017, the legislature "should consider transferring

BRN's enforcement responsibilities" to the central Department of Consumer Affairs.

The audit was released under the title: "Significant Delays and Inadequate Oversight of the Complaint Resolution Process Have Allowed Nurses Who May Pose a Risk to Patient Safety to Continue Practicing." The board, which regulates approximately 430,000 nurses, is the largest RN licensing board in the country.

In conducting the review, the auditor selected 40 investigated complaints resolved between January 1, 2013 and June 30, 2016. Although the state Consumer Affairs department sets a goal for the board to process complaints within 18 months, the auditor said, "BRN has consistently failed to achieve this goal, in large part due to its ineffective oversight of the complaint resolution process and the lack of accurate data regarding complaint status."

**Time Frame for Completing the Investigation Stage for a Selection of Complaints Resolved Between January 1, 2013, and June 30, 2016**




Source: California State Auditor's analysis of the amount of time BRN and DOI took to complete the investigation stage for a selection of 40 complaints resolved between January 1, 2013, and June 30, 2016.

Note: The investigation stage includes the time it took to assign a complaint to an investigator once received in the applicable investigative unit, as well as the time it took the investigator to complete the investigation.

Thirty-one of the 40 complaints failed to meet the 18-month goal, and 15 of those 31 complaints took longer than 36 months to resolve. In seven cases, resolution took longer than 48 months. The assignment of cases to investigative units appeared to be a major bottleneck, as was the categorization of complaints as urgent or high priority subjects of investigation.

In addition, said the auditor, the state's licensing information system, BreEZe, "lacks adequate controls to ensure that BRN's staff members accurately enter information into the system regarding the status of complaints. The board's chief of investigations reported to the auditor that "it is difficult to manage caseloads when the data are not reliable."

The resulting backlog of complaints included more than 180 that had not been assigned to a board investigator as of July 2016—roughly 70 of those involving urgent or high-priority allegations such as patient death or harm. These were awaiting assignment for an average of nearly 80 days.

A related problem was the board's failure to assign many urgent complaints to the Department of Investigation, which has sworn peace officers as investigators, rather than the board itself, which has only non-sworn investigators. "One of these complaints alleged that a nurse failed to follow proper procedures after an alarm sounded during a patient's dialysis procedure, which may have contributed to the patient's death," the auditor noted.

In response to the audit's concerns about the board's internal handling of urgent complaints, a board official stated that it understood the assignment policy to be a guideline rather than a requirement, and noted that the board is able to reduce its enforcement costs considerably when non-sworn investigators investigate complaints.

The DOI rate to conduct an investigation in 2014-15 was $235—more than twice the board's hourly rate of $88. However, the auditor said that cost is not a reasonable justification for failing to use the DOI for the board's most egregious

complaints, especially since sworn peace officers have additional training, skills, and authority that board investigators lack.

A shortage of expert witnesses to help with prosecution of complaints against nurses was another problem cited by the auditor. According to the board's chief of investigations, the low rate of $75 an hour as payment to expert witnesses is "not very enticing to nurses who have full-time jobs," the auditor said.

The auditor also faulted the board for lacking sufficient oversight of enforcement. In addition to needing better training procedures for new staff members, the board has not ensured that all nurses are fingerprinted, as the law requires. "As a result, BRN is not always notified by the California Department of Justice when a nurse is arrested or convicted."

The missing fingerprints were due, in part, to shortcomings of the BreEZe licensing information system, the audit found. Although BreEZe was designed with a control to prevent a nurse from renewing his or her license if fingerprint records were missing, "during the majority of the audit period we reviewed, BRN has been overriding this control by manually removing the hold and approving the nurse's renewal application." Between October 2013 and November 2016, the audit found, "BRN overrode BreEZe more than 60,000 times."

As of November 2016, the board was working with Justice and Consumer Affairs to reconcile the number of nurses the BrEZe system shows as having supplied fingerprints with data provided by Justice.

The board responded to the audit by noting that it agreed with the auditor's recommendations to improve procedures for tracking and investigating complaints, adhere to complaint guidelines, and implement a formal training program for investigative staff, and that it planned to take several steps to implement the recommendations.

## Hearsay evidence admissible to show inappropriate conduct

*Issue: Standard of evidence in misconduct proceedings*

An Oregon appellate court affirmed a decision by the state's Teacher Standards and Practices Commission that relied on hearsay testimony by students' to prohibit a teacher from applying for the reinstatement of his license (*Osuna-Bonilla v. Teacher Standards and Practices Commission*).

After teacher Hector Osuna-Bonilla was accused by several students of inappropriate touching during the 2008-09 school year, he admitted, during eight hours of police questioning, to massaging students and feeling the breasts of one because he was attracted to them but then later recanted the admissions. Eventually, Osuna-Bonilla was acquitted at a criminal trial and an arbitrator reversed his school district's decision to fire him.

In 2012, Oregon's Teacher Standards and Practices Commission charged Osuna-Bonilla with several professional violations. In the hearing that followed, the Commission did not call the complaining students as witnesses, but instead introduced transcripts of their testimony at Osuna-Bonilla's criminal trial. Osuna-Bonilla did not object to the introduction of this testimony at the time, relying on the transcripts and other witnesses at his criminal trial in his defense.

On conclusion of the hearing, an administrative law judge found that Osuna-Bonilla committed several serious violations. Osuna-Bonilla's teaching license had lapsed, and the board revoked his privilege to re-apply for a license for one year. Osuna-Bonilla appealed, and the case went up to a state court of appeals.

On appeal, Osuna-Bonilla argued that the Commission's reliance on the trial transcripts of the students' testimony was impermissible reliance on hearsay evidence. The ALJ hearing his case, Osuna-Bonilla alleged, was unable to fully assess the credibility of the students, since he could not observe their demeanor.

The court did not agree. "We cannot disregard the testimony of the complaining students simply on the basis that they did not testify in the administrative hearing and did not provide the ALJ the opportunity to assess their demeanor," wrote Judge Joel Devore of the Court of Appeals of Oregon in a November 16 decision. The judge noted that hearsay evidence is admissible in administrative proceedings.

Although hearsay evidence is not admissible in a criminal proceeding, the same restrictions do not apply to administrative cases. Instead, the judge noted, the court's task "is to determine whether the students' testimony is the type of hearsay evidence that is sufficiently reliable to contribute to a conclusion that substantial evidence supported the TSPC's order."

"A large part of petitioner's challenge to the credibility of the complaining witnesses was based on alleged differences in their accounts at different times, testimony from one student and arguably a second student about the motives of [a third student] and petitioner's own contrary testimony. Much of that sort of credibility assessment did not depend upon the ALJ's observation of demeanor of the complaining witnesses."

Here, the fact that Osuna-Bonilla had not only failed to object to the introduction of the testimony at the hearing, but had also relied on it himself, undermined his claim. And the corroboration between Osuna-Bonilla's admissions to the police and the students' testimony added to that testimony's credibility, as did the fact that the testimony was offered under oath in a courtroom setting, was subject to cross-examination by Osuna-Bonilla's defense attorney, and was professionally transcribed.

The court affirmed the Commission's decision to restrict Osuna-Bonilla's ability to apply for the reinstatement of his license.

## Board must inform accused that license can be suspended

*Issue: Due process and notice of potential sanctions*

An accountant in Virginia won a reprieve from a five-year license suspension by arguing that the state's accounting board had failed to adequately inform him that the disciplinary charges it brought against him could result in that suspension, in a November 15 decision by the Court of Appeals of Virginia (*Kim v. Virginia Board of Accountancy*).

The court also remanded a decision by the board to fine the licensee $10,000, saying that the board had failed to provide adequate explanations of why it determined that the licensee had violated state accounting standards.

In 2014, the Virginia's accounting board initiated an investigation against licensee Dae Kim after receiving a complaint about his work. In subsequent proceedings, a hearing officer found that Kim had violated many industry standards—to the point where the competency of his work was questioned—and had failed to keep up with mandated continuing education requirements, and the board suspended Kim's license for five years and fined him $10,000. Kim appealed and the case went up to a state court of appeals in Richmond.

On appeal, Kim claimed that the board had not adequately informed him that its disciplinary charges were serious enough to result in the suspension of his license. In the notice of charges the board sent to Kim, the board had only stated that three outcomes were possible: exoneration, a monetary penalty, or the

possibility that the board could "offer a Final Order with other terms and conditions the Board deems appropriate." Kim argued that this notice lacked specificity which would have put him on notice of the danger to his license.

The court agreed. "A reasonable person, reading the three possible outcomes offered by the Board in its notice, easily could have concluded that those three options were an exhaustive list of the possible outcomes that appellant could expect," wrote Judge Randolph Beales.

Compounding any potential confusion was the fact that the section of regulatory code the board cited in the notice for authority to discipline Kim allowed for both a monetary penalty and a license suspension. "Thus, when the notice included *only* a reference to monetary penalties, the reader could well have reasonably concluded that, of all of the remedies available to it . . . the Board would only actually impose *monetary* penalties on appellant."

In addition, the board had failed to mention the possibility of suspension at any time during Kim's disciplinary proceedings.

In a second successful attack on the board's decision, Kim argued that it had failed to adequately explain the findings of fact that supported its decision that Kim had violated state accounting standards. The court agreed, and Judge Beales noted that "the written findings of fact do not give appellant even a general idea *why* the Board ultimately concluded that appellant failed to comply with the technical standards."

" . . . We hold that only generally referencing a violation of the Generally Accepted Auditing Standards and the Generally Accepted Accounting Principles does not give appellant an actual understanding of the Board's grounds for finding that he violated [state code] and it effectively denies appellant" his right to rebut the findings on appeal.

Given these failings, the court reversed the board's decision to suspend Kim's license and remanded its decision to impose the $10,000 penalty.

## Expunged conviction may not be basis for license denial—but "disturbing and strange" letter from applicant can be

*Issue: Role of expunged convictions in license denial, discipline*

Tennessee's nursing board lost part of a license denial case after using a criminal conviction, expunged only after the initial application for licensure had been filed, to deny an applicant a license (*Butler v. Tennessee Board of Nursing*). Despite that error, the board was still within its rights to deny the applicant on the grounds that he had tried to deceive the board through a letter, intended to explain his criminal conviction, filled with "disturbing, strange, and incredible content."

Jack Butler applied for a Tennessee registered nursing license in 2013. During the application process, he sent the state board of nursing a letter explaining a 1994 criminal conviction for "outraging the public decency."

Although Butler acknowledged his conviction, he also claimed that a woman had conspired with minors to create false accusations that he had kissed a teenager, and that he had been subject to extortion threats by two women for $125,000 and a year-long coerced sexual relationship. When asked to supply documentation about his conviction, Butler also claimed that the only document he was able to obtain was a minimal court record simply noting that he pleaded nolo contendere.

After a board member was able to obtain additional documents showing that Butler had initially been accused of two serious felonies before pleading down to the public decency charge, the board sent him a letter informing him that it intended to deny his application on the grounds Butler had both committed a crime and had lied to the board in the letter explaining his conviction.

Although Butler sought to head off the board's decision by applying for and receiving an expungement of his criminal record, the board nevertheless voted to deny him a license. Butler appealed, arguing that the board was wrong to deny him a license based on his now-expunged conviction and that the board was required to provide him a contested hearing before the denial.

Butler met with mixed success in his initial appeal. Although the trial court agreed that the expungement of Butler's conviction removed any evidence that he had committed a crime, it also ruled that Butler's letter to the board, which the court described as being filled with "disturbing, strange, and incredible content"—as well as Butler's seemingly-false claim that he was unable to obtain copies of documents relating to his criminal case—were relevant to the board's finding that Butler had committed deceit while pursuing his license application.

Regarding the expungement of Butler's conviction, the board argued that, although the conviction itself was no longer evidence that Butler had committed a crime, the board was still entitled to rely on his earlier admission that he had been convicted of a crime to deny him a license, regardless of whether Butler later had his conviction expunged.

The court rejected this argument. "The regulations relevant to this issue make clear that it is the *judgment* of conviction that is an essential component of any finding" on a charge of having been guilty of a crime, wrote Judge Stafford.

"In this case, however, there was no material evidence from which the board could have found that Appellant was guilty of a crime because Appellant's expunged plea of nolo contendere does not constitute a conviction under either Tennessee or Oklahoma law . . . The simple fact that Appellant may have committed some misconduct that could have been charged as a crime is insufficient to show that he was actually found guilty."

Both Butler and the board appealed this ruling to the state Court of Appeals in Nashville, which issued a decision September 22.

Citing Tennessee statutes governing the board's power to deny an initial license application, the appellate court held that applicants are not entitled to a contested case hearing. The court also disagreed with Butler that federal and state constitutional guarantees of due process entitled him to such a hearing.

Butler had argued that, because the denial of his license application would be reported to a national database and would make it difficult, if not impossible, for him to practice nursing in any state, the board's denial of his license without a contested hearing was an infringement of this constitutionally-protected liberty interest in practicing his chosen profession.

However, the court noted that Butler had been provided with several opportunities to address the board concerning his case; although those appearances did not follow the formal procedures of a contested hearing, they were sufficient to provide him with due process.

Butler also argued that the board incorrectly considered his letter as evidence that he had attempted to deceive the board. Because the board had incorrectly found him to be guilty of a crime and because Butler sent his letter to the board in an attempt to explain that conviction, Butler claimed that the board would not have had reason to consider his letter if not for that other error.

However, the court noted that the expungement occurred after the filing of the letter; at the time of the letter's submission, Butler stood convicted of a crime and was required to respond to questions about his conviction. "Neither this Court nor the Board was required to ignore Appellant's letter simply because Appellant was able to obtain an expunction of the underlying offense approximately one year after he submitted his application for licensure," wrote Judge J. Steven Stafford.

The board was within its authority to examine Butler's submissions for attempts to deceive the board. "Here," Judge Stafford continued, "the Board chose not to credit Appellant's allegation that the criminal charges against him resulted not from any misconduct on his part whatsoever, but instead from a year-long vendetta initiated by a relative stranger who attempted to: (1) assault Appellant immediately upon meeting him; and (2) extort a significant sum of money from Appellant simply because she believed he was a country music singer."

## Quasi-judicial role gives licensee no immunity from discipline

*Issue: Boards' potential lack of jurisdiction over some licensees*

A court in South Carolina has denied immunity from professional disciplinary actions to a social worker who claimed that she was protected from discipline for any alleged misconduct that occurred during her work as a guardian at litem (GAL) for the state's family courts (*Forman v. South Carolina Department of Labor*).

Karen Forman, the subject of the disciplinary actions, is a licensed clinical practice social worker who primarily worked as a guardian at litem for the state's family court system. In 2009, the state's social work board charged her with misconduct, alleging that she had failed to conduct a full investigation or interview all interested parties in two separate cases, that she had billed for services not performed, and that she had failed to inform the family court in which she appealed that the board had earlier placed her license on probation.

Following hearings before the board and an Administrative Law Commission, the board confirmed that Forman had billed for services unperformed, ordered her to cease working as a guardian ad litem, and prohibited her from practicing without supervision. In her appeal, Forman argued that, as a guardian ad litem, she was entitled to quasi-judicial immunity—immunity granted to administrative agency officials who perform adjudicatory work—for any decisions she had made in the course of that work, and that this immunity shielded her from any disciplinary proceeding.

The Court of Appeals did not agree. Although quasi-judicial immunity protects guardians ad litem from tort suits by private parties, the state social work board is not such a party and a professional disciplinary action is not a civil lawsuit, wrote Judge Thomas Huff in a November 9 ruling.

"The purpose of the Board is the protection of the public," continued Huff. "Extension of quasi-judicial immunity to a licensee would hamper the Board in its execution of this vital function. Accordingly, we hold quasi-judicial immunity for GALs does not extend to disciplinary proceedings." Having dismissed her immunity claims, the court upheld the board's decision.

## Board legal assistant loses absolute immunity after conducting undercover inspection

*Issue: Immunity implications of combining prosecutorial, investigative roles*

Undercover work by a legal assistant, authorized by a board attorney, has exposed that attorney to suit by a group of Louisiana salon owners who claim the state's enforcement regime unfairly targets salons owned by people of Vietnamese descent (*Nguyen v. Louisiana State Board of Cosmetology*).

In 2014, nine nail salon owners of Vietnamese and Asian background filed suit in U.S. District Court for the Middle District of Louisiana against the Louisiana

cosmetology board and a board attorney claiming that the board had engaged in a pattern of harassment and false imprisonment based on their ethnicities.

In support of their suit, the salon owners produced evidence they claimed showed that, although salons owned by people of Vietnamese heritage comprised only 9% of the salons in the state, those salons paid from 80-92% of all fine money during recent years.

The board rebutted the salon owners' statistical evidence by noting that Vietnamese-owned salons comprise 80% of all manicuring salons, and thus the high rate of fines against salons owned by people of Vietnamese ethnicity is not outsized. Each of the salon owners had been investigated by the board for either operating without a license or employing unlicensed salon workers and, in most of the cases, the board followed its investigations with filing of formal charges or the creation of a consent agreement with the salon owner.

Board attorney Celia Cangelosi filed motions for summary judgment with the federal court hearing the case, claiming both immunity from the salon owners' claims and that the evidence they produced in their favor, even if accepted as true, did not show the existence of discriminatory action by the board.

Cangelosi met with mixed success in her claims for immunity. Chief Judge Brian Jackson, in a December 16 ruling, noted that, in her role as a board attorney, Cangelosi functions as a prosecutor, a role that would normally be entitled to absolute immunity from suit for such actions.

In the majority of the case filed against her, he wrote, "Cangelosi . . . did not exceed the traditional and customary functions of a prosecutor" and her actions in those cases were subject to immunity, resulting in the dismissal of the claims brought by those plaintiffs.

However, in one of the cases, Cangelosi had gone further than her normal prosecutor role and had authorized a legal assistant to patronize one of the salons to gather evidence of unlicensed practice. By doing so, she had assumed the role of an inspector and was not entitled to absolute immunity in that case.

Addressing the substance of the plaintiffs' claims, Judge Jackson held that the statistical evidence produced by the plaintiffs—showing that Vietnamese-owned salons paid a hugely disproportionate share of fines—could cause a jury to reasonably find that the actions of the board formed a pattern of racial discrimination.

Jackson acknowledged the board's rebuttal evidence, but held that the question was one for a jury, and dismissed the board's request for dismissal in the single remaining case.

## Successful discipline appeal no guarantee of payment of lawyer fees

*Issue: Court-ordered attorney fees in discipline appeals*

The Supreme Court of Missouri, in a December 20 decision, denied attorney's fees to a nurse who had successfully appealed a disciplinary decision by the state's nursing board. The court held that, although the nurse was a "prevailing party" who would normally be entitled to fees, the decision by the board on the scope of her discipline was not one for which fees were available (*Carpenter v. State Board of Nursing*).

After Karen Carpenter, a nurse, failed a drug screening by her employer hospital in 2008, a state Administrative Hearing Commission found that

Carpenter had violated the state's Nursing Practice Act and the Missouri nursing board held a hearing to determine what discipline she should face.

The board eventually imposed a three-year probationary period and several conditions on Carpenter's license, including a requirement that she provide a copy of the board order to any potential employer, contract with a board-approved third party to schedule random substance screening, contact that third party on a daily basis, and only work as an RN with on-site supervision.

Carpenter successfully appealed the board's decision to a state circuit court, which agreed with her that the conditions imposed on her by the disciplinary order were excessive and unreasonable. It reduced the number of probation years from three to one, eliminating most of the conditions imposed by the board.

Following this success, Carpenter filed for attorney's fees, which are available to a "party who prevails in an agency proceeding or civil action arising therefrom." However, the circuit court held that Carpenter did not meet the definition of a "prevailing party" because she was still subject to some amount of discipline. Carpenter appealed and the case went up to the Supreme Court of Missouri, which issued a decision December 20.

The Court agreed with Carpenter that she was a "prevailing party" within the meaning of the state law governing attorney's fees. Chief Justice Patricia Breckenridge noted that, in the statute, "prevails" is defined as "obtains a favorable order, decision, judgment, or dismissal in a civil action or agency proceeding."

Contrary to the circuit court's holding, the attorney's fees statute did not require that Carpenter prevail on the sole issue of whether she should be disciplined at all, only that she receive a judgment that was a "material alteration" of the original decision, something she had achieved when the circuit court significantly reduced her discipline.

However, despite Carpenter's status as a prevailing party, the Court held that she was not entitled to attorney's fees. The statute governing fees makes an exception where "the position of the state was substantially justified or that special circumstances make an award unjust." The board, Justice Breckenridge held, had not taken a "position" on the scope and quantity of Carpenter's discipline.

An agency like the board has two roles in a case like this, she wrote. Although the board, as an adverse party, took the position before the Administrative Hearing Commission that Carpenter should be disciplined, once the AHC had determined that she should be disciplined, the role of the board switched to that of an adjudicator as it determined what form of discipline it should impose.

In its initial, adversarial role, the board had not taken a position as to the form of discipline that it should impose on Carpenter. Later, when it determined the form of discipline that Carpenter should face, the board was making an administrative *decision*, not taking a "position," as would be required for Carpenter to receive attorney's fees.

The court's decision was not unanimous. Judge George Draper, in a dissenting opinion, wrote that under the majority opinion, attorney's fees will not be available to most parties, because an aggrieved party will always effectively be appealing an agency's *decision*, not its position as defined by the court,

"The more reasonable conclusion," the dissenting judge said, "is to recognize that the Board, in its advocacy role, took a 'position' by advocating that the Board, in its adjudicatory role, enter a 'decision' imposing discipline on Ms. Carpenter's license." The 'position' required by the attorney's fees statute, he concluded, was the board's decision to impose the discipline that it did.

## Board not required to take jurisdiction of "balance billing" complaint

*Issue: Board jurisdiction over professionals violating billing laws*

The state medical board was within its authority to reject taking jurisdiction of a couple's complaint that a group of privately-contracted emergency room physicians engaged in "balance billing," the California Court of Appeal, First District, Division 4, held September 26 (*Leon v. Medical Board of California*).

Under balance billing, emergency room physicians under contract— outside of a hospital's billing system and not covered by insurance—bill patients for the difference between the cost of emergency procedures and the amount a patient's insurer is willing to pay.

Maria and Rafael Leon claimed that when they visited the emergency room at Watsonville Community Hospital in 2010, the hospital, which normally accepted their Blue Cross/Blue Shield medical insurance, assigned emergency doctors to the couple who were not employed by the hospital and were not covered as providers under their policy.

The doctors, organized under a separate organization called the Watsonville Emergency Medical Group, billed the Leons separately from the hospital, and the couple ended up paying the difference between the bill and what their insurance offered—$532—out of pocket.

The Leons claimed that, after paying the bill, they learned both that the Group's contract with the hospital requires the doctors to accept the payment offered by their insurer and that California judicial precedent prevents medical groups from collecting the difference between such bills and their insurer's offer. Believing the doctors had engaged in unprofessional conduct, the Leons sent a letter to the board asking it to investigate and help in settling the matter.

The board declined the case, informing the Leons that it was only authorized to investigate violations of California's Medical Practice Act and that the Leons' "complaint is not about medical care and treatment" and thus fell under the jurisdiction of the state's Department of Managed Health Care. The board explained that it did not have the authority to charge physicians with dishonesty for non-compliance with a private contract.

In response, the Leons filed for a writ of mandamus to compel the board to accept jurisdiction of their complaint, and the case eventually went up to a state court of appeal, which issued a decision September 26.

The appeals court agreed with the board, finding that it was not required to take charge of the Leons' complaint. In their letters to the board, the Leons claimed that the doctors had violated provisions of the Medical Practice Act that prohibit acts of dishonesty related to the duties of a physician.

However, although the board has authority to investigate complaints of dishonesty, "that does not mean the Board is required to conclude that the allegations in any given complaint establish unprofessional conduct warranting further action," wrote Justice Jon Streeter.

In their appeal, the Leons argued that the board incorrectly concluded—based on its comments regarding the Department of Managed Health Care—that it had no jurisdiction to investigate their complaint. Despite the board's statement regarding its authority to investigate complaints of non-compliance with a private contract and that the Leons' complaint was "not about medical care and treatment," Justice Streeter wrote that the board's letters "do not show the Board ultimately concluded it could never investigate whether a physician's billing practice constituted unprofessional conduct."

By saying in its letter that it only had authority to take action against individuals in violation of the Medical Practice Act, the board had simply concluded that the medical group's billing procedures had not violated the act, not that dishonest billing would never be a violation.

"The Board's letters, taken together, show the Board reviewed the Leons' complaint, attempted to respond to concerns and requests presented by the Leons, and explained the Board's judgment that the conduct alleged by the Leons . . did not constitute dishonesty warranting disciplinary proceedings against the individual physicians involved."

## No blanket privilege against self-incrimination in discipline cases

*Issue: Constitutional privileges in disciplinary adjudication*

An appellate court in Washington State rejected the argument of a physician that the state's osteopathic medical board had violated his constitutional privilege against self-incrimination and protection against unreasonable search and seizure by ordering him to produce prescription records and by obtaining other prescription records from a state database (*Alsager v. Board of Osteopathic Medicine and Surgery*).

The board sanctioned osteopath Dale Alsager in 2008 for inappropriately prescribing dangerous medications, prohibiting him from prescribing Schedule II or III controlled substances.

However, in 2012, acting on a complaint, the board again investigated Alsager, requesting that Alsager provide a copy of the complaining patient's file. When Alsager sought to quash the file request, the board searched Washington State's prescription monitoring database and discovered that Alsager had prescribed Schedule III drugs, in violation of the prohibition from his 2008 disciplinary case.

Although acknowledging the "punitive aspect" of professional disciplinary proceedings, the justices held that those proceedings do not rise to the level of criminal cases. Unlike criminal sanctions, which are punitive in nature, professional disciplinary sanctions are remedial. "Sanctioning unprofessional conduct serves primarily to maintain professional standards and promote public health and confidence," wrote Chief Judge Thomas Bjorgen, "rather than seeking punitive goals like vengeance."

This discovery prompted a new investigation by the board, and an investigator again requested medical records which Alsager refused to provide, citing the Fourth and Fifth Amendments and claiming that he could not be compelled to cooperate.

After the board rejected those constitutional arguments, Alsager petitioned for a declaratory judgment based on the same claims. Meanwhile, the board revoked Alsager's license after he refused to testify at his disciplinary hearing, and Alsager appealed. The Court of Appeals of Washington, Division 2, consolidated the cases and issued a decision November 15.

On appeal, Alsager argued that board disciplinary proceedings were "quasi-criminal" in nature and that defendants in such cases have a constitutional

protection against self-incrimination. Alsager claimed that the board, by forcing him to testify and produce records, had violated that right.

The Court of Appeals disagreed. Citing U.S. Supreme Court precedent, Chief Judge Thomas Bjorgen wrote that, under the factors that court created to determine whether proceedings are civil or quasi-criminal, medical disciplinary proceedings should be considered civil in nature. Thus, the Fifth Amendment privilege against self-incrimination does not apply to such proceedings.

Addressing the Fifth Amendment's application to the potential for a licensee to provide self-incriminating information that could be used in a future criminal case, the court held that, in order to claim the privilege, affected licensees must do so by raising "specific, individual objections, not by invoking blanket constitutional protections to avoid participating in the proceedings," as Alsager had done.

Alsager also argued that the board's search and gathering of prescription records violated his constitutional right to be free from unreasonable search and seizure. Addressing the claim, the court noted that, under its own precedent, patients have only a "limited expectation of privacy in prescription records . . . 'given the State's vital interest in controlling the distribution of dangerous drugs.'" As a prescribing physician, Alsager, the court noted, had even less of an expectation of privacy, as he "should be even more aware than patients that the government exercises tight regulatory oversight of these controlled substances."

"[Prescription records kept under the prescription monitoring program, either by a pharmacist or as part of the state database, are not protected from all governmental examination under the Fourth Amendment," Judge Bjorgen wrote. Having addressed and rejected Alsager's constitutional claims, the court affirmed the board's decision to permanently revoke his license.

# Licensing

## New York begins to move all professional licensing online

*Issue: Online license application processing*

Beginning with the occupational therapy, OT assistant, and nursing professions, the state of New York launched a program at the end of 2016 to make professional licensing a 100% online process.

"Online application is the first step in modernizing our professional licensing system," said Deputy Commissioner Douglas E. Lentivech in announcing the program, adding that the Office of Professions and NYSED's Information Technology Department "are working together closely to roll out online licensure applications for all professions in the coming months."

In fiscal year 2017-18, the state Board of Regents says it will seek authorization for OP to use $4.3 million of existing revenue from fees already collected to continue building a new electronic licensing and document management system.

The state expects that the online application forms will improve accuracy of the information obtained and the ease of the process. The online application forms can also be saved for up to 30 days in most cases, allowing an applicant to return to complete the application or submit supporting documentation electronically. On average, online application forms will save applicants up to two weeks of mail and processing time when compared to paper applications, New York state estimates.

The new online system will replace an outdated legacy system .When fully developed, the system is expected to:

• provide online accounts so applicants can see where they are in the process and what information required for licensure has been received by OP;

• allow institutions of higher education to electronically submit transcripts;

• allow supervisors overseeing experience requirements to submit their forms electronically; and

• handle back-office application processing to improve customer service.

The New York Office of the Professions issues licenses in more than 50 fields, and oversees the practice of nearly 900,000 licensed and currently registered professionals.

## License applicants could avoid seeking treatment for mental health issues to dodge application questions, survey finds

*Issue: Relevance and impact of mental health background screening*

A large percentage of female physicians who answered a survey published in *General Hospital Psychiatry* in September said they had felt they might qualify for a diagnosis of mental illness but had avoided treatment because of the stigma associated with the label.

The survey, administered through a private page on Facebook, received answers from more than 2,100 physicians who are also mothers. Close to half of respondents believed they had met the definition for a mental illness at some point in their career but had not sought treatment.

One in three respondents said they had been given a formal mental health diagnosis since medical school. But the lead researcher reported many wrote their own prescriptions or paid cash for visits to avoid having an insurance company record. Only 6 percent of respondents who had ever been diagnosed had reported it to their state licensing board.

The lead author of the survey report, Katherine Gold, said state reporting requirements vary. Some applications ask if physicians have ever been diagnosed with a mental health problem, while others ask if they've had a diagnosis in the last few years.

"There's a huge discrepancy between what states ask about physical conditions—such as whether those conditions affect their ability to practice—and what they ask about mental conditions, where the impact on their abilities is not asked about," Gold said.

She notes that attorneys' legal challenges of mental health questions on state bar applications under the Americans with Disabilities Act—which have led to curbs on such questions—could have an impact on other professions' license applications as well.

## Applicant entitled to factual hearing on whether another person, not she, submitted false documents in her name

*Issue: Due process and hearing rights on factual disputes*

A woman who claimed that a third party fraudulently submitted a nursing license application with false academic records was entitled to a hearing to determine the credibility of her claim, an Oregon court ruled December 7 (*Watts v. Oregon State Board of Nursing*).

In 2012, the Oregon nursing board received a license application under the name of Dawn Watts stating that the applicant had obtained a required degree from Long Island University. After an investigator determined that the documents supporting the existence of the degree were fraudulent, the board denied the license application.

Watts requested a hearing, claiming that, although she had signed the document, she had done so when it was blank, and a man who had pretended to be a representative of the University defrauded her of $4,000 by telling her that he was going to enroll her in a special accelerated program, then later sent the false application to the board without her permission. The board denied that request and assigned the case to an administrative law judge, who granted the board's request for summary judgment. Watts appealed.

On appeal, the board argued that Watts had failed to preserve her arguments for appeal because she had presented no formal evidence in her administrative case. Although Watts's submissions to the board had included her claims about the fraudulently-submitted documents, Watts, who appeared pro se during the disciplinary process, had not formally filed exceptions to the board's assertions.

The court did not agree. The notices sent to Watts explaining the board's process gave the impression that the formal filing of exceptions was optional, explained Judge David Schuman. Given that, the court believed that less formal standards applied to whether Watts had preserved her arguments for appeal.

"We conclude that, if an applicant's submissions contain an explanation of his or her objection that is specific enough to ensure that the court or agency is able to consider the point and avoid committing error, . . . it is misleading and fundamentally unfair to inform petitioner that filing exceptions is optional, without also informing her that failure to do so deprives her of the right to judicial review," wrote Judge Schuman.

"In such situations, the claim of error is preserved, regardless of the fact that the applicant opted not to file exceptions." Because Watts had made her objections known to the board, her claims were preserved for appeal.

In her appeal, Watts argued that the board had erred by granting the motion for summary determination instead of providing her with a hearing, claiming that a genuine dispute existed as to whether she or a third party had submitted the application to the board. The board countered by arguing that Watts had not submitted any actual evidence in her favor, only an assertion regarding the third-party submission in her initial answer to the board's charges.

The court agreed with Watts. This legal analysis on this point turned on a technical legal argument over whether Watt's submission to the board qualified as an "affidavit."

If the submission was an affidavit, then Watts would have presented sufficient evidence that she would be entitled to a hearing. If not, then Watts would not have submitted any evidence whatsoever, and would not be entitled to any further procedure. In the end, despite several formal deficiencies, the court held that the document submitted by Watts was sufficient.

Finally, despite the improbability of Watts's claim, she would still be entitled to a hearing. "If there is evidence creating a relevant fact issue, then no matter how overwhelming the moving party's evidence may be, or how implausible the nonmoving party's version of the historical facts, the nonmoving party, upon proper request, is entitled to a hearing."

## Unanswered questions on "telemental" services across state lines

*Issue: Telehealth/online therapy delivered across state lines*

California residents were warned in September by the state's Board of Behavioral Sciences that when they travel out of state, their therapist (marriage and family therapist, professional counselor, clinical social worker, and others) may not be licensed to treat them remotely.

Because the physical location of the client, not the provider, determines which state has jurisdiction over a licensee, the board requires that if a therapist has a client on vacation or a business trip to another state, the therapist is obliged to check with that state to see if conducting phone or video-conferencing therapy is allowed, or if a temporary license is needed.

Psychology ethics consultant Ofer Zur comments in "TeleMental Health Services Across State Lines" that where psychotherapy or counseling is taking place in telemental health services is not always clear. "Does it take place where the client is, where the therapist is, in both places, in cyberspace, or in all three places?" It is obvious, he adds, that "old definitions of the location of treatment are not suitable to modern digital and Internet based treatments."

Zur notes that mental health professionals licensed in one province of Canada may be automatically eligible to practice under that license in other jurisdictions. In the United States, mental health professions continue to utilize non-comprehensive reciprocity agreements and temporary licenses, with no interstate compact.

# Federal File

### FTC proposes $10.5 million rule on release of contact lens prescriptions *(from page 1)*

The Ophthalmic Practices Rule, known as the Eyeglass Rule, is designed to allow consumers to comparison-shop for contact lenses. Under the rule, prescribers must provide patients with a copy of their eyeglass prescription immediately after an eye exam, even if the patient does not request it.

The rule also bars prescribers from requiring that patients buy eyeglasses as a condition of performing an eye exam or providing them with a copy of their prescription. In 2016, the FTC issued at least 38 warning letters to prescribers about possible violations of the rule

The FTC proposes to require an acknowledgment form entitled "Patient Receipt of Contact Lens Prescription" that states, "My eye care professional has provided me with a copy of my contact lens prescription at the completion of my contact lens fitting. I understand I am free to purchase contact lenses from the seller of my choice."

Although the FTC's proposed requirement that prescribers of contact lens obtain signed acknowledgment of receipt of the prescription from patients may seem like a relatively trivial addition to the existing Eyeglass Rule, the FTC provided a cost estimate based on the added recordkeeping and disclosure requirements the change would entail.

Since the majority of states already require optometrists to maintain records of eye examinations for at least three years, maintaining a one-page acknowledgment form should not take more than a few seconds of time and inconsequential record space, the FTC said.

But to take into account the potential time spent scanning records, the agency assumed a one-minute per form per year cost for record maintenance—for 41 million contact lens wearers, approximately 683,333 hours per year.

To estimate the total labor cost burden, the FTC assumed office clerks would perform most of the labor of printing, disseminating, and storing the acknowledgment forms for prescribers' offices. At an average wage of $15.33 per hour for office clerks, the agency calculated the additional labor cost attributable to its proposed change would amount to about $10,475,495.

In another December action, FTC staff formally commented in favor of a proposed rule of the Iowa Board of Physician Assistants, which would make supervision requirements for physician assistants more flexible, as determined by the physician and the PA.

In November, FTC staff also commented in response to a proposed Delaware rule, which would eliminate an existing restriction on telepractice by speech/language pathologists, audiologists, and hearing aid dispensers, but require initial visits of patients to speech pathologists to be in-person visits. The FTC said it believes that existing regulation of teleservices provides adequate protection for patients without requiring initial visits to be in-person.

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