# Professional Licensing Report

Licensing, testing, and discipline in the professions

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*Highlights in this issue:*



## Discipline

**Aversive experience**

# Court restores board's suspension of "Scared Straight" psychologist's license

*Issue: Existence of a professional relationship*

The state psychology board did not violate a psychologist's due process rights when it suspended his license for improper behavior in leading "Scared Straight" tours for youthful offenders, the Court of Civil Appeals of Alabama ruled September 25 (*Alabama Board of Examiners in Psychology v. Leroy Richardson*).

Reversing a Montgomery County Circuit Court ruling that had overturned the suspension, the appeals court sent the case back to the board to consider the merits of any remaining issues the psychologist, Leroy Richardson, had properly raised during the proceedings.

Richardson was first licensed by the board in 1997. Until early 2003 he was employed by the state Department of Youth Services as the campus psychologist at its Vacca Campus in the Birmingham Area. He frequently arranged for "tours" of the campus for local youth whose behavior suggested they might later turn to crime.

These were known as "Scared Straight" tours, and they often involved fitting young people 10 to 15 years old with metal leg shackles, intermingling them with the resident population, and requiring them to perform the same chores and undergo many of the same experiences, including punishments, as the residents.

The youths were brought in by parents, school administrators, and others and would typically spend from two to eight hours inside the secure facility. Richardson met with them, spoke with them for a few minutes, then turned them over to others at the facility, never speaking with them again.

Richardson testified to the board that he had instructed Vacca security personnel whether to put particular "tour" visitors in shackles and that he told the security personnel where on the campus to take the visitors. The administrative law judge asked Richardson: "So you made all decisions relevant to the child being here and what they would participate in or do while they were here; is that correct?" Richardson replied, "Right, sir."

The appeals court said Richardson "admitted responsibility for the complete two-to-eight hour aversive experience that each visitor would have."

The board charged Richardson with failing to conduct initial assessments of the "tour" visitors, failing to obtain the informed consent of their parents or legal guardian, and failing to produce and maintain documentation of his work, in violation of state law governing the practice of psychology.

It suspended his license. But when Richardson appealed, the county circuit court agreed that the board had failed to prove that a "professional relationship" had existed between Richardson and any of the children brought to the campus or their parents.

It did not prove that he had conducted "therapy," or that he and done any "professional" or "scientific work" or "practice" with the tour visitors. Thus, the court reasoned, Richardson could not have violated the ethical principles cited by the board.

Based on Richardson's own testimony, however, the appeals court found that he actually was practicing psychology in these instances, and that the circuit court's ruling was erroneous.

# Doctor denied license, dropped from school over clerical error

*Issue: Board immunity from suit*

The Kentucky medical board is immune from suit under the Eleventh Amendment, the U.S. District Court for the Western District of Kentucky ruled October 7 in the case of a doctor who was denied licensure based on a clerical error (*Jennifer Peavey v. University of Louisville, et al*.).

The ruling dismissed the Kentucky Board of Medical Licensure and its members from the action, leaving several other defendants. The action arose out of physician Jennifer Peavey's release from the University of Louisville School of Medicine's Glasgow Family Medicine training program.

Peavey charged the school and the board with several violations of her civil rights as well as breach of contract, defamation, libel, slander, wrongful discharge, breach of covenant of good faith and fair dealing, and fraud and deceit.

Peavey was notified by her graduate program in January 2009 that because she had failed to be licensed by the board she was released from the training program.

But the board's failure to license her stemmed from a mistake. After applying for a license in April 2008, she received a notice from the board in June, pointing out that she was placed on academic probation while in post-graduate training at the university, but she had not put the information on her application.

An assistant dean at Peavey's medical school wrote to the board that Peavey was never placed on probation and that it was mistakenly written on her form due to a clerical error. Peavey also sent a letter of explanation, then followed it up with calls to the board, which told her license was being processed. But no license was issued, so the school dismissed her from its program.

In her suit, Peavey argued that the board "refused to process her application, even though she was at all times eligible for a license." She maintained the board denied her due process by not conducting an investigation or hearing to determine whether the allegations made against her were true.

The court agreed with the board that it is immune from suit, but the action against the remaining defendants was allowed to continue.

# Claim of bias on part of board member requires specific evidence

Issue: *Presumption of bias*

A physician's claims that medical board members were biased against him when they imposed discipline on him was unsupported by the evidence, the Superior Court of Connecitcut ruled October 5 (*Charles Ray Jones v. Connecticut Medical Examining Board*).

The case originated with physician Charles Jones's 2003 treatment of two children who lived in Nevada. He diagnosed one as having gestational Lyme disease and ordered treatment.

A discipline panel conducted eleven days of hearings over 14 months, and the full board decided in 2007 that Griffin had violated the standard of care by prescribing an antibiotic to a patient he had never examined and did not know, without monitoring the treatment, and based on laboratory tests that were negative for the disease diagnosed.

The board ordered a reprimand, imposed fines totaling $10,000 and placed Griffin on probation for two years, appointing a physician monitor to conduct regular reviews of Griffin's patient records.

On appeal, Griffin's principal claim was that that a member of the panel, John Senechal, was biased against him, largely based on disparaging comments that Senechal had made about doctors who were not specialists but treated Lyme disease.

In administrative proceedings, the mere appearance of bias that might disqualify a judge will not disqualify an adjudicator, the court said. "There is a presumption that administrative [officers] acting in an adjudicative capacity are not biased." To prove bias, the plaintiff must make a showing that the official had prejudged adjudicated facts that were in dispute. "The test for disqualification has been succinctly stated as being whether a disinterested observer may conclude that the hearing officer has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."

But the statement of violations of the standard of care does not even mention Lyme disease, the court pointed out. The fact that Senechal may have had "hardened views" about the practice of some people treating Lyme disease "would not necessarily reveal any bias as to whether the plaintiff had violated the general standards of medical care at issue in this case."

Board members do have some latitude to have opinions without being considered biased, the court indicated. "It would be unrealistic to assume that a doctor placed on a medical examining panel has no views on the practice of medicine, particularly within his specialty. Physicians, not unlike judges and even jurors, come to their role as adjudicators after a lifetime of experience. This fact is not in itself disqualifying."

Quoting a 2000 Connecticut case, the court added: "A decision maker is not disqualified simply (there should be another word here, but I can't find the case online to check what it is) he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not capable of judging a particular controversy fairly on the basis of its own circumstances."

# NY high court re-confirms ban on MDs' consensual sex with patients

*Issue: Doctor-patient sexual relationships*

A physician who did not deny sexual misconduct with seven of his patients failed to persuade the Supreme Court of New York, Appellate Division, that his license revocation should be overturned (*In the Matter of Carmen D'Angelo v. State Board for Professional Medical Conduct*).

In an October 22 ruling confirming the revocation, the court rejected the argument of physician Carmen D'Angelo that he cannot be penalized for having consensual sexual relations with a patient.

In 2008, a hearing committee of the state medical board sustained 24 of 48 charges of professional misconduct against D'Angelo, an internist, for gross negligence in practicing medicine, conduct that evidences moral unfitness to practice medicine, and failure to maintain accurate medical records.

In his appeal, D'Angelo did not challenge the factual underpinnings of the hearing committee's findings. The record "contains unrefuted evidence of negligence, gross negligence, and failure to maintain proper records in the form of expert testimony, medical records, and patient testimony," the court said.

For patients B, C, D, E, F, and G, D'Angelo did not challenge any of the misconduct determinations. He denied a sexual relationship with Patient A, and argued that misconduct did not occur in the case of Patient H, his current fiancée.

D'Angelo's primary argument was that, unlike a psychiatrist, he cannot be penalized for having consensual sexual relations with a patient, and that in such a case some additional evidence revealing exploitation of a vulnerable patient is necessary to find that a physician is morally unfit to practice medicine.

"We have repeatedly rejected this argument," said the court, which for the last nine years has interpreted the legislature's intent as including all physicians in the ban.

"Although the legislature has expressly proscribed 'any physical contact of a sexual nature' between a psychiatrist and his or her patient,'-This quotation mark needs a partner the absence of a corollary proscription in the practice of all other areas of medicine does not ipso facto constitute approval by the legislature."

Any such sexual contact "between a doctor and patient whom he is actively treating "at a minimum, bears scrutiny for moral unfitness due to the potential for abuse of the confidential relationship between doctor and patient," the court said, upholding D'Angelo's license revocation.

# Court advises against using "shocking" standard to weigh sanctions

*Issue: Standards of review*

A disciplinary sanction imposed by the Arizona Appraisal Board should not have been ruled "so disproportionate as to shock one's sense of fairness," the Arizona Court of Appeals ruled October 22 *(Felicia M. Coplan v. Arizona State Board of Appraisal, et al.)*

The ruling, which reversed a superior court decision, was in response to an appeal by the board. The lower court had overturned the 12-month probation and supervision requirements the board had imposed on appraiser Felicia Coplan.

When Coplan appealed, the superior court first overturned two of the factual findings and said the remaining violations "appear to be technical in nature."

The board responded by reducing the number of continuing education hours it had ordered from 22 to 15 and the number of monitored appraisals from 24 to 12, with Coplan allowed to petition for termination of her probation after just three months.

Coplan appealed again, and the court ordered even more reduced terms for the probation and supervision, plus attorney's fees for Coplan. Then it was the board's turn to appeal.

The board has five levels of violations and suggests different types of sanctions for each one. Some of the dispute concerned whether Coplan had committed "Level II" violations, which "do not involve ethics or competency," or "Level III" violations, which include violations of ethics or competency that "rise to the level of affecting the credibility of the assignment."

For instance, the court noted, Coplan had valued a garage at $25 per square foot yet had valued finished, air-conditioned living space in a residence at $10 per square foot. In another case, Coplan "failed to document in her work file for the market rent and gross rent multiplier stated in her report, violating an ethical rule related to recordkeeping."

The appeals court said the Level II categorization for Coplan's violations was backed by sufficient evidence. It also vacated the lower court's award of attorney's fees to Coplan.

The lower court applied the wrong standard of review, the appeals court said. The test of whether a punishment was "so disproportionate as to shock one's sense of fairness" was "a well intentioned but imprecise attempt at further defining the 'arbitrary and without reasonable cause' standard, the appeals court wrote. "We similarly perceive that the 'shocking' inquiry is an imprecise attempt to define the 'arbitrary and capricious' or 'abuse of discretion' standard…We therefore conclude that a superior court exceeds its authority when it substitutes its judgment for that of any agency through application of the 'shocking' test." A court must apply a "deferential" standard as set forth in state law, the appeals court said.

# Board pays $500,000 to settle with disciplined accountant

*Issue: Freedom of information requests*

The Washington accountancy board agreed to pay $500,000, the equivalent of nearly one third of its annual budget, to settle seven lawsuits and 15 public-record disputes over a board investigation into a licensee that began in 2004.

The settlement, announced in October, ends the long-running disciplinary case of D. Edson Clark. Clark was initially the subject of a complaint to the board by a client, then he submitted a separate complaint about a different accounting firm. Since he criticized the board's decision to dismiss his complaint, Clark maintained that the board targeted him for disciplinary action in retalitation.

In 2007, Clark signed an agreement with the board in which he admitted to a single infraction of board rules and paid investigative costs but no fine. Afterwards, in an effort to clear his name, he said, he filed a freedom-of-information request for a complete copy of his 1,300 page investigative file as well as files in other complaints. He filed suit in Thurston County Superior Court when the board responded inadequately to his records request.

In a May ruling, that court agreed that the board had improperly withheld records and granted Clark summary judgment. The judge stated the board "had developed a pattern of incompetence in answering these discovery requests that is just difficult to believe for a state agency."

In June, Clark's attorneys, Allied Law Group, submitted a request to the state auditor to investigate Richard Sweeney, the board's executive director, and Thomas Sadler, the director of investigations. In September, the board had found no basis for charges that Clark had lied, cheated, or extorted.

That was followed by the October decision to settle all the charges. The settlement ends investigations against Clark, his firm, and his business partners, closes a complaint against a former business partner, and amends two previously closed cases involving Clark from 1996 with "no finding of violations."

The board has agreed to a review by an outside consultant of its policies and practices, according to the office of Washington governor Christine Gregoire. Gregoire issued a statement that she has "seen no evidence of corruption or fraud in the Board's operation," but that this review will help ensure the Board is operating with best practices in place."

# Licensee must wait for full board discipline order before filing suit

*Issue: Civil suits over interlocutory decisions*

A dentist cannot file suit in civil court concerning a disciplinary action that has been taken by the disciplinary committee before a final decision of the full board, the Court of Appeal of Louisiana, Fourth Circuit, ruled September 2 (*Louisiana State Board of Dentistry v. DDS*).

Reversing a ruling by the Civil District Court, Orleans Parish, the appeals court restored four interlocutory orders of the board's disciplinary committee chairman against "DDS," a dentist licensed by the board. (The dentist's name is confidential until the board officially rules against the dentist and releases its findings and discipline order.)

The four decisions of the disciplinary committee at issue were that (a) previous consent decrees against DDS could be received in evidence at DDS's hearing before the disciplinary committee; (b) DDS had to submit to a third deposition; (c) the Board did not have to produce to DDS one of its experts' original report; and (d) the board did not have to produce a "privilege log" of any documents that it asserted were privileged.

To file suit at this early stage, the court said, the dentist would have to show he would suffer "irreparable injury" from the committee's decisions. "Although the statutes regulating the board do not define what constitutes 'irreparable injury' or irreparable harm, we hold that the standard is the same as that relating to temporary restraining orders and preliminary injunctions.. Thus, 'irreparable injury' or 'irreparable harm,' refers to a loss that cannot be adequately compensated in money damages or measured by a pecuniary standard."

The dentist failed to establish such injury would result from the disciplinary committee's interlocutory decisions. "Each decision if erroneous can be adequately compensated in money damages or measured by a pecuniary standard. The board's final decision is reviewable by the courts of this state, both trial and appellate."

"Only in the most extraordinary situation should a court interfere in the orderly administrative interlocutory decisions of the Louisiana State Board of Dentistry," the court concluded.

# Surgeon altered record after removing wrong lung, board finds

*Issue: Document fraud*

The state medical board properly overruled the recommendation of an administrative law judge and made its own determinations in the case of a surgeon accused of altering patient records to cover up a wrong-side surgery, the Superior Court of New Jersey, Appellate Division, ruled April 3, 2009 (*In the Matter of the Suspension or Revocation of the License of Santusht Perera to Practice Medicine and Surgery in the State of New Jersey*).

The medical board imposed a two-year license suspension on the surgeon, Santusht Perera, and the court affirmed the suspension.

The case stemmed from Perera's surgery on patient R.F. in September 2000. R.F. was referred to Perera by a pulmonologist who, following a CT scan of the patient, had found a life-threatening mass, a carcinoid, on R.F.'s left lung.

Perera did not order a second CT scan, he performed surgery, and he mistakenly removed the lower and middle lobes of R.F.'s right lung, leaving the left lung containing the carcinoid untouched.

In the investigation of Perera, the state attorney general submitted R.F.'s records to a forensic document examiner, who determined that two different inks were used to compose the document, but refused to opine as to whether the entries were made at different times. Perera did not deny using different pens but explained he commonly had "pens scattered all over the place" in the examining rooms.

The ALJ found that Perera's failure to order a second CT scan prior to R.F.'s surgery constituted a monumental breach of the standard of care, and was a critical "unjustifiable lapse of sound medical judgment." However, he accepted Perera's explanation that he used different pens but did not make later alterations in the record. The ALJ recommended a two-month suspension.

After the surgery, the court said, "Dr. Perera testified that he informed R.F. that his right lung had been operated on in an attempt to find and remove cancer. However, R.F. testified during a deposition that Dr. Perera did not explain the results of the surgery to him until after he questioned why his right side hurt and was bandaged. When he asked for an explanation, Dr. Perera informed him that he had found a tumor on his right lung that was hemorrhaging and he removed the portions of his right lung to save R.F.'s life. R.F. believed Dr. Perera until he obtained his medical records and discovered that there had been no tumor in his right lung." R. F. died in September 2003.

The board agreed with the ALJ on everything except the alleged alteration of the medical records. The board found it "abundantly clear" that the portions of the report written with one type of ink were written presumably at the time Perera initially examined R.F., and the remainder of the words with the other type of ink were added some time later. In addition, the board said, the ALJ failed to consider the "drastically altered" meaning of the medical report as amended.

In his appeal, Perera did not contest the finding that he was grossly negligent or attempted to obscure the truth from R.F., but he did contest the board's finding that he altered the medical records.

The court, however, agreed with the board: "The Board noted that the document was written in two different inks. Notably the ink supposedly used when Dr. Perera originally drafted the document created a complete, comprehensible thought. However the second type of ink did not make sense in isolation and changed the meaning of the document drastically."

The board's decision in the case was clearly supported by substantial evidence in the record, the court concluded.

# Conflicting experts' testimony up to board to sort out, court says

*Issue: Expert testimony*

A trial court did not have to reconcile conflicting expert testimony from an anesthesiologist and a neurologist before the medical board in the case of a doctor whose license was revoked for violating minimum standards of care, the Court of Appeals of Ohio, Tenth Appellate District, ruled September 15 (*Brian Frederic Griffin v. State Medical Board of Ohio).* The appeals court affirmed an earlier trial court ruling.

The board launched an investigation over the treatment the physician, David Griffin, delivered as a student at a pain management clinic between 1999 and 2001. In 2008 a hearing officer found that Griffin's treatment of 23 patients subjected them to unnecessary tests and failed to respond to abnormal results. In August 2008 the board permanently revoked Griffin's license, staying the revocation in lieu of three years' probation.

During the hearing, board members heard from board-certified neurologists and board certified anesthesiologists on the subject of somatosensory evoked potentials (SSEPs), studies that involve placing electrodes to stimulate nerves in the limbs and recording nerve activity from the spine to the brain.

The specialists' opinions differed on the value of the test. But the appeals court agreed with the trial court that the court did not have to reconcile the differences in the "two contrasting philosophies in pain medicine."

The court's analysis properly centered on two issues, the appeals court said: (1) Was the board's decision in accordance with the law? And (2) was the board's decision based upon reliable, substantial, and probative evidence? "The decision as to which medical philosophy is more appropriate for pain management is best left to the medical professionals, not appellate judges or trial court judges sitting in an appellate role on an administrative appeal."

Addressing Griffin's other charges: Without evidence of some material prejudice against him as a result of the board's delay in bringing formal accusations, the court said, it could not hold that the board violated Griffin's due process rights.

"There is no per se statute of limitations" for filing discipline charges, the court said, noting that boards "are free to set their own parameters." In Ohio, the state must prosecute most felonies, excluding murder, within six years. But this limitation does not apply to professional disciplinary proceedings.

# Board members immune from suit by 'delusional' disciplined doctor

*Issue: Mental illness and disciplinary proceedings*

A physician for whom the California medical board ordered probation and a psychiatric evaluation cannot sue the board members, investigators, prosecutors, consultants, and witnesses for allegedly retaliating against him for exercising his free speech rights, the U.S. District Court for the Northern District of California ruled October 19 (*Wayne Chung v. Barbara Johnson, et al.*).

Dismissing the complaint filed by physician Wayne Chung, the court said that the board members and consultants were all immune from Chung's federal constitutional claims, and that Chung's other causes of action lacked sufficient facts to survive a motion to dismiss.

The case began in 2005 when Chung, an internist who had a private practice for preventive health care, sent a letter to the Special Litigation Section of the Civil Rights Division of the U.S. Department of Justice.

In it, Chung complained that individuals, neighbors, and police officers were using video and cell-phone surveillance to "manipulate the type of patient" who came to his medical practice and that recent "potential patients do not appear to be genuine."

As proof that he was under surveillance by unknown perpetrators, Chung cited: icons on his desktop that were moved from their original positions, several prank calls, the presence of police officers on street corners he passed as he traveled to work, his neighbors' entering and exiting his building at the same time he did, and telemarketers who had called his cell phone and work line simultaneously.

He requested an investigation by the DOJ, but a DOJ employee instead contacted the California medical board with concern that Chung suffered from a mental illness.

After a board investigator conducted a psychiatric examination of Chung, he opined that Chung was unsafe to practice medicine. And in August 2008 the board concluded that the physician's judgment was "impaired by delusional beliefs," and placed conditions on his medical practice including mandatory psychotherapy, evaluation, and periodic monitoring by another physician.

Chung's appeals of this disciplinary order were denied, and he filed the federal suit, alleging that each defendant helped create the appearance that he suffered from a mental illness so that the board could silence him regarding his letters to the DOJ.

The court found that Chung's case consisted largely of "general conclusory allegations" that did not meet the burden of establishing constitutional violations. "Signing petitions and sending documents do not violate a constitutional right without more facts," the court said.

In sum, the court found Chung's contention that there was a conspiracy to persecute him "implausible, to say the least." Indeed, the court added, the fact that plaintiff believes defendants engaged in such a vast and unexplained conspiracy lends support to the board's conclusion that plaintiff suffers from a delusional disorder."

# Complaint of revoked physician "frivolous," federal court holds

*Issue: Statute of limitations*

The U.S. District Court for the Southern District of Alabama dismissed a revoked physician's civil rights complaint regarding his arrest and discipline on drug charges as frivolous *(Dan Leonard Ecklund v. Alabama Medical Licensing Commission*).

The October 30 action in the case of Dan Leonard Ecklund stemmed from Ecklund's 2003 arrest and imprisonment for 12 counts of unauthorized distribution of a controlled substance. The charges were dismissed in 2005 but following a hearing, his medical license was withdrawn a month later.

Ecklund claimed that he was targeted by the medical board because of his joint practice with a chiropractor, "which is considered 'bad policy,' and his extensive use of EDTA chelation therapy in his practice, which is considered non-standard and 'unconventional and alternative medicine.'"

He charged that a board-appointed psychiatrist who concluded Ecklund was mentally impaired "always" makes a finding of sexual deviancy, that he (Ecklund) should have been referred to the impaired physicians program, and that records from the hearing including confidential psychiatric diagnoses were posted on the Internet and at the medical board's website and appeared on Fox 10 news as part of an attempt to humiliate him.

Since the time limit for filing a federal challenge of hearings and the revocation of Ecklund's license to practice medicine expired more than a year before he filed, his claims, which he filed acting as his own attorney, were barred by the federal statute of limitations, the court said.

Ecklund "could have brought an action challenging these hearings and the revocation of his license to practice medicine, and for the mutilation, defamation, slander, conspiracy, and search when these events took place," the court noted. But since his license was revoked on June 8 2005, and he did not file this action until February 26, 2009, his claims are outside the statute of limitations and must be dismissed.

# Ethics offense more than "technically" in violation of "some rules"

*Issue: Professional ethics*

A certified public accountant who was disciplined for performing auditing-type services for a bank with which he had a contract to receive referral fees was properly disciplined for violating rules of the state accounting board, the Supreme Court of Kansas decided September 2 *(Thomas R. DeBerry v. Kansas State Board of Accountancy*).

The accountant, Thomas R. DeBerry, joined the board of directors of The First State Bank of Kiowa, Kansas, in 2001 and owned bank stock. In May 2002, he contracted to perform an "agreed-upon procedure": a director's examination. This examination included verification of customers' accounts and testing of other accounting records. When DeBerry completed it, he submitted it on his CPA's letterhead.

In 2002, DeBerry signed an agreement under which he would receive referral fees for certain individuals he referred to the bank for loans. He received $422.50 in referral fees from the bank.

On his next licensing renewal, DeBerry checked boxes indicating he had performed "compilation" and "tax" work, but not "agreed-upon procedures."

The state Board of Accountancy launched an investigation in 2003 and found that DeBerry had violated several regulations by performing an agreed-upon procedure while on the bank's board of directors, accepting a referral fee for the sale of services to a client, and other actions. His permit was suspended for 90 days, and he was fined $2,000 and ordered to complete a course entitlted "Professional Ethics: The AICPA's Comprehensive Course."

A trial court upheld the board's findings and DeBerry appealed to the Kansas Supreme Court.

His argument on appeal was that the board failed to prove that he "willfully" violated state law, because the board did not find he intended to break the law. DeBerry claimed that he was "technically" in violation of "some rules," but that he did not have any intent to deceive or defraud.

DeBerry questioned the board's practice of accepting an anonymous, oral complaint. He contended that the has been disadvantaged because he does not know the identify of the person who prompted this "anonymous assassination." However, the court noted that at the administrative hearing, DeBerry conceded the validity of anonymous oral complaints, acknowledging that they are frequently used in the legal profession.

The court however, said that to prove a "willful" violation of a CPA's professional standards and regulations, the board must only prove that the CPA intended the forbidden act or intended to abstain from doing something the CPA was required to do.

DeBerry claimed, when asked about AICPA professional standards on CPAs' independence that he was conforming to the rules that governed his client, the bank. But the court said, "DeBerry ignores the fact that he submitted the director's examination on his CPA letterhead. The letterhead made it appear that DeBerry was acting as a CPA, not as an independent examiner.

Another argument made by DeBerry was that the board order that he complete the AICPA comprehensive ethics exam with a score of at least 90 percent was arbitrary, since the standard passing rate is 70 percent. The court said state law set the board free to set its own standard. The 70 percent benchmark "Is used only when an individual pursues continuing education via a self-study program.

In his appeal, DeBerry also questioned the board's having drawn an analogy between his case and those of Enron and WorldCom. DeBerry said this evidence a "departure from rationality."

Affirming the board's discipline, the court rejected this argument as well. "The board's final order reads, 'The independence of a CPA who performs attest services for the public is vital to the accountancy profession. The Enron and WorldCom debacles evidence the dangers of disregarding this tenet.' The Enron and WorldCom scandals demonstrated the problems that occur when the accounting profession fails to exercise appropriate independence. DeBerry violated professional standards relating to independence. There was no error with the board's use of the analogy."

## Testing

# Licensing authorities barred from intervening in testing case

*Issue: Testing and minorities*

New York state teacher licensing authorities may not intervene in a class-action case in which minority teachers who failed a state certification exam are charging the test discriminated against them, the U.S. District Court for the Southern District of New York ruled September 16 *(Elsa Gulino, et al. v. Board of Education, et al.*).

The court said that the interests of the New York State Board of Regents, the state Education Department, and the Commissioner of the Education Department will be adequately represented by the defendant, the New York City Board of Education.

But it ruled that these three "movants" may submit an amicus curiae brief in the case, and said it will inform them of how, as friends of the court, they could most usefully participate in the action going forward.

The case was brought in 1996 on behalf of a class of African-American and Latino New York public school teachers who either lost their teaching licenses or were prevented from obtaining full teaching licenses because they did not pass the Liberal Arts and Sciences Test (LAST) of the state teacher certification exam, or its predecessor, the National Teacher Core Battery Exam (NTE).

The plaintiffs allege that the tests had a disparate impact on minorities and that by mandating the test the board and the department discriminated against the teachers in violation of Title VII of the Civil Rights Act.

A disparate impact on minorities under Title VII invalidates an employment test unless it can be proven that the test is "job-related"—i.e. it has been properly validated, showing "by professionally accepted methods [that the test is] predictive of or significantly correlated with important elements of work behavior which compromise or are relevant to the job or jobs for which the candidates are being evaluated.

The New York Second Circuit Court of Appeals applies a five-part test to determine whether an employment test has been properly validated: (1) The test-makers must have conducted a suitable job analysis; (2) they must have used reasonable competence in constructing the test itself; (3) the content of the test must be related to the content of the job; (4) the content of the test must be representative of the content of the job; and (5) there must be a scoring system that usefully selects those applicants who can better perform the job.

Several rulings have already been made in the case. The Second Circuit Court of Appeals fond that the NTE was properly validated and job-related, but that the LAST was not evaluated for job-relatedness under the proper standard. (See sidebar.)

The Education Department was initially a defendant in the case but was dismissed by the same court because it is not an "employer" under Title VII. The key remaining issue, to be decided by the federal district court, is whether the LAST is job-related.

The three "movants" (the Regents, the department and the commissioner) do have somewhat broader motives for litigating than the New York City Board of Education does, the court said. They "seek not only to absolve the board of liability, but also to protect their investment in the LAST and the integrity of their licensing procedures."

However, the court concluded that allowing the movants to formally intervene in the case was not necessary in order for their interests to be protected.

# Revocation of certification upheld in case where examinee lied

*Issue: Falsification of information on application*

A foreign medical graduate who claimed on application documents that he was ten years older than he really was lost his suit against the Educational Commission for Foreign Medical Graduates for revoking his certification.

The U.S. District Court for the Eastern District of New York agreed with the commission and dismissed the suit of applicant Michael J. Wang September 17 (*Michael J. Wang v. Educational Commission for Foreign Medical Graduates*).

Wang is from the People's Republic of China and did his medical training there. In 1994 he applied to take Step 1 of the USMLE, the medical licensing

exam. Over the next few years he failed 6 times before passing in October 1997. He passed Step 2 on the fifth try in August 1997.

In June 1998, the ECFMG granted him a certificate for having passed the USMLE and the English language exam.

The physician began his post-graduate training in general surgery in New York City, and completed a second year of residency training at State University of New York at Stony Brook.

But in December 2001, SUNY discharged Wang during his third year of residency, after discovering discrepancies between the credentials submitted to SUNY and those in ECFMG's records.

Engaging in "irregular behavior," the ECFMG warns applicants, would result in sanctions such as revocation of their ECFMG certificate. Such behavior is defined as all actions or attempted actions on the part of applicants or examinees that would or could subvert the examination, certification, or other processes of ECFMG Falsification of information applications is specifically cited as an example of irregular behavior.

Wang wrote to ECFMG asking it to correct his date of birth on its records from November 15, 1957 to Novemer 15, 1967, and change his year of graduation from 1982 to 1992. In answer to ECFMG which asked him why he had used the erroneous date on twelve ECFMG applications, Wang said his first application contained the incorrect information and he copied the same information because he was worried he would not be able to sit for the examination if he provided information that differed from his application. He was also found to have reported higher scores on his USMLE than he actually earned.

ECFMG revoked his certification, Wang did not appeal within the required 60 days, and the New York Board of of Professional Medical Conduct determined that he was prohibited from obtaining a medical license.

A suit he filed against SUNY was dismissed. In 2005 Wang filed suit against ECFMG alleging discrimination under federal law and state law claims for intentional infliction of emitional distress and slander.

In dismissing Wang's suit, the federal district court said Wang's allegation that the revocation of his certification was based on race or national origin was baseless—as was the allegation that the revocation was ordered in retaliation for his complaints. The record is clear that ECFMG "had a legitimate, non-discriminatory reason for revoking [Wang's] license," the court said.

## Licensing

# Okay for orthopedic surgeon to provide "physical therapy"

*Issue: Cross-disciplinary billing and practice*

Despite the wording of some state statutes, it is not illegal for a licensed orthopedic surgeon to use certain billing codes for physical therapy evaluation and re-evaluation, the Supreme Court of Kentucky ruled October 29 (*Dubin Orthopaedic Center v. Commonwealth of Kentucky, State Board of Physical Therapy*).

Reversing a 2007 opinion of the state Court of Appeals, the state supreme court reinstated a ruling of the Franklin Circuit Court that the state physical therapy board could not pursue surgeon Ronald S. Dubin for offering physical therapy services.

The case began in 2003 when the board received a complaint that Dubin was offering physical therapy services, that they were being provided by an unlicensed athletic trainer and billed under CPT codes 97001 and 97002. The board sought an injunction to stop Dubin from performing the services and billing for them, but a trial court denied its request.

The appeals court reversed, however, insisting that state law required Dubin to choose some code other than CPT codes 97001 and 97002 when describing and claiming payment for physical therapy services.

The board and the appeals court agreed that Dubin is obliged to use some term other than "physical therapy" when describing his services to patients or third-party payors.

The state supreme court has now said that this holding would mean Dubin could provide physical therapy services but would have to call them something else—clearly "an absurd result not intended by the General Assembly."

The plain thrust of KRS 327.020 is to protect the public against unqualified providers of physical therapy services, not to protect physical therapists against competition from other qualified health care providers, the court concluded .

# "Self-administered" bleaching still qualifies as practice of dentistry

*Issue: Unlicensed practice*

Even though a cosmetic teeth whitening sysem was "self-administered" by customers of a hair and nail salon, it still constituted the pracice of dentistry under state law, the Supreme Court of Alabama ruled October 16 (*WhiteSmile USA, Inc. and D'Markos v. Board of Dental Examiners of Alabama*).

Affirming a trial court judgment, the supreme court said, "The record showed that, under the commonly accepted definition of that term, the sale and application of the whitening system at the salon was the performance of a dental service."

The plaintiffs, WhiteSmile USA and D'Markos, operator of a salon in Montgomery, Alabama, sued the board in January 2008 in anticipation of being charged with practicing dentistry without a license. They sought a judgment declaring that the sale of LightWhite with in-store application was not the practice of dentistry and not subject to the licensing requirements of the dental practice act.

Once a customer purchases LightWhite for application at the salon, a D'Markos employee trained in the application process follows 22 specific instructions provided by WhiteSmile, including "Hand Custom Mouthpiece with gel to client to self-administer, ensuring that mouthpiece is inserted correctly before client bites down into tray with gel," and "Check with client periodically for signs of discomfort."

WhiteSmile provided an expert witness to back up its claim that because no employee ever touched the customer's mouth, sale of LightWhite was not the practice of dentistry. The board chairman and an expert witness disagreed, pointing to the contraindications and potential adverse side effects of the teeth-whitening process.

The court decided that even though the teeth whitening process is largely self administered by the customer, customers "receive more than just the product itself." The employees instruct the customer in the proper application. They answer questions and they handle many of the materials in the process while wearing protective gloves.

These "helpful acts and useful labor" help place it within the practice of dentistry, the court said.

# School's refusal to certify graduates' competence not out of bounds

*Issue: Certification by professional school*

Two pharmacy graduates whose school refused to certify their character or profssional competence to any professional licensing authority failed in their lawsuit against the school.

In a September 11 ruling in the protracted case, the U.S. District Court for the Northern District of New York dismissed the complaint of the former students, Daniel Papelino and Michel Yu, against Albany College of Pharmacy (*Daniel R. Papelino and Michael Yu v. Albany College of Pharmacy of Union University, et al.*).

In May 1998, Papelino and Yu were enrolled as full-time pharmacy students when the school made a determination that the two had violated ACP's student honor code by cheating in various courses during their tenure as pharmacy students. Papelino received failing grades and was expelled; Yu received a failing grade in one class but was not expelled.

When the students challenged the determination before the New York State Supreme Court, it found no rational basis to support the determination that they had cheated, and the Student Honor Code Committee's determination was set aside.

However although Papelino and Yu were awarded their diplomas, the college advised them it "would not certify their character, or personal, professional or ethical competence to any professional licensing authority." It also warned that it would attach information about the court decisions to any certification about their pharmacy education.

The students sued the college alleging that its actions resulted in delay of their ability to become licensed in New York and Florida. Additional claims included charges of quid pro quo sexual harassment and retaliation under Title IX, with the claim that some of the charges of cheating were due to Papelino's rejection of advances by the dean of students.

The court found, however, that Papelino relied only on indirect evidence—timing—to prove a causal connection between their actions and the refusal to provide an unqualified certification of his academic record. The fact that a court found the honor code determination procedurally flawed did not invalidate ACP's belief that the students had cheated, nor did it invalidate the evidence that the panel relied on in determining cheating had occurred.

The court also rejected the former student's claims that the school's actions involved a breach of contract or tortious interference with "precontractual relations and prospective economic advantage."

The school did not refuse to provide certification outright, the court pointed out in dismissing the case with prejudice.

"Rather, plaintiff Papelino chose not to accept the type of certification ACP was wiling to provide. Again, there is no case, law, rule, regulation or policy that requires any educational institution to provide 'unqualified' certification of a student's academic record"—particularly as in this case where the cheating determination was overruled on procedural, rather than substantive, grounds.

# Take Note

## Bankrupt licensee needs to pay student loans to avoid revocation

*Issue: Debt and licensing*

An optometrist in bankruptcy proceedings could find her optometrist license and therefore her source of income jeopardized if she failed to make payments on her $157,040 in student loans, the U.S. Bankruptcy Court for the Southern District of Florida ruled September 25 (*In re: Hagop Jack Kalfayan, Nona Kalfayan, Debtors*).

Ruling that the proposed classification of her student loan creditors did not discriminate unfairly under Chapter 13 federal bankruptcy laws, the court said maintaining payments of $382 per month to her student loan lender would benefit the bankruptcy estate.

Under a law passed by Congress in 1990, student loans are non-dischargeable in Chapter 13 bankruptcy proceedings. Some debtors have argued that this new nondischargeability status made discrimination in favor of student loan creditors fair. But most courts have concluded that discrimination based solely on nondischargeability is unfair.

In this case, the "discrimination" in favor of the student loan creditors can be considered fair, the court said, because the very creditors who were being discriminated against benefited from the arrangement.

Under Florida law, the state Department of Health is obligated to obtain information regarding licensees in default on their student loans—and licensees may be suspended or revoked for failure to repay.

The bankruptcy court ordered Kalfayan to make her student loan payments via the Chapter 13 trustee but stipulated that she could not accelerate payments or make any payment other than needed to remain current.

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