Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue:

Discipline

Don't ask/don't tell: Feds keep partial muzzle on reporters of discipline data

Issue: Public information on malpractice settlements

For more than two and a half years, journalists who consult the National Practitioner Data Bank, the federal repository of state disciplinary actions involving health professionals, have had to agree to a special condition. The Health Resources and Services Administration (HRSA), which operates the data bank, bars reporters from naming physicians and other providers they can match up with other publicly available data to identify those who have reached often confidential settlements in malpractice cases filed by patients.

It's an ongoing point of dispute among state and federal officials controlling discipline information, professional associations concerned about misuse of data, and reporters defending the public's right to know about their providers' background.

The restriction stems from a series of complaints in fall 2011 to HRSA by a Kansas doctor whose unusually large number of malpractice settlements were identified by the *Kansas City Star* based on data bank information.

See Discipline, page 6

Testing

License with an asterisk: Court okays restricted license where ADA test accommodations used

Issue: Application of ADA law to professional licensing exams

Licensing boards have the power to limit the licenses obtained through testing accommodations for disabilities, the U.S. Court of Appeals for the 10th Circuit affirmed in an April 2 decision (*Turner v. National Council of State Boards of Nursing*)

The nursing candidate whose application formed the basis of the case, Barry Turner, suffers from dyslexia. In 2009, he took and failed the NCLEX-RN, the national nurse licensing exam. Turner blamed his failing grade, in part, on anxiety caused by the format of the exam, which adjusts the difficulty of the questions seen by individual candidates based on their in-test performance.

Originally, he had sought accommodations for the test. But after being informed that a license granted after a test passed with the aid of accommodations would be "restricted and limited," Turner declined to follow though on his request and took the test without accommodations.

When he received a failing grade, Turner attempted to appeal the result to the board and the National Council of State Boards of Nursing, which administers the test. Both rejected the request, and Turner brought suit, claiming violations of the U.S. Constitution and the Americans with Disabilities Act.

In his suit, Turner claimed that the testing organizations had violated his constitutional rights to equal protection when they informed him that it would restrict his license were he to take the test with accommodations. The board, he argued, had no rational basis for believing that his dyslexia would impair his nursing practice, and thus had no rational basis for restricting his license.

The court did not agree. "Legitimate public safety concerns could provide a rational basis for Kansas to restrict the license of a nurse who had to take the licensing exam with accommodations in order to pass it," wrote Judge Carlos Lucero. Despite his assertions about his dyslexia, Turner had failed to rebut this reasonable fear, and the court dismissed his suit.

Licensing

Florida says "No" to licenses for undocumented immigrants

Issue: Immigration status and entry requirements for licensure

The Supreme Court of Florida, in a March 6 decision, ruled that the state's Board of Bar Examiners may not grant a license to law school graduates whose parents brought them here illegally as children (*Florida Board of Bar Examiners Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Florida Bar*)

The ruling was in response to an applicant who had recently graduated from a law school in the United States. Brought to the U.S. legally as a child on a tourist visa, he overstayed his visa and was still living in the country in an unauthorized status. The board asked the Florida Supreme Court to decide whether illegal-immigrant applicants may be admitted to the bar.

Under the Personal Responsibility and Work Opportunity Reconciliation Act, a 1996 federal law, state licensure of undocumented immigrants is barred. In this case, the federal Department of Justice weighed in, arguing that Florida could not provide the license.

Although the federal law allows states to circumvent the restriction by enactment of a state statute expressly authorizing benefits, Florida had never passed such a law. By contrast, California, whose supreme court recently ruled that such immigrants were eligible, has passed a law expressly authorizing benefits.

Attorneys for the applicant argued that the court should accede to the executive policies of the Obama administration, which in June of 2012 announced a new policy directive, Deferred Action for Childhood Arrivals, or DACA. DACA defers deportation and grants work authorization for unauthorized individuals who were brought into the country as children.

DACA status, they argued, conferred a sufficiently legal status on the applicant to grant a license. The court, disagreeing, noted that literature from the Department of Homeland Security expressly states that DACA individuals do not have lawful status and that the directive was only a discretionary order and did not actually have the force of law and could not be the basis for a license.

Justice Jorge Labarga, while agreeing with the majority that the current state of the law forbids undocumented immigrants from obtaining licensure, showed his displeasure with the ruling in a lengthy concurring opinion. Describing the decision of

the court correct but "inequitable," Justice Labarga urged the state's legislature to use its power to enact an exception to the federal law.

In many respects, Labarga said, the applicant's life in the U.S. parallels his own. "He and I were brought to this great nation as young children by our hardworking immigrant parents . . . We excelled scholastically and graduated from college and law school . . . Both of us were driven by the opportunities this great nation offered to realize the American dream. "

"Sadly, however, here the similarities end and the perception of our accomplishments begin . . . When I arrived in the United States from Cuba in 1963 . . . my parents and I were perceived as defectors from a tyrannical communist regime. Thus we were received with open arms, our arrival celebrated, and my path to citizenship and the legal profession unimpeded by public policy decisions."

"Applicant, however, who is perceived to be a defector from poverty, is viewed negatively because his family sought an opportunity for economic prosperity. It is this distinction of perception, a distinction that I cannot justify regarding admission to The Florida Bar, that is at the root of Applicant's situation."

Privately-certified treatment providers are "licensed," court rules

Issue: Status of private certification in law

A recent state law that requires insurance companies to cover autism care provided by privately certified providers in effect grants a license to such providers, a California appellate court ruled April 23 (*Consumer Watchdog v. Department of Managed Health Care*).

The case centered around an autism therapy known as Applied Behavioral Analysis, which restores communication and behavioral functions in patients with the disorder. Although studies show the therapy to be effective at managing the effects of the disorder, the therapy was not generally recognized as medically necessary treatment until 2007, and many insurance companies denied payment for it.

ABA therapy is relatively unique in that, although treatment plans must be created by health professionals, the treatment itself can be carried out by anyone who has obtained a high school education and a certain amount of training. This fact is important, as ABA is time-intensive, often requiring more than 26 hours per week. Many of these unlicensed providers are privately certified by the Behavior Analyst Certification Board, or BACB.

Even after ABA was accepted as necessary treatment, many health plans, based on a March 2009 memorandum published by the California Department of Managed Health, which required that health plans cover ABA treatment from certified therapists, continued to deny coverage based on the unlicensed status of many providers.

In June 2009, Consumer Watchdog, an advocacy organization that often focuses on health insurance reform, filed a complaint against the Department. Seeking to force it to require insurance providers to cover ABA treatment performed by unlicensed practitioners and to disavow its memorandum, Consumer Watchdog argued that the DHMC document contradicted state law, which requires that insurance companies cover all "medically necessary" treatments.

Although the plaintiffs lost at the trial court, in October 2011 while the case was on appeal, the California legislature passed a law explicitly requiring insurance plans to cover ABA performed by qualified providers who are certified by a private national entity and unlicensed paraprofessionals working under their supervision.

The new law, which contains exemptions from state health plans, changed the outcome of the case. The Second District Court of Appeal of California in Los Angeles, which heard the appeal, ruled that, regardless of exemptions, all health plans must cover ABA provided by privately-certified professionals, regardless of the licensure requirements.

"The ABA statute constitutes legislative approval of the practice of ABA by BACB-certified providers and individuals under their supervision. That legislative approval effectively qualifies BACB-certification as a 'license' to provide ABA," the court said.

"Thus, while the ABA statute only *requires* certain plans to provide coverage for ABA by BACB-certified providers and individuals under their supervision, the ABA statute also has the effect of licensing BACB-certified providers and those under their supervision to practice ABA." The practice of the DHMC to uphold denials of coverage based on the fact that BACB providers are not licensed was no longer justified.

Competition

U.S. Supreme Court to rule on NC dental board/FTC case

Issue: Federal authority to regulate competition among service providers

The U.S. Supreme Court receives about 10,000 petitions from appellants each year and takes only 75 or 80 cases. But this year one of the cases it hears will be on a scope of practice issue.

In a March 3 order, the court granted petition for writ of certiorari to the North Carolina State Board of Dental Examiners, which has been fighting an anti-competitive practices action by the Federal Trade Commission. The board is appealing a decision by the Fourth Circuit Court of Appeal, which upheld an FTC ruling that the board improperly excluded unlicensed teeth-whitening services from the market.

The case arose in response to a series of cease-and-desist letters sent by the board to unlicensed teeth-whitening businesses and their landlords in North Carolina. The letters explained that the unlicensed services were illegal and seem to have been successful in hindering the practice.

In 2010, the FTC issued an administrative complaint accusing the board—which is composed of seven dental professionals and one consumer representative—of improperly hindering competitors of its dentist members.

A Commission ruling prohibited the board from issuing any further letters, and the board unsuccessfully appealed to the Fourth Circuit. That court ruled that the board would be considered a private actor in the matter, as it was comprised of private practitioners and did not actually have the authority to send the letters.

Board has right to curb misleading"411-Pain" ads

Issue: Discipline of professionals for misleading advertisements

Minnesota may apply its No-Fault Car Insurance Statute to a company whose billboards and other advertising aimed at car-accident victims are misleading, the U.S. Court of Appeals for the Eighth Circuit ruled March 10 (*1-800-411-Pain Referral Service v. Otto*).

The company, 411-Pain, connects customers, who are prompted to call the company through various forms of advertising, to attorney or health care providers in the local area of the caller. 411-Pain brought suit against the Minnesota Board of

Chiropractors, challenging the authority of the board to discipline chiropractic providers who use the company for referrals for violations of the state's No-Fault Automobile Insurance Act.

411-Pain's advertising ran afoul of the no-fault law's restrictions in several ways. Advertisements created by the company listed the possible (though potentially incorrect) dollar amount of benefits available to accident victims, exhorted victims to call the company as soon as possible after an accident, and featured actors portraying police officers and emergency medial technicians telling viewers to call 411-Pain after an accident. In its suit, the company argued that restrictions prohibiting such ads violate its First Amendment commercial speech rights.

The judges of the Eighth Circuit disagreed. One restriction–prohibiting the company from claiming that injured callers were possibly entitled to $40,000–was valid, the judges ruled, because such a claim is inherently misleading and misleadingly simplistic, as some accident victims will receive nothing while others could be entitled to considerably more.

A second restriction, prohibiting the implied endorsement of law enforcement, was also upheld. The use of actors portraying police officers and emergency workers "cloaks 411-Pain with a 'misleading aura of authorized approval to the services in question,' an approval the company has no right to convey in its advertisements," wrote Judge Michael Melloy, quoting an earlier district court decision.

Another provision of the No-Fault Act, which allows advertisement of medical coverage only when done at the direction of a health-care provider, was also upheld, with Judge Melloy noting that the provision did not so much prohibit advertising by non-health care providers as allow advertising which would otherwise be illegal under state anti-kickback laws.

"Rather than burdening speech," Melloy wrote, the Act "appears to allow arrangements that might otherwise be illegal under governing state law." In any case, Melloy noted, 411-Pain—if it was not already in compliance with the law—would be able to draft contractual language with its health care providers to make its advertising legal.

Unlicensed Practice

Board overreached with order to remove self-installed plumbing

Issue: Scope of board authority over do-it-yourself work

A decision by the state's plumbing and gas-fitting board to order the removal of plumbing installed by a homeowner, without hearing any evidence on whether the removal was necessary, was an abuse of discretion, an appellate court in Massachusetts found April 25 (*Meyer v. Nantucket Building Department*).

Ernst Meyer, a resident of Nantucket, installed the offending plumbing in his house without either a permit or a professional license from the state plumber's board. After learning of the DIY plumbing job, the Nantucket city plumbing inspector issued Meyer a cease-and-desist order, which required that Meyer have the work removed by a licensed plumber.

Meyer contested the order, and the appeals court, in a 2010 decision, overturned the removal requirement because the inspector had not inspected the

work to prove that it was "unskilled or inferior," as required by law, and sent the case back to the inspector.

The inspector then investigated the plumbing, declared it deficient, and again ordered it removed. Meyer appealed the decision to the state's Board of Examiners of Plumbers and Gas Fitters. The board upheld the decision, but did so without hearing any evidence on whether the removal was necessary, and Meyer appealed again. The case eventually reached the Court of Appeals.

The appellate court reversed the board's decision. Given the court's earlier decision to reverse the order of the plumbing inspector for failure to inspect the plumbing work, wrote the judges, the board's decision to uphold the removal order without deciding, for itself, that the order to totally remove the plumbing was supported by the deficiencies found by the inspector, was an abuse of discretion.

The case was remanded to the board.

Discipline

Feds partially muzzle reporters over use of discipline data (From page 1)

The data bank keeps its public use file free of names and addresses of doctors, only identifying them by randomly generated numbers. But through "shoe-leather" reporting, journalists can often match data from different sources and identify individual providers.

"As other reporters have done, the Kansas reporter was able, using the data bank, to figure out who it was," said Charles Ornstein, a senior reporter with the public interest group ProPublica, and former president of the Association of Health Care Journalists, in an interview with **Professional Licensing Report**.

Tenny's September 4, 2011 letter to HRSA pointed to what he considered a clear breach of confidentiality:

Dear Ms. Grubbs,

Enclosed is a copy of the lead, front-page article that appeared in the *Kansas City Star* on Sunday, September 4, 2011. I feel that the information contained in the 3rd, 7th, and 9th paragraphs could have only come from the National Data Bank records. Under the section, *How many Doctors*, I feel that the information in the 4th and 7th paragraphs also comes from the National Data Bank. I am sure that you find the information in the section, *Using the federal files*, also interesting and, I hope, will change the way the public data is presented."

Respectfully,

Robert T. Tenny, M.D.

The Kansas physician, Robert Tenny, wrote six letters to HRSA in August 2011 alleging that the data bank was being misused to report on confidential malpractice settlements. In response, HRSA wrote a warning letter to the reporter, advising him he could face fines of $11,000 for each violation of confidentiality, and actually took the databank offline for two months on September 1.

This move was greeted with approval by many professional groups. The American Medical Association, for example, released a statement saying that, to prevent breaches of data confidentiality, it remained opposed to public access to data bank information.

The *Kansas City Star* article ran three days later, reporting that Teny had been sued at least 16 times for medical malpractice but had never been disciplined by the state licensing board.

Tenny continued to write to HRSA alleging that the newspaper was bent on ending his medical career and speculating that the reporter had gotten improper access to information from the full data bank either from a local medical center or from a former data bank employee.

The data bank came back online in November 2011 and public availability was restored, but it was with the requirement that the data not be combined with other publicly available information in a way that providers could be identified.

When the Data Bank (NPDB) was launched in 1990 to address the failure of state regulators to stop providers who had had ethical breaches or committed malpractice in other states, it was considered a significant reform. The law enabling the data bank had been passed in 1984 following some high-profile newspaper articles and series about doctors "licensed to harm."

Making discipline and malpractice data available to the public, Congress believed when it ordered formation of the NPDP, would keep the licensing process responsive and prevent bad providers from simply state-hopping.

But Ornstein and other health care journalists argue that the restriction goes against this intent. Under the current policy "the reporter has to basically agree not to be a reporter in accessing the information," says Ornstein, who won a Pulitzer Prize for his 2005 *Los Angeles Times* series about "The Troubles at King/Drew," and who more recently wrote "When Caregivers Harm: California's Unwatched Nurses" for ProPublica.

"We believe [federal officials] are misinterpreting the underlying regulations as far as the lengths to which they have to go to protect the privacy of individuals," Ornstein says." In many states, such as Florida, he notes, malpractice settlements have to be reported and are considered public information.

"We're not talking about secret discipline. We're talking about for the most part discipline that is publicly reported by the states. The federal government should be actually seeking to give more information to patients and the public that empowers them to make better health care decisions."

There is a work-around that some reporters have used, Ornstein points out. If they access a downloaded version of the old database from before the shutdown—which can be linked to from the probpublica.org site—they do not have to agree to any restriction because they are not going through HRSA. But to obtain current information, the NPDB restriction generally requires a lot more legwork by reporters attempting to cover disciplinary cases, he says.

Newspaper loses bid to get detailed complaint information against docs

Issue: Public disclosure of complaint information

An appellate court in Illinois denied a Freedom of Information Act (FOIA) claim by the *Chicago Tribune* seeking statistics on licensed physicians accused of sexual misconduct. The court ruled March 6 that because the documents sought by the newspaper did not currently exist and would need to be created by the state's Department of Financial and Professional Regulation, the FOIA did not compel the Department to provide them (*Chicago Tribune v. Department of Financial and Professional Regulation*).

The newspaper had filed a request with the Department seeking records of the quantity and outcome of complaints of a sexual nature made against its licensees, the number and names of licensed physicians whom the Department had identified as sex offenders, and detailed information about complaints made against nine particular licensees identified by the paper as having been disciplined for sexual misconduct.

After the DFPR refused to provide all of the information requested—on the grounds that much of the information was privileged as part of the investigatory process—the paper filed a Freedom of Information Act suit in 2011 seeking access to the data concerning the number of sexual misconduct cases.

In response to the paper's altered, lesser, claims to the quantitative data, the Department made two arguments. First, it said that privacy restrictions prohibited it

from disclosing information from complaints that did not end in the formal disciplinary process. Second, because it did not create its own records of such data, the Department said it would be forced to undergo the burdensome process of sorting through each case file by hand to create new documents in order to fulfill the request, something the Freedom of Information Act does not require.

After a state circuit court ruled for the paper, the Department appealed, and the case went up to the Appellate Court, which issued a ruling written by Justice Thomas Harris, Jr.

Harris agreed with the Department's argument that it was not required to create new documents. "Through its various filings in the trial court and in this court, it is apparent plaintiff does not seek production of 'public records' as that term is defined in FOIA, but requests the Department to perform a review of its investigative files and prepare a tally as to the number of initial claims made against certain license holders."

The fulfillment of the newspaper's request would require the Department to create new records, and the FOIA did not compel the Department to do so, the court said. The case was dismissed.

Board's "professional disagreement" no basis for discipline of licensee

Issue: Scope of board discretion in regulating licensee competence

Too much of a decision by the state geologist board was based on disagreements between the board's professional members and the disciplined geologist, the Supreme Judicial Court of Maine found March 11. The court reversed the decision by the Maine Board of Certification for Geologists and Soil Engineers (*Lippitt v. Board of Certification for Geologists and Soil Engineers*).

The case stemmed from geologist Clifford Lippitt's analysis of possible groundwater contamination from a landfill. After reviewing Lippitt's report on the results of groundwater tests which concluded that the landfills were not contaminating local groundwater wells, Richard Behr, a geologist with Maine's Department of Environmental Protection, filed a complaint with the state's geologist's board, claiming that Lippitt's conclusions were "fundamentally flawed."

During hearings held by the board, Lippitt explained his conclusions, stating his belief that further tests were forthcoming and that he based some of his statements denying contamination on the minimum acceptable levels found in state environmental regulations.

Following the hearings, the board determined that Lippitt had not provided false information in his report or acted negligently. But it did find that his conclusions were not justified by the available data and that he had improperly furnished a conclusion without being sufficiently informed.

Both the board and an independent expert determined that the data in the case reasonably supported a conclusion that the landfill had caused groundwater contamination. The board issued a warning and assessed the geologist $3,000 in legal costs. Lippitt appealed.

On appeal, a state superior court invalidated Lippitt's discipline, ruling that the board had failed to make required findings regarding the professional standards it believed Lippitt had violated, and returned the case to the board. On remand, the board elaborated on its conclusions but its discipline decision remained the same. Lippitt appealed again, and the case made its way to the state's high court.

The court, in an opinion written by Justice Ellen Gorman, overturned the board's decision, noting that the basis of the discipline had been the opposing conclusions reached by Lippitt and the board based on the information included in his report.

"The Board's disagreement with a geologist's opinion, without a concurrent determination that the opinion is false, is based on false data, or reflects the geologist's incompetence," wrote Justice Gorman, "cannot be the basis for a determination that the opinion constitutes a violation of . . . the geologists' Code of Ethics."

"The language of [the Code of Ethics] does not allow for the determination of an ethical breach when the Board's conclusion is simply that the geologist's opinion is not 'reasonable' in light of the underlying data." The court remanded the case to the board to vacate the discipline.

Court okays 7-year prosecution delay in discipline case

Issue: Due process and prosecution delays

A seven-year delay in the prosecution of a particularly troubled attorney who had, among other things, attempted to trade his legal work for sex, was not a violation of the attorney's due process rights, the Supreme Court of North Dakota ruled April 3 (*In the Matter of Overboe*).

North Dakota attorney David Overboe, whose discipline was the focus of the case, was charged in 2006 for groping, sexually harassing, exposing himself to his clients, and offering to exchange sex for legal fees on multiple occasions—behavior which earned him criminal convictions for disorderly conduct.

He was also charged with possibly stealing, with the aid of his wife, $190,000 and 640 acres of land from her elderly uncle through abuse of power-of-attorney documents, and issuing a wage-garnishment order for a non-existent case while his law license was suspended. In 2013, after several years of discipline petitions, a hearing panel recommended that Overboe be disbarred.

Before the Supreme Court, Overboe argued that the seven-year duration of his disciplinary proceedings was unreasonable—a violation of his rights to due process. The delay, he claimed, prejudiced his ability to defend himself; memories of the incidents, for both him and witnesses, he explained, were no longer sharp, and some witnesses had actually died.

In response to Overboe's argument that the seven-year duration of the disciplinary proceedings was unreasonable, the justices agreed that the delay was "troubling." But the court concluded that "the delay alone [was] not sufficient to violate Overboe's due process rights." For instance, although two witnesses who had accused Overboe of assault were no longer able to testify, the records of Overboe's criminal convictions, alone, were sufficient for discipline.

The court also rejected Overboe's other concerns about inaccessible witnesses, noting that their inability to testify was either not affected by the delays or was not necessary for his defense.

During the disciplinary proceedings, Overboe had petitioned the hearing panel to place him on disability inactive status; this would have deferred the disciplinary process. Overboe claimed that he suffered from post-traumatic stress disorder originating from his service during the Vietnam War, a request which the hearing panel improperly denied, he charged.

However, the court noted that disability inactive status is only appropriate where a licensee is unable to competently defend against disciplinary charges—which Overboe appeared able to do—and not in cases where an attorney's mental incapacity negatively affects their ability to practice.

Having dismissed Overboe's arguments, the court ordered him disbarred.

"Patient privacy" no defense for doctor charged with illicit prescribing

Issue: Authority of board investigators and patient privacy

Board investigators did not violate patient privacy when they used a state prescription database to gather evidence against a doctor accused of providing illicit prescriptions, a California court ruled April 15 (*Medical Board of California v. Chiarottino*).

The Medical Board of California began investigating physician Michael Chiarottino in 2011 after receiving a tip that he was inappropriately providing prescription drugs. As part of the investigation, board investigators accessed California's Controlled Substances Utilization Review and Evaluation System, or CURES, a database of prescription records created to help law enforcement combat prescription drug abuse, and obtained a report of Chiarottino's prescribing history and the prescription and pharmacy records for five of his patients.

After reviewing the records, board personnel determined that Chiarottino's prescribing history was dangerous and irregular. As a follow-up, the board served subpoenas on both Chiarottino and the five patients whose prescription records were accessed through CURES, seeking those patients' medical records.

The patients objected and Chiarottino refused to supply the records. In response, the board successfully filed for a court order to enforce the subpoena. Chiarottino appealed and the case went to the First District Court of Appeal of California in San Francisco.

In his appeal, Chiarottino argued that the board had violated the privacy rights of his patients, as protected by the California Constitution, when investigators accessed their prescription and pharmacy records through CURES, which Chiarottino argued made the resulting subpoenas invalid.

The Court of Appeals did not agree. Justice Robert Dondero, in the court's written opinion, wrote that the state's compelling interest in policing prescription-drug abuse outweighed the limited privacy expectations of patients in the CURES database.

"For purposes of our decision here," wrote Dondero in dismissing the appeal, "we assume patients have a reasonable expectation that their prescription records will not be disclosed to persons who are not actively involved in their care. Balancing society's substantial interest in reducing the illegitimate use of dangerously addictive prescriptions against the minor intrusion upon a patient's reasonable expectations of privacy when he or she is given a prescription by a treating physician, we concluded that, as applied to such patients, the Board's actions here in accessing and compiling data from the CURES database did not violate . . . the state Constitution . . . Further, even a reasonable expectation of privacy is somewhat diminished as it is widely known that such investigative actions are possible with respect to controlled substances."

Lack of remorse cited as court refuses to license F. Lee Bailey

Issue: Mitigating/aggravating factors in discipline sanctions

The Supreme Judicial Court of Maine, in an April 10 decision, denied former O.J. Simpson attorney F. Lee Bailey admission to the state's bar, ruling that Bailey had not shown sufficient remorse or understanding of the seriousness of conduct that caused the Florida Supreme Court to strip him of his license in 2001 (*Bailey v. Board of Bar Examiners*).

Florida disbarred Bailey in 2001 for misconduct during his representation of a client charged with drug smuggling. The client, Claude Duboc, led a lavish lifestyle, with a classic car collection and two estates in France. When he determined to plead

guilty, Bailey helped Duboc set up complicated arrangements for the maintenance of his properties during the asset forfeitures that would follow.

Part of those arrangements were the use of $3.5 million worth of stocks, which Bailey used to maintain the properties and, dubiously, to pay himself for Duboc's representation.

When Duboc became unhappy with Bailey and moved to replace him, Bailey responded by sending a letter to the presiding judge, Maurice Paul—but not to Duboc or his new attorneys—referring to his client as a "multimillionaire druggie." Unmoved, Judge Paul removed Bailey from his representation of Duboc and ordered that the account that Bailey was using to pay himself be frozen, and for Bailey to surrender the remaining assets.

Despite the order, Bailey withdrew another $300,000, then informed authorities in Switzerland, where the funds were being held, that the money in the account was proceeds from drug trafficking. Swiss authorities then froze the accounts, preventing Bailey from surrendering the money as ordered. Judge Paul held Bailey in contempt, incarcerated him for 44 days, and ordered him to repay over $400,000 that he had removed from the account.

As a result of these several improprieties, Bailey was disbarred in Florida. And, adding insult to injury, the IRS eventually assessed over $4.5 million in tax debts against Bailey, based on income from the sale of the stock that he had not reported.

In 2012, with his debt to the IRS still outstanding, the now 78-year-old Bailey applied for licensure in Maine. The state's Board of Bar Examiners determined that Bailey had not proven that he had the good character and fitness. The Board found that Bailey had not recognized the wrongfulness and seriousness of his offending conduct—a requirement for a showing of good character—noting that he was still contesting his disbarment in Florida.

Bailey appealed the decision with some success. In 2013, a single justice of the state's supreme court determined that Bailey had satisfactorily proved his good character and should be granted a license. The board appealed that decision, and the case moved to the full court.

While the court in this latest ruling determined that the law did not require Bailey to unambiguously accept every adverse finding made against him during his disbarment, it found that in many instances, no evidence existed to show that Bailey accepted his malfeasance at all.

In others, the evidence showed that Bailey had actually minimized both the wrongfulness and seriousness of his conduct. At times, Bailey seemed to even half-heartedly profess the existence of a minor conspiracy on the part of the federal Department of Justice, Florida Bar officials, and various judicial figures to attain his disbarment.

On the whole, the court ruled in affirming the board's decision, Bailey failed to prove that he understood the seriousness and wrongfulness of his past conduct, and he was not eligible for the bar.

Court declines to rule whether board methadone ban violated ADA

Issue: State board regulation of addiction recovery and ADA

The U.S. Court of Appeals for the Third Circuit issued what was likely a final ruling in a case brought by a Pennsylvania nurse who had challenged a virtual ban on methadone use by nurses in addiction recovery programs in the state, in a March 28 action (*Lamberson v. Pennsylvania*).

Melinda Lamberson Reynolds, the nurse whose discipline was at issue in the case, was a former addict who began methadone treatment in 1997. After Reynolds' employer filed a complaint with the board in 2006, she tested positive for tranquilizers, and the board sent her to Pennsylvania's Professional Health Monitoring Program for treatment and monitoring.

Unfortunately, Reynolds attended only a handful of her treatment sessions, causing the treatment facility, A Better Today, to drop her from the program. A second attempt at treatment also ended poorly when Reynolds refused to enter a methadone-detox program mandated by A Better Today and appeared impaired during her contacts with the organization.

After Reynolds failed to conform to several requirements ordered by the Monitoring Program, her case went back to the board. The board suspended her license for three years, but informed her that she could apply to stay the suspension if she reentered the Monitoring Program and was deemed safe to practice.

A Better Today's refusal to allow Reynolds to continue her methadone treatment was a primary factor in the legal cases that followed the board's decision. After the ruling, a doctor at New Directions Treatment Services, where Reynolds was receiving methadone treatment, sent a letter to Reynolds' case manager at the Monitoring Program, Pearl Harris, expressing concern about the detox requirement and requesting that Reynolds be allowed to use a treatment center that allowed methadone treatment.

However, Harris never replied directly to Santoro and was unable to contact Reynolds to speak about the letter due to a problem with Reynolds' phone, though she later sent a letter directing Reynolds to comply with A Better Today's methadone-detox policy.

Reynolds' case prompted a change in the methadone policy of the Monitoring Program. In 2008, the executive director of New Directions, Glen Cooper, met with officials from the program; shortly afterward, the Program eliminated its categorical prohibition on methadone treatment. The board notified staff at New Directions about the change, but Reynolds never contacted the Monitoring Program to re-enroll.

In 2009, Reynolds filed a complaint against the Monitoring Program, claiming that its exclusion of methadone-dependent nurses violated the Americans with Disabilities Act, and her case moved through the court system with varying success, with at least one ruling that the methadone-exclusion policy was inappropriate.

In February of 2012, with a final decision in her case still pending, Reynolds was found lying on a roadside, dead from hypothermia and a mix of Xanax and methadone. Her sister, Beverly Lamberson, continued the suit.

The March decision ended the case without a decision on whether the Monitoring Program's former methadone ban violated the ADA, as the judges of the Third Circuit concluded that, aside from questions about the methadone policy, Reynolds, who had stopped working with A Better Today after it dropped her from its program, had failed to meet a sufficient number of other, unconnected, requirements imposed on her by the board, enough to merit a suspension on their own.

With the methadone policy eliminated as a "but-for" cause of the suspension, the court dismissed the case.

Discipline decision withstands confusion over standard of proof

Issue: Proper standard of proof for disciplinary decisions

Discipline imposed by the state's chiropractic board was valid despite a significant amount of confusion among the parties and a lower court over the

standard of proof to be applied in the case, the Supreme Court of Nevada held April 3 (*Nassiri v. Chiropractic Physicians Board of Nevada*).

The Chiropractic Physicians' Board of Nevada charged chiropractors Obteen Nassiri and Edward Johnson, who had worked together at a clinic, with a raft of professional violations, including fraud, unlawful referrals and fee-splitting, and employing unregistered assistants.

After a hearing, the board substantiated several of the charges, revoked Nassiri's license and fined him more than $30,000, and suspended Johnson's license for one year and imposed several thousand dollars in fines. In the ruling, the board noted that it had made its decision based on "substantial, credible, reliable, and probative evidence."

The chiropractors appealed, arguing, based on this language, that the board had applied an incorrect standard of proof, a "substantial evidence" standard, which Nassiri and Johnson claimed was impermissibly low. After a district court concluded that the "substantial evidence" standard was the correct standard and upheld the discipline, the two chiropractors appealed again and the case went to the state's high court.

In the final decision, the justices of the court elaborated on the proper standard of proof under Nevada law, explaining that both the parties and the district court had been wrong in their earlier interpretation. The law that had been cited was not, in fact, a standard of proof to be used by the board, but a standard of review to be used by a court reviewing the board's decisions.

Without a specific governing statute, as was lacking in the case of the chiropractic board, the correct standard to be used was the "preponderance of the evidence" standard, which requires findings to be more likely than not.

However, because no evidence existed to show that the board actually had used a lower standard than "preponderance of the evidence," its decision was valid. The language the board used in its decision, describing the evidence as "credible, reliable, and probative," spoke only to "the qualification of the evidence, rather than whether the evidence satisfies the standard of proof used to evaluate whether a violation occurred," wrote Justice Michael Cherry. The discipline was upheld.

Courts must defer to board revocations, unless unreasonable

Issue: Board discretion to set disciplinary sanctions

An Indiana appellate court, in a March 18 ruling, upheld the license revocation of a counselor whose obsession with a patient suffering from multiple-personality disorder resulted in the therapist's resignation and two calls by the patient to the police (*Behavioral Health and Human Services Licensing Board v. Williams*).

In 2009, the Indiana attorney general's office began investigating a complaint filed by a former employer that therapist Elaine Williams had an improper relationship with a patient.

During the investigation, both the patient—who suffered from multiple personalities, post-traumatic stress disorder, and depression—and Williams, who acted as the patient's therapist until 2010, testified that Williams engaged in a friendship with the patient outside of their professional relationship, with Williams visiting the patient's home several times a week.

When a supervisor at Williams' employer, Meridian Services, where the patient was being treated, transferred the patient to another therapist, Williams resigned and continued seeing the patient.

In 2010, the patient told Williams she wanted to take a break from therapy and asked Williams to stop contacting her, a request that Williams disregarded. Faced with Williams' continued attempts to contact her, the patient called the police on two occasions, eventually moving and changing her contact information.

Several irregular actions occurred during the discipline hearings that followed. Most notably, a board member stated that he was ready to vote on the case before Williams had presented her defense. At the conclusion of the hearings, the board revoked Williams' license.

Williams then appealed to a state circuit court. Circuit court judge Dennis Carroll, although noting the irregularities and questioning the credibility of the patient, initially found in favor of the board. But after reconsideration, Carroll overturned the decision, saying revocation was too harsh a sanction. He pointed out the irregularities in the administrative process and wrote that the board had failed to sufficiently articulate the reasons for its decisions. The board appealed the decision and the case went to the Court of Appeals of Indiana.

The higher court ruled that the lower had overstepped its bounds in ruling that the revocation was too severe a penalty. The statute giving the board the authority to discipline Williams, noted Judge John Sharpnack, gave the board discretion as to whether to revoke her license. And, because courts owe deference to board decisions in discipline matters, the board's decision to revoke Williams' license could only be overturned if found to be unreasonable.

Sharpnack also said the trial court's concerns with the credibility of the patient were irrelevant, as fact-finding and witness credibility were not within the lower court's purview. Finally, the lower court's ruling that the board had failed to articulate the reasons for its decision was based on a misreading of precedent.

The lower ruling was overturned and the revocation of Williams' license reinstated.

Lower court required to take evidence, find facts in revocation case

Issue: Scope of judicial decision-making in discipline appeals

The Supreme Judicial Court of Maine overturned a lower court's affirmation of a license revocation on March 20, ruling that the lower court had failed its obligation to take evidence in the case (*Zablotny v. State Board of Nursing*).

In January of 2008, John Zablotny, a registered nurse at a hospital in the town of Machias, took charge of a patient who was experiencing such extreme and prolonged bouts of stomach pain that he told medical staff he would "rather die" and had asked to be discharged against the medical advice of hospital staff.

Although other hospital staff had talked the patient out of leaving the hospital earlier that day, when the patient repeated his request to Zablotny, Zablotny had the patient sign out and let him leave, unescorted and without any means of transportation, into a blizzard. The patient's body was discovered the next day, 500 feet from the hospital entrance.

State law provides that nonconsensual disciplinary actions are subject to judicial review exclusively in the Superior Court. But broader review applies to revocations. Any non-consensual revocation of an occupational or professional license is subject to appeal and de novo judicial review exclusively in District Court.

Repercussions followed. The hospital fired Zablotny, the patient's sister filed a complaint with the state nursing board and, after a two-day hearing in 2010, the board revoked his license for two years.

Zablotny appealed, utilizing a Maine law that allows for a full de novo review of license revocations—a procedure that

Zablotny argued would also include a full review of the board's evidence and fact-finding decisions—by a state district court.

The court agreed to conduct a de novo review, although it interpreted that duty as excluding a review of the board's fact-findings. After the court upheld the revocation, Zablotny appealed again and the case went to Maine's Supreme Judicial Court, which issued a decision written by Justice Joseph Jabar.

After a review of legislative history, the high court determined that state law directs a district court to conduct a full hearing, with witness testimony and a fresh look at the evidence in the case and without any deference to the board's decision. "This obligates the court to hear the evidence presented, independently evaluate the testimony offered, make its own credibility determinations, and reach its own decisions regarding the revocation," wrote Justice Jabar. "In doing so, the court will afford licensees and the public the necessary procedural safeguards that the Legislature intended."

The case was remanded to the district court for a full hearing.

Scope of Practice

Non-dentists cannot shine LED light at customers' teeth, court rules

Issue: State curbs on non-licensees' scope of practice

A federal district court in Connecticut, on March 28, upheld a decision by the state's Dental Commission to forbid non-licensees from shining a low-powered LED light at customers' teeth while providing teeth-whitening services (*Martinez v. Mullen*).

In September 2010, on its own initiative, the Connecticut State Dental Commission, the state's licensing board for dentistry, began investigating the licensing implications of teeth-whitening services being provided in the state.

After holding hearings on the subject, the Commission found that the practice of using special LED lights during the teeth-whitening process ran the risk of causing irritation and lip burns if the lights were used improperly. Based on this finding, the Commission ruled that the use of the lights constituted the practice of dentistry and required a license for the procedure.

In July of 2011, two businessmen, Stephen Barraco and Tasos Kariofyllis, whose business Smile Bright performs teeth-whitening services, received a cease-and-desist letter from the Commission ordering them to stop offering the service. Barraco and Kariofyllis then filed a court action seeking to halt the enforcement of the Commission's ruling.

They argued that the prohibition against several of the teeth-whitening methods investigated by the commission served no legitimate public interest and violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

Before trial, the state attorney general's office conceded on many of Smile Bright's arguments, leaving only one issue, as described by the presiding judge, Michael Shea: "whether the Constitution forbids a State from prohibiting a non-dentist from pointing a LED light at a customer's mouth during teeth whitening."

Paradoxically, while Smile Bright was forbidden to use LEDs to perform teeth-whitening, it was still allowed to provide customers with the lights so they could administer the treatment themselves while being instructed in the practice.

During the pre-trial phase of the suit, the Connecticut Attorney General's Office stipulated that certain actions would not violate the Commission's ruling. Among the actions that would be allowed: "[S]imply making a LED light available for use by the client with a self-administered teeth-whitening product at the place of purchase."

Perhaps aware of the possibility that the state might later regret what it had stipulated away, Judge Shea noted that the Attorney General's concessions "will likely also bind the state in the future under the doctrine of judicial estoppel should the state contravene them, for example, by attempting to prosecute non-dentists who instruct a customer on teeth-whitening procedures and methods."

Finding that, because no fundamental rights or suspect classes of identity were involved, the Commission would only have to supply a rational basis to support the regulation, Judge Shea concluded that the plaintiffs had not succeeded in proving the regulation was arbitrary.

Though obviously reluctant to rule in favor of the commission—Shea titled one section of his opinion "A Few Studies Showing That There Might Be Health Risks from the Use of LED Lights Even if They Are Inadmissible and Even if There Is No Conclusive Evidence On Point Are Enough to Supply a Rational Basis for the Restriction"—the judge ruled that the Commission had a sufficient basis for its ruling.

"The absence of admissible evidence in the record to support the restriction is not enough to doom it under the highly deferential standard applicable here," noted Judge Shea.

Although uncontroverted testimony from Smile Bright's expert witness described the strength of the lights used by the business as "equivalent in strength to many home LED flashlights," the mere existence of two journal articles that raised the possibility of slight harm that could occur through the use of "high power" LED's was a sufficient basis for the ruling, the court said.

"At least where neither suspect classifications nor fundamental rights are involved, the Constitution does not prevent government officials from taking prophylactic measures to protect the public in the face of uncertainty," Shea wrote. "It is thus immaterial that as plaintiff emphasizes the medical literature does not cite any instances in which anyone has even been harmed by an LED light."

"The requirements for dental licensure ensure that dentists have medical training that makes them expert in oral health," concluded Shea. "Thus, as discussed above, and as the Commission might have rationally concluded, licensed dentists will be better equipped to assess and mitigate the risks associated with light-enhanced teeth-whitening."

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