Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue:

Discipline

Scofflaw's five-year tax evasion shows moral turpitude and merits suspension, court says

Issue: Nexus between criminal behavior and professional practice

An osteopathic physician who was jailed for failing to file tax returns for five years was properly suspended from licensed practice by the state medical board for misdemeanor offenses involving moral turpitude, the Court of Appeals of Ohio, Tenth Appellate District, held April 19 (*Dominic Joseph Maga v. Ohio State Medical Board*).

In the case, emergency room doctor Dominic Joseph Maga was convicted by a jury in 2009 of willful failure to fie income tax returns, and an 18-month prison sentence was imposed. The following year, Maga was given a hearing before the state medical board, which then ordered that he be indefinitely suspended, with reinstatement contingent upon a period of probation and other conditions after at least 180 days. A trial court affirmed the order.

Maga argued in his appeal that his five convictions alone do not constitute misdemeanors involving moral turpitude, and that the board is required to find more evidence to draw this conclusion. But the court said a five-year failure to file tax returns was sufficient.

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Testing

Breast-feeding mother wins licensing exam accommodations case

Issue: Test accommodations based on equal rights law

A medical student in Massachusetts won a battle in a suit against the National Board of Medical Examiners (NBME) when the state's highest court ruled that the new mother was entitled to extra exam time in order to express breast milk (*Sophie C. Currier v. National Board of Medical Examiners).*

The Supreme Judicial Court of Massachusetts ruled April 13 that the state's Equal Rights Act and Public Accommodations Law protected breast-feeding mothers like medical student Sophie Currier, who brought the case against the NBME, from discrimination.

Currier applied to take the US Medical Licensing Exam in 2007. Currier was a new mother and, in her application, she requested extra break time—over the 45 minutes normally allotted—in order to express breast milk, as well as other accommodations relating to her diagnosis of dyslexia and ADHD.

The NBME gave Currier a separate room to take the exam and offered to accommodate her by having her skip the exam tutorial on the first day and by breaking the second day's breaks into 20- and 25-minute chunks.

Currier rejected the proposal, and submitted affidavits from three medical professionals which stated—among other things—that she would need to use a breast-milk pump at least twice during an 8-hour testing day and that 45 minutes was an insufficient amount of time to perform that activity.

The candidate then filed suit against the NBME, successfully winning a preliminary injunction from an appellate court which required the testing organization to provide her with an additional hour of break-time per day. Although she failed to pass that exam with the extra time, she re-applied the next year without requesting additional time and eventually passed. The case proceeded to move up the judicial system when a judge allowed it to continue despite its apparent mootness.

In her suit, Currier claimed that the NBME violated the state's civil rights act, equal protection act, and public accommodations law by failing to accommodate her need to breast-feed.

The court agreed with Currier on the latter two violations. The public accommodations law prohibits, among other things, discrimination on the basis of sex.

"Here," wrote Chief Justice Roderick Ireland, "women who are expressing breast milk are denied the advantage of having a fifteen-minute introductory tutorial as well as forty-five minutes of break time to eat, rest, and use the bathroom, because all or nearly all of that break time is consumed by expressing breast milk. As a result, a subclass, comprised only of women, are denied advantages of adequate break time."

"In view of the broad remedial purposes of the statute and the rationale employed in our analysis of what is included in the term 'sex' in the context of the equal rights act, we conclude that the protections of the public accommodation statute extend to lactating mothers because we find lactation to be a sex-linked distinction or classification."

Similar reasoning applied to Currier's claim under the equal protection act. Ireland explained that the court had previously held "that the exclusion of pregnancy-related disabilities from a comprehensive disability plan amounted to sex discrimination" and held that the equal rights act extended to lactating mothers.

The claimed violation of the civil rights act was quickly dismissed by the court, which explained that the actions of the NBME lacked the coercion necessary to have violated that law.

The NBME, however, was in violation of the public accommodations law and possibly of the equal rights act, the judge wrote. After ruling that the NBME, as a provider of testing, fell under the scope of the law, the court held that the organization had discriminated against Currier by failing to adequately provide for her breast pumping.

However, because a violation of the act requires an intent to discriminate, the facts of this issue had not been fully explored, and the case was to be returned to a lower court on the NBME's intentions.

Software glitch or not, testers don't have to supply exam answers

Issue: Candidate review of examination answers

Mandating that candidates have post-examination access to answers on a licensing exam is beyond the due process requirements of the Fifth and Fourteenth Amendments to the Constitution, the U.S. District for the Eastern District of Virginia ruled September 14, 2011.

The case, *Jonathan Bolls v. Virginia Board of BarEexaminers*, was the latest in a string of legal actions filed by Jonathan Bolls, a candidate who failed the July 2008 bar examination. After being informed by the state Board of Bar Examiners that he failed, Bolls told the board that he had encountered a "computer glitch" during the course of the exam and requested a copy of his answers to the essay portion.

Bolls maintained "that future bar applicants have a due process right to gain access to their examination answers so they may determine whether their failure to pass the bar examination was a result of their personal performance or that of the computer software." The court disagreed.

When the board refused, Bolls' then filed petitions in a circuit court, which said it did not have jurisdiction, and the Supreme Court of Virginia, which refused to compel the board to perform the "discretionary act" of releasing examination answers. An appeal to the U.S. Supreme Court was also denied.

A suit in federal district court followed. In it, Bolls contended that the Virginia state law governing attorney regulation is unconstitutional because it vests the board with unbridled discretion to determine what circumstances warrant disclosure of bar examination answers.

That argument failed, and in this new suit, Bolls made a different argument. He sought release of examination answer—but as a public service to all prospective Virginia bar applicants who encounter a problem with the functionality of the examination testing software.

Aside from possible jurisdictional issues, the court found that there was a serious question as to whether Bolls' complaint satisfies the "case or controversy" requirements of the Constitution. "Since Plaintiff will suffer no actionable harm as a direct result of the challenged statute, he does not have a sufficient personal interest at stake to prosecute this action." At a minimum, Bolls had to show the likelihood of actual or imminent injury which is neither speculative nor hypothetical.

As long as a board has a basis for finding that a candidate fails to meet standards for admission, and the finding is not "invidiously discriminatory," federal courts have exercised restraint in reviewing non-discriminatory practices and procedures, the court pointed out.

A U.S. Court of Appeals ruling also held that precluding failing applicants from reviewing their exam results is not an offense against due process "primarily because an unqualified right to retake the examination at its next regularly scheduled administration both satisfies the purpose of a hearing and affords it protection."

Applicants like Bolls who believe their failure on the bar examination is attributable to a computer or software glitch have two courses: petition the state supreme court or U.S. Supreme Court, or simply take the exam again, the court said.

Dyslexic candidate loses damages suit against examiners

Issue: ADA accommodations on licensing exam

A dyslexic candidate for a nursing license, who was granted no accommodations and failed the Kansas licensing exam, had no legitimate claim against the test administrator or state board members in his suit for damages, the U.S. District Court for the District of Kansas ruled April 24 *(Barry Turner II v. National Council of State Boards of Nursing, et al.*)

The candidate, Barry Turner, was diagnosed with dyslexia, an impairment of an individual's ability to accurately interpret and organize graphic symbols, including letters. Turner was given various educational services and accommodations for examinations while he was in school, such as extra time, a private room, and readers, and earned a bachelor's degree in nursing from Bethel College, which found his dyslexia did not adversely affect his ability to practice nursing.

But when he contacted a board staffer, Gary Taylor, to request accommodations, Taylor told the candidate he would have to meet three conditions: proof through school records that he had dyslexia, confirmation from his college that it had provided him with the requested accommodations, and a letter setting out his requests.

According to Turner, Taylor told him that in his 30 years with the state board, no applicant had requested accommodations. He also said that if the candidate received accommodations and passed the licensure examination, his nursing license would be restricted and limited.

A staff member at the state board said that in his 30 years there, no applicant had requested accommodations, Turner claimed. He also said that both the state board and the National Council told him there was no point in appealing his score because no test result had ever been changed.

Taylor ended his employment with the board shortly afterwards, leaving no records about the accommodations request, so Turner took the exam without accommodations.

In his lawsuit, Turner brought seven charges under the Americans with Disabilities Act against state board members and staff. He sought monetary damages of more than $75,000 for each claim, and an injunction against the National Council.

His primary contentions: the threat of a license restriction by the Kansas board deterred him from pursuing his request for reasonable accommodations on the exam, and the board and National Council's failure to provide an appeal procedure for applicants and failure to provide an alternative to the computer-assisted testing (CAT) format discriminated against disabled individuals, including him.

Turner alleged that the CAT format of the NCLEX-RN exam in May 2009 had problems, including inexplicably shutting down after he had answered only 57 questions, although the test report indicated he had answered 84 questions. He also asserted that "If a private room had been made available … as an accommodation for taking the test, there would have been no need for electronic monitoring, only periodic monitoring by the test proctor, thus reducing his test anxiety."

The court rejected Turner's arguments. Historically, the court noted, Title II of the ADA Act was passed "Against the backdrop of pervasive unequal treatment in administration of state services and programs and specifically … evidence of discrimination in education, access to courts, transportation, health care, and other public services."

Federal courts have previously found that "the history of unconstitutional discrimination against the disabled regarding their right to practice in their chosen profession…is inimical." Based on case law, the court said it had to dismiss Turner's Title II claims against the state board and his claims for money damages, because Title II does not validly abrogate the board's sovereign immunity in professional licensing.

Since Turner did not allege that any current state board policy or ongoing conduct by any state board official or employee violates the ADA, and did not ask for prospective relief, such as an order to allow him to retake the exam with reasonable accommodations, the court also refused to issue an injunction against the state board. Turner's request for injunctive relief against the National Board was turned down as well.

Tester is immune, court agrees, in dispute over refusal to validate score

Issue: Board association and immunity from suit

On April 5, the U.S. Court of Appeals for the Sixth Circuit upheld a district court decision extending immunity to the National Association of Boards of Pharmacy for refusing to validate the score of a candidate who had taken the North American Pharmacist Licensure Examination, or NAPLEX (*Suresh Dakshinamoorthy v. National Association of Boards of Pharmacy*).

The pharmacist candidate, Suresh Dakshinamoorthy, had his NAPLEX score invalidated after an investigation by the NABP—prompted by an extraordinary improvement in scores from a prior failed test to his most recent—concluded with a determination that Dakshinamoorthy had used a ringer to obtain his last, passing score.

However, after an investigation by the Michigan Board of Pharmacy cleared Dakshinamoorthy and the NABP continued to view his score as invalidated, Dakshinamoorthy sued in federal court. A district court then dismissed the case on the grounds that the NABP had immunity from suit.

The Sixth Circuit agreed. Michigan law, it noted, provides immunity to those who file a report in good faith while aiding in the operations of a board. Because the actions of the NABP were taken to assist the board in its duties, the organization was thus entitled to immunity.

Discipline

Scofflaw's 5-year tax evasion is moral turpitude, merits suspension *(from page 1)*

"Where moral turpitude is disputed, the circumstance surrounding the illegal conduct should be considered. However, the elements of a conviction can be all the necessary circumstances to show moral turpitude in situations where a physician or lawyer has repeatedly violated the law."

Acts of moral turpitude, although not subject to exact definition, are characterized by baseness, vileness, or the depravity in private and social duties which man owes to his fellow man, or to society in general, the court said. "Such acts must be measured against the accepted standards of morality, honesty, and justice prevailing upon the community's collective conscience, as distilled by a similarly principled judiciary."

The physician contended that the trial court referred to "Immaterial facts" that gave no indication of any moral turpitude in making its ruling. But the appeals court said the trial court did not abuse its discretion in finding moral turpitude when it reasoned that "a great number of citizenry would likely find an individual, who is in a prestigious profession, who earns far more than the average and who intentionally deprives the treasury of money due for at least five distinct years, to be a scofflaw who has exhibited moral turpitude."

The court also turned thumbs down on Maga's argument that the moral turpitude provision is "void for vagueness." "It is obvious that the legislature did not wish to define every situation that involves moral turpitude. This task was delegated to the medical board. … It falls to the medical board to determine which offenses warrant license suspension."

Revocation overturned for lack of penalty guidelines

Issue: Guidelines for imposing discipline penalties

Citing the lack of required penalty guidelines, a Florida court overturned discipline imposed by the state's board of nursing on a licensee who had administered drugs to a friend at a different health care facility than that at which the nurse was employed (*Manuel Fernandez v. Florida Department of Health, Board of Nursing*).

The licensee, a nurse named Manuel Fernandez, was making a hospital visit to a friend when he decided to administer heparin, a blood thinner, to the friend. Fernandez was not employed at the hospital and had no other authorization to administer the drug.

After a hearing, the Florida Board of Nursing revoked Fernandez's license and imposed a $3,000 fee. Fernandez then appealed, and the case went before the Court of Appeals of Florida, Fourth District.

In his appeal, Fernandez argued that the disciplinary guidelines used by the board failed to state a range of penalties, as required by Florida law. The court agreed. Fernandez had been disciplined on two counts of violating the disciplinary rules; one of those counts, that Fernandez failed to meet acceptable minimal standards of practice, was not accompanied by the required penalty guidelines and could not adequately inform licensees of the potential of their actions.

Further, wrote Judge Dorian Damoorgian in remanding the case to the board, although guidelines did exist for the other violation charged to Fernandez, the board had exceeded the prescribed penalties. A penalty in excess of the guidelines was possible when aggravating circumstances were present, Damoorgian explained, but an agency must articulate its reasons for imposing an excessive penalty. Because the final order disciplining Fernandez failed to do so, it could not be upheld either.

Court cites "substantially related" clause in affirming revocation for DUI

Issue: Nexus between criminal behavior and professional practice

In a case where the licensee was convicted of a misdemeanor while driving with a blood alcohol level over the legal limit, the state nursing board was properly authorized to revoke the license, the Court of Appeal of California, First Appellate District, held April 19 *(Annuncio L. Sulla Jr., v. Board of Registered Nursing*).

Reversing a superior court decision that had found the revocation unwarranted, the appeals court said the licensee's conduct and his resulting conviction were "substantially related to the qualifications, functions or duties of a nurse."

The nurse, Anuncio Sulla, lost control of his car one night and collided with the center divider on the freeway. A breathalyzer test measured his blood alcohol level at .16 percent, twice the legal limit. He pled no contest to a misdemeanor count and was placed on three years' probation.

Following a hearing, the board revoked Sulla's license on the ground that state law defines as unprofessional conduct the conviction of a criminal offense involving the consumption or self-administration of alcohol.

Sulla petitioned for review, arguing that the board abused its discretion by imposing discipline in a case where the administrative law judge had specifically found that his alcohol-related conviction did not bear a substantial relationship to his qualifications to practice nursing.

The nurse also argued that the revocation violated his right to equal protection under the law, because physicians must suffer two such convictions before they are subject to discipline. The superior court agreed with Sulla and found the imposition of discipline unwarranted.

The appeals court reversed that ruling. "The real issue in this case, the court said is whether the legislature may authorize professional discipline based upon an alcohol-related conviction or the use of alcohol in a dangerous way, absent a separate determination of a nexus or relationship to the licensee's professional fitness." The court said it had found no published decisions that resolve this issue with respect to the nursing practice act, but three parallel statutes governing physician discipline had been ruled on by the court.

Based on those rulings, the court said the unprofessional conduct finding was valid. Sulla argued that if the law did not require that the alcohol-related offense be "substantially related" to nursing practice, then absurd consequences would follow such as revocation for a conviction for public intoxication, drinking while a passenger in a motor vehicle, or having an open container of alcohol in a vehicle. But the court said it would not rule on the reasonableness of the discipline, which Sulla had not challenged.

As for Sulla's argument that he should not have been treated more harshly than physicians, the court noted, "there is no constitutional requirement" that the regulatory schemes for both nurses and physicians be identical, and in addition, even a single instance of driving under the influence could support a disciplinary proceeding against a physician.

Revocation of dentist's license for gross negligence proper

Issue: Standards for determining negligence

There were no prejudicial errors in the revocation of a dentist's license by the state dental board, and the record amply supports the disciplinary action, the Court of Appeal of California, First Appellate District, held April 30 *(Errol M. Gillis v. Dental Board of California*). The ruling reversed a trial court which had nullified the revocation, and ordered the board to redetermine the penalty.

The case began with a 2005 root canal by endodontist Errol M. Gillis, in which he was accused of "overfilling" a patient's tooth, putting the patient at risk of

permanent nerve damage. A series of lapses followed, including Gillis' failure to return the patient's wife's repeated calls about pain and swelling for several days.

Three years later, in 2008, the board initiated a disciplinary action against Gillis, charging him with negligence in failing to maintain complete patient records, failing to prepare a comprehensive treatment plan, use of excessive force during the root canal treatment, gross negligence and incompetence in overfilling the patient's tooth, and failure to respond for seven days to the patient's post-procedure pleas for help. In the 1990s, Gillis had also twice been placed on probation and suspended from practice for abandoning patients, prescribing drugs to those not under his treatment, and using intoxicating and controlled substances. The board agreed to suspend his license.

On appeal, however, the trial court found several errors in the board's decision. It concluded the board was wrong to conclude Gillis's failure to return phone calls was unprofessional conduct, since such conduct was not expressly listed among as unprofessional conduct in the dental practice act, and the board did not provide analysis that the failure to return phone calls was gross negligence.

Gillis argued that his failure to return the patient's wife's phone calls could not be found to be unprofessional conduct, because that failure was not listed in the dental practice act. The court disagreed.

In addition, it found that the board could not discipline Gillis for both gross negligence and incompetence for the same act (overfilling the patient's tooth), and that "It is unclear on what conduct the discipline was imposed." The trial court remanded Gillis's case to the board to redetermine the penalty.

The appeals court, however, agreed with the board that these findings by the trial court were incorrect. It found, instead, that:

—The practice act states that "unprofessional conduct" is not limited to the list of examples in the code and the courts have long interpreted similar language in the medical practice act to allow discipline for unlisted conduct "which indicates an unfitness to practice."

—The board was correct that Gillis may be disciplined for "repeated negligence" based on two negligent acts.

—It was Gillis himself who was personally at fault in failing to return the phone calls of the patient's wife. Gillis had argued that any failure was due to shortcomings of his staff and he could not be held accountable for them, but the appeals court rejected this argument, noting that Gillis was personally informed several times of the calls and had not made arrangements for the patient to speak with another care provider if he, Gillis, was unavailable.

The court entered judgment in favor of the board, overruling the trial court and upholding the board's discipline of Gillis.

Administrative hearing commission may overrule board on revocation

Issue: Due process in review of discipline cases

A court in Missouri has upheld the reinstatement of a doctor's license by the state's Administrative Hearing Commission over the objection of the Missouri Board of Registration for the Healing Arts (*State Board of Registration for the Healing Arts v. Christine A. Trueblood*).

The decision, issued April 3 by the Missouri Court of Appeals, Western District, held that the commission had the power to conduct a full review of the board's decision and owed the board no deference.

Christine Trueblood, the physician whose discipline was the focus of the action, entered the profession with substance-abuse problems. Having just recently graduated from medical school, Trueblood began writing prescriptions for herself in 2002, and by 2006 had been through rehab, had relapsed, was arrested after writing fake prescriptions at a Costco store, resigned her Drug Enforcement Administration license, and was placed on leave from her residency.

After completing a second rehab program, Trueblood completed her residency, moved to Missouri, and applied for licensure there. The state medical board agreed to accept her, but placed her license on a five-year probationary period.

Trueblood, dissatisfied with the probation, appealed to the state's Administrative Hearing Commission and received a hearing, which concluded with the commission upholding the board imposition of probation but limiting the period of probation to fifteen months—which time had already occurred while the case was pending—giving Trueblood access to an unrestricted license.

The board appealed and, after a circuit court upheld the AHC's decision, appealed again. The board's argument before the appellate court centered on the proposition that the AHC had erred by reviewing the board's decision de novo. The AHC, the board argued, owed the board's decision deference and could only reverse that decision if it was found to be arbitrary, capricious, unreasonable, or unlawful.

Judge Ahok Ahuja, in his written opinion for the Court of Appeals, addressed the question of the AHC's authority. The judge cited several cases affirming the commission's authority and noted that the decisions, "issued in a variety of contexts, recognize that the function of the AHC in administrative review is to render the agency's final decision, exercising the same authority as the underlying agency."

Ahuja did note that in the case of an already-existing license, Missouri law creates a bifurcated procedure whereby the AHC determines the facts of a case and the board determines the discipline to be imposed. But in the case of an initial grant of licensure, the AHC retains the ultimate authority.

Board members entitled to immunity for emergency suspensions

Issue: Board member immunity

Board members who have acted to place a summary suspension on a license holder have judicial immunity, the U.S. Court of Appeals of the Ninth Circuit ruled April 26 (*Kevin Ray Buckwalter v. State of Nevada Board of Medical Examiners*).

The court, in a decision written by Judge Richard Paez, held that summary suspensions were sufficiently similar to judicial actions and that allowing suits against board members would cause them to hesitate in situations that require quick action to protect the public.

The censured doctor, Kevin Ray Buckwalter, came to the attention of the medical board of Nevada in 2006, when he was the subject of complaints alleging that he over-prescribed narcotics. After an investigation and peer review, the board found that Buckwalter was acting below the minimum standard of care, and it moved to summarily suspend his license in November 2008.

Buckwalter was not notified of the existence of the proceedings and would not have an opportunity to contest the action until March 18 of the next year, the date the board scheduled for a full hearing for the case.

Before that hearing could occur, however, Buckwalter and the board agreed to vacate the process in anticipation of a negotiated settlement. But when the board rejected the proposed settlement produced by the negotiations, Buckwalter sued the board in federal court for what he claimed were deprivations of his constitutional due process rights. The case then made its way up to the Ninth Circuit.

In response to Buckwalter's allegations, the board claimed that its members were immune from lawsuits stemming from their decisions to summarily suspend a licensee, just as they would be immune from suits originating from decisions to suspend licensees after a formal hearing. To evaluate the issue, the court applied a six-part test from an earlier Ninth Circuit case, *Mishler v. Clift*.

Judge Paez agreed with Buckwalter that the procedure for summary suspensions was significantly different from that of hearings. "Indeed," he wrote, "Buckwalter's own experience demonstrates the parsimony of the procedural safeguards built into the summary suspension procedure." Regarding the length of time between the suspension and the hearing set by the board, Paez noted that "the board members may have considered a four-month wait reasonable. Buckwalter, whose livelihood was at stake, presumably did not."

However, Paez did not agree that these procedural deficiencies weakened the board members' immunity. "The board members' interest in performing their functions free from harassment is at its apex when a physician poses a serious threat to public safety," he explained, and the removal of that immunity "could make board members hesitant to act quickly and decisively to protect the public."

Paez also noted that, although a four-month wait between suspension and hearing is “not a swift process, neither is it unreasonably slow.” And the very fact that a hearing will necessarily happen is, in itself, a significant safeguard. “The board members’ temporary emergency judgment is thus necessarily in the crucible of an administrative hearing with a full complement of procedural safeguards,” Paez wrote.

Buckwalter also questioned the board members' judicial independence. In the "real world of Nevada politics," he said, the board was recovering from a recent scandal and its refusal to settle the case was a result of its desire to burnish its image for the public. However, said Paez, "even if Buckwalter's claim that a scandal influenced the board members' behavior is true, that fact does not gainsay the board members' independence."

"Judicial independence," Paez explained, "is a structural characteristic, not an empirical one." The question is whether the conditions of a board member's employment affect his or independent judgment, not whether current events influenced a decision.

Buckwalter put forth other arguments, but all were rejected by the court on the grounds that the stipulation made between Buckwalter and the board—which vacated the hearing in anticipation of a settlement—made the state process incomplete and improper subject matter for a state court. Buckwalter was free to rescind his stipulation, and once he did so the state appeals process would be open to him.

Discipline reversed against nurse who failed to report child abuse in own family

Issue: Complicating circumstances in professional discipline

Delaware's child abuse reporting statute did not apply to a nurse and she could not be disciplined professionally, the Supreme Court of Delaware held March 30. It upheld the reversal of a two-year suspension imposed on nurse Michele Bice Gillespie, whom the state nursing board

had accused of failing to report child abuse (*Delaware Board of Nursing v. Michele Bice Gillespie*).

The ruling, which was based on legislation that has since been changed, held that because the disciplined nurse did not learn of the abuse in her capacity as a nurse—the abuse was committed within her family—the statute did not apply to her and she could not be disciplined professionally.

Gillespie came to the attention of the board in 2009, when she was arrested and charged with endangering the welfare of a child. The abuse that formed the core of the allegations had occurred between Gillespie's own grandchildren. One of the children informed a parent, who then told Gillespie of the incident. Although all the parents of the children knew of the abuse, Gillespie did not inform the proper authorities, and this was the basis of her discipline.

After a hearing, the board suspended Gillespie's license, based on her failure to adhere to a Delaware statute requiring "any physician, and any other person in the healing arts including any person licensed to render services in medicine, osteopathy, dentistry, any intern, resident, nurse … or any other person" who knows about an incident of child abuse to inform the authorities. In 2010—after Gillespie's case was heard by the board—the statute was changed to require all people to report incidents of child abuse.

Because Gillespie had learned of the abuse in her role as a grandmother and not as a nurse, she was not required to report the abuse under the version of the statute in effect at the relevant time.

Gillespie challenged the suspension, arguing that the statute only applied to persons acting in a professional medical capacity. The abuse in her case occurred only within the personal sphere of her life, she claimed, and she was thus not in violation of the law. After a lower court agreed with this argument and overturned the discipline, the board appealed and the case went to the Supreme Court.

The court upheld the reversal of discipline. Justice Randy Holland, in his written opinion, noted the "narrow class of professionals articulated in the statute" as evidence that the legislature had only intended the statute to apply to those who were in a position to learn of incidents of child abuse through their work. Although the end of the list of professionals required to report had included the words "or any other person," Holland reasoned that the phrase was meant to apply to other professionals not enumerated in the statute.

The court found that because Gillespie had learned of the abuse in her role as a grandmother and not as a nurse, she was not required to report the abuse under the version of the statute then in effect. Gillespie's discipline was based on her violation of the statute, and because the Court held that Gillespie did not actually violate the statute, the board had erred when it suspended her license.

Revoked licensee admitted failures—but not "willful" failures

Issue: Establishing intent in breaches of professional standards

A pharmacist who tried to argue that board findings of fact leading to the revocation of her license were incorrect, because there was no showing of willfulness, lost her appeal in a decision by the Ohio Court of Appeals, Coshocton County March 9 (*Elise Miller v. Ohio State Board of Pharmacy*).

After investigators from the Ohio pharmacy board conducted surprise inspections of her two pharmacies in 2009, the licensee, Elise Miller, was charged with 23 counts of misbranding drugs, adulteration of drugs, and failure to keep

adequate records. Her license was officially revoked, and in 2011 a trial court affirmed the board's decision.

Among Miller's arguments in her appeal was the contention that several of the board's findings of fact were incorrect because there was no showing of willfulness. For example, she admitted dispensing a single-use product into four different syringes, reducing the drug's effectiveness, but said the doctor had approved this practice; the reason no documented proof of the approval was available was because of the FBI search and confiscation of documents in her second pharmacy.

"Willful tort involves the element of malice or ill will, but it is not necessary to show actual malice or ill will," the court said. "It may be shown by indifference to the safety of others after knowledge of their danger, or failure after such knowledge to use ordinary care to avoid injury."

Miller also said her failure to have her ID badge on and failure to have the Drug Laws of Ohio book at hand were not willful either. Said the court: "Although technical violations, they were nevertheless violations. These standing alone would not have precipitated the board's actions, but were part of [Miller's] 'house of cards' when she admitted her life was in chaos."

The licensee also admitted to failing to properly record the dispensing of drugs and keep patient profiles, but "she attempted to excuse them by arguing her life was in chaos and she was a small town pharmacist who knew her physicians by voice and first name."

The court was not convinced by this argument. "Although all of these claims may very well be true, they are no excuse for failing to comply with the Administrative Code and her own standard of care for her profession."

Dismissing these and Miller's other arguments, the court affirmed the trial court's decision backing up the board's revocation.

Licensing

Medical practice act does not limit other health care licensees

Issue: Public information and records requests

When certified registered nurse anesthetists (CRNAs) administer anesthesia under physician order but without physician supervision in California, it's nothing new—they've been doing it for decades, and it's never led to any disciplinary action against a CRNA, says the Court of Appeal of the State of California.

That was one reason why, in a March 15 ruling, the court agreed with California governor Jerry Brown that physician supervision of CRNAs is not required. (*California Society of Anesthesiologists et al. v. Edmund G. Brown, Jr.*).

The ruling is the latest in a case filed by Caliifornia anesthesiologists and the California Medical Association in 2010, challenging the state's decision to "opt-out" of the Medicare physician supervision requirement for CRNAs. That decision was in compliance with state law, said the Court of Appeal.

In its decision, the court made a strong statement against relying upon the medical practice act to curb other health care professionals' scope of practice. Although the medical associations "vehemently contend that the Governors opt-out decision was made in contravention of the laws relating to the practice of medicine by physicians, it is clear that those laws are not intended to, and do not

limit the scope of practice of other licensed health care professionals, such as CRNAs."

Only the nursing board has authority to determine nurses' scope of practice, the court said.

To receive Medicare reimbursement for a CRNA administering anesthesia, hospitals and other care facilities require that the CRNA be supervised by a physician. But a state may opt out of this requirement if the governor attests that the opt-out is consistent with state law. This ruling holds that California's decision to opt out was valid.

To agree that the governor abused his discretion in opting out of the federal Medicare physician supervision requirement, "We would have to ignore not just one, but multiple authoritative sources uniformly concluding" that CRNAs do not require physician supervision to administer anesthesia, the court added.

The decision also advised the medical groups to take their case to the legislature if they have remaining concerns. "As nursing becomes more specialized, many nursing functions will inevitably overlap with physician functions. That does not mean, however, that those functions are not legitimately part of the practice of nursing."

"If appellants remain concerned that a physician's practical, ethical, and legal responsibilities for his or her patient's care will be jeopardized by the use of unsupervised CRNAs to administer anesthesia, the solution lies with the legislature, not this court."

Oregon eases veterans' access to gamut of professions

Issue: Public information and records requests

A bill passed in March on an emergency basis in Oregon opens up access to more than 20 occupations or professions to the nation's military veterans, by adding language permitting them to take a licensing exam or be admitted if the candidate supplies documentation and the licensing board determines they have "military training or experience that is substantially equivalent" to the education and experience normally required.

The measure, House Bill 4063, reflects a nationwide effort backed by the Obama administration to allow more veterans to qualify to practice professions and ease their transition to civilian life.

On the list are private security professionals, engineers, land surveyors, psychologists, occupational therapists, physician assistants, nurses, denturists, speech language pathologists and audiologists, chiropractors, physical therapists, radiologic technologists, hemodialysis technicians, athletic trainers, respiratory therapists, pharmacists, cosmetologists, funeral service providers, and private investigators.

Lift some licensing rules for military spouses, ABA urges

Issue: Public information and records requests

Bar admissions authorities should accommodate lawyers who must move frequently to other states because of their spouses' deployments, the American Bar Association House of Delegates resolved February 6. The organization said attorney licensing officials should adopt rules, regulations and procedures for military spouse attorneys including:

—enacting "admission by endorsement,"

—reviewing application and admission procedures to ensure that they are not unduly burdensome to military spouse attorneys, and

—offering reduced bar application and membership fees to military spouse attorneys who are new to the jurisdiction or who no longer reside there but wish to retain bar membership.

In the same month, the U.S. Departments of Defense and Treasury released a report that aims to remove employment barriers, including certain licensing restrictions across the professions, for military spouses. "We're not asking any state to change their standards," said the President's wife, Michelle Obama, in releasing the report, adding that the administration would be urging more national professional associations to follow the lead of the ABA.

"Technically surgical" chiropractic practice provisions struck down

Issue: Determining appropriate scopes of practice

An appeals court in Texas, on April 5, struck down regulations of the state's chiropractic board which would have allowed chiropractors to engage in activities that the court ruled were technically surgical procedures (*Texas Board of Chiropractic Examiners and Texas Chiropractic Association v. Texas Medical Association, et al.*). The case pitted the Texas' chiropractic board and association versus the state medical board and medical association.

The regulations in question were promulgated by the Texas Board of Chiropractic Examiners in response to statutes passed by the state legislature in 2005 defining the practice of chiropractic. Although state law had already banned chiropractors from engaging in "incisive or surgical procedures," with the exception of blood draws, the 2005 laws redefined "surgical procedures" as procedures described in the surgery section of the coding systems used by the federal Medicare/Medicaid program.

The new law also required the chiropractic board to officially adopt rules clarifying what activities were included within the practice of chiropractic, a rejection of the board's prior use of unchallengeable advisory opinions to fill that role.

The board complied by promulgating a scope-of-practice rule which included two controversial procedures: needle electromyography, the insertion of sensory needles to record electrical activity within the body, and manipulation under anesthesia (MUA), which, as the name suggests, allows a treatment provider to sedate a patient and manipulate their body in ways that a conscious, pain-feeling patient would not tolerate.

The use of needles to perform electromyography, claimed the physician parties, was an "incisive procedure" and thus forbidden to chiropractors. The chiropractic board, in response, claimed that the use of the needles was of a different quality than other procedures which break the skin and were not “incisive” as that word was intended in state law.

An earlier set of statutes had prohibited the chiropractic board from certifying practitioners to perform this procedure. The promulgated rule also allowed chiropractors to "diagnose" certain conditions.

In response to the rules, the Texas Medical Association and the state medical board brought suit against the chiropractic board, challenging the three sections of the chiropractic scope-of-practice rule described above.

The use of needles to perform electromyography, claimed the physician parties, was an "incisive procedure" and thus forbidden to chiropractors. As evidence, the physicians pointed to the fact that the legislature had made a special exception to the standard rules when it allowed chiropractors to use needles to draw blood, which showed that all other needle procedures were included in the prohibition against incisive procedures.

The chiropractic board, in response, claimed that the use of the needles was of a different quality than other procedures which break the skin, and was not "incisive" as that word was intended in state law.

Justice Bob Pemberton cut through the parties' arguments and pointed to the fact that some of the needles used for the procedure have beveled cutting edges. "Regardless of the relative size of the instrument," he wrote, "it remains that the insertion of a needle EMG needle having a beveled edge would 'cut' tissue, as it is designed to do, under any definition of that term. It would therefore be an 'incisive' use of a needle," and was thus prohibited to chiropractors.

In their argument against manipulation under anesthesia, the physician parties pointed to the fact that the professional statutes of the state prohibit the chiropractic board from "adopting a process to certify chiropractors to perform manipulation under anesthesia," seemingly a damning provision. Further weighing against the board was the fact that MUA was included in the list of surgical procedures in the federal billing codes referenced by the legislature to define "surgical procedure."

For its part, the chiropractic board argued that the statutory prohibition on certifying chiropractors in MUA simply meant that the board could not impose a certification system above and beyond its initial chiropractic licensing scheme and that the very inclusion of the prohibition on certification indicated that chiropractors were normally licensed to perform the procedure.

This contention was further supported, the board argued, by the fact that, if the legislature *had* intended to bar chiropractors from the procedure, the use of two different provisions of law to accomplish that would make one of those provisions superfluous, a result which should be avoided.

The court did not agree. That position, Pemberton wrote, "suggests that the legislature intended (without explicitly saying so) that chiropractors be allowed to perform MUA, yet went out of its way to bar [the chiropractic board] from requiring any additional training or qualifications beyond licensing minimums to ensure that chiropractors perform that procedure safely. Such a construction yields what approaches 'absurd results' that we presume the legislature could not possibly have intended."

Further, he continued, far from indicating permissiveness, the use of two different provisions of law to accomplish the prohibition "can be viewed as reinforcing the Legislature's intent that chiropractors not perform MUA."

The physician parties' objection to the use of the word "diagnose" in describing chiropractor's scope of practice did not meet with success. Pemberton noted that the common definition of the word was "to perform analysis, examination, and evaluation," and that the word as used in the scope-of-practice regulation was sufficiently modified by the use of chiropractic terms to indicate that the unfettered ability of chiropractors to diagnosis disease was not the intention of the rule.

Missouri private investigator statute constitutional, court rules

Issue: Public information and records requests

Missouri's statute for licensing and regulating private investigators is constitutional, the state's supreme court held in March 6 decision, in response to a suit filed by a license applicant challenging the licensing structure on free speech grounds (*Robert B. Gurley v. Missouri Board of Private Investigators*).

The case was unusual in that the license applicant, Robert Gurley, though initially denied a license, was granted one on appeal, but continued a collateral suit he had filed challenging the validity of the state's licensing scheme.

Prior to 2007, the year Missouri enacted its statewide private investigator-licensing scheme, Gurley possessed a private-investigator license issued by the city of Columbia, which he had maintained since 2003, along with a share in Risk Management Research, a private investigation company.

When the new statewide scheme was introduced, Gurley applied for a state license but was informed by the newly-created Missouri Board of Private Investigators that his application would be denied as the result of indiscreet blog posts Gurley had made which violated federal law by including personal information gained from Missouri driver records.

Gurley both appealed the decision and filed a collateral suit against the board, attacking the licensing scheme on free speech grounds. Gurley's stated concern was that, because the definition of "private investigator business" in the statute creating the licensing scheme, on its face, lacks a commercial element, it purports to regulate not just the private investigator industry, but any individual pursuing several types of investigations, from employers checking on potential employees' backgrounds to people using Facebook to search out old acquaintances.

After a trial court dismissed the claims, Gurley's appeal took him to the state supreme court, which issued a decision March 6.

The court, in an opinion by Justice William Ray Price, Jr., agreed with Gurley that his reading of the licensing statute would make it unconstitutional for its prohibitions against speech. However, Price wrote, the use of the term "private investigator business" in the statute is sufficient to indicate that the law only attempts to regulate commercial activity, despite the fact that the statutory definition of "private investigator business" does not include the word "business" or any similar word itself.

Because "business," in its common understanding, indicates a commercial enterprise, the inclusion of the word is enough to alter the statute without it being included in the definition of the larger phrase, the court said.

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