Professional Licensing Report

Licensing, testing, and discipline in the professions

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Testing

Board must allow cross-examination of oral exam questions addressed to licensee in hearing

The state medical board must reconsider a physician's revocation that was based on examination questions it asked of him during a hearing on whether he was competent to practice, the Court of Appeals of Missouri held June 17.

Issue: Due process in evaluating competency to practice

In *William E. Colyer v. State Board of Registration for the Healing Arts*, the court reversed and remanded the board's revocation order with directions to review it.

Colyer had been licensed in Missouri for thirty years. In 2005, following a competency proceeding and a probable cause hearing, the board issued an order questioning his competency to practice medicine.

The board contended he failed to demonstrate minimally adequate knowledge of (1) evaluation of a patient for Lyme's Disease, (2) the definition, evaluation, confirmation, and proper pharmacology in the management of essential hypertension, 3) the use of Hemoglobin A1C in the monitoring of diabetes, (4) testing for a patient who is taking Coumadin, including the use of the International Normalization Ratio levels and Prothrombin time, (5) the existence of any local pain centers, and (6) diagnosis and treatment of migraine headaches.

After a hearing and charges questioning Colyer's competency, the board required him to submit to a re-examination. He was allowed two attempts in six months to take the SPEX examination (Special Purpose Examination, a multiple-choice test developed by the Federation of State Medical Boards) and receive a passing score of 75.

Colyer failed the exam with a score of 70, then was compelled to attend a final disciplinary hearing.

Colyer's daughter and office manager testified that Colyer was unfamiliar with computers and that she had requested an accommodation for him to take the exam in a pencil-and-paper format, but the contractor administering the exam, Thomson Prometric, refused.

In his appeal, Colyer claimed that the board had abused its discretion because the evidence overwhelmingly shows that a physician's score of 70 on the SPEX is not a valid indicator of his ability to practice medicine safely.

He also claimed that state law did not permit the board to utilize the SPEX as the sole measure of physician competency, and that the board deprived him of due process by relying on answers he gave to hypothetical patient situations that board members posed at the probable cause hearing.

The court held the latter argument was of concern. "Fundamental aspects of due process include the ability to cross-examine witnesses and to present evidence," the decision stated. The board relied on Colyer's inadequate answers in the hearing as a basis for discipline, but it could not legitimately do so without giving Colyer minimal due process rights.

In reversing the discipline order against Colyer, the court said the board could correct its error easily. "We have held that the evidence at the probable cause hearing was not appropriately used because of the lack of opportunity for cross-examination. That deficiency can easily be cured by presenting those questions and answers through an expert that can be cross-examined."

ADA provides only for injunctive relief, not damages

Issue: ADA test accommodations

A candidate who was denied test accommodations can sue only for injunctive relief under the the Americans with Disabilities Act, not for damages, the U.S. District Court for the Southern District of Ohio ruled June 16 (*Karen Barbosa v. American Osteopathic Board of Surgery, et al)*.

The plaintiff, Karen Barbosa, contended she is disabled as defined under the ADA because of her 1995 and 1998 diagnoses of dyslexia, abnormal auditory perception, impairment of auditory discrimination, and abnormal auditory processing.

She applied for accommodations including a private room and extra time to complete the oral board examinations to be certified as a surgeon, but her request was denied.

Barbosa also claimed that on September 13, 2006, the day of the examination, the board discriminated against her. After taking a break to use the restroom, Barbosa was locked out of the testing room and therefore arrived late to several of the questions. Barbosa alleged that as a result of both incidents, she failed the exam.

She sought injunctive relief and monetary damages including compensation of $3,000,000 for lost salary, lost time spent on appeals, legal hearings, and time to study and retake the exam, plus other damages including $10,000,000 in punitive damages due to "discriminatory ill-will and animus."

The AOBS sought a partial judgment concerning the monetary damages sought under Counts 1, III, IV, and V of the complaint. The remedies and procedures outlined under Title III of the ADA state that a person may bring "a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order."

The words "preventive relief," the board argued, "clearly indicate that the relief afforded a person under Title III is proscriptive or forward-looking in nature. Such relief does not include relief meant to compensate for past wrongs such as restitution, compensatory damages, or punitive damages."

The court agreed. The board, added the court, does not claim "that the complaint is factually insufficient to support the claim, only that if the court should find that Dr. Barbosa is entitled to relief under Title III," the only remedy available is an injunction.

Court dismisses claim of teacher accused of using substitute test-taker

Issue: Establishing protected interest

An Illinois substitute teacher suspected of having someone else take her certification exam did not have a legitimate due process claim against state education officials who refused to renew her teaching certificate, the U.S. District Court, Northern District of Illinois ruled February 28 *(Gertha Bates v. Randy J. Dunn et al.*). The court dismissed the complaint filed by the teacher, Gertha Bates.

Substitute teachers in Illinois may teach before taking and passing the Illinois Certificate Testing System's Basic Skills Test, Content Area Test, and the Assessment of Professional Teaching Test, but the tests are required to become fully certified.

The testing company National Evaluation Systems administers the tests and analyzes the scores. It notifies the state Board of Education if someone took the test and did not pass, but then took the test again and got a significantly higher score based on NES's statistical analysis. About six to twelve test scores a year are voided because of test-taker misconduct.

Bates took the Basic Skills Test four times before 2004 but did not receive a passing score. In February 2004 she claimed she took it again, but NES noticed a statistical discrepancy in her score compared with her most recent score. Her tests were sent to Illinois State Police for a handwriting analysis. A forensic scientist with the police analyzed her handwriting and reported that it "failed to establish" that Bates had actually taken the February 2004 test.

The state voided her score and informed her it would deny all future applications for certification based on her misrepresentation about her February 2004 Basic Skills Test.

In her complaint, Bates contended that the state damaged her reputation and deprived her of her liberty interest in pursuing her chosen profession of teaching. But the court disagreed. To prevail on this claim Bates had to show that state officials publicly disclosed stigmatizing information and she suffered a tangible loss of other employment opportunities resulting from the disclosure. But Bates cited no evidence that the state publicly disseminated information about her test and denial of teaching certification.

Because she failed to establish a protected liberty interest in her chosen profession, the court concluded, it did not have to determine whether she was afforded due process under state law.

Board backtracks on passing-score revisions

Seventy-five is often the magic cutoff score between passing and failing, but the Kansas Dental Board decided May 9 that the number won't work for its dental licensing exam. The board unanimously voted to reverse a November 2007 decision to raise the minimum scores on all five components of the dental licensing exam from 55 to 75.

The effect of the increase was that 19 students from the University of Missouri-Kansas City dental school failed to receive a license. When those students, the testmakers, and the dean of the dental school complained, the board decided that it had made a mistake.

Licensing

Licensing provision unconstitutional because it conflicts with NAFTA

Issue: State law versus NAFTA provisions

A New York law that restricts the granting of professional licenses to U.S. citizens and permanent residents is unconstitutional, the U.S. District Court for the Western District of New York held June 23.

In the case of *Simon E. Kirk v New York State Department of Education, et al.*, the court found that Simon Kirk, a Canadian citizen seeking a veterinary practice license, is authorized under the North American Free Trade Agreement to apply for the license with a TN (temporary entry) visa. Under NAFTA, certain Canadian and Mexican professionals are allowed temporary entry in the United States to practice their profession.

Kirk has practiced in New York as a veterinarian for four years under a limited license, because he was able to obtain a temporary waiver of the citizenship/immigration status requirement by providing proof that there was a shortage of otherwise qualified veterinarians. The waiver, however, was to be valid only through July 2008.

Kirk challenged the constitutionality of New York State education law, alleging that it "discriminates against aliens" and further, that it violates the Supremacy clause of the U.S. Constitution since it conflicts with NAFTA.

In response, the New York education department contended that the statute is rationally related to a legitimate goal, protection of the citizens of New York, and that the statute does not violate the Supremacy Clause because states have the power to administer their professions.

The court noted that it is well established that aliens residing in the U.S. are entitled to the benefits of the Equal Protection clause. "Classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny," the court said. Because aliens have no direct voice in the political processes, the U.S. Supreme Court has also treated certain restrictions on aliens with "heightened judicial solicitude."

The veterinarian being lawfully present in the U.S. and practicing veterinary medicine here for four years, New York's "purported concerns about his citizenship/immigration status, such as those involving the handling of controlled substances," do not appear to have any rational relationship to his fitness to practice, the court said. "Accordingly the court finds that Education Law sections 6704(6) violates the Equal Protection clause."

By requiring Kirk to become a U.S. citizen or obtain Permanent Resident Alien status, the same law also imposes an additional burden on him that was apparently not contemplated by NAFTA, the court added, ruling that the law also violates the Supremacy Clause, and granting summary judgment to Kirk.

Medical board civil penalties against lay midwife overturned

Issue: Overlapping definitions of practice

A lay midwife did not engage in the unauthorized practice of medicine, and the state Board of Medicine violated her due process rights in failing to notify her that she was violating the Midwife Regulation Law, the Commonwealth Court of Pennsylvania ruled May 23.

The case*, Diane Goslin v. State Board of Medicine*, concerned a September 2007 order by the state medical board that Diane Goslin, who assists with home births as a Certified Professional Midwife, cease and desist from the practices of medicine and midwifery, pay a civil penalty of $10,000 for the unlicensed practice of medicine, and pay a civil penalty of $1,000 for the unlicensed practice of medicine. The Commonwealth Court reversed this order.

The board had concluded that Goslin had engaged in the practice of medicine by providing "antepartum, intrapartum, postpartum and/or nonsurgically related gynecological care." However, the court the board's regulations define midwifery practice with exactly the same words. "Thus the board concluded that Goslin practiced medicine and surgery…simply by practicing midwifery," the court said.

The court also agreed with Goslin that the board incorrectly charged that she had violated the 1985 law regulating nurse-midwives, when, since she was not a nurse, it should have charged her with violating the 1929 midwifery law (which relates to granting of certificates to other persons who attend women in childbirth).

"Given the different purposes of the two statutes, we conclude that the nurse-midwife charges against Goslin under the 1985 act did not give Goslin adequate notice to defend against the midwife offenses described in the 1929 law."

Two judges, however, dissented with the first finding. Goslin's violations of the law are "grave because the conduct puts women and their newborn infants at risk," their opinion stated. "Judging by the medical definitions alone of some of the procedures undertaken by Goslin her birthing practice, it is evident that the Board in its expertise did not commit any errors in determining that Goslin engaged in the unauthorized practice of medicine."

Physicians lacked standing to sue state over new practice act

Issue: Medical vs. non-medical practice acts

Two physician associations had no standing to bring suit seeking to invalidate Missouri's new law legalizing midwifery practice, the Supreme Court of Missouri decided June 24. (*Missouri State Medical Association v. State of Missouri and Missouri Midwives Association et al.*). The court overturned a circuit court ruling which had invalidated the statute on the basis that it violated the original purpose, single subject, and clear title requirements of the Missouri Constitution.

The physicians' claim to be directly and adversely affected by the midwifery statute was weak, the Supreme Court found. Their primary claim "is premised on a concern that physicians' voluntary cooperation with nurse midwives who are not 'licensed' may subject those physicians to professional discipline by the Board of Registration for the Healing Arts." But under the law, physicians would not be subject to discipline because midwives are not engaging in the practice of medicine as the statute defines it.

The prospect that the board would impose discipline against physicians who assist or cooperate with certified midwives, the court found, "is simply too attenuated, too slight, and too remote to confer standing."

Podiatrists, physicians "not similarly situated" says insurer

Health Net of Connecticut admits that it reimburses podiatrists at different rates than medical doctors, the Superior Court of Connecticut, Judicial District of Waterbury, said June 6. But it concluded it had to dismiss a lawsuit filed by podiatrists in the state against Health Net because state law does not require payment parity.

In *Connecticut Podiatric Medical Association et al. v. Health Net of Connecticut*, the court found that the meaning of the state Unfair Insurance Practices Act was "unclear and ambiguous as it could not be determined from the text alone" whether the legislature intended to require insurers to compensate podiatrists and medical doctors equally.

Health Net had argued that podiatrists and medical doctors are not similarly situated with respect to "licensure, regulatory oversight, and scope of practice."

Competition

Court reverses discipline, warns board against using it as "economic weapon"

Issue: Use of discipline to dampen competition

A state board and administrative hearing panel had no authority to impose discipline on a licensee simply for not distinguishing his work from that of another licensee, said the Supreme Court of Missouri in a June 10 ruling (*Bruce E. Bird v. Missouri Board of Architects, Professional Engineers, Professional Land Surveyors and Landscape Architects*).

Reversing the decision of the Administrative Hearing Commission, the court said since Bird had taken specific responsbility for defects in plans for a commercial building, the fact that the plans were largely drafted by an architect not under his immediate supervision did not justify disciplining him.

The case stemmed from Bird's contract with a company, Landmark Builders, that hired him to complete plans and drawings for a commercial building project when the original architect, disputing Landmark's failure to pay an additional $17,000 fee, refused to complete the plans.

Although there was no contention that the plans were substandard, the Missouri Board of Architects, Professional Engineers, Professional Land Surveyors and Landscape Architects charged Bird with improperly signing and sealing work that he himself, or persons under his immediate personal supervision, had performed. The Administrative Hearing Commission suspended Bird's license for three years.

"As a matter of economic reality," the complaint against Bird, the engineer appears to be part of the fee dispute between the architect McInnis and

Landmark, the court noted. After McInnis refused to complete the building plans without more money, Landmark hired Bird rather than give in to McInnis' demands. McInnis then complained to the board.

In a separate action, McInnis sued the client Landmark for the additional amounts he claimed were due, and not only lost the claim for additional compensation, but was ordered to pay back the fees he had already received

Bird charged in his appeal that during the disciplinary hearing the assistant attorney general urged the board to impose substantial discipline because the architect McInnis' career has been "ruined" by this case.

The court suggested that such "economy realities" were the real motivation for the case, and concluded that the supervision requirement was improperly used as a rationale for disciplining Bird. The law "does not apply to situations in which two licensees work separately on a project," said the court.

Occupational licensing boards deserve deference in cases that require technical expertise in their respective fields, the court added. "But this is not such a case. The resolution of this case depends on the interpretation of the licensing statute—a question that is not committed to the discretion of the licensing board, nor dependent on its expertise, but is a question for the courts ultimately to resolve on judicial review when called upon to do so."

Quoting legal scholar Walter Gellhorn, the court said, "Occupational licensing is—or rather, should be—a prophylactic measure, intended to save the public from being victimized. It is not—or rather it should not be allowed to continue to be—an economic weapon intended to strengthen the licensees."

Discipline

Board discipline over insurance billing reversed on appeal

Issue: Burden of proof

The Virginia dental board's findings of fact concerning a dentist's billing practices and records were not supported by substantial evidence, the Court of Appeals of Virginia ruled June 17 (*Farid A. Zurmati v. Virginia Board of Dentistry*). Reversing a trial court that had upheld the board's discipline of the dentist, the appeals court remanded the case to the board.

Following a formal administrative hearing, the board had found that Zurmati charged insurance companies for nine patients amounts higher than the corresponding amounts stated on the patients' treatment plans, and committed various recordkeeping violations.

It imposed a reprimand, an unannounced inspection of Zurmati's dental practice random sampling of his patient records by the Department of Health Professions, and a four-hour continuing education requirement.

In his appeal, Zurmati alleged that the complaint regarding his billing had been "concocted" during the formal hearing, had not been alleged before, and related to an entirely standard practice in the industry: the difference between "usual and customary rate" (UCR) and "usual and customary fee" (UCF).

Submitting a fee to an insurance company that is different from an amount shown to a patient is standard in the industry and required by the insurance companies, Zurmati argued, and the board did not show how it violated any provision of law.

The appeals court agreed, noting that Zurmati was contractually bound to accept payment based on the insurer's UCR, not his UCF. The board's own expert witness, it added, admitted that each of the nine patients paid what he or she was supposed to pay and the insurance company paid what it was supposed to pay.

The court reversed the sanctions that were based on the alleged billing irregularities and sent the case back to the board to consider whether the sanctions should be imposed based solely on the existence of the recordkeeping violation that remained.

Court upholds suspension of physician who filed false police report

Issue: Nexus of crimes and practice of profession

A physician who pled guilty to a misdemeanor charge of filing a false police report was properly suspended from the practice of medicine on the grounds that the crime involved moral turpitude, the Court of Appeals of Ohio, Tenth Appellate District, held June 24.

In the case (*Ansar v. State Medical Board of Ohio*), Azber Azher Ansar, an internist licensed in 14 states, was convicted of a misdemeanor after he falsely accused his wife of attacking him, then recanted the accusation. The Ohio medical board voted to impose a six-month suspension, and the Franklin County Court of Common Pleas affirmed the order.

In the summer of 2005, Ansar was in the midst of a bitter divorce and custody battle. He became upset about a police report that his wife had filed against him. He admitted to the board that in an attempt to gain a legal advantage in the divorce, he drove to a store with his child, purchased a knife, and then drove to his parents' home, where he was living at the time.

Ansar cut himself with the knife and tossed it into this wife's car, then called police and made a false report that he had been attacked by his wife. He later recanted his statement when he realized the officers were going to handcuff his wife and take her into custody.

Ansar made several arguments in his appeal. He claimed he should have been advised of his Miranda rights before his recanting of his false statement; however, the court said that since Ansar had pled guilty to the charge, this argument was waived. The fact that the board's hearing examiner refused to admit letters from other states' medical boards which had not take any action against Ansar's license as a result of the same incident was not relevant, the court also held.

As to Ansar's charge that his crime did not involve moral turpitude, the court said it was incumbent upon the board to review the circumstances "to determine if they manifest the requisite lack of social conscience and depravity beyond any established criminal intent."

In this case, "the act took place in front of Dr. Ansar's four-year-old son, and there was evidence of premeditation because Dr. Ansar purchased the knife the day of the incident and put it in his pocket while he awaited his wife's arrival. The incident was staged and involved dishonesty, and the intent was to set his wife up to gain an edge in the divorce proceedings. This constitutes reliable, substantial, and probative evidence that Dr. Ansar's misdemeanor conviction involved moral turpitude."

The fact that Ansar recanted almost immediately might affect the severity of the sanction, but not the proof of moral turpitude, the court added, agreeing with the trial court decision to affirm the discipline order.

Failure to respond may be deemed admission to charges, court confirms

Issue: Due process in disciplinary proceedings

A discipline panel properly deemed a neurologist's failure to respond to misconduct charges an admission of the charges, the Supreme Court of New York, Appellate Division, held June 12 (*F. Javier Monreal v. Administrative Review Board of the State Board for Professional Medical Conduct*).

The neurologist, F. Javier Monreal, was personally served in 2007 with a notice of hearing and statement of charges alleging multiple specifications of misconduct involving his treatment of 12 children between 2002 and 2006, and further asserting that his communication with various state agencies reflected possible symptoms of paranoid or grandiose personality.

The administrative law judge contacted Monreal who told him he would not attend the hearing, and returned letters from the Bureau of Professional Medical Conduct unopened.

Although he chose not to submit an answer to the charges, Monreal did write a letter to the state health department and the medical board stating that he was commencing a separate action to forestall the hearing.

The medical board's hearing committee deemed the charges against Monreal admitted and revoked his medical license. In appealing the order, Monreal argued this action was an abuse of discretion. The court, however, said it was not. "It is not disputed that [Monreal] had abundantly ample notice of the charges and the hearing. His refusal to answer the charges provided a proper basis to consider the charges admitted."

Monreal made the argument that he suffered from a mental health infirmity and in that light, the decision should have been vacated and another hearing conduct. But the court said: "There is no indication that petitioner's infirmity prevented him from understanding or answering the charges. Indeed, it appears that during the time of the investigation of the charges and when these proceedings were pending, he was pursuing litigation in other forums, including an action in Supreme Court, an appeal to his court, and a claim in the Court of Claims."

The court said it found no legal error or abuse of discretion in the review board's refusal to vacate the discipline order.

Lay board members equally competent to participate in board deliberations

Issue: Lay board member authority

The Virginia Board of Dentistry properly ordered disciplinary penalties against a dentist who was charged with recordkeeping violations, the Court of Appeals of Virginia ruled June 17 (*John Doe v. Virginia Board of Dentistry*). Agreeing with a trial court, the appeals court affirmed the board's discipline order.

The discipline case against the pseudonymous dentist "John Doe" began with press coverage of a malpractice suit against him. In April 2003, a Virginia newspaper published an article detailing a civil malpractice suit initiated against Doe by his former patient.

The patient alleged that Does did not sufficiently anesthetize her prior to extracting her teeth, left broken root fragments in her mouth, and broke her nose during the extraction process. Following publication of the article, the board launched an investigation, which progressed to a probe of Doe's recordkeeping.

In the case of "Patient A," Doe's records did not indicate which teeth he had extracted; in other cases, Doe's records left out an ascertainable diagnosis, and prepared unsigned work authorizations. At a formal hearing in December 2005, the board found that Doe had kept inadequate patient records and imposed sanctions including a $2,000 fine, eleven hours of continuing education, and unannounced audits of patient records by the board for an eighteen-month period.

Doe argued that the dental hygienists on the board, who participated in the decision to impose discipline, "would not necessarily be familiar with the standard of care or dental record keeping." As such, he contended, the panel could not make a finding of a departure form the standard of care for recordkeeping with an expert opinion.

The court, however, said that the practice act contemplates that "all board members are competent to participate in board matters, including formal hearings, regardless of whether that board member is a dentist or dental hygienist."

Mention of heavy patient caseload did not improperly influence discipline decision

Issue: Potential bias in disciplinary proceedings

Comments that medical board members made about a doctor's heavy caseload were not independent grounds for discipline and did not mean the board abused its discretion in suspending the doctor's license, the Court of Appeals of Ohio, Tenth Appellate District, decided June 30 *(Alan Parks v. Ohio State Medical Board*).

The physician, Alan Parks, was appealing the state medical board's finding that he had failed to conform to minimum standards of care in the treatment of three patients between 1995 and 2001, and its imposition of a six-month suspension of Parks's license.

One of Parks's arguments on appeal was that the decision to discipline him was based, at least in part, on the board's belief that he sees too many patients to provide each with adequate care. After Parks testified that he typically sees 900 patients within any given month, individual board members were very critical.

Board minutes demonstrate that two members expressed reservations about the caseload, while others stated that Parks "represented what is really wrong with some medical professionals," Parks was "overloaded" and "seeing way too many people," the court said.

Parks asserted that he was not given an opportunity to respond to or defend the allegations of some board members. "However," the court found, "there is no evidence that the board actually based its decision to discipline Dr. Parks on the statements about his caseload, as opposed to the medical errors found by the board."

The court overruled this assignment of error as well as four others, and affirmed the trial court's decision to uphold the discipline order.

Administrative remedies must be exhausted before appeals

Issue: Appeals process

A nurse who was summarily suspended by the Connecticut nursing board, but whose suspension was later vacated, must exhaust administrative remedies before seeking damages and injunctive relief for improper suspension of her license, the Superior Court of Connecticut ruled June 12.

In the case*, Pamela D. Johnson v. Connecticut State Board of Examiners of Nursing et al.*, the nurse Pamela johnson was charged in October 2006 with providing false and/or materially deceptive information to the state Department of Public Health on her licensure application. Her license was summarily suspended the same day.

The administrative licensure action was heard in September 2007 and March 2008, at which time the board unanimously voted to vacate the summary suspension. In the meantime, Johnson alleged before the court that as a result of the suspension, she had "suffered irreparable harm including the auctioning of her home and unemployment."

Johnson was required to wait until the board issued a final decision, however, before she could appeal to the Superior Court. The court stated that since the board had vacated the summary suspension, no exception to the exhaustion doctrine applies. "It can hardly be argued that recourse to the administrative procedure would necessarily have been futile or inadequate," the court added.

Court dismisses suit of inmate-sex lawyer in case against discipline board

Issue: Grounds for suing disciplinary boards

A federal district court dismissed with prejudice the suit filed by suspended attorney Noland J. Hammond against the director of the Louisiana Attorney Disciplinary Board and the former assistant counsel for the board *(Noland J. Hammond and Courtney Jones v. Charles Plattsmier, et al.*)

The June 2 decision by the U.S. District Court for the Western District of Louisiana concerned the discipline taken against Hammond, following his indictment on two counts of public obscenity in 2004 and 2005.

Hammond and his co-plaintiff, Courtney Jones, allegedly visited two inmate clients at Bunkie Detention Center and videotaped Jones engaging in a sex act with one of the clients. The state Attorney Disciplinary Board suspended Hammond's license to practice law in December 2005.

Hammond alleged the disciplinary decision constituted disparate treatment based on both race and sexual orientation in violation of his civil rights. In the opinion of Judge James Trimble Jr., Hammond did state a cause of action under the Fourteenth Amendment for unconstitutional invasion of privacy, but he failed to allege any facts in support of his claim; he only made vague assertions.

"Hammond has not availed himself of any responsive filings and has not filed any motions for extension of time in order that he may participate in motion practice in his case," Trimble wrote in dismissing the suit. "Given Hammond's former status as a licensed attorney, we are puzzled by this seeming indifference," he added.

Alabama court restores board's revocation order

Issue: Proper grounds for staying revocation orders

A county circuit should not have issued a stay of the Alabama medical board's revocation of David G. Morrison's license, the Court of Civil Appeals of Alabama agreed May 9 in *David G. Morrison MD v. Jerry N. Gurley MD*.

The appeals court said that the circuit court erred by applying the wrong standard for issuing a stay, and that the physician's due process rights had not been violated in the disciplinary process.

The medical board filed complaints against Morrison, a hematologist-oncologist, in 2005 and 2006, charging him with endangering patients. Following eight days of hearings over a two-month period, the Medical Licensure Commission issued a 93-page order determining that Morrison was guilty of all charges, revoking his license, and assessing an administrative fee of $266,000 against him.

After Morrison appealed on October 29, 2007, the circuit court proceeded to hold an evidentiary hearing on his motion for a stay, even though the 2,100-page record of testimony and 2,000 pages of exhibits on the record had not been filed with the court.

> The licensing board's counsel argued: "Under the law there is a presumption that a doctor is dangerous to the public safety, health, and welfare once a revocation is entered. The only way that they can get a stay—and the law is very clear—it says, 'No stay shall be granted unless a reviewing court, upon proof by the party seeking judicial review, finds in writing that the action of the Licensure Commission was taken without statutory authority, was arbitrary and capricious, or constitues a gross abuse of discretion.'"

The circuit court heard testimony from nine witnesses, including physicians acquainted with Morrison's medical competency, and then decided: "It is in the best interest of the public, and specifically the patients whose care he is currently managing, that [Morrison] continue in practice during the pendency of this appeal." The court added that based on the only evidence it had seen, "the rocks will cry out" in protest if a stay of the revocation was not granted.

However, the Medical Licensure Commission in the case argued—and the appeals court agreed—that Morrison could not base his appeal on witnesses who would testify that he was not a danger:

"Whether or not he's a danger to the public is already decided. They can't bring in witnesses to say he's not a danger. That's our position. We're going to object to any witness that would testify to anything other than whether the Commission's order was taken without statutory authority, was arbitrary and capricious, or constitutes a gross abuse of discretion."

The appeals court said the circuit court was in error. Under Alabama law, the right to a stay is denied in "all but the most egregiously erroneous medical-license revocation cases—cases in which the movants can demonstrate that they will prevail on the merits of the appeal." The circuit court had no authority to disregard the requirement that Morrison show the medical licensure commission had violated his due process rights.

In a dissenting opinion, one judge pointed out that without a transcript of the hearing, Morrison had no meaningful opportunity to obtain a stay of the revocation.

Nurse's lack of opportunity to cross-examine witnesses sinks board's revocation

Issue: Disclosure and due process

A nurse's license was improperly revoked by the Oregon Board of Nursing because the board limited the nurse's cross-examination of one of the witnesses, the Court of Appeals of Oregon held May 28 *(Susan M. Shank v. Board of Nursing*). In remanding the case to the board for reconsideration, the court said the board had incorrectly constructed state law regarding disclosure of discipline information.

The case stemmed from an incident August 24, 2003, in which a patient under Shank's care died. Following the death, Shank was suspended from the hospital and then resigned from her position.

The state nursing board investigated and proposed revocation of Shank's license, citing several failures to properly assess the patient, assist in managing her pain, and take other appropriate actions.

When Shank requested a hearing before the board, her counsel requested that the board's investigator bring to the hearing her entire file and any other documents pertaining to the charges or investigation. The board refused, citing confidentiality of board investigations.

According to the board's argument, Shank was a member of "the public," in this case, and the board therefore was not authorized to disclose to her any of the information it obtained as a result of its investigation.

Following the hearing, the administrative law judge found that some but not all of the board's charges were accurate, and recommended a two-year suspension. The board rejected the ALJ's "erroneous findings of fact" and concluded that Shank's license should be revoked.

On appeal, Shank argued that the revocation order was defective because she had been denied the opportunity to cross-examine the investigator regarding the persons who had led her to the opinion that Shank violated essential standards of nursing. (When she tried to cross-examine the investigator, the board and the ALJ refused to permit it on the ground that the details of the investigation were confidential.)

The court agreed with Shank that the board's position was incorrect. "In light of the fact that the statute contemplates the imposition of sanctions against an applicant or licensee, including the revocation of a professional license, it is counterintuitive to believe that the legislature would have intended to include 'licensees' and 'applicants' within the meaning of the term 'the public,'" the court said.

Because the board's order finding that Shank violated essential standards of nursing was therefore "based on an incomplete record," the court said, it remanded the case so that Shank could cross-examine the investigator, allowing the board to reconsider its order based on a complete record.

Exoneration of radiologist in same incident not relevant to discipline of surgeon

Issue: Relevance of related discipline hearings

The state medical board properly suspended a surgeon for negligence in a case where a board hearing committee exonerated a radiologist involved in the same incident, the Supreme Court of New York, Appellate Division held January 10 (*Jose G. Posada v. New York State Department of Health et a.*).

The case concerned an operation in which the surgeon, Jose Posada, installed a cardiac pacemaker in an elderly patient who later died for unrelated reasons. A hearing committee of the board determined in 2004 that Posada had committed acts of negligence on more than one occasion and it ordered a two-year stayed suspension of his license.

A different hearing committee of the board subsequently considered charges of negligence and incompetence against the radiologist involved in the same operation and exonerated him. Posada argued before the state Supreme Court that there was a perceived contradiction between these two determinations, and that court ordered the board to reconsider the merits of the hearing committee's decision.

In response, the director of the state Office of Professional Medical Conduct reviewed the order and found the determinations were not inconsistent. He therefore declined to vacate the findings of misconduct against Posada. Posada filed an appeal seeking to hold the board in contempt for violating the order mandating reconsideration.

The trial court proceeded to order a full rehearing by a hearing committee, but the appeals court noted that once the court had found punishment for contempt was inappropriate, it should have denied the surgeon's motion for a rehearing.

Board members qualified and authorized to decide on rehab and anger management

Issue: Board member authority

The Court of Appeals of Washington rejected an appeal by dentist Jeffrey A. Burgess of his license revocation for sexual misconduct. In a June 9 ruling (*Jeffrey A. Burgess V. Washington State Department of Health*) , the court said the fact that the state Dental Quality Assurance Commission failed to determine whether complaints about Burgess merited investigation before initiating an investigation was harmless.

The revocation was the result of charges filed in 2003 and a six-day hearing held in 2004, at which ten female patients testified that Burgess touched their breasts in a sexual manner during techniques allegedly used to relieve pain and tension of temporomandibulary joint syndrome.

Expert witnesses testified the technique called "spray and stretch" was useful but did not require massaging patients below the collarbone. The state Dental Quality Assurance Commission revoked Burgess's license, imposed a $25,000 fine, and required him to get a psychological evaluation, anger management assessment and counseling, and to take a jurisprudence exam.

In his appeal, among other arguments, Burgess contended that members of the commission's discipline panel are dentists, not psychologists, and therefore unable to make determinations about non-dental conduct.

But the court noted that state law grants disciplinary bodies wide latitude in ordering sanctions and in rehabilitating a license holder, and the imposition of anger management sanctions and an exam requirement was not arbitrary or capricious.

Lawyer in sex sting "overstepped boundaries" and violated trust

Issue: Nexus between felonies and practice of profession

An indefinite suspension is appropriate in the case of a lawyer who attempted to arrange a sexual encounter with an underage girl, the Supreme Court of Ohio held May 29.

In the case*, Disciplinary Counsel v. Goldblatt*, the attorney Jay Goldblatt tried to arrange an encounter with a minor but unwittingly made the arrangement with an undercover FBI agent. He was convicted of two felonies: compelling prostitution and possession of criminal tools.

Agreeing with the Board of Commissioners on Grievances and Discipline, the court said Goldblatt's behavior "grossly overstepped the boundaries of appropriate adult-child relationships," and that the attorney "demonstrated, and

even acknowledged to himself, that he may not be trusted around children in general."

Although adult-child interactions are not related directly to Goldblatt's practice of law, the court said, "The concept of trust is an inseparable element of any attorney's practice. It is inconceivable, therefore, how we presently may authorize and entrust [him] with the innumerable confidential, fiduciary, and trust-based relationships that attorneys, by their profession, are required to maintain in their dealings with their clients or the public."

Penalty for snooping through other lawyers' e-mails: two-year suspension

Issue: Severity of sanctions

An attorney in Charleston West Virginia was suspended for two years after admitting he snooped through the e-mails of other lawyers including his wife, the state Supreme Court announced in June.

The lawyer, Michael P. Markins, testified in disciplinary hearings that he started accessing the e-mail account of his wife in 2003 because he thought she was cheating on him with a client. After discovering that the password for each e-mail account at the firm Offutt Fisher and Nord was simply the lawyer's last name, he expanded into the accounts of other lawyers "out of curiosity."

The firm became suspicious and hired a computer systems engineer to investigate. In March 2006, Andrea Markins, who the court said was completely unaware of her husband's misconduct, told him that someone had been breaking into the e-mail accounts and that the firm was "getting close" to discovering who it was. Michael Markins confessed his actions to his wife. Later both Markinses were fired from their respective law firms.

The State Bar ordered that Markins must cease practicing law for two years, be supervised for one year when he resumes practicing, finish 12 hours of continuing legal education, and pay more than $1,500 in court costs.

Tummy-tuck dentist went beyond scope of practice

The state medical practice act provided "fair notice of the forbidden acts to persons of ordinary intelligence," the Court of Appeals of Texas, Fourth District, said June 11 in an unpublished decision in the case of an oral surgeon indicted for thirteen counts of practicing medicine without a license. *(Ex Parte Carlos Morales-Ryan*).

The oral surgeon, Carlos Armin Morales-Ryan, earned his dental degree and certificate of oral surgery in Mexico and Puerto Rico, and further studied oral and maxillofacial surgery in Texas. His dental license contained a special designation permitting him to administer anesthesia because he is an oral and maxillofacial surgeon. A county court denied Morales-Ryan's application for writ of habeas corpus, and he appealed.

Morales-Ryan was arrested for operating a practice in which he engaged in non-oral surgeries including tummy tucks, liposuction, and breast augmentation. At his habeas corpus hearing he argued he is qualified to perform the challenged procedures because he is a surgeon and because the practice act is void for vagueness. In particular, he said, the act's use of "physician" and "surgeon" as interchangeable terms creates an "ambiguity that would tend to mislead a person of ordinary intelligence" and "encourage erratic and arbitrary prosecution."

The court however, overruled Morales-Ryan's points of error, concluding the trial judge did not err in denying him writ of habeas corpus.

Mandatory reporting requirements tightened to single day

School districts in Colorado now have 24 hours to report allegations of sexual misconduct by teachers to the state. With the passage and signing of House Bill 1344 in June, Colorado became one of the stricter states on mandatory reporting.

The new law requires that school districts report any teacher who is fired or who resigns because of allegations of illegal behavior involving a child, if the claim is supported by significant evidence, even if there is no conviction.

Settlements that allow teachers to avoid a license-revocation hearing must also be made public. The measure will be paid for by an increase in teacher licensing fee from $60 to $71.50.

Sexual assault incidents have risen sharply the past few years, according to a recent state Board of of Education report. It showed there were 293 disciplinary actions against Colorado teachers from 1998-2007 including 51 sexual assaults on a child and four sexual assaults involving adults.

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