Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue:

Discipline

Secret tape of doctor's interaction with patient was proper, court finds

Issue: Authority to conduct surveillance of licensees

An Ohio doctor charged with sexual misconduct after one of his patients secretly taped him making inappropriate sexual comments lost his appeal of discipline charges on September 27, when a Court of Appeals in Columbus ruled that the evidence from the camera was properly authenticated and did not violate his due process rights (*Larry Lee Smith v. State Medical Board of Ohio*).

When a female patient of Larry Lee Smith, a doctor of osteopathy, complained to local police that Smith had plied her with drugs in order to make sexual advances, law enforcement officials outfitted her with a hidden camera and sent her back to Smith's offices. The patient, who had sought Smith's treatment for a drug addiction, visited and recorded Smith on three occasions, capturing the doctor on tape making inappropriate sexual comments suggestive of a sexual relationship between the two.

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

Licensing

State violated ADA rights of applicant with bipolar disorder

Issue: Rights of applicants with disabilities

A licensee who sued the Nebraska medical board for violations of the Americans with Disabilities Act saw her damage award from a trial victory more than double September 18 when the U.S. District Court for Nebraska awarded attorney fees and costs of over $108,000—about $30,000 more than the original damage award (*Elaine James v. Nebraska Board of Medicine & Surgery*).

The case stemmed from two decisions made by the Nebraska Department of Health and Human Services on applications for medical licensure by a medical graduate named Elaine James, who suffers from bipolar disorder. When she applied for a temporary permit to practice medicine at the University of Nebraska Medical Center in 2007, the agency

was willing only to grant her a probationary permit, a decision it labeled a "disciplinary action."

James appealed the decision, requesting a hearing with the department, but the matter had not been resolved by the time James applied for a full license in 2008. DHHS made a similar decision on this application: James was offered only a license on a disciplinary probation basis. In addition, the department published meeting minutes concerning James on its website.

In 2009, James filed suit against the board and the department, alleging violations of the ADA, her right to due process, and defamation.

While the trial was pending, Joann Schaefer, chief medical officer of the department, reviewed the case and granted James an unrestricted license, declaring that DHHS had not afforded James due process when making its decisions. The disciplinary nature of the action had not been warranted, Schaefer said, because James had never been found guilty of a professional violation through any sort of adjudication.

James kept on with the lawsuit and, although three of her bases for suit were dismissed, she went to a jury trial on her ADA claim, eventually winning $72,727 in damages against the state. She then filed for costs, requesting $138,000 in attorneys' fees and $24,000 for expert witnesses.

The state agency acknowledged that some costs were appropriate, but objected to the amount requested. James had only prevailed on one of her five claims, the department argued, and it should not bear the costs of her failed legal strategies. Further, it claimed, it would be improper to award an amount in fees so much higher than the actual damage award.

The court did not agree. Citing Supreme Court precedent in support of its decision, it awarded James much of what she requested: $85,250 in attorneys' fees and $23,235 in expert costs. All of James's legal claims, including those that failed, followed from a common core of facts, the court explained, and her damage award at trial was limited by immunities claimed on behalf of the department, two factors that weighed in her favor. But she had not quite achieved the level of success required to provide her compensation for the full amount of attorney hours expended.

Discipline

Doctor caught on hidden camera loses appeal of discipline (from page 1)

After Smith was convicted on a criminal controlled-substance charge, professional charges soon followed and a hearing was set for February 2011.

During the discipline process, Smith failed on several occasions to appear for important dates. He skipped the first day of his hearing, and although his attorney pleaded that inclement weather had kept Smith from appearing, the officer in charge of the hearing refused to postpone, noting that three witnesses had traveled from the same area as Smith without issue.

When Smith's attorney attempted to contact his client to participate by phone, Smith did not answer. The next day, Smith failed to show again; nor had his attorney heard from him. During this process, the physician also skipped a mandated mental health evaluation without explanation.

The board revoked Smith's license in May 2011 for the substantive charges, and again in July for skipping the mental evaluation, and Smith appealed.

Before the Court of Appeals, he argued that the surreptitious recordings of his incriminating statements were a violation of his due process rights, that the hearing officer had improperly proceeded without his participation during the hearings he had skipped, and that the board improperly ordered him to undergo the mental health evaluation which gave rise to the second ground for revoking his license.

The court did not accept his arguments. The camera, it ruled, was not a violation of his rights, and the evidence it contained had been properly authenticated during the discipline proceedings. The hearing officer, also, had acted legitimately in deciding not to postpone Smith's hearing after he was a no-show. Judge John Connor, in his opinion for the court, wrote that Smith "cannot establish deprivation of due process based upon his own failure to communicate with counsel and make himself available despite counsel's repeated attempts to contact him."

Finally, Connor noted in affirming the board's decision to revoke Smith's license, under the circumstances ordering a mental health evaluation was a reasonable action for the board to take.

Judges debate: Is one doctor's opinion enough to revoke a license?

Issue: Sufficiency of evidence in discipline proceedings

In an October decision on the appeal of a doctor sanctioned for a drug dependency, judges of the Pennsylvania Commonwealth Court voiced significant disagreement over the court's decision to uphold the sanctions based on the sufficiency of a small chain of evidence and admissions that one judge pronounced a "bare, one-sentence conclusory opinion of a doctor of unknown qualifications" (*Michael J. Oakes v. Bureau of Professional and Occupational Affairs*).

The license at issue in the case belonged to Michael Oakes, a doctor of osteopathy. In 2001, while serving in the Navy, Oakes had been severely injured, and his surgeries and recuperation had extended into the period of his medical training and resulted in his use of painkillers, which he overused for at least a short period of time. His use of the painkillers was noticeable enough that in 2007, the board ordered Oakes to undergo a mental and physical evaluation.

That evaluation was carried out by a physician named Robert Wettstein, who concluded that Oakes suffered from an opioid dependency. Though his dependency was in remission, Wettstein wrote, Oakes would only be able to safely practice medicine if he entered treatment for his addiction and submitted to a monitoring program for the next three years.

Based on these statements, the board brought disciplinary charges against Oakes and held a hearing in June 2011. Prior to the hearing, Oakes admitted to the existence of Dr. Wettstein's conclusion. Oakes then failed to show up for the hearing, with the result that the only evidence introduced was by the prosecutor, and included the charges, a letter Wettstein wrote detailing his conclusions and their bases, and Oakes's admission of Wettstein's conclusion.

The hearing examiner for the case struck out Wettstein's letter as uncorroborated hearsay. But based on Oakes's own admission of Wettstein's conclusion, the board ordered a three-year suspension and required Oakes to enter treatment.

Oakes appealed, claiming that the board had insufficient quality evidence to sanction him. He challenged the board's apparent reliance on Wettstein's opinions despite the hearing examiner's ruling that Wettstein's letter was inadmissible hearsay.

The Commonwealth Court disagreed with Oakes's argument. Although Wettstein's letter had been disqualified, Judge Kevin Brobson wrote in the court's opinion, it was Oakes's admission of Wettstein's conclusion that had formed the meat of the board's evidence against him. The admission amounted to sufficient evidence that Oakes had a drug dependency, Brobson concluded, and thus the evidence for his sanction was sufficiently substantial.

As noted, however, the court's judges were not in agreement on this point. Judge Renee Cohen Jubelirer wrote a dissenting opinion in which she concluded that the board's decision was rooted in inadmissible evidence. While it was true that Oakes had admitted to Wettstein's final conclusion, the judge wrote, that was all he had admitted to.

And citing an older case, *Walker v. Unemployment Compensation Board of Review*, Cohen Jubelirer noted that hearsay evidence could only support a finding of the board if it were corroborated by other competent evidence in the record.

Here, however, the only evidence introduced to support the sanction was "a corroborated hearsay statement that lacks any context or factual support," she wrote.

The only admission made by Oakes was that Dr. Wettstein believed him to be unfit to safely practice medicine without treatment and monitoring. The board's conclusion had been based on that alone, with an explicit inference that the only reason Wettstein would have believed his statement to be true was as the result of evidence of opioid dependency on the part of Oakes.

However, such an inference, Cohen Jubelirer wrote, did not suffice for the standard of substantial evidence. Although Dr. Wettstein had documented the evidence for his conclusions, that evidence was contained in portions of the letter whose truth Oakes had not admitted to. Because the letter had been struck as inadmissible, that evidence had never been entered into the record.

As a result, Cohen Jubelirer said, "I would conclude that a bare, one-sentence conclusory opinion of a doctor of unknown qualification, based on unknown facts, is not such relevant evidence upon which a reasonable mind could accept as adequate to conclude that Oakes today, almost five years after Dr. Wettstein wrote his letter, actually is unfit to practice and should have his license suspended or revoked.

Free speech cited as court overturns revocation for "saying too much"

Issue: Scope of board authority to regulate speech

On October 26, the Supreme Judicial Court of Massachusetts overturned the permanent license revocation of a Boston embalmer who engaged in what the state's Board of Registration of Funeral Directors and Embalmers described as "gross immorality" when he gave a very detailed account of his professional experiences to a local newspaper reporter (*Troy J. Schoeller v. Board of Registration of Funeral Directors and Embalmers*).

In 2006, embalmer Troy Schoeller was interviewed by Camille Dodero, a reporter for *The Boston Phoenix*, about a clothing store Schoeller had recently opened called Horror Business. He appears to be quite a colorful character—apart from embalming and running his store, Dodero wrote that he was also the front man for two heavy metal bands—and the article became a profile of Schoeller and his wife, a pathologist's assistant.

During a dinner interview, Schoeller opened up to Dodero and began to describe his experiences in the embalming profession. Although he did not disclose any confidential or private information, the details disclosed by Schoeller were quite gruesome and potentially offensive. As a result, when the article was published, he

was fired by his employer, who also lodged a complaint with the Massachusetts Board of Registration of Funeral Directors and Embalmers.

The board proceeded to file charges against Schoeller for violating a board regulation prohibiting licensees in the funeral profession from commenting on the condition of any body entrusted to the licensee. His comments, the board alleged, were a violation of his professional duties, and a "gross immorality."

In the article, Schoeller described the embalming of an infant in graphic detail, referring to his finished workmanship as "awesome." He went on to discuss the embalming of obese people, which he described as "nasty," and joked about the release of gases from decomposing bodies. After a hearing, the board ruled that Schoeller had committed license violations and had violated an oath that licensees of the profession are required to make "not to comment on the peculiarities or conditions of any dead human bodies entrusted" to them. He concluded that Schoeller's comments indicated a "cavalier and even callous attitude toward dead bodies."

Schoeller challenged the legitimacy of the regulation to the board, but the board dismissed the motion, concluding that the regulation was reasonably related to the board's interests. Funeral service professionals who speak of their work in an "undignified and salacious" manner, the board concluded, harmed the public welfare and the integrity of the profession.

After the board permanently revoked his license, Schoeller appealed, arguing that the regulation violated his right to free speech and that the board's punishment was disproportionate to his offense.

The justices of the Supreme Judicial Court agreed with Schoeller's First Amendment claim and ruled that the regulation was unconstitutional.

During Schoeller's board hearing, an official testifying on behalf of the board noted that, despite the wording of the regulation prohibiting licensees from commenting on the condition of bodies, not all such discussions were unprofessional. Trade journals and other professional publications were full of professional discussions of technique and trade-craft.

While the Supreme Judicial Court recognized the narrow manner in which the board enforced the regulation against commenting on the condition of bodies, it nevertheless found the regulation overbroad.

Justice Fernande Duffly wrote that the board's authority to regulate the speech of licensees when they were not acting in a professional capacity was dependent on two issues: whether the licensees' free speech protections should give way to some compelling societal need, and whether the regulation was narrowly tailored to meet that need and minimized its restriction of the speech rights of others.

Here, she noted, "The board's generalized interest in maintaining the integrity of the profession cannot outweigh the First Amendment rights of embalmers and funeral directors when acting outside of their professional capacity." And even if the board's concern for the profession's integrity did outweigh the First Amendment, the regulation was not sufficiently narrow.

If the board wants to regulate the speech of licensees outside of their professional capacities, Duffly continued, it "would need to identify a more specific and compelling interest than a vague, generalized notion of integrity in the funeral services profession, and promulgate a regulation narrowly tied to that end."

"Although Schoeller spoke colloquially, using both graphic and crude terms in his description of the challenges that he faced as an embalmer," she concluded, "his comments convey that he took apparent pride in his skills."

Change of charges after trial costs board discipline case

Issue: Procedural due process

A post-trial switch of charges cost the Texas Board of Educator Certification a discipline case when a state appellate court ruled September 24 that such an after-the-fact change in pleadings violated the due process rights

of the principal being disciplined (*Andra Barton v. State Board for Educator Certification*).

The disciplined educator, a principal in the Carroll Independent School District named Andra Barton, saw her school lose its "exemplary" rating in 2007 because of low scores on the Texas Assessment of Knowledge and Skills, a state-wide test that measures academic performance.

In response to the low scores, the staff of Barton's school devised a plan to improve the performance of the school's special education students. Implementing the plan would involve changing the required individual education plans for each special education student, an action requiring the consent of the child's parents.

While Barton was able to get that consent from the parents—the Court of Appeals of Texas in Texarkana later noted that consent to the school's plan was almost universally granted—the plan was less well received by some of Barton's staff. An assistant principal filed a complaint with the District, alleging that in handling the process Barton engaged in several improper actions, including coercion and misrepresentations.

A law firm hired to investigate the case concluded that the charges were accurate. Barton resigned, and the board brought discipline charges against her.

During her discipline trial, the administrative law judge handling the case came to the conclusion that the charges against Barton could not be substantiated. On the contrary, the judge noted that Barton's decisions were "reasonable and appropriate" and that no evidence of coercion existed.

However, among the charges the board pursued during Barton's trial was that Barton failed to inform the affected children's parents about the potential changes, an action required by law. And while Barton was found to have notified the affected parties, the judge also concluded that the she had failed to provide that notice in written form as required. Barton was given a reprimand.

Unhappy with this portion of the decision, Barton appealed, arguing that the board had never charged her with failing to give written notice and so any conclusion that she had failed to do so was improper. After a district court upheld the decision of the board, the case was appealed again to the Court of Appeals in Texarkana.

In response to Barton's claim, the board had pointed to language in its charging petition which alleged that she had acted without notifying the affected parents and which had cited the correct statute for charging Barton with failing to issue written notice. In the board's opinion, that citation was specific enough to make the charge proper.

Chief Justice Josh Morriss disagreed. While certain specifics do not have to be pled, he explained, "The board's argument overlooks the requirement that minimum standards of due process must still be met." Although the board had cited the relevant statute, the specific conduct alleged to Barton was not the conduct that she was eventually found to have committed.

The board, by arguing a different case at trial, had surprised Barton and deprived her of an opportunity to prepare a defense for the final accusation made against her. For example, Morriss noted, even if Barton actually had failed to provide written notice, it was possible that she could have prepared a defense relying on waivers by the parents.

"It was fundamentally unfair," Barton wrote, "to plead and try the total failure to notify or involve parents, which was successfully refuted, and then use Barton's

evidence of oral notice to help prove lack of written notice, which had not been alleged."

Misdemeanor grand theft held substantially related to license

Issue: Nexus between criminal conduct and license

A social worker's conviction for grand theft for charging $48,533 to her employer credit card for personal purchases was "substantially related" to the qualifications, functions, or duties of her profession, and sufficient basis for discipline of her license, the Court of Appeal of California, Fifth Appellate District, held September 25 in an unpublished opinion (*Torre v. Board of Behavioral Sciences, Department of Consumer Affairs*).

In the case, licensed clinical social worker Carol Ann Dela Torre was clinical director of a non-profit child welfare agency, where between 1996 and 2001 she incurred $48,533 in charges for personal expenses on her corporate credit card. Dela Torre reimbursed the agency after a demand by the board of directors, but in 2008 pled no contest to misdemeanor grand theft. The state Board of Behavioral Sciences first placed her on probation for two years with various conditions imposed, but a few months later the board sought suspension or revocation of Torre's license.

Despite other evidence of Torre's professional competence and evidence that she was sincere, credible, contrite, and remorseful, the ALJ concluded that Torre was convicted of a crime that was "substantially related to the qualifications, functions and duties of an LCSW," and the evidence "did not support appellant's contention that she was fully rehabilitated and that no discipline should be imposed."

The administrative law judge in the case made factual findings regarding Torre's conduct, including that she used company credit cards for personal expenses for six years without making any attempt to return the money taken, she did not stop taking the money until she learned that the board of directors had retained a chief financial officer who would discover what she was doing, and she waited an additional two years until the agency actually demanded reimbursement, before paying back the money she took.

In the end, the board ordered that Torre's license be revoked, the revocation stayed, and a probationary license issued for three years on certain stated conditions.

In her appeal, Torre contended that although she had failed to keep track of the personal items she was charging, she had always intended to pay back her agency, and that misdemeanor grand theft was not a crime that evidenced moral turpitude. The court, however, found that the issue of moral turpitude is irrelevant to the statutory standard for discipline of a license under state law, and that Torre's crime was substantially related to her fitness to practice social work.

"The evidence of clinical competence in this case does not alter the conclusion that appellant's criminal conduct demonstrated a willingness to use money intended for her clients' welfare for her personal financial gain. On the facts established in this case, [Torre's] conviction evidenced to a substantial degree her present or potential unfitness to perform the functions authorized by her license."

Revocation upheld for refusal to submit for mental examination

Issue: Board authority to order mental examinations

The state nursing board has the power under state law to revoke a license in the case of a refusal to submit to a board-ordered mental health examination, the Court of Appeal of California, First Appellate District, Division Two, held September 26 (*Ophelia Lee v. Board of Registered Nursing*).

Ophelia Lee, the nurse whose license was at issue, was working at Eden Medical Center in the Bay area in 2007 when she complained to her supervisors about two separate series of incidents.

Lee believed that she was the subject of bullying and racial discrimination by her supervisor and other nurses based on her Chinese ethnicity, and that she was being

stalked by a man named Tony Chen. Chen, she claimed, had been stalking her for the last nine years and had also begun to stalk a doctor at Eden. But when that doctor was contacted by hospital authorities, so many details of Lee's story were found to be inaccurate that Eden's Human Resource Director, Phyllis Weiss, had Lee report for an evaluation by a doctor in the hospital's occupational health clinic.

That doctor found that Lee was not fit for duty, after which Weiss ordered Lee to report for a psychiatric evaluation before she could return to work. A psychiatrist who evaluated Lee diagnosed her as having a psychotic disorder, manifested by paranoid delusions, and also concluded that she was not fit for duty.

Following that diagnosis, the hospital placed Lee on medical leave and informed her that she would need to submit to treatment before she could resume work. Lee however, failed to communicate with the hospital during her absence. Eventually, the hospital terminated her employment and informed the state's Board of Nursing about its concerns. A lawsuit against the hospital followed, with Lee alleging racial discrimination and labor and contract violations, but her claims were eventually dismissed.

The board ordered Lee to submit to a mental evaluation in 2009. Lee refused to see any mental health professional that she did not choose herself, and eventually she refused to submit to any evaluation at all. After a hearing, the board revoked Lee's license for her failure to sit for an evaluation. Lee appealed, and the case made its way to the Court of Appeals.

Justice James Richman, writing for the court, noted that the board's action was supported by a California statute that allows the board to order a licensee to submit to a mental evaluation if that person appears to be impaired, and allows the board to revoke the license of a professional who refuses to submit to such an evaluation. This had been the board's sole basis for disciplining Lee and the court determined it was sufficient.

"All that is relevant is that Lee did not comply with the board's order to submit to a mental evaluation," Richman wrote. "Although Lee argues strenuously that the order should not have been made, the board's power to make it cannot be the subject of dispute in the face of the Legislature's declaration that 'Protection of the public shall be the highest priority for the Board of Registered Nursing in exercising its . . . disciplinary functions.'"

Court reinstates discipline over failure to disclose illness history

Issue: Licensee disclosure of personal health history

A September decision by a Louisiana appellate court reinstated discipline that had been imposed by the state's Board of Practical Nurse Examiners on a licensure candidate for a failure to fully disclose her history of illnesses (*Wren Robichaux v. Louisiana State Board of Practical Nurse Examiners*).

Wren Robichaux, the licensee disciplined by the board, submitted a required evaluation form and health certificate when she was first admitted to the Practical Nursing Program at Louisiana Technical College in 2007. Strangely, although the health certificate Robichaux submitted indicated that she suffered from a long-term seizure disorder, Robichaux did not disclose that illness on her evaluation form, instead answering "No" to the question of whether she had ever suffered from a condition that would affect her ability to practice.

As a result of the discrepancy, Robichaux was dismissed from the program by her faculty advisor in May of 2008, and a complaint was filed to the board. She was then re-admitted to the program in time for classes in August of that year, and submitted a new evaluation form—in which she answered "Yes" to the previously

troublesome question—and a new health certificate, which contained the same information as the first.

When Robichaux graduated from the program in 2010, she applied to take the required tests for licensure, but was informed by the board that as a result of the earlier transgression with her school's health evaluation form—which it termed a fraudulent answer—she would have to accept a reprimand and pay a $500 fine before she could be considered for licensure.

Unhappy with this limitation, Robichaux appealed, first to a full hearing before the board—which affirmed the decision—then to a state court. She argued that the board both improperly charged her with actions that occurred outside its purview—before she had applied for a license—and with violating state law by waiting more than two years after the receipt of the complaint against her.

The trial court found merit in Robichaux's charge that the board had failed to prosecute her in a timely manner and reversed the discipline. The board appealed that decision and the case came before the Court of Appeal of Louisiana in New Orleans, which did not agree with Robichaux's arguments.

In response to Robichaux's claim that the board had overstepped its bounds by punishing her for an action that occurred before she became a candidate for licensure, the court noted that because state law authorizes the board to deny applicants, the board must have the power to consider actions of individuals before they apply for a license.

And although the law does require that the board pursue a fraud complaint within two years of the discovery of the fraud by the complainant, the board had only acquired jurisdiction to pursue discipline against Robichaux when she applied for a license. In that case, a different timeline applied to the board, giving it only six months to file a complaint.

However, because the board had filed the complaint within six months after Robichaux application for a license was filed, the court ruled the prosecution timely.

Providers may refuse to deliver "morally unconscionable" care

Issue: "Conscience clauses" for health care professionals

A September 20 ruling by an Illinois appellate court has effectively nullified recently-enacted rules that require pharmacists to dispense emergency contraception when requested (*Morr-Fitz, Inc., et al. v. Pat Quinn, et al.*). In making its decision, the Appellate Court of Illinois, Fourth District, relied on the Illinois Conscience Act, a 1977 law that allows health-care providers to refrain from participating in care they find morally unconscionable.

The new rules, first issued in 2005, mandated the fulfillment of prescriptions for emergency contraception. But in a lawsuit, a group of pharmacists and associated pharmacies argued that the emergency contraception rules violated two state statutes: The Conscience Act and the Religious Freedom Restoration Act, which narrow the burden the state can place on individuals contrary to their religious beliefs. The plaintiffs also argued that the rules violated the First Amendment's Establishment of Religion Clause.

The case spent some time traveling through the Illinois court system before the final ruling of the Appellate Court. After an initial circuit court decision, the Appellate Court dismissed the suit on appeal, ruling that the pharmacists did not have standing to bring the case. That ruling was then overturned by the state's supreme court and, after more travel and the entering of a permanent injunction against the enforcement of the rules by a state circuit court, the case returned to the Fourth District court.

The court ruled that the Conscience Act prevailed; while the permanent injunction issued by the circuit court had been too broad and would not be upheld, the Conscience Act would take precedence in the case of a pharmacist who refused to fill an emergency contraception prescription.

The challenged rules did not violate the Conscience Act, the court explained. Instead the Conscience Act operates to protect pharmacists and other medical professional from liability once they choose not to follow such rules for reasons of conscience.

However, the Act only prevented the state from taking any action against a pharmacist who had refused to fill a prescription as a matter of conscience. So, to the extent the rule could be used against non-conscientious pharmaceutical-delivery failures, the rules were still valid. A permanent injunction could only be issued preventing enforcement of the Act against the pharmacist plaintiffs in the case.

In defending the rules before the court, the state argued that the Conscience Act did not apply to pharmacists or pharmacies. First, the state claimed, the language of the Act did not encompass pharmacists. Second, the state maintained that pharmacies themselves were not “health care facilities” as described in the language of the act—which applied only to larger institutions like hospitals—and were therefore not subject to its provisions.

The court rejected both arguments. Pharmacists, it declared in an opinion by Justice James Knecht, were engaged in the furnishing of health-care services, which was the language used in the Act to describe providers who would be protected from liability. And pharmacies were indeed health-care facilities. “It would be a tortured interpretation,” Knecht wrote, "to conclude individuals who dispensed medicines inside a hospital or school are protected while individuals who dispense medicines outside the hospital or school are not.”

The state’s other significant argument—that the dispensing of emergency contraception pills met emergency exceptions to the Conscience Act—was similarly rejected. The Act’s exceptions were intended for conditions which required “immediate medical attention," explained Knecht, and, although the effectiveness of the emergency contraception pills was limited by time, “given the 72-hour window, even though the window may become narrower in that time frame, unprotected sex does not place a woman in imminent danger requiring an urgent response.”

“Our interpretation and application of the term ‘emergency’ may not be the same definition that would be applied by a woman seeking the emergency contraceptive,” Knecht concluded. “However, the evidence here does not show there would be an imminent danger to the patient or the need for immediate attention as contemplated by the Conscience Act.”

Financial mismanagement, not bankruptcy, justified license denial

Issue: Constitutionality of disciplinary actions

A mortgage broker whose license application was denied lost his bid for licensure because he was unable to manage his financial affairs, not because he had filed for bankruptcy, the Court of Appeals of Ohio, Fifth Appellate District, held October 8 (*Richard B. Diso v. Department of Commerce*).

The plaintiff, Richard B. Diso, failed to show prejudice on the part of the Ohio Division of Financial Institutions when it denied his license, and failed to show that the division denied his application in response to Diso's exercise of his free speech rights under the U.S. Constitution, the court said, affirming the division's July 2010 order.

Diso held a loan officer license between 2004 and 2008, when several default judgments were entered against him for credit card debts totaling more than $100,000. After requesting information from Diso, the Division told him it intended to deny his 2008 loan officer license renewal. Diso filed for Chapter 7 bankruptcy in June 2009, and requested that the division stay its administrative proceedings under federal law providing for bankruptcy stays.

After Diso's bankruptcy was discharged, the Division proceeded with its action. Initially, the hearing officer issued a Report and Recommendation concluding that Diso's debt demonstrated his lack of financial responsibility to command the confidence of the public to warrant the belief that his business would be conducted honestly and fairly in compliance with state law.

However the Division in adopting the recommendation changed the words "lack of financial responsibility" to "lack of character and general fitness," because "financial responsibility" had not been referenced in the state law affecting mortgage broker licensing before 2010.

Diso appealed the decision to deny his renewal application, arguing that it is a violation of federal law to suspend or revoke a license due to debts discharged in bankruptcy. "I should not have to forfeit my license due to the greed of politicians and no fault of my own," Diso said.

The court, however, found that the Division did not discriminate against Diso due to his bankruptcy filing, and that the Division often approves loan officer applicants who have unpaid debts or applicants who have previously filed for bankruptcy. In fact, the court noted, as many as 60% of individuals who apply for mortgage broker licenses are bankruptcy filers. Diso was afforded a due process hearing, and the decision in his case "rests upon conduct reasonably viewed as incompatible to a loan officer's duties," the court said.

Courts may hear appeals of medical board subpoenas during investigations

Issue: Jurisdiction over board subpoenas

State courts are authorized to hear motions to quash subpoenas issued by the state medical board in the midst of disciplinary investigations, the Supreme Court of Kansas ruled September 7 (*Carol Ann Ryser v. Kansas Board of Healing Arts, et al.*). The ruling resolved a clash between the state's Judicial Review Act and its Healing Arts Act.

Carol Ann Ryser, the nurse whose license was at issue in the investigation, practices primarily in Missouri but holds a Kansas license. After the Kansas Board of Healing Arts learned of a lawsuit filed in Missouri by a patient of Ryser's alleging negligence and fraud, the board opened an investigation into Ryser's actions, issuing a subpoena as part of that investigation.

Instead of challenging the subpoena to the board, as she was permitted, Ryser appealed directly to a state district court, filing a petition to revoke the subpoena. The board, she argued, did not have the authority to issue the subpoena because it did not have the authority to investigate her actions in Missouri.

The board, for its part, asserted that it did have authority to investigate Ryser's actions in Missouri. It also claimed that the state's courts did not have jurisdiction over the subpoena, as the subpoena was not a final agency action which could be reviewed by a court.

In its ruling, the district court held that Ryser could challenge the subpoena in court, but that she had lost the challenge on the merits. Ryser appealed, and the case made its way to the state Supreme Court. Although the board had not

challenged the district court's decision on its jurisdiction to hear the subpoena, the court addressed the issue anyway.

Two different statutes addressed the issue of the subpoena, wrote Justice Nancy Moritz for the court. The Kansas Judicial Review Act required that a licensee exhaust their administrative remedies before appealing to the court system. But the Kansas Healing Arts Act, while providing licensees a specific mechanism to challenge a subpoena to the board itself, also contains a provision giving a district court jurisdiction to hear petitions to revoke subpoenas for a number of specific causes, including claims that the subpoena does not relate to practices that would be grounds for discipline, which was Ryser's claim.

The specificity of the Healing Arts Act controlled the issue over the more general language of the Judicial Review Act, wrote Justice Moritz. The Act, as written, allows board subpoenas to be appealed to the court system.

However, Ryser did not have as much luck with the merits of her claim. She had claimed only to be an "incidental" licensee of the state of Kansas because her primary practice was located in Missouri. Further, she claimed that she was not, in the words of the Healing Arts Act, "practicing under the Act," and was therefore not subject to the authority of the Kansas board.

Moritz wrote that the relevant question was not where Ryser practiced, but whether she was licensed with the Kansas board at the time of her allegedly offending actions. There is no geographical limitation in the Act's definition of the practice of medicine, Moritz wrote; the statute only addresses the actions that are considered the practice of the healing arts. It did not help Ryser's case, Moritz continued, that of the 18 listed exemptions to the Act, practice in another jurisdiction was not one. Ryser's motion to quash the subpoena was dismissed.

General counsel's dual roles cause court to overturn discipline

Issue: Conflict of interest in discipline proceedings

The permanent revocation of a license by the Louisiana State Board of Dentistry was overturned by a state appellate court in September after the board's general counsel, having been appointed to impartially adjudicate evidentiary matters during a discipline hearing, continued to act as an advocate for the board (*C. Ryan Haygood v. Louisiana State Board of Dentistry*). The decision, by the Court of Appeals of Louisiana for the Fourth Circuit, was issued September 26.

The licensee at issue in the case, dentist Ryan Haygood, came to the board's attention in 2007 after some of his patients filed complaints regarding Haygood's treatment plans. After an investigation—in which the board utilized several "patients" to seek treatment from Ryan and report on his practice—the board charged him with fraudulently diagnosing conditions to cause patients to seek unnecessary treatment and with paying his patients for referrals.

During Haygood's trial, the board appointed its general counsel, Brian Begue, to act in the role of an independent counsel who would impartially adjudicate disputes over evidentiary issues, a process allowed by the Louisiana Administrative Code.

Unfortunately, Begue allowed his two roles to overlap throughout the trial and continuously advocated for the board when he should have been acting impartially. He frequently acted as a prosecutor, taking over the questioning of witnesses adverse to Haygood, questioning Haygood's credibility, and introducing objections. At the same time, Begue continued to act in his role as independent counsel and at one point even ruled on one of his own objections. Judge Roland Belsome, in a concurring opinion, went so far as to note that "a reading of the hearing transcripts

leaves one to believe that he was working as co-counsel with the board's attorney rather than independent counsel."

Haygood objected to Begue's activities, but to no avail: The board found the dentist guilty of eight specific violations, permanently revoked his license, and fined him $40,000, the maximum allowed. Haygood appealed the ruling, arguing that Begue's actions during the trial violated his rights. Eventually, the case made its way to the Court of Appeals, which issued a decision.

The board, in its defense, argued that Begue had not acted impartially and his actions were intended only to "expedite the process" of the trial. But after reviewing Begue's conduct during the trial, the court did not agree. In an opinion by Judge Terri Love, the court concluded that the mingling of his roles had violated Haygood's due process rights and exceeded the authority of such an independent counsel as described in the state's Administrative Procedure Act.

"Based on our review of the record," Love wrote, "we find that Mr. Begue's functions of general counsel, independent counsel, prosecutor, and fact-finder were so interwoven that they became indistinguishable, which created the appearance of impropriety and deprived the proceeding of the imperative and fundamental appearance of fairness." The case was remanded to the board for a new hearing.

"Conduct unbecoming" not shown in case of revocation for failing to report an incident

Issue: Professional misconduct meriting revocation

A teacher whose license was permanently revoked over an incident involving restraint of a child and failure to report scratches on the child within two days was not guilty of "conduct unbecoming" a teacher that would justify revocation, the Court of Appeals of Ohio held September 28 *(Orth v. State Department of Education*).

The case involved a teacher, Sherrie Orth, who had worked in the Columbus Public Schools for 25 years without a history of misconduct or disciplinary action. On October 22, 2009, according to court records, she restrained a student who was out of control and as a result the student ended up with scratches and red marks on his lower back and buttocks. Orth let the student board a bus without treating the scratches, then did not file paperwork reporting her encounter with the student and his minor injuries for two business days.

The phrase 'conduct unbecoming an officer has been a part of the Uniform Code of Military Justice for many years," the court said. "It implies misconduct so seriously against law, justice, morality, or decorum so as to expose the offender to disgrace or so as to dishonor the military profession." But such a phrase has never been applied to situations as minimal as the one described here, the court noted.

She was charged under a state law that authorizes suspension, revocation, or limitation of a license for "engaging in an immoral act, incompetence, negligence, or conduct that is unbecoming to the applicant's or person's position." Here, the issue was "conduct unbecoming," which is not clearly defined by statute in Ohio.

Agreeing with a trial court, the appeals court found that there was a reasonable explanation for Orth's decision. The child had thrown a "fit" so strong and long that another member of the schoo's staff had to take the other children to the bus while Orth tried to get the student under control. Instead of taking the child off the bus and putting an antibiotic cream on the child's scratches, Orth directed the bus driver to have the child's mother call Orth.

Remanding the case to the Department of Education for further proceedings, the court said the revocation penalty must be vacated due to the failure of proof of an underlying violation.

The court said it could not interpret state law in such a way as to make the teacher's handling of the first aid treatment for the scratches conduct that would merit revocation. "The reasonable exercise of professional judgment teachers are called upon to make every day cannot constitute a violation of R.C. 3319.31(B) as conduct unbecoming a classroom teacher."

Revocation appeal thrown out over lack of jurisdiction

Issue: Personal jurisdiction

A physician who filed an appeal of his revocation by the West Virginia medical board in federal court in Nevada because he had relocated to that state did not meet basic jurisdiction requirements, the U.S. District Court for the District of Nevada held October 4.

In the case, *Louis J. Del Giornio v. West Virginia Board of Medicine*, the plaintiff physician's license had been revoked in West Virginia based on a documented pattern of prescribing controlled substances to patients with evidence of addiction. He then moved to Nevada, and seeking various forms of relief against the board, Del Giorno filed suit in federal court there.

Under federal rules of civil procedure, a court may dismiss a suit if it lack personal jurisdiction over the defendant. Del Giornio did not establish that the West Virginia board has certain "minimal contacts" with the state of Nevada so that the maintenance of the suit "does not offend traditional notions of fair play and substantial justice," the court found. He merely moved to Nevada.

"Plaintiff's claims are based on the outcome of a licensing hearing which took place in West Virginia and resulted in the revocation of a West Virginia medical license. . . His only argument for jurisdiction is that somehow his presence in Nevada and the nature of this case confer jurisdiction over the board." This is an insufficient and unreasonable basis for the court to exercise jurisdiction over the board, the court found.

Testing

Court dismisses candidate's second challenge of board certification exam

Issue: Repeated lawsuits over same issues

A candidate who failed the certification examination of the American Board of Internal Medicine, and lost one lengthy court challenge of the exam which he filed against the New Jersey state medical board as well as the ABIM, tried to add the argument on a second appeal that the exam violated the Americans with Disabilities Act because it was located too far from a source of food and drink.

But the U.S. District Court for the Eastern District of Pennsylvania, in a September 11 ruling, found that most of the appeal was precluded on the doctrine of res judicata, because it involved matters that had already been litigated (*Anand Munsif v. American Board of Internal Medicine, et al*.).

Munsif, a foreign medical graduate, filed a lawsuit in 2007 against six ABIM officers asserting numerous claims arising out of ABIM's alleged mishandling of his exam registration and the poor conditions at the examination facility which, he charged, caused him to fail the exam. That suit was dismissed by the federal district court and the Third Circuit Court of Appeals.

The medical board was drawn in after ABIM complained to the New Jersey Law Division that Munsif was paranoid and exhibited illogical thinking and irrational behavior. After an investigation, the Law Division suspended Munsif's medical license in July 2011, ordering him to undergo a psychological evaluation or skill assessment.

Following that action, Munsif's new complaint asserted claims of fraud, special damage, gross negligence, discrimination, antitrust violations, violations of state whistleblower statues, and the medical practice act, and violation of the United Nations Universal Declaration of Human Rights.

Munsif's complaint about the lack of food at the examination site in his first suit evolved into a claim in his second suit that ABIM, by failing to have any food or coffee available that was closer than a three-block walk in the sweltering heat, had violated the ADA. Among other things, Munsif added a claim that the ABIM examination facilities were inadequate to accommodate his diabetes.

Under res judicata doctrine, plaintiffs are barred from bringing up not only claims that were brought in a previous doctrine, but also claims that could have been brought, if the allegations involve issues "fundamentally similar" to those raised in the earlier action. "Applying these standards," the court said, "it is clear that many of Munsif's claims in this action are based on the same cause of action as his earlier federal lawsuit."

So the court rejected the new claim based on alleged violation of the ADA. "To the extent that Munsif's claims are not barred by res judicata, his allegations are insufficient to state a plausible claim for relief for violation of any of the rights alleged."

Take Note

Board must release names, phone numbers for licensees in training

Issue: Public vs. non-public licensee information

A September decision by a Texas appellate court requires the Texas medical board to disclose the telephone and fax numbers of all holders of temporary physician-in-training permits on request (*Texas Medical Board v. Greg Abbott*).

Although licensee phone numbers collected for emergency use are protected from disclosure by state law, the appellate court ruled that because temporary practitioners hold only “permits,” and not “licenses,” their contact information is subject to public disclosure under the state’s Public Information Act.

In October 2009, the medical board received a request from Optimum Healthcare, a Texas-based medical group, to provide Optimum with contact information—names, addresses, telephone, and fax numbers—for all of the board’s licensees, including all licensed physicians, out-of-state physicians with temporary licenses, and physicians-in-training. The latter are medical residents who are issued a permit to practice under the supervision of a licensed physician.

The board often discloses the names and addresses of its licensees, but balked at giving Optimum access to its licensees' telephone and fax numbers. Those numbers are provided by licensees for contact in case of an emergency, and are protected from disclosure by a Texas statute. However, Texas law also requires an agency that wishes to claim an exception to the public disclosure law to request an opinion from the state’s attorney general, and the board submitted such a request.

When delivered, the opinion of the Texas Attorney General’s Office matched that of the board, with two notable exceptions. The statute protecting the numbers from disclosure only applied to “license holders,” the opinion said, and out-of-state physicians and physicians-in-training are not license holders, holding as they do only “permits” to practice.

The board appealed this decision to the Court of Appeals of Texas in Texarkana, asking for declaratory relief and the court issued a decision written by Justice Jack Carter on September 6.

In its appeal, the board had argued that despite the precise wording of any regulations, all people who practice medicine in Texas do so with a license. Justice

Carter disagreed. "While the definitional language clarifies that physicians are license holders, it is not so broad as to suggest that any person who practices medicine is a license holder." Because "license" and "license holders" are not defined in the state's Medical Practice Act, Carter wrote, whether the information would be protected was contingent on the legislature's intent when it created the non-disclosure law.

Despite language in the board's rules describing a "temporary permit" for visiting physicians, the legislation granting the board authority to issue such permits described them as "provisional licenses." This legislative cue was enough for the court to declare visiting physicians as the holders of licenses whose phone numbers would be protected from disclosure.

But while the legislature intended for visiting physicians have their phone and fax numbers protected from disclosure, it apparently did not intend that physicians-in-training should have that benefit. The board's rules describe the permit available to medical residents as a "physician-in-training permit" and the legislation granting the board the power to issue the permits uses the same language. Further, the board's regulations specifically describe physicians-in-training as physicians who do "not hold licenses to practice medicine in Texas" and the legislation refers to such physicians as "not otherwise licensed by the board."

For the court, the legislative use of this language meant that physicians-in-training were "permit holders" only and their phone and fax numbers were subject to disclosure.

Mari Robinson, the executive director of the medical board, said that the board has no plans to appeal the ruling, and that the state legislature has been made aware of the discrepancy of language in the non-disclosure legislation.

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