Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue:

Discipline

No need to spell out standard of care

Issue: Specificity of standards of professional conduct

A physician can be disciplined for a violation of the "standard of care" despite the fact that the doctor's specific actions were not explicitly specified by law as a violation of that standard or as unprofessional conduct, the Kentucky Court of Appeals ruled December 7 (*Bradford Quatkemeyer v. Kentucky Board of Medical Licensure*).

After the sister of a patient of Kentucky doctor Bradford Quatkemeyer complained to the state medical board that the doctor had overprescribed weight-loss medication, the board investigated and brought discipline charges against Quatkemeyer for controlled substance violations.

During the discipline proceedings, a hearing officer found that Quatkemeyer had committed numerous violations of the state's professional code and recommended discipline. The board followed that recommendation, placing the doctor's license on probation and limiting his ability to prescribe controlled substances.

(*See **Discipline,** page 4)*

Testing

Licensing exam violates Civil Rights Act

Issue: Relationship of licensing tests to competence

The New York City Board of Education violated Title VII of the Civil Rights Act of 1964 by requiring teachers to submit to a licensing exam that has a disparate impact on minority licensure candidates without being adequately related to the minimal standards of competence in the profession, a U.S. district court in New York ruled December 5 (*Gulino, et al. v. Board of Education for the City of New York*).

The case was originally brought by a group of African-American and Latino teachers in 1996, when they sued the board and the State Education Department for requiring the use of two standardized tests to determine whether experienced teachers with provisional licenses would be able to receive a permanent license.

Although certification for teachers is a state requirement, the city of New York is allowed to operate its own licensing system, with the stipulation that the standards for licensure in the city are to be substantially related to the state's standards. Therefore, in 1984, when the state introduced its first licensing exam, the Core Battery exam, the city followed suit.

At the time, newly-admitted teachers would receive a conditional license, which they would need to upgrade to a permanent license within five years. Teachers who failed to acquire a permanent license within that time could only work as substitutes, with a lower salary and fewer benefits.

When the exam was introduced, those teachers with conditional licenses were required to pass it to receive a permanent license. However, because of teacher shortages and administrative problems, many teachers who did not pass the test were nevertheless allowed to continue teaching. When the state cracked down in 1991, those teachers were demoted to substitutes but again, because of teacher shortages, many continued working full time, only with less pay and benefits.

The state "raised the cutoff score knowing that [the] decision would have disparate impact on minority test-takers, and without any evidence that the higher score was necessary to select competent teachers," the court found.

By 1996, a new exam, the LAST, developed by the company National Evaluation Services, was in place across the state.

In their challenge to the exam, the minority teacher plaintiffs claimed that the use of the tests to evaluate experienced teachers violated Title VII of the Civil Rights Act, which prohibits employment exams that have a "disparate impact on a protected class" and do not have a "manifest relationship to the employment in question."

For their part, the teachers argued that the test did have a disparate impact on minority test takers—Caucasian licensure candidates passed the exam at significantly higher rates—and that the exams, which purported to measure communications skills, knowledge of teaching techniques, and general knowledge in several subject areas, did not measure whether experienced teachers were qualified and were thus not job-related.

They sought permanent licenses and money in the form of back pay for those teachers who had been demoted, a declaration that the Board was liable under Title VII, and a monitor to ensure that future tests would conform with the law.

In 2002, the first judge who heard the case ruled that the Civil Rights Act was applicable, because the State Education Department could be considered the teachers' employer, and that the board could be held liable because it was the entity that enforced the teachers' certification.

That judge ruled against the plaintiffs' substantive claims, however, by holding that the exam was adequately related to the teachers' work. Two standards of evaluation were used: the validation test, which requires proof "by professionally-accepted methods, [that the exam is] predictive of or significantly correlated with important elements of work behavior or jobs for which candidates are being evaluated"; and a Supreme Court-derived standard which measured whether the test is "manifestly related to legitimate employment goals."

The LAST exam failed the validation test, the court had ruled, but passed the less-wordy "manifestly-related" test. Both parties appealed, and the case went to the Second Circuit Court of Appeals.

That court dismissed the State Education Department from the suit and ruled that the city board was both the teachers' licensor and employer, and thus subject to Title VII. The judges of the Second Circuit also found that the lower court had erred in deciding that the test was not job-related. The only legal standard that could be

used to evaluate the licensing exams, the court ruled, was the validation test, but the lower court had improperly applied that test.

The case was referred back the District Court, which issued an opinion by Judge Kimba Wood.

Before ruling on the substance of the case, Wood addressed a new legal wrinkle. A recent Supreme Court case, *Wal-Mart Stores v. Dukes*, had changed the class certification process. No longer could claims which asked for individualized remedies, like back pay and licenses, be certified under the procedural rules which the plaintiffs had used.

Thus, the teachers would have to be decertified as a class to the extent that they sought back pay and permanent licenses. However, their requests for declaratory relief and a monitor would be able to continue under class action rules, and if the board were declared to be liable under Title VII, they would be able to certify as a class under a different procedural rule for the remedies portion of the trial.

Judge Wood ruled that the board would, indeed, be liable under Title VII; the use of the LAST exams failed the validation test, she ruled, and, because of their disparate impact on African-American and Latino teachers, the exams were a violation of the Civil Rights Act.

In the Second Circuit, a five-part legal test is used to determine whether an employment exam has been properly validated, and after application of the test, Judge Wood determined that the Board had failed on all five measures.

The five-part test for proper validation of an employment test in the Second Circuit, according to Wood:

(1) The test-makers must have conducted a suitable job analysis.
(2) The test-makers must have used reasonable competence in constructing the test.
(3) The content of the test must be related to the content of the job.
(4) The content of the test must be representative of the content of the job.
(5) There must be a scoring system that usefully selects those applicants who can better perform the job.

First, National Evaluation Services, as the test-maker, had not done a suitable analysis of the tasks required of teachers. Judge Wood stated that there were "several flaws" in the way the company had developed and reviewed the subtopics that would appear on the test.

NES had never created a list of tasks that would be required of teachers and thus never evaluated the relative importance of those tasks.

And, although company representatives testified that they conducted many interviews with education experts in the states on what subjects the exams should cover, not only could details of those interviews not be produced, no information about the use of any of that material could be provided because the company did not maintain any of the material it had collected. In fact, Wood noted that the company appeared to have drafted the substance of the exam prior to beginning such interviews and that the exam was little changed afterwards.

Wood wrote that the "gaps in the evidence regarding test construction and flaws in the pilot testing compel the court to find that NES did not use reasonable competence in constructing the LAST."

She also ruled that the test questions were neither adequately related to nor representative of the work of teaching.

The judge noted that the company had tested pilot questions on college students training to become teachers, but that this population was not representative of the full population of test-takers because it excluded experienced teachers such as the plaintiffs. The LAST covered many subjects that would be learned in college-level liberal arts and science classes and it was thus more likely that the information from

those classes would be more accessible to current university students than competent teachers—even fully competent ones—who had long been removed from their own schooling.

And, Wood wrote, "the fact that the LAST exam is related generally to the liberal arts and sciences does not prove that the exam is job-related; indeed the liberal arts and sciences is an extremely broad field that encompasses far more than the basic knowledge all teachers need in order to be competent. Rather, to be job related, the LAST must test for the minimum level of knowledge about the liberal arts and sciences that is necessary to ensure that all teachers are competent to teach."

No evidence had been produced about that minimum level. While Wood acknowledged that some independent bases existed for establishing the existing minimum test scores, she noted that it was not clear that the members of the state committee that had done the evaluation used appropriate criteria. Instead, they had been asked to imagine their own version of a minimally competent teacher and assess how that imaginary individual would have answered the test scores.

Because evidence had been presented to state authorities that the chosen level of appropriate test scores would have a disparate impact on minorities, the state had "raised the cutoff score knowing that [the] decision would have disparate impact on minority test-takers, and without any evidence that the higher score was necessary to select competent teachers," the judge found.

Discipline

Standard of care does not need to be specified (from page 1)

Quatekemeyer appealed. He challenged the board's finding that he had acted unprofessionally by noting that the board had acted to impose discipline without tying any particular action to specifically enumerated violations of professional behavior in the code. Instead, he argued, the board had improperly charged him with a simple violation of failing to meet the "standard of care" without pointing to any regulation that adequately defined that standard. Such a leap, he claimed, was beyond the power of the board.

In an opinion by Judge Jeff Taylor, the court disagreed. One piece of legislation on which the board had relied prohibited departure from "standards of acceptable and prevailing medical practice" and another allowed the suspension of a doctor whose unprofessional or unethical behavior was likely to harm the public.

"By juxtaposing [the two laws]," Judge Taylor wrote, "it is clear that a physician's breach of the standard of care qualifies as conduct bringing the medical profession into disrepute which in turn constitutes conduct that is dishonorable or unprofessional of a character likely to harm the public. In a nutshell, a physician's breach of the standard of care may be, under appropriate circumstances, sufficient to justify disciplinary action by the board."

The board did make one mistake, Judge Taylor noted. Quatkemeyer had argued that his actions had not resulted in injury to one of his patients, a condition explicitly *not* required by one section of the statute he had been charged with violating, but not mentioned at all in another which he had been found to have violated.

Thus, injury of a patient was required for a violation of that statutory section, Taylor wrote, but the error was harmless because Quatkemeyer had been charged under other sections which he had legitimately been found to have violated.

The decision was not unanimous. Judge Michael Caperton, in a dissenting opinion, wrote that he believed Quatkemeyer was right when he had argued that the board was required to use a specifically enumerated administrative regulation in order to impose discipline.

"Secret methods" doc who pled 5th Amendment loses appeal

Issue: Board authority to discipline over unacceptable treatments

An Illinois psychiatrist lost the appeal of his indefinite suspension from practice for fraudulent treatment when a state appellate court ruled against his claims of bias and improper documentation on the part of the state (*Howard Wolin v. The Department of Financial and Professional Regulation*). The decision by Judge Bertina Lampkin was issued December 21 by the First District, Sixth Division, Appellate Court of Illinois.

The psychiatrist in the case, Richard Wolin, was the subject of a complaint filed by the Illinois Department of Financial and Professional Regulation in 2008 which charged that Wolin had used crystals and "secret methods"—in the words of the complaint—in his treatment of a patient.

Further, in a year and a half of seeing this patient, Wolin was alleged to have charged her $11,500 for consultations, supplements, and crystals. He was charged with three professional violations related to fraud and his case was scheduled for a hearing.

Prior to the hearing, Wolin was granted an informal conference to attempt to settle the allegations. Instead of discussing the truth of the charges, however, Wolin pled the Fifth Amendment, explaining that he was concerned over possible criminal charges related to his treatment of patients.

Wolin tried to make his case by defending the medical use of crystals in general. This did not sit well with at least one member of the state's Medical Disciplinary Board present at the hearing, board chair Edward Rose, and when Wolin tried to make the case for crystals, Rose interrupted him, saying that he refused to listen to Wolin's arguments and that the issue of whether the use of crystals in the medical profession was acceptable was closed for the purposes of the discipline process. The only relevant question, Rose stated, was whether Wolin had actually used crystals in his practice, in which case he would be subject to discipline.

After the unsuccessful conference, Wolin filed a motion to disqualify Rose and other members of the Board, arguing that they were biased. However, the motion was never decided, as other developments kept the case from going to a formal hearing at all.

The board refused to listen to Wolin's arguments that use of crystals in medicine was acceptable. The only relevant argument, the board said, was whether Wolin had actually used crystals in his practice—in which case he would be subject to discipline.

Although the patient whose treatment formed the basis of the complaints against Wolin provided the board with a signed release of her medical records for use in the case, when Wolin was provided with the documents in February 2009 he failed to respond until December 2010, and then claimed that the documents were defective.

Wolin cited two alleged defects in the release documents. One was that, in response to statutory requirements, they stated that the patient whose records were at issue granted the requesting agency permission to inspect and copy the documents. Wolin argued that the release documents needed to state that the patient herself had the right to inspect and copy their own medical records. He also claimed the records request was overbroad.

After an administrative law judge ruled that the release documents were valid, a series of delays occurred, with Wolin missing at least another two deadlines to

produce the medical records. Finally, in September 2010, he was held in default and the Department indefinitely suspended his license.

Wolin appealed, restating his concerns about the release documents, and arguing that the Medical Disciplinary Board had been biased and his constitutional rights had been violated when he had been denied the opportunity to make a statement during his informal pre-hearing conference.

In response to Wolin's claim that he was improperly denied a pre-hearing conference, Judge Lampkin, speaking for the Appellate Court, noted that although Wolin should have been given more of an opportunity to state his case, the informal nature of the conference meant that such a breach was not a violation of his due process rights. Wolin had been given his opportunity to be heard: at the hearing that would have occurred had he not failed to comply with the records request.

And although Rose and other Disciplinary Board members had been hostile to Wolin, their hostility, alone, did not rise to the level of bias. Because Wolin had refused to discuss whether he used crystals in his practice, Rose and other board members had not had a chance to make any judgment regarding the merits of the case in advance of hearing it.

Wolin's claims about the release documents met with similar dismissal. His claim regarding the notice of permission to inspect did not hold up, Lampkin explained, because the section of Illinois law that Wolin cited in his defense dealt with the release of documents to a third party and would not require a statement regarding the patient's own right to inspect their medical records, which was covered in a different statutory section.

And while the release documents did appear broad, they were not "overbroad," or at least not so broad that they could overcome the requirement that the Department's actions be "clearly erroneous" in order for the court to rule against them.

Because the documents for release of the records were valid, the board was within its power to declare Wolin in default of the case and to suspend his license.

"Good faith" no excuse for violating ethics code

Issue: Discipline for professional conflicts of interest

Reversing the decision of a lower court December 21, the Court of Appeals of Louisiana in Baton Rouge restored the revocation of a professional counselor for professional conflicts of interest during a sexual abuse and custody case (*In re Chadwick*).

The counselor, Dawn Chadwick, was hired by a district court in 2006 to conduct a custody evaluation in a case in which accusations of sexual abuse had been made against the child's mother and her husband. After several family meetings with Chadwick, the mother and husband, unhappy with her performance, began recording audio from the sessions.

In 2007, the couple filed a complaint with the Louisiana Licensed Professional Counselors Board of Examiners, alleging that Chadwick had acted inappropriately, both in her actions during the sessions and by forming both a counseling and custody-evaluating relationship with the child and one of the parents. The complaint also charged that Chadwick had disclosed confidential information, and that she had made false statements regarding court documents in the case.

The board began investigating, but it was not until 2010 that a hearing was ordered. That hearing seemed to confirm most of the couple's complaints and the board made several adverse findings against Chadwick.

The end result was the revocation of Chadwick's license, with permission for her to reapply after three years. In support of its decision, the board observed that she had shown "a total lack of awareness of ethical issues," did not recognize the difference between her appropriate roles, and showed no remorse for her lack of understanding.

The board found that Chadwick had no specific training for either custody evaluations or family therapy; she had gone beyond the role of custody evaluator and engaged in a counseling relationship; her assumption of the dual roles of custody evaluator and sexual abuse evaluation was inappropriate; and her interview methods were improper, including her practice of having both the mother and child in the room during her evaluations. Chadwick had even made suggestions that the mother did not love the child while both were in the room, the board noted.

Chadwick, unsatisfied with the board's decision, appealed to a state district court, which made the surprising decision to reinstate the counselor's license. While acknowledging that Chadwick had engaged in several professional violations, the district court judge nevertheless reduced Chadwick's discipline to a retroactive three-month suspension, saying that she had not acted in bad faith or with any intent to break the rules.

The court of appeals reversed the district court's decision and reinstated the revocation of Chadwick's license. For a court to reverse a revocation decision by a board based on faulty evidence requires that the board's decision have been arbitrary or capricious, Judge Edward Gaidry wrote, and the district court had simply failed to make that finding.

Whether Chadwick had acted in good faith was irrelevant. Louisiana statute "provides that the board shall withhold, deny, revoke, or suspend a license upon proof that the licensee has violated the code," Gaidry concluded. "No mention is made of good or bad faith."

Court rejects licensee's claim not to get meaning of "revoke"

Issue: Advance notice of discipline sanctions

When government documents mention the possibility of license revocation, they really mean it. An Ohio pharmacist who appealed the permanent revocation of his license by the state pharmacy board by claiming that the notice of charges he received did not adequately inform him that permanent revocation was a possibility lost his case November 19 when the Twelfth Court of Appeals in Clermont County found that the possibility of revocation was clearly conveyed to the licensee (*Michael R. Krusling v. Ohio State Board of Pharmacy*).

In August 2010, forty-year Ohio pharmacist Michael Krusling received notice that the board intended to take action to discipline him for several alleged professional violations involving controlled substances. Krusling, the board alleged, had sold drugs without a prescription, knowingly filled forged prescriptions, mislabeled drugs, and even allowed non-pharmacists to dispense drugs.

The notice delivered to Krusling informing him of the license action added that after a hearing, the board might, among other things, revoke or suspend his license.

And revoke they did. After a hearing, the board issued a permanent revocation of Krusling's license, which he appealed. After a lower court rejected his arguments, Krusling appealed again.

For all the paper that ended being spent on the case, the issue seemed very straightforward, Judge Robert Ringland wrote for the appellate court. Despite Krusling's objections to the contrary, the board had indeed provided adequate notice that his license was in jeopardy of a permanent revocation.

Despite Krusling's claim that he could not understand "revoke" to mean "permanent revocation," Ringland wrote, "The term 'revoke' is unambiguous in the context of proceedings before the Pharmacy Board."

"Krusling's ignorance of the precise definition of 'revoke' in this context," the judge continued, "does not mean he was not notified of the possibility that his

pharmacy license might be permanently revoked, especially given its use in conjunction with 'suspend' and the common, everyday, meaning of the term."

Board head has power to overrule hearing officer on discipline

Issue: Due process within state agency authorities

The Secretary of the State Board of Education may overrule the recommendations and fact-finding of a hearing officer in order to revoke the license of a teacher on the Secretary's own authority, the Court of Appeals of New Mexico ruled November 8 (*Chad Skowronski v. The New Mexico Public Education Department*).

The teacher whose license was at issue at the case, Chad Skowronski, was charged by the state education department with sexual misconduct with a minor. Although a hearing officer recommended, based partly on a credibility determination of Skowronski and the minor victim, that the case be dismissed because the charges could not be proved by a preponderance of evidence, the secretary of the department, Veronica Garcia, decided to look at the case herself.

Garcia saw the case differently than the hearing officer did. In a final decision which included nine pages of fact-finding, she judged the credibility of the witnesses differently and concluded that the charges against Skowronski were supported by a preponderance of the evidence, and revoked his license on her own authority.

Skowronski appealed Garcia's decision and eventually his case came before the Court of Appeals which issued a decision by Judge Jonathan Sutin.

In his appeal, Skowronski offered several arguments, but three stood out as the most contentious.

First, he contended that the Secretary of the Department of Education did not have the power, by herself, to revoke licenses. For support, Skowronski cited several pieces of legislation that dealt with the board, including the state's constitution and its general licensing act, a 2004 Public Education Act, and the School Personnel Act.

Although the state's board of education had long possessed the sole power to revoke teaching licenses, a 2003 amendment to the constitution and the Public Education Act had eliminated the board and placed its duties with two different entities: A newly-created commission and the Department of Education, headed by the Secretary.

The state licensing act required that a quorum of board members be present for a decision revoking a license, and Skowronski argued that only a quorum of the members of the replacement commission could muster that power in place of the board. Acting on her own, he argued, Garcia could not constitute a quorum and thus could not issue a revocation.

The court did not agree. While the members of the commission did replace the members of the board of education, the roles of these members had been changed to a more advisory one. Meanwhile the School Personnel Act, which states that "all references in law to the state board of education shall be deemed to be references to the public education department," indicates that the state legislature had intended the Department to replace the old board in most ways, including the authority to revoke licenses.

And while no law specifically granted the Secretary the exclusive duty or responsibility to make license revocation decisions—only departmental regulations designated that role—no law granted the commission the power of revocation either.

Therefore, wrote Sutin, the court could not say that the Secretary lacked the power of license revocation. “We see no constitutional mandate that requires an interpretation of the constitutional and statutory scheme as placing the final decision-making authority in the commission or some unspecified group or as precluding the Secretary from having the final administrative say,” Sutin wrote. “Nor do we see any basis in the scheme to determine that the commission or any group has the authority to make the revocation decisions.”

Skowronksi also argued that Secretary Garcia erred when she dismissed the credibility determinations of the hearing officer, both on statutory and due process grounds. He contended that her decision was not supported by sufficient evidence.

However, the court noted that the law allows for the Secretary to make such credibility determinations or otherwise modify recommendations from hearing officers as long as a review of the evidence was undertaken.

Here, as she stated in her final decision, Garcia did make a review of the evidence, and she included a lengthy fact-finding document in support of her decision. And although the hearing officer, the district court, and the court of appeals agreed that some of the case facts were supportive to Skowronski, under the standard of review for administrative decisions, those facts were not of sufficient weight to merit a reversal of the Secretary’s decision.

Courts overrules state AG on confidentiality of investigative records

Issue: Confidentiality of investigation vs. patient rights

A Texas court in November rejected a legal opinion by the state’s attorney general that patients had a right to access their own prescription records from confidential board investigative files (*Greg Abbott, Attorney General of Texas v. Texas State Board of Pharmacy*).

In 2009, the state’s board of pharmacy board received a complaint from a patient named Ardesir Ashtiani that a pharmacist had refused to fill a valid prescription. The board investigated the complaint and copies of Ashtiani’s prescriptions were made part of the investigative file.

Ashtiani eventually filed a request under Texas’s Public Information Act, seeking access to the whole investigative file. Investigative files are confidential by statute and the board, not wanting to disclose the records, filed a request with the state’s attorney general, Greg Abbott, to issue a legal opinion on the matter.

When the opinion came back, it was not everything the board had hoped for. Abbott’s office agreed that the investigative file was confidential by law but ruled that Ashtiani’s prescription record was an exception. The prescription was a medical record, the Attorney General’s office reasoned, and through the operation of other Texas statutes, patients had the right of access to their own medical records, even when those records were part of an otherwise confidential record.

Not happy with the opinion, the board brought suit against the Attorney General to settle the issue. After a district court found for the board, Abbott’s office appealed, and the case went to the Court of Appeals in Austin, which issued a decision written by Judge Diane Henson November 21.

The issue in the case appeared to be a clash between the state’s pharmacy act, which made the investigative file confidential, and its medical practice act, which gave patients a right of access to their own medical records.

Judge Henson ruled in favor of the board, finding that the sections of the medical practice act relied on by the Attorney General's office did not require the board to release a requestor's medical information.

Of the two operative sections used to justify the Attorney General's legal opinion, one only extended standard confidentiality requirements of medical records to third parties receiving those records, who then are prohibited from disclosing medical records unless that disclosure is consistent with the purpose for which the information was obtained. And the section of the medical practice act which requires disclosure of a patient's own medical records, noted Henson, applied only to requests for records from patients to their medical provider and was not relevant to a request to the board.

When the Attorney General's office pointed to other sections of the state's Public Information Act which require disclosure of personal information held by government agencies when confidentiality requirements are primarily intended to protect the privacy of the requestor, Henson noted that the confidentiality requirements of the pharmacy act were not subject to the privacy exception.

The pharmacy act's confidentiality requirements were "not intended solely to protect the privacy interest of the requestor" and were thus not subject to the Public Information Act's disclosure requirements, the court found.

State may discipline professionals doing sexual conversion therapy

Issue: Scope of professional prerogatives in treating patients

A challenge to California's new law prohibiting the practice, on pain of professional discipline, of sexual orientation conversion therapies on minors by licensed providers was not likely to succeed on the merits, a federal judge in California ruled December 4 (*David H. Pickup v. Edmund G. Brown*).

Judge Kimberly Mueller, of the U.S. District Court for the Eastern District of California, issued her ruling in response to a request from the plaintiffs challenging the law for a preliminary injunction blocking its enforcement.

The plaintiffs, a group of psychiatrists, advocacy groups, and parents of potential patients of the therapy, brought a challenge to the bill, SB 1172, claiming that its enforcement would infringe on their First and Fourteenth Amendment rights to free speech, religious practice, and privacy.

By prohibiting licensed providers from engaging in the therapy and minor patients from receiving information about the therapy, the bill unconstitutionally discriminated against the providers on the basis of their views, the plaintiffs argued.

Judge Mueller disagreed. Reviewing the text and history of the law, she ruled that the bill did not subject providers to discipline for their views or statements concerning sexual orientation conversion therapy, instead only prohibiting the actual practice of the therapy. "What SB 1172 proscribes," wrote Mueller, "is actions designed to effect a difference . . . not recommendations or mere discussions" of the therapy.

And, as Mueller wrote, because previous rulings have determined that the provision of healthcare is not expressive conduct, the therapy could not be protected on strong First Amendment Grounds. Because the "therapy is subject to the state's legitimate control over the professions," she noted, "SB 1172's restrictions on therapy do not implicate fundamental rights and are not properly evaluation under strict scrutiny review, rather under the rational basis test," meaning that the state

would only have to show that the statute was rationally related to the furthering of a legitimate state interest.

Citing the rule's stated purpose of protecting the physical and psychological well-being of minors, as well as the expert opinions relied on by the state legislature when they created the law, Mueller ruled that the bill was able to pass that minimal test.

When the plaintiffs complained that the statute was vague, arguing that its definition of "sexual orientation" was not sufficiently specific to avoid confusion, Mueller noted that the bill "proscribes that which the named plaintiff therapists themselves admit to practicing and therefore must understand: therapy the sole purpose of which is to alter the sexual orientation of the patient."

"Plaintiff therapists," she continued, "'well enough know' what the statute proscribes."

The plaintiffs also challenged the law on the grounds that it violated parents' fundamental rights to make decisions regarding their child's health.

However, Mueller wrote, "parents' interest in choosing mental health therapy for their children is not beyond state regulation; if the state determines a therapy is potentially harmful to minors, it may prohibit minors from receiving that therapy from state-licensed therapists."

"Parents," she continued," may not conscript the state-regulated mental health professions into treating their children with a potentially harmful therapy before those children have reached the age of majority."

Court okays board switch of ALJ, but not imposed attorney's fees

Issue: Board control over discipline adjudication process

The state medical board was handed both a legal victory and a legal defeat on December 19 when the Court of Appeals of Florida in West Palm Beach ruled on two separate points in an appeal by a doctor whose license had been suspended for over-prescribing painkillers.

The court held that although the board was able to legitimately switch administrative law judges between the conclusion of hearings and the issuing of a decision, it was in the wrong when it imposed attorneys' fees on a licensee without proper supporting documents (*Ricardo Jose Sabates v. State of Florida Department of Health*).

The disciplined doctor, Ricardo Sabates, was accused by the board of prescription violations and went before an administrative law judge in December 2011. A recommended decision was issued in June 2011, but by that time, the judge who had overseen Sabate's case, Patricia Hart, had retired, and the final recommended order was issued by Administrative Law Judge Robert E. Meale.

Sabates objected to this switch of judges by the board, but to no avail, and the board suspended his license. He was also assessed the costs of the disciplinary process and attorney fees. However, the board did not submit attorney affidavits stipulating the hours spent on the case in support of those fees, instead offering an affidavit from an operations manager with the Department of Health's compliance unit.

Sabates appealed the decision, claiming that his due process rights were violated by the switch in judges and that the attorney fees were improperly awarded without the submission of affidavits from the attorneys involved.

His first point on appeal did not get him far. Despite his objection to the recommended order issued by ALJ Meale, Judge Dorian Damoorgian noted in his written opinion for the appellate court that Florida law allows for such a judicial change if one administrative law judge becomes unavailable during the hearing process.

On his second point, Sabates met with more success. Quoting Florida statute, he noted that attorneys' fees "must be supported by competent, substantial evidence by the attorney performing the services." Although the board had submitted the affidavit of an administrative officer with knowledge of the time spent, anything less than an affidavit from the attorneys themselves would be insufficient, and the award of attorney fees would be voided, the court ruled.

Despite statute, state courts may stay license suspensions, revocations

Issue: Statutory ban on granting stay of discipline sanction

Although a statute may seem to imply otherwise, state courts have the power to stay the revocation or suspension of a licensee by state boards for medical professionals, the Supreme Court of Oregon ruled December 20 (*Rachel Weldon v. Board of Licensed Professional Counselors and Therapists*).

The case began in January 2012, when the Oregon Board of Licensed Professional Counselors and Therapists moved to suspend the license of professional counselor Rachel Weldon. Weldon planned to appeal the decision and she asked the board for a stay of the suspension in order that she be able to continue practicing during the appeals process. The board denied Weldon's request, and the case moved to a state court of appeals.

The statute (ORS 676.210) states: "No person whose license has been revoked or suspended by any board authorized by the statutes of the State of Oregon to issue licenses to practice a health care profession shall continue the practice of this profession after the order or decision of the board suspended or revoking the license of the person has been made. The license shall remain suspended or revoked until a final determination of an appeal from the decision or order of the board has been made by the court."

Prior to a full hearing before that court, an appellate commissioner took charge of the case and Weldon repeated her request for a stay of the suspension, this time to the commissioner.

At this point, the board introduced an Oregon statute which appeared to prohibit courts from allowing licensees to continue practicing during their appeals from suspensions or revocations. The statute, on its face, prohibited any licensee from practicing during an appeal of the suspension or revocation of the license, and the board argued that this language prohibited state courts from granting a stay which would allow such a licensee to continue practicing.

The appellate commissioner agreed with the interpretation of the board. However, he also believed the law to be a violation of the Oregon Constitution's separation of powers—an attempt by the legislature to improperly control the actions of state courts. Unfortunately for Weldon, the commissioner also ruled that, unconstitutional statute or not, she did not merit a stay of her suspension.

Both Weldon and the board appealed to the full appellate court, which came to the opposite conclusions on both points. Weldon did merit a stay, it ruled, but the statute was constitutionally permissible and thus prevented such a stay from being granted.

Weldon appealed to the state supreme court. That court issued a decision December 20, written by Justice Martha Lee Walters.

While the primary question the parties wished the court to resolve was the constitutionality of the statute, the justices had other ideas. Reluctant to make a decision on the constitutionality of a statute, the court instead chose to investigate whether the challenged legislation actually did prevent courts from issuing stays in revocation and suspension appeals.

After noting that the statute, on its face, would also preclude state boards from issuing their own stays of suspension or revocation—in seeming contradiction of explicit language in the state's Administrative Procedure Act—the court reached out for other sources. And, after a detailed investigation of the legislative history of the statute, the Court decided that the statute did not, in fact, restrain state courts, despite the beliefs of the two parties to the case.

Justice Walter wrote that, based on the statute's history, it was in fact intended to change a historic practice of assuming an automatic stay of suspension or revocation while a licensee appealed and not to constrain state courts from any action.

"We conclude from the text, context, and legislative history of [the statute]," Walters wrote, "that the legislature's purpose in enacting the statute was to grant courts statutory power to enter injunctions, not to deprive them of their inherent judicial power to enter stays."

The case was remanded to the appellate court to rule on Weldon's request for a stay.

Recommending licensure for little-known applicant can lead to discipline

Issue: Standards of professional conduct

A doctor who submitted a recommendation for licensure despite the fact that she knew nothing about the applicant's actual practice could be subject to discipline for making a false statement on a license application, the Court of Appeals of Ohio, Franklin County, ruled December 28 (*Michele A. Oyortey v. State Medical Board of Ohio*).

In 2009, the disciplined physician, Michele Oyortey, was approached by another doctor, Christopher Rice, who was looking for a letter of recommendation from an Ohio physician for his application to practice medicine in the state. Oyortey and Rice had met only twice before, both times at dinner parties, but Oyortey was impressed with Rice's descriptions of his work with Doctors Without Borders and agreed to file a recommendation, despite never having observed or worked with Rice professionally.

Rice, it turned out, did not have an exemplary past. His license had been revoked in both New York and Illinois and he had both a felony theft conviction and two medical malpractice settlements under his belt. The Ohio Medical Board permanently denied his application and turned to investigating Oyortey for issuing the recommendation.

Eventually, Oyortey was charged by the board on several counts stemming from what it claimed were her false statements on an application for licensure.

Oyortey's case went before a hearing examiner, who concluded that the doctor's favorable statements about Rice did not rise to the level of a professional violation. The hearing examiners believed Oyortey had not intended to mislead the Board, and the examiner issued a recommendation that the charges be dropped.

Although the board agreed with the hearing examiner's findings of fact, the members of the board nevertheless believed that Oyortey should be disciplined. Despite her intentions, Oyortey had knowingly misled the board by filing a recommendation for a license applicant about whom she knew very little. However, given the circumstances, the board decided that the entry of a finding that Oyortey had violated the professional code would be sufficient.

> Oyortey claimed that she was immune from sanction because she had not intended to mislead the board with her statements. But, the court wrote, "by completing the recommendation and distinguishing between Dr. Rice's medical knowledge and technique, relationships with patients, and relationships with peers and medical staff, Dr. Oyortey conveyed to the board that she had sufficient knowledge to make those distinctions, to assess Dr. Rice's suitability for a license to practice medicine in Ohio, and to vouch for his moral character . . . The recommendation form implicitly requires the physician to possess the knowledge to do so."

Oyortey was nevertheless unhappy with the decision and she appealed. She argued that the section of the professional code prohibiting false statements on license applications, under which she had been sanctioned, was improperly applied to her because she was not the license applicant.

The court disagreed. Rather than being limited to the license applicants themselves, the statute prohibits false statements in an attempt to secure "*any* certificate to practice," which would include Oyortey's effort to secure a license for Rice.

Oyortey also tried to argue that because the misleading statement had not been about her own skills or moral character, she was not in violation of the law. However, the court disagreed and corrected her on this point, noting that the falsity of her statement was in implying that she had the required knowledge to recommend Rice.

"The misleading nature of Dr. Oyortey's recommendation," the court wrote, "did not stem from the substance of her responses, but arose from her implication that she had sufficient knowledge to answer the questions asked of her."

Last, Oyortey argued that her recommendation had not been an act within the compass of her practice and therefore could not be considered an unprofessional action. But the court noted that because the recommendation form required that the person filing it be a licensed Ohio physician, it was not unreasonable for the board to interpret the law to include the prohibition of misleading license recommendations.

Competition

Federal court assails board's attempt to put monks selling caskets out of business

Issue: Scope of board authority to regulate non-licensees

In response to a lawsuit by a group of woodworking monks, who make and sell funeral caskets out of their abbey as a means of livelihood, the U.S. Fifth Circuit Court of Appeals issued an October 23 decision castigating the Louisiana State Board of Embalmers and Funeral Directors for their efforts to regulate the sale of non-licensed casket sellers in the state (*St. Joseph Abbey v. Paul Wes Castille*).

The decision was a follow-up to a judgment issued by Judge Stanwood Duval of the U.S. District Court in New Orleans, which had declared that regulations purporting to prevent the sale of caskets by those not licensed by the board have no rational basis other than unlawful economic protectionism.

The retail sale of funeral caskets by the monks of St. Joseph's Abbey in Saint Benedict, Louisiana, began after 2005, when Hurricane Katrina destroyed timberland owned by the monks that had been an important means of support. When they died, the monks had been traditionally buried in caskets made by a woodworking shop at the abbey. Seeking a new means of economic support, they invested $200,000 and opened a business called St. Joseph's Woodworks in order to sell the caskets to the public.

Their caskets were sold at two price levels—$1,500 and $2,000—which the district court noted were significantly lower than the prices of funeral home caskets.

When the state funeral services board learned of the retail operation, it issued a cease-and-desist letter to the Abbey. In order to legitimately sell caskets, the board believed, the Abbey would have to set itself up as a full-fledged funeral operation with embalming facilities, a lay-out parlor, and a licensed funeral director. The monks, in turn, believing the restrictions unreasonable, and brought the board to court, seeking declaratory and injunctive relief.

In response to the lawsuit, the board argued that the rules had three legitimate purposes: economic protection of the funeral industry, protection of consumers from predatory sellers of funeral goods, and public health and safety.

All three arguments had been rejected by Judge Duval, who had declared all of the proffered purposes of the regulation illegitimate and the rules unconstitutional. The board appealed, and the case went before the Fifth Circuit, which issued the October decision, written by Judge Patrick Higginbotham.

The appeals court largely agreed with Duval. Higginbotham noted that Louisiana does not have any statutory laws governing casket construction or even requiring them for burials, and that none of the required training for the licensure of funeral directors relates to caskets.

Regarding economic protection of the funeral industry, "as we see it," the judge wrote, "neither precedent nor broader principles suggest that economic protection of a pet industry is a legitimate governmental purpose." Without even a post hoc rationale, he continued, such rules could be "aptly described as a naked transfer of wealth."

Because Louisiana law does not require caskets and allows state residents to purchase caskets from out-of-state unlicensed sellers, Higginbotham declared that "whatever special expertise a funeral director may have in casket selection is irrelevant to its being the sole seller of caskets."

The court went further and recited the history of federal regulation of the industry, which itself had historically been seen as predatory of consumers and was a subject of past actions by the Federal Trade Commission, which had also found little evidence of injury caused by third-party sellers of funeral goods.

Also noted was Louisiana's consumer protection framework, which already prevented the fraudulent or predatory sale of funeral goods, as it did other consumer products.

Addressing the issue of public health and safety, the court expressed doubt that the regulations had a legitimate purpose. "That Louisiana does not even require a casket for burial, does not impose requirements for their construction or design, does not require a casket to be sealed before burial, and does not require funeral directors to have any special expertise in caskets makes us doubt that a relationship exists between public health and safety and limiting intrastate sales of caskets to funeral establishments," Higginbotham wrote.

He continued: “The great deference due state economic regulation does not demand judicial blindness to the history of a challenged rule of the context of its adoption nor does it require courts to accept nonsensical explanations for naked transfers of wealth.”

However, despite a lengthy constitutional dismantling of the rule, the court stated that it wished to avoid making its decision on constitutional grounds if possible. It found an outlet for this wish by noting that the statute creating the board may not actually give it the power to regulate casket sales by sellers it has not otherwise licensed.

“The circularity in the structure adopted to regulate intrastate sales of caskets,” the judge noted, “requiring intrastate sellers of caskets to be licensed as funeral homes to bring their business within the state board’s regulatory reach, suggests an unspoken awareness that the state board only has authority to regulate funeral establishments and funeral directors.” The link between the board’s authority to regulate casket sales seemed, from the relevant state statutes, to only apply to its own licensees.

Given what the court described as a “critical” issue of state law, the decision ended with a request for certification to the Supreme Court of Louisiana, from which the court sought guidance in answering the state law question before it made a final decision on the constitutional issues of the case.

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