Professional Licensing Report

Licensing, testing, and discipline in the professions

Highlights in this issue

January/February 2009 Volume 20, Numbers 7/8

Discipline

Strict monitoring, swift penalties are keys to success in treating addicted health professionals

Issue: Dealing with substance-abusing professionals

Two years ago, the last in a series of reports blasting California's diversion program for drug- or alcohol- abusing physicians finally led to the program's being spiked. According to the California State Auditor, inconsistent monitoring of doctors and poor medical board oversight were the issues: The program failed to conduct random drug tests, did not require doctors to immediately stop practicing after testing positive for alcohol or drugs, and did not quickly identify missed drug tests.

Now, a national study appears to confirm that oversight is indeed critical to the success or failure of diversion programs. When they couple treatment and monitoring of drug- or alcohol-addicted physicians with rapid response to noncompliance, they are effective, says a report in the March 2009 issue of the *Journal of Substance Abuse Treatment*.

The first national-level study of these "Physician Health Programs" followed 904 physicians in 16 states from 1995 to 2001—the largest number of physicians ever studied, and over the longest period. Under the programs' requirements, doctors had to abstain from alcohol or other drugs and if frequent random tests showed they had returned to substance abuse, swift action was taken: they were reported to the medical board.

The study found that more than three quarters of doctors enrolled in the programs stayed drug-free over a five-year monitoring period, whether their drug of choice was alcohol, crack cocaine, prescription drugs, or another substance.

Such a program should be a model for treatment of anyone diagnosed with a drug or alcohol addiction, says Mark Gold, psychiatry professor at the University of Florida College of Medicine. He co-authored a 2008 review showing rates of illicit drug use are lower among doctors than in the general public, but rates of prescription drug abuse are five times higher.

Physician Health Programs are not addiction treatment programs. Rather, they provide intensive long term case management and

monitoring. Fifty-five percent of doctors enrolled in the programs are mandated formally by a licensing board, hospital, malpractice insurance company, or other agency. The enrollees contract to abstain from drugs or face intensified treatment, being reported to their medical licensing boards, or losing their license.

The components of the program include group and individual therapy, residential and outpatient programs, surprise workplace visits, and links to the 12-step programs of Alcoholics Anonymous and Narcotics Anonymous.

A fifth of the physicians were reported to their boards, leading to some disciplinary action. But 78 percent of the doctors in the program had no positive drug tests during five years of intensive monitoring.

Five to seven years after starting treatment, 72 percent were actively practicing medicine without drug abuse or malpractice. Eighteen percent left medical practice, while others relapsed into drug use. Three percent of those who did not complete their programs had substance-related deaths or committed suicide.

The two essential ingredients that successful programs have in common are 1) treatment extended over years, and 2) unambiguous success markers such as urine testing, the study authors conclude.

Court upholds nurse's revocation for refusing to follow physician's order

Issue: Severity of sanctions

The weight of the evidence supported the California nursing board's conclusion that a nurse who refused to comply with a physician's order was guilty of both incompetence and gross negligence, and the board properly revoked her license, the Court of Appeal of the State of California held November 13, 2008 (*Ellen Hughes Finnerty v. Board of Registered Nursing*).

The case stemmed from an August 2002 incident in which the RN, Ellen Finnerty, then working as a charge nurse at Huntington Memorial Hospital, was caring for a patient with Down syndrome, "Mr. C," who began to suffer from respiratory distress while in a subacute station at the hospital.

After attempts were made to suction the patient's pharynx, administer oxygen, and conduct various blood tests, the patient's respiration continued to be labored, and he became barely responsive. The on-duty resident, Jennifer Nguyen, was paged and when she arrived, ordered that the patient be intubated.

The American Association of Nurse Attorneys filed an amicus curiae brief on Finnerty's behalf in this case. It argued that as a matter of policy, "the harsh nature of the discipline imposed on [Finnerty] will unduly constrain the exercise of nursing judgment, nurses "might be more likely to simply follow the physician's order rather than question it under the urgent circumstances," and "many patients would be harmed by preventable errors." The AANA also contended there should be a "mild and middle range of possible disciplinary action between no action at all and revocation of a license."

Finnerty, however, told Nguyen that the patient could not be intubated on the floor and was to be taken first to the intensive care unit; she proceeded to unplug the bed from its electrical outlet and maneuver the bed out of the room, taking the patient on the five-minute trip to the ICU.

The patient was intubated there but shortly afterward died. However, according to court documents, there was no evidence that the delay in intubating the patient caused or contributed to his death.

A few days later, the hospital fired Finnerty, listing gross negligence—failure to follow direction from treating physician—as the reason. Finnerty contended that there had not been a

direct order to her by the physician, and she knew that the patient could be transported to ICU faster than a code team could have come to the room. The hospital settled Finnerty's subsequent legal action by canceling her termination in exchange for an agreement to resign.

The state nursing board entered the picture in 2005, alleging that Finnerty was guilty of unprofessional conduct, gross negligence, and incompetence. At a January 2006 hearing, an expert hired by the board stated that while it is permissible for a registered nurse to disobey an order that is inaccurate or unsafe, that was not the case in this instance.

Finnerty contended that she had many reasons for countermanding Nguyen's orders, including her understanding that in-room intubation was not the norm at the hospital, intubation has risks, and the patient's underlying conditions made it the wrong choice.

The board decided to revoke Finnerty's license with the revocation stayed while she remained on probation for three years.

Appealing to the court, Finnerty said that she was required under standards of competent performance set by the nursing board to act as Mr. C's advocate by taking him to the ICU for intubation, and that the laws defining gross negligence and incompetence were improperly applied to the facts of this case.

But the court sided with the board, finding that Finnerty had "merely substituted her own clinical judgment for those of the two attending physicians." Regarding the sanction of a stayed revocation, the court said, the board imposed the minimum discipline available under its guidelines.

Board finds no substantiation for patient complaint against dentist, her former lover

Issue: Sexual relationships with patients

A patient who had a lengthy affair with her dentist, then filed a complaint against him with the state dental board, had no cause for legal action when the board investigated and found the allegations could not be substantiated, the Court of Appeal of Louisiana, Fourth Circuit, ruled January 7 in *Fillis Friedman v. Louisiana State Board of Dentistry*.

Upholding a trial court ruling, the court said the record "does not reveal any impropriety in the first and only mandatory investigation."

The patient, Fillis Friedman, wrote to the Louisiana State Board of Dentistry to complain that her dentist, Wiliam Karam, was guilty of unprofessionalism. She claimed that Karam molested her, convinced her she loved him more than her husband, sent her lewd photos, and acted inappropriately with her daughter.

The board responded stating that the investigation could prove none of the accusations, and that any recourse would come from a private or civil action. When she filed a petition for review of declaratory judgment against the board, the board filed a peremptory exception of "no cause of action," which the trial court maintained, dismissing Friedman's petition.

In her appeal to the Court of Appeal, Friedman contended that the trial court erroneously granted the board's exception of no cause of action because judicial review of administrative actions is available.

However, the court found that the board is vested with discretion as to initiating disciplinary proceedings following an investigation. "Ms. Friedman desires this court to order the board to conduct a new investigation. However, the

statute only provides for review if the board or a disciplinary committee of the board renders a decision in an administrative adjudication. After conducting a mandatory investigation of Ms. Friedman's claims, the board determined that the claims could not be substantiated."

The record lacks evidence of impropriety in regards to the investigation, the court added, upholding the trial court. It confirmed that "Ms. Friedman is not entitled to the relief she seeks."

Readmission bid rejected over applicant's lack of reinstatement elsewhere

Issue: Reinstatement and reciprocal discipline

The state did not have to consider a former licensee's application for readmission to the practice of law, because he had not been readmitted in the jurisdictions where he committed the professional misconduct that caused him to be suspended, the Supreme Court of Florida held January 30.

In the case, *Florida Board of Bar Examiners Re David Webster*, the attorney, David Webster, was initially admitted to the bar of Washington DC in 1968 and to the Florida Bar the following year. He was suspended in Florida due to his commission of several trust-account violations, and was thereafter disbarred in several other jurisdictions, including Palau and Micronesia, because he failed to disclose the Florida suspension on his license application. Those disbarments led him to be disbarred in Florida.

When Webster tried to apply for readmission, the Board of Bar Examiners decided to cease processing his application. On review, the court found that that action was proper because Webster was ineligible to apply for readmission.

When Webster had been disbarred, the court noted its finding that he had "intentionally deceived the Micronesia and Palau Bars for his personal gain… and cleverly manipulated the flow of information between the District of Columbia, Florida, and Palau in order to practice law." But it held that until Webster was readmitted in the foreign jurisdictions, Florida would not consider his application.

Rejecting what it called an "ad hoc" approach to bar readmissions, the court said Webster "has personally created the supposedly untenable circumstances that he now faces." Webster contended Florida was his "home state," not Palau, but that was not relevant, the court said, upholding the precedent that no readmission application is allowed until the attorney has been readmitted in the state that originally disbarred him.

"We should not allow the practice of law in Florida by one disbarred or suspended in a foreign state," the court stated.

Defamation charges over reporting of complaint to board against MD

Issue: Public disclosure of disciplinary charges

A radiologist's defamation and "false light" claims against a staff physician and a news organization may not fall under the fair reporting privilege, the US District Court for the Western District of Kentucky held October 29, 2008.

Refusing to dismiss the radiologist's charges, the court said claims that Paxton Media Group defamed the physician when it reported on the points of a complaint letter that was filed with the medical board must be determined at trial.

In the case (*Philip C. Trover v. Neil Kluger and Paxton Media Group, LLC*), Neil Kluger, an oncologist, wrote a letter in 2004 outlining numerous complaints about the job performance of Philip Trover, the radiologist. They both were on staff of the Regional Medical Center in Madisonville.

The complaints were sent to the state Inspector General and the Kentucky Board of Medical Licensure, and an investigation and site visit by the OIG led to conclusions that the allegations were substantiated, a finding that threatened to terminate the medical center's Medicare and Medicaid funding.

Several news organizations including the local newspaper *The Messenger* and local television studio News Channel 25 reported on the Kluger letter.

The court said that it had already determined that the fair reporting privilege which "allows the press to freely serve as a kind of 'government watchdog' by reporting on public proceedings," applies generally to the medical board and OIG. And in this case, the letter did lead to an investigation that substantiated the complaints in Kluger's letter.

However, the court said it does not believe "that Kentucky courts would hand news reporters a carte blanche privilege. To exercise the watchdog role legitimately, the publisher must have knowledge that he or she is reporting on a relevant proceeding." If the publisher did not know that the letter was filed with the medical board or OIG and was a part of its investigation, there is no rationale for extending the privilege.

In the case of the Kluger letter, there was insufficient evidence of that required knowledge, the court said. In addition, even if the Paxton Media Group meets the knowledge requirement, "the fair reporting privilege is likely unavailable here because the news article must also convey a fair and impartial summary of the relevant proceedings," the court said.

An expert witness for Trover testified that the media group did not satisfy journalism standards of truth and fairness in publishing the main article in question, because it should have contacted Kluger and the parties who made statements in the letter before publishing.

"Given the serious nature of the allegations in the letter, [the newspaper's] investigation may be viewed as not satisfying the minimum standard of care in these circumstances." The court added that it could not conclude all the statements published in the article are true.

Yet the article contained at least thirteen specific potentially defamatory statements, which expressed serious doubt as to whether Trover properly performed his job and even suggested his actions resulted in a patient's death, the court said, suggesting that the number of statements published, the seriousness of the allegations, and the ease with which any single statement could have been removed, may indicate actual malice on the part of the publisher.

So the court refused to dismiss the claims. However, it did turn down Trover's claim for special damages. He had sought lost wages and relocation expenses on the theory that harm to his reputation caused him to be fired and move his practice. The court found that the medical center fired Trover based on its internal review, and the medical board suspended Trover's license in 2005 based on its own review. And those two events alone were enough to lead plaintiff to seek work outside the state.

Assault conviction properly considered in revocation of teacher's license

Issue: Settlements of discipline charges

A trial court properly affirmed the revocation of a teacher's license based on allegations of inappropriate behavior at a high school dance and the fact that the teacher had been convicted of misdemeanor assault, the Court of Appeals of Ohio, Fifth Appellate District, held November 4, 2008 (*Donald R. Contini v. Ohio State Board of Education*).The board of education decided to revoke Contini's license in 2007 and a trial court upheld the decision.

The teacher, Donald Contini, taught high school science in Columbus, Ohio, in 2004-2006. He was notified in 2006 that the school district was initiating a discipline proceeding based on Contini's behavior at a dance, where according to the state Department of Education, he arrived smelling of alcohol and engaged in inappropriate physical contact with a female student. Contini also had prior convictions for misdemeanor violation of a civil protection order and misdemeanor assault.

On appeal, Contini argued that the board's action was unwarranted because since his conviction for violation of the civil protection order was not based upon a violent act, the revocation must have been based on a finding of "conduct unbecoming to the teacher's position," so under case law the board must show some nexus between the conduct and the individual's performance as a teacher. He claimed such a nexus could not be shown.

Contini also claimed that the trial court should have let him introduce evidence that the conviction for assault was against his wife's "paramour," that he had received bullying voice mail messages from that person, and that the person was of bad character. However, the court said it was not an abuse of discretion for the trial court to affirm the revocation based on an undisputed conviction of assault.

The court also rejected Contini's claim that he should have had access to the department's investigative file to determine whether the high-school dance witnesses had made inconsistent statements. The court said, however, that the trial court did not abuse its discretion in denying Contini's motion for the investigative file, and that Contini had the opportunity to confront the witnesses to the incident at the administrative hearing and did cross-examine them as to their recollection of the incident.

However, the court found that the department could properly revoke Contini's teaching licensed based upon the acts that occurred at the high school dance.

Licensee can't back out of signed consent order, court rules

Issue: Settlements of discipline charges

A registered physician's assistant who signed a consent agreement to settle disciplinary charges lodged against him could not withdraw from the agreement or challenge any of its terms or conditions, the Supreme Court of New York, Appellate Division, ruled January 8 (*In the Matter of Robert David Kirk v. State Board for Professional Medical Conduct*).

The licensee, Robert Kirk, was charged with various instances of misconduct and signed a consent agreement in 2007 which finally disposed of all the charges pending against him. Almost immediately thereafter, however, Kirk claimed in a letter that he was "under duress" when he consented to the terms of the agreement, and he wished to withdraw it.

An administrative law judge for the state Board for Professional Medical Conduct informed Kirk that the consent agreement he signed had effectively

terminated the proceedings pending against him and that he was, as a result, without power to undertake any further review of the consent order or the proceedings.

The court agreed and dismissed the case. "Because he consented to the entry of this order, [Kirk[is not an aggrieved party and cannot initiate a proceeding that seeks to challenge any of its terms or conditions." Kirk failed to provide any evidence that he had been under duress, he was at all times during the proceedings represented by counsel, and never made a formal application to challenge or vacate the consent order, the court noted.

Court eases practice restriction of optometrist convicted of indecent exposure

Issue: Sexual misconduct And patient protection

The Court of Appeal of Florida, Fourth District, reduced the restrictions placed on an optometrist's practice after he appealed an order restricting him to seeing patients over the age of 18, in a December 10, 2008 ruling (*Douglas J. Machiela v. State of Florida, Department of Health, Board of Optometry*).

The optometrist, Douglas Machiela, pled guilty to indecent exposure after being charged with exposing himself to two children during eye examinations in October and November 2006. In two separate incidents, students testified to Machiela's exposing himself after removing eye examination equipment from their eyes. When Machiela was interviewed by a police officer, he stated that he could not recall the zipper of his pants being down in front of anyone but acknowledged that it could have happened.

After he pled guilty to a first-degree misdemeanor of indecent exposure and was given twelve months' probation, the Board of Optometry ordered an emergency restriction of his license for sexual misconduct, "an immediate serious danger to the public."

It barred Machiela from providing services to minors under the age of 18, and initiated a proceeding seeking the formal suspension or discipline of his license.

On appeal, Machiela argued that he did not violate the section of the practice act prohibiting the attempts to induce persons to engage in verbal or physical sexual activity, or to engage in sexual misconduct—a claim that the court rejected. "We conclude that his actions violated both provisions. Allowing him to continue to perform eye examinations on minors without appropriate restrictions would pose an immediate serious danger."

However, the court said it did "find merit" in Machiela's secondary argument that there are less restrictive but equally effective means to protect the public during the pendency of the disciplinary proceedings. "Consideration of this aspect of a suspension order is important to prevent 'the disruption of Dr. Machiela's practice and potential harm to his patients … if he were to ultimately prevail" in the disciplinary proceeding,

Noting that the department is specifically authorized to tailor restrictions "necessary for the protection of the public health, safety, and welfare," the court said the restrictions could include setting designated conditions or certain settings.

Agreeing with Machiela's suggestion, it said that one alternative would be to require the presence of a parent, legal guardian, or other adult during the examination of minors, and it sent the case back to the board for consideration and "crafting of more tailored restrictions."

Discipline affirmed for LPN who "didn't think the gentleman was that ill"

Issue: Discipline for negligence

A licensed practical nurse was properly placed on probation for two years by the Michigan Board of Nursing Disciplinary Subcommittee, the Court of Appeals of Michigan decided February 12 *(Department of Community Health v. Bruce Milton Rahe*).

The case involved an LPN, Bruce Rahe, who had worked in the emergency room at Lakeland Regional Health Systems hospital for ten years. He had been subject of investigation by the hospital for complaints about job performance at least six times over that period, and was fired over care he provided one particular patient in 2003.

Based on that incident and another one in February 2004 that showed violations of the standard of care, the disciplinary panel imposed probation of two years, and Rahe appealed.

He claimed that he had failed to obtain ordered lab samples for one patient because he was unable to start an IV, although there was no notation about that difficulty on the chart. He also failed to reassess the patient's pain level or administer ordered medication. He had left his shift at 5:30 p.m. without leaving any report about the patient for the incoming nurse.

The second incident related to a hypertensive patient, "GD," presenting to the ER with complaints of chest pain. According to the court, Rahe testified "that he believed GD to be suffering from heartburn or stomach problems rather than a cardiac problem and that he did not check GD's vital signs because he 'didn't think this gentleman was that ill.' He further testified that he did not perform an EKG because 'all that costs money.'"

The court found no due process violation in the panel's imposition of discipline and held that no reversal of the sanction against Rahe was warranted.

Alleged physical infirmity not adequate to get out of disciplinary hearing

Issue: Discipline and disabilities

The state Board of Disciplinary Appeals should not have reversed a lawyer's disbarment based on an alleged disability that he claimed prevented him from defending himself, the Supreme Court of Alabama held January 9 *(Alabama State Bar v. Jesse Derrell McBrayer*)

Reversing the board, the court agreed with the state bar that the board's denial of the lawyer's motion for delay was not clearly erroneous.

The case involved two sets of formal charges issued against the lawyer, Jesse McBrayer, in 2005. One set arose from allegations that a client in a land-development purchase gave McBrayer $500,000 to be deposited in his trust account. When the purchase fell through a month later, the client asked that the funds be returned, but McBrayer only repaid $235,000, claiming that the remainder was his attorney's fee. The client had to sue to get his money back and incurred $70,000 in attorney's fees in the process.

The other charge related to a $100,000 loan another client had made to McBrayer, which the attorney failed to pay on the due date. Each time the client asked to be paid, the court said, McBrayer would have an excuse as to why he could not pay and promise to repay within a few days or a few weeks, or he would write a check that would bounce.

When disciplinary hearings were scheduled, McBrayer chronically filed motions for continuances, based on his not having received timely notice to prepare, or "a trip concerning business not law and involving millions of dollars that cannot be changed," or new counsel who required a retainer that McBrayer could not pay for 30 days, or McBrayer's having had surgery that restricted him from driving and forced him to take Lortab, a pain medication that caused him to be unable to think clearly.

When the panel finally convened on June 20, 2007 and first heard arguments from McBrayer, McBrayer said his motions were premised on the fact that he did not have legal counsel, and that he needed legal counsel to represent him. He also said: "I have trouble hearing. I have hearing loss. Also, I'm a severe diabetic. It's related to my diabetes as well… I have my own medical issues I deal with all the time, and they do cause problems."

…"And if I do have a surgery, it's not like a normal person who has surgery and that—because of the severity of my diabetes… And that—I need counsel to help me to—with a sharper mind to know what's going on as to the matters to be handled… I have not practiced essentially in the last two years or so and have no intention of being very active because of my medical problem." He also asked if he could remain seated because he said he suffers from neuropathy and "has the shakes sometimes."

The panel took fifteen minutes to find McBrayer guilty of all charges and determine that he should be disbarred. But when McBrayer appealed to the board, the board reversed, saying that the panel should have transferred McBrayer to "disability inactive" status because of his medical condition.

The court disagreed. It noted that McBrayer had requested a continuance for four of the five dates on which a hearing was sent, he did not make timely efforts to secure assistance of counsel, and clear and convincing evidence that his medical condition made it impossible for him to defend himself did not exist. It reversed the board and sent the matter back to the board for proceedings consistent with that decision.

Testing

Candidate who wrote too long forced to retake bar exam

Issue: Alleged cheating on exams

An applicant who admitted continuing to write answers on portions of the bar exam after time was called found her application for admission rejected by the Supreme Court of Ohio, in a January 29 ruling. But the court recommended that she be permitted to reapply to take the July 2009 Ohio bar examination (*In Re Application of Nwankwo*).

The candidate, Joy Usoamaka Nwankwo, sat for the bar exam in July 2007, her third attempt. One portion of the exam included six sets of two essay questions, which applicants have a specific amount of time to answer.

There were several instances during the July 2007 exam administration, bar officials said, when Nwankwo was reminded to stop writing but continued working on her answers. She was told to stay behind after the other applicants were dismissed and allowed to write a statement responding to the charges of continuing to write before she left.

At a March 2008 hearing conducted by the Board of Commissioners, Nwankwo testified she had not heard the instructions at the beginning of the

exam because she was using the restroom, but admitted she knew she was violating the rules when she continued to write after being ordered to stop.

Two weeks before the exam, applicants receive a set of written instructions regarding the test labeled "Violation of Exam Instructions." One instruction provides: "An applicant may be subject to disqualification or other sanctions if he or she…continues working on an exam segment for any period of time after time to stop has been called… In addition, applicants are advised orally at the beginning of the exam and at the end of each testing segment that when time is up, they are to stop writing and are to put their writing instruments down.

Her explanation was twofold, according to the court. First, she stated that she was so invested in passing the bar exam that administration, having taken six months' leave from her job to study and having spent money for study materials, that she was desperate to write down everything she could remember.

Second, she claimed that in Nigeria, where she already is licensed to practice law, infractions similar to those in question in this matter are not taken seriously.

The bar's Board of Commissioners decided that Nwankwo had clearly violated that the rules and it called into question her character, due to her request that the proctor not report her and her "cavalier attitude" toward the exam rules.

This reflected on her "integrity and trustworthiness, her ability to conduct herself within the Rules of Professional Conduct, and whether she is capable of appreciating the importance of meeting the numerous filing deadlines and time constraints established by the civil rules and Ohio's courts."

The panel found that even taking into account that there may be differences between Nigerian and Ohio bar exam protocol, by consciously disregarding instructions to stop writing, Nwankwo had not demonstrated the requisite character and fitness for the bar. It rejected her motion to seal the record in the case, but did agree to permit her to take the bar exam.

Board must reconsider test accommodations for learning-disabled applicant

Issue: ADA test accommodations

A candidate whose request for accommodations on Part I of the US Medical Licensing Examination was turned down may actually qualify as disabled under new provisions of the Americans with Disabilities Act, the U.S. Court of Appeals for the Sixth Circuit ruled February 11.

In the case*, Kirk D. Jenkins v. National Board of Medical Examiners*, the court noted that in September 2008 Congress had passed amendments to the ADA, intended to ease the ability of people with disabilities to be accommodated, which were scheduled to take effect January 1, 2009.

Kirk Jenkins is a third-year medical student at the University of Louisville School of Medicine. He was diagnosed with a reading disorder at a young age and has received formal and informal accommodations on exams at each stage of his education. Jenkins sought and received 50% additional time on the ACT and MCAT examinations before entering medical school.

In preparation for Step 1 of the USMLE, he submitted a request for accommodation to the National Board of Medical Examiners. NBME denied his request after conducting several levels of review. When Jenkins sought an injunction, a Kentucky district court turned him down.

That court applied the strict standard of the 2002 case *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* and asked Jenkins to demonstrate how his reading difficulties limited his ability to perform tasks central to most people's daily lives.

Focusing on such activities as reading menus and newspapers—things that Jenkins can do capably, if slowly—the court concluded that "there is ample evidence that Jenkins processes written words slowly, and that his condition prevents him from succeeding where success is measured by one's ability to read under time pressure."

But Jenkins' inability to identify meaningful tasks central to most people's daily lives that he is precluded from performing is "fatal" to his claim of disability under the ADA, the district court said.

The federal appeals court disagreed with that assessment. "On September 25, 2008, Congress passed a law repudiating Toyota's strict standard for finding a disability under the ADA and expressed its intent that the ADA be construed in favor of broad coverage, effective January 1, 2009."

Because Jenkins' suit for an injunction was pending on appeal when the amendments became effective, they apply to this case, the court said, remanding the case to the district court for further consideration in light of the ADA Amendments Act.

Licensing

Designer defends "unlicensed practice" charges, saying building was never built

Issue: Enforcement of unlicensed practice prohibitions

An Oregon building designer tried to argue that since the building he designed was not actually built, he could not be charged with the unlicensed practice of architecture, but in a September 24, 2008 ruling, the Oregon Court of Appeals (*James Davis v. Board of Architect Examiners*) upheld the board's fine against James Davis, who does business as Coast Drafting & Design.

In 1996, a construction company contacted Davis about designing a strip mall that it wanted to build in Lincoln City. Davis' company produced and stamped several floor plan drawings showing two levels of building units with square footage. They were submitted to the Lincoln City Planning Director who approved them, and were followed by more detailed plans including framing and section details.

However, the strip mall project was abandoned and the buildings were never erected.

In 2004, the board notified Davis of a proposed penalty of $10,000 for misrepresenting himself as an architect and practicing architecture without a license. After Davis appealed, the board dropped the misrepresentation charge and reduced the proposed penalty to $5,000.

In his appeal, Davis did not deny that he produced plans and designs for a proposed nonexempt building. But he argued only that the statutory definition of practicing architecture does not encompass planning and designing buildings that are never erected. If the overarching purpose of the regulation of architects is to safeguard life, health, and property and to eliminate unnecessary loss and waste, as the law provides, then plans and designs not used in the construction of a building should not fall under the definition, he maintained.

The court ruled, however, that the legislature intended its definition of practice of architecture to encompass what Davis did in this case. "Public safety and

prevention of waste can be safeguarded by prohibiting activities that are undertaken in contemplation of erecting buildings; the state logically need not wait until the erection actually occurs."

Davis had contended that under the board's interpretation, a client who meets with a contractor and sketches on a paper napkin the rough outline of a proposed home could be penalized for the practice of architecture. In answer, the court said, "If the board decides to penalize a person for that activity, we will have the opportunity to evaluate" that hypothesis.

Court dismisses law student's challenge of admission requirements

A law student who had completed 78 of the 84 credits required to earn his law degree tried to establish his right to sit for the bar exam in California even though he had not yet graduated. But in a February 9 decision *in Roger Gordon v. Scott W. Davenport, et al.* the U.S. District Court for the Northern District of California dismissed the student's case.

The plaintiff, Roger Gordon, was in his third year at Georgetown University Law Center in Washington, DC. An African American, he alleged that he is low-income and has attention deficit disorder, and sought to complete his preparation for the California Bar exam by using "alternative" study rather than by completing his law degree.

His purpose, he said, was to "lower the financial and opportunity costs of obtaining a legal education" and to reduce the barriers to entry into the legal profession to enable attorneys to afford to represent a broader scope of clients.

In California, applicants to practice law may either pursue a traditional track by graduating from a school accredited by the American Bar Association, or an alternative track requiring four years of correspondence study, reading for the law under supervision of a licensed attorney or judge, or attending certain non-ABA accredited law schools.

Gordon alleged that requiring alternative preparers to complete four years of study violates his equal protection and due process rights because the rules have a disproportionate impact on low-income African Americans as well as disabled individuals.

The court, however, agreed with the State Bar of California's Committee on Bar Examiners, finding that Gordon's claims had deficiencies or were unlikely to succeed. In the first place, Gordon may not even have standing to assert his claims because he is not currently an alternative preparer—he only expressed his intent to become one.

But in addition, the court said Gordon failed to provide any facts to back up his conclusory assertions that the bar's rules are "unreasonable," "arbitrary," and "unconstitutionally vague." The court said it was dismissing the case with prejudice and without leave for Gordon to amend it.

Board drops concept of reciprocity in admission rules

Issue: Due process and reciprocity

Wisconsin's State Bar board voted 26-15 to support elimination of the state's reciprocal licensure provisions in a move that by order of the state Supreme Court, took effect January 1, 2009.

The rule change ensures that requirements for "admission on proof of practice elsewhere" no longer vary based on what rules the applicant's native state imposes on Wisconsin attorneys. Now, the Board of Bar Examiners may admit a lawyer to practice if he or she has been substantially engaged in the active practice of law in any state for three years within the last five years prior to applying for admission.

The previous eligibility limit stated that lawyers who "practice in a jurisdiction that does not grant bar admission to attorneys licensed in Wisconsin on the basis of practice in Wisconsin shall not be eligible for admission on proof of practice elsewhere."

On the dissenting side, Justice David T. Prosser objected to the decision to modify eligibility. "The free movement of attorneys from one jurisdiction to another might be a desirable objective if every jurisdiction played by the same rules. But they do not. This court gave no consideration to any strategy or plan to attack existing barriers to Wisconsin attorneys set up by other jurisdictions."

A former president of the state bar, on the other hand, maintained that the rule change is fair. "The idea is that admission should be based on individual qualifications, not the rules of other states," said Steven Levine. "Why penalize someone just because of the laws of their state?" He expressed hope that the rule change would set an example and serve as a catalyst to other states to open up their rules as well.

"Courtesy and civility" provisions: Unconstitutional or not?

Issue: Parameters of "professionalism"

An attorney who made vulgar comments about a judge on a radio show, was charged with violating professional codes, and challenged the constitutionality of discipline for violating "courtesy and civility" provisions, won a round in 2007 when a federal district court held the provisions were indeed unconstitutional. But he lost when the U.S. Court of Appeals for the Sixth Circuit overturned that ruling January 20.

In the new decision *(Geoffrey Fieger and Richard Steinberg v. Michigan Supreme Court*), the appeals court remanded the case to the district court with instructions to dismiss it for lack of jurisdiction.

The case stemmed from a 1997 trial in which the attorney, Geoffrey Fieger, won a $15 million jury verdict for his client in a medical malpractice action. That award was overturned in 1999 by a three-judge panel of the Court of Appeals, which ruled that Fieger and his client had failed to provide legally sufficient evidence, and that Fieger's "repeated misconduct" by itself would have warranted a new trial.

On a radio show three days after that ruling, Fieger said, figuratively addressing the judges, "I declare war on you," called them "jackasses," and proceeded to make more vulgar comments.

When the Attorney Grievance Commission filed a complaint against Fieger,he agreed to be reprimanded but stipulated he would appeal the constitutionality of the two rules. They provide that a lawyer shall not "engage in undignified or discourteous conduct toward the tribunal, and that a lawyer "shall treat with courtesy and respect all persons involved in the legal process."

When Fieger challenged the two provisions in the US District Court for the Eastern District of Michigan, the court held that, as construed by the Michigan

Supreme Court, the provisions were unconstitutionally vague and overly broad, and it enjoined their enforcement. The Michigan Supreme Court, which regulates attorneys in the state, then appealed to the U.S. Court of Appeals.

That court has now sided with the Michigan Supreme Court. The court's reasoning was that Fieger and his attorney lacked standing because they had failed to demonstrate actual present harm or a significant possibility of future harm based on a single, stipulated reprimand, they had not articulated, with any degree of specificity, their intended speech and conduct, and they had not sufficiently established a threat of future sanction under the narrow construction of the courtesy and civility provisions that the Michigan Supreme Court had applied.

When Fieger initially appealed the reprimand against him, the Attorney Discipline Board agreed that the courtesy and civility provisions did not apply in his case because his comments were made outside the courtroom in a case regarded as completed, and that if the rules did apply they were in violation of the First Amendment.

The Michigan Supreme Courr reversed that decision. It clarified that the courtesy and civility rules were not designed to "silence," "censor," or "prohibit criticism" but were intended to prohibit only "undignified," "discourteous, and "disrespectful" conduct or remarks. It also held that the rules were not unconstitutionally vague.

Take Note

Maryland auditor criticizes management, oversight, of three licensing agencies

Issue: Fiscal management and license recordkeeping

In an audit report sent to the state legislature January 21, the Maryland State Auditor alleged there were numerous fiscal and license recordkeeping deficiencies in the functioning of the Health Professional Boards and Commissions, the State Board of Physicians, and the State Board of Nursing. Together the three agencies collect about $10.7 million annually, issuing and renewing about 158,000 licenses.

As in previous audits dating back to 1983, the auditor said, "Our audit again disclosed that the Department of Health and Mental Hygiene has not consolidated certain fiscal and license recordkeeping functions of the boards and commissions, and had not provided adequate oversight of these functions. Numerous internal control weaknesses continue to exist, primarily related to controls over the collection of cash receipts and license processing."

Specifically, the auditor cited:

• improper deposit verification to ensure that all collections were deposited;

• lack of reconciliation of licenses issued and exams given with the related cash receipts deposited;

• inadequately controlled access to the automated licensing system;

• lack of controls to ensure that only qualified individuals were issued a new or renewed license;

• lack of procedures at the State Board of Physicians to adquately enforce continuing medical education requirements (see article below);

• inadequate procedures at the Board of Nursing to ensure that the license status of non-renewing nurses was changed in the board's licensing system (470 nurses who did not renew were still recorded as active in the system); and

• lack of a system at the Board of Pharmacy to regulate pharmacy technicians for one full year after the program mandated by state law took effect.

The boards concurred with most of the findings, frequently noting that they had already changed their procedures to address the issues raised by the auditor.

The department disagreed with the auditor's finding about consolidation. Its position is that legislative authority is required for it to comply with the consolidation recommendations. In some cases it has sought but not obtained board compliance.

For example, the department noted: "Following the previous audit the Department attempted to convince the boards to use the same licensing software, with an interest in consolidating functions to limit redundancy. The majority of the boards rejected the offer."

Finding: Board's random audits not effective in enforcing mandatory CE

A key finding of the Maryland state auditor in its January report was that the medical board is failing to effectively enforce its mandatory continuing education program for physicians.

For example, in the 2005 renewal period, of the physicians selected for review, 11 submitted documentation indicating they had completed less than the number of hours required, as many as 33.5 hours less. In one case, no CME had been taken at all.

"Although the board notified these physicians that they would be required to submit documentation of CME completed during the next renewal period, these physicians were allowed to subsequently renew their licenses without submitting any documentation of hours completed," the auditor found.

In the 2006 renewal period, 12 of the 100 physicians randomly audited did not submit any documentation and the board took no action against their license.

The board responded that it performs roughly 600 physician CME audits, or 5% of the total renewing physicians, annually. "One hundred of the audits are random and the balance is done during a full compliance investigation. Prior to 2003, the Board's practice had been to refer physicians who could not document their CME to the Compliance Division. The physicians were given the opportunity to sign a consent agreement stating that they had failed to obtain the CME, were guilty of unprofessional conduct, and would pay an administrative fine for the missing CME."

"In 2003, Board Counsel advised the Board that they did not have either statutory or regulatory authority to impose fines in this way. Therefore, the Board discontinued this practice and began consideration of regulations. The Board continued the random sample audit and sent advisory letters to physicians who had not submitted adequate documentation."

The draft regulations considered by the Board in 2006 were not approved by the Board at that time. Instead, there was consideration given to requesting a statutory provision that would allow the Board to impose a fine without charging the physician with violation of the Medical Practice Act (specifically, unprofessional conduct) by failing to obtain CME.

"This provision was included in the Board's Sunset Legislation (SB 255), which passed in 2007," the board said. "Therefore, the new process is as follows: a random sample of physicians is selected; physicians are requested to submit documentation; documentation is reviewed; if the physician falls a few credits short of the required 50 credit hours within the two-year cycle, a letter is sent to the physician and an administrative fine of up to $100 per missing CME credit in lieu of a sanction is imposed; if the physician falls significantly short of the required 50 credit hours, it is the Board's decision to open a case on the grounds of unprofessional conduct in the practice of medicine; if the Board so decides, the physician will be referred to compliance for action."

Each of the physicians selected for review during the 2006 renewal period (ending in November 2006) who had not submitted any documentation of completed CME, was sent an advisory letter in September 2008 indicating that if the CME requirement was not fulfilled, his or her license would not be renewed, the board explained.

Professional Licensing Report is published bimonthly by **ProForum**, a non-profit organization studying public policy and communications, 4759 15th Ave NE, Suite 313, Seattle WA 98105. Telephone: 206-250-5609. Fax: 206-526-5340. E-mail: plrnet@earthlink.net Website: www.plrnet.org Editor: Anne Paxton. ISSN 1043-2051. Subscriptions: $198 per year, $372 for two years, $540 for three years. Additional subscriptions mailed in the same envelope are $40 each per year.