Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue:

Discipline

In sharply-worded ruling, court overturns discipline for lack of evidence

Issue: Sufficiency of evidence in discipline proceedings

Calling the state medical board's investigation "blatantly sub-par," an Iowa appellate court in an April 24 ruling overturned discipline imposed on a doctor who the board was concerned would abuse alcohol while practicing medicine (*Wendy R. Smoker v. Iowa Board of Medicine*).

The physician, Wendy Smoker, a professor of neuroradiology, had a history of alcohol abuse but also a record of managing her proclivity for alcohol abuse. In 2000, she self-reported her impairment to the Virginia medical board and completed a physician health program. She reported two relapses later, both times completing additional treatment programs.

However, in 2009, after a colleague reported to the Iowa medical board that Smoker appeared to have been intoxicated on two occasions, Smoker reported herself to the department chair of her school and admitted to two instances of drinking when questioned by investigators with the medical board. When the head of the board's physician health program recommended Smoker self-report to the board itself, Smoker refused.

(*See **Discipline,** page 5)*

Licensing

Challengers of unconstitutional citizenship requirement win $500K in attorneys' fees

Issue: Constitutionality of residency, citizenship requirements

A group of non-resident pharmacists who successfully sued the New York Department of Education for exclusion from the licensing process were awarded $500,000 in attorneys' fees by a federal district court March 28 (*Nareen Adusumelli, et al. v. David Steiner, et al.*).

The plaintiffs in the case challenged a New York state statute prohibiting non-U.S. citizens or permanent residents from applying for a pharmacist's

license. The suit alleged that the policy violated the Equal Protection Clause and Supremacy Clauses of the U.S. Constitution.

After being granted summary judgment on their claims, the plaintiffs filed for more than $600,000 in attorney's fees.

The Department of Education objected, claiming that much of the work of the attorneys was redundant and duplicative of an earlier case, *Kirk v. New York State Department of Education*, which had challenged the same law, but had ended as moot when the plaintiff in that case was granted permanent residency. The Department also claimed that senior lawyers in the firms had billed for work that should have been performed by lesser-paid associates and that the billing had been too vague.

Judge Jesse Furman of the U.S. District Court for the Southern District of New York approved most of the fee requests in his ruling.

One of the two principal firms representing the plaintiffs in the case, Harter Seacrest, had also worked on the earlier *Kirk* case, and they used much of their research and writing from that case in the representation of the would-be pharmacist candidates in the *Adusumelli* case.

In the end, the court did reduce the requested fees for reasons of duplication, noting that the summary judgment brief submitted by the plaintiff's law firm, Harter Seacrest, was "virtually identical" to the one it had submitted in the earlier case, *Kirk*. The firm actually submitted more hours for work on the brief in the current case than in the previous one, and the two facts together indicated to the judge that the firm was billing for its combined time in both cases working on the brief.

But Furman rejected the notion that duplicative work on two similar cases could disqualify a plaintiff's firm from collecting fees. "A per se rule of that sort," he noted, "would disincentivize experienced attorneys from taking on civil rights litigation."

The other firm representing plaintiffs in the case, led by attorney Krishnan Chittur, had also billed for work done during the *Kirk* case. Although not directly involved in the litigation, he had submitted a friend-of-the-court brief after the parties in the *Adusumelli* case agreed to halt litigation until the *Kirk* case was resolved.

The Department's attorney also challenged these fees as duplicative, but was again unsuccessful. Judge Furman noted that the work Chittur and his associates performed on the amicus brief was related to the advocacy of their clients in the fee case.

The Department challenged both firms' fees on other points, but only one, based on what the Department's attorney claimed were excessive fees, met with significant success. Chittur had charged nearly $200 more per hour than Harter Seacrest, and Furman ruled that his fee was excessively large and reduced his fees by $100,000, down to approximately $200,000.

Outrageously fake doctor loses habeas corpus appeal

Issue: Appropriate sanction for crime of unlicensed practice

A California woman who masqueraded as a doctor—doling out pills, making unfounded diagnoses, and preying on the local Indian immigrant community—lost a habeas corpus appeal of her state criminal conviction in March (*Reena Chopra v. Attorney General of California*).

The case is notable for the particularly brazen way the fake doctor, Reena Chopra, attempted to defraud her patients. The events that set Chopra's criminal conviction in motion began in 2003, when she met a woman at a Hindu Temple in Fremont, California, who was looking for a doctor to evaluate her mother for the purpose of applying for an exemption to the English competency requirement needed to gain United States citizenship.

Chopra told the woman that she was a medical doctor with a PhD and repeatedly held herself out as a doctor when the woman brought her mother in for an evaluation. During the evaluation, Chopra checked the older woman's ears, eyes, and blood pressure, and declared that she would be able to meet the exemption for citizenship. The daughter paid Chopra for the visit and for Chopra's services in filling out the federal form needed to apply for the exemption.

Later, on receipt of the form, the daughter noted that, aside from being often illegibly-written, the form was also lacking Chopra's medical license number. Although Chopra initially refused to provide her license number, she eventually relented and supplied a number to the daughter, who by this time was growing suspicious about Chopra's qualifications. A check of Chopra's license number revealed that it belonged to a deceased woman whose license had expired in 2001.

During her time of medical malefaction, Chopra also purported to sell medical insurance, with herself acting as the primary care doctor for her customers. One such family, lured by Chopra's offer of insurance rates of $100 per year per person, signed on with Chopra, then began to utilize her services, with predictable results.

When one of the sons of the family came to Chopra with knee pain, Chopra took the boy to a local hospital and subjected him to a machine that measures bone density, a service that the hospital provides free to the public, and that Chopra often utilized, as staff at the hospital later testified. Without informing him of the results, Chopra told the patient that he had low bone density, advised that he discontinue strenuous activity, and sold the family some pills to treat the "condition."

Similar medical treatment occurred for the mother of the family and another son, with Chopra taking urine samples to check for cholesterol levels, misreporting the results of a chiropractic examination, and blaming a bad spine for what turned out to be a urinary tract infection, all the while doling out suspect pills.

After failing to get a refund on their insurance payments, the family also reported Chopra to the medical board. Several other individuals who came into contact with her did the same after experiencing Chopra's suspicious behavior. In one incident, a naturopath who questioned her credentials after Chopra offered to hire him was dared by Chopra to research her non-existent license.

In August 2006, Chopra was convicted of practicing medicine without a license and sentenced to two years in prison. After appealing to various state authorities, she filed a federal habeas corpus petition. The case was taken up by Judge Jeffrey White of the U.S. District Court, Northern District of California, who issued a decision March 28, denying the petition.

Chopra had produced a litany of objections to her conviction in state court: Her counsel had been ineffective, she claimed; her sentence violated her rights to due process and freedom from cruel and unusual punishment; the section of California law under which she had been charged was unconstitutional; both the prosecutor and the judge at her state trial had committed misconduct; evidence against her was improperly admitted; the jury that convicted her had been prejudiced by the standard criminal-case jury instruction recited to them; and, last but not least, the evidence against her had been insufficient for a conviction.

Judge White rejected all of Chopra's arguments, stressing that her conviction was justly imposed and the sentence was anything but disproportionate to the offense.

The judge in the case discoursed longest on Chopra's claims of insufficient counsel and unjust sentence.

Far from agreeing with Chopra that her attorney had been ineffective, Judge White lavished praise on the attorney, noting that he actually managed to get Chopra acquitted on two of the three charges levied against her.

Regarding her prison sentence, White noted that "a two-year prison term is far from 'extreme' or 'grossly disproportionate' to the acts of fraudulently misrepresenting herself to patients and putting their health at risk by medically evaluating them despite her lack of medical training, expertise, or license."

Use of title on letter to board is unlicensed practice

Issue: Enforcement of title act restrictions

A former engineer who signed a "P.E.," standing for "Professional Engineer," after his name on a complaint letter to the Oregon engineering board found himself on the end of board action himself when he was charged with unlicensed practice (*Stephen Topaz v. Oregon Board of Examiners for Engineering and Land Surveying*).

In 2009, Stephen Topaz, who had been a licensed engineer in Maryland from 1961 to 1986, sent the Oregon engineering board a letter complaining that the engineering department of the city of St. Helens, where Topaz lived, had damaged his house during a sewer rehabilitation project. Topaz included a detailed analysis of the issue and two proposed remedies, plus the designation "P.E." after his name.

Unfortunately for Topaz, although he renewed his Maryland license in 2010, at the time he sent the letter he was not licensed in any state. The board, noting this fact, moved to impose a $1,000 fine on the former engineer for unlicensed practice and falsely holding himself out as a licensed engineer. Topaz, in reply, claimed that he was a licensed engineer in Maryland and that he simply hoped the board would be more likely to act if the members knew he had professional training.

During the discipline process, Topaz argued that he was subject to a statutory exception to the rules governing unlicensed practice which allows individuals to practice engineering that affects only the individual's property. He also raised a First Amendment argument, claiming that other states had done away with bans on the use of signatures such as "P.E." on free speech grounds.

A non-licensee can violate the Oregon engineering statute if the person through a "verbal claim, sign, advertisement, letterhead, card or in any other way implies that the person is or purports to be a registered professional engineer" or "purports to be able to perform, or who does perform, any service or work that is defined by [statute] as the practice of engineering."

Topaz's argument found favor with the administrative law judge in charge of his case, who dismissed the claims against him, ruling that Topaz had broken no law, having incorrectly signed the designation after his name from error due to force of habit. However, the board disregarded the recommendations of the ALJ and found that Topaz had falsely held himself out as a professional engineer, although it did lower the penalty from $1,000 to $350.

Topaz appealed and the case reached the Court of Appeals of Oregon, which issued a ruling on February 6 written by Judge Lynn Nakamoto.

On appeal, Topaz had argued that the statute with which he had been charged, prohibiting individuals from "falsely" representing themselves as engineers, requires that an individual intend that their representation be false, and he cited an older Oregon case in support of the claim. The court noted, however, that the cited case pre-dated the state's revised criminal code, which now exempts criminal violations for which the harshest penalty is a fine from needing to require a culpable mental state. And, Judge Nakamoto wrote, "had the legislature intended to require a heightened mental state, it would have provided one in less ambiguous terms than the word 'falsely.'"

Topaz, she continued, "does not dispute that P.E. is an abbreviation for professional engineer. By using that designation, petitioner implied that he was a professional engineer and purported that he could perform engineering work, such as evaluating the City of St. Helen's sewer system."

As to the statutory exception to the licensing rules which exempt an individual's work on their own property, Nakamoto noted that the act of sending the letter to the board, containing professional engineering advice and with the intent to instigate an investigation, constituted practice outside of Topaz's property.

Discipline

Discipline overturned for lack of evidence (from page 1)

In February 2010, the board ordered the doctor to undergo an evaluation. The evaluation center recommended that Smoker be monitored, that she see a therapist, and that she have a workplace mentor.

The board then filed discipline charges that June, charging that Smoker's history of alcohol abuse impaired her ability to practice. A hearing was held, in which the board, while determining that Smoker had never consumed alcohol while practicing, nevertheless found that a relapse on her part might be a danger to the public.

Citing an Iowa law that allows the board to discipline a licensee for "habitual intoxication," the board fined Smoker $5,000, placed her on probation for five years, and required her to participate in monitoring and regular reporting.

Smoker appealed, making two primary claims. First, she argued that the board would only have the authority to discipline if it could prove that her use of alcohol could be shown to be so excessive it impaired her ability to practice. The board, she claimed, overstepped its bounds when it reasoned that the statutory prohibition on excessive alcohol use could be used to discipline a licensee who only has the potential to use alcohol to the point where her practice is impaired. She also claimed that the board lacked sufficient evidence to prove that she was an excessive drinker.

The case went before the Iowa Court of Appeals, which issued a decision by Judge Richard Doyle. Doyle noted first that the statute allows the board to act preemptively: "The board should not have to wait until habitual intoxication becomes so debilitating that there is immediate danger of harm to patients."

That said, the court nevertheless questioned the way the investigation of Smoker was handled, with Doyle noting that, contrary to the normal procedure of conducting interviews with the accused, the complainant, and any witness, the investigative report consisted only of an "executive summary" written by the head of the physician health program, and no interviews were conducted.

Further, when questioned during the hearing, the board's chief investigator stated that the board had no evidence to support the charges against Smoker. Similarly, the doctor who evaluated Smoker also stated, during questioning, that Smoker did not show signs of "active alcoholism" and no evidence indicated that she was a danger to the public.

Citing this lack of evidence, Doyle described the investigation against Smoker as "blatantly sub-par," and the court ruled to overturn the discipline imposed on her. "We conclude," Doyle wrote, that "a reasonable mind would find the facts and circumstances presented in this proceeding to be inadequate to reach the conclusion reached by the board."

Revocation for Medicaid fraud too harsh, court rules

Issue: Severity of disciplinary sanctions

The California dental board erred when it revoked the licenses of two dentists who were overpaid more than $140,000 by the state, a state appellate court ruled April 30 (*Shahab Ebrahimian, et al. v. Dental Board of California*). In overturning the

revocation, Judge Perluss, of the Court of Appeal of California, Second Appellate District, Division Seven, stressed that revocation, as the most stringent punishment available to the board, must be reserved for the most egregious cases.

Shahab Ebrahimian and Farhad Shafa, former dental school classmates, formed a dental corporation in 1999 and began operating two clinics which primarily treated patients using MediCal, California's state Medicaid program.

Things initially went well for the pair, but either through shoddy book-keeping practices or intentional fraud, their clinics came under investigation by the California Department of Health in 2001. After the investigation, the state agency determined that Ebrahimian and Shafa had been overpaid more than $140,000. That amount included the payment of at least $15,000 for 394 fillings which the Department determined had never been performed.

In addition, California's state Medicaid program only pays for cheaper metal crowns, but the two dentists offered their state-insured patients more expensive porcelain crowns and paid the difference themselves. The state regarded this practice as, essentially, a payment to the patients for choosing the pair's clinics.

Charging for metal crowns instead of the more expensive porcelain crowns provided to patients, billing under one office instead of two, and mislabeling X-rays may be violations of MediCal regulations, the court said, but "it is inconceivable that kind of misconduct would warrant revocation of the dentists' licenses."

The discovery led to a criminal investigation and the filing of fraud charges in 2006. However, the pair eventually pleaded no contest to a much-reduced charge of one count of paying patient referral fees. They received suspended sentences and three-years' probation and paid $110,000 in restitution and fees.

In 2009, the state dental board opened its own proceedings against the dentists, charging them with both the guilty pleas and for "numerous acts of fraud."

Defending themselves in a hearing before an administrative law judge, Ebrahimian and Shafa claimed that most of the charges had resulted from their sloppy administrative practices, brought on by the high volume of patients that they had been seeing. Although none of the evidence from the earlier Department of Health investigation was introduced at the discipline hearings, the judge hearing the case did not find the pair's excuses credible, and recommended the revocation of their dental licenses.

The dental board followed the recommendation and revoked both men's licenses. They appealed, getting a favorable ruling from a lower court, and the case went up to the Court of Appeal.

In finding for the two dentists, the lower court had ruled that revocation was too harsh a penalty, stating that the dental board had not adequately investigated whether the pair had committed fraud.

The Court of Appeals agreed, ruling that the dental board had abused its discretion in issuing the revocations. "By disregarding the well-established preference for rehabilitation rather than revocation, . . . the Dental Board failed to appreciate the scope and contours of its discretion."

The summary of the administrative law judge who heard the case, Judge Perluss noted, "fail[s] to distinguish between the types of misconduct at issue and the amount of improper payments attributable to each category. While charging for metal crowns instead of the more expensive porcelain crowns provided to patients, billing under one office instead of two and mislabeling X-rays, conduct that resulted in the

bulk of the $110,00 figure, may violate MediCal regulations, it is inconceivable that kind of misconduct would warrant revocation of the dentists' licenses."

Absent an actual finding of fraud, Perluss continued, "the penalty of revocation is too severe—that is, arbitrary and capricious—based on the totality of the facts and the relatively benign nature of the other misconduct involved."

"We reiterate it is rare to find an administrative agency abused its discretion in its choice of penalty," he concluded. "Nevertheless, for a penalty range to have any meaning, revocation must be reserved for the most egregious cases, unless the licensee is not capable of safe practice."

Legal fees awarded to licensees in "groundless" case upheld

Issue: Investigative groundwork in discipline cases

Four Tennessee doctors, the subject of discipline charges from the state's health department that were thrown out by the Tennessee medical board as "groundless," won a second legal victory against the state April 12, when an appellate court upheld attorney's fees that were ordered to be paid after a hearing exonerated the doctors (*Tennessee Department of Health and the Division of Health-Related Board v. Kandala Chary, et al*.).

The four doctors whose actions were the center of the discipline case all worked or operated Tennessee Kidney Clinics, a group of seven dialysis clinics in the state.

In 2004, after a patient filed a complaint claiming that patients at the clinics were not receiving proper medication, the state's Department of Health initiated an investigation. As part of the investigation, an expert hired by the department reported that she found the conduct of several doctors at the clinics to be unprofessional and unethical. The department filed charges against the doctors in 2007.

The problems at the clinic stemmed from a computer error on the part of a Medicare third-party payer, which caused a shortage of anti-anemia drugs at the clinics from June to September of 2004. As a result, doctors at the clinics began rationing the remaining drugs.

The court found that the basic problem was an insurer's computer error leading to a medicine shortage, and there was no evidence that the physicians were in violation of professional conduct standards of the medical practice act.

When it became apparent that the problem would not be resolved quickly, the medical director of the clinics, and one of the doctors in the discipline case, Kandala Chary, obtained a personal $1 million line of credit to purchase an adequate supply of the drugs.

The department pushed on with discipline charges despite that effort. But when the case came before a three-member panel of the state's medical board, not only were the charges thrown out, but each of the four doctors received more than $25,000 in legal fees, as the result of the fact that the charges against them were, as an administrative law judge wrote, "not well grounded in fact."

On appeal, a state chancery court upheld the award, citing the Department of Health's poor investigation. For example, the court noted, the department's chief investigator was apparently not even aware that the medicine shortage had been caused by a computer error.

Although the department had charged that the doctors failed to document that the clinics' patients had been informed of the medicine shortages, not only was there no evidence to support the assertion, there was no evidence that the doctors would

have been in violation of the medical code even if they had not documented the notice, the court found.

After the Department appealed again, Judge Frank Clement, Jr. issued a decision for the Court of Appeals of Tennessee. Clement upheld the decisions of the medical board and the lower court, at one point noting that the Department had failed to conduct an investigation of the causes of the medicine shortage before bringing the charges.

"Additionally," he noted, "the trial court observed that the Department failed to identify any rule or regulation that makes it unprofessional not to document that a patient was counseled about a shortage of medication on the patient's chart." Further, Judge Clement noted that, even after the charges were filed, evidence was available that should have put the Department on notice of the groundlessness of the charges, but the Department failed to mitigate the situation by dropping the case.

The legal fee awards were reasonable, he concluded, and would be upheld.

Repeated delays cause court to throw out discipline case

Issue: Due process in disciplinary proceedings

In a March 5 ruling, West Virginia's supreme court threw out a discipline case against a nurse accused of stealing narcotics after the state's board for registered professional nurses repeatedly delayed the case without adequate explanation (*State ex rel. Jennifer A. Fillinger v. Laura S. Rhodes*).

The justices chastised the board for the delays, noting the seriousness of the charges against the nurse and the subsequent violation of her rights through the delay.

Jennifer Fillinger, the nurse, was fired by two different medical centers in 2008 and 2009 after discrepancies in prescription narcotic disbursement records indicated that she had stolen hundreds of painkillers and sedatives. Each medical center reported Fillinger to the state Board of Examiners for Registered Professional Nurses, which then charged the nurse with violations of the state's professional code.

The date of the hearing was rescheduled at least five times, always with minimal or no explanation, and often notice of the postponement was not delivered to Fillinger until late on the day before the scheduled hearing. Fillinger argued that, by repeatedly delaying, the board was effectively denying her a hearing, in violation of the law.

Although West Virginia statute requires the board to send status reports to complainants, and to issue a final ruling in a case within one year unless a delay is agreed to by the complaining parties, the board only sent a single status report to one of the two complainants, and never obtained consent to delay the case's resolution, despite the fact that the case was ongoing more than three years later.

In 2011, three years after the initial complaint, Fillinger rejected a consent agreement proposed by the board, and a hearing was scheduled for July 26, 2011. This began a long process of postponement by the board. The date of the hearing was rescheduled at least five times, always with minimal or no explanation, and often notice of the postponement was not delivered to Fillinger until late on the day before the scheduled hearing.

After the fifth continuance, Fillinger applied to the state's Supreme Court of Appeals for a writ of prohibition, seeking to prevent the board from continuing its prosecution of the case. Fillinger argued that, by repeatedly delaying, the board was effectively denying her a hearing, in violation of the law.

In response to Fillinger's claim, the board argued that she could not file for a writ with the court because she had not yet exhausted her administrative remedies. But Justice Menis E. Ketchum, writing for the court, noted that the board's "assertion is difficult to sustain, . . . where the administrative remedy, delayed over an unreasonable period of time, becomes largely theoretical."

Citing an older case, *State ex rel. Sheppe v. West Virginia Board of Dental Examiners,* Ketchum said that the failure of a state board to take action within a reasonable time limit will be assumed to be a refusal of the action sought.

The board, he wrote, violated both its responsibilities to file timely reports or obtain agreements for a delay. The board also failed to provide adequate notice of the postponements, he noted, when it delivered that notice one day prior to the hearing and did not provide an explanation for the delays, in violation of state law.

Fillinger had effectively been denied an opportunity to be heard, her request for a writ was granted, and both charges being dismissed with prejudice.

Two justices contributed concurring opinions, both for the sole purpose of castigating the board for its actions.

Justice Allen H. Loughry noted that, despite the serious nature of the accusations against Fillinger, the charges against her would never be decided on their merits because of the board's delays.

Chief Justice Brent D. Benjamin wrote "to emphasize that by repeatedly violating [West Virginia law] and Ms. Fillinger's due process rights, the [board] engaged in excessively vexatious conduct."

"In the future," he continued, "I believe this Court should pay special attention to such conduct and make such awards of costs and expenses to compensate the victims of such conduct and to communicate the message that this Court expects all parties to abide by the [West Virginia] Code and by applicable rules."

Automatic revocation rule survives another challenge in Illinois

Issue: Discipline for offenses pre-dating legislation

A challenge to a recently-enacted Illinois law that automatically revokes the licenses of health care workers who have been convicted of assaults on patients withstood another legal challenge April 8, when the Appellate Court of Illinois dismissed a lawsuit filed by four former doctors who claimed the law's automatic nature violated their constitutional rights (*Angelo Consiglio v. The Department of Financial and Professional Regulation*).

Each of the four plaintiffs was a male doctor who had been convicted of a battery or sexual abuse of a patient. The licenses of all four doctors had been suspended or otherwise restricted, but each had since returned to practice, their licenses restored by the state.

Then, in 2011, the state enacted a statute which required the automatic revocation of the license of any health care worker who had committed either a forcible felony, a criminal battery of a patient, or any crime which required registration as a sex offender. Because the statute is triggered by an official record of a conviction, no hearing is required for its enforcement.

As a result, each of the plaintiffs found their previously-restored licenses revoked, and all four brought their case to court, seeking judicial declarations that the newly-

enacted law could not be applied to their past crimes, claiming that such retroactive enforcement would be a violation of their rights under the federal and Illinois constitutions.

The Appellate Court issued a decision by Justice Thomas E. Hoffman. Citing an earlier federal challenge to the same law, *Bhalera v. Department of Financial and Professional Regulation,* Hoffman drew a distinction between statutes that operate retroactively and those that only apply to convictions that predate their enactment. "Although the act may draw upon antecedent convictions for its operation, it does not impose new legal consequences to the plaintiffs' convictions or their right to practice medicine in the years after their convictions and prior to its effective date."

Illinois' automatic revocation law "affects only the plaintiffs' rights to practice as health care workers subsequent to its enactment, and it is not retroactive in a manner that triggers . . . substantive due process protections," the court said.

When the doctors complained that the law's denial of a hearing to affected licensees violated their procedural due process rights, Hofman noted that, because the law was triggered in the event of a conviction, the risk that a license might be erroneously revoked was low, as the existence of the conviction is a matter of public record and can be established without a hearing.

A theme of the court opinion, like the earlier decision in *Bhalerao*, was that the license revocations were not punitive, but were instead intended for the protection of the public from the practice of doctors whose licenses had been revoked. Because the law did not act punitively, many seemingly applicable constitutional rights invoked by the doctors in their challenge to the statute had no effect on the revocations. Constitutional provisions prohibiting double jeopardy and ex post facto laws were only applicable to sanctions the primary purpose of which was punishment.

"The act," Judge Hoffman explained, "has alternative . . . purposes—namely the protection of public health and safety and the maintenance of the integrity of the medical profession . . . and those purposes are actually the primary goals of the legislation."

That primary function of the enacted statute to protect the public was at the heart of the rejection of other claims made by the plaintiffs. Claims by the doctors that the statute violated the separation of governmental powers delineated by the state constitution were rejected because the statute did not overrule any earlier judicial decision, claims that the statute violated the prohibition on the legislative impairment of contracts were rejected because the law was determined to be reasonable and necessary to serve a public purpose, and res judicata—the re-litigation of claims already heard by a court—did not apply because the new law did not concern the same issues as earlier decisions made by the department.

Despite charging error, board employees immune from suit

Issue: Board member immunity

In a March 19 decision, a federal district judge in Colorado dismissed a damages suit brought against the state's board for professional counselors after the board incorrectly charged and disciplined a counselor, then filed the discipline with the National Practitioners Data Bank (*Penelope Thome and Dennis W. Thome v. Alan L. Cook*).

Penelope Thome, the disciplined licensee, is a professional counselor in Colorado. The state board for licensed professional counselors filed charges against her in 2008, but an administrative law judge ruled that the evidence did not support any of the charges.

The board accepted the findings of the ALJ on four of the five charges, but sanctioned Thome for the remaining charge. However, conviction on that charge did not carry heavy sanctions: Thome was issued a letter of admonition and ordered to complete some relevant classes.

Thome appealed, while the board reported the discipline to the National Practitioner Data Bank. A state appellate court eventually overturned the discipline, at least partially because the original notice of charges failed to allege a violation of the rule eventually used to discipline Thome.

Although the sending of discipline information to the National Practitioner Data Bank is not protected by judicial immunity, state law protects state employees from actions taken on the job unless those actions were proved to be "willful and wanton."

Thome then brought suit against the board in federal court, alleging fraudulent behavior. Although judicial immunity would seem to apply to the board's actions, Thome argued that, taken as they were after the decision of the ALJ and alleging an entirely new charge, the actions were not judicial or prosecutorial in nature and thus were not subject to the usual immunities.

In his decision for the U.S. District Court for Colorado, Judge Robert E. Blackburn rejected Thome's reasoning, ruling that the actions of the board were, in fact, judicial in nature, and thus subject to immunity. "Whether procedurally improper or not," he wrote, "the actions of the board described in the complaint all constituted an inextricable part of the board's prosecution and adjudication of the disciplinary charges against Ms. Thome."

One action by the board, the sending of discipline information to the National Practitioner Databank, was not subject to judicial immunity.

However, a state statute, the Colorado Governmental Immunity Act, protects state employees from suit for actions they took on the job unless a plaintiff can prove that the actions of the employee were "willful and wanton." Although Thome alleged that the "defendants knew what they were doing was unlawful and in violation of Ms. Thome's rights," Judge Blackburn ruled that the language used in her brief was not sufficient to allege that any particular employee acted in a willful and wanton manner, and thus could not overcome their statutory immunity.

"The allegations above describe the actions and motivations of the defendants as a group, rather than describing the actions and motivation of specific defendants," he wrote. Thus, the allegations were "too general to attribute willful and wanton action to any individual defendant."

Court dismisses appeal by doctor who threatened to kill patient

Issue: State discipline actions and federal court jurisdiction

A federal district court in Washington dismissed a suit by a doctor who had been disciplined by the state board of osteopathic medicine for sexually assaulting and threatening to kill a patient and former employee (*Dale E. Alsager v. Board of Osteopathic Medicine and Surgery*).

The doctor, Dale Alsager of Bothell, Washington, was reported to the police by the patient, who alleged that Alsager had touched her inappropriately. Although the initial incident was reported as a sexual assault, the encounter led to an ongoing sexual relationship. At one point, the relationship apparently went sour, and Alsager allegedly threatened to kill the patient.

After learning of the police complaint, the state's osteopathic board sent Alsager a letter informing him that he was under investigation. In response, Alsager sent, through his attorney, a letter claiming constitutional rights of due process and freedom from self-incrimination. He then filed a suit for declaratory relief against the

board, seeking both to quash its request for documents and a declaration that some of the statutes under which he was charged were unconstitutional.

Although the board responded by claiming immunity under the Eleventh Amendment, Judge Robert Bryan, of the U.S. District Court for the Western District of Washington, ruled March 8 that Alsager's suit for injunctive relief against named government officials in their official capacity were not barred by immunity.

However, Bryan ruled that, because the case involved an ongoing state proceeding, it would not be appropriate for a federal court to intervene.

Alsager had attempted to counter this argument by his own, relatively novel, claim. In Washington State, he claimed, a case cannot be considered initiated for purposes of federal court abstention until charges have been filed. Therefore, as the board's case was still in the investigative stage, a federal court was not yet prevented from intervening.

However, wrote Bryan, Alsager "confuses state-initiated 'ongoing proceedings' for purposes of [federal court] abstention, with 'adjudicative proceedings.'" The initiation of the board's investigation was still sufficient to prevent a federal court from intervention in the case, the judge ruled.

"Fraud" not catch-all for potential board misconduct

Issue: Negotiated settlements of disciplinary charges

An appellate court in Kentucky rejected the appeal of a doctor who, having agreed to a conditional reinstatement of his revoked license, challenged the reinstatement, charging that the state's medical board fraudulently induced him to enter into the agreement (*John L. Doyle, III v. Kentucky Board of Medical Licensure*).

In 2003, a professional associate of Kentucky doctor John Doyle advised the board of concerns about Doyle's competence due to an ongoing alcohol abuse problem.

After an investigation, the board echoed the concern, and filed a complaint in 2004, suspending Doyle's license on an emergency basis in the meantime. A hearing officer ruled that, indeed, Doyle did have an alcohol abuse problem, and that he maintained inadequate records. Despite the problems, the officer did not think that Doyle was a threat to the public, and recommended that the suspension be lifted and Doyle's license be reinstated with restrictions.

The medical board seems to have agreed with the recommendations, but negotiations with Doyle over the terms of the board's action—particularly over whether an official restriction was to be noted on Doyle's record—could not be resolved, and the case went to a lengthy hearing process instead.

Over a year later, the board officially determined that Doyle suffered from alcoholism, that he kept inadequate records, that he made false statements in those records, that he had prescribed medication for his girlfriend, and that he failed to meet adequate standards of medical practice.

The board suspended Doyle's license for two months, with indefinite restrictions to be imposed thereafter, and assessed him legal costs of $25,000.

Doyle appealed, but during the process, he stopped making payments on his court costs, with the eventual result that the board revoked his license. He appealed that discipline as well.

He then packed up and moved to the Solomon Islands, where he continued to practice medicine. There he married a woman with children of her own and decided to return to Kentucky in 2007. However, to fulfill immigration requirements for his new wife and stepchildren, he would need to prove that he could provide for them. So he began to petition the board for reinstatement of his license.

While he was engaged in that process, a state circuit court ruled that Doyle, in his still-ongoing appeal of the suspension of his license, had raised enough of a question as to the existence of board misconduct during the license suspension proceedings that discovery in the case could begin.

Although the court would later reverse this decision, the board offered Doyle a deal: If Doyle would drop the appeals of the suspension and the revocation of his medical license, the board would reinstate him, although with some restrictions on his license. Doyle agreed, and his license was reinstated.

The court said the immigration status of Doyle's family members did not make the agreement with the board one induced by fraud or duress. "Parties in law suits often compromise their claims in less than ideal ways to avoid collateral consequences," the judge wrote. "Taking Doyle's argument to its logical conclusion, every settlement where one party had some advantage over the other would be subject to attack as having been obtained through fraud."

One year later, Doyle moved to set aside the dismissal of his appeals, arguing that the board had acted fraudulently and that his agreement to dismiss the charges had been made under duress.

Specifically, Doyle challenged the legal ability of the board to "reinstate" his license with restrictions, arguing that it did not have the power to take that action, only the power to issue a new license, making its assurances to the contrary unfairly deceptive. And the precarious immigration position of his family, he claimed, had the effect of making his agreement to the reinstatement one of duress and one made under fraudulent circumstances.

Judge Michelle Keller, in her opinion for the Court of Appeals of Kentucky, issued April 5, rejected Doyle's arguments.

The immigration situation of Doyle's family, Keller ruled, did not make the agreement one induced by fraud or duress. And although Keller agreed with Doyle that, according to its rules, the board did not actually have the power to simply reinstate a revoked license, she noted that the law does allow the board to impose restrictions on a new license, so Doyle had not been harmed by the mistake.

And, noting that Doyle himself approached the board in search of the reinstatement of his license, Keller wrote that Doyle himself was a willing participant in any fraud. "Doyle's argument that he was somehow entrapped by his own plan is not persuasive."

Decision wasn't sufficiently final for appeal, court rules

Issue: Administrative law procedural requirements

The appeal of a doctor who challenged a board decision to withhold the reinstatement of his license was dismissed April 19 when the Court of Appeals of Kentucky ruled that, despite the state medical board's decision to place conditions on the doctor's application for licensure, the case lacked a final board decision (*Ali Shamaei Zadeh v. Kentucky Board of Medical Licensure*).

Shamaei Zadeh's medical license was revoked by the state medical board in March of 2000. He applied for reinstatement twice, and in 2009, the board ordered him to submit to an evaluation by the state's Center for Personalized Education for Physicians.

The assessment was not a positive one, with the Center reporting that Shamaei Zadeh had trouble focusing, reasoning, and problem solving, and that his knowledge of medicine was very limited. As a result, the Center recommended that he enter a residency program. It also recommended that he submit to a comprehensive neural and mental health evaluation.

The assessment that followed concluded that Shamaei Zadeh was "mildly to moderately impaired." A second evaluation concurred, reporting that the doctor did not have the intellectual capacity to practice medicine.

As a result, Shamaei Zadeh withdrew his reinstatement petition, but he renewed it, twice, in 2011, asking that he be allowed to resume practice under the supervision of a licensed physician. The board did not deny his requests, but instead twice deferred a decision, telling Shamaei Zadeh that he would need to complete a residency.

In response, Shamaei Zadeh appealed to the court system, asking it to grant the reinstatement of his license. Unfortunately for the doctor, despite the seeming finality of the board's decision, he characterized his appeal as an interlocutory one. Because the board's decision was not considered final, it could not be heard by a court.

Letting license lapse to avoid discipline not a successful dodge

Issue: Status of expired licenses in discipline process

The Pennsylvania state board of auto dealers was within its power when it suspended the license of a former board chair, despite the fact that he had let his license lapse in an attempt to avoid discipline, the Commonwealth Court of Pennsylvania ruled January 30 (*Gary Michael Barbera v. State Board of Vehicle Manufacturers, Dealers and Salespersons*).

Gary Michael Barbera, former car salesman and chair of the Pennsylvania State Board of Vehicle Manufacturers, Dealers and Salespersons, pled guilty in 2010 to the filing of false tax returns, a felony. He received three years' probation and was required to pay restitution and fines of approximately $150,000.

Given Barbera's former status as the head of the board, the members recused themselves from his case in favor of a hearing examiner.

"Prior to the board taking action and actually prevailing," the court said, "a licensee has a property interest in an existing license or an expired license, which provides the board with jurisdiction to act. To hold otherwise would allow a licensee to avoid disciplinary action by the board for a criminal conviction that occurred while his license was active, by simply allowing his license to expire prior to and in anticipation of a disciplinary proceeding."

After the filing of the charges but prior to filing an answer, Barbera let his license expire without attempting to renew it. He then replied to the charges by, among other things, denying that he had a license to sanction.

Unimpressed, the board went forward with the hearings anyway and, at their conclusion, the hearing examiner suspended Barbera's license for three years.

In making the decision, the hearing examiner reasoned that, despite his current unlicensed status, Barbera's crime was committed while he held an active license. The examiner noted that Barbera had a current property interest in his license; if not disciplined he would simply be able to pay the standard license fees and file for renewal.

Barbera appealed, repeating his argument that he could not be disciplined because he did not have a current license.

Like the hearing examiner, the Commonwealth Court of Pennsylvania did not buy this argument. "This court," wrote Judge James Brobson, "has long held that owners of expired licenses possess a property interest in their expired licenses sufficient to subject the licensee to discipline . . . because they could renew their licenses at any time."

Barbara argued that such past precedent was incorrect. According to statute, he argued, a person in his position would not have the power to simply renew his license by paying the normal fee. Instead, he claimed that by law, a licensee in his position—having been convicted of a felony—would be required to wait five years from that conviction before applying for renewal.

The board, for its part, countered that Barbera's interpretation of the law was incorrect. The statute he cited, it argued, only applied to applicants for a new license, not current license holders seeking a renewal.

The court agreed with Barbera's interpretation of the statute, which it noted explicitly applied the five-year waiting period to those seeking license renewals. However, Brobson wrote, that section of law does not actually prohibit the renewal of a license. Instead, it only grants the board the power to bring an action against Barbera and allow for a hearing.

The board is not required to periodically review the fitness of license holders when they apply for renewal, the court said. If not disciplined, Barbera would still be able to renew his license, so he retained a property interest in the license, and it was thus still subject to discipline.

Take Note

Court dismisses suit against CE company over discipline description

Issue: How discipline actions may be described in published reports

A defamation lawsuit brought by a former accountant for the consulting firm KPMG against a company that organizes continuing education courses for accountants was dismissed by a federal court April 15, when the judge ruled that the supposedly defamatory statement was both true and protected from suit by privilege (*David Greenberg v. Western CPE and Steve D. Nash*).

David Greenberg, formerly a partner and licensed accountant with KPMG, was charged in 2006, and acquitted, for participation in the preparation and use of fraudulent tax shelters.

Another investigation, by the U.S. Internal Revenue Service, which resulted in the firm's entering into a deferred prosecution agreement with the Department of Justice in 2004, provided information which the California Board of Accountancy used to charge Greenberg with professional violations in 2008, resulting in the revocation of his license.

Western CPE, a company that organizes continuing education classes, used Greenberg's disciplinary case as an example in course material it provided to its

The Western CPE description of the case listed the revocation and included an editorial summary which stated, among other things, that Greenberg's case was "also important because the initial investigation was by the IRS" and that "after being sanctioned by the IRS, the Board of Accountancy initiated its disciplinary process."

Greenberg, having never been personally sanctioned by the IRS, but believing that the grammatically-awkward summary claimed that he had been, brought suit against Western CPE and Steven Nash, who had written the offending paragraph for the course.

students, and Greenberg sued. The U.S. District Court for the Central District of California issued a decision in the case written by Judge Cormac Carney.

Carney wrote that several privileges protected Western and Nash from suit for the statement. For starters, because the commentary to the case was describing the decision of the accountancy board, a state agency, the commentary was protected from defamation suits as a report of an official public proceeding.

Second, the statement was protected from suit under the common interest privilege, a nebulously-worded piece of law which the court described as applying "to a variety of situations in which the allegedly defamatory statements were made among individuals with some common connection or relationship and with the purpose of furthering the interest they share." The continuing education course fit this description well, Carney concluded.

Perhaps most importantly, Carney wrote, Greenberg's suit must be dismissed because the statements in question were actually true. "A close reading of the sentence," he wrote, "reveals that, contrary to [Greenberg]'s assertion, it does not specifically state that [Greenberg] was sanctioned by the IRS."

And, "although technically it was KPMG that was sanctioned by the IRS, and the Board of Accountancy subsequently initiated its disciplinary process against KPMG and then [Greenberg], these details would not change the entire complexion of the published statements such that they would have a materially different effect on the reader."

"In light of the necessarily compressed nature of this brief summary," Carney noted, "the sentence adequately conveys the 'substance' or 'gist' of the complex procedural history" that resulted in the disciplinary action against Greenberg.

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