Professional Licensing Report

Licensing, testing, and discipline in the professions

Highlights in this issue:

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Licensing

Online, virtual, centralized, streamlined

Top ten reforms Georgia legislators want in professional licensing

Issue: Increasing efficiency of professional regulation

Georgia's 42 boards need to keep an active website, go paperless and web-based where possible, use videoconferencing rather than travel for board meetings, let the central Professional Licensing Boards Division handle minor violations, and let some boards be combined, says a December 2013 report by the House Study Committee on Professional Licensing Boards.

Those were a few of the recommendations of the committee, which was created by the Georgia legislature to explore any needed reforms to the existing structure of professional licensing in the state. After five meetings and input from the state's 42 licensing boards, the committee announced its findings as to the best plan for more efficiency, better use of technology, and adequate funding and staff for professional regulation.

*See **Licensing,** page 13*

Testing

Memory impairment not enough to justify testing accommodations, court rules

Issue: Grounds for receiving test accommodations

A doctor whose memory impairment made it difficult for him to take multiple-choice exams was not entitled to his requested disability accommodations on a board certification test because he still had average test-taking abilities and because the accommodations would fundamentally alter the nature of the exam, a federal district court in Pennsylvania ruled November 6 (*Rawdin v. The American Board of Pediatrics*).

While in school in the late 1980s, pediatrician David Rawdin had suffered from a brain tumor and, after receiving treatment and surgery, he found his memory impaired; he was unable to properly process information without considering its larger context. As a result, he began having trouble processing multiple-choice tests.

Although his affliction did not prevent him from successfully attending medical school, Rawdin twice failed a section of the United States Medical Licensing Examination, known as the USMLE; for his third try, he was granted testing accommodations. This time, he passed the test and was granted a license in Pennsylvania, where he practiced for a number of years as a pediatrician without trouble and was, by all accounts, an excellent physician.

Unfortunately, the hospital that employed Rawdin requires that its physicians become board-certified. Rawdin sought certification from the ABP but was unable to pass its exam. As a result, he was fired.

During the hearing, Rawdin provided an explanation of his trouble:

"When I read the question, and I saw the answers, my mind could reason answers for each of the answers—correct answers. And meaning that, these—these exams, what it says in their literature and whatever you read about them, were designed for one right answer . . . . My brain needs live performance for that, so I can—like a real setting, so in a sense, I could ask the questions. I could verbally talk to the person. I could see their reaction. I could feel the room, the person and everything. Those aren't present, so I only have my mind to rely on, and my mind is reasoning answers for those questions, which actually could be construed as being correct. They just weren't the absolute correct one, because I didn't have all the information."

Board certification is an important credential in pediatrics; after his termination, Rawdin encountered difficulty finding work, as most hospitals require the credential.

Rawdin then applied for testing accommodations with the board and was granted similar accommodations to those he had received on the USMLE, primarily extra time. He had requested further accommodations–advance knowledge of the exam questions and an alternate essay format–but was denied those.

In response, Rawdin filed a suit seeking a court order to force the board to either provide the accommodations or to grant him certification without passage of the exam. The case went before Judge Juan Sanchez of the US District Court in Philadelphia.

After testimony from a former ABP examiner, Judge Sanchez determined that the test questions contained all the pertinent information a test-taker would need to provide an answer and that "Rawdin's impairment should not impact his ability to take the exam."

Sanchez also accepted the board's argument that changing the test format for Rawdin would be extremely difficult and costly, given the time and money put into the existing test.

While Rawdin did suffer from an impairment of his brain's memory retrieval system, Sanchez ruled, and while test-taking fell under the umbrella of the statutory term "major life activity," making it relevant for the Americans with Disabilities Act, Sanchez found that Rawdin's impairment did not substantially limit that area of his life; thus he could not be considered "disabled" under the law. While his overall IQ indicated that Rawdin should perform better on the exam, his test-taking abilities were still no worse than the average person's.

The discrepancy between Rawdin's intelligence and his test scores, Sanchez wrote, "is not enough to qualify Dr. Rawdin as disabled because the court must compare his test scores and test-taking ability against the general population and not against his own expected capabilities . . . While the Court does not doubt Dr. Rawdin's struggles with the Exam, the law requires a substantial limitation in comparison to most people."

And, Sanchez continued, even if Rawdin's impairment made him disabled, his requested accommodations would not be reasonable because they would be prohibitively costly and would fundamentally alter the nature of the test.

"While the Court expresses its admiration for what Dr. Rawdin has accomplished," Judge Sanchez concluded, "it is bound by the limits of the law and finds that his failure-to-accommodate claim fails and he is not entitled to injunctive relief."

Discipline

Did board members conspire against a dentist? A trial may decide

Issue: Alleged misuse and manipulation of discipline process

A district court was legally wrong when it granted summary judgment against a dentist who charged his license was revoked through misuse and manipulation of state dental board proceedings by other dentists, the Court of Appeal of Louisiana, Second Circuit, ruled November 20, 2013.

Noting that there is a "plethora of disputed facts" in the case, the court remanded the case to the district court for further proceedings. "The unresolved issues preclude the grant of summary judgment," the court said.

In the case (*Haygood v. Dies*), dentist Ryan Haygood alleged that another dentist, members of the state board, and investigators conspired to deprive him of his dental license by defamation, malicious prosecution, and unfair trade practices. A key statute on which the case hinges is LUTPA, the Louisiana Unfair Trade Practices Act, which creates a right of action for any person who suffers any ascertainable loss for a violation of the statute.

Among the items of evidence in the complex case are cell phone records of calls by Dies to board members, emails from a broker to Dies allegedly regarding Dies' potential purchase of Haygood's practice, and a deposition by one of the investigators stating that Dies bragged to her that he was "in charge" of the investigation and "couldn't be touched." Dies has denied a competitive interest in stopping Haygood, denied the allegations that he ever attempted to buy Haygood's practice, and asserted that Haygood could not prove the contents of Dies' numerous phone calls to board members. Dies also contends that board proceedings cannot be construed as commerce and thus LUTPA does not apply.

Haygood opened a practice in Bossier City in 2005, conducting an aggressive advertising campaign. When the Louisiana State Board of Dentistry opened an investigation into Haygood's treatment of patients and dental plans, Haygood suspected that another dentist whom he regarded as his direct, primary competitor, Ross H. Dies, whose practice was one mile away, had conspired with board members to trump up complaints.

According to court records, the board sent two investigators to Haygood's office, who posed as patients with false symptoms. Those investigators are included as defendants in the suit filed by Haygood.

After the dental board found Haygood had committed eight violations, it imposed maximum fines and costs totaling over $173,000, and Haygood relocated out of state, filing suit September 26, 2011 against Dies, the board, and the investigators.

According to Haygood's complaint, the board's actions were zealous and exceeded its authority including hiring unlicensed investigators to work as dental hygienists at his office, offering them immunity for testifying against him, and retaining Dies as an expert to evaluate complaints.

As the court notes, "the ensuing litigation has been complex." But in brief, in 2012 the Fourth Circuit Court of Appeal overturned the decision to revoke Haygood's license, citing gross due process violations by the board, including the board's attorney having overstepped his bounds in the investigation.

In its November 20 decision, the Louisiana Court of Appeal said that the Fourth Circuit ruling—which suggests the potential of a corrupted investigation and a strong inference that other members of the board engaged in the conduct attributed to Dies—plus the large number of contested issues of fact in the case, make summary judgment "simply inappropriate." If some of the allegations regarding Dies' behavior are proved, the court added, they "would strongly suggest that Dr. Dies's conduct was motivated less by altruistic concern for the public than animus to suppress a

competitor. They would also prove that other board members agreed with Dr. Dies to engage in conduct to accomplish these objectives."

The allegation "that a direct, primary competitor may have initiated a board investigation, served as an expert, and rendered spurious opinions that resulted in revocation of the competitor's license," remains to be resolved, the court said in reversing and remanding the case to the district court.

Stop making disability a reason for discipline, sunset review says

Issue: Qualifications for licensing board membership

Colorado's dental practice act has a problem, say state sunset reviewers: If a dentist or dental hygienist has a condition that "significantly disturbs their cognition, behavior, or motor function" and may impair their ability to practice safely, they may have to enter into an agreement or practice limitation with the board.

But those orders are considered discipline and become part of the licensee's permanent record. The state Department of Regulatory Agencies, in its October 15, 2013, review of the state Board of Dental Examiners, says it does not believe this component of the law is quite fair. "Being injured in a car accident, suffering a stroke, or receiving a diagnosis of bipolar disorder is fundamentally different from committing an act that constitutes grounds for discipline under the law."

"It seems unjust for a dentist who successfully manages bipolar disorder with medication to be included in the same category as a dentist who has defrauded a patient. Not only does this stigmatize the person with the condition, it can affect his or her ability to participate in provider networks and can increase malpractice insurance rates."

The reviewers recommend that the board establish that a dentist's or dental hygienist's failure to properly address his or her own physical or mental disability is grounds for discipline, and authorize the board to enter into confidential agreements with licensees to address their respective conditions.

The state medical board in Colorado has already been authorized to make these agreements since 2010, as have boards regulating acupuncturists, physical therapists, mental health professionals, pharmacists, and massage therapists. As a result, "Simply having a physical or mental condition or illness is no longer a reason to impose discipline."

With the medical board, as long as the physician notifies the board, enters into a confidential agreement outlining the measures to be taken to assure safe practice, and adheres to the agreement, there is no violation of the practice act, and the agreement does not appear to be reportable to the federal National Practitioner Data Bank. Licensees subject to discipline for alcohol or substance abuse are not eligible to enter into the confidential agreements, the reviewers note.

Sunset recommendation: Drop ban on board members with past criminal conviction

People who have criminal convictions or who have been disciplined in the past should not automatically be barred from being board members, Colorado state sunset reviewers say in their 2013 review of the state dental board. The dental board should drop this blanket provision, the review recommended.

Not only is this provision unusual, the reviewers point out, but it could automatically disqualify people otherwise qualified to serve on the board—e.g., someone who had successfully completed board probation 15 years ago.

Criminal history must be disclosed anytime one applies for a position on a state board or commission, so the governor would be able to decide whether he or she wishes to appoint the person based on his or her history. "The governor should have maximum flexibility in evaluating potential board members," the sunset review states.

Not just bipolar disorder but character issues caused license denial

Issue: Applicant screening for mental health, character

Concerns about an applicant's character, in addition to concerns about his mental health, were enough to justify the denial of his license application, the Supreme Court of South Dakota ruled December 18. The court dismissed the appeal of a bar applicant who claimed the state's Board of Bar Examiners had denied his license application because of his diagnosis of bipolar disease (*In re: Application of Henry*).

In March of 2009, the applicant, a law graduate named Jacob Henry, visited a counseling center at the University of South Dakota, where he was a law student, to seek help for anxiety and relationship problems. The symptoms described by Henry eventually led to a diagnosis of bipolar disorder; as a result, he began taking medication and seeing a counselor.

An individualized assessment of an applicant with a history of bipolar disorder is necessary to protect the public, the court said. Courts have routinely upheld bar application questions that ask whether an applicant has been treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder within a specific time frame. The rationale for these inquiries is that these disorders may affect the person's ability to practice law and show regard for ethical concerns, possibly posing a risk to clients who often entrust an attorney with their livelihood, freedom, or even life.

For reasons that are unclear, Henry eventually stopped using his medication and later discontinued his counseling. While he did not seem to have a recurrence of his problems, twice in early 2010 he was arrested for driving with a high blood alcohol content and pleaded guilty to a charge of driving under the influence.

In 2012, Henry applied to take the South Dakota bar exam. Shortly after completing the exam, he took advantage of a new health insurance policy, acquired through his employer, and visited a health clinic to follow up on his earlier problems and because he was experiencing of a period of depression.

Although an evaluation by the clinic determined that he did not likely suffer from bipolar disorder, a doctor gave Henry a prescription and recommended counseling. But, after determining that the level of his problems did not merit the trouble, Henry declined to see a counselor and discontinued the medication due to its negative side effects.

Unfortunately for Henry, the South Dakota Board of Bar Examiners did not approve of his decision to forego treatment. Despite the fact that Henry had passed the state bar exam, the board denied his application to the bar, noting concern over his decision not to seek treatment, and stating that it believed he had improperly withheld some of his mental health records and had disrespected board members. The board was also concerned over the lack of judgment that led to the DUI.

Henry appealed the judgment, claiming that the board had denied him entry to the bar based on his diagnosis for bipolar disorder—an action he claimed violated the Americans with Disabilities Act—and the case went to the state's supreme court.

Because of the uncertainty of his diagnosis, the court found that Henry was not, in fact, disabled. But against the arguments of the board, it found that the ADA nevertheless could apply because the board seemed to perceive that he was bipolar.

However, whether or not the board believed Henry to be mentally ill soon became a moot point. The court denied his appeal, noting that the board had made its decision based on several concerns about Henry's character. Although it had cited concern over his mental health, "at no point did the board state that Henry could not practice law in the State of South Dakota solely because of his diagnosis for bipolar disorder," wrote Chief Justice David Gilbertson.

The factors used by the board—its belief that he withheld information and its concern over the lack of judgment showed by the two DUI arrests—"when viewed in totality, are significant."

"The cumulative effect of Henry's lack of candor, poor judgment, criminal record, and unreliability, paired with the unresolved issues regarding the status of Henry's mental health," Gilbertson concluded, "justify the Board's decision."

Actions "bringing medical profession into disrepute" were not proven

Issue: Evidence required to establish a violation

A doctor who engaged in a verbal altercation with a patient's father and grandmother in an outpatient burn center was not shown to have violated Nevada state law by actions bringing the medical profession in disrepute, the Supreme Court of Nevada said in a December 19 decision (*Tate v. State of Nevada Board of Medical Examiners*).

Reversing a trial court which had denied the physician's petition for judicial review, the state supreme court said there was a lack of evidence that Tate's actions brought the medical profession into disrepute, and remanded the case for the trial court to reconsider.

The incident occurred when the physician, James S. Tate, Jr., and the patient's relatives got into a heated discussion over his care, profanities and insults were exchanged, and Tate was alleged to have poked the grandmother's chest, although witness accounts differed.

An investigative committee of the Nevada medical board filed a complaint against Tate, charging that he had violated NRS 630.301(6) by engaging in disruptive behavior that negatively interfered with patient care and violated NRS 630.301(9) because his actions brought the medical profession into disrepute.

Tate filed a complaint challenging the constitutionality of the "disrepute" section of the law, which indefinitely deferred the agency action, but the investigative committee scheduled a prehearing conference, and the hearing officer recommended dismissal of count one and allowed count two to proceed to hearing.

The hearing officer found the evidence did not support the account of the patient's relatives and that they themselves said Tate's conduct did not bring the medical profession into disrepute in their eyes, "but rather only lowered their opinion of Dr. Tate." Medical staff who observed the incident admitted that upsetting, heated exchanges between doctors and families were "not uncommon in emergency and trauma settings."

While Tate's "inappropriate response escalated the situation, the hearing officer recommended against finding a violation by Tate and suggested that the board consider adopting an ethics code to clarify "disrepute." The board, however, did find a violation, fined Tate $1,000, imposed a public reprimand, and required him to take continuing medical education credits.

On appeal, the court noted that no statute or administrative regulation defines "disrepute," but there must at least be some evidence from which to infer a decline in the public's perception of the profession. Here there was no evidence of that by witnesses and there was uncontroverted testimony that Tate's actions were not uncommon in the high stress of a trauma center. For these reasons, the court found the board's decision to be "clearly erroneous," and ordered the trial court to review the decision.

Former ringside doctor loses argument that regulators were biased

Issue: Standards for evidence of bias in discipline decisions

A former boxing-ringside doctor lost his appeal of the revocation of his medical license when an Illinois appellate court in Chicago rejected the doctor's claim that a state regulatory official was biased. The doctor claimed that the

official, formerly in charge of medical investigations and prosecutions, had requested free medical care while attending fights at which he was practicing. The appellate court ruled the doctor had failed to provide concrete evidence of the alleged bias (*Giacchino v. Department of Financial and Professional Regulation*).

In 2010, department officials accused physician Joseph Giacchino of prescribing anti-anxiety drugs and painkillers for non-medical purposes, providing drugs to patients who intended to sell them, and trading drugs for sex with patients.

At Giacchino's discipline hearing, one former patient testified that the doctor had demanded and received sexual favors in trade for prescriptions. The patient, who blamed her brother's overdose death on prescriptions issued by Giacchino, had agreed to wear a wire during an visit to the doctor's office, a tactic that successfully captured Giacchino in the act; at one point he told the patient to "take your pants off and get on the table."

Several other violations of controlled substance policy were brought to light at the hearing: Giacchino had provided drugs to his patients on request, without legitimate purpose, had disregarded any safety or addiction precautions, and had post-dated prescriptions, a federal crime.

Following the discipline hearing which contained specific testimony and recorded evidence a patient obtained by wearing a wire, the DFPR revoked Giacchino's license. Giacchino appealed, and the case made its way to the Appellate Court of Illinois in Chicago, which issued a decision written by Justice Mary Rochford.

Giacchino used his appeal to accuse DFPR official John Laguttata, Chief of the Division's Administrative Law Judges, of malfeasance in his case. The accusation went back to Giacchino's time as a ringside doctor at boxing matches; Giacchino claimed that Laguttata, who at the time was in charge of investigation and prosecution of licensees, had requested free medical services from Giacchino.

Giacchino said that later, when he was being investigated by journalists with the *Chicago Tribune*, Laguttata had told Giacchino not to defend Giacchino's license in any action, as the DFPR official was running for a judge position and did not want any bad press. Lagutatta's position as Chief ALJ, during Giacchino's discipline case, deprived him of a fair hearing, the doctor claimed.

Unfortunately for Giacchino, he had waited until his appeal to formally make his bias accusations against Lagutatta. The court, noting this, ruled that he had failed to raise the issue in a timely manner and dismissed the claim. Even if Giacchino had successfully argued the claim, Justice Rochford wrote, he had failed to provide any actual evidence of bias on Lagutatta's part.

Giacchino also challenged the Department's factual and legal interpretation as incorrect and argued that the revocation of his license was excessive, but he failed to convince the court to overturn the lower decisions on any of these grounds. With the appeal dismissed, the doctor's license revocation remained in effect.

If patient didn't know surgeon was abusing drugs, was consent 'informed'?

Issue: Intersection of professional discipline and negligence lawsuits

A patient signs a consent form for spinal surgery. But later he finds out that the state medical board reprimanded the neurosurgeon for substance abuse during the period of the surgery. Does the patient's consent form qualify as true "informed consent"? And if not, could the patient make the case that the surgery actually constituted medical battery?

That was the question at the heart of *Rice v. Brakel,* and it formed an interesting twist on professional licensing and tort law. But in a September 12, 2013 opinion, the Court of Appeals of Arizona rejected the patient's theory that his surgeon had committed medical battery.

When the patient in the case, Jay Rice, underwent spinal surgery in 2007, complications ensued and one of his doctors concluded that there had been "probable operative injury" to a nerve root and a post-operative scar affecting the nerve root. Three years after the operation, Rice happened to check the state Board of Medical Examiners' website to see if his surgeon, Arlo Brakel, had a disciplinary history with the state.

It turned out that Brakel did have a dependency on unprescribed prescription drugs, including morphine, Dilaudid, and Percocet, around the time of Rice's surgery, and that sometime after the surgery Brakel was reprimanded by the board and placed on probation for five years. Brakel had obtained some of his drugs by stealing them from his patients.

Rice's lawsuit charged Brakel and his practice group with battery, negligence, and breach of contract. Brakel, the patient said, "impliedly represented that he was not illegally taking prescription drugs during the relevant time period" and this was a sufficient misrepresentation to vitiate his consent. The trial court, however, granted the doctor's motion for summary judgment, and Rice appealed.

The appeals court found for the surgeon as well. Rice cited no evidence that Brakel had misrepresented the nature of the procedure to him, that he did not generally consent to Brakel performing the procedure, or that Brakel exceeded the scope of the procedure, nor did Rice have evidence he would not have consented to the surgery had he been informed of Brakel's drug dependency, the court said.

Court upholds revocation of oncologist for spreading hepatitis B

Issue: Standards of evidence of negligence

A license revocation and $370,000 judgment against an oncologist whose unsanitary office practices caused an outbreak of hepatitis B in his patients were properly ordered, the Appellate Division of the New Jersey Superior Court held December 5 (*In the Matter of Dara*).

The New Jersey medical board filed a complaint against oncologist Parvez Dara in 2009, accusing him of maintaining unsanitary conditions in his practice and of mishandling toxic substances. One hundred three of Dara's patients contracted hepatitis B—which is transmitted by exposure to infected bodily fluids—after being treated in his office.

The physician argued that the board had applied a lesser criterion of guilt than the usual "preponderance of the evidence" standard, which requires that the violations were more probable than not. The basis for this argument was the board's rejection of the ALJ's recommendations, which the judge had based on the fact that investigators could not draw a definite, concrete connection between Dara's practice habits and the infections. Instead, the board relied on what it termed "scientific epidemiologic concepts of causal interference." This, Dara claimed, had created an alternate and impermissibly low standard.

State investigators had discovered egregious lapses on the part of Dara's office staff: Soiled gloves used for invasive procedures were often not changed and were often used again for procedures intended to be sterile, needles were often taken out of their sterile packaging early; medicines were not properly stored, waste containers of sharp medical tools were not properly handled, records of waste disposal were lacking, and the office lacked written infection control policies.

Medical tests confirmed that 11 of Dara's patients were infected with a genetically identical strain of hepatitis B, which they had contracted by patient-to-patient infection at his office. After a series of hearings, the board revoked Dara's license and imposed fines and costs of more than $370,000.

In issuing its decision, the board rejected the finding of an administrative law judge that the state did not possess enough evidence to show that Dara had been the cause of the infections. The board explained the decision by noting that the ALJ, because of his lack of background in medicine, was unable to draw accurate connections that the board members, with their medical expertise, could better understand.

In his appeal, Dara challenged this decision, calling it arbitrary and unsupported by the evidence. The court, however, ruled that, based on longstanding law, the board was entitled to rely on its own expertise. Combining the evidence of sanitary lapses at Dara's office with the fact that 11 of his patients had contracted an identical strain of hepatitis B, the board's decision met the standard of "more probable than not."

Dara also argued that the revocation of his license was overly harsh. However, the court, in affirming the revocation and the $370,000 penalty imposed, noted Dara's extensive record of negligence.

Rejecting bias claim, court restores revocation of licensee with 120 violations

Issue: Standard for evidence of bias in discipline decisions

Citing a collection of errors by a trial court that had thrown out a license revocation for bias on the part of the Missouri funeral board, an appellate court reinstated the revocation imposed on a funeral director.

In the November 5 decision, the court noted that the funeral director had amassed 120 professional violations (*Buescher Memorial Home v. Missouri State Board of Embalmers and Funeral Directors*).

In 2008, the Missouri Board of Embalmers and Funeral Directors filed a complaint against Barbara Buescher, who ran a funeral home in Jefferson City and held both a funeral director and an embalmer license. She was accused of several violations of the professional code, including incompetence, the misuse of money, and violations of professional trust.

When Buescher failed to respond to the complaints or any notices from the state's Administrative Hearing Commission, she defaulted on the claims and the Commission entered a judgment finding that Buescher had committed 120 professional violations.

Buescher then failed to respond to motions during the discipline phase of her hearing; as a result, the board revoked her license.

At this point, Buescher seems to finally have taken notice of the situation and filed a request for review of the decision with a state court. That court issued a ruling in her favor, finding that two of the board members, who had also served as complaining witnesses and who had engaged in or inquired into business dealings with Buescher—had been biased. The court put a hold on the revocation and remanded the case to the board to reconsider the discipline it would impose on Buescher.

The board appealed, and the case went to a state Court of Appeals in Kansas City, which issued a decision written by Judge Mark Pfeiffer.

The appellate court did not agree with the lower court's assessment of bias on the part of the board members. One of the two members, Pfeiffer noted, had recused himself from the decision and the other had only inquired about business with Beuscher four months after her discipline hearing.

"This is the extent of the supposed 'clear and convincing' evidence that the 'administrative body was improperly influenced' by actual bias or the probability of bias when it revoked Licensee's license in the face of over 120 *admitted* violations in the categories of incompetence, gross negligence, violations of professional trust and confidence, monetary misconduct, and utter disregard and refusal to cooperate in the investigative process."

No evidence existed, Pfeiffer wrote, to show "that the board had *ever* extended any discipline less than the discipline it imposed in the face of over 120 violations of the sort Licensees admitted to" and no evidence that the board members had acted on biases.

"Instead, the design of Licensees' evidence was to establish the *appearance* of impropriety with speculative innuendo and to shift the burden of proof to the Board to

disprove bias as opposed to Licensees' obligation to *prove* bias by *clear and convincing* evidence."

The lower court had erred, he stated, in abusing its discretion by presuming that the board's decision was invalid and by using a standard for evidence of bias that was less than "clear and convincing."

"The collection of errors made by the circuit court constitute[d] an abuse of discretion," Pfeiffer concluded. Its judgment was overturned and the revocation reinstated.

Veterinarian suspended for fatal spine manipulation loses appeal

Issue: Standard for "unduly harsh" disciplinary sanction

The fact that his mistakes were unintentional and not proven to have hurt an animal was not a basis to reverse a veterinarian's two-month suspension, said an appeals court in Arkansas November 20. The court dismissed the appeal of the suspension which was imposed after a client accused the veterinarian of improper conduct in the death of her dog from spinal damage (*Zepecki v. Arkansas Veterinary Medical Examining Board*).

The Arkansas veterinary board initially suspended the license of Robert Zepecki for six months after a client, a nutritionist named Trisch Marina, filed a claim that Zepecki had sedated her diabetic dog, Nikki, against Marcino's wishes during a teeth cleaning in March of 2006, and that the veterinarian performed chiropractic adjustments on the dog that injured the animal so severely that it was unable to walk.

To remedy the injury, and with the permission of Marcino, Zepecki had one of his veterinary assistants take Nikki to a chiropractor who performed further adjustments on the dog. Unfortunately, the chiropractor was not licensed to treat animals, which required Zepecki to be present during the treatment, and he was not.

After Nikki returned home, Marcino noticed that the dog was bleeding. A second veterinarian informed Marcino that Nikki was dying as a result of damage to her spinal column and the dog was euthanized in April.

A complaint to the board from Marcino followed Nikki's death, and the suspension of Zepecki's veterinarian license came soon after. Besides the chiropractic treatment alleged to have harmed the dog, the board also cited Zepecki for record-keeping failures, as he had failed to keep adequate records of Nikki's care. Zepecki appealed to a state circuit court and won an overturn of two of the six violations found by the board, although the court upheld the length of his suspension.

Zepecki appealed again—this time joined by the board, which did not like the reversal of the two violations—and the case went to a state Court of Appeals, which issued another favorable ruling for Zepecki, striking two more of the charges and returning the case to the board for a reconsideration of the sanctions.

On remand, the board reduced the suspension to only two months, but it also fined Zepecki $6,000. The doctor, still unsatisfied, appealed again, and the case came back to the Court of Appeals.

In his appeal, Zepecki argued that the sanctions imposed by the board were unduly harsh, claiming that his transgressions were unintentional and had not demonstrably affected the health of the dog.

The court did not agree. "There is no requirement that a veterinarian act willfully or that an animal be injured in order for there to be a violation of the rules governing the practice of veterinary medicine," wrote Judge Kenneth Hixson. Regardless of whether Zepecki was aware of the requirements regarding treatment of animals by

non-veterinarian chiropractors, the rules still applied. The suspension and the fine were affirmed.

Insurer's doctor could not be disciplined because he owed no duty of care to patient, court rules

Issue: "Duty of care" standard in discipline for negligence

A chiropractor who had been hired by an insurance company to provide an independent medical examination for an insurance case owed no duty of care to the patient, said an appeals court in Michigan December 3. The court reversed a disciplinary decision by the state chiropractic board placing the licensee on probation for negligence (*Bureau of Health Professions v. Serven*).

Chiropractor Michael Serven was hired by State Farm Insurance to perform an independent examination on a patient involved in a car crash in 2004. After the exam, Severn reported his opinion that the patient was not disabled from the injuries he sustained in the accident and State Farm cut off the patient's benefits.

After the insurance company denied claims for payment from the patient's regular chiropractor, the chiropractor filed a complaint against Severn. An action from the state's Attorney General followed, charging Severn with professional negligence because the chiropractor had not reviewed the patient's entire treatment history and a lack of good moral conduct, a charge which stemmed from comments Severn made asserting that the complaining chiropractor had a record of providing unnecessary treatment.

A disciplinary subcommittee of the state chiropractic board agreed with the charges and, after a hearing, Severn was placed on probation for one year.

Severn appealed the decision and the case went to the Court of Appeals of Michigan, which reversed the discipline.

In his appeal, Severn argued that, because State Farm had hired him to perform the examination, he owed no duty of care to the patient; the court agreed. Because the examination had been performed as an independent exam for an insurance case, "the only duty [Severn] owed the patient," Judge Riordan wrote, quoting the relevant law, "was 'to perform the examination in a manner not to cause physical harm to the examinee.'"

The court also threw out the subcommittee's finding that Severn exhibited a lack of good moral character when he disparaged the patient's regular chiropractor. "Good moral character," Judge Riordan noted," is defined as 'the propensity on the part of the person to service the public in the licensed area in a fair, honest, and open manner."

"Here, an alleged comment during an informal interview that [the chiropractor] had a track record of performing medically unnecessary treatment does not constitute behavior that was unfair, dishonest, *and* secretive. In fact, respondent was attempting to be candid with [the board's] investigation, as he honestly communicated his opinion, based on his experience."

Different standards of supervision lead to partial reversal of discipline

Issue: Parameters of "direct supervision" in discipline

The Supreme Court of Appeals of West Virginia, on November 5, partially overturned a decision by the state physical therapy board to revoke a therapist's license for failing to adequately supervise his assistants after the board admitted its own error in applying a regulation (*Sorongon v. West Virginia Board of Physical Therapy*).

Ferdinand Sorongon, the licensee at the center of the case, owned two physical therapy clinics in the state. In 2008, after the West Virginia Board of Physical Therapy received a complaint that Sorongon was failing to adequately supervise his physical therapy assistants and aides, the therapist entered into a consent agreement in which he admitted to lax supervision and inappropriate delegation of his responsibilities and agreed to a two-year probation period for his license.

Part of Sorongon's argument was that the board applied the wrong standard. Current West Virginia regulatory interpretations of a phrase in the relevant statute–"direct supervision"–hold that close observation or a "direct line of sight," is necessary. But at the time of the surprise inspection, the rule had not yet specifically been interpreted in that way, only as requiring the therapist's presence in the "immediate area."

During the probationary period, a board representative made a surprise visit to one of the clinics. As the result of improprieties the representative observed during that visit, Sorongon found himself facing new charges. After a hearing, the board revoked his license and ordered him to pay the legal costs of the case.

Sorongon appealed and the case eventually rose to the state supreme court. In his appeal, Sorongon claimed that the board had erred when it held that a licensed physical therapist assistant who worked at one of his clinics required his direct observation while treating patients. The board admitted its error, noting that Sorongon needed only to be present in the building while his licensed assistants treated patients, and the court dismissed the charge.

Sorongon also claimed that the board had erred when it disciplined him for failing to maintain a "direct line of sight" with one of his unlicensed assistants while she was treating a patient.

The Court disagreed with this claim. "Giving the term 'immediate treatment area' its ordinary and familiar meaning in the context of a physical therapist's direct supervision of a physical therapy aide, the term clearly means that the physical therapist must be close enough to the physical therapy aide to either witness or hear her actions and to communicate with her as she treats a patient."

Because of the reversal of the finding that Sorongon had failed to supervise his licensed assistant, the case was remanded to the board to reconsider the discipline to be imposed.

Court rules attorney fees not "costs," rejects $100,000 fee award

Issue: Awards of attorney fees in disciplinary cases

An appellate court in Louisiana rejected the state accounting board's imposition of $100,000 in attorney fees against an accountant whose license it revoked for embezzling hundreds of thousands of dollars in tax money. In the December 18 ruling, the court said legislative changes made the attorney fees award invalid (*John Davis v. State Board of Certified Public Accountants of Louisiana*).

In 2003, accountant John Davis, whose license was the focus of the discipline decision, entered into a business partnership with two of his clients to open a series of drugstores, agreeing to provide in-house accounting services in exchange for equity in the companies.

In 2007, an outside accountant hired to provide a valuation of one of the pharmacies discovered that the businesses had under-reported their income for sales tax purposes. Davis was then fired as the pharmacies' accountant and the businesses paid several years' worth of tax corrections, which for one pharmacy totaled more than $330,000.

The Louisiana accounting board began an investigation of Davis and eventually concluded that he had embezzled the tax money and attempted to hide the thefts, as well as committing several lesser professional violations.

After a discipline proceeding, the board revoked Davis' license and imposed approximately $160,000 in fines and attorney fees. Davis appealed and the case went to a circuit court, which upheld the revocation but dismissed the award of attorney fees. Both Davis and the board appealed that decision, and the case went to the Louisiana Court of Appeals in New Orleans.

The court quickly rejected Davis' appeal arguments, which had been based primarily on the credibility of the evidence against him—noting that the evidence supported the discipline—but upheld the dismissal of the attorney fees imposed on Davis by the board.

A change in legislation prompted the dismissal. At the time the board assessed the fees against Davis, Louisiana law allowed it to impose "the costs of any proceedings" on a licensee. Unfortunately for the board, in 2013—after the proceedings had concluded—the state legislature changed the law to allow the board to impose "all costs of board proceedings, including . . . attorney fees."

Although the board had argued that attorney fees were included in the "costs" mentioned by the earlier statute, the different, more explicitly-inclusive language of the new law—as well as the explicit mention of attorney fees in other sections of the old law—precluded the imposition of attorney fees prior to its passage. "The inclusion of attorney fees elsewhere," wrote Judge Paul Bonin, "precludes their implied inclusion as part of the "costs" of the adjudication proceedings against Mr. Davis."

Licensing

Top ten reforms Georgia legislators want in professional licensing *(from page one)*

The committee recommended:

Minor investigations by central agency Some boards allow the PLB Division staff to handle minor investigations of licensees without requiring each violation to be brought before the board. This practice should be established by all boards and might reduce the need for meeting time.

All applications and renewals online plus more paperless options This will eliminate costs associated with paperwork and enhance efficiency, the panel said. Boards and central agency staff should go paperless for retention and printing of records, notifications, etc.

Mandatory website Boards should create and maintain a website that includes an online manual showing the board's responsibilities, rules, and regulations, plus frequently asked questions that cover inquiries to the Secretary of State's call center. These measures will reduce staff workload by reducing calls, said the panel.

More efficient technologies Utilizing videoconferencing for meetings, which could be accomplished by partnering with other state agencies to establish a statewide accessible network, would reduce travel expense to Macon for board meetings.

National testing PLB administrators should pursue all national organization testing/certification options and partnerships to minimize the need for state sponsored activities. They should also maximize state reciprocity to reduce redundant paperwork for applicants and administration.

Combined boards The Secretary of State should recommend to the legislature any existing boards that should be combined to reduce costs. However, the panel noted that a 1992 report by the Governor's Commission on Effectiveness and Economy in

Government would have decreased the number of boards from 38 to 23 but would have only saved the state $80,000.

Extended renewal periods/concurrent renewals Some boards have expressed interest in extending renewal periods from two to four or six years, which the General Assembly could authorize. The committee also recommended having license renewal periods for individuals with multiple licenses occur concurrently to reduce confusion.

Civil fines for unlicensed practice Investigators from the Secretary of State currently may only issue Cease and Desist Orders. "By the time law enforcement has a chance to follow up, the unlicensed practitioner has completed the job and moved to another location," the committee said. It recommended that the legislature authorize a civil fine structure for unlicensed practitioners.

The committee called on the Secretary of State to undertake a performance review of the professional licensing board structure, account for any changes made, and report back to the legislature by December 1, 2014.

Ethics

CIA doctors' roles in post-911 interrogations "eviscerated" ethical standards, report says

The role that licensed health professionals played in detainee interrogations during and after the American invasions of Iraq and Afghanistan seriously undermines professional ethics standards, according to a report released in November by the Institute on Medicine as a Profession. The report calls on state licensing boards to ensure that their professional regulations are enforced for violations by licensees in the military.

The paper, *Ethics Abandoned: Medical Professionalism and Detainee Abuse in the "War on Terror,"* presents the findings of a task force formed by the Institute in 2010, exploring the role that licensed medical professionals played in the controversial interrogation techniques employed by the military and intelligence agencies of the United States following the attacks on the World Trade Center and the Pentagon September 11, 2001.

In its own words, the organization sought "to examine what is known about the involvement of health professionals in infliction of torture or cruel, inhuman, or degrading treatment of detainees in U.S. custody and how such deviation from professional standards and ethically proper conduct occurred."

The interrogation methods described by the report include many that came to light in internal government memos obtained and publicized by the news media and which read as a sort of horror story: "beatings, exposure to extreme cold, physical suspension by chains . . . sleep deprivation, constant light, . . . forced nakedness . . . throwing a detainee repeatedly against a wall . . . facial slaps . . . use of insects, and waterboarding." Sleep deprivation was, at times, approved for over a week of use on a prisoner shackled in a standing position—–naked except for a diaper–sometimes followed by another week after a short period of rest.

The report also cites documented but unacknowledged methods, primarily threats of harm to detainees and their families, intimidation with firearms, and sexual and cultural humiliation of the sort documented at the Abu Ghraib prison.

The role of medical professionals during interrogations Guidelines stated that medical professionals from the CIA's Office of Medical Services were to be present to monitor the interrogations and intervene to prevent "serious or permanent harm."

Such monitoring appears to have been necessary, due to the potential for harm created by interrogators. For example, one method of interrogation involved naked prisoners kept in environments with temperatures of 64 degrees and doused with water as cold as 41 degrees, conditions the paper's authors note risked hypothermia. And, "in the case of waterboarding" —in reference to the infamous simulated-drowning technique used as an interrogation tactic—"the guidelines advised keeping resuscitation equipment and supplies for an emergency tracheotomy on hand" for patients who ceased breathing. The guidelines noted that "any subject who has reached this degree of compromise is not considered an appropriate candidate for the waterboard, and the physician on the scene cannot concur in the further use of the waterboard without . . . consultation and approval."

Three specific elements of government conduct following the attacks affected health professionals in detention centers, the task force found.

First was the decision to deny the protections of the Geneva Conventions to combatants from Afghanistan and Pakistan by applying the labels "detainee" and "enemy combatant" and the subsequent decision by the Department of Justice to approve of interrogation methods that the task force found to constitute "torture or cruel, inhuman, or degrading treatment."

Second was the involvement, through the Department of Defense and the CIA, of medical professionals in implementing "abusive interrogation" and the breaking of hunger strikes, which the task force found "undermin[ed] health professionals' allegiances to established principles of professional ethics and conduct."

And third was the atmosphere of secrecy created to hide abusive interrogation practices, which the task force found "allowed the unlawful and unethical interrogation and mistreatment of detainees to proceed unfettered by established ethical principles and standards of conduct" and public and legal review.

Creation of interrogation techniques by medical professionals Medical professionals played a significant behind-the-scenes role in creating and developing interrogation techniques for both the CIA and Department of Defense.

The Department of Defense enlisted mental health professionals—primarily psychologists and psychiatrists—in what were called Behavioral Science Consultation Teams, which were used to develop its interrogation techniques. The teams created interrogation recommendations that included sleep deprivation, exposures to extreme noise and temperatures, and extended periods in stress positions.

The report also describes the implementation of the techniques on a detainee named Mohammed al-Qahtani, who was believed to have been linked to the September 11 attacks. Two licensed professionals, a psychologist and a psychiatrist, were involved with al-Qahtani's interrogation, which included sexual and religious humiliation and the use of a dog to terrify al-Qahtani.

Besides advising the creation of the interrogation techniques and being present to monitor the harm being done to detainees, medical professionals took an active role in the ongoing interrogation process, using psychological evaluations of detainees' vulnerabilities and reviews of their medical records to advise interrogators on how to successfully exploit any vulnerabilities. As a result, the report notes, many detainees declined to seek medical care, fearing—often correctly—that their medical records would be exploited during future interrogation sessions.

The report also details significant and systemic failures in medical care of the detainees, including overuse of drugs with significant mental side effects and failure to investigate pervasive "psychological deterioration" of detainees in the Guantánamo Bay prison.

Professional ethical restraints According to the paper's authors, the Department of Defense issued its own interpretations of medical ethics rules in order to employ medical professionals in the harming of detainees. The report notes that the Department believed that a medical professional's duty to avoid or minimize harm did not apply to professionals working in interrogation situations because the interrogations were not clinical treatment, and DoD classified licensed professionals

working for the teams as "combatants," which it claimed removed them from complying with all of their ethical duties.

"The [Department]'s position, the report notes, "undercuts the fundamental role of health professionals in society and the duties attached to that role, including non-participation in interrogation on the basis that it is inherently coercive . . . The DoD wants its behavioral science consultants to have professional qualifications, including a license for clinical practice in psychology or forensic psychiatry, but then excludes them from the full panoply of ethical norms that govern their professions and that they committed to uphold."

The report also condemns the DoD's practice of conflating professional responsibilities with general legal standards: "Unlike an interrogator, who may create stress for a detainee so long as he or she acts within legal standards, including those prohibiting torture and cruel, inhuman, or degrading treatment, a health professional has an obligation not to participate in acts that deliberately impose pain or suffering on a person."

"Replacing ethical standards with a legal one—that is, only to refrain from torture and cruel, inhuman, or degrading treatment—eviscerates the ethical standards."

Aside from urging the DoD to bring its practices in line with existing medical ethics standards, the report's authors also called on state licensing boards to ensure that their professional regulations are enforced for violations by licensees in the military: "States' non-enforcement of ethical obligations comes at a great cost, undermining professional standards, eroding public trust, and undercutting deterrence of future misconduct."

"By contrast, disciplinary accountability signals to licensees and those who employ them that the profession and institutions designed to ensure adherence to ethical obligations take violations seriously. Moreover, it empowers health professionals to resist demands by authorities to engage in acts that violate their professional responsibilities and to report abuse when they believe it has occurred."

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