Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue:

Discipline

"Unprofessional conduct" charge for DUI is constitutional, court rules

Issue: Nexus between professional standards and criminal conduct

The state medical board was within its rights to discipline a doctor for unprofessional conduct after he was convicted of driving under the influence, the Court of Appeals of Tennessee in Nashville ruled January 9 (*Ernest B. Kleier v. Tennessee Board of Medical Examiners).* The court found that the state's statute for charging physicians with unprofessional conduct is not unconstitutionally vague.

Tennessee physician Ernest Kleier was arrested for driving under the influence in the summer of 2008. Kleier, whose blood-alcohol level was 0.182%, more than twice the legal limit of 0.08%, at the time of his arrest, pled guilty to criminal charges that September and the Tennessee Board of Medical Examiners filed its own charges the following fall.

(*See **Discipline,** page 4)*

Testing

Two federal courts rule against examinees on ADA accommodations

Issue: Test accommodations under Americans with Disabilities Act

On the question of test accommodations for candidates with a disability, federal district courts ruled against licensure candidates in at least two recent lawsuits, one filed by a nursing graduate with test anxiety, the other by a blind medical school graduate.

In the first case, the candidate for a nursing license failed to allege a causal link between the actions of the licensing exam administrators and harm to the candidate, the U.S. District Court of

Kansas held in a January 10 ruling. The court overruled the candidate, Barry D. Turner II, who sought damages and injunctive relief under the Americans with Disabilities Act (*Barry D. Turner II, v. National Council of State Boards of Nursing, Inc.*).

Turner filed suit against the National Council of State Boards of Nursing, the Kansas nursing board, and several state board officers, members and employees, alleging that the defendants discriminated against him on the basis of disability and failed to provide reasonable accommodations during administration of the Kansas nurse licensing exam. The court agreed with the defendants that Turner's suit should be dismissed.

> Several defects were apparent in Turner's complaint, said the court. "Plaintiff does not allege that the asserted problems in the administration of the test to him in May 2009 are in any way related to, or caused by, the alleged general flaws in the CAT (computer-aided testing) format related to candidates with test anxiety, in general, or to his asserted disability, in particular. Nor does he allege that he failed the May 2009 examination because of any asserted problems in its administration or its CAT format. He even fails to allege that the asserted CAT format flaws cause candidates, with claimed test anxiety, to fail disproportionately the exam because of their test anxiety rather than their lack of knowledge, skills, and ability."

He filed a motion for relief from judgment in May 2012, which the court has now overruled, noting that the complaint is "completely devoid" of any assertion that the National Council's failure to provide an alternative format for the NCLEX-RN exam caused him any harm.

In the second case, student Maria Mahmood, who started a fire in a testing center bathroom when her disability accommodations were delayed, lost her lawsuit against the National Board of Medical Examiners, which she had sued under the Americans with Disabilities Act for failure to provide the accommodations (*Maria Mahmood v. National Board of Medical Examiners*).

Judge Timothy Rice of the United States District Court in Philadelphia blamed Mahmood herself for the eventual postponement of her test, writing that the fire had prevented NBME staffers from fixing the problems with her disability accommodations.

Mahmood's disability was not at issue; she is legally blind and the NBME agreed to provide her requested accommodations when she applied to take the United States States Medical Licensing Examination, or USMLE, in 2007. However, during that test and another attempt in 2009, technical problems and miscommunications caused postponements of the exam.

On August 8, 2011, Mahmood sat again for the USMLE. According to her complaint, although Mahmood had not requested a private room to take the exam, NBME staff seated her in one anyway. Then, while taking the test, Mahmood was interrupted by staff who informed her that another disabled candidate needed to use the room. When staff moved Mahmood's special monitor, which she needed to access the test, to another area, the monitor's stand broke.

While NBME staff attempted to fix the monitor stand, Mahmood, distraught about the repeated delays and the upcoming seven-year deadline for her to take the test, set a fire in the testing center's bathroom in order to cause a delay.

The ploy did not work. Instead, Mahmood was arrested and spent the next two weeks in custody, then was banned from the test for three years by the NBME.

> "No reasonable jury could conclude that the NBME or its agents denied Mahmood accommodations that precluded her from taking the August, 8, 2011 test," the court stated.

In response, she brought suit against the testing organization, claiming that, as a result of the repeated postponements, the NBME had failed to accommodate her disabilities and was in violation of the Americans with Disabilities Act.

In his February 14 decision, Judge Rice dismissed Mahmood's ADA claim, writing that the ADA had provided her with all of her requested accommodations for the test. "Although technical problems with Mahmood's requested equipment may have delayed her exam by hours or a few days," he noted, "undisputed testimony establishes that she was accommodated, as required by law."

Rice credited the NBME for providing accommodations, writing that their efforts were derailed by the fire set by Mahmood and that she would not have been required to take the test at that sitting if her accommodations were not available. Because the NBME had acted in good faith, it could not be found in violation of the ADA.

Discipline

Discipline for DUI conviction is constitutional *(from p. 1)*

After Kleier's case went to a hearing in January of 2010, the board imposed a two-year probation on his license, and ordered him to seek treatment. After six months, Kleier would be allowed to petition for the lifting of the probation.

Kleier was not happy with the decision and he appealed, arguing that the Tennessee statute under which he had been disciplined, prohibiting licensees from engaging in "unprofessional, dishonorable, or unethical conduct," was unconstitutionally vague because it did not spell out what sort of actions could be considered unprofessional, dishonorable, or unethical.

An appellate court agreed with Kleier, ruling that the statute was unconstitutionally vague and noting that the doctor's "unseemly conduct in another state was used as a platform for disciplining his professional license without describing how that conduct undercut the minimally acceptable level of professional competence expected of all physicians in Tennessee."

Now it was the medical board's turn to appeal, and the case went to the Court of Appeals of Tennessee in Nashville, which issued a decision by Judge Richard Dinkins.

In its appeal, the board made two primary claims: 1) the statute was not unconstitutionally vague; and 2) the lower appellate court had been wrong to make any ruling based on a failure to elaborate a standard of care, as Kleier had not been charged with incompetent treatment of a patient.

Dinkins agreed with the board on both points. “The board,” he wrote, “could properly consider driving under the influence an act which could jeopardize the interest of the public, and be an indication of ‘unfitness to practice medicine.’”

“In this manner,” he continued, “the term ‘unprofessional, dishonorable, or unethical conduct' is adequate to advise Dr. Kleier that a conviction for driving under the influence could subject him to a proceeding before the Board to determine his fitness to practice and is not unconstitutionally vague.”

Dinkins also noted the difference between discipline charges which result from the direct treatment of a physician’s patients and those that do not. Because Kleier had not been charged with unprofessional conduct in the direct treatment of his patients, the lower appellate court had been wrong to cite a failure to elaborate the standard of care as a reason for overturning the board’s decision.

Doctor can't dodge order barring surgery by drilling into spine

Issue: Defining scope of practice in discipline orders

A physician who was ordered not to perform surgery tried to argue that using a drill to penetrate spinal vertebrae was not actually surgery. But he lost his appeal of his license revocation February 6, when the Court of Appeals of Texas in Austin affirmed the state’s medical board decision to revoke (*Merrimon W. Baker v. The Texas Medical Board and Donal Patrick*).

The doctor, Merrimon Baker, saw a string of complaints come to a head in 2006, when, after an investigation, he entered into a consent agreement with the Texas Medical Board. The board agreed to forego the suspension of Baker’s license in favor of a probationary status, and as part of that compromise, Baker agreed, among other things, not to perform spinal surgery.

Four days later, Baker found himself in violation of the agreement when he performed a procedure called kyphoplasty, a surgical procedure which involves drilling into damaged spinal vertebrae and the injection of bone cement to fill gaps for repair.

The surgical procedure was following by the filing of a renewed complaint by the board for the violation of a consent agreement, and the case went to a hearing. A hearing officer recommended revocation and the board agreed, revoking Baker’s medical license. Baker appealed, and the case eventually reached the Court of Appeals, which issued a decision by Chief Justice J. Woodfin Jones.

Baker’s primary argument on appeal was that the board had failed to prove that kyphoplasty was a surgical procedure and thus a violation of the consent agreement. Despite the drilling and filling involved in the procedure, Baker argued that it was more akin to an injection than a surgery, similar to an epidural.

The court did not accept the argument. Baker's own office notes, Jones pointed out, refer to kyphoplasty as a surgical procedure, and the patient operated on by Baker was required to sign a form consenting to surgery. The board had also presented competent and relevant expert witness testimony in support of the contention that the procedure was surgery.

Taking the evidence all together, the board had a reasonable basis to rule as it did, and the court would not overturn the board's judgment.

Baker also argued that the revocation was too harsh a sanction and that the board had failed to adequately consider mitigating evidence. However, Jones noted that the board was not required to consider mitigating evidence at all, and Jones failed on this point as well.

Convictions for dodging taxes show moral turpitude

Issue: Nexus between criminal conduct and discipline

An appellate court in South Carolina dismissed the claims of a disciplined veterinarian January 16 by noting that the statute he cited to argue that the state's veterinarian board incorrectly relied on his felony convictions to impose discipline only applies to applicants for licensure, and not existing licensees (*John D. Cottingham v. South Carolina Board of Veterinary Medical Examiners*).

John Cottingham, the disciplined veterinarian, found himself facing professional discipline charges from the South Carolina Board of Veterinary Examiners after he pled guilty to two felony charges related to his failure to pay $66,000 in payroll taxes to the U.S. Internal Revenue Service.

The board issued Cottingham a public reprimand, imposed a $638 fine, and required him to subject his clinical records to evaluation, submit to a mental examination, attend a training related to the care of diabetic cats, and file a report about what he should have done differently in the animal's treatment.

After noting the conviction, the board charged Cottingham with using a false document in his veterinary practice, fraudulently obtaining fees, unprofessional conduct, and having been convicted of a crime involving moral turpitude. A second set of charges already pending against Cottingham involving his allegedly substandard care of a diabetic cat was combined with the new charges.

Cottingham entered into a Memorandum of Agreements and Stipulations with the board, in which he stipulated to having the felony convictions, maintaining inadequate records, and not meeting an adequate standard of care in his treatment of the diabetic cat. He stipulated further that his actions were deserving of sanction.

Based on the agreement, the board went forward with the charges and imposed a reprimand, fine, and several other penalties. Cottingham appealed, claiming that the evidence did not support the board's action, and arguing that the board had exceeded its authority when it based sanctions on his felony convictions, and that the sanctions themselves were arbitrary and capricious. The case eventually reached the Court of Appeals of South Carolina.

To support his argument that the board incorrectly relied on his convictions for the purpose of disciplining him, Cottingham cited a state

statute to that effect. However, the court noted that the statute expressly applied only to applicants for initial licensure, not to existing licensees and, thus, not to Cottingham.

"Furthermore," the judges noted, "even if [the law] did apply to existing licensees, which it does not, Cottingham's convictions did directly relate to his unlawful practices at the veterinary clinic and did implicate moral turpitude."

Theft of $136,000 from clients warrants disbarment penalty

Issue: Severity of disciplinary sanctions

Disbarment was not too severe a discipline for a lawyer who misappropriated $136,430 from five clients during a financial and personal crisis, the Review Department of the State Bar Court of California ruled February 7 (*In the Matter of Karl Werner Schoth*).

The court found that the evidence that the attorney, Karl Werner Schoth, offered in mitigation was "impressive," but not enough to excuse the presumptive discipline of disbarment for his serious misconduct.

Schoth had practiced law in California for more than 25 years without any disciplinary complaints, the court noted, maintaining a successful personal injury practice, but in November 2005, he learned that one of his daughters had been drugged and raped while at a party the previous year. That discovery, Schoth said, led him to start drinking heavily, experience a deteriorating relationship with his wife, and stop being able to focus at work, leading to a significant decline in his income.

After withdrawing all of his retirement savings and his wife's $75,000 inheritance without her permission, Schoth turned to his client trust account and began stealing from five different clients for whose funds he was responsible.

Schoth admitted misappropriating a total of $136,430 from clients, and the court agreed with the hearing judge that aggravating factors in the case were his multiple acts of misconduct, his repeated bad faith and dishonesty (e.g., representing to clients that the inheritance funds were "tied up in the probate proceedings" and could not be distributed), and client harm, particularly in the case of one client who was forced to move out of his home and lived a marginal existence while Schoth diverted his funds.

The court gave some weight to mitigating factors such as strong character witnesses, Schoth's candor and cooperation, lack of a prior record of discipline, remorse and recognition of wrongdoing, community service, and extreme emotional difficulties.

But, the severe sanction of disbarment was still warranted, the court believed. "Schoth did not establish that he is fully rehabilitated from the emotional difficulties that led to his misconduct. Thus, we remain concerned that other serious upheavals may trigger similar behavior. Moreover, Schoth's misconduct involved 'a level of dishonesty that raises concerns beyond those associated with misappropriation of others' funds.'"

In the final analysis, Schoth's evidence in mitigation did not clearly predominate over his grievous misconduct, the court said.

Diagnosing "No Illness" is no ticket for personal relationship with client

Issue: Defining improper dual relationships with clients

The Supreme Judicial Court of Massachusetts issued a January 2 ruling rejecting the arguments of a social worker who had argued that because she diagnosed a client as not suffering from a disorder, she was not forbidden from forming a personal relationship with him (*Sandra Clark v. Board of Registration of Social Workers*).

The social worker, Sandra Clark, worked for a program by which employers could get assessments of the mental health of their employees. In late 2008, Clark was treating one such client, whose employer was concerned that he suffered from an anger management problem, and sent him to Clark for an evaluation. Although Clark determined that the client did not suffer from anger problems during their first meeting, Clark continued to have the client return to her office.

At the same time, Clark began to suffer problems of her own, as she began to experience fatigue, weight loss, sleeplessness, and delusion, culminating in her hospitalization in January 2009. When she was released, she entered into a treatment plan which included medication and check-ins with a psychiatrist. She continued to practice and contact clients before and after her hospitalization.

During this time, Clark had begun contacting the client on a personal basis, sometimes by having other people call him on her behalf. According to the opinion of the Supreme Court, she left several messages indicating that she suffered from delusions. In 2009, Clark took the step of opening an office 100 yards from the client. When the client learned, the police were contacted.

The state's social worker board initiated a case against Clark in December 2009. A hearing officer concluded that Clark had attempted to enter into an improper dual relationship with the client, that she had practiced while impaired, and that she had improperly disclosed confidential client information. The board then suspended her license for five years.

Clark appealed, and eventually her case came before the full Supreme Judicial Court.

Her most significant argument on appeal was that her client was not actually her client. Because she had simply determined that the person who came to her office did not have anger management problems, she argued, she did not "treat" that person, as defined by law, and did not enter into a professional-client relationship with that person.

Clark argued that this interpretation of events was consistent with the laws governing the social work profession, which she read as dictating that the practice of social work has only occurred if a licensee has assessed, diagnosed, and prevented or treated a mental health disorder.

The court did not agree. “It is unreasonable,” the justices wrote, “to interpret the regulation to mean that a social worker who meets with an individual and determines that the individual does not have a mental disorder has not provided social work services. The assessment and diagnosis . . . themselves involve the provision of social work services.”

“The only sensible reading of the reading of the regulation, as the board suggests,” continued the court in affirming the board's decision, “is that it simply provides the range of services that a social worker might provide.”

Board has no responsibility to defer to hearing officers

Issue: Recommendation of hearing officer versus board orders

The state’s Uniform Licensing Act did not create a responsibility for licensing boards to defer to any decision of an appointed hearing officer, the Court of Appeals of New Mexico ruled January 24. The ruling reversed a decision of a lower court which had held that discipline imposed by the state’s dental board was inappropriate because the board had failed to defer to the findings of a hearing officer in the case (*New Mexico Board of Dental Health v. Lilliam P. Jaime*).

The dentist in the case, Lillian Jaime, came to the dental board’s attention after it received a complaint from a patient. During a visit to Jaime’s office in 2007, the patient had been told by Jaime that he would need fillings. The patient initially declined, stating that he needed to return to work, but after Jaime informed him that the procedure would take only 30 minutes, he acceded. Then, when the patient’s teeth had already been ground down to remove the old fillings, Jaime changed her mind about which procedure to perform and had the now-anesthetized patient with removed fillings sign a consent form while in the dentist’s chair.

The patient, apparently, did not like the situation, and the board opened a discipline case against Jaime and assigned a hearing officer to her case. On conclusion of the hearing, the hearing officer filed a report which found that Jaime had not engaged in any unprofessional conduct and recommended that no discipline be imposed.

In the balance of power between the hearing office and members of the board, the court said, the collective experience of the board members “is particularly important where, as here, there is no evidence that the individual selected to serve as the hearing officer, who is a retired judge and practicing attorney, had any particular knowledge of dentistry.”

When the board received the report, it reviewed the evidence and came to an opposite conclusion. The board imposed a fine, assigned Jaime three hours of ethics training, and assessed her the costs of the administrative hearing.

Jaime appealed and the case went to a state district court. That court overturned the discipline, ruling that the board had failed to give proper deference to the hearing officer’s report and its discipline order should be considered arbitrary and capricious.

The hearing officer, the lower court reasoned, was the direct receiver of witness testimony and was thus in the best position to weigh the credibility of that testimony and resolve conflicts.

In his decision on the board's appeal, Chief Justice Roderick Kennedy noted that the two cases relied upon by the district court in making its decision involved administrative procedures which were not governed by the Uniform Licensing Act. Jaime's case, like all professional licensing decisions by the state's professional licensing boards, did involve the Act.

Under the ULA, Kennedy wrote, "there is no statutory basis for a hearing officer to provide conclusions of law or to make a recommendation regarding discipline. A board is not required to give deference to the hearing officer's factual findings, since, after the hearing officer's report is submitted to the board, it is the board that is charged with the task of rendering a decision and providing the findings of fact and conclusions of law underlying that decision." The board, wrote Kennedy, is responsible for findings and conclusions, as well as the ultimate decision.

The lower court had been in error, the appellate court ruled. The dental board properly followed all the requirement of the Uniform Act. "It reviewed the testimony, evidence, and exhibits presented to the hearing officer," Kennedy noted. "It then made factual findings that included citations to the portions of the hearing transcript and the exhibits that supported those findings."

Minor mistake on notice letter does not invalidate discipline

Issue: Document errors and enforceability

A letter of notice that listed the wrong type of nursing license for a nurse with a drug problem did not invalidate the discipline imposed by the state's board of nursing against her, the Court of Appeals of Ohio in Columbus ruled January 17 (*Ronika Lee Richmond v. Ohio Board of Nursing*).

After testing positive for cocaine in 2008, nurse Ronika Lee Richmond failed to respond to 12 follow-up requests from the Ohio Board of Nursing over two and a half years, then tested positive for other drugs in 2010.

In response, the board pursued discipline against Richmond and entered into a consent agreement with the nurse, suspending her license and requiring her to forego the use of alcohol and drugs and to submit to periodic testing.

Even in the absence of the consent agreement, the court noted, the allegations and statutory references in the notice plainly informed Richmond of the nature of the charges and of her right to request a hearing.

When the board sent her an official notice of the suspension and notice of a hearing for further discipline in March 2011, it mistakenly identified Richmond's license as that of a registered nurse; Richmond was registered as a licensed practical nurse.

Richmond signed for the letter but neither responded nor showed up for the board meeting in which her license was to be discussed. During that meeting, the board voted to permanently revoke Richmond's license.

She appealed, claiming that the notice she had received was insufficient because it had incorrectly referenced the type of license she held. Accordingly, she claimed that she had never failed to request a hearing on her license discipline because she was never correctly informed that her

license was the subject of a discipline action. Her case eventually reached Judge Lisa Sadler.

Sadler did not have much sympathy for Richmond's argument. Despite the mistake in the letter that informed Richmond of the discipline, the letter incorporated the consent agreement, which did contain accurate references to the type of Richmond's license. Also, she noted, the regulation cited by the board in the letter empowers the board to impose discipline "on *any* nursing license."

"It was unreasonable," Sadler wrote, for Richmond "to assume that the board intended to revoke her RN license when, as she concedes, appellant did not have an RN license. Regardless, even in the absence of the consent agreement, the allegations and statutory references in the notice plainly informed appellant of the nature of the charges and of appellant's right to request a hearing."

Expert testimony needed to establish negligence, court rules

Issue: Rules of evidence for discipline proceedings

Expert testimony must be presented to establish the standard of care for a charge of gross negligence, the Court of Appeals of Missouri, Western District, Division Three, ruled January 8. The court reversed a license revocation imposed by the state's board of nursing (*Mary Luscombe v. Missouri State Board of Nursing*).

The nurse, Mary Luscombe, faced charges for two separate series of events.

The first, and more serious of the two, involved Luscombe's employment as a nurse with a hospital in Columbia, Missouri, where she worked in the hospital's neonatal intensive care unit. During a 12-hour shift in 2005, Luscombe unplugged a cardiac monitor, in violation of hospital policy, for an infant patient after alarms on the monitor had gone off several times, then left the bedside of the infant. Although Luscombe had turned the monitor to be able to see it while she went about the room, she apparently did not watch the monitor very closely. When the baby's parents noticed a low heart rate, they had to seek out Luscombe to attend to the patient.

Luscombe was subsequently fired and began to work for Integrity Home Care, where she performed house calls with elderly patients. While at Integrity, she failed to file more than 200 nurse visit reports from January to August 2007. When confronted with the fact of the missing paperwork after her resignation from Integrity, Luscombe appears to have forged the signatures of several patients in an effort to file the papers. In the end, discrepancies between Luscombe's reported hours and the number of visits for which paperwork was successfully filed required Integrity to refund amounts that had been billed to Medicaid.

Both the hospital and Integrity filed complaints with the state board of nursing, which then filed charges relating to the incidents, and Luscombe went before the Missouri Administrative Hearing Commission.

The Commission found that Luscombe had committed gross negligence for her actions in the hospital's neonatal intensive care unit and had committed fraud and acted incompetently as the result of her actions while working for Integrity. In making its findings, the Commission acted without expert testimony, stating that experts were not needed because the Commission's members were capable of determining that Luscombe's violation of hospital protocol constituted gross negligence.

The case then went back before the board, which revoked Luscombe's license. Luscombe appealed. Her most important argument on appeal was that the Hearing Commission had erred when it made findings that Luscombe had been grossly negligent and incompetent without the aid of expert testimony, simply relying on the fact that she had violated hospital policy by turning off the cardiac monitor.

Mere violation of a hospital rule or regulation does not establish a violation of the standard of care without expert testimony as to whether the factual explanation for the violation is outside the standard of care, the court said.

The court agreed that a finding of gross negligence—which the court noted was rare—required the aid of expert testimony. "The standard of care applicable to professional conduct cannot be established by a hospital's rules and regulations, and even if it could," wrote Judge Cynthia Martin in her written opinion for the court, "mere violation of a hospital rule or regulation does not establish a violation of the standard of care without expert testimony whether the factual explanation for the violation is outside the standard of care."

Citing an older Missouri case, *Hart v. Steele*, for the rule that "evidence establishing the standard of care in a medical negligence case must be introduced by expert testimony," Davis noted that "except in those cases involving sponges left in operating cavities, we are not aware of a case in Missouri in which the standard of care for performance of professional duties has been established without the benefit of expert testimony."

Although Luscombe prevailed on that point, the court did not agree with her argument that expert testimony was needed to find that she had acted incompetently by failing to file her paperwork while with Integrity. Where the "standard of care" in performing professional duties with patients is not at issue, no expert testimony is needed.

License lapse does not allow licensee to sidestep discipline

Issue: Technicalities of licensure status and discipline

A doctor could not avoid discipline simply because he let his license lapse before the state's medical board filed charges against him, the Supreme Court of Kansas ruled February 15 (*Amir M. Friedman v. The Kansas State Board of Healing Arts*).

The doctor involved in the case, Amir Friedman of Independence, Kansas, had a history of troubled care for his patients. On two occasions in 2004 and 2005, Friedman, an obstetrician, was not available when expectant mothers came with an emergency to the hospital where Friedman had seen them. Both times the hospitals where Friedman worked claimed he failed to adequately designate a covering physician during his absences and both times Friedman attempted to manage the care of his patients over

the telephone. And, more seriously, both times the medical record appears to have been altered to show that Friedman was present when he was not.

Other allegations were made by the board, including a case where a patient of Friedman's had died of cancer after Friedman had failed to order a pap smear for her over 16 visits where the patient had complained of bleeding and pain.

In 2006, the board filed charges against Friedman, alleging unprofessional and incompetent conduct. However, just prior to the filing of those charges, Friedman had let his license lapse and it was cancelled, while Friedman apparently intended to move to New Jersey.

As a result, Friedman moved to dismiss the charges, arguing that because he no longer had a license, the board had no power to discipline him. After an appeal to a lower court, the case reached the Supreme Court of Kansas, which issued an opinion on February 15 penned by District Judge Mike Keeley, assigned to the case to cover a vacancy on the court.

Keeley noted that no Kansas statute or court decision had explicitly addressed the question of whether the state's medical board could discipline a former license holder for conduct that occurred before the lapse of a license.

Keeley then determined that question in the affirmative, pointing out that if Friedman's argument were accepted, a licensee under suspicion could simply let their license expire and then apply for licensure in another state with a clean record.

Although no legislation explicitly addressed the question, Keeley wrote, there were sections of state law that answered it indirectly. The relevant legislation, the judge explained, was a statute stating that the Board "shall have jurisdiction of proceedings to take disciplinary action . . . against any licensee practicing under the [Kansas Healing Arts] Act."

The statute, Keeley concluded, "is worded in the past tense—persons *issued* a license—rather than the present tense—persons who *have* a license. Thus, the focus is not on the status of the licensee at the time of the disciplinary proceeding." The board therefore had the power to implement discipline if the misconduct at issue occurred while a license was current, and it could therefore pursue charges against Friedman.

Second licensing board wins confidentiality case against state AG

Issue: Confidentiality of investigative files

Following on the heels of a similar decision in favor of the State Board of Pharmacy, a state appeals court in Texas ruled that the investigative files of the state's chiropractic board will remain confidential, even in the case of requests from patients from copies of their own files held by the board (*Texas State Board of Chiropractic Examiners v. Greg Abbott, Attorney General of the State of Texas*).

Like the pharmacy board, the Texas State Board of Chiropractic Examiners requested an opinion from the office of the state's attorney

general, Greg Abbott, after receiving a request from a patient for copies of a patient's medical records contained in an investigative file the board had created when it undertook an investigation of the patient's chiropractor.

When the attorney general's office returned an opinion stating that the patient had a right to the records, the board brought suit against the attorney general to settle the matter and the case eventually reached the Court of Appeals of Texas in Austin, which issued an opinion January 16.

The AG's Office believed that although board investigative files were normally confidential under provisions of the state's occupations code which controls the board, the state's Public Information Act—which gives patients a right to their personal files, both from medical practitioners and from state agencies—took precedence over that statutory confidentiality.

Both the confidentiality requirements and the statutes allowing individuals access to their own information dealt with the same topic, the AG contended. Therefore, because the statute dictating access was more specific than that making the records confidential, that rule took precedence over the other.

The court, however, said the AG incorrectly believed that the rules protecting the confidentiality of board investigative files were similar to statutory rules which generally protected the confidentiality of medical files.

The two confidentiality sections do not share a common purpose, the court pointed out. Statutes protecting patient files were intended to protect the privacy of the patient, but rules protecting the board's investigative files were "designed to protect the integrity of the board's investigative process."

As a result, the rules allowing patients and individuals access to their own information were not connected to the rules which kept the contents of board investigative files secret. And the Public Information Act contains an exception to the disclosure rules, retaining confidentiality where the statutes that denied access were not intended to protect the requestor's privacy.

"Because the privilege asserted by the board here is one intended to protect the integrity of the Board's regulatory process, rather than the requestor's privacy interests," the court concluded, the Act "does not prevent the board from denying access to the requested information."

Licensing

Psychic's free speech rights not violated by permit requirement

Issue: Professional speech doctrine and First Amendment rights

A fortune teller in Virginia, where the County of Chesterfield has adopted a fortune teller permit ordinance, tried to argue that the First Amendment professional speech doctrine, which allows the government to license and regulate those who would provide services to their clients for compensation, did not apply to her business.

But on February 26, the U.S. Court of Appeals, Fourth Circuit, upheld a district court's summary judgment for the county on all of the fortune teller's challenges. (*Patricia Moore-King v. County of Chesterfield, Virginia*).

The psychic and spiritural counselor, Patricia Moore-King, who went by the name "Psychic Sophie," rented office space in an area zoned as a Community Business District along with psychologists and licensed professional counselors. When county officials contacted her demanding she pay a $300 fortune teller license fee plus penalties, she chose to challenge the county's regulatory scheme.

Violations of her First Amendment rights to free speech and free exercise of her religion were among her complaints. A district court held that Moore-King's business and speech purporting to predict future events constituted "quintessential deception" and were not entitled to any First Amendment protection.

A district court held that Moore-King's business and speech purporting to predict future events constituted quintessential deception and were not entitled to any First Amendment protection. On appeal, however, the federal court disagreed.

On appeal, however, the federal court disagreed, Since Moore-King contended she does not deceive her clients, and aspects of her business are clearly identified as entertainment purposes, there is a genuine issue of material fact, making this question unsuitable for decision without a jury considering it. Second, the court pointed out, the U.S. Supreme Court held last year in *United States v. Alvarez* that falsity alone may not suffice to bring speech outside the First Amendment. "The statement must be a knowing or reckless falsehood."

Since the county did not specifically argue that Moor-King's speech is knowingly or recklessly false, the court concluded that the First Amendment Free Speech Clause affords "some degree of protection" to the psychic's activities."

But under the professional speech doctrine, the government can license and regulate those who would provide services to their clients for compensation without running afoul of the First Amendment. This "basic paradigm of regulatory requirements" therefore does not abridge Moore-King's First Amendment freedom of speech, the court found. It affirmed the district court ruling in favor of the county.

Accreditation

Board may halt program—but may not keep it from re-applying

Issue: Withdrawal of school accreditation by licensing board

A nursing program whose accreditation was withdrawn by the Ohio Board of Nursing for graduating nurses without adequate clinical training was rightfully closed, but the board has no power to impose a two-year bar for the program to re-apply for approval, an Ohio appellate court ruled December 20 (*ATS Institute of Technology v. Ohio Board of Nursing*).

Shortly after the nursing program at ATS Institute of Technology in Cleveland was given initial approval in 2006 by the Ohio nursing board, it

began running into trouble with board inspectors who found that the school was graduating nurses without requiring them to participate in a sufficient amount of clinical preparation or achieve adequate grades in the clinical programs in which they did participate, in violation of both state law and the school's own rules.

In 2008, the board had identified enough problems with the school that the program's approval was placed into provisional status. By 2011, the board moved to withdraw approval from the program entirely, saying that it was endangering the public.

After a hearing, approval for ATS's program was withdrawn and a two-year bar imposed on the school for reapplication for approval.

The school appealed from this order, arguing that the board had improperly interpreted state statutes governing nursing program curriculums to impose the clinical requirements and saying that the board did not have the power to impose the two-year bar.

A trial court agreed with the board's interpretation of the curriculum requirements, although it ruled against the board's decision to impose the time-barred re-application provision. Both parties appealed, and the case went before the Court of Appeals of Ohio in Franklin County

The central argument of ATS was that the statute governing clinical experience requirements in nursing programs was capable of more than one interpretation. Where the statute indicated that the content of nursing programs "may be integrated, combined, or presented as separated courses," the school argued that the inclusion of the word "may" meant that particular curriculum sections, including the clinical programs the board wished to require, were optional.

However, the board argued otherwise and its interpretation of the statute as imposing mandatory requirements was neither incorrect nor unreasonable, Judge Lisa Sadler wrote. "Though appellant argues its alternative interpretation is a 'fair reading' of the [statute], that is not a standard of review employed by this court when reviewing orders from an administrative agency." The correct standard was deference, Sadler noted, a standard that supported the board's decision.

Deference was not accorded to the board's two-year ban, however. After inspecting the statutes governing the board, Sadler could find no language that purported to give the board that kind of power, and thus its ban was inappropriate.

Competition

State physician self-referral ban may be broader than federal ban

Issue: Curbs on licensees' business practices

The U.S. Court of Appeals for the 11th Circuit in a January 10 ruling upheld a Florida statute barring physicians from referring patients to business entities in which they have a financial interest. Unlike a

similar federal law, the Florida statute lacks an exception for dialysis centers (*Fresenius Medical Care, et al. v. Elisabeth Tucker, et al.*).

Federal statutes, known collectively as the Stark Acts, prohibit physicians from referring Medicare and Medicaid patients to business entities in which they or a family member have an interest. But federal law includes an exception for physician care related to end-stage renal disease.

Originally, Florida's similar law contained the same exemption for end-state renal dialysis services as the federal law, but the state legislature repealed that exemption in 2002.

In 2003, three out-of-state companies that provide renal dialysis services sued the state's health department, medical board, and osteopathic board to challenge the now exemption-free law on constitutional pre-emption and due process grounds. All three companies wished to set up a vertically-integrated business model wherein they refer patients from their dialysis clinics to associated laboratories for laboratory work

On appeal, the companies argued that because the Florida statute prohibits activity expressly permitted by federal statute, the state statute is preempted by the federal legislation. But the court noted that a conference report on the bill stated that "federal law [should] not preempt state laws that are more restrictive," and the top federal official tasked with enforcement of the law had issued a statement that the rules "do not provide for exceptions of immunity from civil or criminal prosecution or other sanctions applicable under any state laws."

As a result, the court did not see a conflict between the federal and state laws. "Any physician employed by any of the appellants who provides clinical care for ESRD patients in Florida can comply with the Florida Act without neglecting any obligations under federal law." The law had a rational basis and was constitutional, the court concluded.

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