Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue:

Discipline

Molestation conviction no basis for professional license suspension, court finds

Issue: Criminal convictions and professional discipline

An engineer convicted of child molestation may keep his state license because no relevant connection exists between his conviction and his ability to perform engineering work, a Washington appeals court ruled May 11 (*Dennis E. Ritter v. The Board of Registration for Professional Engineers and Land Surveyors*).

The decision by the Court of Appeals of Washington overturned the suspension of the engineer's license by the state Board of Professional Engineers and Land Surveyors.

The engineer at the center of the case, Dennis Ritter, had formerly been the public works director for the city of Lacey, Washington, and seems to have enjoyed a solid professional reputation. However, in February of 2007, Ritter resigned from his position, and shortly thereafter was charged with three counts of child molestation, dating back to 1998.

Ritter pled guilty and was sentenced to six months in jail, with the rest of his sentence suspended because he was a first-time offender.

This prompted the board to initiate its own charges, in which it sought to suspend Ritter's engineering license for five years. At his hearing, Ritter produced several witnesses who testified favorably to his professional character, with one fellow engineer testifying that Ritter "demonstrated the highest character in his professional conduct" and another colleague going so far as to say that Ritter's "morals and ethics were those that most strive to achieve."

Nevertheless, the board, based solely on the molestation conviction, chose to suspend Ritter's license for five years. "First degree child molestation is an act of moral turpitude," the board noted in its decision, and because 'good character and reputation' are included in the statutorily required qualifications for licensing to practice as a professional engineer," Ritter's conduct constituted unprofessional conduct.

Ritter appealed and, after a Washington superior court affirmed the board's decision, he took the case to the Court of Appeals, which, in a

2-1 decision, overturned the suspension, declining to find a connection between Ritter's conviction and the practice of engineering.

Of the two statues the board used to discipline Ritter, the court noted, the first "unambiguously requires the proscribed act to *relate to* the practice of professional engineering" and the second, which did not expressly require a nexus as written, would nonetheless be subject to one through the surrounding statute's catch-all proviso requiring disciplined conduct to relate to a profession.

No such nexus existed between a conviction for child molestation and the practice of engineering, the court held. "When professionals regularly interact with children, such as physicians or attorneys, and when the evidence in the record shows that the professional used their skill or standing to take advantage of children, courts could reasonably say that a child molestation conviction relates to the practice of that professional."

"... But where, as here, the record does not show that Ritter regularly interacted with children or that Ritter used his professional position to take advantage of children, we cannot say that Ritter's child molestation conviction is related to the practice of professional engineering."

Covert camera worn by patient proved unlicensed practice charges

Issue: Discipline investigations

There was competent, credible evidence that a former licensee engaged in the unlicensed practice of dentistry, the Mahoning County Court of Appeals held February 25, affirming a trial court in a case in which the Ohio State Dental Board and an undercover police officer covertly recorded a patient's encounter in order to investigate the allegations (*State v. Mangle*).

The court also upheld a ruling that the dentist who employed the former licensee was guilty of permitting the unlawful practice of dentistry.

The case involved the practice of James Gentile, currently licensed, and Ronald Mangle the former licensee. A patient who needed to have some crowns re-fitted found her appointments cancelled each time she arrived at Gentile's office, and she contacted the state dental board.

A combination of actions captured by the covert recording led the court to conclude Mangle engaged in the unauthorized practice of dentistry. These included conducting a dental examination after introducing himself as "Dr. Mangle," diagnosing various issues, assuring that he knew what steps to take, formulating a treatment plan, essentially stating that he would be the one who ensured the crowns were functional and that they looked good, stating that this was his "forte," ordering another to affix a crown to an implant by use of a screw, and instructing another how to go about remedying the issue including the directing of how much of a permanent tooth should be shaved off.

The board began a covert investigation in conjunction with the local police department. When Gentile's office finally agreed to see the patient, an undercover police officer waited in the waiting room while she attended the appointment wearing audio and video recording equipment.

Gentile told the court that Mangle was primarily dealing with the patient from a business standpoint. But the recording shows staff referring to Mangle as "the doctor" and Mangle examining the patient, promising to repair the crown, and noting that "making it all look perfect" had always been his forte, while directing a dental assistant to engage in unauthorized practice of dentistry.

Affirming the trial court, the appeals court found that Mangle had held himself out as a dentist at least by inference, and was guilty of practicing dentistry without a license.

Court upholds liposuction doctor suspension for attempt to influence board

Issue: Due process by boards

A physician who was called before the state medical board after one of his patients died following a liposuction operation he performed, and who then allegedly attempted to improperly influence board members, lost his appeal of the subsequent 60-day suspension of his license in a June 15 ruling by the Commonwealth Court of Pennsylvania *(Richard P. Glunk v. State Board of Medicine*).

The physician, Richard Glunk, was a defendant in a medical malpractice case filed by the parents of an 18-year-old patient, Amy Fledderman, who died following the liposuction procedure. The board filed an Order to Show Cause against Glunk, charging that he was subject to disciplinary action as a result of the treatment of Fledderman and two other patients.

Even though a jury found against Glunk in the malpractice case, four months later the board's Order to Show Cause against Glunk was dismissed.

In 2009, however, the state charged Glunk with unprofessional and immoral conduct consisting of meeting with a board member, making a contribution to a political campaign supported by and through the board member, and making a $5,000 contribution to the board member's synagogue with intent to influence the board member in a disciplinary matter pending before the board. In 2010 Glunk's license was suspended for 60 days.

On appeal, Glunk argued that although the prosecution may have proved that he committed an act of moral turpitude, dishonesty, or corruption, the state did not sufficiently prove that his conduct adversely affected the health, welfare, or safety of the citizens of the state. The court disagreed, saying it failed to see how such an action cannot at least indirectly affect the health, welfare, or safety of citizens.

Glunk also contended that the hearing examiner in his case improperly refused to let him reopen the record to explain his contributions to the political campaign. But the court rejected this argument too, noting that Glunk had a full and fair opportunity to present his own testimony and chose not to do so.

Despite serious procedure error, board members immune from suit

Issue: Board member immunity

The members of the Puerto Rico Examining Board of Accountants were entitled to immunity from suits, despite a "grave and unacceptable procedural error" on their part which violated the due process of a licensee, the U.S. Court of Appeals for the First Circuit ruled April 22 (*Miguel Guzmán-Revera v. Kermit Lucena-Zabala, et al.*). The ruling most likely brings to an end a lawsuit filed by accountant Miguel Guzmán-Rivera after the board revoked his license.

The events which were the focus of the suit began in June of 2006, when the board notified Guzmán-Rivera, based on an audit, that he would be required to submit to a practice review by the end of that August. A series of scheduling mix-ups and miscommunications followed, Guzmán began his practice review late, and the board suspended and then revoked his license in October 2007.

Guzmán appealed the decision, and in June 2008 the Puerto Rico Court of Appeals restored his license, ruling that the board had violated his due process rights during the administrative process.

The violation of due process came in the form of two notices sent by the board to Guzmán, informing him of the hearings regarding the suspension and then revocation of his license. Neither notice contained required information regarding the purpose of hearings, the legal provisions involved, Guzmán's alleged violations, his right to counsel, or the consequences which would follow if he failed to appear. The Puerto Rico court went so far as to say that "the board totally disregarded the procedures required to suspend and revoke a license."

Guzmán brought suit against the board in federal district court, alleging violations of his 14th Amendment due process rights and damages due to the loss of his license for the twenty months it took to resolve the case. However, the district court dismissed his claim, ruling that the board members were entitled to immunity and that Guzmán's rights were adequately protected.

Guzmán appealed to the First Circuit, which issued a ruling affirming the decision of the district court to dismiss the case.

The court used a three-prong test provided by earlier cases to rule that the boad members were subject to immunity as judicial officials. Of the three elements provided by the test to identify whether an official is entitled to judicial immunity, the only one that merited extended discussion was whether or not adequate safeguards existed to protect a licensee's constitutional rights. But the court, examining all of the existing procedural safeguards, concluded that the safeguards were adequate.

Guzmán attempted to circumvent this argument by claiming that, because of the degree to which the board members disregarded the required procedural safeguards, they had acted outside the scope of their duties and were not entitled to immunity.

However, the court noted that although "the [board's] summary suspension of Guzmán's license was a grave and unacceptable procedural error," the test to determine whether a judicial official acted outside the scope of their duties is whether or not the official had jurisdiction over the subject decided upon. Because the board did have jurisdiction over Guzmán, the members were subject to immunity from their actions in the case.

Discipline of doctor using unproven weight-loss procedure upheld

Issue: Board member immunity

Discipline imposed by the state medical board against a weight-loss physician, for advertising that an unproven medical procedure would cause patients to lose weight, was supported by substantial evidence, the Court of Appeals of Tennessee held June 27 (*Richard W. Feldman v. Tennessee Board of Medical Examiners*).

Physician Richard Feldman advertised the use of a procedure called "mesotherapy," or "lipodissolve" and claimed that he was "Tennessee's most experienced weight-loss physican."

The procedure involves subcutaneous injections which, according to Feldman's advertisements, will "melt fat cells" as a method of "cellulite reduction, spot weight reduction, and skin rejuvenation," such that "one pound of fat per week on average is lost—equal to four sticks of butter!"

Feldman also advertised the procedure as safe and FDA-approved, although the waiver he had patients sign before beginning treatment stated that

mesotherapy "is a relatively new procedure and that little is known about its long term safety" and that the injections "are NOT approved by the Federal Drug Administration for ANY type of human benefit."

In June of 2006, the Board of Medical Examiners filed charges against Feldman of unprofessional and unethical conduct, fraud, negligence, malpractice, and the use of a drug in bad faith. After a hearing, in which several experts for both sides testified, the board found Feldman in violation of all but the malpractice and bad faith drug use charges.

Feldman appealed the decision and, after a lower court upheld the discipline, came before the Court of Appeals, where he argued that the board's decision was not based on substantial evidence, that it improperly considered his disciplinary history, and that the administrative law judge in the case improperly excluded expert testimony.

To address Feldman's first claim, the Court, in a fact-heavy opinion written by Judge Alan Highers, recounted the case. The board produced two expert witnesses, experts in metabolism and nutrition, who stated that, given the scant existing scientific literature on mesotherapy, no benefits would result from use of the procedure. One expert testified that no safety studies or blinded clinical trials had been performed. The other stated that "spot weight reduction" was "not a medically relevant term that I'm familiar with or that I could even define for you."

Questioned about his claim to be the most experienced weight loss physician in Tennessee, "Dr. Feldman said he had not claimed that he was the most experienced weight loss physician in Tennessee until after the death of one of his colleagues who had been practicing since 1947. He said he would concede that he was not the most experienced weight loss physician in Tennessee 'if somebody comes forward and showed me that they had more patients they treated for obesity.'"

Feldman introduced several expert witnesses on his own, all involved in the application of mesotherapy. All testified as to the benefits of the procedure, though all agreed that the procedure could not be used to bring about overall weight loss.

In fact, during the hearing, neither Feldman or his experts claimed that mesotherapy would result in overall weight loss. To achieve that, Feldman acknowledged, he required his patients to adhere to a special low-carbohydrate diet. When questioned, Feldman stated that although the special diet is not expressly mentioned in his advertisements connecting mesotherapy and weight loss, because his practice was named "Doctors Diet Program," he believed a reasonable person would assume a diet is involved.

Feldman's claims about the exclusion of his experts' testimony were unsuccessful as well and dismissed for various reasons.

Feldman's last claim, that his disciplinary history was improperly considered by the board, seemed to be the most plausible of his claims. In 1997, Feldman had been disciplined by the Board for unprofessional behavior, including suggestive and inappropriate remarks to staff members and patients, sexual contact with a 17-year-old patient, exchanging drugs for sex at a massage parlor, and an episode where he told a patient "there was nothing he could do for her and that she could put a gun in her mouth and pull the trigger."

Assigned to a physician health program, he was diagnosed with narcissistic personality disorder, failed to follow through on the terms of his probation, and was again subjected to discipline. In 2001, he was disciplined for another advertising violation—offering a fifty percent discount to patients who brought a "diet buddy" to their appointment.

The ALJ in charge of the case withheld this information until the disciplinary phase of the proceeding. One board member, faced with the record, expressed some surprise and stated that, if he had been on the board at the time, he would have voted for permanent revocation. However, the court said, "the board was authorized to consider Dr. Feldman's disciplinary history," and "considering all the circumstances, we decline to interpret the statements of this one board member as an indication that the board's decision was arbitrary and capricious."

Court rejects part of suit against board for publicizing discipline order

Issue: Suits against board members

A physician whose license was revoked in 2006, then restored by a state court, then surrendered by him in an agreement with the licensing board, lost part of his bid to sue members and staff of the New Mexico Medical Board for disseminating the reversed discipline decision to medical boards of other states.

Answering a motion to dismiss In *George R. Schwartz v Guru Terath Singh Kalsa, et al.*, the U.S. District Court of the District of New Mexico March 16 dismissed three of the physician's complaints, but declined to dismiss his claims on the ground of absolute judicial or prosecutorial immunity.

In the case, physician George Schwartz appealed the revocation of his license. A state court reversed the decision, finding that the denial of a continuance that Schwartz had requested resulted in denying him his right to be represented by counsel, "rendering the hearing structurally defective and tantamount to a denial of due process."

When the case was remanded to the board, Schwartz entered into an agreement with the board by which the disciplinary proceeding would be dismissed with prejudice, but in return, he would surrender his New Mexico license, not reapply for a New Mexico license, and forego the practice of medicine anywhere in the United States.

Schwartz sued in federal court after the board disseminated certified copies of the reversed discipline decision to medical boards in other states where he was licensed: California, New Jersey, New York, and Pennsylvania. Those states revoked his license in reciprocal disciplinary actions.

The court dismissed Schwartz's state law claims for fraud, conspiracy, and tortious interference with business contract, business relations, and business expectancy, on grounds of sovereign immunity—that the board members and staff were acting within the scope of their duties.

But the court said it was "not persuaded" that the board members and staff are entitled to absolute immunity, because disseminating the reversed findings might be an administrative function—falling outside the protections of absolute immunity—rather than a judicial or prosecutorial function. The case will continue on that basis.

"Overly rigid" denial of expert testimony dooms board discipline

Issue: Expert testimony

Beware of inflexibility. That's the lesson to take from a recent case in which the Maryland Court of Special Appeals overturned discipline imposed by the state Board of Dental Examiners.The June 30 decision criticized the board for an overly rigid interpretation of both the content and timing of expert witness submissions (*Maryland State Board of Dental Examiners v. Deborah K. Tabb*).

The licensee in the case, Maryland dentist Deborah Tabb, was accused in August 2005 of fraudulent billing, incompetent practice, and dishonorable and unprofessional behavior, and a pre-hearing conference was scheduled. Tabb was required to submit the proposed testimony of her expert witnesses fifteen days before the conference and, in response, Tabb sent a two-paragraph summary of her experts' proposed testimony.

Arguing that these summaries were inadequate for purposes of discovery, the prosecution moved to deny the use of Tabb's experts' testimony. Tabb countered with several reasons to delay and argued that she should be allowed to file supplemental proposed expert witness testimony at a later date.

In January 2006 the ALJ denied Tabb the use of her experts, then issued a final ruling finding that Tabb acted incompetently and unprofessionally and had misrepresented her fees.

The ALJ cited a law imposing strict deadlines on the submission of expert testimony and a mandatory control on his ability to allow for exceptions. But, the court noted, that law is actually subservient to another statute that details the responsibility and authority of ALJs. It allows them to grant delays for good cause and requires them to conduct hearings "in a manner suited to ascertain the facts and safeguard the rights of the parties to a hearing."

The dental board not only upheld the ALJ's finding against Tabb, but found Tabb in violation of other charges that the ALJ had dismissed. Tabb challenged the decision, and the case made its way to the Court of Special Appeals.

The court reversed the board's decision, calling the ALJ's decision to deny Tabb the use of her experts an "error of law" and "arbitrary and capricious." Further, the court said, the ALJ seemed to disregard all information from Tabb and her experts as to why they were unable to comply with the discovery deadlines. It also failed to explain why Tabb's initial summaries of her experts' proposed testimonies were inadequate, making any decision on that matter an arbitrary one.

The court also took issue with the board's rejection of the ALJ's decision which found that Tabb had not violated two of the provisions with which she was charged. In rejecting that decision and imposing discipline, the board failed to explain a required standard on one charge and failed to detail the factual findings that would have supported its decision on the second.

The case was remanded to a lower court and the payment of costs was imposed on the board**.**

Sanctions, injunction awarded against litigious doctor, counsel

Issue: Vexatious litigants

In the latest in a series of decisions stretching back to 2007, a federal district court in Virginia April 18 awarded attorney's fees against a doctor who had brought suit against the state medical board and several other defendants following revocation of his medical license (*Lokesh Vuyyuru, et al. v. Gopinath Jadhav, et al.*).

Although the amount of the fees was not set, the state defendants alone claim over $38,000 in attorney fees. The U.S. District court for the Eastern District of Virginia also imposed an injunction on former gastroenterologist Jokesh Vuyyuru, preventing him from bringing suit in any federal court regarding the loss of his license.

The case began in 2005, when the medical board summarily suspended Vuyyuru's license in response to allegations that he had caused the death of one

patient and performed unnecessary procedures on others. A formal hearing followed, and Vuyyuru's license was revoked in May 2006.

In the meantime, Vuyyuru mounted an obsessive campaign against what he claimed was a massive medical fraud at two hospitals where he had worked. In 2004, he began a self-published newspaper to spread the allegations, accusing doctors and administrators in the two hospitals of fraudulently billing Medicare for unnecessary and unperformed procedures, and in 2006 Vuyyuru filed an *ex relatione* action against the conspirators on behalf of the United States.

Vuyyuru's appeal of the revocation of his license eventually ended in 2008, when the Court of Appeals of Virginia upheld the board's decision and the Virginia Supreme court turned down his petition for further appeal. Meanwhile, Vuyyuru brought more claims against the board and other state officials in 2006, 2007, 2008, and twice in 2009 before bringing this last case, against both private and state parties, in March of 2010. Then in April 2010, he brought suit against the same defendants in a Virginia circuit court.

Citing Vuyyuru's five lawsuits, his rambling, 38-page complaint that asserted several claims totally foreign to state or federal law, and the amount of the court's time and energy expended on claims that "no reasonable attorney would expect to survive a motion to dismiss," the court said it was not convinced its award of attorneys' fees would adequately deter Vuyyuru from raising these claims in federal court again.

Chastising Vuyyuru for the deficiencies of his claims, the court dismissed them for being precluded by earlier cases, for the immunity of several of the defendants, and for failure to state a coherent claim under any of the laws cited by Vuyyuru and his attorney. Several pages, alone, were devoted to a discussion of Vuyyuru's misunderstanding of the Racketeer Influenced and Corrupt Organizations Act (RICO), under which he had sued all the defendants.

The court also awarded attorney fees to Vuyyuru's defendants. "Given Vuyyuru's litigation history, any attorney undertaking a reasonable inquiry would have concluded these claims had absolutely no chance of success on the merits." Vuyyuru's RICO claim, for example, had "sufficiently glaring and severe errors to ensure that it lacked any chance of success."

In an unusual step, the court, stating that Vuyyuru "undoubtedly has a history of filing 'vexatious' and 'duplicative' lawsuits," barred him from filing further federal actions related to the revocation of his license.

Threat of violence, not just harassment, needed for revocation

Issue: Criteria for discipline

Because a school bus driver's unwanted voice messages to a former lover were telephonic harassment but did not involve a threat of violence, the Court of Appeals of Oregon, in a March 2 decision, reversed a decision by the state Department of Education revoking the driver's state certificate (*Dawn M. Macks v. Department of Education)*.

In the case, the bus driver, Dawn Macks, left four unwanted voice messages for Hawkins, a man she had known for 20 years and with whom she had been romantically involved. She was convicted of telephonic harassment.

Under state law, suspension or revocation of a school bus driver's certificate is required if the driver has been convicted of a crime the commission of which involved a threat of violence. Because Hawkins sought and obtained a civil protective order against Macks after the four messages, based on her alleged fixation on him, the state Department of Education revoked Macks's bus driver certificate.

At a hearing, Hawkins stated that Macks had made aggressive and unwanted phone calls but he did not state the calls involved any threats of violence.

The court said that a "threat" is "a communication that instills in the addressee a fear of imminent and serious personal violence from the speaker, is unequivocal, and is objectively likely to be followed by unlawful acts." The court reversed and remanded the case to the department. While the calls may have alarmed Hawkins, the court said, it was error for the department to find that they involved a threat of violence.

Paraphrasing deposition against licensee is not "knowingly falsifying" it, court says

Issue: Due process in discipline investigations

An investigator for the state of Vermont, who paraphrased statements by a disciplined physician's employee in his affidavit about the physician, did not purposefully falsify or make assertions that deviated materially from the employee's deposition, the Supreme Court of Vermont held March 8. *(Chase v. Agency of Human Services, et al.*).

The case concerned a 2003 decision by the Vermont Medical Practice Board to summarily suspend the license of ophthalmologist David Chase for allegedly recommending and performing medically unnecessary cataract surgeries. In a later filing the state alleged 136 counts of unprofessional conduct concerning 13 patients.

In 2004 Chase agreed not to practice medicine until final resolution of the charges against him. Although he was acquitted of federal charges relating to his medical practice, the board concluded he engaged in unprofessional conduct with 10 patients.

Chase appealed, alleging that the investigator's affidavit was falsified. Agreeing with a lower court and rejecting the argument by Chase, the court made a lengthy comparison of the employee's deposition about Chase and the investigator's paraphrase of it. The investigator did use words like "crafted," "script," and "spiel" which were not used in the deposition. Chase claimed that the affidavit was designed to support the notion that he would coerce his patients into unnecessary and undesired cataract surgery, then falsify his records to make it appear that the surgery was necessary and wanted.

Affirming the lower court's ruling, the court concluded that, read in its entirety, the deposition was fully consistent with the assertions in the affidavit.

Sanctions "unduly harsh" for licensee guilty of DUI misdemeanors

Issue: Criminal convictions and board discipline

A chiropractor found guilty of driving under the influence of alcohol and attempted obstruction of justice, both misdemeanors, was given an unduly harsh discipline when his license to practice was indefinitely suspended for a minimum of three years, the First District Appellate Court of Illinois held March 25 *(David C. Grogg v. Division of Professional Regulation of the Illinois Department of Financial and Professional Regulation*).

The case involved David Grogg, who was licensed as a chiropractor but had worked in construction since 2001, and claimed in a board hearing he had only treated one patient in the interim, and wanted to avoid license suspension because he had been offered a position as a professor. The board imposed an indefinite suspension, Grogg appealed, and a circuit reversed the suspension as "against the manifest weight of the evidence."

The appeals court reversed that judgment. However, as to the sanction of indefinite suspension, the court noted that there was no explanation in the record as to the basis for the sanctions imposed. "We are aware of no case in which an indefinite suspension of the length imposed in this case was upheld for misdemeanor convictions. Rather, indefinite suspensions typically involve serious felony convictions or conduct causing direct harm to the medical professional's patients."

The court ordered a new hearing to impose sanctions against Grogg and to set forth the reasons for those sanctions so that a reviewing court may determine whether they are proportionate to the conduct at issue.

Board doesn't need explicit authority to discipline unethical licensee

Issue: Scope of discipline authority

An auctioneer who entered a false bid can be disciplined, despite the state auctioneering board's not having explicit power to enforce the statute which expressly forbids such false bidding, the Supreme Court of New Hampshire ruled May 5 (*Appeal of Harold French*).

The ruling, which upheld discipline imposed on auctioneer Harold French by the New Hampshire Board of Auctioneers, asserted the power of the Board to construe the violation of a statute related to auctioneering as "unprofessional conduct."

The disciplined conduct in the case occurred in 2009, when French attended an auction run by another auctioneer, Stephen Bennett. Due to errors in promotional materials for the auction, a painting at auction was mistakenly listed as not having a reserve, a minimum bid for it to be sold.

When the seller of the painting refused to remove the reserve, Bennett asked French to insert a bid to ensure that the reserve level of $10,000 was met. French did insert such a bid, but unfortunately for him, it ended up being the highest, and, when no other bids were made, Bennett tagged the painting as sold.

When the seller, who had believed the reserve was removed at the last minute, demanded payment from French, he was told that the reserve had not been met, causing him to file complaints against both auctioneers. The Board of Auctioneers reprimanded French and placed him on one year of probation.

On appeal before the New Hampshire Supreme Court, French argued that the board did not have the authority to impose discipline for the inserting of a false bid by an auctioneer. Although the board is given, by statute, the power to discipline an auctioneer for unprofessional and dishonorable conduct, no express authority exists for the board to enforce the New Hampshire law that forbids collusive bidding.

However, the Court disagreed that the board needed such express authority. In his written opinion, Justice James Duggan noted that although the board was not expressly authorized with the enforcement of the anti-collusive-bidding statute, it "correctly determined that because a New Hampshire statute prohibits collusive bidding, it is also a form of 'unprofessional' or dishonorable' conduct. Accordingly, the board did not exceed its authority by disciplining French for collusive bidding."

Revocation of license overturned for lack of evidence

Issue: Evidentiary standards

The permanent license revocation of a teacher accused of molesting a student was overturned by an appellate court in Ohio because the board decision to revoke lacked sufficient reliable evidence (*Martin D. Carter v. Ohio State Board of Education*). The June 16 decision by the Court of Appeals of Ohio, Tenth Appellate District, upheld a decision by a lower court which reversed and remanded discipline imposed on teacher Martin Carter by the Ohio State Board of Education.

Martin was accused of inappropriately touching a student in December 2006, and the criminal trial which followed ended with a hung jury and the dismissal of the charges. The board filed its charges shortly after and, after a hearing, permanently revoked Martin's teaching license.

The student who accused Martin did not testify at his hearing and was instead represented by his parents and psychologist, who testified as to what the student told them and vouched for his truthfulness, a fact which the hearing officer in charge of the case cited in his decision to revoke Martin's license.

Martin appealed to a court of common pleas, which overturned the discipline, ruling that the decision to revoke Martin's license was "not supported by reliable probative, and substantial evidence," due to the board's reliance on hearsay evidence. The case then went to the Court of Appeals, which upheld the ruling of the lower court.

"The trial court," wrote Judge Gary Tyack in his opinion, "did not abuse its discretion in coming to the conclusion that the board lacks a preponderance of reliable, probative, and substantial evidence to support its order. The due deference normally afforded an administrative agency is partially based on the fact that they had an opportunity to observe the demeanor of the witness. This advantage of observing a witness is nullified when evaluating hearsay testimony."

The case was remanded to the board for further consideration.

Racial discrimination claim raised too late in revocation case

Issue: Judicial procedure

A pain physician who argued that racial discrimination led the state medical board to permanently revoke his license while white physicians facing similar charges were sanctioned much less harshly did not make this claim at trial, so the appeals court couldn't consider it, the Court of Appeals of Ohio, Tenth Appellate District, ruled May 24 (*W. David Leak v. State Medical Board of Ohio*).

The doctor, W. David Leak, is an anesthesiologist and directed a practice in Columbus, Ohio. He utilized tests called Selective Tissue Conductance Tests and Somatosensory Evoked Potential to corroborate a patient's claim of pain before administering pain medication. Two neurologists testified to the board that the tests are ineffective or worthless from a diagnostic standpoint.

After a 17-day evidentiary hearing on charges against him, the board found that Leak had inappropriately utilized testing and/or failed to provide treatment to 24 patients in accordance with minimal standards of care, in addition to failing to notify patients that his malpractice insurance had lapsed over several months. The board permanently revoked Leak's license in 2008 and a trial court upheld that action.

In his appeal, Leak, an African-American, asserted that the board's discipline order violated his constitutional rights to due process and equal protection because similarly situated white physicians had received little or no discipline from the board. However, the appeals court noted that Leak did not make this allegation in either the board hearing or the trial court, so it could not be considered by the appellate court. The court also upheld the trial court denial of Leak's other claims regarding introduction of evidence, use of expert witnesses, and the board's alleged failure to file a complete administrative record.

Hiring unlicensed individual to act as bounty hunter sufficient to revoke license

Issue: Grounds for discipline

The purposeful hiring of an unlicensed felon to track down and apprehend a defendant—an action which resulted in physical threats and the arrest of the unlicensed individual—was sufficient evidence for the revocation of a bail bondsman's license, the Court of Appeals of Arkansas held May 25 (*Leonard Hester v. Arkansas Professional Bail Bondsman Licensing Board*).

The bondsman, Leonard Hester, employed as an office assistant Vernon J. Meyer, a convicted felon who had previously attempted to get hired at Midwest as a bounty hunter, a position he was told he was not qualified for.

Hester's office, using a licensed bondsman for tracking, had been experiencing difficulty apprehending a defendant named Matthew King. Hester offered Meyer $300 to apprehend King himself, Meyer accepted, and a small train of chaos followed.

Meyer tracked King to a trailer where King was staying with his wife and children and attempted to apprehend him without assistance from Hester or another licensed bondsman. Meyer also failed to alert local law enforcement of his impending actions, a statutory requirement. After a foot chase, the threatened use of both mace and a baseball bat, and the flight of King by vehicle while his family blocked Meyer from reaching his own car, local police arrived and arrested Meyer.

Notwithstanding this incident, Hester continued to employ Meyer, who eventually acted on his own again, successfully apprehending King without violence and receiving the promised $300.

Eventually, the Professional Bail Bondsman Licensing Board learned of the incidents and filed charges against both Hester and the owner of the company. After an administrative hearing, the board found that both men were in violation of the law and had acted "in a manner that demonstrates incompetency or untrustworthiness." Hester's license was revoked and the company owner was required to pay a $5,000 fine.

Hester challenged the decision and eventually came before the Court of Appeals, where he argued that the board had inappropriately revoked his license based on insufficient evidence that he had directed Meyer to act on his own.

The court disagreed. By his own testimony, the court said, Hester instructed Meyer to "catch" King. Also, despite having knowledge of Meyer's first disastrous attempt, Hester continued to employ him, leading Meyer to go out alone again to apprehend King in order to be paid the promised $300. As a result of the combination of these things, and because no mitigating factors existed that would have made revocation too harsh a punishment, the board had sufficient evidence to revoke Hester's license.

Licensees sue over law making abortion notification a discipline issue

Issue: Grounds for discipline

An Illinois appellate court has overturned the decision of a lower court which dismissed a suit filed by several medical providers against the state Division of Professional Regulation and medical board. The providers are seeking, on state constitutional grounds, to keep the licensing entities from enforcing a 1995 Illinois law that requires providers to notify the parents or guardian of a minor seeking an abortion (*The Hope Clinic for Women and Allison Cowett v. Brent Adams, et al.*).

The June 17 decision by the Appellate Court of Illinois, First District, Sixth Division, was premised on the distinctions between Illinois and U.S. constitutional law.

Two licensed abortion providers, the Hope Clinic and physician Allison Cowett, filed the suit against the Illinois State Medical Disciplinary Board and other state entities responsible for disciplining medical professionals after the 2008 passage by the Illinois Supreme Court of rules implementing the Parental Notification Act of 1995. This law, with a few exceptions, requires abortion providers to notify the parents or legal guardians of a minor seeking an abortion.

Although the suit was founded only on Illinois constitutional law, a state circuit court ruled that because Illinois and U.S. constitutional law are coextensive on the issue of abortion and because the issues in the case had previously been decided in federal litigation, the claims could not be brought into court again.

On appeal, the appellate court overturned that decision and remanded the case for trial on its substantive issues. Because the Illinois Constitution contains an explicit right to privacy, state constitutional law on abortion issues is not co-extensive with federal constitutional law.

Illinois constitutional jurisprudence contains a right to abortion, the court said, and the issue would be whether that right would be subject to unreasonable interference by the law, the standard for Illinois privacy issues.

Licensing

Suit questioning board's right to issue opinion may continue

Issue: Scope of board authority

A suit questioning the state medical board's authority to send a letter stating its opinion on whether nurses are qualified to perform a particular medical procedure may proceed on the question of whether the board was improperly attempting to regulate the nursing profession, the Supreme Court of Missouri ruled June 28 (*Missouri Association of Nurse Anesthetists, et al. v. State Board of Registration for the Healing Arts*).

The suit, which sought a declaratory judgment against the State Board of Registration for the Healing Arts, was brought by a doctor, a nurse, and the Missouri Association of Nurse Anesthetists (ANA) in response to a letter issued by the board in 2008.

The case has its origins in a request from the Missouri State Medical Association asking the board to adopt a position prohibiting physicians from

delegating, to an advanced practice nurse, the injection of therapeutic agents under fluoroscopic control. This resulted in a letter to the nurse anesthetist association and Glenn Kunkel, a doctor who had opposed the request of the Medical Association, stating that the board held the opinion that nurses did not have the "appropriate training, skill, or experience" to perform the injections.

Kunkel, a nurse in his employ named Gary Snyders who often performed the questioned procedure, and the MANA brought suit against the board, seeking declaratory relief to the effect that the letter could not function as a rule and was therefore not enforceable, and that the board inappropriately acted to define the scope of practice for nurse practitioners. The case was dismissed by a trial court and eventually made its way on appeal up to the Supreme Court.

In its unanimous opinion, written by Chief Justice William Ray Price, the court overturned the dismissal and granted the plaintiffs' request for declaratory judgment on the question of whether the letter was an enforceable rule.

The board's own statement asserted that the letter was "a non-binding correspondence, … does not have the force or effect of law" and that the board "cannot seek to take any action against a physician, advanced practice nurse, or any other individual or entity, based on a contention that their actions are proscribed by the letter." Although the lower court had ruled that the board's non-contestation made the case moot, the Supreme Court found declaratory relief appropriate.

The court found that Kunkel had an inadequate administrative remedy due to the delay of time, four and a half months, between the filing of the declaratory suit and the board's administrative action against him. Because "physicians should not be foreclosed from declaratory judgment for that span of time and forced to practice their profession at the mercy of the board, thereby jeopardizing their license to practice," declaratory relief was appropriate. Further, the letter, if implemented, would affect advanced practice nurses, who had no administrative remedy against the board.

The plaintiffs also argued that because the board had no authority to make *any* determination about the scope of practice for APNs, it had no power to issue the letter. Because no evidence had been introduced as to any actual agreement between a physician and an APN to perform the procedure, and because no evidence had been introduced to the actual training required to perform the procedure, the court ruled that summary judgment on the question had been inappropriate and remanded the case.

Court rejects "ancient practice" argument in hair-removal case

Issue: Scope of practice

The claim of a hair-removal business that the State Board of Cosmetology had no regulatory control over its operations because the method the company uses is not one generally used by cosmetologists is not valid, the Commonwealth Court of Pennsylvania ruled May 9 (*JuStringz-Century III Mall, et al. v. Bureau of Occupational Affairs, State Board of Cosmetology*).

The decision affirmed that the licensing laws apply to the type of work performed and are not limited by the methodology used to perform that work.

The hair-removal company, JuStringz, offers, through mall kiosks, a service called eyebrow threading, a method of hair removal using looped string which the

company's literature claims is an ancient practice originating in India and the Middle East.

Ancient practice or not, the Pennsylvania State Board of Cosmetology initiated an investigation into JuStringz activities, and eventually issued citations to the company and two of its employees for the unlicensed practice of cosmetology. After a board hearing upheld the citations, JuStringz appealed to the Commonwealth Court.

Eyebrow threading, the company argued on appeal, is not a practice that can be regulated by the cosmetology board because it is not a method normally used by cosmetologists.

Under Pennsylvania's Beauty Culture law, cosmetology includes "any and all work done for compensation by a person, which work is generally and usually performed by cosmetologists, which work is for the embellishment, cleanliness and beautification of the human hair, such as arranging, braiding, dressing, [etc.]." Threading is not listed among the various examples of cosmetology included in the statute, and enough evidence was introduced in the case to indicate that the practice was rare, if not non-existent, among licensed cosmetologists in the state.

Therefore, in the words of dissenting judge Rochelle Friedman, who agreed with the company, "an ethnic practice like 'eyebrow threading,' which is **not** generally and usually performed by cosmetologists, is not 'cosmetology.'"

However, the court's majority disagreed and approvingly cited the board's earlier decision in the case, which held that cosmetology was to be "defined in terms of the nature of the **work** generally and usually performed by cosmetologists, **not** the precise practices."

As defined by the law, the court said, cosmetology "includes the removal of superfluous hair, [which is] generally performed by cosmetologists. Because the practice of eyebrow threading involves the work of removing superfluous hair, it is within the Law's definition of cosmetology."

Quoting the board again, the court noted that "this makes sense, since historically the range of practices offered by cosmetologists has expanded and incorporated new techniques as technologies advanced, new fashions emerged, and older practices, common in other parts of the world, spread to the Commonwealth."

Federal File

District court dismisses board challenge to FTC action

Issue: Restraints on competition

A federal district court, on May 3, rejected a suit by the North Carolina State Board of Dental Examiners seeking to halt administrative enforcement proceedings initiated by the U.S. Federal Trade Commission over the board's practice of prosecuting businesses who offer teeth-whitening services without a dental license (*North Carolina State Board of Dental Examiners v. Federal Trade Commission*).

In declaring that it could not exercise subject matter jurisdiction over the case, the U.S. District Court for the Eastern District of North Carolina also rejected an attempt by several other licensing boards in the state to file a friend-of-the-court brief.

The dental board had filed suit to stop an FTC administrative case, filed in June of last year, which accused the board of acting to "prevent and deter non-dentists from providing or expanding teeth whitening services, increase prices

and reduce consumer choice without any legitimate justification or defense." "The actions of the dental board," the agency stated in its complaint, "unreasonably restrain competition and violate Section 5 of the Federal Trade Commission Act."

In particular, the FTC took issue with the board's practice of issuing letters ordering teeth-whitening providers to stop their actions, instead of applying for a court order. In a press release, FTC Bureau of Competition Director Richard Feinstein said, "Without active supervision by a disinterested state authority, a regulatory board whose members have a financial interest in the industry it is charged with regulating cannot exclude its competition from the marketplace."

After a number of its motions were denied by the administrative law judge assigned to the case, the board sought relief in federal court. As it had before the ALJ, the board argued that the FTC did not have antitrust jurisdiction in the matter because of the state action doctrine, a Supreme Court precedent which exempts the actions of states from antitrust laws. The board was supported on this point of law by a request from several other North Carolina licensing boards to file a friend-of-the-court brief.

For its part, although the FTC claimed that the board was not a state actor for the purposes of state action doctrine because it acts independently of state control, it based its response to the board's suit on what it argued was a lack of subject matter jurisdiction for the district court. The FTC's primary argument in the district court was that the proper venue for the appeal of that decision was not in a collateral case such as the one the board brought, but on appeal to the 4th Circuit after the FTC's complete decision, should it go against the board.

The court agreed with the FTC and dismissed the case, saying that it lacked subject matter jurisdiction. "It is well-settled that this court lacks jurisdiction to enjoin ongoing administrative enforcement proceedings such as the one at issue here," wrote Chief District Judge Louise Flanagan in her published opinion. The appropriate forum for the board's state-action argument, she continued, is within the FTC administrative hearings, with the possibility of appeal to the 4th Circuit once the agency makes its determination.

The board attempted to distinguish the current case from the precedents which required the district court to dismiss the case, arguing both that, because the FTC was acting outside its statutory authority, as well as violating the board's constitutional rights, the district court had the power to step into the case.

However, the case law introduced by the board to support the first argument only applied where a party had no meaningful chance of review—not the case here, since the board would have the right to appeal to the 4th Circuit. The constitutional argument failed, as well; "until [the FTC] takes final action in the proceedings before it, any constitutional injury is simply hypothetical."

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