# Professional Licensing Report

Licensing, testing, and discipline in the professions

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***Highlights in this issue:***



## Discipline

### Revocation for sexual relationship with patient overturned as "overly harsh"

*Issue: Severity of disciplinary sanctions*

License revocation in the case of an Illinois psychiatrist accused of sexual misconduct with a patient was overly severe punishment, given his offense, and another sanction must be imposed, the Illinois Appellate Court ruled May 17 (*William Joel Kafin v. The Division of Professional Regulation of the Department of Financial and Professional Regulation*).

The case had its start in May 2007, when a lawsuit was filed alleging that the psychiatrist, William Joel Kafin, caused emotional distress to his patient, L.F., by providing negligent counseling. The action triggered a mandatory report to the state Division of Professional Regulation, and in September 2007 the department filed a formal complaint charging that Kafin had engaged in a personal and sexual relationship with L.F.

The complaint was amended in 2009 to charge Kafin with immoral conduct, gross negligence in practice, and dishonorable, unethical, or unprofessional conduct likely to deceive, defraud, or harm the public.

(*See* ***Discipline,*** *page 2)*

## Testing

### Test provider not a state actor, court tells candidate who started a fire during test

*Issue: Test accommodations for candidates with disabilities*

A court in Pennsylvania has denied most of a lawsuit against the National Board of Medical Examiners filed by a test-taker who was banned for three years after starting a fire in the rest room of a testing facility (*Maria Mahmood v. National Board of Medical Examiners*).

In a decision dated June 21, the United States District Court for the Eastern District of Pennsylvania declared that plaintiff Maria Mahmood's

*(See* ***Testing,*** *page 12)*

# Discipline

## *Sexual misconduct punishment overturned* *(from page 1)*

The director of the Division of Professional Regulation in 2011 rejected the board's recommendation that Kafin's license be indefinitely suspended for at least three years. Instead, the director revoked Kafin's medical license and assessed a $5,000 fine, noting that the "egregious nature of [Kafin's] conduct, coupled with his lack of candor and seemingly indifferent attitude towards the seriousness of his actions, warrants a proportionately severe discipline."

In his appeal, Kafin contended that his right to due process was violated where no member of the medical board was present at his formal administrative hearing, that the administrative law judge admitted improper testimony from an unqualified expert witness, and that the revocation of his medical license was disproportionate discipline to the alleged offense.

The court found that the expert witness testimony was properly admitted and that there was no requirement that a medical board member be present at the formal administrative hearing.

Even if it were assumed that the judge erred in admitting the testimony, the appeals court added, "The error was not prejudicial to plaintiff given the overwhelming evidence presented against him. The records show [Kafin] had sexual relations with L.F., provided her with a fake identification card, purchased alcohol for her, smoked marijuana with her, pretended that she was his intern, and exchanged sexually suggestive e-mails with her—all this while continuing to prescribe medication for L.F."

However, the court said, revocation of Kafin's license was an overly severe punishment. Based on the punishments imposed in the similar cases of *Reddy* and *Pundy* (see sidebar), "we find that plaintiff's punishment was overly harsh in light of the mitigating circumstances." The court remanded the case with instructions for the department to reexamine the sanction.

In two earlier sexual misconduct cases involving psychiatrists, the court noted, the sanctions were much lighter. In *Reddy v. Department of Professional Regulation* (2002), a psychiatrist professed his love for his patient during a treatment session, later divorcing his wife and marrying the patient. The marriage lasted about one year. The department imposed a six-month license suspension.

In *Pundy v. Department of Professional Regulation* (1991), the psychiatrist engaged in a sexual relationship with the patient, hired her to work for him, and eventually allowed her to act as a "co-therapist." The department ordered a six-month suspension of the psychiatrist's license followed by a two-year probationary period.

# "Impairment" doesn't require current drug use

*Issue: Enforcement of laws on impairment*

Even though board-approved evaluators had differing judgments, an emergency medicine physician who admitted in his license renewal application to four instances of cocaine use in a nine-month period was properly disciplined by the Ohio medical board, the Court of Appeals of Ohio, Tenth Appellate District, ruled June 5 (*Arthur H. Smith v. State Medical Board of Ohio*).

In the case, the physician, Arthur Smith, had been licensed in Ohio since 2004. When he applied for renewal in September 2009, he admitted alcohol use and cocaine use on four occasions while he was in a residency program in New York between May 2008 and January 2009.

The board ordered a 72-hour inpatient evaluation, after which a board-approved provider, Richard Whitney, diagnosed Smith with cocaine abuse and determined he was impaired in his ability to practice medicine. The physician disagreed, requesting an evidentiary hearing, and submitting to evaluation by

Gregory Collins, another board-approved evaluator, who concluded that Smith was not impaired.

The hearing examiner sided with the first evaluation and recommended a license suspension, a 28-day inpatient treatment program, urine, drug and alcohol screening tests, a 5-year probationary period, and other conditions. Smith met these requirements and his license was renewed; however he appealed the board's finding and disciplinary sanctions to a trial court, which affirmed them, and subsequently to the Court of Appeals.

When a licensed physician is impaired, "The board is not required to show evidence of patient harm, or deficient work performance in order to take disciplinary action." It is "entirely appropriate to take prophylactic steps," the court said.

There were two key differences that led the hearing examiner to find Whitney's diagnosis of cocaine abuse more credible than Collins's diagnosis of reactive depression and stress, the appeals court said: First, Whitney reviewed all of Smith's treatment and hospitalization records from 2008 and 2009 when the disciplined physician was in New York; Collins did not.

Second, Whitney examined Smith a year and a half year after his drug use, while Collins's evaluation occurred two years after the drug use. Although Smith attacked the first evaluator diagnosis and assessment methods, the court found there was no evidence that the trial court abused its discretion in affirming the board's and hearing examiner's decision that Whitney was more credible.

Smith also argued that finding him impaired was improper because impairment must be current, and he had been sober for 28 months at the time of the board meeting. But the appeals court rejected this line of reasoning, noting that the time lapse between Smith's cocaine use and the board's order need not be given the weight Smith suggested.

Requiring Smith to undergo a 28-day inpatient treatment program was not an infringement of his due process rights, the court also said. In a concurring opinion, one judge commented, "Dr. Smith's arguments re-package in various ways [his] belief that he should not be subject to the 28 day inpatient requirement. However, the 28 day requirement is a reasonable, validly enacted administrative rule which Dr. Smith is subject to as a result of his license to practice medicine in Ohio."

# Consumers lack standing to press boards to discipline

*Issue: Patient, client status in complaint handling*

In separate cases, two state high courts recently ruled that clients or patients of professionals licensed by the state do not have standing to ask that disciplinary boards discipline those professionals.

In New York, the Supreme Court, Appellate Division dismissed a complaint on June 21 by the recipient of treatment from a state-licensed physical therapist, who sought to reverse a determination by the Office of Professional Discipline that there was insufficient evidence to pursue a professional misconduct complaint. The plaintiff, Dover Davis, Jr., alleged that the therapist inappropriately touched him (*In the Matter of Dover Davis, Jr. v. New York State Department of Education*).

Davis lacked standing to commence such a proceeding, the Appellate Division said, agreeing with the state Supreme Court. "Where he did not personally suffer some actual or threatened injury as a result of PD's decision not to prefer charges against the therapist, that is different from any injury sustained by the general public."

While the Office of Professional Discipline is required to investigate complaints that allege professional misconduct, and refer the results of the investigation to the designated professional conduct officer, that officer may decide that no further action is warranted, and the matter may be closed, the court noted.

In another case, the Supreme Judicial Court of Massachusetts held May 23 that there is no private right to commence a court action to seek disciplinary action against an attorney. The plaintiff in the action (*Valentina Gorbatova v. Joel Semuels*) filed a "Petition for Disciplinary Action" against an attorney, Joel Semuels, who was serving as a hearing officer for the state Office of Elder Affairs.

In that capacity, Semuels had conducted an administrative hearing and issued a final decision reducing home care services to Gorbatova's husband. Gorbatova, in her petition to the court, claimed that Semuels had violated several provisions of the Rules of Professional Conduct.

Gorbatova's case was properly dismissed, the court said. Citing several decades of case law, the court explained, "In seeking disciplinary action against the defendant, the plaintiff is not properly before the court…It is the Board of Bar Overseers and not private individuals, which is ordinarily responsible for prosecuting complaints against attorneys. A citizen filing a complaint … is not a party to any action taken against the attorney, nor are the citizen's rights jeopardized. As in the case of a criminal prosecution, the complainant may be a witness, but he may not appeal or participate as a party to the litigation."

# Board has right to re-weigh evidence after hearing officer

*Issue: Due process in board deliberations*

In the case of a clinical mental health counselor charged with unprofessional conduct, the licensing board was not prohibited from re-weighing the evidence and entering findings of fact specifically rejected by the hearing officer, the Court of Appeals of New Mexico ruled March 23 (*Homer J. Avalos v. New Mexico Counseling and Therapy Practice Board*).

The counselor, Homer Avalos, was licensed and provided counseling services from his home office in Chaparral, New Mexico. In October 2007, the board received a formal complaint that Avalos had inappropriately touched and sexually assaulted a 16-year old female client who was in his office for a urinalysis test. The victim's family had called 911 on the night of the incident.

In his appeal, Avalos argued that the board was prohibited from re-weighing the evidence after the hearing officer or entering findings of fact specifically rejected by the hearing officer. But the court disagreed. Under state law, said the court, "it is clear the board, and not the hearing officer, is the ultimate decision maker with respect to agency adjudications."

The board issued a Notice of Contemplated Action to Avalos alleging that the conduct violated the practice act and the code of ethics governing counselors and therapists, and could justify the suspension or revocation of his professional license. After a formal hearing, the hearing officer submitted a report to the board, finding that the evidence of sexual touching was insufficient but that Avalos' treatment and intervention deviated from that expected of a licensee, and that his license should be suspended for one year followed by two years' supervised probation.

The hearing officer's report initially did not contain findings of fact. Those were submitted by him a few weeks later, after the board contacted the state Regulation and Licensing department and asked it to request that the hearing officer amend his report. The board then considered the hearing officer report, made several additional findings of fact, and upped the discipline to a permanent revocation.

When Avalos appealed, the court said, "we consider the hearing officer's report, and the question is ultimately whether there was sufficient evidence to support the board's findings regarding Avalos' impairment." Finding that there was sufficient evidence, the appeals court affirmed the final order of the district court and upheld the board's revocation of Avalos' license.

Among other arguments, Avalos alleged that the board's request for the hearing officer's findings of fact amounted to an impermissible "ex parte communication." But the court noted that the board's legal counsel had not made an inappropriate request because the initial report was inadequate as a matter of law without the findings of fact. There was no evidence that the communication between the board and the department concerned the merits of the adjudication, the court added.

## Hearsay admissible in disciplinary hearings, court emphasizes

*Issue: Disciplinary hearing procedure*

Although hearsay evidence is not allowed in criminal cases, hearsay *is* admissible in administrative proceedings, said the Superior Court of New Jersey in a June 18 ruling. In the case (*In the Matter of the License of Jeanette Marasco to Practice Nursing in the State of New Jersey*), the court rejected arguments by a licensed practical nurse, Jeanette Marasco, that the public reprimand imposed on her by the board was arbitrary and capricious.

The case stemmed from a May 2007 incident in which a psychiatric patient punched Marasco, knocked her to the ground and kicked her, and after being separated from the patient, Marasco kicked the patient in the back. The state nursing board initiated disciplinary proceedings and held an investigative inquiry in October 2008.

In administrative proceedings, the factual finding or legal determination of the hearing officer cannot be based solely on hearsay, the court said. "But as long as there is a "residuum of legal and competent evidence in the record to support the hearing officer's findings, the use of some hearsay evidence is permissible."

Following those proceedings and an interim consent order with Marasco, the board's final order of discipline imposed a public reprimand based on findings of patient abuse and misstating of material information.

In her appeal, Marasco argued that the board erred by not granting her an evidentiary hearing, and that the investigative inquiry conducted by the nursing board was "fatally flawed" because the nursing board improperly considered hearsay evidence and other inadmissible evidence from Marasco's former employer. But the trial court rejected these challenges, noting that evidentiary hearings are only required in cases where an agency is seeking to revoke a license, not in a public-reprimand case.

## *Suspension upheld for inappropriate content on school computer*

*Issue: Parameters of unprofessional conduct*

An Ohio teacher who used a classroom computer to show a colleague a joke email containing a picture of a partially naked woman lost an appeal of his license suspension on May 4 (*Craig Robinson v. Ohio Department of Education*). The decision, by the Court of Appeals of Ohio in Montgomery County, held that such displays—even if not seen by students—fall very clearly under conduct unbecoming of a teacher.

The trouble began when Craig Robinson, by all accounts a well-respected science teacher with 21 years of experience, received an email from a former fraternity brother containing a joke about a third member of their fraternity being nursed back to health after a recent surgery. The joke was accompanied by a visual aid: three photos of a woman in a bikini, and a fourth photo of the same woman exposing herself.

Robinson, apparently amused by the joke, wanted to share it. So he went to the classroom of fellow teacher Billy Brooks, where he used Brooks's computer to sign into his own email and then displayed the contents to Brooks.

Brooks, apparently unamused, reported the incident to school officials, explaining that he was motivated to do so because he believed that Robinson had shown him a pornographic image. Robinson's school placed him on unpaid administrative leave for five days and reported the incident to the state Board of Education.

The board, in its turn, instigated an action against Robinson, accusing him of conduct unbecoming a teacher. After a hearing, Robinson's license was suspended for one year, although all but 60 days of that sentence was suspended, and those 60 days left were to be served in the summer months, when school was not in session. Robinson, unsatisfied with the result, appealed the decision and the case eventually made its way up to the appellate court.

Robinson's only legal argument on appeal was that the board's decision to suspend his license was not supported by substantial and probative evidence. His conduct, he claimed, while admittedly inappropriate, was not "conduct unbecoming a teacher," as the board had decided.

To support his contention that he had not violated a ban on "conduct unbecoming a teacher," Robinson attempted to make several points. First, he claimed, he had not "hosted" or "posted" inappropriate material as the relevant section of the code of professional conduct forbade, as simply displaying them to a fellow teacher on a computer display was not within the meaning of those terms.

Second, Robinson argued that the email was only a joke and that he had not accessed his email to show the pictures to Brooks, only to share that joke with Brooks. Third, Robinson challenged a finding by a hearing officer that Brooks had found the images pornographic.

These arguments didn't take. Robinson viewed an email with the attached inappropriate pictures, the court noted in an opinion by Judge Jeffrey Froelich. "[He] accessed that email in Brooks's classroom during school hours and with students in the classroom, and he displayed the images to Brooks."

The intent of the rule against posting or hosting inappropriate material, Froelich wrote, "appears to be that educators should not use technology to display improper or inappropriate material where they could be reasonably accessed by the school community." It did not matter that Robinson had not uploaded the pictures himself, and his intention was clearly to show the email and images to Brooks, despite his claim to the contrary.

Brooks's opinion as to whether the images were pornographic was irrelevant, the court stated. "The nature of the photos was readily apparent from the exhibits presented to the hearing officer, and the officer did not need to rely on Brooks's perception of the photos," Froelich wrote.

Robinson also challenged the hearing officer's decision to treat Robinson's assertion that he did nothing wrong as an aggravating factor when sanctions were considered. Judge Froelich upheld the officer's decision. Robinson's minimization of his actions, including a statement during his hearing that "she was dressed in three of those pictures," was a reasonable basis for aggravating his sanctions.

Robinson's last claim, that no nexus existed between his actions and his profession, which he claimed was required for sanctions, met with similar defeat. "Although there was no evidence that students saw the photographs and Robinson testified that he took steps to ensure that students would not see the pictures, the fact that he displayed the pictures to another teacher during school

hours while students were engaged in class work in the room reflects on Robinson's performance as a teacher and affected his relationships within the school community."

## Court affirms permanent license revocation for human trafficking conviction

*Issue: Nexus between criminal conduct and licensure*

The state cosmetology board acted reasonably in revoking the license of a cosmetologist and nail salon owner convicted of human trafficking, the Commonwealth Court of Pennsylvania held May 7 (*Lynda Dieu Phan v. State Board of Cosmetology*).

The cosmetologist whose license was the subject of the revocation, Lynda Dieu Phan, traveled to Vietnam in 2000 to recruit women to work in two nail salons she owned. She successfully recruited two women and paid their travel expenses and, eventually, their cosmetology training and license fees. In order to facilitate entry to the United States, Phan required the women to enter into false marriages, one with Phan's brother—who lived with his girlfriend and the couple's child—and the other with Phan's own live-in boyfriend.

After three years of abusive conditions, one of the women fled Phan's house in a nighttime escape aided by a customer of one of the salons. Once she escaped, the woman went to the authorities, who initiated a process that eventually led to Phan's pleading guilty to trafficking with respect to forced labor, conspiracy, and marriage fraud. She was sentenced to 90 days in prison and 270 days of house arrest, forced to forfeit $134,000 in cash immigration agents found in her home, and ordered to pay $300,000 in restitution to the victims.

Phan confiscated the women's immigration papers, charged them room and board—including rent for beds with no mattresses (the women slept on the floor of their room)—and required them to work an average of 71 hours per week without pay, ostensibly toward the goal of repaying Phan for their travel and professional-training expenses.

Accordingly, the Pennsylvania Board of Cosmetology moved to take action against Phan's license in June of 2010. A hearing was held, followed by a board deliberation, and Phan's license was revoked.

Although it is hard to conceive of a successful legal defense, given the serious nature of Phan's conviction, her attorney did try to argue that sufficient mitigating circumstances existed such that Phan should be spared the revocation. The attorney argued that the case was not one "involving involuntary servitude, or at least involuntary servitude to a degree that it merits severe penalties set forth under the law."

Phan's case was not helped by a Statement of Acceptance and Responsibility she had agreed to sign as part of her plea deal, in which she admitted that she "mentally forced" the victims to work for her.

Phan appealed the board's decision, based on the prior argument and on a claim that the board did not understand exactly what she had pled guilty *to*; Phan argued that her guilty plea in the criminal case should be understood as an admission of guilt to marriage fraud only, and not to forced labor. As evidence, she pointed to her supposedly lenient sentence. Phan also argued the board ignored mitigating evidence concerning what she claimed were the self-serving motives of the two victims in the case.

These were not successful arguments. Judge Bernard McGinley, writing for the court, noted that "there is nothing in the federal court documents which indicates that Phan pled guilty only to conspiracy to commit marriage fraud." Phan had pled guilty to all three crimes charged against her, and "neither the board nor this court

may postulate, based on the so-called leniency of the punishment, that she meant only to plead guilty to conspiracy to commit marriage fraud."

In response to Phan's last plea—that the board had improperly issued too harsh a sanction, given the supposedly mitigating evidence she had supplied—McGinley stated that "given the gravity of the crimes, the fact that the crimes involved the board's licensing program, and the fact that Phan damaged the reputation and confidence of the public in the profession, the board felt it was compelled to act in the public interest by revoking, and that revocation would serve as a deterrent and prevent Phan from acting in that manner again. Not one of these concerns is unfounded."

## Court re-affirms board members' immunity

*Issue: Board members' immunity from liability*

The state dental board actually is entitled to state immunity, the Supreme Court of Alabama ruled May 25 (*In re: Mary Ann Wilkinson v. Board of Dental Examiners of Alabama*). Reversing an unexpected 2011 ruling by the state Court of Civil Appeals, the state supreme court said that the dental board was not a state agency because it raised its own funds, and thus was not entitled to immunity.

The lower court had reasoned that because the board collects its own funds, and that money is never transferred to another state fund, the state never supports the board. Further, the legislation creating the board did not characterize it as a state agency and the board is able to enter into contracts, both indicators that it is a separate entity.

That ruling was wrong, the state supreme court said, because the court applied an overly narrow definition of "state funds" that appears to misapprehend the true nature of the funds collected and retained by the board. "Once the board collects the funds established by the legislature, those funds become state funds. . . .The fact that the legislature has allowed the board to deposit those funds in a bank rather than in the state treasury also does not alter their status as state funds."

Wilkinson, a former employee of the board, complained she had not been properly compensated. After her complaint was dismissed on the grounds that such matters are the sole province of the state Board of Adjustment, a trial court said the courts could consider her complaint because the board, due to its structure and funding, was not a state agency and not entitled to immunity.

The functions performed by the board, including examining and licensing, promulgating rules and regulations, investigating violations and imposing discipline, also support a finding that the board is entitled to state immunity, the court added. "It is clear that the board is an 'arm of the state' rather than a mere 'franchisee' licensed for some beneficial purpose. . . .The board is entitled to immunity . . . and the Court of Civil Appeals erred when it concluded otherwise."

The state supreme court remanded the case and ordered the appeals court to enter a judgment upholding dismissal of Wilkinson's complaint against the board.

## Permanent revocation upheld for assault of patients and cover-up

*Issue: Appropriate disciplinary sanctions*

A Delaware doctor who sexually assaulted a patient had his license permanently revoked for both that offense and for failing to report an earlier incident on a license application form. The Superior Court of Delaware in New

Castle upheld the revocation on June 29 (*Todd Bezilla v. Board of Medical Licensure and Discipline*).

In 2010, a patient lodged a complaint against physician Todd Bezilla, claiming that he had sexually assaulted her during a 2003 examination. That complaint led to an investigation by the Delaware Division of Professional Regulation, which in turn uncovered other allegations against Bezilla stemming from 2001, while he was working in Pennsylvania, and which resulted in a malpractice suit.

A state investigator then discovered that when Bezilla had applied for a Delaware license in 2002, he had failed to adequately disclose the allegations against him.

After a hearing, the examiner in charge of the case recommended that Bezilla's license be revoked. In reviewing the evidence in the case, the hearing examiner came to believe that Bezilla had made incomplete disclosures on his license application and that he had sexually assaulted the complaining patient in 2003. The board of medicine followed the hearing examiner's recommendation and permanently revoked Bezilla's license. Bezilla then appealed.

He argued that the board had insufficient evidence that he assaulted the patient in 2003 and that he had properly reported the 2001 incident when applying for Delaware licensure.

The case didn't last long. Judge Richard Cooch issued a ruling supporting the board's findings of fact and dismissing Bezilla's appeal.

Substantial evidence indicated that Bezilla had withheld important details of the 2001 malpractice case, Cooch held, and substantial evidence allowed the hearing officer and the board to reasonably conclude that Bezilla had assaulted his patient. As the court was not in a place to second-guess the board, the revocation would be upheld.

## *Attorney suspension for forging client's guilty plea cut to 1 year*

*Issue: Mitigating circumstances in discipline*

An Idaho attorney was suspended from the profession for one year after forging the signature of a client in order to submit a criminal plea deal (*Iowa Supreme Court Disciplinary Board v. Richard S. Kallsen*).

The disciplined attorney, Richard Kallsen, had been in trouble before. In 2003, he received a suspension for ignoring his clients' cases and failing to give an accounting of his fees. Nevertheless, citing Kallsen's stated desire to leave the profession to pursue a teaching career, as well as other mitigating evidence, the Idaho Supreme Court issued only a three-month suspension to Kallsen, explaining that his exit from the profession meant the public would not likely be threatened by further misconduct on his part.

However, Kallsen re-entered the profession in 2008, successfully applying for the reinstatement of his license. In 2009, he agreed to represent a man named Elvin Farris against a charge of driving while intoxicated. When Farris refused to sign several plea deals negotiated by Kallsen, Kallsen enlisted Farris' girlfriend to forge Farris' signature on one of the deals. The document was then notarized by Kallsen and submitted to court.

Farris was arrested and served seven days in jail, but then filed for post-conviction relief based on the forgery and eventually saw his charge dismissed.

Unsurprisingly, Kallsen then found himself the subject of disciplinary proceedings and, although he informally denied intentionally soliciting the forgery, the court ruled that all factual allegations against him had been admitted. He placed his license in inactive status and again declared his intention to quit the profession.

After examining the case, the state's Grievance Commission recommended a two-year suspension, citing Kallsen's "active deceit." The Supreme Court agreed that Kallsen's voluntary exit from the profession should be given less weight, since "Kallsen voluntarily ceased practice for five years after his 2003 suspension, only to later seek reinstatement and again violate our ethical rules." However, the court cited other mitigating factors and reduced his suspension to one year.

## Dodging procedural question, judge says discipline justified

*Issue: Due process challenges of discipline actions*

A Texas court, after putting aside the issue that both parties expected to decide the case—whether an administrative law judge's decision, under board pressure, to change a conclusion into a recommendation would prove fatal to discipline imposed by the board—held that a license revoked by the state's board of dentistry would remain because the lengthy disciplinary history of the licensee justified revocation (*Gerald Froemming v. Texas State Board of Dental Examiners*).

The dentist involved, Gerald Froemming, had been sanctioned on several previous occasions by the state dental board, twice for abandoning patients and once for refusing to remove a patient's braces unless the patient agreed to purchase an orthodontic retainer.

In 2009, while Froemming was still under probation from his last offense, the board brought more disciplinary charges, claiming that he had entered into agreements with patients to charge a certain amount and then changed those prices later and that he had abandoned patients due to outstanding bills.

An administrative law judge conducted a hearing and concluded that Froemming had engaged in unprofessional conduct. However, the ALJ stopped short of revoking Froemming's license, instead issuing a conclusion of law stating that the board should suspend Froemming.

The board filed exceptions to the ruling, and asked that the "conclusion" stating that Froemming's license only be suspended be instead treated as a "recommendation." The ALJ herself agreed to amend her ruling to reflect that change of wording, and the board then revoked Froemming's license.

Froemming appealed the decision, eventually reaching the Texas Court of Appeals in Austin. His appeal challenged the decision of the board to ignore the conclusions of the ALJ, arguing that the board had violated a state statute which would allow the board to ignore such a ruling only in the case of a mistake on the part of the ALJ.

For its part, the board argued that because the ALJ had changed her ruling from a "conclusion" to a "recommendation", the statute cited by Froemming was inapposite.

The court, in a ruling by Justice Diane Henson, bypassed a decision on the issue. While Henson did state that the court "disagree[s] that the labeling of the ALJ's proposed sanctions as a 'recommendation' rather than as a 'finding of fact or a 'conclusion of law' ultimately determines its binding effect," she then went on

to declare that the issue was moot, as the board would have been justified in modifying the ALJ's decision even if it was a conclusion.

The ALJ, Henson explained, failed to properly consider Froemming's four previous sanctions when considering his appropriate punishment. As such, she was in conflict with the board's rules and her judgment was subject to modification by the board. And considering Froemming's disciplinary history, the board was acting within its power to revoke his license.

## Dentist revocation in infant death backed by sufficient evidence

*Issue: Appropriate severity of disciplinary sanctions*

There were sufficient grounds for the Missouri Dental Board to discipline dentist Joseph H. Kerwin over his care of a newborn infant who later died, the Missouri Court of Appeals, Western District, held June 29 *(Kerwin v. Missouri Dental Board*).

In the case, the parents took their two-day-old infant to Kerwin in 2006 after the infant developed a high fever, because they understood Kerwin to be a "cranial doctor' or "chiropractor." Kerwin's medical records later noted that the child had a "compressed frontal and occipital side bend, slight fluid or edema under the scalp, and signs of birth trauma." Instead of referring the infant to a medical facility, Kerwin performed a cranial manipulation on his head and applied a vibrating machine to his body.

The child died less than 12 hours later, an autopsy showing the cause of death as complications caused by a right cerebral subdural hematoma. The county coroner filed a complaint with board regarding Kerwin's treatment of the child, and following a hearing the board revoked Kerwin's dental license. A trial court affirmed the discipline.

Kerwin disputed that he ever held himself out as a medical doctor or a doctor of osteopathic medicine, the court said. He claimed that the only sign outside his door was one describing him as a general dentist; and he believed that "craniosacral therapy" was an appropriate treatment modality for him to perform under the cloak of general dentistry. Based upon her interaction with Kerwin, the mother of the dead infant . . . stated that she understood Kerwin to be the family's "cranial doctor" or "chiropractor" who provided "cranial treatments." The county coroner testified that when he interviewed Kerwin, Kerwin told him he was a dentist who also performed osteopathic medicine after taking some osteopathic courses.

For his appeal, Kerwin argued that the board was wrongly regulating his practice of craniosacral therapy, which is a form of therapy not regulated in Missouri and not within the statutory scope of the practice of dentistry. However, in his testimony, Kerwin said he believed craniosacral therapy was a treatment modality of dentistry.

Kerwin presented two expert witnesses, a dentist and an osteopathic physician who testified as to the practice and usefulness of craniosacral therapy. The board presented a witness who testified that the standard of care of general dentistry when presented with a 2-day-old infant patient exhibiting symptoms of fever and nursing or suckling problems was not to provide any form of dental treatment, but to refer the patient to a medical facility. Not to do so, the witness stated, would constitute a gross deviation from the standard of care required by a general dentist.

The appeals court agreed, finding that the board's specific allegations about Kerwin's conduct demonstrated both his violation of the parents' professional trust and confidence in him and his misrepresentation that his license to practice general dentistry qualified him to provide any treatment, "let alone cranial manipulation" to their newborn son. Competent and substantial evidence supported the findings of the Administrative Hearing Council and the board, the court said. It also found that the board's choice of revocation was within the

statutory range of discipline available. "We find no abuse of discretion requiring appellate interference with the board's action in this case."

# Testing

## Test administrator not "state actor" (from page 1)

constitutional claims against the NBME must be dismissed because the organization is not a state actor subject to such claims. However, Mahmood's claim under the Americans with Disabilities Act was allowed to continue.

Mahmood is legally blind and was to be provided special equipment by the NBME when she sat for the second Clinical Knowledge portion of the U.S. Medical Licensing Exam in Maryland, a test she was required to take for graduation from her medical school and eventual licensure. However, shortly after the beginning of the test, a problem occurred with the monitor Mahmood was using and, while testing staff were working to fix the problem, Mahmood started a fire in a restroom. This led to her arrest and a three-year ban on taking the test.

Mahmood subsequently brought suit against NBME, on the basis of violations of her constitutional rights and the ADA. Specifically, Mahmood claimed violations to her rights to be free from cruel and unusual punishment and due process, that the NBME further violated her rights by commingling investigative and adjudicatory functions, and that the NBME violated the ADA by failing to reasonably accommodate for her blindness.

While Mahmood's ADA claim was deemed to be too vague and lacking a factual background, Judge Timothy Rice allowed her time to file an amended complaint.

As for the constitutional claims, the NBME—for its part—argued that it was not a state actor and, therefore, not subject to the constitutional claims.

Judge Rice agreed. In his written decision, he noted that the "NBME does not license physicians; rather it provides testing services and exam results that states may choose to use." Maryland does not take any part in creating the test and no "symbiotic relationship" exists between the state and the tester. "Rather," Rice continued, "NBME acted independently in suspending Mahmood; what Maryland does with this information is another matter within the state's discretion."

## State properly denied NY doctor a license over "single sitting" exam requirement, court finds

*Issue: Conflicting state test format requirements*

Due to a difference in the way scores are calculated on the medical examination in the two states, an experienced New York doctor will be unable to obtain licensure in Ohio because he used a composite exam score to obtain licensure a quarter-century ago.

The June 19 decision by the Court of Appeals of Ohio for Franklin County (*Jose Vargas v. State Medical Board of Ohio*), acknowledged that the doctor was a "qualified, competent" physician, but held that administrative rules that denied him licensure in Ohio were not unreasonable.

Jose Vargas, a licensed physician in New York since 1989, applied in March 2010 for licensure in Ohio. Not wishing to retake the required examinations for licensing, Vargas applied under the Ohio statute that allows the board to license physicians from other districts without the requirement that they take the qualifying exams currently being offered in Ohio.

At first glance, Vargas's application would not appear to have been a problem. He is a physician in good standing with the state of New York, the court reported that he had received several awards, and he declared that his intention in even seeking to practice medicine in Ohio was to provide care to underserved Latino communities.

When Vargas took the Federation Licensing Exam, or FLEX, in Michigan in 1984, he was unable to pass on the first try, receiving a score of 74 of the required 75 on the three-day test. When Vargas applied to retake the test in New York, he benefited from a rule in that state which allows license candidates to only retake those parts of the test they would need to pass to achieve a passing composite score. Vargas successfully retook the first and third days of the exam, and soon thereafter became a licensed physician.

Unfortunately for Vargas, a rule created by the Ohio Medical Board requires that a licensure candidate have passed the FLEX in one sitting. Consequently, although it declared him to be an "excellent applicant" for licensure, the board moved to deny him certification.

Some states require the test to be taken in a single sitting and some did not, Judge Dorrian said. "It was neither unreasonable nor arbitrary for the board to require Dr. Vargas . . . to demonstrate that [he] passed the test in a single setting with a weighted average score of 75 points."

Vargas appealed the decision. In that appeal, he argued that the board had overstepped its authority in requiring that candidates for licensure have achieved a passing score in one sitting of the FLEX. The Ohio statute that gives the board the power to grant licenses to out-of-state applicants, he claimed, did not give authority to the board to create a rule which requires candidates to have achieved a specific score on an exam, as such a rule improperly adds to the requirements laid out in the statute.

Further, he argued, a rule which denied a competent and otherwise qualified applicant like himself licensure is arbitrary and unreasonable, and therefore unenforceable.

Judge Julia Dorrian, writing for the court, disagreed. The statute which gave the board power to issue such licenses is discretionary, she wrote. "Thus, although [the administrative code] requires an out-of-state physician to demonstrate additional prerequisites that are not set forth in the statute, this does not create a conflict between the rule and the statute."

In response to an argument by Vargas that the rule actually limits the board's discretion by providing a definite score which an applicant must obtain and prohibits the board from assessing each applicant on a case-by-case basis, Dorrian noted that the board still maintained much discretion in the face of the rule.

The last two arguments that Vargas made met with similar fates. When the doctor attempted to argue that the rule improperly created new policy, the court noted that given the discretion afforded by the relevant statute and the mission of the board to "safeguard the public's interest in having competent, educated, experience physicians," the rule simply implemented the policy of the legislation.

All that was left was Vargas's accusation that the rule, by denying a competent physician licensure, was arbitrary and unreasonable. While this assertion could

invalidate the rule if it were true, Dorrian said, the rule did not in fact appear to be unreasonable.

Noting that several alternative means of achieving qualifying test scores existed were spelled out in the code (though none applied to Vargas), Dorrian wrote that "the rule appears to be responsive to changes in the examination that an out-of-state physician would have taken to obtain a license from other states. This supports a finding that the rule is reasonable by avoiding a scenario where an out-of-state physician would be denied an Ohio license by endorsement based on a failure to pass an examination that was not offered when he obtained his original license in another state."

Finally, Dorrian noted that there remained one route left to Vargas to obtain an Ohio license: "He retains the option to take the licensure examination that would otherwise be required of an applicant for a medical license in Ohio."

## Court denies ADA accommodation to above-average test-taker

*Issue: Test accommodations for candidates with disabilities*

In a May 3 ruling, a federal district court in Indiana denied a request by a former international figure skater-turned medical student to force the National Board of Osteopathic Medical Examiners to provide with him disability accommodations, citing the candidate's above-average intelligence, test scores, and ability to deal with stressful situations (*Matthew Healy v. National Board of Osteopathic Medical Examiners*).

The candidate, Mathew Healy, believes himself to suffer from disabilities which prevent him from initially processing and communicating his thoughts in a way that matches the high level of his general comprehension of the same information, as well as anxiety disorders related to this lack of ability.

Although he had received diagnoses of these disorders in the past and had been given testing accommodations throughout his college tenure at New York University and during medical school, as well as on the Medical Colleges Admission Test, Healy had also done well in school, performed well on the SAT and the ACT, had long been an elite-level figure skater and member of the International United States Figure Skating Team for several years, and had never really been found to be below-average in any assessment of his comprehensive abilities.

What *was* noted in assessment of Healy was that his reading speed was significantly lower than his reading comprehension, with Healy falling into the 99th percentile in the latter, but only the bottom 25% of the former. This was enough for two doctors to have diagnosed him with a reading disorder and for one doctor to have diagnosed him with attention deficit hyperactivity disorder.

As an osteopathic medical student, Healy was required to take the COMLEX-USA Level 1 examination during his studies. He submitted his disability diagnoses to the NBOME when applying to take the test and, though tentatively granted those accommodations by the testing organization, he was eventually denied them after two new medical evaluations of Healy determined that he did not suffer any impairments.

Both of the doctors who supplied the new evaluations questioned past diagnoses of Healy's condition. Joseph Bernier, a psychologist who reviewed Healy's history, acknowledged that Healy seemed weaker in his ability to immediately process new information, but stressed that such a discrepancy did

not necessarily indicate a disorder. Healy's working memory could only be considered deficient relative to his performance in other areas, Bernier noted, as Healy still tested in the average to high average range when compared to the general population.

Most of the anxiety that Healy suffered, Lawrence wrote, came from external stressors that would cause anxiety in most people, such as sitting for tests. Lawrence also noted that a full view of Healy's history—including his elite figure skating status and his high ACT and SAT scores—indicated a person fully able to thrive in high-pressure situations.

Both doctors also questioned Healy's diagnosis of an anxiety disorder, pointing to the many external stresses on Healy's life that would likely cause anxiety in a healthy individual.

Judge William Lawrence, who heard the case, struck a middle position. While Lawrence believed that Healy did suffer from a reading disorder, based on the relative weakness of his reading speed scores to his other abilities, the judge noted that Healy still scored well relative to the general population.

Lawrence discussed the testimony of Amanda Baten, the doctor to whom NYU officials had referred Healy when he requested accommodation while studying there and whose diagnosis had been the basis of Healy's subsequent successful requests for accommodations. Although "Dr. Baten's testimony establishes that Mathew may have a personal weakness when it comes these areas," Lawrence wrote, "her testimony clearly establishes that he is not substantially limited when compared to the general population."

Healy did not meet the ADA's standard of someone who was substantially limited by a disability, Lawrence continued. "By definition, 'average' is not 'substantially limited.' To find otherwise would to be to give credence to [a] sort of illusory inferiority, a notion demonstrated by a situation in which roughly 75% of people believe themselves to be of below-average intelligence."

"Mathew's above average standardized testing scores, ACT scores, and SAT scores, during which he received no accommodation, still stand as testament to his ability to read, learn, think, and concentrate just as well, if not better, than the general population." Although Healy had described the supposed coping mechanisms he used to deal with his problem, like rewriting class notes, Lawrence pointed out that, "more realistically, this simply describes good study habits."

Addressing Healy's anxiety, Judge Lawrence expressed doubt that his problems rose to the level of a disability, noting that "what little evidence of anxiety is present in the record indicates only that Matthew suffers anxiety in ways common to many people."

"Matthew Healy is clearly a gifted and driven individual," Lawrence concluded. "While he may struggle with what he considers to be personal weaknesses, his reading disorder does not substantially limit major life activities as compared to the general population. As such, he is not disabled under the ADA."

# Take Note

## *Suit against upstart "certification board" allowed to continue*

*Issue: Standards for certifying agencies*

A court in California has allowed a suit accusing the American Board of Optometry of false advertising to continue, rejecting the board's request for summary judgment because the plaintiff in the case, the American Optometric Society, produced enough evidence such that a reasonable fact-finder could find

that the Board was attempting to mislead patients with its certification labels (*American Optometric Society v. American Board of Optometry*).

The ABO was formed in 2009 with the intention of creating a certification program similar to those used by physicians and other medical professionals to specify licensees with specialist training. The AOS, in turn, formed to oppose the certification program, claiming that, in the case of optometrists, such certification was meaningless, intended only to provide a competitive edge to those optometrists who obtained the certification.

The ABO's own promotional materials tended to support this contention. Examples of text from the website of the organization: "Board certification is a meaningful term to the public and to my patients"; "It is a term they (patients) recognize and will help me stay current over the next ten years"; and "Board certification provides an opportunity to demonstrate one's commitment to patient care that is easily identifiable to the public."

A motion for summary judgment by the ABO was denied June 12 by Judge Howard Matz of the US District Court for the Central District of California.

After ruling that the Society and the Board were, essentially, competitors, that the AOS thus had standing to bring the suit, and that members of the AOS were arguably being hurt by competitors who could claim "board certification," Matz moved to a discussion of the substance of the false advertising accusation.

Significantly, Matz noted that the ABO's own corporate representative, David Cockrell, admitted that ABO certification did "not demonstrate that an ABO-certified optometrist is a specialist as compared to a non-ABO certified optometrist." In addition, Matz continued, "Cockrell admitted that ABO certification does not demonstrate that a certified optometrist has demonstrated that he or she has knowledge, skills, and abilities that a non-certified optometrist does not have."

In contrast, because board certification for physicians *did* indicate those qualities and because the promotional materials of the ABO seemed to be using the public's perception of the concept of board certification for physicians to create a similar perception for certified optometrists, the AOS had a reasonable claim when it accused the ABO of using false advertising to affect competition, the court found.

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