Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue:

Discipline

Arrested over anonymous complaint

Nurse acquitted following trial for filing complaint with medical board

Issue: Rights of complainants in discipline cases

When Anne Mitchell, a registered nurse at Winkler County Memorial Hospital in Kermit, Texas, decided to file an anonymous complaint about a physician with the state medical board last April, the last thing she expected was to be arrested, lose her job, and find herself charged with a third-degree felony.

But in a turn of events that different professional licensing experts have called "bizarre," "absurd," "unprecedented," and "outrageous," that's exactly what happened.

Mitchell—and another nurse who was ultimately dismissed from the case—collaborated on a letter to the Texas Medical Board, expressing concern about a physician with whom they worked, Roland G. Arafiles Jr.

Pointing to six cases of concern, the two nurses said they saw a pattern of improper prescribing and surgical procedures, including a failed skin graft that Arafiles allegedly performed without having surgical privileges. The letter also noted that Arafiles was sending email messages to patients about an herbal supplement he sold on the side.

The two complainants said they were not signing the letter due to fear of retaliation. "Administration has made it clear that there will be no reporting of any problems without administrative, medical staff, and board notification," Mitchell wrote.

"This would certainly create the opportunity for (the administrator) to remove me from employment. At the appropriate time I will speak with an investigator should the Medical Board determine that an investigation is warranted."

The medical board, after receiving the letter, contacted Arafiles, who in turn contacted a friend who happened to be the Winkler County sheriff, Robert Roberts. Based on Arafiles' complaint that he was being harassed, Roberts obtained a search warrant, seized the two nurses' work computers, and located the letter. *(See page 6.)*

Top Ten Professional Licensing Stories of 2009

Professional Licensing Report recently selected the most significant developments in professional licensing and regulation that occurred during 2009. They are listed below, together with the issue of *PLR* in which they were covered.

1. **Amid scandals, California strives to reform discipline** The nation's largest professional licensing system was under siege following a press exposé of nursing board delays and failure to discipline in July. Nursing board members were fired and broad disciplinary reforms for health professionals were promised—but then the governor vetoed a bill requiring hospitals to report misbehaving physicians to the medical board. The report by Charles Ornstein and Tracy Weber of ProPublica on lax oversight of nursing in California, published in the *Los Angeles Times*, was a finalist for the Pulitzer Prize for Public Service, Pulitzer's highest honor. (November/December 2009)

2. **ACLU targets a licensing application** "Have you ever been treated for a mental illness?" The American Civil Liberties joined a lawsuit challenging the Indiana state bar's admission application, over its questions relating to applicants' history of treatment for mental health problems. (November/December 2009)

3. **Bombing suspected to stem from discipline decision** The chief suspect in a bombing that crippled and partially blinded the chair of the Arkansas medical board in February 2009 was named in August. He is Randeep Mann, a physician whose license was suspended by the board after several of his patients died of drug overdoses, and who lost his appeal of the suspension in 2006. Mann was arrested and charged with possessing several illegal weapons. (November/December 2009)

4. **Excessive debt ruled a moral character problem** Courts in Texas and New York upheld the rejection of candidates to practice law because their excessive debt indicated a longstanding lack of financial responsibility, or they failed to meet the requirement of good moral character. (July/August 2009)

5. **Settlement with disciplined licensee wracks board budget** The Washington state accountancy board spent $500,000, the equivalent of one third of its annual budget, to settle a long-running challenge by a disciplined licensee over an investigation that began in 2004. (September/October 2009)

6. **A title act is ruled unconstitutional** A state law limiting use of the title "interior designer" was too extensive and would "eviscerate" First Amendment guarantees of free speech, a federal court ruled. (May/June 2009)

7. **Successful impaired professional programs have teeth** Professionals who abuse drugs are generally not helped by so called "diversion" programs—unless the programs ensure consistent monitoring and swift action for violations such as failing a urine test, a national study finds. (January/February 2009)

8. **Testmakers win $1,021,000 from exam videotaper** A federal court ordered a candidate who was decked out with myriad electronic recording devices during the engineering exam to pay damages for willful copyright violation. (May/June 2009)

9. **Lack of "grandfathering" not a violation of due process** Imposing new certification requirements on teachers—meaning they were not "grandfathered" in to new entry standards—did not violate their rights to due process even if they lost their job as a result, a federal court ruled. (July/August 2009)

10 **Licensee can't use Alford plea as ticket out of revocation** A Maryland appeals court ruled the state medical board properly revoked a physician's license without a hearing after he entered a "no contest" plea to second degree sexual assault. (March/April 2009)

Testing

Blind candidate wins all computerized aids she requested for exam

Issue: Disabilities law and test accommodations

The National Conference of Bar Examiners must give a legally blind candidate all the computerized aids she is accustomed to using in order to take

the bar exam in California, a federal court ruled February 4 (*Stephanie Enyart v. National Conference of Bar Examiners*).

Granting the candidate's request for a preliminary injunction, the U.S. District Court for the Northern District of California ordered the NCBE to arrange for the test accommodations, in accordance with the Americans with Disabilities Act, within two days of the ruling.

The candidate, Stephanie Enyart, has a progressive case of macular degeneration and retinal dystrophy known as Startgardt's Disease. Legally blind, throughout her undergraduate career and in law school, she used special devices and other accommodations to complete her coursework and to take exams.

Commenting on the ruling, Anna Levine of Disability Rights Advocates, an attorney representing Enyart, said, "I hope that our hard-fought victory here will send a message to testing organizations that they need to comply with the ADA and provide each individual test taker with a disability the accommodations that he or she needs to demonstrate his or her actual knowledge, skills, and abilities."

Enyart contended that one particular accommodation, namely, "a computer equipped with screen reading software (JAWS) and screen magnification (ZoomText) software," is required for her "to read lengthy texts, legal and academic material, to perform legal work."

Further, "it is what I used to take all of my law school examinations, with the exception of a single multiple choice portion of one law school examination, which I took using only the assistance of a human reader, with disastrous results." The combination of JAWS and ZoomText, Enyart said, "is the only method through which I can effectively read and comprehend lengthy or complex material."

The State Bar of California approved Enyart's request for the sections of the exam that it administers, but the NCBE refused to permit Enyart to use the ZoomText. Instead, NCBE offered the combination of a CCTV to magnify the print exam and a human reader to read the text aloud, and a large-print exam in addition to an audio CD with the test questions pre-recorded, along with several other accommodations

NCBE justified its denial of Enyart's request because it feared security risks associated with permitting computer aids to be used in multiple-choice tests. Since NCBE reuses some of the questions on both of its multiple-choice exams, the Multi-State Professional Responsibility Exam and the Multistate Bar Exam, it said that the use of laptops could permit a test-taker to surreptitiously record the questions.

Enyart sought a preliminary injunction under the ADA ordering the NCBE to permit her to use JAWS and ZoomText. The NCBE opposes any such order, contending that it has already offered to reasonably accommodate Enyart's disability, and that it is not obligated to provide Enyart's choice of accommodation. Essentially, the NCBE argued, it is only obligated to provide a reasonable accommodation, which it believes it has done.

The court ordered the NCBE to provide the following accommodations on the March 2010 administration of one of the NCBE exams:

(a) Double the standard time
(b) A private room
(c) One five-minute break every hour
(d) A scribe to fill in the answers, and
(e) The exam loaded onto a laptop computer equipped with JAWS and ZoomText software.

Enyart is to be permitted to bring and use the following:
(f) An ergonomic keyboard
(g) A trackball mouse
(h) A large monitor
(i) Her own lamp to control lighting conditions
(j) Sunglasses
(k) A yoga mat
(l) Large print digital clock
(m) Migraine medication

Much of the case turned on the wording of the regulations implementing the Americans with Disabilities Act, which do not contain the term "reasonable accommodation." Rather, test administrators are required to assure that "the examination is selected and administered so as to best ensure" that the results accurately reflect the individual's aptitude or achievement level, whether or not the person is disabled.

Citing several previous cases in which a candidate was denied his or her preferred accommodations, NCBE argued that they supported the proposition that candidates are not entitled to "preferred" accommodation, but only to a "reasonable" accommodation.

The "best ensure" wording of the ADA regulations is "by no means clear," the court said. But because the accommodations provided by NCBE will not permit Enyart to take the exam without severe discomfort and disadvantage, the court found that she has demonstrated the test is not "accessible" to her, and the accommodations therefore are not "reasonable."

In addition, it found that Enyart had persuasively made the case that she would suffer irreparable harm in the form of a serious career setback and the "professional stigma of failure because of her medical disability."

NCBE did not adequately support its position, the court also said. The organization said that if Enyart used her own laptop, it could not prevent the questions from being copied onto her hard drive. But the injunction does not permit Enyart to use her own computer, the court noted. It ordered instead that the test be loaded onto NCBE's own device.

Based on the current record and documents filed in the case, it concluded that it is more likely than not that Enyart will succeed on the merits at trial. "The balance of equities tips in Enyart's favor, she will be irreparably harmed in the absence of preliminary relief, and the public interest supports issuance of the preliminary injunction.

Did applicant use a "ringer" to take his licensing exam?

Issue: Alleged cheating on licensing exams

A federal district court refused to dismiss a lawsuit against the National Association of Boards of Pharmacy filed by a candidate whom the testmaker accused of using an impostor to take his pharmacy licensing exam (*Ureshkumar Dakshinamoorthy v. National Association of Boards of Pharmacy*)

In a January 7 decision, the U.S. District Court for the Eastern District of Michigan denied motions by the Educational Testing Service and Prometric, administrators of the test, to dismiss the case, and refused a motion by NABP and its executive director to make a partial judgment in the matter.

The dispute arose when the candidate, Ureshkumar Dakshinamoorthy, was accused—initially by his brother-in-law—of using a "ringer" to take the North American Pharmacist Licensure Examination (NAPLEX) pharmacy licensing exam in June 2007.

Dakshinamoorthy had failed the test twice before, in June 2006 when he scored 27, and in December 2006 when he scored 24. The third time he took the test, he scored 130.

In communication with NABP, Dakshinamoorthy's brother-in-law claimed to have heard from other family members that the candidate had had another person take the exam for him. NABP launched an investigation, requesting materials from Prometric, the company that administers the exam.

According to the attorney general, dismissal was warranted because NABP did not examine the forensic evidence, a photograph of another candidate who sat for a totally other test at a different time was at first erroneously portrayed as Dakshinamoorthy, the brother-in-law who had accused Dakshinamoorthy refused to cooperate further, the thumbprints reviewed by the board were of poor quality and NABP did not provide originals, no videotapes from the testing events were still available, the photos of the individuals who appeared for each NAPLEX testing date were "clearly those of Mr. Dakshinamoorthy," and the signatures obtained at the three test administrations showed no discernible difference from his signature.

Prometric takes photos of persons sitting for each NAPLEX test, takes their fingerprints, and videotapes the testing itself.

In this case, the fingerprints were blurry, and the videotapes were stored for only 30 days before being taped, the court said. Prometric provided NABP with pictures of Dakshinamoorthy from the three exams and the photo from the third exam did not match the photos from the first two.

"Ultimately, however, it was determined that Prometric gave NABP the wrong picture, and in fact there was a picture of Dakshinamoorthy that matched the first two," the court stated.

Based on its investigation, on March 14, 2008, NABP invalidated Dakshinamoorthy's score, notifying him that it could not verify that he was the person who sat for the exam. The discipline subcommittee of the Michigan Board of Pharmacy filed an administrative complaint six days later, to determine whether disciplinary action should be taken

But the state attorney general's office recommended that the complaint be dismissed because "the invalidation has turned out to be based upon mere speculation and conjecture."

Despite the state board's reinstatement of his license, NABP sent Dakshinamoorthy a letter in July 2008 affirming its invalidation of his score, on grounds that it still could not verify that he passed the June 2007 exam on his own merits.

Dakshinamoorthy then filed suit charging Prometric, Educational Testing Service, and NABP with negligence, intentional infliction of emotional distress, breach of contract, and libel and defamation. Among other things, he maintained that Prometric intentionally gave NABP the wrong photograph.

In answer to some of Dakshinamoorthy's charges, Prometric and ETS claimed that his contract was with NABP, not with them, and that all the duties alleged by Dakshinamoorthy were contractual duties between them and NABP, under a contract to which Dakshinamoorthy was not a party.

The court said this was a strong argument but refused to dismiss the charges against Prometric and ETS, noting that "discovery has barely begun," and several issues remain to be explored. It also denied without prejudice NABP's motion for judgment on the negligence claim "because it is early in this litigation and there has been little discovery taken." However, it did grant the motion that Thomson Reuters Corporation, former corporate parent of Prometric, be dropped as a defendant.

Discipline

Nurse tried, acquitted for filing complaint with board *(continued from page 1)*

Subsequently, the two nurses were arrested, fingerprinted, photographed, and indicted on charges of "misuse of public information."

On February 11, a jury deliberated less than an hour and returned a verdict of "not guilty." But the controversy over the arrest and prosecution continues.

The medical board was one of the agencies that expressed alarm. Executive Director Mari E. Robinson wrote to prosecutors, warning that the case would have "a significant chilling effect" on the reporting of malpractice. The Texas Nurses Association, which helped fund Mitchell's defense, also filed a formal complaint with the Texas Department of State Health Services against the hospital.

The state presented witnesses who said Mitchell had made disparaging comments about Arafiles and refused to sign off on his original credentialing. However, the sheriff admitted that he didn't check with the state medical board or investigate whether the complaints were true before seizing the nurses' computers. Both the state and the defense's witnesses agreed that nurses have a duty to report unsafe care.

To prove the charge of "misuse of public information", the prosecutor in this case had to show that Mitchell was a public servant, she had access to information because of her employment, that information was public, she used the information with intent to harm another, and the information was used for a nongovernmental purpose.

In response to the acquittal, the American Nurses Association said it was satisfied at the vindication of Mitchell but "shocked and deeply disappointed that this sort of blatant retaliation was allowed to take place and reach the trial stage….Nurse whistle blowers should never be fired and criminally charged for reporting questionable medical care."

A civil lawsuit in federal court has been filed by the nurses' lawyers, charging the county, hospital, sheriff, physician, and prosecutor with vindictive prosecution and denial of the nurses' First Amendment rights.

Explicit statute not needed to discipline for sex with patients

Issue: Prosecution for sexual misconduct

A psychologist's two-year stayed suspension for his sexual relationship with a former patient, whose husband and son were also former patients, was backed by substantial evidence, the Superior Court of Connecticut, Judicial District of Fairfield at Bridgeport, ruled December 23 (*Reuben T. Spitz v. State of Connecticut Board of Examiners of Psychologists*).

The case stemmed from an investigation by the state Department of Health of the psychologist, Reuben T. Spitz. In 2007, the department presented the state psychology board with charges that in 2004 Spitz began a personal relationship with LB, a former patient and wife of RB and mother of EB, who were also former patients. Spitz had provided martial counseling to LB and RB, who later divorced.

The relationship with the wife became sexual in February 2005, and ended in about May 2006. The department alleged Spitz had also provided her with Xanax and/or amphetamines, and conveyed confidential information about at least three other of his patients to her. These charges constituted grounds for disciplinary action under state law against a psychologist's acting "negligently, incompetently, or wrongfully in the course of his profession," the department said.

The board found that there was insufficient evidence to support the drug and confidentiality allegations, but it approved a two-year suspension based on Spitz's having engaged in an inappropriate relationship with LB.

An expert witness to the board opined that Spitz's conduct violated an ethical obligation that "a psychologist would not commence a sexual relationship with a patient nor a former patient for at least two years after termination of therapy, particularly if there is a likelihood it will harm the patient, nor with relatives of current therapy clients."

The suspension was immediately stayed, with Spitz placed under probation for two years, regularly scheduled therapy with a preapproved psychologist required, and supervision of his practice required as well.

Spitz made several claims in his appeal regarding inadequate notice of the charges, conflict of interest and bias by board members, and insufficient evidence. Among other arguments, he contended that he was "left to guess at what the charges were" and what standards the board would apply regarding code of ethics and sexual relationships.

Spitz claimed there was "not a scintilla of evidence to support that LB" was ever his patient. But the court found that the board's specialized professional knowledge and recognized principles within the practice of psychology gave it a legitimate basis to conclude that LB's presence alone during therapy sessions with her 10-year-old son would establish that a psychologist-patient relationship existed between her and Spitz.

"There is no requirement," as Spitz had argued," that there be a statute or specific section of the code that provides that attendance of a spouse constitutes treatment of that spouse or that treatment of a minor constitutes treatment of his parents."

The court also noted that the absence of medical records of Spitz's treatment of LB definitely did not dispose of the issue. "There was evidence in this case that appellant was concerned about other clinicians learning of his contact with LB outside treatment sessions," the court said.

It added that LB had testified Spitz advised her not to see another psychiatrist because of the nature of their relationship and concern that another doctor might make a complaint about Spitz to the licensing board. "It is not surprising that medical records of [LB's] treatment would not exist."

Rejecting Spitz's other arguments as well, the court found that given the evidence there was ample justification for the two-year license suspension.

Licensee has no right to cross-examine board members

Issue: Due process in discipline proceedings

The censure and probation imposed on a podiatrist for poorly conducted surgery was partially upheld and partially vacated, in a decision by the Court of Appeals of Arizona September 1, 2009 (*Alan L. Gaveck v. Arizona State Board of Podiatry Examiners*).

The case involved podiatrist Alan Gaveck and his treatment of a patient, "DO," in 2005. Gaveck performed two surgeries on DO's foot, which after various complications led to the amputation of one of the patient's toes. The patient filed a complaint with the state podiatry board, alleging that Gaveck's incompetence and negligence was the direct cause of her toe amputation.

At a hearing, Gaveck presented an expert witness on his behalf who testified that Gaveck's failure to obtain a written consent from the patient before the second surgery "falls into something of a gray zone," but did not constitute a departure from the applicable standard of care, and that his other treatment decisions were reasonable actions.

Gaveck's counsel then asked the board for the opportunity to "examine your witness against Dr. Gaveck, your expert witness." The board had not relied on any independent experts as part of its investigation, and the board chair denied the request, responding, "Why do we need an expert witness? We are the expert witness."

The board overruled the counsel's concern regarding the fairness of the proceeding, unanimously agreeing that Gaveck was guilty of unprofessional conduct, and imposing a censure and one-year probation on the podiatrist.

In his appeal, Gaveck contended the board denied him meaningful due process at its informal interview with him, which he described as a "sham proceeding" because the board did not clearly articulate the standard of care against which his actions were to be measured. In addition, the board's lack of independent expert evidence violated his due process rights, he claimed.

The court found that the board had given Gaveck appropriate notice of the standard of care over his failure to obtain written consent for the second surgery, but found that the board's notice concerning the allegation that a second opinion should have been recommended was insufficient.

"In advance of the informal interview or any adjudicatory phase, Dr. Gaveck was entitled to know the exact nature of when and how the board disagreed with his post-operative management of this patient."

The court rejected Gaveck's contention that a licensee has the right to call one or more board members for cross-examination. "Such an approach could be seen as an effort to intimidate the board, would undermine the presumed efficiency built into the statutory framework of all licensing boards... and would eliminate for all practical purposes the use of the informal interview process."

Affirming the board's finding of unprofessional conduct relating to the lack of informed consent, the court vacated the other finding of unprofessional conduct, as well as the discipline imposed by the board, and remanded the case to the board for reconsideration.

Board president does not have to be lawyer, appeals court agrees

Issue: Board officials not required to have legal training

A trial court that threw out the state pharmacy board's suspension of a license was in error when it found that the board president's not being a lawyer violated a pharmacist's due process rights, the Court of Appeals of Ohio ruled February 10 (*Scott A. Vinci and Connie Campbell v. Ohio State Board of Pharmacy*).

Restoring a five-year suspension that the board had ordered for pharmacists Scott Vinci and Connie Campbell for dispensing of pain medication not for a legitimate medical purpose, the court said that there is no statutory requirement that the president of the board have any legal training or be a lawyer.

The board began investigating the pain clinic known as Professional Pain Management of Ohio after receiving complaints about its prescribing habits, and that clinic closed in December 2003.

Vinci and Campbell, pharmacists at Dusini Drug, had filled many of the clinic's prescriptions, and told investigators most of them were for two drugs with high abuse potential and a high illegal street market value: Hydrocodone 10 mg and Carisoprodol 350 mg, which is a muscle relaxant also known as soma.

The board ordered license suspensions for Vinci and Campbell for failure to assure that prescriptions were issued for a legitimate medical purpose by licensed providers in the usual course of professional practice.

The pharmacists admitted that customers were flocking to Dusini Drug because other pharmacies in the area (New Philadelphia) were refusing to fill their prescriptions. Among the red flags these pharmacies reported: many of the customers were from West Virginia and Kentucky, they often asked for a specific pill color, they were often coming in large groups, and they were predominantly paying cash.

But when Vinci and Campbell appealed, a trial court agreed that the board had violated their due process rights. In a 2003 decision, it reversed and vacated the suspensions.

"The trial court, in its orders, made much of the fact that the President of Board is not a lawyer," the appeals court commented. "The decision in both cases noted that the president was a 'non-lawyer with, apparently, no formal legal or judicial training.' The trial court further stated that the President had consistently allowed non-admissible hearsay evidence to be presented and failed to assure that [the pharmacists'] due process rights were protected."

The appeals court disagreed, finding that the evidence against Vinci and Campbell was overwhelming, the two were provided with proper notice, there is no requirement that the board president have legal training, and hearsay evidence is not precluded at administrative hearings. Reinstating the disciplinary sanctions, the court assessed costs to the two pharmacists.

After audit, insurer requested that board revoke dentist's license

Issue: Severity of sanctions for misconduct

A two-year suspension was not unreasonable in the case of a dentist whose insurer requested that the licensing board revoke his license, the Superior Court of Providence, Rhode Island, ruled February 12 (*David A. Marcantonio v. Rhode Island Department of Health, Health Services Regulation, Board of Examiners in Dentistry*).

The case concerned a dentist, David Marcantonio, who was audited starting in December 2006 by insurer Delta Dental, following three complaints about the quality of his patient treatment. In February 2008, Delta Dental filed a complaint about Marcantonio with the dental board and the state department of health.

The complaint said the company's audit revealed "a disturbing pattern of quality of care issues, negligence, fraud, and record-keeping violations," that Marcantonio "posed a risk to his patients," and that the board should revoke his license to practice dentistry.

The board issued a summary suspension of Marcantonio's license and conducted a hearing consisting of six sessions over a three-month period, which covered the cases of ten patients in detail, and found a pattern of poor dentistry marked by untreated decay, failure to refer, and poor documentation. Marcantonio supplied an expert witness in his defense, but even that witness said "a lot of the entries [in Marcantonio's charts] are unreadable to me."

The discipline imposed was a two-year suspension, a $10,000 fine, and mandatory completion of an ADA approved "Advanced Standing Program" and a course in proper documentation of clinical records.

On appeal, Marcantonio argued that the penalty was excessive, that the board was biased and employed the wrong standard of proof, and that the board impermissibly relied upon the expert knowledge of its members in reaching factual conclusions.

The court rejected these arguments. It said the preponderance of the evidence standard the board employed was widely accepted. "Although neither

the United States Supreme Court nor our Supreme Court has specifically addressed that standard applicable to professional license revocation hearings, the majority of states have upheld the constitutionality of the preponderance of the evidence standard."

The evidence is "overwhelming," the court noted, that Marcantonio's poor record-keeping practices were a consistent source of problems. As to the issue of board members' expert knowledge, the court cited a generally accepted principle that the board cannot rely on the expert knowledge of its members to fill the gaps in inconclusive evidence.

"Here, however, the board may have relied upon its members to review patient X-rays in order to resolve conflicting evidence." As fact finders, board members are permitted to fill this role, the court said.

Domestic assault and other charges warrant suspension, court says

Issue: Justification for severe sanctions

A one-year suspension from the practice of law was a necessary sanction for an attorney convicted of felony possession of steroids, three misdemeanor counts of domestic assault and one count of malicious injury to property, the Supreme Court of Rhode Island ruled October 8 (*In the Matter of Stephen M. Hunter*).

In appealing the discipline, the attorney, Stephen Hunter, argued that it was too severe a sanction for his behavior. In mitigation, he said, he had had no history of professional discipline, his criminal conduct, while serious, did not involve a client and is not related to the practice of law, he is attending both substance abuse counseling and anger management counseling, and he is in compliance with all the terms of his sentence.

The court said the one-year suspension was not intended as punishment, but was a means of carrying out the purpose of professional discipline. "An order of suspension in this matter is necessary to maintain the integrity of the profession," the court ruled.

Criminal convictions present boards with discipline challenges

Issue: Nexus between criminal conduct and practice

Should a criminal conviction be considered a valid reason to discipline a professional? That's not a simple question, according to Cheryl Lalonde, an assistant attorney general and board counsel in Kentucky, who addressed this subject at the annual FARB Forum, sponsored by the Federation of Associations of Regulatory Boards in January.

For example, different standards are in play depending on whether the convicted person is making an initial application for licensure or whether he or she was already licensed, she said. Recent convictions usually require a higher level of scrutiny, and factors like the severity of the offense or a pattern of offenses must also be taken into account.

Whether the law compels action, or creates discretion is another issue, Lalonde said. "Most of our laws create discretion, but you need to see if your laws use mandatory language like 'shall' versus discretionary language like 'may.'"

Describing several recent cases that have confronted licensing boards, Lalonde said they illustrate a few core principles that regulators might want to follow when contemplating professional discipline for criminal convictions.

Persistence and preparation, for example, can make the difference between winning and losing. A Supreme Court of Missouri case, *State Board of Accountancy v. Integrated Financial Solutions* (decided June 24, 2008), involved a certified public accountant who offered a get-rich-quick scheme and was indicted on federal wire fraud charges. "The board revoked his license but received three unfavorable rulings on appeal before finally winning."

The court ultimately upheld the board, but the board had to work at it. So the lesson, Lalonde says, is: Don't give up. "This was a serious level of fraud, tied to the practice of accountancy, and that came out and was well prepared by the board. Make sure you articulate all the reasons for denial and make sure they're all enumerated."

In the case of *State of Alaska, Alaska Board of Nursing v. Joy Platt*, involving a nurse with a string of criminal convictions for check forgery and shoplifting, the Alaska Supreme Court in 2007 reversed a lower court and held that the board may consider a conviction that has been set aside.

Although a hearing officer recommended the nursing board license the person, "the board said no, this is an individual who's going to be in proximity to individuals who are vulnerable; we need to be able to rely on her trustworthiness. And the court upheld the board's ability to engage in that kind of thinking."

Despite the number of disciplinary sanctions that are overturned on appeal, Lalonde recommended that boards not give up. "If you're right, pursue it. And if you have the evidence, pursue it."

The case of *Jorge Cisneros v. The School Board of Miami-Dade County, Florida,* decided by the Court of Appeal of Florida, September 17, 2008, shows the difficulty inherent in defining moral turpitude, Lalonde said.

The licensee was a teacher who was charged with vehicular homicide in an incident in which a 7-year-old boy was killed. "He pled no contest and was adjudicated guilty. So the question was whether he was guilty of moral turpitude. The school wanted to takes his license and said he was."

"But the court looked at the plain meaning of the statute—whether his recklessness rises to the level of moral turpitude. The answer turned out to be no. The court said the accident was tragic, and his behavior was foolhardy, but the death was accidental and unintended and does not rise to the level of being "base, vile or depraved.'" However, Lalonde noted, "the standard would have been different if he was making his application and had already been convicted."

Another case in which the board lost was *Kevin Allen Ake v. Bureau of Professional and Occupational Affairs, State Board of Accountancy*, in which a CPA who had allowed his license to go dormant admitted a conviction for a hate crime on his application. "The board goes ahead and issues the license, then later that year they decide to have a hearing."

The board decided to revoke Ake's license, "but on appeal in 2009, the Commonwealth Court of Pennsylvania said look at the fact the crime was committed seven years prior and it was never repeated. This is not conduct intrinsic to the accounting profession, there was evidence of rehabilitation, and you don't have the evidence to inflict the most serious penalties."

"So maybe the timing here affected the outcome," Lalonde commented, noting that it may be better to make the decision before issuing the license.

Make sure you articulate all the reasons for a license denial, she recommended. "Because you might think it's the conviction on the marijuana charge [that's most important], and in fact what ends up saving you is the fact that she lied on her application." If conduct is closely tied to practice, it might be able to considered even if the courts have not convicted the person. "Don't summarily throw out conduct that doesn't rise to conviction."

Other advice Lalonde offered:

* Help boards to "wordsmith" their regulations to eliminate vague language in favor of explicit language.

* Ask applicants to disclose all misdemeanors and felonies and decide what is relevant. "Don't leave it to the discretion of licensees to choose what's important enough to disclose to you."

* Remember your mission is to protect the public. "Once you've established that their criminal conduct is tied to the functions and duties of the profession, they have the burden to prove there isn't a nexus."

After-hours drunk driving? Yes, it's unprofessional conduct

Watson argued he did not have adequate advance notice of "how much alcohol consumption prior to driving, or which conduct involving suspicion of driving under the influence of alcohol, would give rise to disciplinary cause." While convictions provide a "bright line" as to what conduct is prohibited, "there is no lower level of alcohol consumption.. that would not trigger the ability of the medical board to proceed." The court found, however that the standard of "posing a danger to the physician or others" was adequate and no bright line was required.

One of the cases described by Kentucky board counsel Cheryl Lalonde was decided August 25, 2009 by the Court of Appeal of California, Third Appellate District. The ruling (*Louis H. Watson v. The Superior Court of Sacramento County, Medical Board of California*) involved a surgeon who had several DUI violations and a battery conviction. The California medical board sought to revoke his license.

"This was a really interesting case where you've got a law that allows you to take into consideration somebody's sobriety if it impairs their professional practice, but there are no allegations about incompetence or negligence in his practice," Lalonde said. In this instance, "the court said it was okay for the board to look at the potential for adverse impact."

The surgeon, Louis Watson, had been stopped and arrested, and in some cases charged, for driving under the influence on four occasions between 2000 and 2005. He had also pled no contest to a charge of battery, and he had provided false information on applications for reappointment to hospital medical staffs or for professional liability insurance.

Following a hearing, the board revoked Watson's license but stayed the revocation and placed him on probation for five years with 30 days' actual suspension.

On appeal, Watson charged that the state law authorizing discipline for after-hours conduct was unconstitutional. The court rejected that argument, stating, "Driving while under the influence of alcohol demonstrates an inability or unwillingness to obey legal prohibitions against such conduct and constitutes a serious breach of a duty owed to a society."

"There was no doubt… that the physician's driving after consuming alcoholic beverages posted a danger, given that crashes occurred in two of the four incidents," the court added.

The court held that the board did not violate Watson's right to due process. "Although there had to be a nexus between the use of alcoholic beverages and the fitness to practice medicine, such a nexus was established by the legislature… It did not require a finding of an actual, adverse impact on the past day-to-day practice of medicine, but could be satisfied by a potential for such adverse impact in the future."

The state Supreme Court denied Watson's petition for review of the decision on December 2, 2009.

HHS to enforce data collection by National Practitioner Data Bank

Issue: Federal collection of disciplinary data

State licensing boards are on notice: If they aren't reporting disciplinary actions to the federal government, the U.S. Department of Health and Human Services (DHHS) plans to name names.

Owning up to deficiencies in its data and promising to remedy them, DHHS said in a February 12 letter to state governors that for the first time, it would make the information on nurses, pharmacists, and allied health providers in the National Practitioner Data Bank, and in a second repository, the Healthcare Integrity and Protection Data Bank, available to private entities like hospitals.

Beginning March 1, private hospitals and other entities concerned with patient safety and quality will be able to access licensing and disciplinary actions taken

against nurses, pharmacists, and other health care providers. The data bank has made information on physicians and dentists available for the last decade.

The letter, signed by HHS Secretary Kathleen Sibelius and Health Resources and Services Administration head Mary Wakefield, requested that states and territories and their respective health practitioner licensing boards help the federal agencies fill information gaps in the National Practitioner Data Bank.

The federal database has been criticized as being less comprehensive than similar discipline data banks maintained by some individual professions.

To fill in the missing information, the agencies promised to form an action team to work with state representatives to improve data reporting, conduct regular data audits that will provide data back to the state licensure boards for verification and correction of missing data elements, provide technical assistance to state licensing boards on opportunities to expand use of health information technology, provide education and training programs for state licensing board staff on maintaining and reporting health practitioner licensure data, explore opportunities to make reporting easier, and establish a process for public reporting of entities that fail to meet their reporting requirements.

On July 1, 2010, and annually thereafter, the letter added, HHS plans to publish a report that identifies any governmental agencies that fail to fulfill the reporting requirements of the Healthcare and Protection Data Bank.

Should victim's rights be included in discipline proceedings?

Issue: Victim's rights in setting of sanctions

The victim of an accused lawyer in a disciplinary proceeding could submit a written statement regarding the harm caused by the alleged misconduct, under a proposal by the California Bar's Board Committee on Regulation, Admissions and Discipline Oversight.

The Bar says it would be analogous to a provision of the state's penal code, which lets victims of criminal conduct appear at the defendant's sentencing hearing to express their views on the crime and restitution.

The written statement could be in the form of a letter or statement rather than a detailed declaration under penalty of perjury, the proposed new rule states.

The statement would have to be admitted into evidence only after a finding of culpability has been made, and would be considered in determining the degree of discipline to be imposed or recommended to the state Supreme Court.

Licensing

Former mental health patients certified as class in class-action challenge of license application

Issue: Application questions regarding mental health

A federal court granted class certification to former mental health patients applying to take the bar exam, a step preliminary to a class-action lawsuit against the Indiana bar examiners.

The January 29 ruling by the U.S. District Court for the Southern District of Indiana (*Amanda Perdue v. The Individual Members of the Indiana State Board*

of Law Examiners) concerned a challenge that had previously been filed by an anonymous plaintiff.

The named plaintiff in this case, Amanda Perdue, is an Illinois attorney who was previously diagnosed with an anxiety disorder and post-traumatic stress disorder, and has received treatment for both conditions. In 2008, she applied to take the bar exam and was required to provide information about her physical and mental health.

Because she answered "yes" to a question about her mental health, the Board of Law Examiners requested additional information and referred her to the Judges and Lawyers Assistance Program for a mental health review.

Perdue withdrew her application instead of consenting to the review. She filed suit, joined by the American Civil Liberties Union of Indiana (the Indiana University chapter), and then filed an amended motion for class certification for all persons who:

--have been diagnosed with, or treated for, bi-polar disorder, schizophrenia, paranoia, or any other psychotic disorder;

--have been diagnosed since the age of 16 until the present or treated for, any mental, emotional or nervous disorder; or

--have a mental emotional or nervous condition or impairment which if untreated could affect their ability to practice law in a competent and professional manner.

Perdue had to show that the class is "sufficiently definite to warrant class certification, and she has requested aggregate data from the past two bar exams, identifying the number of individuals who answered affirmatively to the mental health questions.

Based on an estimate cited by Perdue—that 15% of University of Maryland law students sought counseling for mental illness— the court concluded that approximately 95 individuals may answer the challenged questions in the affirmative—thus satisfying the "numerosity" requirement for a class of persons to be certified as a class.

The court also found that the proposed class have a common nuclei of fact (commonality), and the claims of the representative parties are typical of the claims of the class (typicality). Since the putative class members' interests are identical to Perdue, the court said, the requirement that the representative parties will fairly and adequately protect the interests of the class is also met.

The court said it was unable to address the issue of whether the ACLU was an appropriate class representative, and requested briefs from both sides on the question. However, Perdue has met the requirements for class certification, the court concluded.

License of prosecutor under a cloud—but that doesn't mean mandate for new trial

Issue: Status of actions taken by prosecutor with restricted license

A Minnesota prisoner argued unsuccessfully that his conviction for first degree assault should be overturned because the restricted status of the prosecutor's license to practice law entitles him to a new trial. In the case, *Abdulkani Abdi Ali v. State of Minnesota*, the U.S. District Court for the District of Minnesota, in a December 17 ruling, rejected this argument and others presented on appeal.

At the time of the trial, prosecutor Gemma Graham had her license to practice law restricted because she had failed to submit affidavits of her compliance with continuing legal education requirements.

"Defendants do not have a constitutional right to be tried by a licensed attorney," the court said. Citing case law, the court noted that it is "obviously preferable" that a prosecutor be licensed in the jurisdiction in which he or she practices, but the fact that a prosecutor is not licensed does not necessarily undermine the fairness of the trail.

"The defense counsel and an impartial trial judge are capable of monitoring the prosecutor's conduct in order to ensure that no constitutional violations occur, and it would be inappropriate to conclude that a due process violation automatically results from the prosecutor's unlicensed status."

To make his case, Ali would have to produce evidence to demonstrate that prejudice arose from the unlicensed prosecutor's conduct, the court concluded.

Requiring intention to reside permanently in U.S. for license is unconstitutional, court re-affirms

Issue: Constitutionality of residency requirements

The U.S. District Court for the Western District of New York on November 24, 2009 denied a motion to vacate its decision that state education law requiring citizenship for licensure is unconstitutional.

The court held June 23, 2008 in *Simon E. Kirk v. New York State Department of Education, et al.* that state law referring to citizenship or immigration status violated the equal protection clause of the U.S. Constitution.

The reason: the state's purported concerns about veterinarian Simon Kirk's status, such as those involving the handling of controlled substances, did not have any rational relationship to his fitness to practice veterinary medicine, the court said.

The court has also found in the 2008 ruling that the state education law conflicts with the federal North American Free Trade Agreement, and therefore violates the Supremacy Clause of the constitution.

"NAFTA provides that plaintiff may practice veterinary medicine in the United States as long as he does not intend to permanently reside here. Conversely, [New York's] Education Law provides that plaintiff may obtain a veterinarian's license only if he intends to reside in the United States permanently, as evidenced by U.S. citizenship or green card status. In the Court's view, these statutes are in conflict."

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