Professional Licensing Report

Licensing, testing, and discipline in the professions

July/August 2010
Vol. 22, Numbers 1/2

Highlights in this issue:

JAMA study: little chance of impairment getting reported…..1

Illinois drops online physician discipline profiles……....1

Licenses not renewed for eight years as contract stalled……...2

Massive security breach leads to test suspension…….4

Board to end controversial oral exam.....…….6

Rules defining negligence not required before discipline……..7

Doubling punishment due to aggravating circumstances.....9

Unhappy complainant may not second-guess board…..…….....10

Court refuses to hear challenge of discipline for drug abuse....12

Absenteeism legitimate cause for discipline……..…13

Board not obliged to ask if licensee can afford fine ……..14

Plus: *Open records ... Evidentiary standards ... 90-day investigatory deadlines ... Agreement not to sue .... Fees and state treasury ... Posting of online accusation ... Bombing attack on board chair ... FTV v. horse veterinarians ..."Kangaroo court" dismissal.*

Discipline

Cloud over self-regulation

One third of doctors who knew an impaired or incompetent colleague failed to report

Issue: Role of colleagues' complaints in enforcement

The obligation to report a potentially dangerous colleague in medicine should be similar to the obligation to report suspected child abuse or spousal abuse, say the authors of a study in the July *Journal of the American Medical Association* on reporting patterns among physicians. But the study found that a third of doctors surveyed who personally knew an impaired or incompetent doctor did not report the person to any hospital or clinic authorities, professional associations, or "other relevant authorities." Medical boards were not mentioned in the study.

As reported in the article, "Physicians' Perceptions, Preparedness for Reporting and Experiences Related to Impaired and Incompetent Colleagues," 17% of the doctors polled had direct, personal knowledge of an impaired or incompetent physician in their workplaces. Because peer monitoring and reporting are the primary mechanisms for identifying such physicians, the data "raise important questions about the ability of medicine to self-regulate," the authors conclude.

The most frequent reason physicians cited for failing to report was that they thought someone else was taking care of the problem. The next most commonly cited reasons: they thought nothing would be done about it, or they feared retribution. Only 64% of those surveyed said they completely agreed with the professional commitment to report.

The study has made a huge splash in terms of press attention, but its findings aren't surprising, said psychiatrist John B. Herman, former board member and chair of the Massachusetts Board of Registration in Medicine. "Physicians have a lot of concern about regulation, and

(See "Reporting," page 2)

Illinois scrubs online profiles

Issue: Online disciplinary histories

The state said it had no choice. Because the Illinois Supreme Court invalidated a law relating to medical malpractice on February 10, all the other reforms in the enacting

legislation were invalidated as well. That's why the online physician profile program of the state medical board had to be scrubbed from the Department of Financial and Professional Regulation's site, two years after the profiles were first made available via the web.

Due to compromises reached by legislators to gain passage of the physician profile law, there was an "inseverability" provision in the enabling legislation ensuring that if part of the measure were ruled unconstitutional, the whole thing would be stricken and would have to be reenacted. On its website, the department said it is "reviewing its options for reinstatement," and apologizes for any inconvenience.

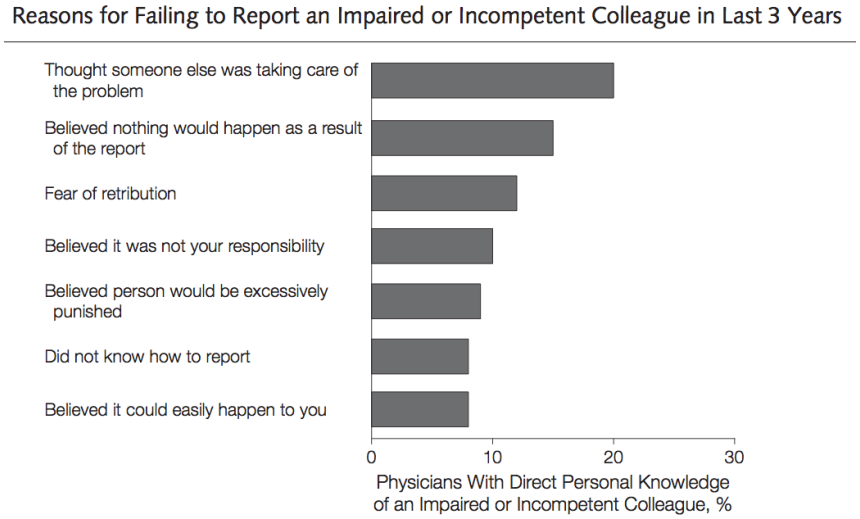
It is still possible to view a description of any disciplinary action taken against a physician. But the profile had also included whether the doctor had malpractice judgments or settlements, felony or Class A misdemeanor convictions, or restriction of hospital privileges within the last five years.

The *Chicago Tribune* cited one example: the case of surgeon Nercy Jafari. He was convicted of sexually abusing a patient, but because the Department chose not to take action against him, its website does not mention the conviction. Patients would need to search the state's online registry of sex offenders or DuPage County court records, the *Tribune* said, to discover Jafari's history.

Reporting of impairment or incompetence *(continued from page 1)*

particularly with the lifeblood of a physician, which is their license."

In his state, with some 38,000 physicians, "given what we know about addictions—that 10% to 20% of people have substance misuse problems—you can do the math. Some physicians are in trouble, but the number of reports is vanishingly small." Complaints about physicians to the medical board are rarely made by other physicians, he said; they come mostly from aggrieved patients and other government agencies or hospitals that are mandated to report in certain cases.



All physicians reporting direct personal knowledge of an impaired or incompetent colleague (n = 309) were asked to respond "yes" or "no" to each item, so percentages add up to more than 100%.

Source: JAMA 2010; 304(2):187-193.

Health lawyer and former Pennsylvania medical board member Nathan Hershey agreed that the role of colleagues' reports in medical regulation is small. Doctors who are aware of impaired or incompetent colleagues probably report such matters to the managers of their hospital or clinic. "My impression is the entity fires the doc, does not renew a contract, and then moves on." Referring to the University of Pittsburgh Medical Center, he said, "I cannot picture a UPMC doc here going on his own to the state board."

Unfortunately, licensing bodies for both doctors and lawyers "are almost entirely reactive with near zero [acting] proactively," commented Wisconsin health lawyer Dennis Purtell. "The sad news is that there is no real functional alternative. Governmental agencies provide a most limited ability to assist, due to finance problems. The reality is that licensure is bare-minimum quality control."

Licensing

The online licensing system that wasn't: Board renewed no licenses for 8 years while spending $1 million on online system, audit finds

Issue: Online licensing systems

A state licensing authority created in 2001 to regulate Hawaii teachers simply stopped renewing licenses and merely extended them, while it wasted over $1 million in the attempt to develop an online licensing system that was not operable, says a scathing report by the Hawaii Legislative Reference Bureau.

Up to January 2010, the bureau found, the Hawaii Teacher Standards Board did not renew a single license. As a result, teachers renewing for the first time were not required to meet any of the licensing standards, and those seeking subsequent renewals only have to meet two of the ten licensing standards.

Perhaps more significant: The board did not even attempt to accept and process hard copies of license applications by hand, instead just using authority it did not have to extend the licenses, the report notes. "The validity of licenses that expired in 2004 or later was questionable."

Among other problems found by the state auditor, the board was plagued by a lack of technical expertise because of a long-term vacancy in the position of data processing systems analyst—blamed variously on statewide hiring freezes and a lack of qualified candidates. "As a result, the HTSB still lacks an employee who has the expertise to monitor the work of its contractor," the report said. The authors criticized the executive director for taking control of the online licensing system project without being trained in information technology, and for acting without the approval of the board many times by approving payments to the third vendor.

"The Hawaii Teacher Standards Board—Is Oversight Needed?" was released in January 2010. The 2010 state legislature passed a bill requiring the board to submit a report prior to the 2011 Legislative Session, outlining whether or not the board requires more funding through an increase in teacher fees and how it plans to comply with current laws.

What went wrong with the contract for the online system? According to the report, "the [board] placed great hope in an online teacher licensing system," and prepared to fully launch it in January 2003. But "the nearly seven years that followed were plagued with problems with the contractors hired to develop" the system.

Teacher Records, Inc., was the first contractor and had a three-year time frame, but near the end of 2003, the company said it "had underestimated the scope of the project and needed additional resources to complete it." Subsequently, a former

employee of Teacher Records spun off Open Frameworks Corporation, and the contract for the online licensing system was formally assigned to that company.

"Over the next several years, there were repeated promises by the contractor, executive director, and the HTSB that the project was near completion. After a conflict occurred between the HTSB and Open Frameworks Corporation in 2008, the contractor shut down the board's computer system, disabled the HTSB's website and email function, and blocked access to licensing applications used by the HTSB's staff."

The HTSB is currently using a third contractor, Hawaii Information Consortium, and now reports that its online system is functioning.

Testing

Massive security breach prompts boards to spend thousands of dollars to suspend some testing

Issue: Test security

In a move that will halt the license application process for many candidates and cost several agencies—including itself—hundreds of thousands of dollars, the Federation of State Boards of Physical Therapy (FSBPT) in July halted the administration of the National Physical Therapy Exam for graduates of physical therapy schools from Egypt, India, Pakistan, and the Philippines until a new test can be developed in Fall of 2011.

No one will be allowed to register for the current test, while candidates in the midst of the approval process have been refunded their money, and candidates already approved to take the exam have been offered refunds and told they should not proceed.

Maribeth Decker, associate to senior staff at the Federation, explained that the cancellations were prompted by massive security breaches in the test's administration by hundreds of individuals. Citing one investigation, she said, "more than 200 individuals were found to be using at least 14 different email accounts to distribute recalled questions."

The decision to suspend the exam was based not only on the evidence of question-sharing, but also on analyses of candidate performance across programs, according to Maribeth Decker. The Federation's analyses revealed that graduates of the restricted programs, as a group, and as compared to graduates of other programs, "show stark anomalies in their score performances and demonstrate a pattern of behavior that is sufficiently suspect of having an unfair advantage on the exam."

At the time of the activity these individuals were located across the U.S. as well as internationally, but all were identified as, or were believed to be, affiliated with PT programs in the restricted countries, Decker said.

In a posting on its website, the Federation lists the St. Louis Review Center in Manila as the most notable offender. From that center's offices evidence was seized revealing "the widespread sharing of hundreds of live test items." Decker also said that no FSBPT employees or contracted workers were found to be involved in the breaches.

The Federation chose to cancel the exam and wait for the new test to be developed, rather than continue with the old exam in the interim, because it did not want to risk exposing more examination items to sharing. It also cited concerns that, under the current circumstances, the test could not be relied on to give an accurate indicator of the competence of the test-takers.

Those candidates that had already been approved for the test received a letter explaining the decision and outlining their options. Approved candidates may either receive a full refund and consider themselves eligible for the new test, whenever it is ready to be used, or they may continue with the test for which they have been approved.

However, the letter cautions candidates who wish to continue with the current test: “Given the extensive nature of the detected security breaches and our heightened security procedures, it is *highly likely* that your score will be invalidated based on the results of one or more score analyses. If you choose to test and your score is invalidated, *no refund* will be provided.” (Bold and italics in original.)

Decker explained the possible invalidations. “The criterion is a forensic psychometric analysis demonstrating a pattern of behavior that is sufficiently suspect of having an unfair advantage on the examination. These might include, in addition to other analyses, whether the candidate was getting the easy questions wrong and the hard questions right, similarity in response amongst members of the group, and the amount of time spent responding to a question.”

The new test, called the NPTE-YRLY, will have entirely new items, will be given once per year, and will be otherwise identical to all other NPTE test forms, said Decker. The main difference will be one of security. The Federation estimates that it will take around 18 months to create.

Given the breadth of the cancellation and the extensive wait until the new test-creation process is finished, questions naturally arise as to the effect of the decision on those candidates who will have to wait. Asked for comment, Decker said, “We acknowledge the consequences of this action, but everyone has been placed in a rather tough situation as a result of this systematic sharing of recalled items. FSBPT’s top priority, however, is ensuring the security of the exam and the validity of candidate score performances."

"FSBPT’s role is to protect the public from candidates that do not meet minimum entry-level competence to enter practice, particularly given that the public is not in the best position to judge the competency of their physical therapist.”

Testing processes exempt from open records law

Issue: Confidentiality of test development material

The U.S. Supreme Court, in a June 14 action, refused to hear the appeal of an unsuccessful applicant to the bar who was denied additional information about bar examination procedures (*Timothy Lamb v. North Dakota State Board of Law Examiners*).

This leaves intact the January 12 ruling of the Supreme Court of North Dakota, in which it held that the applicant, Timothy Lamb, did not have a "clear legal right" to the information he sought about the February 2008 bar examination procedures.

Lamb wanted "emails, phone messages, letters, memoranda, notes, minutes of meetings, training materials, and all relevant documentation" relating to February 2008 bar exam procedures. He requested information on:

1) grading techniques
2) how raw scores are converted
3) whether the board performs periodic assessments of its scores

4) whether a report is available of psychometric procedures
5) whether the board has an ongoing assessment of its procedures
6) what practices the board uses in maintaining acceptable standards
7) how the essay scoring judges are trained
8) whether a content analysis has been conducted to measure the relationship of questions to being competent in the legal profession
9) security measures and related bar exam information.

The board had provided Lamb with "a great deal of information," the courts agreed, including a copy of his two personal Multistate Performance Test question and answer booklets with the drafter's point sheet and model answers for each, a copy of his personal six Multistate Essay Examination question and answer booklets and the analyses for those questions, and a copy of the state board's grading guidelines.

The board also divulged where the conversion and scaling of scores are performed, where the Multistate Performance Test and Multistate Essay Examination are prepared, and how often the pass-fail policy is reviewed.

Under a 1990 law, all records maintained by the board regarding applications for admission to practice law, all exam materials, and all board proceedings are confidential except for a few exceptions such as basic applicant information and statistical summaries.

Oral exams head for extinction with California move to drop

Issue: Testing Formats

One of the nation's last remaining oral exams for architects will be eliminated in 2011 when the California Architects Board finishes developing a multiple-choice written exam to replace it.

In September 2009, the board unanimously voted to convert the California Supplemental Exam (CSE) from an oral exam to a written test. This resulted from a decision two years earlier to hire an outside consultant to complete an objective study of the oral format and other possible options.

The format change "would increase defensibility, maintain examination integrity, expand capacity to serve candidates, and preserve the board's resources," the board said.

The oral exam had been the target of complaints about the delay it imposes on candidates, in addition to its low pass rate. "Most likely the earliest oral exam date available will be filled up by the time you qualify," said one candidate on an online forum. "Maybe even the next one. I mailed my last registration form in right away; the day after it arrived in my mailbox, and I STILL did not get scheduled to take the exam until the 3rd-earliest date." Said another: "I'd say prepare yourself for the possibility that you will have to sit around twiddling your thumbs for the next 9 months waiting for your test date to roll around."

Administered after candidates have passed all divisions of the Architect Registration Examination (ARE), the 28- to 35-question oral exam was intended to test aspects of practice that the ARE does not adequately address, plus areas unique to California including seismic design, energy conservation, environmental concerns, and legal issues.

"The CSE is not like most other examinations," says the board. The oral exam "takes a scenario project through a natural course of development and includes graphic and written documents that candidates have the opportunity to review prior to and during the exam." A panel of three architect commissioners grades the candidates' overall understanding in their answers to predetermined questions.

Over the years, multiple state reviews of the board by the Joint Legislative Sunset Review Committee had recommended that the board explore converting

the oral exam, a 90-minute test that on average only 50% of candidates pass. The architect board said that recently it had already moved toward a written exam by starting to present exam questions to candidates in written format during the exam.

Among other benefits of the change will be an increase in the administration of the CSE and a significant reduction in the CSE fees. It plans to administer the written exam via 13 computerized test centers throughout California, as well as 10 additional sites located across the U.S.

Discipline

Rules defining negligence not required before imposing discipline

Issue: Delegation of legislative powers

If the legislature delegates to a board the power to impose discipline for "negligence" within the licensee ranks, that is sufficient to allow the board to create standards through adjudication alone, the Supreme Court of Oregon ruled July 9 (*Nicholas W. Coffey v. Board of Geologist Examiners*).

Upholding the discipline of geologist Nicholas W. Coffey, the court rejected his argument that the state Board of Geologist Examiners was required to complete the legislative regulatory scheme by rule promulgation, not adjudication.

Coffey argued that the board was required to promulgate rules stating their standards for selecting particular sanctions and, having failed to do so, had no legal right to impose those sanctions. He also argued that the board, in regulations that it did promulgate, insufficiently defined "negligence" and improperly relied on expert testimony to determine the standard of care outlined in that definition. The court, in a detailed opinion, rejected both arguments.

Coffey was accused by the board in 2005 of having committed "negligence, gross negligence, incompetence or misconduct in the practice of geology as a registered geologist" as the result of complaints about three reports he prepared as a geologist. After a hearing which affirmed the charges, Coffey's license was revoked. He appealed, the board's order was affirmed, and he appealed again.

To support his argument, Coffey relied on *Megdal v. Board of Dental Examiners* (1980), in which a court determined that "when a licensing statute contains both a broad standard of 'unprofessional conduct' that is not fully defined in the statute itself and also authority to make rules for the conduct of the regulated occupation, the legislative purpose is to provide for the further specification of the standard by rules."

Having failed to promulgate rules explaining the selection of different disciplinary sanctions, the board did not have the power to impose those sanctions, he argued.

The court disagreed. Unlike the dental board case, the legislative scheme in this case delegated "the power to impose a sanction from the list of sanctions set out in [the statute] … if it finds that a registrant has 'been involved in' conduct described."

Here, the delegated power of the board was "more analogous to the interpretation and application of existing law than to the making of new law." Further rejecting a sub-argument regarding fair notice, the court held that rules

describing the criteria by which particular sanctions will be chosen are not necessary for the board to impose discipline.

Coffey's second argument involved rules the board *did* promulgate, though not to his satisfaction. The board's rule defining "negligence" does so as a "[f]ailure by a registrant to exercise the care, skill, and diligence demonstrated by a registrant under similar circumstances in the community in which the registrant practices." Coffey argued both that the rule was insufficient in failing to outline how the community standard of care will be determined and that the board acted improperly by relying on an expert to help determine that standard.

The court rejected this argument as well. "[T]he community standard element of negligence may differ from place to place and, ordinarily, is determined by courts and other tribunals on a case-by-case basis, frequently with the aid of expert testimony. Consequently, we cannot attribute to the legislature an intent to require the board to specify by rule, in advance of adjudication, how it will determine the community standard of care in every case."

Strong evidence of sexual assault warrants revocation

Issue: Standards of evidence

In the face of numerous incidents strongly suggestive of sexual assaults on patients, a Massachusetts court upheld a board revocation of a nursing license May 7 (*Paul D. Duggan v. Board of Registration in Nursing*).

The Supreme Judicial Court of Massachusetts rejected the claims of Paul Duggan, a Boston emergency room nurse, who had argued that the Board of Registration in Nursing's decision to revoke his license was unsupported by evidence, was arbitrary, and lacked a statement of reasons.

The decision to discipline Duggan stemmed from a series of incidents, from 1998 to 2000, in which Duggan was caught in several compromising situations, including three cases in which he was found in locked or barricaded rooms with young and highly intoxicated women patients. In making its decision, the board stated that all of the incidents combined, and the last-reviewed incident alone, were sufficient violations of professional standards to result in the loss of Duggan's license.

Duggan appealed, claiming that the revocation lacked substantial evidence for support, an assertion that was roundly rejected by the reviewing court. Without speculating as to his motives in each compromising situation, the court found that substantial evidence existed for every conclusion the board made against Duggan.

Although Duggan claimed legitimate purposes for all of his actions, and objected to the board's characterization of his actions as gross misconduct, the court repeatedly denied his objections to the board's decision as irrelevant or out of context.

The case was remanded to the county court with instructions to affirm the board's decision. "The board did not abuse its discretion in determining that Duggan's conduct, individually, collectively, or in totality … warranted the revocation of his license," the court said.

Missing 90-day investigation deadline is not fatal to complaint

Issue: Discipline and deadlines

Violations of Michigan's legal deadlines for boards to investigate complaints against health practitioners do not require dismissal of the complaint, the Court of Appeals of Michigan ruled June 8 (*Bureau of Health Professions v. John Gil Chun*).

The case stemmed from the practice of John Gil Chun, a physician responsible for treating the medical needs of patients in a prison for the mentally ill. Chun was terminated from employment at the prison in 2000, then reinstated and later terminated a second time. The Bureau of Health Professions filed a complaint alleging he had provided negligent and incompetent care to 11 patients at the facility, and his license was suspended.

In his appeal, Chun argued that the complaint should have been dismissed because the Department of Community Health took more than 90 days to investigate and take actions on the allegations against him.

But although the law specifies that certain actions must be taken within 90 days after initiation of an investigation, the court said violations of the time requirements do not require dismissal. "A clear reading of the statute shows that dismissal is provided as one option to pursue … not as a sanction for an investigation not completed on time."

Maintaining that the Public Health Code should be "liberally construed" to protect the public, the court said in this case "it would not be reasonable to dismiss the complaint and fail the public in light of a complex and lengthy investigation."

Aggravating circumstances may double original punishment

Issue: Due process claims

The state medical board may consider aggravating circumstances, not mentioned in its original discipline charges, in order to double its original sentence against an offending licensee, an Ohio court ruled July 27 (*Leonid Macheret v. State Medical Board of Ohio*).

The Court of Appeals of Ohio, Tenth Appellate District, Franklin County, rejected the arguments of physician Leonid Macheret that the board's consideration of those aggravating circumstances amounted to new charges and a violation of his due process rights.

When questioned about allegations that he had a sexual affair with a patient, Macheret claimed that he had terminated the doctor-patient relationship in writing before the tryst began. The patient denied that assertion and stated that Macheret had never informed her he could no longer act as her doctor and that she herself had ended the doctor-patient relationship after the conclusion of the affair.

The hearing examiner assigned to the case believed the patient, finding that Macheret was not credible when he claimed to have ended the professional relationship before the personal relationship began. In the end, the hearing examiner recommended permanent revocation of Macheret's license, with the revocation stayed and a suspension of at least 180 days.

The board followed these recommendations, except that it increased the suspension to a full year. That decision was due, at least in part, to the board's

disapproval of Macheret's practice of exchanging hugs and kisses with his patients; several board members hearing the case expressed strong disapprobation of the practice, although their statements never intimated a belief that the behavior was sexual on the part of the doctor.

In his appeal, Macheret claimed that the board's consideration of this behavior amounted to bringing a new charge against him after the hearings had already commenced.

In June of 2000, Macheret began an affair with a patient whom he was treating for several minor ailments, mostly by prescribing supplements and intravenous injections of vitamins and minerals. According to Macheret, before the affair commenced, he told the patient that he could no longer be her doctor, but the patient denied this conversation ever happened. Macheret saw the patient twice more, once to give her an unscheduled injection and once to treat back pain. The relationship soon ended, the patient confessed the affair to her husband, and he, in turn, reported Macheret to the Cincinnati Academy of Medicine, who passed the case on to the board.

In rejecting this line of argument, the court pointed out the difference between the conduct alleged by Macheret and what the board actually did. Without formally acting on new charges, "a disciplinary body may consider aggravating circumstances, including uncharged misconduct, in determining the appropriate sanction for a member who violates the rules of practice."

The board could not be considered to have initiated new charges against Macheret because it did not find him in violation of professional rules for the new conduct in question. Its use of this evidence simply to increase Macheret's punishment within the possible bounds of sanction for his charged offense was not a violation of his right to due process.

Macheret also challenged the board's decision to discipline him for, as Macheret saw it, failing to give a written notice of termination of the doctor-patient relationship, a practice not required by Ohio law until six years after the events in the case. But, "[c]ontrary to Macheret's contention, the board disciplined him for his misrepresentations during the investigatory process, not failure to follow" the code requiring written notice, the court said.

Unhappy complainant? No right to second-guess board

Issue: Duty to complainants

State licensing boards are authorized, but not required, to investigate allegations that are brought to their attention, the Superior Court of New Jersey, Appellate Division, said February 22.

Ruling on a complaint filed by an unhappy client of architect John Heyrich, the court said the client did not have a right to judicial review of the architects board, which decided not to file disciplinary charges against Heyrich (*Angela Burns v. John Heyrich and New Jersey State Board of Architects*).

The client, Angela Burns, filed a complaint with the State Board of Architects charging that Heyrich performed incompetently, engaged in professional misconduct and employed improper billing practice after she retained him to design a home. After reviewing Burns's evidence and Heyrich's response, the board found no violations of state law or regulations, advised that it had "cautioned" Heyrich regarding his communication methods when working on future projects, and closed the matter without filing disciplinary charges.

Burns contended that the board's procedures did not afford her a fair hearing, the board did not answer the questions she raised, and the board should be required to set forth its reasons for choosing not to discipline Heyrich.

The court said the legislature has given professional boards "broad discretion" to decide whether and how to investigate allegations brought to its attention. In a similar case relating to the state medical board, the court said the complainant did not have a right to judicial review of the board's response because the patient was not a party to a proceeding before the professional board or affected adversely by its action (or non-action). The same reasoning justified its decision to dismiss Burns's case, the court said.

Licensee may challenge agreement not to sue over discipline

Issue: Discipline settlements

A doctor who signed a memorandum of agreement with the state medical board forbidding her from challenging a disciplinary decision in court must be given a chance to challenge the validity of the agreement itself at a trial, the Supreme Court of Alaska ruled July 16 (*Anne Marie Yost v. Division of Corporations, Business and Professional Licensing*).

Anne Marie Yost, a neurosurgeon, successfully argued that a lower court's dismissal of her case as an administrative appeal was a violation of her due process rights.

Yost had practiced medicine in Washington state until 2004, when she moved to Alaska and applied for a license. When asked if she had ever been the subject of an investigation by a medical licensing body, she answered in the negative, though, in fact, she had been the subject of such a complaint in Washington state. When questioned about the lapse, she explained that the Washington state episode had barely registered with her and that she did not consider it to be a formal investigation for the purpose of the question. Indeed, the complaint against her had been dismissed fairly quickly with a finding that no evidence of a violation had occurred. Nevertheless, the investigator for the Alaska State Medical Board saw the issue as a serious matter, and Yost's application was stalled.

Yost was accused of failing to report that she had been the subject of a complaint in Washington state. However, because her lapse seemed relatively light and "neurosurgeons in Alaska are not easily replaceable," Yost was given the opportunity to enter into a memorandum of agreement with the board, requiring her to pay a $1,000 fine and receive a reprimand. In turn, she would be given a temporary license immediately and a permanent one once the board approved the agreement.

Yost claimed that, before signing the agreement, the investigator in the case assured her that she would be afforded an opportunity to appear before the board and explain the lapse on her application, as she hoped to have the disciplinary case dismissed. However, on the day the board was to consider her case, business proceeded quickly and the matter was heard three hours earlier than expected.

Yost's attorney could not be reached at the time, so the board formally accepted the memorandum without input from Yost. Later, the investigator denied that an assurance of participation was given and pointed out that the memorandum itself did not include such a provision, though it did state that she would be allowed to attend, either in person or by telephone.

Yost brought a breach of contract suit against the board and a state agency, the Division of Corporations, Business and Professional Licensing, which a trial court converted to an administrative appeal and dismissed.

In her appeal before the Supreme Court, Yost argued that her due process rights had been violated when the court refused to give her a trial. The Division argued that Yost was kept from bringing suit by a clause in the agreement barring her from appealing any disciplinary decision of the board in the matter.

The court disagreed with the notion that the memorandum of agreement, itself, barred suit in this case. While an appeal from a disciplinary decision by the

board would indeed be barred by the wording of the agreement, Yost's suit was not an appeal from such a decision but an attack on the validity of the agreement itself. The memorandum could not bar a challenge to its own validity. As to the cause of action, the lower court was correct in converting the breach of contract suit into an administrative appeal, according to the court.

Yost did have the right to have a hearing on the merits of her claim, the court said. Further, summary judgment was not appropriate because the contentious issue was one of fact and credibility, appropriately determined by a fact-finder, not by a judge as a matter of law.

The court remanded the case to the lower court, to weigh the matter of the alleged promise to Yost. If it determined that the promise was given, the case was to be remanded back to the board where Yost would receive a hearing on the merits of her discipline.

Court refuses to hear challenge of discipline for drug addiction

Issue: Appeals of state discipline to federal courts

Because federal courts are prohibited from unnecessarily interfering in state adjudicative proceedings, the U.S. District Court in Maine abstained July 12 from hearing the claim of a Maine doctor seeking an injunction against the state medical board (*Ellen Michalowski v. Anne L. Head, et al*).

Ellen Michalowski, a Maine physician, brought suit against the Maine Board of Licensure in Medicine, seeking an injunction and declaratory relief to keep the board from disciplining her for her substance abuse problem. Although Michalowkski alleged bias and a violation of her rights to due process, the court held that the *Younger* doctrine, a rule based on precedent, required it to abstain from hearing the case.

Michalowski had a long-running problem with knee pain which led to a painkiller addiction. That, in turn, led to action by the Maine Board of Medical Licensure. In 2007, she entered into a consent agreement with the board, limiting her to using one approved physician for prescriptions and one for primary care. Despite the agreement, Michalowski continued to abuse painkillers, at times self-prescribing.

In August of 2008, Michalowski voluntarily accepted a suspension of her license and entered substance abuse treatment, which seems to have been successful. Provided with a second consent agreement barring her from re-applying for her license for four years, Michalowski refused to sign it and the board prosecuted her for unprofessional practices stemming from her addiction. In July 2010, Michalowski sought an injunction and declaratory judgment against the board, seeking to keep it from prosecuting her case.

To prove her case, Michalowski introduced several pieces of evidence of what she alleged was bias on the part of the board. The most substantive-seeming of the allegations was that an assistant attorney general who normally provided legal counsel to the board served as prosecutor in the case. The other objectionable actions were mostly statements made during the proceedings that Michalowski saw as evidence of bias.

The court did not agree with Michalowski's interpretation of her evidence. As the Office of Attorney General is required by law to provide representation to state agencies, and because an independent hearing officer was hired to proceed with the case, the AAG's participation was not evidence of bias.

The rest of the evidence, the court said, including a remark by a member of the board that an assertion by Michalowski's attorney was "ridiculous" and a positive assertion by a board member regarding the credibility of an investigator in the case, "has not nearly risen to the level of bias that would justify application of an exception."

Absenteeism due to alcohol abuse is cause to discipline

Issue: Substance abuse and unprofessional conduct

A nurse who at one point missed 18 out of 60 work days due to alcohol impairment may be disciplined, a Missouri court ruled July 6 (*Janice M. Koetting v. State Board of Nursing*). The Court of Appeals of Missouri, Western District, upheld the discipline imposed by the state Administrative Hearing Commission against nurse Janice M. Koetting for missing significant periods of work due to alcohol use, though she was not alleged to have performed her nursing duties while impaired.

From December 2003 to February 2004, Koetting missed 18 of 60 days of her work as a nurse at Cedar County Memorial Hospital in El Dorado Springs, all without explanation. These initial absences were followed by a leave of absence, then her return, her termination, and the initiation of discipline against her.

After her employers became aware that her absences were related to an alcohol problem, Koetting was granted a leave of absence to seek treatment. When she returned the next month, she signed a "Return to Work Agreement" with the hospital, stating that the leave had been for "alcohol impairment" and requiring Koetting to submit to requested drug testing and to report to the emergency room if she called in to miss work for any reason.

Despite the agreement, Koetting missed work three days after signing the agreement and failed to contact the hospital in any way. When a friend from the hospital went to check on her, Koetting admitted to drinking the night before and being tired and depressed as a result, then agreed to be taken to an alcohol treatment facility. The hospital fired Koetting and reported her termination, causes and all, to the Board of Nursing.

Koetting drew an analogy with golfer Tiger Woods in arguing that her absences did not amount to an impairment. She said "no one would argue that Tiger Woods is 'impaired' in his professional golfing abilities because he has missed some tournaments."

But the court, finding that Koetting's absences did, in fact, amount to an impairment, rejected the golf analogy. Unlike Tiger Woods, Koetting was a "member of a 'health team'" and the "disregard of her professional responsibilities by engaging in alcohol use … impaired her ability to work as a nurse and was subject to discipline."

The board then filed a complaint under a law which allows the imposition of discipline for the use of any "alcoholic beverage to an extent that such use impairs a person's ability to perform the work of any profession licensed or regulated by" certain other sections of Missouri law, the end result of which was a one-year probation. A trial court affirmed the discipline, and Koetting sought relief in the Court of Appeals.

She advanced several arguments supporting dismissal of the charges against her. First, she claimed that the evidence of her alcohol use was insufficient to show that she was impaired and subject to discipline under the above-mentioned law.

Further, the Return to Work Agreement, which admitted her alcohol impairment and which was signed by Koetting, was, she argued, inadmissible because it was an involuntary admission—she had feared for her job—and in violation of court-made law governing the admission of such evidence.

The court rejected this argument because Koetting had failed to advance, and even rejected, the idea of contesting the Agreement's use as evidence of alcohol abuse in her hearing before the Commission. In any case, the court continued, "the 'conscious or voluntary acknowledgment' element of this rule [is] met in circumstances where there is dispute as to whether the admission was voluntary or coerced. Questions about the voluntariness of an admission go to the weight a fact finder can give the admission and not its admissibility."

Aside from the agreement, the court said, her repeated absences and the testimony of the friend that took her to treatment were strong circumstantial evidence, as was the fact of her last absence "despite knowing the consequences of such a course of action." The commission had sufficient evidence to support its decision.

Although none of Koetting's patients suffered harm from her actions, "the duty of the board is broader than responding to harm—its duty is to proactively seek to prevent harm by members of this profession before it happens." And while absenteeism by itself was not subject to discipline, "when such absence is caused by alcohol impairment, and more particularly when such conduct becomes frequent or habitual," discipline is proper.

"A holding that habitual absenteeism caused by alcohol abuse does not support disciplinary action … could adversely affect patient care by potentially leaving hospitals understaffed or forcing some nurses to work double shifts, putting patients at greater risk."

The last argument offered by Koetting was one of public policy. By punishing her decision not to report to work impaired, she claimed, the Commission would create a "dangerous incentive, ... encouraging nurses and other health professionals to report to work when they are impaired."

This argument, too, was rejected. Because reporting to work impaired would itself subject a licensee to discipline, it would not be reasonable to assume that an impaired worker would choose that route and its risk of discipline over being absent. "Our ruling today does not encourage nurses to risk driving drunk to work or to perform the work of a professional nurse while under the influence of alcohol. It does discourage habitual, excessive alcohol use by professional nurses that would impair their ability to practice their profession."

Board not obliged to ask whether licensee can afford penalty

Issue: Discipline sanctions and licensee rights

A board may impose civil penalties on a former licensee for actions that occurred while his license was still valid, the Superior Court of Maine held July 27 (*James D. Cyr v. Board of Licensing of Auctioneers*). The court decided that the state Board of Licensing of Auctioneers could impose penalties on former licensee James Cyr despite the fact that his license had already been revoked.

Cyr's case formally began in 2008, when he entered into an agreement with the board as the result of several regulatory violations. The agreement suspended Cyr's license for one year and required him to notify any potential consignors of his suspension. Later in the same year, Cyr's license was revoked for other transgressions. Prior to this revocation, Cyr both continued to accept consignment contracts in spite of his suspension and failed to adhere to the requirement that he notify potential consignors of his license status. As a result, the board held two hearings and fined Cyr around $33,000. Cyr then appealed to the Superior Court.

It also ruled that questions about the propriety of the penalties, given Cyr's possible inability to pay them, should have been advanced by Cyr at the administrative stage and could not be considered now.

Cyr put forward two arguments. First, he said, the board did not have the power to assess penalties against him because his license had already been revoked at the time of their assessment. Second, he argued, the board was required—and failed—to consider his ability to pay when imposing the civil penalties.

Answering Cyr's argument that the board, as stated by law, was only able to impose discipline on a "licensee or applicant for licensure," the court stated, "The problem with this argument is that it is equally possible to interpret [the

statute] as authorizing discipline against anyone who, at the time of the violations, was a licensee or applicant for licensure."

Further, the court said, a statute authorizing the board to impose penalties on individuals practicing without a current license supports the idea that the board can impose penalties for practicing with a revoked or suspended license.

"If discipline can be imposed for engaging in an activity requiring a license after that license has been revoked, it follows that discipline can also be imposed after revocation for actions undertaken in violation of a license suspension."

The court gave more weight to Cyr's second argument but rejected it nonetheless. While the court agreed that ability to pay was a relevant factor to the imposition of civil penalties, "it is the respondent's obligation to raise the issue" because "any relevant information with respect to ability or inability to pay is almost always in the possession of the respondent." As long as the board afforded "a reasonable opportunity to raise ability to pay" during its proceedings, "this issue cannot be raised for the first time on appeal."

Take Note

Earmarked licensing fees not separate from state treasury

A Kentucky physician appealing the restriction on his license tried to argue that the physicians on the medical board weren't really immune from suit because the board is funded by doctors fees which are not part of the state treasury. But in a February 26 ruling in *Quatkemeyer v. Kentucky Board of Medical Licensure*, the U.S. District Court for the Western District of Kentucky rejected this reasoning.

Under state law, fees collected by the board are paid into the state treasury and credited to a trust which is used by the board for its costs and expenses, the court said. "While it is true that those trust funds never revert to the general funds of the commonwealth, the funds are still a part of the state treasury and any damages judgment in this case will be paid out of state treasury funds. Simply earmarking the funds for a specific purpose does not render the funds separate from the state treasury for purposes of the Eleventh Amendment." The court dismissed most of the case filed by Bradford Quatkemeyer, whom the board placed on a five-year probation over his controlled substance prescription practices.

End-running board, state posts licensee accusations on its own

After the state accountancy board failed to meet an August 18 deadline set by the California Department of Consumer Affairs for posting detailed accusations filed against licensees online, the department unilaterally posted the information involving the 22 accountants itself. The accountancy board was the only board or commission under the department that had failed to comply with the order. Each accusation includes a large watermark across it noting, "This is not a disciplinary action or a final decision of the board."

Disciplined doctor convicted in bombing that maimed board chair

Following a month-long trial, a federal jury on August 6 convicted Arkansas physician Randeep Mann of setting off a car bomb to injure the chair of the Arkansas medical board. Mann was convicted of seven counts, including using a weapon of mass destruction against a person and property, and using an explosive resulting in personal injury. In the February 2009 attack, former board chair Trent Pierce, a family practitioner, was approaching his SUV to head to his clinic when the bomb exploded; he incurred serious injuries and lost an eye. Mann was the subject of multiple disciplinary proceedings relating to his prescription practices in his specialties of internal medicine and pain management. Shortly after the bombing, federal agents discovered he possessed a grenade launcher; along with the convictions relating to the bombing he was found guilty of possessing 98 unregistered grenades and illegally possessing two machine guns. Mann faces a possible sentence of life imprisonment.

Back off on equine dentist restriction, FTC tells board

A proposed rule that would prohibit non-veterinarians from floating the teeth of animals with motorized or air-powered files, unless they were supervised by a veterinarian, would eliminate

important competition without countervailing benefits, said the U.S. Federal Trade Commission in an August 20 letter to the Texas Veterinary Medical Examiners board.

Teeth floating involves filing or rasping down the outer contours of a horse's teeth which can wear unevenly and leave sharp points that are painful to the horse. The FTC said its staff "is not aware of evidence that this new restraint is needed to protect animal well-being or otherwise to benefit purchasers of teeth floating services," but it would likely reduce Texas consumers' choices and increase the prices they must pay for floating. The board's own material supporting the rule indicates that it might increase prices by 15 to 20 percent, in a state that has close to a million horses.

The FTC cited a Texas legislative committee report from 2006, which found that non-veterinarian providers of animal dental services are highly proficient in their work and often graduates of schools with rigorous training programs. There is a shortage of veterinarians willing to provide dental services and veterinary schools do not emphasize animal dentistry in their programs, the committee noted.

"Kangaroo court" dismisses licensee appeal

An Ohio court dismissed the appeal of a disciplined nurse for lack of jurisdiction (*Sheila R. Breckenridge v. Ohio State Board of Nursing*). In its July 13 decision, the Court of Appeals of Ohio, Tenth Appellate District, Franklin County, cited the lack of a timely appeal by Sheila Breckenridge, the disciplined nurse.

Breckenridge's discipline stemmed from a 2005 jury trial conviction on three counts of Medicaid fraud. In 2008, the board imposed a suspension of at least three years, not including the time that Breckenridge's license had already been inactive.

She appealed, but was denied in her claim by a trial court. Acting as her own attorney, she filed a motion to reopen the appeal and "alleged that she was subject to a 'kangaroo court.'" Despite the allegation, the Common Pleas Court filed a Final Order dismissing her motion and ending the case. Breckenridge opted to file another motion to reconsider.

However, Final Orders cannot be reconsidered in Ohio, and her motion was denied. The Court of Appeals affirmed. Dismissing the case, it said Breckenridge had missed the deadline to have it heard by a higher court.

Professional Licensing Report is published bimonthly by **ProForum**, a non-profit organization studying public policy and communications, 4759 15th Ave NE, Suite 313, Seattle WA 98105. Telephone: 206-250-5609. Fax: 206-526-5340. E-mail: plrnet@earthlink.net Website: www.plrnet.org Editor: Anne Paxton. ISSN 1043-2051. Subscriptions: $198 per year, $372 for two years, $540 for three years, $696 for four years. Additional subscriptions mailed in the same envelope are $40 each per year. Licenses to distribute extra PDF copies, beyond the initial subscription, are $15 each per year.