Professional Licensing Report

Licensing, testing, and discipline in the professions

September/October 2010
Vol. 22, Numbers 3/4

Highlights in this issue:

Board members hit with $6.3 million judgment………………..*1*

State takes $6 million from board; group sues for return*.....2*

Court upholds revocation for failure to renew on time*……….4*

Employer endorsement okayed as recertification requirement*..6*

Misdemeanor theft called "moral turpitude" in revocation*……….7*

Disclosure of 15-year-old discipline not required…….........*8*

Patient confidentiality provides cover for MD with Rx abuses*…9*

Lawyer disbarred for exchanging sneakers with client*……...11*

Racial bias suit against board dismissed over late filing*…….12*

Acupuncture not a "professional service," court rules…………..*13*

Discipline overturned for failure to articulate standard of care*..14*

Plus: *Fake licensees...Lack of remorse …Civil rights allegations… Bahamas trip with patient…Complaints rise, discipline plunges…Test security… Federal supervision requirement spurned… Single licensing exception…Contractor faults… Overzealous board …Lax enforcement.*

Discipline

"Gross negligence" charged

Court strips board members' immunity, finds them liable for $6.3 million

Issue: Board member immunity from liability

A chiropractor whose discipline case was overturned by the Court of Appeals of Missouri for abuse of discretion was successful in his suit against the state chiropractic board August 13, when a jury awarded him a judgment of $6.3 million against the individual members of the board (*Gary F. Edwards v. Lawrence M. Gerstein, et al.*).

A 2007 Supreme Court decision in the case had invoked a Missouri statute to strip the board members of their immunity as quasi-judicial actors, if it could be shown they acted with gross negligence.

Chiropractor Gary Edwards filed suit against the individual members of the Missouri Board of Chiropractic in 2005, claiming legal fees and loss of business which resulted from the board's 2002 decision to prosecute him for allegedly defrauding a patient by claiming to have cured his HIV status.

The patient, Duane Troyer, a Mennonite farmer who has since died of complications related to AIDS, claimed that in 1990, Edwards subjected him to a bizarre regimen of pseudo-medicine in an attempt to cure his HIV-positive status, including the use of a controversial diagnostic device called the "Interro" machine.

Edwards allegedly prescribed a course of nutritional supplements and liquid drops, then tested Edwards' "progress" in eradicating HIV from his body. Troyer and his wife Regina claimed that Edwards later told Troyer that he was cured and would be able to safely start a family. After Regina gave birth to their daughter, it was discovered that both she and the baby were HIV-positive. Duane Troyer died in 1992, and the chiropractic board filed a complaint against Edwards in 1998.

During the disciplinary hearing before an administrative hearing commission, Edwards made a number of objections concerning the discovery of evidence in the case. Edwards had claimed the right 1) to investigate the journals of Regina Troyer on dates when he was alleged to

have informed Duane he was cured, 2) to obtain Regina's testimony in a previous litigation against the hospital where Duane received the fatal transfusion, and 3) to investigate correspondence between the board, its lawyers, Regina Troyer, and experts hired to help prosecute the case.

The court denied Edwards' requests, and after the AHC submitted its findings to the board, gave Edwards a two-year suspension of his license and a subsequent five-year probationary period. He appealed, the Jackson County Circuit Court affirmed the decision, and Edwards appealed again, this time to the Court of Appeals.

Under Missouri law, members of the chiropractic board "shall not be personally liable either jointly or separately for any act or acts committed in the performance of their official duties as board members *except gross negligence*" (italics added).

That court was more favorable to Edwards and ruled that the hearing commission had abused its discretion when it denied several, though not all, of his discovery requests (*Gary F. Edwards v. Missouri State Chiropractic Board*). Citing Missouri case law, the Court of Appeals defined "abuse of discretion" as a "ruling [that] is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration."

The appeals court went on to declare that the board had abused its discretion in denying Edwards discovery of several pieces of evidence. The case was then remanded to the board, which chose not to continue its prosecution of Edwards.

In 2005, Edwards brought suit against the individual members of the chiropractic board, claiming legal fees and lost business stemming from the disciplinary case. To make his case, he cited a Missouri law stating that members of the chiropractic board "shall not be personally liable either jointly or separately for any act or acts committed in the performance of their official duties as board members *except gross negligence*" (italics added).

Despite the wording of the statute, both the trial court and Court of Appeals dismissed Edwards' claims against the board members. The courts stated that, although the legislation waived two other types of immunity—official immunity and public duty immunity—it did not waive the quasi-judicial immunity held by the board members as adjudicators in the case.

The case that Edwards cited in support of his proposition that the statute removed the board members' immunity, *State ex rel. Golden v. Crawford*, was rejected by the court because it did not specifically address quasi-judicial immunity. Though its decision did not clearly state why the immunity legislation did not supersede judicially-created doctrine regardless of the type of immunity as issue, the court ruled that the board members were safe from liability for their actions as adjudicators.

However, when presented with the case, the Supreme Court of Missouri quickly overturned the decision, paving the way for the eventual $6.3 million judgment against the board members. In a short analysis, the court declared that the statute, using clear, unambiguous language, removed all common law-created immunities if the board members were found to have acted with gross negligence.

"Although *Golden* dealt only with official immunity and this case involved quasi-judicial immunity, the distinction is without difference because both are common law immunities subject to legislative modification," the court said.

(See page 6 for more Discipline stories.)

Take Note

Association sues to recover $6 million taken from board budget

Issue: Dedicated funding for licensing and discipline

The California Medical Association, which dropped its suit seeking to discontinue furloughs of state medical board staff when those furloughs ended in June, is continuing a suit seeking to recover $6 million appropriated by the legislature from the board's coffers for the state's general fund.

The suit claims that the transfer of the $6 million, taken from the Medical Board of California's Contingent Fund, was prohibited by statute and an unconstitutional appropriation of money from a special fund.

The medical association originally filed two major complaints against the efforts by the state government to fill its budget gaps. The first was a challenge, one of many, to two executive orders issued in 2008 and 2009 by California Governor Arnold Schwarzenegger imposing furloughs on numerous state agencies, including the medical board.

Because the board was a specially-funded, self-sustainable agency, the association argued, the governor did not have the power to impose furloughs on its staff. However, when the second of the furloughs ended in June 2009, the association dropped the case. Although a third round of furloughs was imposed in September, a recent California Supreme Court ruling has ended the future use of executively-imposed furloughs, and the association has not renewed its claim.

The CMA's suit also challenges any appropriation from the medical board's finances. The board, like many professional licensing agencies, is self-funded. It receives the bulk of its money from physician license fees, which are placed in the board's Contingent Fund and kept separate from the state's general fund.

Normally, this money is protected from use for other purposes by the medical practice act, which states: "No surplus [after the payment of board salaries and expenses] in these receipts shall be deposited in or transferred to the General Fund."

However, the transfer of the funds was enabled by the state legislature itself in the Budget Act of 2008. That law directs the state Controller or Director of Finance to transfer $6 million from the board to the state's general fund. It characterizes the transfer as a loan, stating that it will be repaid with interest and "so as to ensure that the programs supported by the Contingent Fund of the Medical Board of California are not adversely affected by the loan through reduction in services or through increased fees." A legislature would normally have the power to overturn its own laws, so the appropriation would appear to be legitimate.

“These special funds are raised for regulatory purposes and are set apart for the exclusive use of the state departments and agencies for which they are imposed and collected," the court said.

It added that the legislature "may not on one hand set up a department to authorize, regulate, and supervise business transactions large and small, imposing fees upon those affected for the purpose of carrying out the purposes of the law, and on the other hand permanently divert the funds thus raised and constituting the life blood of the department to a general fund or other general tax purpose." The legislature has required that when diversions are made, the transfers must be deemed loans to be returned to the fund as soon as possible.

Given this history, the initial brief filed in the case by the association reaches above the legislature, to California constitutional law, to make its case. It cites a Supreme Court case, *Daugherty v. Riley*, for the proposition that "the California Constitution requires that money collected for a special fund for specific purposes may not later be diverted by the state for general revenue purposes."

And, indeed, in *Daugherty*, the California Supreme Court threw out an appropriation of money from a special fund to the general fund. However, the court left open the possibility of loans from special funds to the general fund so long as the appropriation does not adversely affect the performance of the duties for which the special fund was created.

Therefore, whether the appropriation adversely affects the duties of the board would appear to be the heart of the case, and the medical association does, in fact, argue that loss of the $6 million "deprives the medical board of funding to hire more staff and carry out its duties."

In a press release, medical board president Brennan Cassidy said, "Taking that money and instituting the furloughs have greatly hampered the work of the medical board and undercut patient safety and access to medical care for all Californians."

However, the trial court judge in San Francisco whose ruling prompted the appeal did not agree that the board had been harmed by the transfer:

"During the year the budget transfer would have expected to have the greatest impact, which is fiscal year 2008 to 2009, the medical board had $5 million left over from its total spending appropriations. Given the surplus of funds available to the medical board to carry out its functions, even after the $6 million loan," he said, there is no showing that special action is needed to protect the board's 'substantially harmed' right.

Licensing

Court upholds revocation for failure to renew on time

Issue: Board duty to send notice of renewal

The license of a professional counselor who failed to renew within a year of expiration was properly revoked, even though no notice of the expiration was sent to the counselor by the board, the Court of Appeals of Texas held May 14 (*Chris D. Riley v. Texas State Board of Examiners of Professional Counselors*). In an October 29 action, the Supreme Court of Texas refused to review the ruling.

The counselor, Chris Riley, was licensed for 19 years, but failed to perform the necessary actions to renew her license by December 31, 2002. She learned for the first time that she was no longer listed as a licensed professional counselor four years later. At that point, the board denied her request to renew based on her license's having been expired for a year or longer.

In a lawsuit, Riley argued that the board's denial of her renewal without first providing her notice of the expiration date violated her constitutional right to due process. Both a trial court and the appeals court agreed that the board was required to notify the licensee of an expiring license. But the notice serves "as a reminder, not a trigger for deadlines," the court said.

"Pre-expiration notice ... is not a prerequisite to compliance" with the renewal requirement, the court held. The board's failure to provide notice "did not excuse, toll, or otherwise affect Riley's independent responsibility to comply with" the renewal requirement.

Fake licensee must repay $18,000 in wages for work as "nurse"

Issue: Forging of licensing documents

A woman who stole a nurse's identity and used it to obtain a license must repay the government more than $18,000 in wages she received in two nursing positions, the U.S. Ninth Circuit Court of Appeals held August 20 (*United States v. Becky Nadine Hunter*).

In the case, Becky Nadine Hunter moved to Alaska in 1998 and used a fake license, plus false employment history, address, and identity to get jobs as a school nurse in Fairbanks, and as a nurse with the U.S. Department of Labor. She was arrested following a probe by the Federal Bureau of Investigation, convicted of mail fraud, sentenced to 96 months in prison, and ordered to pay restitution for the wages (required under the federal Mandatory Victims Restitution Act).

In her appeal, Hunter argued that her employers would receive windfalls if she were required to repay wages for work she actually performed. But the court said that under traditional principles of contract law, providing compensation to unlicensed individuals practicing in fields where requirements are set to protect public health and safety "might encourage fraud or undermine public health and safety." So Hunter had to repay the money. "If Hunter had not acted unlawfully, her victims would not have paid any of these wages, or would have paid them for valuable services from a real, qualified nurse," the court noted.

Lack of remorse cited as court refuses to ease fake attorney's discipline

Issue: Appropriate sanction for impersonating a licensee

A man who forged documents to impersonate a licensed lawyer was found to have shown a lack of remorse and lost his bid for judicial diversion (i.e., a rehabilitation program), in place of a two-year probation period. In an October 19 ruling, the Court of Criminal Appeals of Tennessee upheld a circuit court's denial of the defendant's request to modify his sentence.

In the case, *State of Tennessee v. Joseph W. Denton*, Denton pled guilty to one count of forgery and one count of impersonation of a licensed professional. But he argued that the trial court, in insisting on a probationary sentence, placed disproportionate weight on the fact that he impersonated a lawyer rather than some other professional, and improperly relied on Denton's lack of remorse in declining to grant judicial diversion.

The trial court said Denton's statement essentially excusing his conduct was a key factor in its decision to deny pre-trial diversion. Denton stated: "I practiced law without a license. However, I was hired to be a clerk and the job escalated into something more than I wanted."

"I created a bar card. I gave a …statement …to [Tennessee Bureau of Investigation] Agent Dan Friel. Overall, I am a good citizen and do not harm or bother anyone. I believe this [prosecution] is frivolous and a waste of taxpayer money. However, I admit it and will not be around the legal field in the future."

The appeals court agreed that Denton's behavior and lack of remorse, demonstrated in his statements, were sufficient to support the trial court's denial of judicial diversion.

Court upholds requiring employer endorsement for recertification

Issue: Licensure renewal requirements

State regulations that require a hospital employer to endorse an EMT-Paramedic's proficiency in order for him or her to be recertified are valid, the Superior Court of New Jersey, Appellate Division held October 22 (*Steven Santaniello v. New Jersey Department of Health and Senior Services*).

The EMT-Paramedic, Steven Santaniello, was initially certified in June 2000 and obtained several recertifications until in August 2007 he was discharged from his hospital job and recognized he could not meet the regulatory requirements for recertification. He requested a waiver from the regulations, arguing that they improperly delegate agency oversight responsibility to private hospitals and individuals, and that they violated his due process rights by not affording a pre-deprivation hearing.

Admittedly, the court said, state law does not expressly provide for recertification, but it is "implicitly authorized" under the statutory scheme, which does require that EMT-Paramedics be overseen and supervised by hospital's mobile ICU medical directors and staff.

As to Santaniello's argument that he should have had a pre-denial hearing, the court noted that his certification had been neither revoked nor suspended but was inactive. Santaniello is free to seek employment with an authorized hospital and activate his certification; if certification were denied he would then be entitled to a hearing.

For EMT-Paramedics, the court added, employment is a precondition for certification; state law explicitly provides that they can only work for the mobile ICU of an accredited hospital. So, "it is entirely reasonable to have the physician observe the applicant and evaluate whether he or she is proficient in skills approved for EMT-Paramedics."

"There is no protectible property right in continuing or future certification since any properly interest in the certification is extinguished upon its expiration."

In a previous case involving pilots, the court decided differently. It held that "the power to decide licensure may not be validly delegated to a private person or body, not subject to public accountability, particularly where the exercise of such power is uncontrolled by adequate legislative standards inhibiting arbitrary or self-motivated action by such private parties."

The condition of licensure was that the pilots receive written authorization from an airport. In that case, the court said the regulation was an improper subdelegation because it did not have objective criteria to measure eligibility, and therefore the airport could arbitrarily deprive the pilot of receiving licensure.

Discipline

Misdemeanor theft called "moral turpitude" in revocation case

Issue: Nexus between conviction and professional practice

Citing a conviction of "a crime of moral turpitude," a Pennsylvania court on August 6 upheld the revocation of the license of a nurse who had claimed he was an American citizen in order to attend school and obtain student loans (*Kwame Dwumaah v. State Board of Nursing*).

The Commonwealth Court of Pennsylvania sustained a State Board of Nursing decision holding that the conduct of nurse Kwame Dwumaah "demonstrates a complete lack of morals," and affirmed the revocation of his license based on a misdemeanor theft conviction.

Dwumaah's legal troubles began in 1990 when he acquired a fraudulent Social Security card which he would use to successfully apply to Community College of Philadelphia and Villanova University. Using the false Social Security identity, he also obtained a $500 grant from the federal government and over $75,000 in education loans.

Later, Dwumaah filed for bankruptcy, was subsequently indicted on several counts of fraud, and eventually pled guilty to one count of theft of public monies (less than $1,000), a misdemeanor and the only charge that would result in conviction. He was sentenced to five months in prison and ordered to pay approximately $75,000.

The board brought a disciplinary action, claiming that Dwumaah's conviction was one of moral turpitude. Among the facts it considered and cited in its decision were the restitution and Dwumaah's bankruptcy filing. After a hearing, the board decided to revoke Dwumaah's license.

Dwumaah appealed, arguing that the board erred in using his bankruptcy and restitution to elevate his misdemeanor conviction to a crime of moral turpitude. He also claimed that the conduct in question was too remote in time and did not reflect on his ability as a nurse. Finally, given that he was convicted only of a misdemeanor, Dwumaah argued that a complete revocation of his license was too harsh a sanction.

> The court cited the board's assessment of Dwumaah's character: "Nurses must be trustworthy. Nurses are also required to have good moral character. Respondent's conduct demonstrates a complete lack of morals."

His arguments were roundly rejected. Citing past case law, the court found fraud to be a crime of moral turpitude regardless of whether it was a felony or not. As the court stated, "the statute gives the board the authority to revoke his license for either a felony conviction or a conviction of a crime of moral turpitude, and nowhere does the statute preclude a finding that a misdemeanor crime can also be a crime of moral turpitude."

Further, the statute "authorizes the board to discipline a nurse who has been convicted of a crime of moral turpitude regardless of whether the conviction is related to the practice of nursing." Stating this, and citing the board's declaration that Dwumaah's fraud called into character his judgment and fitness to be a nurse, the court rejected Dwumaah's argument that his actions were unrelated his profession.

As for the events' remoteness in time, the court rejected that line of Dwumaah's appeal as well. Although the fraud itself occurred in 1990, it was Dwumaah's conviction that was pertinent. Because that happened only three months prior to the disciplinary action, remoteness in time was not an issue.

The court also turned down Dwumaah's last line of argument, that the sanction was too harsh since he had only been convicted of a misdemeanor. "Unless the occupational licensing board acts with bad faith or fraud, allegations not made by Dwumaah, our review of the board's disciplinary sanction is 'limited to the determination of whether there has been a manifest and flagrant abuse of discretion or a purely arbitrary execution of the agency's duties or function.'"

Disclosure of 15-year-old discipline for sexual remarks not required

Issue: Disclosure of discipline actions to clients and others

An arbitrator who had been censured 15 years earlier for conduct "prejudicial to the administration of justice" did not have to disclose this conduct to the parties in a case he was hired to arbitrate, the Supreme Court of California ruled August 2 (*Randal D. Haworth v. The Superior Court of Los Angeles County*).

The failure of retired judge Norman Gordon, previously subject to judicial censure for making inappropriate sexual and ethnic remarks, to reveal the prior discipline was not grounds for throwing out the arbitration agreement reached between the parties in the case, the court found.

The arbitrated case began with a cosmetic surgery procedure gone allegedly wrong. Patient Susan Amy Ossakow accused physician Randal D. Haworth of failing to acquire her informed consent and falling below the standard of care in performing a cosmetic lip surgery that she claimed left her with several physical problems.

A three-person arbitration panel led by Judge Gordon as the neutral arbiter decided in favor of the physician, Haworth. It found that Ossakow was unable to prove lack of consent, that Haworth had not fallen below the standard of care, and that even the cause of Ossakow's problems was not sufficiently established.

Ossakow claimed Gordon's skewed attitude toward women would lead him to view her case unfairly or would at least give her reasonable cause to believe he would do so. In fact, during the arbitration Gordon was allegedly heard to say, "One thing probably everyone can agree on, after five facial surgeries, she could have done without the sixth one," a statement Ossakow submitted as proof of his bias.

Ossakow later challenged the arbitration after discovering that Gordon had been censured as a Superior Court judge in 1996 for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." Gordon, it was alleged, once had a propensity for making inappropriate sexual and ethnic remarks to female members of the judicial staff, to the point where a court reporter brought a complaint to the Judicial Performance Commission. Following the censure, Gordon continued on as a judge, without further reported incident.

In her claim, Ossakow argued that Gordon violated his legal duty to disclose "all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial." Because of his past officially-censured actions, Ossakow claimed, Norman would be biased in a case having to do with cosmetic surgery, a subject uniquely relevant to stereotypes of women.

The Superior Court, hearing Ossakow's appeal from the arbitration, agreed with her arguments, decided that "a reasonable person would question whether [Gordon] would be impartial in this case" and threw out the arbitration decision.

On appeal, however, the Supreme Court was less sympathetic to Ossakow. Citing past case law, the justices decided to interpret the arbitration statutes similarly to a law requiring the recusal of a judge whose impartiality might reasonably be questioned. The standard in question "must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice."

So then, "nothing in the public censure would suggest to a reasonable person that Judge Gordon could not be fair to female litigants. . . . One might just as well speculate that a man who values physical attractiveness in women might be more sympathetic toward the female patient in such a situation."

"The disclosure requirements," the court continued, "are intended only to ensure the impartiality of the neutral arbitrator. They are not intended to mandate disclosure on all matters that a party might wish to consider in deciding whether to oppose or accept the selection of an arbitrator."

Gordon's actions "were taken in an ostensibly joking manner and there was no evidence of intent to cause embarrassment or injury, or to coerce, to vent anger, or to inflict shame," the court said. "Furthermore, implicit in a determination that public censure, rather than permanent removal from office, will be sufficient to protect the public is the expectation that the judge will respond to the censure by ceasing to engage in the conduct that resulted in the disciplinary action."

Further citing Ossakow's failure to discover the censure—a matter of public record—on her own, and discussing the importance of the finality of arbitration awards, the court reversed the decision of the Superior Court, restoring the decision of the arbitrators.

One justice dissented from the opinion. "I doubt any person aware of the facts would see evidence of a sympathetic attitude toward women in the embarrassing, belittling, and disrespectful conduct and comments the [Judicial] Commission found occurred. At any rate, to draw the opposite conclusion—that is, to doubt the arbitrator would be fair to the female plaintiff's claims of negligent cosmetic surgery—would at least be 'reasonable.'"

Court refuses to consider civil rights allegations against board

Issue: Sovereign immunity

A court in Texas in July cited sovereign immunity in rejecting the appeal of a bar applicant who had sued the Texas Board of Law Examiners for what he alleged was a violation of due process (*Kristofer Thomas Kastner v. The Texas Board of Law Examiners*).

The case before the Court of Appeals of Texas, as argued by applicant Kristofer Kastner in July, raised issues of constitutional violations, chemical dependency, and fitness to practice law, and the ability of bar examiners to use closed juvenile case files in determining fitness to practice law.

However, none of that mattered, the court said in its July 29 ruling, because the legal doctrine of sovereign immunity protects states from lawsuits to which they have not acquiesced. "In this case, we need go no further than to observe that Kastner has sued appellees solely for money damages and has not asserted any waiver or means of avoiding sovereign immunity."

"Patient confidentiality" provides cover for doctor charged with Rx abuses

Issue: Provider/patient confidentiality & discipline

The state medical board was legitimately denied access to patient records of a board-certified psychiatrist who specializes in pain management, because of state law governing psychotherapist-patient privilege, the Supreme Judicial Court of Massachusetts ruled September 2 *(Board of Registration in Medicine v. John Doe*).

The case began in 2007, when the state medical board received a report from a physician expressing concern about the psychiatrist John Doe and his possible impairment. The board began an investigation.

Doe's practice is cash-only, with no insurance accepted; he only accepts patients referred by other patients, and he holds open hours rather than scheduling appointments. A board investigation of prescription records for 205 of Doe's patients showed that 81% had been prescribed oxycodone, 78% had been prescribed diazepam (Valium), and 77% had been prescribed both.

In 2008, the investigator requested an interview with Doe seeking the medical records of Patient A and 23 other patients. Doe appeared for the interview with only one patient's records, saying he could disclose it because the patient violated a pain management agreement with him. Patient confidentiality prohibited him from disclosing the other records, he claimed.

The board served Doe with a subpoena demanding the production of the 24 patients' records. Doe refused, arguing that the records are protected by the psychotherapist-patient privilege and state common law of privacy. He also countered with a subpoena directed at the investigator and seeking all records relating to the board's investigation.

Doe contended that he qualified as a psychotherapist because pain management is a subspecialty of psychiatry. And under Massachusetts law, a statutory privilege protects certain communications between psychotherapists and their patients; it applies "in any court proceeding and in any proceeding preliminary thereto and in legislative and administrative proceedings."

A trial court ruled against Doe, but on appeal the Massachusetts Supreme Judicial Court confirmed that Doe did qualify as a psychotherapist. It is the legislature's duty, the court said, to carve out exceptions to the psychotherapist/patient privilege when they are warranted. Turning down the board's request that the privilege be waived in the case of Doe, the court concluded that under the law as it stood, the privilege was not outweighed by a strong public interest in disclosure.

Psychologist loses appeal after Bahamas trip with patient

Issue: Professional boundaries violations

A New Jersey psychologist whose trip to the Bahamas with a former patient elicited sanctions from the state psychology board failed in her appeal of the board's action in a September 1 decision.

Finding "no merit" to any of the psychologist's contentions, the Superior Court of New Jersey, Appellate Division, rejected the psychologist Samuelle Klein-Von Reiche's appeal of a discipline decision by the state psychology board which suspended her license and imposed a substantial fine (*In the Matter of the Suspension or Revocation of the License of Samuelle Klein-Von Reiche*).

The actions which formed the basis of the discipline arose from Klein-Von Reiche's treatment of two patients, referred to as "C.V." and "M.A." in the Superior Court's decision. C.V. and M.A. were a long-term couple; their difficulties were one of the reasons that C.V had initially sought treatment from Klein-Von Reiche. However, during or immediately after the treatment period, C.V. expressed interest in dating Klein-Von Reiche and eventually invited her to accompany him on a trip to the Bahamas in which M.A. had decided not to participate.

Doctor and patient formally severed their professional relationship, and two weeks later Klein-Von Reiche agreed to go. She and C.V. shared a room and even a bed, though both denied that sexual activity occurred.

After a complaint was filed by M.A., the psychology board initiated an investigation. Unfortunately for Klein-Von Reiche, among her responses to the board's questions was a letter stating that "at no point during or following treatment did I socialize with [C.V] in any capacity."

Given the testimony of C.V. and the eventual admission of Klein-Von Reiche to her participation in the trip, this response was determined to be false, and Klein-Von Reich was also charged with misrepresentation and failure to cooperate with a board inquiry.

The psychologist terminated the professional relationship but did not allow enough time to go by, the court found. Following a hearing, an administrative law judge determined that Klein-Von Reiche engaged in "an inappropriate personal and social relationship with C.V. for her own benefit and one that exploited his trust and dependence on her," adding that "two weeks is not a sufficient time for a patient to decide that his relationship with his therapist would be permanently severed."

After a penalty hearing before the ALJ and another before the board, Klein Von-Reiche was given a one-year suspension with six months stayed and assessed court costs of $32,855.29. Only four members of the board were present at her hearing; a majority of members constitutes a quorum and ten board positions exist and only seven are filled.

Klein-Von Reiche appealed the board's decision, claiming, most importantly, that the board violated its quorum rules by having only four of ten possible board members present for the hearing. The court rejected this argument, pointing out that although the four members would not form a quorum on a fully-staffed board, because three board positions were vacant the four did constitute a majority of the seven existing members and served as a quorum of the majority. In The court relied upon an opinion from New Jersey's Attorney General on the topic, which it said was reasonable and entitled to deference.

Klein-Von Reiche appealed on several other points but the court deemed them without sufficient merit to warrant discussion in a written opinion. "Here, appellant not only engaged in professional misconduct with C.V., but she also exacerbated the situation by her less than forthcoming response to the board's inquiry . . . Under these circumstances, we find nothing untoward about the sanctions imposed by the board."

Lawyer disbarred for exchanging sneakers with client

Issue: Appropriate sanctions

The Supreme Judicial Court of Massachusetts, in an October 18 ruling, ordered the disbarment of an attorney who exchanged sneakers with a client defendant in a murder case—a felony violation of the law (*In the Matter of Jon C. Taylor*). The felonious exchange occurred within the walls of the Plymouth County House of Correction and, along with several other crimes, led to the eventual disbarment of Massachusetts attorney Jon Taylor.

Taylor had a troubled tenure as an attorney. In 2007, he was convicted on a charge of operating a motor vehicle with a suspended license and placed on probation. That year also saw an assault and battery conviction for an event which occurred at the house of a client, as well as a conviction for failure to appear at the ensuing parole violation hearing.

Taylor received ten days in jail and an additional period of probation, which he subsequently violated by driving without a suspended license, testing positive for marijuana, and failing to report to his probation officer. Then, in January 2008, Taylor went to the Plymouth County house of correction to visit a client he was defending on a murder charge. During the visit, Taylor exchanged his sneakers for the sneakers of the client and left.

Unfortunately for him, the delivering and removing of articles from prisoners is a felony; this would prove to be the last straw for the Board of Bar Examiners. Taylor actually reported the incident himself, but this was not enough to save him from discipline by the board, who first placed him on temporary suspension and

then filed to have him disbarred. Taylor appealed, seeking to have his disbarment lessened to a 2-year suspension.

In his appeal, Taylor argued that the lower court had overlooked mitigating factors when it decided to disbar him. Certain of his offending actions, he argued, were not connected to his practice of law, and the court overlooked the fact that Taylor turned himself in for the sneaker incident.

The court was not sympathetic. "Even if [the self reporting] were viewed as a mitigating factor, the fact remains that the respondent has committed a felony, and has demonstrated repeatedly that he is not prepared to comply with the law. He has a history of prior discipline, has been convicted of various other crimes, and has more than once violated the terms of his probation. These are not the types of 'special circumstances' that warrant, as the respondent requests, a lesser sanction than disbarment.

Racial bias suit against board dismissed over late filing

Issue: Timeliness of filing

A suit against the California Veterinary Medical Board by an Indian-born applicant who claimed racial discrimination in the board's decision to reject his application was dismissed June 18 because the plaintiff, Kamal Walia, failed to pursue his options before the California statute of limitations barred him from bringing a claim (*Kamal J. Walia v. California Veterinary Medical Board*).

Before applying for licensure in California, Walia had been a licensed veterinarian in Florida, Illinois, and Washington State, where he had been subject to investigation by state authorities. Although Walia claims that that investigation was closed without action and his license was unaffected, the California veterinary board rejected his application for licensure in the state three times, stating that he had not been sufficiently rehabilitated. The most recent rejection occurred on June 21, 2006.

Walia did not file suit against the board alleging racial discrimination until June 22, 2009, three years and a day after his last rejection by the board. However, California's statute of limitations in such matters is only two years, and Walia's suit was barred for lack of timeliness.

Nevertheless, the court appeared accommodating to Walia, who was proceeding as his own attorney in the suit. California law, it explained, allows for the tolling of a statute of limitations if a plaintiff was pursuing other remedies in respect to the primary wrong addressed in the litigation. Indeed, Walia had filed a request for reconsideration in his earlier cases. However, the court's effort seemed academic, as it would soon reject its own argument on two different grounds.

Unfortunately for Walia, the facts in the 2006 case and his current suit were too different to allow for the tolling of the time limitation. "As set forth in the complaint, plaintiff sought relief at the administration hearing solely focused on his assertion that his previous discipline at the hands of … Washington on account of consumer complaints was based on either stale or much exaggerated information, intimating that he had even been exonerated." At one point, Walia even "emphasized that he would submit his skills to a demonstration." His recent suit, based on a claim of racial discrimination, was "too different to toll the statute of limitations based on pursuit of other remedies."

Even if Walia had been able to toll his claim, the court explained, he was nevertheless too late. In California, requests for reconsideration are denied as a matter of law thirty days after they are filed. Walia filed his request on September 26, 2006, received no reply, and never again broached the subject with a judicial body until his current suit. "Therefore, any possible tolling under state law ended at the latest on October 29, 2006 with the deemed-as-a-matter-of-law determination. Plaintiff's June 2009 federal filing was beyond the two-year limitations period, even commencing the period on October 29, 2006."

Acupuncture not "professional service," court rules in closing licensee's office

Issue: Parameters of "professional" services

The Court of Appeals of Minnesota on September 14 upheld a decision by a lower court to close a chiropractic office because the principal owner had his chiropractic license suspended and his acupuncture certificate did not qualify him to have an ownership interest in a professional firm (*Minnesota Board of Chiropractic Examiners v. Curtis L. Cich*). The Court of Appeals also found that the lower court had improperly extended the suspension of the doctor, Curtis Cich, beyond the original time set by the state chiropractic board.

Cich was originally disciplined in 2008 when the board found he had committed unprofessional conduct by deceptively billing patients. He appealed and his case rose to the Court of Appeals, which, while upholding most of the discipline against him, struck down a board decision that he had engaged in improper fee collection techniques and lowered the amount of civil penalties imposed by the board.

Ownership interest in a firm providing “professional services” is forbidden to non-professionals in Minnesota, as in many other states, and with his suspended license, Cich was prohibited from owning a share in the company. But he argued that his intact acupuncture certificate should have allowed him to keep his office open.

In 2009, the board filed a complaint against Cich, accusing him of continuing to practice while under suspension and of owning an illegitimate interest in his chiropractic firm, Cich Chiropractic. Ownership interest in a firm providing "professional services" is forbidden to non-professionals in Minnesota, as in many other states, and Cich, with his suspended license, was prohibited from owning a share in the company. The district court in which the case was being heard granted summary judgment to the board, rescinding the clinic's ability to offer chiropractic services and renewing Cich's two-year suspension, starting it anew from December of 2009.

Cich appealed from this decision. His first major argument on appeal was that the district court overstepped its bounds in extending his suspension beyond the two years originally imposed by the board. Only the board may impose suspensions, Cich claimed, and thus the court had no authority to sanction him as it did.

The court agreed with this argument. "The district court's injunction, by its own terms, extends the board's original suspension due to Cich's alleged failure to comply with the terms of that order." But according to Minnesota law, only the board may suspend a chiropractor's license for his or her failure to comply with an order. The law does not permit the district court to act as the board in matters related to the suspension of a chiropractor's license. "Therefore, we conclude that the district court exceeded its authority in doing so."

Cich's second important point on appeal was that the district court had erred in rescinding Cich Chiropractic's ability to provide chiropractic services. The district court had done this after determining that Cich, who did hold a valid chiropractic license, still maintained an ownership interest in the firm during his suspension in violation of state law, a fact Cich did not contest.

Cich, however, argued that because the law only prohibits from ownership interest a person disqualified from practicing "all the pertinent professional services," and because Cich still possessed an acupuncture certificate, his ownership interest was not a violation of the law and the court had wrongly rescinded the firm's ability to practice.

The court, however, found that the Minnesota Professional Firms Act (MPFA), which controls such matters, requires a professional firm to specify from a single, exhaustive list which specific professional services the firm is authorized to provide. Acupuncture is not included in this list, the court said, and thus "[w]e are not persuaded that acupuncture is considered a pertinent professional service for purposes of the MPFA…The statutory language specifically limits 'professional services' to those listed." Therefore, the court ruled, the district court "correctly determined that the firm's election to provide chiropractic was rescinded by operation of law."

Discipline overturned for failure to articulate standard of care

Issue: Due process in discipline proceedings

The Tennessee Board of Medical Examiners failed to articulate a standard of care while deliberating the case of a physician accused of improperly or unnecessarily administering chelation, hydrogen peroxide therapy, and methadone treatments, a Tennessee court said in overturning the discipline (*Joseph Edward Rich v. Tennessee Board of Medical Examiners*).

On September 14, the Court of Appeals of Tennessee reversed several discipline findings made against the doctor, Joseph Edward Rich, because the board had improperly relied on expert testimony to establish the standard of care in the case without formally outlining the standard themselves. Several other discipline findings against Rich were upheld.

The charges at issue in the case were brought in relation to Rich's practice, the Center for Environmental and Integrative Medicine, where performed chelation, intravenous hydrogen peroxide therapy, and the administration of methadone. In 2005 and 2007, the board brought charges against Rich, first alleging that his use of chelation and hydrogen peroxide therapy was not supported by appropriate diagnoses or medical documentation, then claiming that Rich's use of methadone was unlicensed.

Expert testimony is not necessary to establish the standard of care in Tennessee. "Any Tennessee licensed physician serving as a board member, hearing officer, designee, arbitrator or mediator is entitled to rely upon that person's own expertise in making determinations concerning the standard of care. However, to sustain actions based upon a violation of this standard of care, the board must, in the absence of admissions or other testimony by any respondent or such respondent's agent to the effect that the standard was violated, articulate what the standard of care is in its deliberations."

After the board eventually found Rich in violation of several provisions of Tennessee law and one provision of federal law, it suspended his license for a year, and imposed several other conditions.

In his appeal, Rich argued several claims which met with varied levels of success. The court cursorily disposed of his claims of ineffective assistance of counsel, bias on the part of the chancery court which had rejected his first appeal, improper admission of evidence, and procedural errors. Slightly more attention was given to Rich's claim that the board lacked the required substantial evidence for its decision, but the court found the board's decisions reasonable and declined to overturn them.

Rich's claim that the board had inappropriately failed to articulate a standard of care merited more attention. Two provisions of Tennessee law which Rich was held to have violated require the board to

articulate a standard of care during deliberation. Two more require such an articulation only if the standard of care is an issue, as it was in this case.

However, the board failed to articulate such a standard for any of the charges, instead relying on the presentation of expert testimony to do the job. In response to the board's assertion that such use of an expert was adequate to establish the standard of care, the court found "no merit to this contention. This is because the plain language of the statute expressly requires the board to articulate the applicable standard(s) of care."

Due to this omission, the court reversed Rich's discipline on three of the charges. It upheld a fourth charge that Rich had contested after determining that the standard of care was not an issue in the board's decision on that charge.

Citing the seriousness of the disciplinary charges which it did uphold, the court declined to reverse the sanctions imposed on Rich. It remanded the case to the board, leaving open the possibility that its decision would not affect the severity of the sanctions imposed. "[W]e believe it appropriate to afford the board the opportunity to reconsider what sanctions are appropriate in light of our decision to reverse three of the seven violations found by the board."

Take Note

"System Failure": Discipline plunges while complaints surge

The number of physicians practicing is up, and so are complaints, but the number being sanctioned by New York's Office of Professional Misconduct has dropped to a 15-year low, says the New York Public Interest Research Group in a June 2010 report. Nearly 60% of the 292 actions in 2009 were taken by the discipline agency based on other states or courts' actions. The report, "System Failure," calls on the state to require that every health facility and physician's office post a notice of the right to file a complaint against a doctor. The state should also investigate why its medical malpractice experience is so skewed by doctors with multiple payouts, says the group.

16 states now "opting out" of federal supervision requirement

The federal government may allow states to opt out of requiring nurse anesthetists to be supervised by a physician—but what if this conflicts with state law? In a challenge of the state's "opt-out" decision, state medical societies claimed that state law doesn't permit unsupervised practice, but on October 8, the San Francisco Superior Court said nothing in state law required physician supervision. (*California Society of Anesthesiologists et al. v. Arnold Schwarzenegger*). Reflecting nurses' increasingly independent practices, 16 states have now "opted out" of the federal supervision requirement.

Testmaker moves up schedule for replacement test following freeze

Following the freeze of its exam in several countries due to security breaches, in September, the Federation of State Boards of Physical Therapy announced that it had stepped up its timetable and would be able to offer a replacement test in May 2011 for those candidates from countries where the administration of the National Physical Therapy Exam was halted for security reasons. Earlier (see July August 2010 **PLR**), the federation had stated that the new test, originally called the NPTE-YRLY, would not be ready until Fall 2011. The federation also announced it would be able to offer the test twice per year, with a second date added in December. The exam had been halted in several countries starting in July due to persistent security breaches and sharing of exam information. Candidates from Egypt, India, Pakistan, and the Philippines were informed that the test would be halted for candidates in those countries and those that had already taken the test but not received their scores were advised to accept a refund because of the likelihood that their scores would be invalidated.

State legislature crafts exception for one doctor's license

Over the objections of the state medical board, the Tennessee legislature created an exception to state standards to allow a physician to practice in a medically needy community. The standard in question was the requirement to complete all medical board examinations within seven years of completing the first step of the exam process. Although the physician is licensed in Georgia,

Illinois, and Michigan, he exceeded the seven-year limit and without an exemption would have had to spend months retaking board exams to practice in Tennessee. The governor signed the bill May 27.

State reins in "overzealous" board

Dentists in Ohio, many of them targets of dental board probes, succeeded in a campaign to get the legislature to clamp down on what they called excessively long and overly aggressive investigations. During a series of hearings in 2009 and 2010, witnesses showed copies of "blank" subpoenas for patient records that they charged had been filled in by hand by board investigators on-site in dental offices, and complained about some discipline proceedings taking years to complete and costing licensees many thousands of dollars in legal fees. On June 13, the governor signed into law HB 215 making subpoena standards of the dental board similar to those of the medical board, and requiring investigations to be completed within two years for standard of care allegations and one year for other cases. Licensees under investigation also have enhanced discovery rights under the new law, and the license renewal process becomes more lenient.

Newspaper finds lax, underfunded monitoring of sex-offending MDs

The state of Illinois is overburdened and does a hit-or-miss job of monitoring sex-offending physicians, according to an investigation by the *Chicago Tribune* published October 6. The Department of Financial and Professional Regulation employs only three officials to monitor more than 7,500 licensees or revoked licensees who committed violations ranging from substance abuse to sexual abuse. One psychiatrist was disciplined in 1999 for allegedly instructing a patient to have sex with him as part of therapy, but the doctor's probation wasn't implemented until 2007, and he was never monitored in person. The *Tribune* cited a 2006 state audit that found the department's medical probation caseload dangerously large, with some required documentation missing in the majority of cases the auditor reviewed.

Subcontracts faulted for sub-standard drug testing of monitored licensees

It was a spaghetti map of contracts. Virginia-based Maximus had the contract with California to screen health care licensees with histories of substance abuse, Pennsylvania-based First Lab had the subcontract with Maximus to do the drug testing, and Kansas-based Clinical Reference Lab had the subcontract with First Lab to do the screening. The bottom line, though, as the *Los Angeles Times* reported in October, was sub-standard work: 146 individuals tested positive but were allowed to continue practicing. Maximus was criticized in an earlier California audit for failing to report a positive drug test on a timely basis. However, the company continues to perform screening under contract to California, following promises to improve its processes and procedures.

Professional Licensing Report is published bimonthly by **ProForum**, a non-profit organization studying public policy and communications, 4759 15th Ave NE, Suite 313, Seattle WA 98105. Telephone: 206-250-5609. Fax: 206-526-5340. E-mail: plrnet@earthlink.net Website: www.plrnet.org Editor: Anne Paxton. © 2010 Professional Licensing Report. ISSN 1043-2051. *Subscribers may make occasional copies of articles in this newsletter for professional use. However, systematic reproduction or routine distribution to others, electronically or in print, including photocopy, is an enforceable breach of intellectual property rights and is expressly prohibited.* Subscriptions: $198 per year, $372 for two years, $540 for three years. Additional subscriptions mailed in the same envelope are $40 each per year.