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Highlights in this issue:

Licensing enforcers land in court over joint raid with police…..……1

Failure to notify licensee voids revocation in assault case….....3

Barring former addict from anesthesiology reasonable…….3

Preponderance of evidence standard affirmed…….....4

Board overreached by imposing "prospective suspension".....5

New charges during hearing lead to discipline remand……..6

Lawsuit against methadone policy dismissed….....6

Revocation reversed for "improperly mirroring" state……..8

Negligence justifies suspension even without causation proof……..8

Licensee wins court order against board but not fees……9

Discipline for verbally abusive behavior upheld…….....10

RN license revoked for giving heparin to hospitalized friend……11

Lack of documentation dooms accommodations suit…….....12

School employees may administer insulin……13

Medical marijuana clinic is practice of medicine.....14

Licensing requirements different enough to deny reciprocity……15

Board overreached in action against midwives……15

Discipline

Body armor, zip ties, lawsuit

Professional licensing enforcers land in court over joint raid with police

Issue: Enforcement of unlicensed-practice regulations

A massive raid on several Orlando, Florida, barbershops, in which the state's professional regulation agency was aided by armed police officers in body armor and masks, resulted in at least one lawsuit claiming that the raids violated the constitutional rights of the target licensees. An August 22 decision by U.S. District Court in Orlando detailed the operation and allowed some of the complaints to proceed (*Berry v. Demings*).

On August 21, 2010, the Florida Department of Business and Professional Regulation, aided by the Orange Country Sheriff's Office, conducted a large sweep operation in Pine Hills, a neighborhood near Orlando. Included in the sweep was Strictly Skillz, a barbershop owned by licensed barber Brian Berry that was suspected of hosting unlicensed cosmetologists.

According to court records, the sweep was the extension of an accidental "team-up" that occurred when Amanda Fields, a state inspector investigating a local mall barbershop, ran into Keith Vidler, an undercover police officer with the Sheriff's Office, who was at the mall on an unrelated assignment.

After Fields described the difficult safety situations in which she often found herself while performing investigations—investigators do not have law enforcement authority—Vidler accompanied her to the mall shop. The collaboration was immediately successful, as the pair issued license citations.

Inspired by their success and Officer Vidler's subsequent discovery that unlicensed cosmetology is actually a 2nd-degree felony, the two began discussing a series of larger operations, in which the sheriff's department would work with the Department during future barbershop inspections. The Department, concerned about criminal activities occurring in and around local cosmetology businesses and without the ability to engage in law enforcement themselves, agreed to accept police assistance.

The two agencies planned a large one-day operation to target cosmetology businesses that had been uncooperative or violent during previous inspections. Strictly Skillz was included in the sweep because, during an inspection three years prior, barbers at the shop had refused to produce their licenses when questioned by investigators.

Two agencies collaborated, and an ambitious plan requiring the coordinated presence of a team of eight law enforcement officers and state inspectors was produced, complete with multiple layers and plans for surveillance by undercover agents.

Unsurprisingly, the actual inspection of Strictly Skillz resembled a police raid from an action film. According to barbers in the shop, several police officers—some masked, some with drawn weapons, and some wearing bullet-proof vests, in various combinations—unexpectedly rushed into the shop, halted its operations, placed zip-ties or handcuffs on the hands of at least three barbers, and closed the store, forcing the customers to leave. The Department inspectors and police officers searched the shop for half an hour but, after finding nothing amiss, freed the fettered barbershop workers and left.

Following the dramatic events of the raid, Berry and three other Strictly Skillz barbers brought suit against the Orlando County Sherriff's Office, in which the four men claimed several constitutional violations and tortious actions.

The case was assigned to Judge Charlene Honeywell of the federal district court in Orlando, and the state defendants filed for summary judgment on various grounds of immunity. Honeywell's ruling on that motion was the basis of the August decision.

Addressing the barbers' complaints one by one, Honeywell first noted that, although the barbers had filed an equal protection claim based on their allegation that Strictly Skillz was singled out because the proprietors were black, they had failed to provide any evidence of bias on the part of the police.

The judge found that the administrative inspection of the barbershop was "not invalid," since there was "some suspicion" of unlicensed barbering. But she allowed the lawsuit to continue over the complaints relating to the extreme show of force by police officers, the detention of barbershop employees, ejection of customers, and inspection of a storage room where no barbering services were rendered.

Although the plaintiffs had filed a claim alleging their Fourth Amendment rights to privacy were violated and, although the police seemed to lack any evidence, the court ruled that the searches were, for the most part, constitutional.

Judge Honeywell concluded that the search was valid. "Clearly," she wrote, "brief observations of any unlicensed barbering that occurred in 2007 do not give rise to probable cause that would support the issuance of a warrant in 2010. In the absence of direct criminal suspicion, [sheriff's office] and [department] representatives validly invoked their statutory authority to inspect Strictly Skillz to determine whether barbers were operating without a license. . . . Because [the] representatives had *some suspicion* of unlicensed barbering based on [an inspector's] encounters and [Department] inspections at other neighborhood barbershops, the administrative inspection was not invalid."

The involvement of the police, who lacked any "direct criminal suspicion" of activities at the barbershop, was not to investigate criminal activities, Honeywell noted, but to provide security for the Department's representatives and "to make arrests for unlicensed barbering."

Honeywell nevertheless had several reservations about the behavior of the security-providing police officers. The judge noted concerns about the extreme show of force that officers had used, the detention of barbershop employees, the ejection of customers, and the inspection of a storage room "where no barbering services were rendered."

"The 'inspection' of Strictly Skillz," she continued, "was in marked contrast to previous administrative inspections, which had never involved law enforcement, let alone narcotics agents," and was excessive. Honeywell ruled that the lawsuit could continue on claims related to those activities.

Failure to notify licensee voids revocation in sexual assault case

Issue: Due process lapses

A decision by the New Mexico Counseling and Therapy Practice Board to revoke the license of a substance-abuse counselor it believed had sexually assaulted a minor client was overturned by the state's supreme court because the board had failed to inform the counselor of the meeting at which it decided to revoke his license (*Avalos v. New Mexico Counseling and Therapy Practice Board*).

The counselor, Homer Avalos of Chaparral, New Mexico, was accused of sexually assaulting a sixteen-year-old client in September 2007. The accusation led the state's counseling board to file discipline charges in 2009.

After a hearing, the officer in charge of the case found that insufficient evidence existed to show that Avalos had assaulted his client and passed on his recommendation that the charges be dropped. The board then moved to hold a meeting to discuss the case.

Although the board issued a public newspaper notice announcing the meeting, it failed to give personal notice to either Avalos or his attorney, both of whom consequently did not attend.

Then, despite the recommendation of the hearing officer and absent Avalos' participation, the board ruled that the evidence indicated that Avalos was guilty of the accusations against him, revoked his license, and assessed over $4,000 in fines and costs.

Avalos appealed and eventually the case reached the state's Supreme Court. The court, in a decision written by Justice Charles Daniels, reversed the discipline against Avalos and vacated the board's discipline order.

The board, the court explained, denied Avalos his due process rights when it failed to inform him of the meeting in which it revoked his license. In so doing, the board denied him the chance to contest its findings of fact and to monitor the board's adherence to administrative procedures, Justice Daniels wrote.

"Avalos," he continued, "was entitled to personal notice of the date, time, and location of any meeting at which the board would decide to suspend or revoke his license."

The case was vacated and returned to the board to decide if another attempt to discipline Avalos was warranted.

Barring former addict from anesthesiology, solo practice is reasonable

Issue: Weighing reasonableness of practice restrictions

An order restoring an anesthesiologist's license but with heavy conditions—including a permanent ban on prescribing controlled substances—was both reasonable and necessary to protect the health of the public, the New York Supreme Court held April 4 (*In the Matter of Jason Saporito v. State Board for Professional Medical Conduct*).

The physician, Jason Saporito, is a board-certified anesthesiologist who was observed injecting himself with Fentanyl, a highly addictive opiate, while in an operating room awaiting a surgery in which he was to participate. After entering inpatient treatment and temporarily suspending his license to practice, in October 2009 Saporito applied to have his license restored.

Saporito had a lengthy history of illegal drug use. He became addicted to Fentanyl, which is considered far more addictive than other opiates including morphine, in 2006, during the last year of his residency, and the addiction progressed from home use to use at work prior to surgeries. To sustain the addiction, Saporito stole the drug from his co-workers, over-prescribed it for his own patients, and foraged for it in the operating rooms including the waste bins.

A hearing committee of the state Board for Professional Medical Conduct agreed to restore the license. The catch was that Saporito could not practice in any specialty where dispensing of controlled substances was required, such as anesthesiology, pain management, emergency medicine, or critical care.

He was also banned from applying for a U.S. Drug Enforcement Administration Registration certificate for four years, prohibited from solo practice, and required to have an on-site supervisor.

In his appeal, Saporito challenged these conditions and produced witnesses who opined that he could be permitted to return to the practice of anesthesia. But each witness acknowledged the possibility of relapse.

The court took note that Saporito's recovery period of two years was quite brief, and he had attended very few individual therapy sessions once he completed his initial inpatient treatment. Another cause for concern: Saporito's ability and willingness to hide his addiction from his wife, colleagues, and patients, and the potential that he could still be abusing the drug if he had not been caught.

The court confirmed the board's discipline action. Despite Saporito's substantial efforts toward rehabilitation, there was a rational basis for the conditions the hearing committee of the medical board imposed on Saporito's license, including the permanent restriction from practice specialties where the dispensing of controlled substances is required, the court found.

Preponderance of evidence standard affirmed in discipline cases

Issue: Standard of proof in disciplinary decisions

The Supreme Court of Connecticut, in an August 13 decision, affirmed the use of the preponderance of the evidence standard in licensing cases, ruling against a doctor who had argued in his appeal that the board must use a stronger standard when acting to impair a license (*Jones v. Connecticut Medical Examining Board*).

At issue in the case was the standard of proof required to discipline doctors. Connecticut's medical board applied a "preponderance of the evidence" standard; The disciplined doctor, Charles Ray Jones, who was well known and controversial for his clinical practice focused on Lyme disease, claimed that the board should have used the "clear and convincing evidence" standard, a higher evidentiary bar.

The doctor had been accused by the state's public health department of violating the proper standard of care during his treatment of two Nevada children. Jones, the department claimed, while based in Connecticut and only in contact with the children through a telephone, had "provisionally" diagnosed them with Lyme disease and issued prescriptions for treatment and antibiotics starting six months before conducting an actual physical examination of the children. And, although subsequent tests ordered a year later by Jones indicated that the children did not, after all, suffer from the disease, the doctor continued treatment.

The board, unhappy with Jones's alleged long-distance methodology, took up the case and, after a lengthy hearing process, found that the doctor had violated the standard of care by recklessly prescribing antibiotics and diagnosing the children as suffering from Lyme disease without strong indicators that they were actually afflicted with the disease. Jones was placed on probation for two years, issued a $10,000 fine, and required to have a monitor periodically review his practice.

Jones appealed, making both his standard of evidence argument—which he based on constitutional rights claims due to the hardship that the loss of his license

would cause—and asserting that the board had been biased, based on angry comments made by one board member during his hearings. The case eventually rose to the state's supreme court, which issued an opinion written by Justice Peter Zarella.

The court ruled against Jones. Taking cues from the decisions of other state's high courts, Zarella wrote that the preponderance of the evidence standard was sufficient for licensure cases. "We are mindful of the plaintiff's important property interest in his medical license, the deprivation of which, the plaintiff claims, could both preclude him from practicing medicine and subject him to social stigma," Zarella wrote. "Nevertheless, this interest does not rise to the level of those for which the United States Supreme Court has concluded that due process mandates the application of the clear and convincing evidence standard rather than the preponderance of the evidence standard."

Noting further the reduced chance of error owing to the procedural safeguards which apply to licensing cases, and the strong governmental interest in maintaining the lesser evidence standard, the court affirmed the board's decision.

Board overreached by imposing "prospective suspension" on licensee

Issue: Proper grounds for disciplinary sanctions

The state's dental board was within its power to suspend a dentist's sedation permit for professional misconduct, but it could not order the continuation of that suspension to be contingent on its investigations of further problems in the dentist's office, the New Hampshire Supreme Court ruled August 28 (*Appeal of Kevin D. Boulard*).

The dentist, Kevin Boulard, possessed a "moderation sedation-unrestricted permit," which allows the holder to use anesthesia on dental patients. In 2011, after a former employee informed the board that Boulard was unprepared to handle a "sedation emergency," the board and the state department of justice sent undercover investigators to the dentist's office.

The investigators were able to determine that Boulard was improperly lacking a working defibrillator and had an incomplete emergency medical kit, which led the board to issue an emergency suspension of Boulard's license on the grounds that he was a danger to his patients. A second investigation, of which Boulard had advanced notice, resulted in a more favorable assessment of his office, but he was still found to be lacking in several areas.

After hearings, the board determined that Boulard had committed professional misconduct and suspended his sedation permit indefinitely.

The mere fact that the board is conducting other investigations of the petitioner's practice "does not, without more, justify the continued suspension of his permit," the judge wrote. The permit would remain suspended until Boulard complied with the board's order to fix the identified problems in his practice, but the suspension could not be contingent on those that it had not yet identified.

Boulard appealed the decision and the case made its way to the state's supreme court, where he made several arguments to challenge the board's decision.

Only one met with any success, though it was slight. Boulard had argued that the suspension of his license was an abuse of discretion on the part of the board. Justice Robert Lynn, writing on behalf of the court, ruled that the board had overreached in one aspect of the suspension decision, when it ordered that the sedation permit would remain suspended until it had received and reviewed information about other potential problems with Boulard's practice.

"The mere fact that [the board] is conducting other investigations of the petitioner's practice does not, without more, justify the continued suspension of his permit," Lynn wrote. Boulard's permit would remain suspended until he complied

with the board's order to fix the identified problems in his practice, but the suspension could not be contingent on problems that it had not yet identified.

Unexpected charges at hearing lead to discipline remand

Issue: Due process lapses

Chiropractic board members made sanction decisions based on new allegations not made until the middle of a discipline hearing, and the board's discipline decision would have to be invalidated as a result, a Florida court ruled August 30 (*Carlos M. Gonzalez v. Florida Department of Health*).

The Florida Department of Health had filed complaints against chiropractor Carlos Gonzalez, alleging that he kept illegible patient records and had failed to provide copies of records patients had requested.

Gonzalez admitted fault, but requested an informal hearing with the state's chiropractic board to explain his actions. Unfortunately, during the hearing, the dialogue between Gonzalez and the board members made his situation worse. Aside from noting his poor record-keeping, the board also questioned his competence, as well as the procedures he used in his practice. In the end, Gonzalez' license was placed on probation, and he was required to use a monitor and pass an examination—conditions that indicated the board was concerned about Gonzalez' competency. He was also assessed fines and legal fees of about $5,000.

He appealed the decision, arguing that the board had acted improperly when it considered his professional competency during the hearing, as that had not been part of the complaint issued against him and he was not prepared to defend himself on the issue. The case went before a state District Court in Tallahassee, which issued an opinion written by Judge James Wolf.

Judge Wolf agreed with Gonzalez. Noting that the board had strayed from the topic of Gonzalez' record-keeping, Wolf noted that a "portion of the discipline imposed appears directly related to competency rather than the record-keeping offenses that were charged." By doing so, the board had erred and, because the error appeared to have led to additional discipline, the court returned the case to the board for a new hearing.

Lawsuit against anti-methadone policy dismissed

Issue: Impairment, treatment, and discipline

A lawsuit brought by a Pennsylvania nurse challenging an anti-methadone policy of the state's Professional Health Monitoring Program was dismissed when a federal court ruled that the representatives for the nurse, Melinda Lamberson Reynolds, who died in 2012, were unable to prove that the policy was the deciding factor in a decision by the state's board of nursing to suspend her license (*Lamberson v. Pennsylvania*).

Reynolds was a nurse who suffered from heroin addiction and an overuse of the anti-anxiety drug Xanax, problems that had troubled her intermittently since the 1970s. She made efforts to control the problem and, from 1997 to 2010, sought methadone treatment at various clinics and went through at least one inpatient detox program for tranquilizer pills.

The therapies met with only mixed success and Reynolds continued to have problems with tranquilizers through 2008. On three dates in 2007, she tested positive for cocaine use, and she tested positive for opiates once in 2008.

In 2006, Reynolds signed a consent agreement with the board that required her to attend a support group and submit to an evaluation and random drug tests.

Nevertheless, she continued to suffer problems and her interactions with treatment providers evaluators were rocky. In May of 2007, the state moved to suspend Reynolds' license.

Pennsylvania enforced a policy making methadone-dependent licensees presumptively unfit to practice and ineligible to participate in professional rehabilitation programs. Seemingly in accordance with this policy and along with the other requirements, Reynolds was required to enter into a treatment program with a provider, A Better Today, which would not continue her methadone and which directed her to enter a detox program where she would be weaned from the substance. Reynolds did not enter the program.

From 1993 to 2008, Pennsylvania's impaired professional program maintained a policy declaring methadone-dependent licensees ineligible to participate in the board's impaired-professional program and presumed as unfit to practice. Methadone is considered useful in treatment of opioid drug dependence both as a short-term medication to control withdrawal symptoms ("detoxification") and as a long-term ("maintenance") medication to assist opioid dependent patients to refrain from use of illicit drugs.

With Reynolds having failed to sufficiently meet any of the requirements of the consent agreement, a hearing examiner in charge of the case recommended that she be suspended for three years. Although the decision was not rigid—the examiner declared that Reynolds would be allowed to continue practice while she continued to rely on methadone—her case manager at the board's professional health program told Reynolds that in order to continue in the program she would need to obtain a statement from A Better Today declaring that she had entered treatment to be weaned from methadone.

Life continued to be troubled for Reynolds. She had several run-ins with the law over the next two years and often appeared to abuse her tranquilizers. In February of 2012, she was found lying on the side of a road, dead from hypothermia and a mix of Xanax and methadone.

Before her death, Reynolds had brought a lawsuit against the nursing board in which she argued that the board's anti-methadone policy was in violation of two federal statutes: the Americans with Disabilities Act and the Rehabilitation Act, both of which offer some protection to recovering drug addicts. After Reynolds' death, her sister, as the executor of her estate, continued the suit.

Although at least one interim decision was made in Reynolds' favor, eventually District Court Judge James Munley, who had charge of the case, dismissed the suit. In order for Reynolds to have a case under the ADA, he wrote, she must show that the suspension of her license would not have happened but for the board's methadone policy.

"Although plaintiff seeks to have the court treat this case as if it is about nothing other than [the impaired professionals program]'s methadone policy," Munley wrote, "the facts require otherwise."

Although the board had essentially ordered Reynolds to follow A Better Today's recommendation that she be detoxed from methadone, her failure to do so was only one of many reasons motivating the board to suspend her license, he noted. Reynolds had refused to participate in a drug-testing program and had failed to attend support group meetings, and these failures gave the board sufficient reason to discipline her, Munley wrote.

In response to those arguments, Reynolds' sister had argued that Reynolds should not have been responsible for complying with *any* part of her consent agreement, given that her failure to comply with one particular requirement—to detox from methadone—would doom any attempt at compliance.

Munley disagreed, saying "the monitoring requirements contained in the consent agreement constitute an independent obligation plaintiff agreed to abide by when she signed the consent agreement."

Revocation reversed for improperly mirroring other state's discipline

Issue: Reciprocal discipline

A doctor whose New York license had been revoked for failing to mention prior discipline incurred in Tennessee won his bid to have the revocation overturned July 17. A Tennessee appellate court reversed a decision by the state's board of medicine to revoke the Tennessee license of Adedamola Oni (*Oni v. Tennessee Department of Health*).

In 2007, the state medical board accused Oni of unprofessional conduct. According to the complaint, he had made several mistakes including misdiagnosing a patient's skin problem, issuing an improper prescription, and failing to keep a sanitary office. Oni agreed to accept a reprimand and pay around $3,600 in fines, although he eventually failed to follow through with payments.

Then, in 2011, Oni, who was also licensed in New York, failed to mention the 2007 Tennessee discipline action or an earlier criminal arrest on his license renewal form. Unfortunately for Oni, New York's medical conduct board received a referral from its counterpart in Tennessee, and the doctor found himself the focus of both a reciprocal discipline action and a new charge of attempting to deceive the board. The board, incensed at Oni's act of dishonesty, revoked his license.

Following the New York decision, the Tennessee board then instituted a new case against Oni, seeking to impose reciprocal discipline based on the revocation of his New York License. After a hearing, the board revoked the doctor's Tennessee license and imposed legal costs. Oni appealed, arguing that the board had, essentially, punished him for failing to report its own 2007 discipline action.

The case went to Tennessee's Chancery Court, where Oni's arguments met with surprising success and the revocation decision was overturned. "The board," wrote Chancellor Russell Perkins, "made a clear error in judgment by simply mirroring the revocation sanction levied by its New York counterpart." Oni also successfully argued that, because New York requires the report of criminal charges but Tennessee only requires report of *convictions*, the board had punished him for actions that would not otherwise have resulted in discipline in that state.

The board appealed to the state's Court of Appeals which ruled July 17. Judge Andy Bennett did not agree with the Chancery court. The Tennessee board, Bennett wrote, had not punished Oni for failing to report its own action or for failing to report criminal charges, "but rather upon un-rebutted evidence that Dr. Oni made false statements in his New York renewal applications." Because lying to the board is an action that the Tennessee board *is* authorized to punish, reciprocal discipline was warranted.

Judge Bennett did find serious fault with another aspect of decision to revoke. After examining the board's deliberations, Bennett noted that the board seemed to incorrectly believe that it had no choice but to mirror the New York board's decision to revoke Oni's license and that it had, as a result, failed to provide sufficient reasons to impose the revocation.

"By simply mirroring the New York board's choice of discipline," he wrote, "the board rendered an arbitrary or capricious decision." He remanded the case to the board for an independently-reasoned decision.

Negligence justifies suspension, even without link to patient death

Issue: Discipline sanctions and proof of negligence

A Delaware nurse who successfully appealed a decision by the state's department of health and human services to place her on an adult abuse registry lost an appeal of the suspension of her license stemming from the

same incident, in a July 16 decision by the state's supreme court (*Jain v. Delaware Board of Nursing*).

In 1999, Madhu Jain, a nurse at the Delaware Psychiatric Center in the city of New Castle, noticed a patient lying unconscious in the facility, half-undressed and in a puddle of urine. Either concerned for her safety if the patient was undergoing a potentially violent psychiatric episode or—Jain appears to have supplied conflicting accounts—simply to find help to move the patient, who was larger than Jain herself, she decided to seek help before attempting to approach or physically examine the patient.

When Jain returned, the patient, who was, in fact, suffering from a blood clot in her lung, no longer had a pulse, and died while other nurses attempted to revive her with CPR.

After the state's Department of Justice filed a professional complaint, the nursing board held a hearing on the matter, and concluded that, although her lack of medical action when she left the patient's side did not lead "in any way" to the patient's death, her failure to act was nevertheless sufficiently negligent to be a professional violation. The board suspended her license for three years, and Jain appealed.

Meanwhile, the Delaware Department of Health and Human Services instituted its own action against Jain and eventually placed her on the state's Adult Abuse Registry. However, Jain successfully appealed this order, winning a decision in the state supreme court by arguing that the department had improperly found her guilty of neglect without proving that she acted either recklessly or intentionally.

Although she won that earlier decision, and although her appeal of the board's suspension of her license also reached the Delaware Supreme Court, Jain did not meet with the same success as in her earlier arguments.

Her most cogent argument on appeal was that, because the board ruled that her actions had not contributed to the patient's death, it had erred in finding that she was negligent. That lack of causation, she believed, exonerated her behavior.

The court did not agree. Justice Jack Jacobs, writing for a unanimous majority, noted that neither of the board's rulings depended on the other: "The board's finding that Jain was negligent," he wrote, "did not mandate a showing of causation and was properly supported by substantial evidence." The suspension was upheld.

Licensee succeeded in forcing board to send evidence, but court denies attorney's fees

Issue: Evidence in professional conduct complaints

An appellate court in Texas reversed a $100,000 award of attorney's fees to a veterinarian who had to acquire a court's order to see evidence the state's veterinary board had received in a professional conduct complaint against him. In an August 22 decision, the court found that the order was not an "enforceable judgment" for which fees could be awarded (*Texas State Board of Veterinary Medical Examiners v. Giggleman*).

In 2010, the Texas State Board of Veterinary Medical Examiners received a complaint from the animal-rights activist group PETA (People for the Ethical Treatment of Animals) about the veterinarian, Gene Giggleman. Giggleman was employed by a company called U.S. Global Exotics, which had been engaged in the business of importing exotic animals before being shut down by federal and state agencies in 2009. PETA had sent an undercover operative to monitor Global Exotics' activity and the group submitted video and photos of what it claimed was Giggleman engaged in professional misconduct.

Unhappy with this decision, Giggleman filed suit against the board seeking a court order releasing the evidence against him. The suit was filed under the state's Public Information Act, which allows plaintiffs to seek legal fees if a state agency acted unreasonably, and, although Giggleman filed a request for legal costs and attorney fees, he claimed them under a different section of law.

As required by law, in response to PETA's complaint, the board sent Giggleman a notice that the complaint had been filed, along with a copy of the letter submitted by PETA. However, because Texas law also requires that the investigation records for complaints which are found to be "groundless" be confidential, the board did not provide copies of the photographic documentation submitted by PETA.

Giggleman requested copies of the evidence. In response, the board submitted his request to the state's attorney general office for an opinion and was told that the exhibits should remain confidential.

A state district court subsequently issued an interlocutory ruling that Giggleman must be allowed access to the evidence provided with the complaint, and sent the case back down to the board. The board acquiesced and provided Giggleman with the evidence, and his case proceeded.

Meanwhile, the district court moved forward on Giggleman's monetary request, awarding him around $100,000 in attorney's fees and ruling that the board had not acted reasonably when it relied on the opinion of the attorney general's office. The board appealed the decision and the case went to the Court of Appeals, which issued an opinion written by Judge Bob Pemberton.

The board made two noteworthy arguments. First, the board claimed that the district court had wrongly awarded Giggleman fees under the Public Information Act despite the fact that he had failed to request fees under that law's framework. Judge Pemberton noted, however, that "how Giggleman asked for the attorney's fees is irrelevant, as, for several reasons outlined by the court, a specific plea under the Act is not necessary to claim attorney's fees by its mechanisms."

Nevertheless, Pemberton continued, Giggleman was not qualified to receive attorney's fees. Responding to the board's second argument, the judge wrote that, under state and federal law, when the board provided the evidence that Giggleman sought in response to a command by the district court, it had done so only in response to an order on an interlocutory motion and not a final decision. Therefore, the case was rendered moot before a final judgment; his request for the evidence was not an issue in which fees could be awarded.

Despite the unequivocal language of the lower court's decision granting Giggleman his request for an order forcing the board to relinquish copies of its evidence, the appellate court did not believe that Giggleman was a "substantially prevailing" plaintiff, as the language of Texas statute requires for those seeking attorney's fees. The lower court's order, Pemberton wrote, was "not an 'enforceable judgment,' but only a preliminary ruling."

Giggleman objected, noting that the ruling creates an incentive both for plaintiffs to forego interlocutory relief in order to preserve their claim to attorney's fees and for boards to avoid those fees by simply relenting only well after plaintiffs have spent time and money forcing them to comply with the law. But Judge Pemberton simply noted that Giggleman's "remedy for these perceived injustices would lie in the legislature rather than the judicial branch."

Giggleman's other claim to attorney's fees, under Texas' Uniform Declaratory Judgment Act, was also invalid, the judge ruled, as it failed to meet the requirement that it was not redundant or incidental to his Public Information Act claim.

Discipline over verbally abusive behavior upheld

Issue: Public information about discipline charges, sanctions

The Court of Appeals of Iowa upheld a decision by the state's board of medicine to discipline a doctor who had been terminated from a university hospital system as the result of his abusive and demeaning behavior towards

his colleagues and students (*Al-Jurf v. Iowa Board of Medicine*). The case was decided July 24.

In 2003, the provost of the University of Iowa filed an ethics complaint against Adel Al-Jurf, an oncologist employed by the university's hospital system, accusing Al-Jurf of "personal vilification" and verbal abuse of other hospital employees.

A investigatory panel sustained many of the accusations, finding that the doctor was so combative and demeaning in his behavior that the hostile environment he created for colleagues and students was likely to undermine patient care, and he was fired in January 2005.

When Al-Jurf applied for reinstatement of his license in 2009, the Iowa medical board filed discipline charges based on the same events that had led to his firing.

A seeming mix-up in the charging documents—the citations to the statutes and rules under which Al-Jurf was charged were cited to the 2009 versions, which was improper because the conduct being disciplined occurred in 2003—resulted in the dropping of some charges. But the board proceeded with the case by altering the language of one charge to "unethical conduct." An administrative law judge allowed the change because of the similarity of that phrase to its counterpart in the older rule, which had used the term "unprofessional conduct."

The board's final decision, reached in January 2011, reprimanded Al-Jurf, required him to complete a clinical practice program before he could be reinstated, and placed him on a prospective three-year probation if he was able to regain his license.

Although in making its decision the board noted that the doctor did not appear to intend his actions to be malicious and that he "clearly lacks insight and understanding of how his behavior appears to others," a press release issued shortly after the decision neglected to mention this and other mitigating statements included in the decision.

Al-Jurf appealed the ruling, arguing against, among other things, the decision of the board to continue with his discipline proceeding despite citing the older version of the law and the unvarnished publication of his discipline in the press release. The case eventually reached the state's Court of Appeals.

Judge Mary Tabor, writing for that court, noted that changing the language of the charge from "unprofessional" to "unethical" "did not substantially change the allegations leveled against Al-Jurf, who was well aware of the inappropriate interactions alleged to endanger his medical license," and did not unfairly prejudice his defense.

The court agreed with the board's assessment of Al-Jurf; Judge Tabor noted that he had created a "hostile educational environment" and that "his actions in threatening, demeaning, bullying, and interfering with the abilities of others to do their work failed to uphold dignity and honor in the medical profession."

Similarly, the doctor failed in his challenge to the board's decision to issue a press release detailing his discipline. "While the release could have done a more thorough job of reflecting the final outcome of the board's deliberations," Tabor wrote in dismissing Al-Jurf's claims, "nothing in the notice was inaccurate."

RN license revoked for administering heparin to hospitalized friend

Issue: Evidentiary standards in disciplinary actions

A Florida nurse whose license was revoked by the state's board of nursing —only to have the discipline thrown out because the state's nursing regulations failed to list the possible sanctions for such an action—had his

license revoked by the board for a second time on the same charges. But more complications arose when an appellate court issued an August 14 ruling that the board had provided insufficient evidence to convict the nurse on at least one count (*Fernandez v. Department of Health, Board of Nursing*).

Manuel Fernandez, a registered nurse licensed for 13 years in the state, was working as a home care provider when, in February 2009, he went to visit a friend in the hospital who had just given birth to twins.

During the visit, Fernandez discovered that his friend was in some discomfort. To alleviate the discomfort, Fernandez chose to administer the drug heparin, a prescription blood thinner. Unfortunately, Fernandez failed to inform any of the hospital's staff that he was going to do this, the patient did not have a prescription for the drug, and, in any case, Fernandez had no permission to practice nursing in the hospital.

When hospital staff discovered vials of the drug in the patient's room, the authorities were contacted and Fernandez admitted his action to the police.

The Florida Department of Health followed his admission with a license complaint to the state's nursing board. The board subsequently issued an order permanently revoking Fernandez's license to practice.

However, on appeal to a court, Fernandez successfully argued that the revocation was invalid both because the board's disciplinary guidelines failed to state a range of penalties, thereby failing to give licensees notice of the consequences of their actions, and because the board had failed to articulate any aggravating factors that led it to revoke his license, an action it was required to take because revocation in Fernandez's case was in excess of the discipline recommended by the guidelines.

When the case was returned to the board, it found five specific aggravating circumstances and again ordered a revocation of Fernandez's license. He appealed again, arguing that the evidence supported none of the five aggravating factors, and the case went before the Florida Court of Appeal in West Palm Beach.

The court, in an opinion by Judge Alan Forst, upheld four of the board's five factors, but struck one, a finding by the board that Fernandez's action had led to medical problems later experienced by his friend.

"This 'finding,'" Forst wrote, "is not supported by the competent substantial evidence in the record before us." With that aggravating factor stricken, the court returned the case to the nursing board to consider whether revocation was still the proper discipline for Fernandez.

Testing

Lack of documentation dooms test accommodations lawsuit

Issue: Testing accommodations under Americans with Disabilities Act.

A medical student who sued the National Board of Medical Examiners and his medical school for not providing testing accommodations for a reading disorder saw his claims dismissed August 23 by the U.S. Court of Appeals for the Tenth Circuit because he had failed to inform the NBME that he had provided them with all the documentation available on his disability (*Cunningham v. University of New Mexico Board of Regents*).

The University of New Mexico Medical School placed the student, Chad Cunningham, on academic leave in 2009 because he had not passed the first step

of the United States Medical Licensing Examination (USMLE), the national test for a medical license, a step the school requires to advance to the third year of study. Cunningham, who suffers from Irlen Syndrome, a reading disorder that results in headaches after long periods of reading, had already failed the test twice and a third failure would force him to leave the school.

Cunningham had failed the exam twice and one more failure would mean he could not continue in medical school. However, the student's complaint asserted contingent future harm and was thus not ripe for review, the court said. His assertion that he would risk his medical exam career if he took the exam without a judgment entitling him to accommodation did not by itself constitute hardship.

Cunningham claimed that his failing grades on the USMLE had been due to the bright fluorescent lighting in the testing rooms, which, because of his condition, caused him to experience severe headaches. Although he requested a disability accommodation for his second try at the exam, the NBME, which administers the USMLE, denied his request. Cunningham, the NBME explained, had not provided the needed documentation of his past accommodations.

Although Cunningham had requested and been denied similar accommodations from the school in the past, he did so again now, seeking help in establishing his claim before the NBME and to avoid a mandatory deadline for his completion of the medical school program. The school rejected his request again.

Now on leave, with the deadline for completing medical school approaching, Cunningham brought suit against the school and the NBME, claiming violations of the Americans with Disabilities Act and breach of contract.

The case eventually made its way to the circuit court, which issued a decision by Judge Jerome Holmes dismissing the suit. The court ruled that Cunningham's ADA claim against the Board of Medical Examiners was not yet ripe for review. The NBME, Judge Holmes explained, had only provisionally denied Cunningham on the grounds that it did not have sufficient information to evaluate his request. Cunningham had acted prematurely by filing suit instead of providing the documentation.

As for his claims against the university, Cunningham failed to show that he required help as a result of his syndrome. "Notwithstanding his accommodation request to UNM," Holmes wrote, "Mr. Cunningham demonstrated that he did not need an accommodation to pass his medical school classes or tests." His trouble was with the USMLE, a test that was not controlled by the school.

Last, in response to Cunningham's claim that the school should allow him extra time to graduate, Holmes wrote that such a request would be an unreasonable accommodation because it would require the university to change its advancement requirements.

Licensing

School employees may administer insulin

Issue: Supervision and scope of practice for non-licensees

In response to a challenge by the American Nurses Association of a legal opinion from the California Department of Education, the California Supreme Court ruled August 12 that unlicensed school employees have authorization to administer insulin to diabetic children if doing so on the orders of a doctor (*American Nurses Association, et al. v. Torlakson*).

Although federal law entitles diabetic school children to have someone administer insulin while at school, 26 percent of California's schools do not have a nurse on staff to administer those injections. The shortage makes administration of insulin difficult and, in 2005, four diabetic students from the city of Fremont filed a class action suit against the state for failing to adhere to the law.

As part of a settlement with the students who filed the lawsuit, the state's Department of Education issued a legal advisory opinion in 2007, which, among other things, authorized unlicensed school employees to administer insulin to students if instructed by a doctor to do so.

Shortly after the opinion was issued, the American Nurses Association (ANA) challenged it in court as promoting the unlicensed practice of nursing. The lawsuit prompted the American Diabetes Association to become involved, and it issued its own legal complaint seeking to dismiss the suit.

The ANA's challenge met with initial success when a trial court invalidated the section of the opinion that authorized injections by non-nurse employees. However, the American Diabetes Association appealed and the case eventually went up to the Supreme Court, which issued an opinion written by Justice Kathryn Werdegar.

Although an important issue, the case was unusually more cut-and-dried than a typical case meriting a published opinion from a state supreme court. California statutes, which regulate the administration of medicine at school, expressly allow for students to be assisted by nurses or "other designated school personnel" and the issue actually had a lengthy regulatory and enforcement history.

Further, the judge wrote, the state's Nursing Practice Act itself allows for unlicensed individuals to administer care to a patient prescribed by a physician as long as the person does not purport to be a professional nurse.

The ANA proffered differing interpretations of the law—arguing, for instance, that an individual acts as a nurse by performing nursing activities. But Werdegar did not agree. If the Nursing Practice Act were to be interpreted that way, she wrote, the Act's own exceptions would be meaningless.

Operation of medical marijuana clinics is practice of medicine

Issue: Defining scope of medical practice

The business operation of medical marijuana clinics in California requires a medical license, a state appeals court ruled July 31 (*People v. Superior Court, Sean Cardillo and Andrew Cettei, real parties in interest*).

Sean Cardillo and Andrew Cettei, who operated two medical marijuana clinics in Venice, California, were not licensed physicians but, in an attempt to comply with California law, the two contracted with physicians to work at the clinics. While lease agreements between the pair and the clinic doctors showed the doctors to nominally be in charge of the facilities, the agreements also directed two thirds of the clinic's profits to Cardillo and Cettei.

After an investigation by the state medical board, Cardillo and Cettei were criminally charged with practicing medicine without a license on the grounds that their operation of the clinics was the practice of medicine. Both objected, arguing that they could not be charged with unlicensed practice of medicine because they never actively treated patients.

This argument met with success before a magistrate and a trial court and the charges were dismissed. However, prosecutors appealed and the case went to a Court of Appeal in Los Angeles.

That court, in a decision written by Justice Thomas Willhite, reversed the lower courts' decisions and remanded the case. Quoting the argument of the prosecutors trying the case, Willhite wrote that the unlicensed practice statute "makes it illegal for an unlicensed person to 'practice … any system or mode of treating the sick or afflicted,' which would include 'the operation of medical clinics to treat sick people by exclusively prescribing marijuana and selling it to them.'"

Licensing requirements different enough to deny reciprocity

Issue: Standards for reciprocal licensing

The differences between Missouri's and Kansas's licensing requirements are significant enough that reciprocity cannot be guaranteed , a Missouri appellate court ruled March 26 (*State Committee for Marital and Family Therapists v. Haynes*). The court overturned a decision by the state's administrative hearing commission granting a reciprocal license to a Kansas therapist. Key to the decision was the fact that Kansas actually has two distinct levels of licensure for marriage and family therapists.

In May 2008, Jennifer Haynes, who is licensed in Kansas as a marriage and family therapist, applied for a Missouri license under reciprocity rules. After being turned down by the Missouri State Committee of Marital and Family Therapists, she challenged the denial before the state's Administrative Hearing Commission.

The Commission found in favor of Haynes, saying that the license requirements in Kansas were substantially the same as those in Missouri. The Committee appealed, but a state circuit court affirmed the decision. The Committee appealed again, this time to the state's Court of Appeals, which issued a decision on March 26 authored by Judge Joseph Ellis.

In Kansas, there are two types of marriage and family therapist licenses. Practitioners with a clinical license may practice independently, while licensed practitioners with a standard license may only practice under the supervision of a clinical therapist. Haynes, who had only a standard license, could not practice on her own. The Hearing Commission had incorrectly used the requirements for licensed clinical family therapists in making its comparison. The license requirements for a standard Kansas license are "substantially less stringent" than the Missouri requirements for license, the court said.

The Court of Appeals disagreed with the Commission, stating "Kansas has a different license and significantly different criteria for marriage and family therapists and for clinical marriage and family therapists," requirements that are "substantially less stringent" than those in Missouri.

Also, Ellis noted, Haynes scored six points lower than the minimum passing score for Missouri licensure on the nationally-used Examination in Marital and Family Therapy, although her score was sufficient for licensure in Kansas.

Because of Haynes's experience and additional coursework, those six points were the only thing that kept her from applying for non-reciprocal licensure in Missouri, the judge said. "But," he concluded, "there is no provision in [the law] allowing licensure for those that come close to meeting those requirements without satisfying them."

Board overreached in action against midwives, court finds

Issue: Board authority over unlicensed practice

The state medical board exceeded its authority when it issued cease-and-desist letters to two midwives whose advice resulted in the birth of a baby in the back of a car as well as hospital stays for both the new mother and baby, a Connecticut appellate court ruled July 23 (*Albini v. Connecticut Medical Examining Board*).

The decision limits the medical board's control to advice and practices that concern deviations from a healthy state of being and would seem to exclude advice about healthy, relatively-non-problematic births.

The case centered around prenatal care that the two midwives, Mary Ellen Albini and Joan Mershon, provided to an expectant mother beginning in 1999 or 2000. Contrary to the advice given by the mother's physician based on the position and fetal weight of the baby, the two midwives advised their client that a home birth was possible.

That advice proved short-lived when, during the birth, complications arose and the two midwives advised their client to travel to a hospital. However, the baby, apparently unhappy to deviate from the plan, began to arrive during the car ride, and the whole party pulled into a parking lot, where the birth occurred.

Although Albini and Mershon attempted to refuse arriving emergency responders access to the baby and the new mother, and initially advised against medical attention at each step, further complications eventually sent first the mother and then the baby, who was having difficulty breathing, to the hospital,

The end results of the mess, aside from a baby, were charges against Albini and Mershon filed by the state's public health department. After hearings ended in 2005, the state medical board determined the two had been practicing medicine without a license and issued a cease-and-desist order.

Albini and Mershon appealed the order, claiming that the board had no jurisdiction over their activities as midwives, and the case eventually rose to the Appellate Court.

The court, in an opinion written by Judge Barry Schaller, agreed with the midwives and ruled that the board had exceeded its authority. The statute under which the midwives had been charged, "by its plain language," the judge wrote, "defines the scope of unauthorized practice of medicine specifically in terms of abnormalities or deviations from a healthy state of being."

The board, however, had written in its decision that Albini and Mershon had engaged in diagnosing their patient's "condition," a word Schaller noted could encompass a healthy person, and the use of that wording put the board's ruling beyond its jurisdiction. The appeal was upheld and the offending section of the board's order was ordered stricken.

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