Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue

Discipline

Need for livelihood no rationale for staying revocation

Weighing public protection vs. property right to license

A circuit court had no authority to issue a stay of the medical board's revocation order on a physician's license without proof that the order was without statutory authority, arbitrary or capricious, or a gross abuse of discretion, the Court of Civil Appeals of Alabama ruled March 21 (*David G. Morrison v. Jerry N. Gurley, Chairman of the Medical Licensure Commission of Alabama*).

Reversing the stay order, the appeals court said hematologist-oncologist David Morrison had presented no evidence as to these factors.

"The state's legitimate and important concern of public health and safety far outweighed any interest of a physician whose license had been revoked to continue his livelihood," the court said.

Morrison was charged with practicing medicine in an unsafe manner, using false or deceptive statements concerning the results of proposed treatment, performing unnecessary medical services, and gross malpractice, among other violations.

The Medical Licensure Commission of Alabama held eight days of hearings and in October 2004 determined that Morrison was guilty of all charges, revoked his license to practice medicine, and assessed an administrative fine of $266,000 against him.

When Morrison appealed, the circuit court issued a stay of the revocation order in November 2004.

The appeals court, however, said that the state legislature has provided that when the Commission revokes a license to practice medicine, it "creates a presumption that the physician's continued practice would create an immediate danger to the public health, safety, and welfare."

Even though the circuit court allowed Morrison to present nine witnesses to testify that his continued practice would not endanger the public, and found that immediately halting his practice would adversely

affect his more than 300 patients, it was not within its authority to issue a stay because Morrison presented no evidence of the required finding: that the discipline order was taken without statutory authority, was arbitrary or capricious, or constituted a gross abuse of discretion, the appeals court said.

"It is reasonable to conclude that our legislature adopted an analog of the more exacting permanent-injunction proof requirements ('success on the merits') rather than the less exacting preliminary-injunction proof requirements ('a likelihood of success on the merits') as the standard" for two reasons, the court said.

First, "there is a presumption that, after the Commission has issued a license-revocation order, the public interest will be disserved by the physician's continuing to practice medicine. Second, at the time when a physician moves for a stay of the commission's order revoking his license, a 'full trial on the merits' has already been held and there is no reason for requiring a less exacting measure of proof than 'success on the merits' of an appeal."

In a dissenting opinion, one judge noted that because the transcript of the board's disciplinary hearing was not available when Morrison appealed, Morrison did not have a meaningful opportunity to present evidence in support of his motion for a stay. This judge maintained that the law passed by the legislature violates physicians' due process rights.

Board had no basis for charges against nurse or for discipline

Evidentiary basis for discipline

None of the evidence—not even the board's findings of fact—supported the conclusion that a nurse acted willfully to harass, abuse, or intimidate a patient, said the North Carolina Court of Appeal in *Teresa Elshoff v. North Carolina Board of Nursing*.

In a March 18 ruling reversing a trial court, the court rejected the board's discipline of Teresa Elshoff which had included a letter of reprimand, required course work, and a probationary license.

Elshoff is a registered nurse who was providing home care to patient B.T., who had recently been released from the hospital and was taking several prescription medications. Elshoff called and asked if she could retrieve B.T'.s medication profile from her house, and according to testimony by a neighbor who was there, the nurse began searching the house in a way that upset the patient.

Elshoff testified that she noticed that B.T.'s Oxycodone was not with her other medications, and she began searching for it out of concern that B.T. might be taking it inappropriately.

The board argued that "It is absolutely the role of the board to determine from the evidence of Record whether [Elshoff's] search for the missing medication had a harassing or intimidating effect on Patient B.T." Thus, the court said, "the board essentially contends that if [Elshoff's] actions had a harassing or intimidating effect on B.T., even if there is no evidence that she willfully intended to harass or intimidate B.T., and even if her actions were in keeping with her assigned job duties," then she was guilty of misconduct.

The board sent Elshoff a letter charging that her actions in B.T.'s home threatened and intimidated the patient, and gave Elshoff the option of an administrative hearing, a settlement conference, or discipline including a letter of reprimand. Following a hearing, the board ordered the reprimand plus completion of an ethical/legal decision-making course with emphasis on therapeutic communications.

On appeal, Elshoff argued that the board had failed to show she willfully violated any of the board's rules. The court agreed.

There is no dispute that B.T. was very distressed after [Elshoff's] visit," the court said. 'However, the subjective effect of one person's actions upon another individual is not the test for willfulness…We cannot conclude that 'opening drawers and cabinets and going in and out of rooms through a patient's home' constitutes willful harassment, abuse, or intimation of a patient," without evidence that the harassment was deliberate.

Restitution order in unlicensed practice case was out of bounds

Raising new issues on appeal

A trial court decision upholding the conviction of a nurse for practicing without a license was proper, except for the trial court's order that the nurse provide restitution to the county's general fund as a condition of probation, said the Court of Appeals of Indiana in *Rebecca D. Lohmiller v. State of Indiana*.

In the April 22 decision, the court affirmed the trial court in part but said that the restitution order constituted fundamental error because there was no evidence that the state raised the issue of restitution.

Rebecca Lohmiller was licensed as a medical nurse in Georgia in 1974 and moved to Indiana in 1985 but did not apply for licensure there because the state does not have reciprocal licensure with other states.

She eventually became a full-time public health nurse with the Carroll County Health Department, a position requiring a valid Indiana license. For four years, Lohmiller provided excuses for not having her license when her employer requested it.

Lohmiller was accused of signing her name with the initials "RN, MSN" on at least 27 occasions including tobacco settlement subcontracts, grant requests, immunization record, and other documents. She was charged with 27 counts of practicing nursing without a license and 6 counts of class C felony forgery.

In Lohmiller's jury trial, she alleged that she had avoided getting an Indiana license because she had been in the federal Witness Protection Plan and did not wish to be traced. After the jury was sent to deliberate, it requested a dictionary and asked the court to define the term "material fact" as it was used in the jury instructions. But the court denied the requests over Lohmiller's objections. The jury found her guilty as charged.

The court's sentence included four years' imprisonment, with two to be spent in home detention and two in probation. It also imposed a fine of $25,000, noting that it was not restitution for the salary the county paid or the potential liability it carried, but referring to it as a "fair amount based upon your financial situation" and "for the county's benefit as far as being deceived by the qualification in this case."

But, the appeals court said, since the state at sentencing did not assert that the county was a victim entitled to restitution, and did not argue that Lohmiller should be required to pay the county restitution, it was fundamental error for the trial court to order the payment.

It instructed the trial court, in reconsidering the case, to hold a hearing to determine the county's actual damages, if any.

Refusal to transfer birth control prescription unprofessional conduct

Board authority to assess costs to licensee

A pharmacist who was reprimanded for refusing to fill or transfer a patient's prescription for an oral contraceptive was properly disciplined by the pharmacy board, but should not have been assessed the full costs of the disciplinary action against him, the Court of Appeals of Wisconsin ruled March 25. *(Neil Noesen v. State of Wisconsin Department of Regulation and Licensing, Pharmacy Examining Board*).

The ruling affirmed part of a circuit court decision, but remanded the case to the court to send back to the board to reconsider costs.

The licensee, Neil Noesen, was assigned to work for two Wisconsin K-Mart pharmacies in 2002. He wrote to the pharmacy placement service that employed him stating he wished to "exercise my right not to participate in " certain tasks including dispensing birth control pills. The letter did not mention a refusal to transfer prescriptions.

A patient named Amanda Renz submitted a birth control prescription to Noesen soon after, and he refused to fill it or tell her where or how she could get it refilled. Renz filed a complaint against Noesen, alleging that by refusing to transfer the prescription order, he engaged in pharmacy practice which constitutes a danger to a patient and departs from the standard of care.

An administrative law judge agreed with the charges and ordered Noesen to pay the full costs of the disciplinary proceedings.

The appeals court said even the conscience clause does not free the pharmacist from transferring the prescription. "Noesen abandoned even the steps necessary to perform in a minimally competent' manner under any standard of care," by refusing to give Renz an option for obtaining her medication elsewhere.

The board's choice of a reprimand instead of an administrative warning, the court said, suggests that it did not consider Noesen's action to be a minor violation.

The opinion of the ALJ stated that Noesen "gave the distinct impression that satisfying his own personal moral code was his only concern. He did not even acknowledge that he had caused or could have caused harm to a patient. In fact, he argued that others were to blame for the problem"—including the patient, the board, and another pharmacist.

The court upheld the discipline; however, it suggested the rationale for assessing costs to Noesen might be based on a rigid rule that fails to account for mitigating factors, and ordered the board to reconsider the costs.

No authority for board to award itself attorney's fees

Authority to assess attorney's fees

A board's decision to revoke an accountant's license was properly made but the board did not have authority to award itself attorney's fees, the Court of Appeals of Texas, Third District held April 24. *(Fred Rogers v. Texas State of Public Accountancy*).

The state accountancy board disciplined Fred Rogers in 1999 for violations, suspending his license for two years and imposing administrative costs of $17,429. The appeals court agreed with a trial court in upholding Rogers' discipline, pointing out that the record supports the finding that Rogers committed "discreditable acts" as defined in the board's rules, and is not fit to hold a certificate to practice public accountancy. However, the court reversed the portion of the district court's judgment affirming the board's award of attorney's fees.

The Texas Supreme Court had consistently held that one cannot recover attorney's fees unless permitted by statute or contract between the parties, the court said. The board cited a section of the practice act that allows it to award "direct administrative costs," which are defined by board rule to include attorney's fees.

However, the court maintained, "Until it speaks with a clear voice to expressly provide for attorney's fees, we conclude the legislature has not authorized an award of attorney's fees in the language of the Public Accountancy Act."

Optometrist does not qualify as expert in physician's malpractice case

Licensed status of qualified expert witnesses

The medical malpractice case of an ophthalmologist's patient should be dismissed because the patient's expert report was authored by an optometrist and not a physician, the Court of Appeals of Texas, Fourteenth District, ruled January 22 (*William Davis v. John Q.A. Webb Jr.*)

In a concurring opinion, one judge said that although he agreed with the ruling in this case, "I believe the application of the [Texas Civil Practice and Remedies Code, drafted with an eye toward reducing the number of frivolous medical malpractice lawsuits] to all fact-scenarios is problematic and can lead to the miscarriage of justice in some instances."

In some situations, where a physician fails to provide the type of treatment he could have delegated to another, or the type of treatment another often performs, "this negligence should not be shielded by his medical degree," said Judge Frank Price. If the physician is "wearing another hat," the individuals who most often wear that hat might be aptly trained to opine as to the standard of care or causation.

"Such might be true when a physician performs medical care at the site of an accident where an EMT would be best qualified to testify as to on-scene standards of care, or when a physician refers an injured patient to a physical therapist or chiropractor who, though not a physician, may have greater training and experience in rehabilitation and might be best qualified" to express on opinion on post-operative care.

Non-physicians are barred by state law from offering an expert opinion regarding medical causation or the alleged breach of the standard of care applicable to a physician.

The case concerned ophthalmologist John Webb Jr. and his surgery to remove a cataract from William Davis's left eye in October 2004. During the surgery, fragments of lens nucleus were allegedly left in Davis's eye due to a small capsular tear.

Davis filed a petition two years later alleging that Webb's post-operative treatment fell below the acceptable standard of care, causing him to experience blurred vision and significant pain, as well as forcing him to undergo numerous other surgeries.

The expert opinion was authored by Anastis Pass, an optometrist and lawyer, but not a physician. The trial court agreed with Webb that Pass did not meet the statutory qualifications for an expert, and it awarded attorneys' fees and costs to the ophthalmologist.

On appeal, Davis argued that the trial court should not have dismissed his claim because the report prepared by Pas is deficient but curable; a 30-day extension should have been granted instead, he said.

But the appeals court said under the facts of the case and the applicable law, no "expert report" has been served, and this failure also justified the award of costs and attorneys' fees to the ophthalmologist.

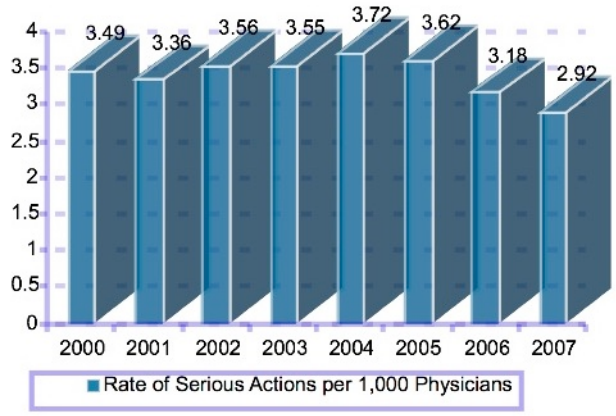
Serious medical disciplinary actions continue nationwide plunge, Public Citizen says

Discipline trends

Serious disciplinary actions involving physicians have dropped by 22 percent since 2004, says Public Citizen's Health Research Group, while the total number of physicians in the country has risen by 6 percent in the same period.

The figures appear in an April 22 report based on the annual summary of actions released by the Federation of State Medical Boards. The federation, which calculates discipline trends differently, reports that total disciplinary actions are down 15% from a 2004 high, and prejudicial actions have dropped 17% from 2004 to 2007.

"We have calculated that there were 2,743 serious disciplinary actions (revocations, surrenders, suspensions, and probation/restrictions) taken by state medical boards in 2007, a sharp decrease in such actions from 2004, when the number peaked at 3,296. This marks the third consecutive year the number of these actions has decreased from the previous year," the Health Research Group said.



Source: Health Research Group

Hearing not required to deny license to convicted felon

Felony convictions and license denial

The Louisiana psychology board had authority to deny a license to practice to an applicant without holding a hearing, the Court of Appeal of Louisiana, First Circuit, ruled March 26 (*Samuel B. Howell v. Louisiana State Board of Examiners of Psychologists*).

Reversing a ruling by a district court in the applicant's favor, the appeals court said that the board had sufficient grounds for denying a license to Samuel B. Howell, without holding a hearing.

Howell, who was licensed as a psychologist in Virginia, was convicted of felony sexual abuse of a minor and was sentenced to 21 months in federal prison. After his release in 2002, he moved to New Orleans. He wrote to the board in 2005 while he was still on probation, seeking information about possibly becoming licensed in Louisiana.

When he applied in 2006, he submitted recommendations from other psychologists who expressed support, but had reservations about Howell's ability to counsel adolescents.

The board denied Howell's application, stating that it believed his prior felony conviction would substantively affect his ability to practice psychology. When Howell appealed, the district court determined that the board had improperly failed to grant Howell a pre-determination hearing, and it remanded the matter to the board to hold such a hearing.

The appeals court, however, found that the state Administrative Procedures Act does not create an independent right to a hearing before a state agency can take any action.

"We find that the board acted within its authority and thus did not act unreasonably in denying licensure to Dr. Howell based on his conviction of sexual abuse of a minor."

Revocation okayed for licensee with "pyramid of lies and deceit"

Penalties more severe than ALJ recommendations

The Wisconsin chiropractic board properly revoked the license of a chiropractor convicted of federal tax evasion, even though the administrative law judge had recommended only suspension, ruled the Court of Appeals of Wisconsin March 12 *(Gregory R. Daniels v. Wisconsin Chiropractic Examining Board*).

In the case, Gregory Daniels initially appealed the revocation to a circuit court, which reversed it, finding that the board failed to adequately explain its decision to revoke the license instead of suspending it. The board's explanation was "little more than a perfunctory embellishment of its first explanation…[which] does not engage in any meaningful discussion as to why suspension would not work aside from simply claiming that based on the character traits of Daniels, it just wouldn't."

The circuit court also found that the board denied Daniels due process because it did not allow him to appear before the board regarding the proper sanction for his violations.

The appeals court reversed the circuit court. "The Board's written decision makes a reasoned justification of the sanction it selected, and also explains why it departed from the ALJ's recommendation, just as the statute requires. Daniels' due process rights were satisfied in as much as there is no statutory or constitutional right to a hearing before the board as a whole," the court added.

Noting that Daniels did not challenge any of the findings of fact or conclusions of law reached by the board, the court said the board's explanations of its decision were thorough and logical and the sanction of revocation was needed to adequately protect future clients from abuses.

"The character traits revealed by the unprofessional acts committed by the respondent appear to be so deeply rooted that no amount of supervision or oversight will adequately protect society. He was convicted of fraud, the elements of which require lying with the intent that others rely upon the lies to their detriment. He then failed to disclose the conviction to the board."

"When confronted with this accusation, he originally attempted to deceive by claiming that he thought his attorneys had notified the board. He continued his deceitful ways by seeking an extension of time to comply with the continuing education requirement by use of yet another deceitful tactic, claiming health related conditions. When confronted with this deceit he attempted to shift the blame by downplaying the seriousness of his conduct. This pyramid of lies and deceit indicate an unduly high risk of recidivism. Where the board would like to see remorse and rehabilitation, it sees resentment and recrimination."

Daniels "has demonstrated a character of dishonesty and greed directed at all who come in contact with him, whether patient, insurance company, the government or this board."

"To request another chiropractor to monitor such a person…would require a Herculean task beyond the ken of any one person. In addition to catching the lies, merely confronting the respondent with the lie is not likely to result in corrective behavior but is likely to result in additional lies and deceit in an attempt to justify the inappropriate behavior."

Executive session in discipline case violated Open Meetings Act

Provisions of Sunshine laws

The Court of Appeal of Louisiana, First Circuit, agreed with only part of the appeal of the state practical nursing board, in the case of a practical nurse who was disciplined for refusing to submit to a drug screen during an investigation of missing narcotics by her employer, a nursing home.

The March 26 ruling in *Judith Sandifer v. Louisiana State Board of Practical Nurse Examiners* involved a 2003 decision by the board to place Judith Sandifer's license on probation for two years and to require her to meet certain conditions of probation.

Sandifer was employed as an LPN at Good Samaritan Nursing Home in Franklinton, Louisiana, when some narcotics went missing and she refused to submit to a drug screen. She later admitted her refusal was an error of judgment and said that she refused because she had recently accepted some marijuana while on vacation.

After the board placed her on probation, Sandifer appealed to a trial court, arguing that the board had violated Louisiana's Open Meetings Law and administrative procedures act.

The district court agreed, finding that the board denied Sandifer the right to observe and participate in the deliberations of the matters involving her license, and it issued a permanent restraining order barring enforcement of the disciplinary order, awarding Sandifer $45,000 in attorney's fees.

The board appealed. It contended that executive sessions were exempt from open meetings requirements, and that Sandifer had "improperly and frivolously" requested attorney's fees amounting to $54,219.94.

The appeals court said that because Sandifer had specifically requested an open hearing and the board refused it, the board's executive session did not qualify as an exemption under the open meetings act.

"After carefully considering the argument presented by the parties and the doctrines at issue, we conclude that implied within Ms. Sandifer's request for an open meeting of the board to discuss the disciplinary proceeding filed against her was her consent to waive any right to privacy interests she may have had in the matters addressed during the course of the disciplinary action through that date."

But the court did agree with the board that the attorney's fees awarded were excessive and related to litigation that was unnecessary to the resolution of the Open Meetings Law issues. It sent the issue of attorney's fees back to the trial court for assessment of a more limited amount.

Extension of suspension proper in sexual misconduct case

Violation of conditions of orders

The Court of Appeals of Texas rejected the appeal by a Texas physician of the state medical board's extension of his license suspension. In the March 19 action in *Harold Granek v. Texas State Board of Medical Examiners and Donald W. Patrick*, the court upheld a district court which had affirmed the board's order.

The physician, Harold Granek, was brought before the board over charges of unprofessional conduct, and after a contested case hearing, in 2004 the board initially ordered that his license be revoked. A trial court granted a temporary restraining order enjoining the board from enforcing this order, because, it said "the board's allegations were stale and revocation was a disproportionate penalty."

Granek, an ophththalmologist, was charged with patient abandonment in one case, and with improper contact with patients in other cases that occurred in the 1980s.

Ordered to reconsider the penalty, the board issued a three-year probated license suspension, along with the provision that Granek "not examine or treat female patients," and pay a $25,000 administrative penalty.

While Granek was still in the process of appealing this order, the board directed its staff to investigate whether Granek had violated its terms and conditions. Finding that Granek had continued to treat several hundred female patients, the board extended his suspension from three to six years.

In his appeal, Granek tried to argue that the board, which had issued orders, amended orders, and final orders, did not actually have an order to enforce on February 4, 2005, when it extended his suspension. The appeals court rejected this argument, as well as Granek's allegations that the suspension and fine were arbitrary and capricious.

Court reverses freedom-of-information records release

Confidentiality and open records laws

The disciplinary records of a doctor, including proceedings of a state hospital's credentials committee, the medical board, and clinical affairs subcommittee, were exempt from disclosure under the Connecticut Freedom of Information Act, said the Superior Court of Connecticut, Judicial District of New Britain in a March 10 decision *(Director, State of Connecticut et al. v. Freedom of Information Commission*).

The ruling reversed a decision of the state Freedom of Information Commission, which had held that since the John Dempsey Hospital was a state agency, its records of physician Jacob Zamstein had to be released.

Zamstein's records were requested several times by the plaintiff in a malpractice case, who finally won agreement from the FOIC in 2007. The court granted a stay of the decision until it could consider Zamstein's appeal.

Proceedings of a medical review committee conducting peer review are protected from disclosure even though the hospital be owned by the state, the court said, maintaining that the FOIC's decision contained errors of law.

"If Connecticut providers are to continue to have meaningful peer review… physicians who participate in the peer review process must be assured that their evaluation of their peers will not be publicly disclosed."

Specific incidence of patient harm not needed in discipline for DUI conviction

Nexus between criminal offense and professional practice

In the case of a radiologist convicted of driving under the influence of alcohol, the Ohio medical board did have authority to consider the issue of impairment, and order a suspension of his license, even without evidence of a specific incidence of patient harm, the Court of Appeals of Ohio ruled March 25 *(Joseph Ridgeway v. State Medical Board of Ohio*).

The physician, Joseph Ridgeway, had an extended history of arrests and convictions for driving under the influence of alcohol from 1992 to 2004, and was charged with domestic violence in 2005. A treatment facility medical director issued a report in 2005 opining that Ridgeway met the criteria for statutory impairment.

In 2006, the medical board hearing examiner issued a report concluding that Ridgeway was diagnosed with alcohol dependency and his conduct constituted impairment of ability to practice. The medical board voted to impose a minimum suspension of three months. A trial court upheld the decision in 2007.

In his appeal, Ridgeway argued that the medical board's disciplinary action, based primarily upon alcohol-related driving charges that did not directly implicate patient care, was not authorized. He also contended that there was a relevant distinction between alcohol dependence and alcohol abuse, and the diagnosis should have been the latter.

The court held that substantial legal authority provides that conduct occurring outside the practice of medicine may form the basis for discipline because it reflects on a licensee's fitness and qualifications to practice medicine. It found Ridgeway's other assignments of error to be without merit and overruled them, upholding the board's disciplinary order.

Physician missed proper time to appeal and must accept suspension

Compliance with deadlines for appeals

A physician who failed to get a comprehensive physical and psychological evaluation after being required to do so by the state medical board failed to file a timely appeal, the Iowa Court of Appeals ruled April 8, and the board's suspension of his license in October 2007 was properly ordered *(Monte L. Skaufle v. Iowa Board of Medical Examiners*).

Skaufle, who was alleged to have engaged in sexual harassment and inappropriate sexual misconduct, including possible sexual relationships with patients, ignored a 2006 order by the board to undergo a $5,000 evaluation and did not appeal. Eight months later, the board indefinitely suspended his license contingent on his full compliance with the evaluation order.

Skaufle was issued an Iowa medical license in July 1981. He worked for Genesis Health System in Davenport for many years and became director of the Genesis residency program. In 2003 Genesis received complaints about Skaufle regarding mismanagement of the program and alleged sexual contact with students, residents, staff members and a patient. After being confronted by Genesis, Skaufle chose to resign in July 2004.

Six months later, the state medical board received a letter from a former coworker stating that there were reports that Skaufle had engaged in a sexual relationship with one of his patients. The board assigned an investigator, who interviewed several former employees, former residents, and former co-workers of Skaufle, as well as Skaufle himself.

In an October 2005 "Evaluation Order," the board stated it had received information that Skaufle had engaged in inappropriate sexual misconduct in the practice of medicine and may suffer from a mental condition impairing his ability to practice competently.

It ordered Skaufle to undergo a comprehensive physical, neuropsychological, mental health, and sexual misconduct evaluation, and ordered Skaufle to undergo it with a specific doctor in Atlanta, Georgia, at his own expense.

On appeal, Skaufle claimed this was not a final decision from which he was entitled to judicial review, because he was not "aggrieved and adversely affected" by the decision as he had to "wait and see" what the board response would be to his failure to comply with the order.

The court disagreed. "It would be strange indeed if Skaufle had to disobey the order and suffer discipline in order to garner a final decision from which he could seek judicial review," the ruling stated.

The court said Skaufle was indeed "aggrieved or adversely affected" by the decision in that he was required to undergo a very personal evaluation and pay more than $5,000 to do so, and faced suspension or revocation of his license if he did not.

Skaufle is now precluded from appealing the evaluation order, the court said, and it found no reason to overturn the board's decision to suspend his medical license.

Rationale for requiring enrollment in course must be specified

Particularity required in overruling ALJ

The Florida chiropractic board failed to specify its reasons for including a mandatory continuing education requirement in the penalties it imposed on a chiropractor charged with sexual misconduct with a patient, the Court of Appeal of Florida, Fifth District, held March 14 in *James E. Hether v. Florida Department of Health*.

Although the court affirmed the other penalties, it reversed the order that chiropractor James Hether take five hours of continuing education on ethics and boundaries, and sent the case back to the Department of Health directing it to specify its reasons or drop the requirement.

After a hearing, an administrative law judge had made factual findings and recommended penalties for Hether including a reprimand, a $2,500 administrative fine, a psychological evaluation by the Professional Resource Network, and two years' probation, along with a practice restriction prohibiting Hether from treating a female patient without another health care professional present in the room.

The Department of Health's final order, issued by the board, accepted the penalties but also added the following:

"Respondent shall document the completion of five (5) hours of continuing education in the areas of boundary issues and ethics within one (1) year from the date that this Final Order is filed. These hours shall be in addition to those hours required for license renewal. Said continuing education courses must be pre-approved by the board and shall consist of a formal live lecture format."

Although the department discussed the reasons for the requirement and reviewed the record at its own hearing, it did not include the reasons for adding the CE penalty in its final order, the court said. Under state law, an agency may accept the recommended penalty in a recommended order, but it may not reduce or increase it without a review of the complete record and without "stating with particularity" its reasons.

California audit details faults of chiropractic board

Management of enforcement and prioritization of complaints

Lack of knowledge about open meeting laws, inappropriate delegation of responsibility, and weak management of enforcement led some members of the Board of Chiropractic Examiners to actually violate state laws and to flout the board's own policies, said the California State Auditor in a March 25 report.

How to prioritize

The auditor said three other California boards it surveyed generally reported well-structured prioritization systems for complaints. For example, the physical therapy board prioritzes consumer complaints using three levels: urgent, high, and routine.

Urgent priority goes to complaints alleging sexual misconduct, use of drugs or alcohol, or mental illness, notifications of felony convictions, unlicensed practice involving patient harm, complaints involving licensees on probation, and quality-of-care complaints involving recent occurrences of patient death, gross negligence, or incompetence. Complaints alleging sexual misconduct or negligence resulting in patient injury are forwarded to the Division of Investigation at Consumer Affairs usually within one week of receipt.

"High" priority complaints typically involve licensees with alleged non-felony convictions or prior complaints, or quality of care issues involving patient death, gross negligence, or incompetence when a significant period of time has elapsed. These are handled after all urgent complaints are handled.

"Routine" complaints consist of false advertising, failure to release medical records, medical malpractice notices, patient abandonment, fraud, and quality of care complaints with litle potential for patient harm.

Among the most egregious examples of state law violations: In March 2007 the board convened a closed-session meeting at which it fired the executive officer of the board without providing written notice to her in advance. This violation in fact nullified the decisions the board made in that closed session, forcing the board to start the process over, hold a public hearing, and eventually vote to terminate the officer without cause.

Oversight controversy

The audit of the chiropractic board is the latest chapter in a series of public conflicts over how best to regulate chiropractors.

In 2007, after the firing of the executive director, the *Sacramento Bee* ran a series of investigative articles on the board and state senator Mark Ridley-Thomas launched legislative hearings to investigate allegations of board misconduct. According to Ridley-Thomas:

"The Board violated open meeting laws, approved a highly questionable chiropractic method known as manipulation under anesthesia, and interfered in ongoing criminal proceedings regarding this matter. The Board had also inappropriately tried to fire staff and eject legal counsel from the Attorney General's office when their unlawful procedures were questioned."

The legislature passed a bill (SB 801) to let voters approve placement of the board under the jurisdiction of the central agency, the Department of Consumer Affairs. But governor Arnold Schwarzenegger, an outspoken fan of chiropractic treatment, vetoed the bill in October, stating:

"The Board of Chiropractic Examiners is currently working with the Department of Consumer Affairs to provide essential support services and correct any prior deficiencies. I do not feel it is necessary at this time to go through the expense of placing this measure on the ballot to essentially codify existing practice. I also do not support requiring the profession's licensing fees to pay for the costs of placing this measure on the ballot."

Other board members actions led them to inappropriately insert themselves in the enforcement process, the audit said. The auditor called the board's prioritization system for complaint review "seriously flawed."

"Our review of 25 complaints closed in fiscal year 2006-07 found many instances where the chiropractic board failed to take action on complaints for excessive periods of time in all phases of the complaint process." In 11 priority complaints, it took the board from one to three years to process nine of them, the audit said, "potentially leading to repeat offenses and a failure to protect the public."

Unexplained and unreasonable delays included lengthy periods of inactivity between when the board received a contracted investigator's report and when it referred a case to an expert.

The board lacks proper background in consumer protection, the auditor said, noting that it found no evidence that board members had received training in ethics, sexual harassment, or even basic orientation within prescribed timelines of taking office.

The chiropractic board, in response to the audit, said it concurred with nearly all the auditor's recommendations, which include closer compliance with open meetings laws, board member control over licensing approvals, compliance with conflict-of-interest laws, establishment of benchmarks and more structured procedures for each step of complaint review, clear identification of priority complaints and monitoring of complaint status, and assurance that continuing education approval processes conform to regulations.

Competition

Ban on telephone solicitation not unreasonable

Reach of limitations on advertising & solicitation

A chiropractic board's limits on advertising by chiropractors were not more extensive than was necessary to protect the public from fraud and overreaching, the U.S. Court of Appeals for the Fourth Circuit ruled April 9.

Agreeing with a federal district court in the case of *Darcey Walraven v. North Carolina Board of Chiropractic Examiners*, the court turned down the appeal of chiropractor Darcy Walraven, who wished to conduct telephone solicitation of potential clients.

The district court had said in its ruling that it agreed that the challenged regulations "significantly burden Dr. Walraven's ability to advertise by effectively precluding all telephonic contact with the class of persons who would be most receptive to a personal invitation to see

> "Telephonic solicitations (even scripted ones) do not take place in a controlled environment and improper deviations from the script are not susceptible to detection until after the harm is done (provided that a disgruntled consumer even bothers to report the violation to the relevant authorities), and then the only recourse in the event of a violation likely would be against a party (the 'runner' or telemarketer) not necessarily subject to the board's disciplinary jurisdiction," the district court wrote.

a chiropractor," but "this is a far cry from a 'blanket ban' on Dr. Walraven's commercial speech."

Written solicitations are acceptable under the board's rules because they can be screened for compliance by a state board before they are ever mailed, the court said. But telephone solicitations cannot be screened that way. The appeals court agreed that the board's advertising regulations are constitutional.

Licensing

Part of practice act unconstitutional in giving too broad a rulemaking authority

Statutory basis for rulemaking authority

The state pharmacy board cannot adopt a rule for reapplication for a pharmacy license after revocation, because it does not have the authority to do so, the Court of Appeal of Florida, First District, ruled April 3 in *Stuart A. Sloban v. Florida Board of Pharmacy*.

The board had revoked the license of Stuart Sloban following his criminal convictions for federal offenses related to pharmacy practice and his six-month prison sentence, and it denied his request to reapply because it had not adopted rules permitting former licensees to reapply.

Sloban argued that the pharmacy statute had to be read to require the board to adopt such rules. But the appeals court said no. In fact, the wording of those two sentences of the statute, which granted the board "the absolute, unfettered discretion" to decide whether former licenses could reapply, was an unconstitutional delegation of legislative authority, the court said.

Since the constitutionality of that section "could not be salvaged," the ruling said, the board had no authority to adopt the rules in question.

Untimely notice not excused by "commonplace responsibilities" of a student

Mitigating circumstances in complying with rules

Failing to notify the Vermont Board of Bar Examiners within 30 days of starting a required clerkship in a judge's office was adequate grounds for denying a law student credit for completing the requirement, the Supreme Court of Vermont held April 11 (*Steve Ball v. Board of Bar Examiners*).

The case involved a lawyer candidate, Steve Ball, who, needing one more month to complete a three-month requirement for admission to the bar, pursued a clerkship from August through early December 2006, but did not notify the board of it until April 2007.

The board refused to grant him credit because his notification was untimely and he had not shown good cause for an extension of time. Ball's explanation was that he was "busy with school, [his] internship, finding a spring internship in the Boston area, renting [his] house in Vermont, and planning a move."

The court agreed with the board that the board had discretion to determine whether Ball demonstrated good cause, and it was not unreasonable for it to conclude that the "commonplace responsibilities of a law student" do not amount to good cause.

Outsider specialty board loses latest bid for recognition

State recognition of private certification agencies

The American Board of Cosmetic Surgery, a medical specialty board that does not belong to the American Board of Medical Specialties, briefly saw progress in its 11-year quest to be recognized by the Medical Board of California.

When the board's licensing division denied the ABCS's application for recognition, the Superior Court of Sacramento County granted the group's petition for writ of mandate, an order by the court to comply with a law.

But on April 28, the Court of Appeal of California, Third Appellate District reversed the judgment and directed the trial court to deny the petition. Denying the ABCS's application was not an abuse of discretion, the court said, "because the record reflected the reasons for the decision and the reasons were rationally related to the regulatory requirements and were supported by ample evidence."

The applicant's "voluminous materials," a medical consultant's reports, and testimony from members of the medical community representing both sides at two public hearings were considered, the court noted.

The concern expressed by the consultant, that certification would mislead the public because the same certificate would be given for three separate subspecialty areas, despite the fact that there was a significant disparity in the surgical training and procedures required for those three areas, was more than sufficient to support the board's denial of the application.

Orthopedists' retake advantage over podiatrists in Texas ruling on ankle

Scope of practice conflicts

The Texas podiatry board did not have authority to make a rule authorizing podiatrists to treat parts of the board above the ankle, the Court of Appeals of Texas, Third District, ruled March 14 in *Texas Orthopaedic Association, et al. v. Texas State Board of Podiatric Medical Examiners et al*.

The court reversed a ruling by the Travis County district court that the board, which in 2001 promulgated a rule defining the word "foot" to include portions of what laypersons call the ankle, did not exceed the board's authority. Earlier, the state attorney general issued an opinion stating that the rule was invalid.

Podiatrists have been treating the ankle for several decades, according to the podiatry board. "Several podiatrists testified that they were trained to perform both surgical and nonsurgical procedures on the ankle during their residencies, and the board presented evidence that various podiatry books written over the last 80 years have included sections on treating the ankle."

"In addition, several podiatrists testified that they have been granted privileges by various hospitals to perform surgeries, and have been reimbursed for them by insurance companies."

But the court said the rule goes beyond the ankle. "The Rule states that the 'foot' includes 'all soft tissues (muscles, nerves, vascular structures, tendons, ligaments, and any other anatomical structures) that insert into the tibia and fibula in their articulation with the talus.' However, many of the soft tissues included in the definition are not part of the foot or even the ankle. For example, various nerves ending in the foot—including the tibial nerve, the peroneal nerve, and the sural nerve—run along significant portions of the leg before reaching a termination point in the foot."

"Similarly, several veins and arteries—including the saphenous vein and the tibial artery and vein—also end in the foot after having traversed significant portions of the leg. In fact, one of the nerves and one of the veins previously mentioned run along the entire length of the leg."

It's reasonable to allow a practitioner treating the foot to consider and treat other anatomical systems that interact with and affect the foot, the court said, but that debate must be held by the state legislature. The rule as promulgated allows podiatrists to perform outside their scope of practice, and is invalid, the court decided.

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