Professional Licensing Report

Licensing, testing, and discipline in the professions

Highlights in this issue:

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Discipline

State won't defend fired board director

Issue: Board staff operating outside legal authority

The Arizona state attorney general's office denied a request by the state's former medical board director to pay legal fees she incurred from a high-profile 2013 investigation by the state ombudsman.

In a scathing report last October, the ombudsman found that both the director and deputy director ordered state employees to violate state licensing laws. At one point, the director's actions included reducing license-approval staff to two employees, allowing unqualified applicants to receive licenses.

The former director, Lisa Wynn, filed a Notice of Claim for a $60,000 payment plus legal fees in December, arguing that the allegations in the ombudsman report stemmed from performance of her official duties. But the state AG says the board is not obliged to pay Wynn's legal fees.

See Discipline, page 5

Licensing

Federal court strikes down licensing exam

Issue: Justification for licensing scheme

The D.C. government failed to explain why a licensing scheme for tour guides, complete with a 100-question licensing exam, is necessary to prevent real harm to the public, the Court of Appeals for the District of Columbia held June 24 (*Edwards v. District of Columbia*).

Reversing a federal district court ruling that had upheld the requirement as only an incidental, limited burden on free speech, the appellate court said the licensing scheme was unconstitutional. “The city has provided no convincing explanation as to why a more finely tailored regulatory scheme would not work,” wrote Judge Janice Rogers Brown.

Until the ruling, paid tour guides operating without a license could be subject to a $300 fine or 90 days in jail. The decision means that “Segs in the City,” which leads tours around Washington, DC, on rented Segway scooters, can continue without its guides’ having to take the exam covering the city’s attractions, geography, and history.

The court was critical of the law's focus on familiarity with the city over other aspects of tour guiding that might present more potential danger to the public. "How does memorization of addresses and other, pettifogging data about the District's points of interest protect tourists from being swindled or harassed by charlatans? Why would a licensed tour guide be any less likely to treat tourists unfairly and unsafely by abandoning them in some far-flung spot or charging additional amounts for return passage?"

Judge Brown noted the ruling differed from a June 2 decision in a Fifth Circuit court. "We are of course aware of the Fifth Circuit's contrary conclusion in *Kagan v. New Orleans,* which affirmed the constitutionality of a similar tour guide licensing scheme." However, she said the D.C. court declined to follow that decision because the opinion either did not discuss, or gave cursory treatment to, significant legal issues.

Under the First Amendment of the U.S. Constitution, free speech is protected, the D.C. court explained, and any restriction must be justified based on real harms, plus evidence showing the restriction is an appropriate antidote. The licensing exam, the court said, failed this test.

Automatic suspension for delinquent license fees unconstitutional

Issue: Due process barring sanctions without hearings

A rule which automatically suspends the license of an attorney who fails to timely pay bar fees violates due process protections under the U.S. Constitution, the Supreme Court of Arkansas held May 14 (*Chandler v. Martin*). The court invalidated the rule.

The issue came before the court after a state judicial electoral candidate sought to have her opponent ruled ineligible, based on his history of failing to pay his dues.

Doralee Chandler, running for a judicial position in Arkansas, filed an action seeking to declare her opponent, incumbent judge Harry Foster, ineligible for the position on the grounds that he had been automatically suspended several times in the last decade for failing to timely pay his state bar dues.

The state constitution requires that candidates be licensed for the six years prior to assuming a judicial position. The lapses, Chandler claimed, meant that Foster had not been consistently licensed. But the court rejected this reasoning.

Foster filed his own suit in response, challenging the suspensions on the grounds that, as automatic discipline imposed without the possibility of a hearing, the suspensions had deprived him of his constitutional right to due process.

A circuit court judge agreed with Foster and declared the rule that allowed the automatic suspensions unconstitutional. Both Chandler and the state bar appealed, and the case went up the state supreme court.

That court, in an opinion by Justice Cliff Hoofman, ruled in favor of Foster, noting that the lack of a hearing meant that no process was afforded to potentially delinquent licensees, and declaring the rule unconstitutional.

"A lawyer may know of the Rule but may not be aware, until it is too late, that his or her fee did not reach the clerk's office," he wrote. "Under the rule, a lawyer's fee could theoretically get lost in the mail or even be miscredited by the clerk's office, and a lawyer would have no notice or any opportunity to have the mistake corrected prior to the suspension, even though the mistake was made through no fault of the attorney's own."

Chandler's challenge was dismissed, and Foster won the election, with 57.8% of the vote.

Licensed status required to expose high school coach to criminal punishment

Issue: Meaning of "licensed" status in state law

A high school basketball coach in Iowa successfully appealed a criminal conviction for having sex with one of his students. The reason: the statute under which he was charged, which requires the perpetrator to be a licensed school employee, did not apply to the coach, who possessed only a type of limited license known as a "coaching authorization", the Supreme Court of Iowa held April 11 (*Iowa v. Nicoletto)*.

The defendant, Patrick Nicoletto, worked part-time as an assistant high-school basketball coach. To qualify for the job, Nicoletto acquired a coaching authorization, a type of status which would allow him to work with students.

Then he got into trouble. During his first year on the job, he began exchanging sexually-charged text messages with a 16-year old player. The electronic exchanges eventually led to actual sexual contact.

After a jury found him guilty of "sexual exploitation by a school employee" and he was sentenced to five-years' imprisonment, Nicoletto appealed and the case went up the state's supreme court.

Although Iowa's age of consent is 16, state law still makes sexual contact between a teacher and student illegal. Thus, when authorities learned of the relationship, Nicoleto was charged with the crime of "sexual exploitation by a school employee."

On appeal, Nicoletto argued that he was not a "school employee," as that term was defined in the criminal statute the state had used to convict him, and that therefore the statute could not be applied to him. Referencing another provision of law, the criminal statute under which Nicoletto was charged defines a school employee as "an administrator, teacher, or other licensed professional . . . who provides educational assistance to students."

Although the state had agreed that Nicoletto was not a "teacher," it had charged him based on the belief that his coaching authorization placed him in the category of "other licensed professional." Because the authorization required training and was a prerequisite to Nicoletto possessing the coaching job, the state argued, it qualified him as a professional.

The court disagreed. According to statute and experience, "persons holding coaching authorizations may be as young as eighteen, lack secondary education, have only a minimum of training, and often conduct their coaching avocation apart from their full-time jobs," wrote Justice Brent Appel. "To apply the term 'licensed professional' to Nicoletto, who worked the night shift at a pipe manufacturer and received a very small stipend for his coaching services, would not comport with our longstanding rule of narrowly constructing criminal statutes."

Further, because "license" is defined under Iowa law as "the exclusive authority" to engage in a licensed activity, and unpaid volunteer school coaches are not required to obtain an authorization, Nicoletto's coaching authorization could not be considered to provide him that exclusivity and was not a license, the court ruled.

The court ordered the charges against Nicoletto to be dismissed.

Complainant lacks standing to intervene in license renewal

Issue: Standing of complainant to challenge license renewal

The Supreme Court of New Hampshire, in a May 22 decision, denied an action brought by an anti-abortion advocacy group which challenged the state pharmacy board's renewal of a limited drug distribution license held by the state's Planned Parenthood chapter (*Appeal of New Hampshire Right to Life*).

In 2012, the group, New Hampshire Right to Life, filed a complaint with New Hampshire's Board of Pharmacy, claiming that the New England branch of Planned Parenthood had not properly followed all of the procedures necessary for it to

maintain its license as a limited retail drug distributor. These lapses, said the group, meant that Planned Parenthood was illegally dispensing prescription drugs at its clinics.

The advocacy organization also sent letters to the board objecting to the renewal of Planned Parenthood's license.

After the board renewed Planned Parenthood's licenses over NHRTL's objections, the advocacy organization filed a formal request for a rehearing. The board rejected the request, on the grounds that NHRTL had no legally cognizable interest which would allow it to be a party to the board's decision.

NHRTL appealed the ruling, and the case went up to the state's supreme court, which issued a decision written by Justice Robert Lynn.

In its appeal, NHRTL argued that its attempt to intervene in the license renewal decision was supported by a state regulation which allows any person who files a misconduct complaint against a licensee to be a party to the case.

The justices disagreed. The regulation cited by the advocacy organization, Justice Lynn wrote, was relevant only to discipline complaints against a licensee, not the license renewal process.

Although NHRTL had argued that language in the regulations applied the complaints provision to the renewal process, the court rejected the notion, writing that the connection was "strained." In any case, Lynn wrote, the regulations would still provide the board with discretion whether to allow complainants to challenge its decisions.

NHRTL also claimed that it had standing to intervene under a regulation which allows parties directly affected by a board decision to request a rehearing, but the court rejected the argument on the grounds that the organization did not allege a specific injury caused by the renewal of Planned Parenthood's license.

Alabama contractor board denies license based on non-profit status

Issue: Non-profit enterprise's access to licensing status

Licensing is the battlefield over claims about unfair competition between businesses and non-profits in Arkansas. A June 6 decision by an appellate court in Alabama rejected jurisdiction for an appeal by the Huntsville Housing Authority against a decision by the Alabama Licensing Board for General Contractors (*Huntsville Housing Authority v. State of Alabama Licensing Board for General Contractors*).

According to the Housing Authority, the board denied the organization a license on the grounds that it was a public entity. Although the board had made an initial ruling, the court held, it had not issued a final decision which could be appealed.

In January 2013, the board denied an application for a general contractor's license by the Huntsville Housing Authority. Officials from the organization claimed that the board stated that the Housing Authority, as a non-profit, was not eligible for a contractor's license and that, as a public entity, it was inappropriate for the organization to compete with private companies. Neither justification for the denial, the Authority argued, was permissible under the law.

The Authority claims that, in March, after the Housing Authority asked for a reconsideration of the decision, board personnel informed the organization by telephone that it was confirming the application's denial, although no formal written decision was ever delivered. The Authority then filed a judicial complaint seeking to

appeal the decision. Faced with the appeal, the board argued that the judicial system did not have proper jurisdiction over the case, as no final judgment had been made.

The court agreed. “[The board’s] statement to the assistant to HHA’s counsel during the March 2013 telephone conversation appears, at best, to be a courtesy or a preliminary notice of denial, informing HHA to expect a final written decision of the Board regarding the denial; no such final written decision appears to have been rendered.” Without the existence of a formal final decision, the HHA had no grounds for appeal.

The court dismissed the case to await further action by the board.

Discipline

Fired medical board director won't get legal fees covered *(from p. 1)*

The ombudsman substantiated several allegations that Wynn purposely ignored state laws during an aggressive attempt to streamline the operations of the board. The board fired Wynn shortly after the release of the report, in October of last year.

The case came to the attention of state officials after a licensing coordinator from the board filed a whistleblower complaint, accusing the board's executive leadership of violating the state licensing laws by improperly creating and enforcing expedited licensing procedures in an attempt to shorten license-application processing times.

The coordinator, whose identity was kept confidential by state investigators, was one of six employees to file complaints, and also claimed that law violations, poor management, and staff turnover made it impossible for the board to protect the public from unqualified license applicants.

Taped evidence and testimony showed that both the board's executive director and deputy director repeatedly acknowledged that they were violating state laws, though both claimed they were following the general policy dictates of elected state officials.

According to the report of the investigation, when Wynn was asked to explain her seemingly troublesome decisions, she defended them by stating "they addressed a mandate that she perceived state leaders placed on the AMB to operate more efficiently and reduce regulatory burden on doctors."

In particular, Wynn cited an executive order signed by Arizona governor Jan Brewer in 2012 which extended a moratorium on agency rulemaking in order to "promote job creation and retention" and called on regulatory agencies "to quicken the pace on streamlining existing rules and reducing wasted time in regulatory processes to increase Arizona's economic competitiveness and job creating."

Wynn stated that the new expedited policies were superior to the "outdated" state laws which controlled the licensing process.

The state's report paints a picture of an agency unraveling after its leaders moved to consolidate authority and circumvent state laws.

According to the report, "the board ignored or violated many state laws and licensed potentially unqualified doctors" for a period of a year and a half beginning in September 2011.

State investigators found that, around that time, board leadership ordered license processors to stop verifying applicants' employment and information from each state in which applicants already held a license, and to stop requesting copies

of medical school certificates or any other primary documents, actions which state law required the board to conduct before issuing a license.

In addition, the deputy director of the board assumed sole responsibility for deciding whether to investigate applicants with problematic applications. Claims of board certification made by physicians and published on the board's website were not verified, simply being posted on the word of the claiming physician.

At one point, board employees were completing the shrunken verification process in as little as three days, down from an average 38 during the period just preceding the changes. According to the state report, turnaround for license applications at other state agencies averaged 55 days.

During this period of unsanctioned deregulation, the board began terminating employees. At one point, it reduced the total number of license processing staff responsible for all applicants for physician and physician assistant licenses throughout the state from fourteen to two, with the most senior remaining staff member having only a year's experience with the board.

Wynn initially seemed proud of the changes. During a meeting with board staff, the executive director expressed her ambitions for reducing the time needed to process applications.

The board's licensing manager at the time of the initial changes, Suzann Grabe, was fired shortly after implementing the first stages, and a second licensing manager resigned when Wynn and her deputy director would not agree to abide by a policy that complied with state laws. One employee alleged, in a complaint, that many employees were terminated because they objected to the new policies.

In November 2013, six former employees, including Grabe, the licensing manager fired shortly after the implementation of the new procedures, filed legal claims against the board, arguing that Wynn fired them in an attempt to hide the improper licensing procedures

She was quoted as claiming: "We are going to be the premier licensing board. Other states are going to look at us and go, 'What the hell, they've got four full-time staff for 21,000 docs and look at how effectively they do licensing!'"

In all, the ombudsman substantiated 19 of the 20 allegations made against the board (see sidebar). Faced with an extended period of inadequate vetting of licensees, the Ombudsman's office recommended a review of every license granted by the board since fall of 2011.

"We are going to be the premier licensing board"

Among the violations the Ombudsman's office found that the medical board committed under Wynn's leadership:

- The board licensed doctors who had not proved their legal immigration status, as required by law. During a conversation with staff, the executive director mused, "What is the worst thing that can happen? He murders a patient under the influence of alcohol and the fact that he never had a birth certificate won't matter . . . we do an audit, and we find out his mom was a part of the Taliban, OK . . . really remote . . . I tend not to sweat this stuff."

- Temporary licenses were granted without proper vetting of applicants' backgrounds. At least two unqualified physicians received temporary licenses because of the diminished background checks.

- The board stopped reviewing primary sources of medical college certification for applicants who had graduated from medical school abroad.

- The board stopped requiring renewal applicants to attach a report of any disciplinary actions they incurred. Additionally, renewals were automatically granted; staff would only later check the National Practitioner Data Bank for problems with applicants.

- The board stopped following rules requiring most doctors applying for licensure to have taken specific exams during the ten years prior to their application, instead adopting a policy to grant licenses based on work and employment history.

- The board stopped requiring applicants to submit photos with their applications; stopped requiring notarized signatures; issued licenses to out-of-state doctors who, although they were licensed in Arizona through endorsement, had let both licenses expire–which meant that they were not qualified for licensure; improperly relaxed verification of continuing education credits; and allowed physicians who had failed to properly or timely renew their licenses to continue dispensing drugs.

When licensee numbers surge, how can discipline agencies keep up?

Issue: Adequacy of discipline resources for number of licensees

The doctor population in New York State is growing 18 times faster than the general population, and the discipline reporting system is not keeping up, according to a May report by the New York Public Interest Research Group (NYPIRG), "Questionable Doctors: Negligent Doctors and the Failure of New York State to Notify Patients."

In the past ten years, New York's population has grown by about 2%, while the doctor population has increased by 36%. The Office of Professional Medical Conduct (OPMC) has not kept pace with this staggering increase, NYPIRG says. It reports that the Health Department has failed to update annual figures on OPMC's physician discipline activities. The most recent report covers activity in 2010.

The NYPIRG report asserts that the lack of proper enforcement of disciplinary action and keeping track of records and databases of physicians who have been disciplined threatens patient care. More than 77% of doctors sanctioned for negligence by OPMC were allowed to continue to practice, but NYPIRG says that because of OPMC reporting lapses, "it is highly unlikely that [the patients of these physicians] are aware of their physician's punishment."

OPMC itself is not initiating the majority of disciplinary actions that it reports, NYPIRG notes. Nearly 60% of New York state actions against physicians were based on sanctions taken by other states, the federal government, or the courts, not directly based on an OPMC investigation.

"Very few of New York State's doctors ever face a serious disciplinary action," NYPIRG's report says. "The 468 completed actions taken by OPMC in 2013 must be judged in light of the staggering number of patients harmed by negligent medical annually."

When estimates of patient harm are expanded to include general medical practice outside of the hospital, the potential harm by physicians is even greater, NYPIRG says. A study of surgical errors in physicians' offices, for example, found that patients were ten times more likely to be harmed due to medical errors than when they had the same surgery in more highly regulated health care facilities.

To better keep track of physicians and keep the public safe, NYPIRG offers several recommendations:

- Allow the public easy access to a doctor's background information via the physician profiles program, and promptly notify patients if their physician has had any limitation placed on their license. "All patients of physicians who have had any limitation placed on their license must be notified in a timely manner," NYPIRG advocates.

- Create a consumer assistance office operated by the OPMC to manage the complaint process. According to NYPIRG, there is currently no requirement that patients be informed that their doctor has been given a sanction and/or limitations.

- Require physicians by law, not merely their ethics code, to tell the patient or patient's family when a medical error has occurred. This would ensure a more stringent and prophylactic environment for patients, NYPIRG maintains.

- Impose a standard requirement of re-certification for physicians to check that doctors' skills haven't diminished and that their medical knowledge is current and accurate.

Land surveyor discipline regulations too vague, court finds

Issue: Specificity of standards for imposing professional discipline

The Supreme Court of Kentucky partially overturned a discipline decision by the state's engineering and land surveying board, in a June 19, decision, because the regulations that controlled the professional violations of surveyors failed to provide sufficiently specific standards (*Curd v. Kentucky State Board of Licensure for Professional Engineers and Land Surveyors*).

The case revolved around land surveyor Joseph Curd and his testimony on behalf of a party in a boundary dispute.

Prompted to investigate the case by Curd's criticism of the work of the other surveyor, the board determined that Curd's conduct fell short of professional standards. A disciplinary action followed and, after a hearing, the board suspended Curd's license for six months. Curd appealed, with varying success, and the case eventually made its way to the state's high court.

In his appeal, Curd argued that his actions as an expert witness were immune, as part of the judicial process, from disciplinary actions by the board.

The court disagreed. Although acknowledging that the protection of expert witnesses from lawsuits stemming from their testimony furthers the goal of providing information in cases, Chief Justice John Minton noted that "[e]xtending absolute immunity to protect expert witnesses from the possibility of administrative discipline for their testimony stretches the concept beyond the point of recognition."

The board alleged that during his testimony as an expert witness in a boundary dispute case, Curd ignored a fundamental principle of surveying land described in a deed—that the use of monuments takes precedence over other boundary measurements, such as measured distances—and criticized the work of another surveyor-witness as falling below professional standards. Curd also identified himself as an investigator for the board, though his contract with the board had not been renewed.

"While a trial judge's authority to control the trial proceedings through evidentiary rulings is a lever to be used to encourage accurate expert testimony, that authority may be insufficient given the potential complexity of the technical, scientific, or otherwise specialized subject matter involved in the case."

Curd also argued that by attempting to police his testimony in a judicial case, the board, an executive state agency, violated the separation of powers delineated in the Kentucky constitution.

The court disagreed with this argument as well. The court's authority in policing Curd's testimony, Justice Minton wrote, was limited to "whether Curd was qualified as an expert to give opinion testimony" and "not whether the opinion testimony he gave offended professional ethical standards established for Kentucky-licensed land surveyors."

Quoting an older case, *Austin v. American Association of Neurological Surgeons*, Minton noted that board control over the content of expert witness testimony was necessary to ensure that judges receive accurate testimony. "If the court," he wrote, "were able easily to understand the content of a witness's testimony and effectively prevent misleading statements, an expert witness would not be required."

It would be "illogical," he continued, to rely on judges to police testimony they cannot personally validate. And the board, he added, by providing licenses which often form the basis of the qualification of an expert, is involved in the process from the beginning.

"The board," he concluded, "is advancing the Judiciary's most prominent policy: the pursuit of the truth through forthright and credible testimony…The judiciary and

the board exist in a symbiotic relationship. The judiciary governs the admissibility of evidence and qualifications of expert witnesses while the board, on the other hand, operates to ensure that when a licensee appears in court as an expert witness, his testimony conforms to the ethical standards associated with his license."

Curd's final primary argument, that the statutes the agency used to discipline him were unconstitutionally vague, did meet with some success. The justices agreed with Curd that several of the statutes used by the board were unconstitutionally vague. The statutes failed to define or provide standards for such violations as "gross negligence," "incompetence," testimony "likely to deceive the public," and actions which "bring dishonor to the profession."

Further, although the board argued that Curd's testimony could negatively impact "public health, safety, or welfare," Justice Minton believed the connection between the testimony and public ills is "too attenuated."

The board had argued that Curd's negligent testimony caused the opposing party in the boundary case to spend a significant amount of time and money, but Minton noted that, despite Curd's testimony, the claim of his party was valid and would likely have required time and money to defend against anyway. Other standards, the court ruled, were simply too vague when applied to expert testimony.

With much of the board's basis for discipline invalidated, the court returned the case to determine proper sanctions for the causes of discipline that were upheld.

"Letters of concern" cannot be subpoenaed, says Colorado court

Issue: Status of disciplinary "letters of concern"

Many warning letters sent by the state's medical board to doctors suspected of violating professional regulations are totally protected from subpoena or use in a civil proceeding or administrative action of a judicial nature, The Supreme Court of Colorado, held June 23, (*Colorado Medical Board v. Train*).

During the discovery phase of an appeal of her application for a Colorado medical license, license candidate Polly Train requested documents known as "Letters of Concern," warning letters that the board sends to physicians whose actions concern the board but do not warrant formal discipline proceedings.

Although the board argued that the letters were confidential under "professional review privilege," which protects the records of peer review committees from disclosure, the ALJ disagreed and ordered it to provide any relevant letters to Train.

The board appealed, but a state district court upheld the disclosure order, ruling that the professional review privilege applied only to civil suits, a category which did not include administrative actions.

The professional review privilege, from Section 12-36.5-104(10)(a) of Colorado's Medical Practice Act provides that: "The records of an authorized entity, its professional review committee, and its governing board are not subject to subpoena or discovery and are not admissible in any civil suit."

The board then appealed to the state supreme court, which has now reversed the lower decisions. The court held that the professional review privilege both protects records of professional review committees from all subpoena or discovery and prevents the admissibility of those records in all civil suits, including administrative proceedings of a judicial nature.

This protection from subpoena or discovery, Justice Gregory Hobbs, Jr. wrote, "promotes the General Assembly's intent to empower the board's issuance of confidential Letters of Concern to individual doctors as a corrective and precautionary device to protect the public from improper medical practice."

"It makes little sense," Hobbs added, "to construe the statute's protection of the Board's records against use in court adjudicatory proceedings, but to allow their use in administrative adjudicatory proceedings."

Board has "compelling interest" in using Rx database for investigations

Issue: Investigator access to prescription records

In a May 29 decision, a California appellate court upheld the use of the state's prescription record database by medical board investigators looking into the activities of practitioners (*Lewis v. Medical Board of California*).

The board began investigating physician Alwin Lewis after one of his patients filed a complaint focused on a recommendation from Lewis that the patient lose weight and start a diet the patient found unhealthy. The board used the CURES prescription database in its investigation.

Based on the initial complaint and improprieties discovered during the prescription search, the board issued several charges against Lewis. After a hearing, the board placed Lewis on probation for three years.

Lewis appealed, challenging those parts of his discipline that were based on data from CURES, and claiming that the searches violated his patients' privacy rights under the California constitution because the board conducted them without showing good cause or obtaining judicial permission.

Although Lewis' prescription practices were not the focus of the investigation, the board accessed his prescribing records in the CURES database, a database of prescriptions maintained by California in order to combat prescription abuse, accessible by the board without the use of a subpoena or other form of judicial approval.

While the court acknowledged that patients have a protected privacy right for their prescription information, it also held that the interest was a diminished one.

"Contrary to Lewis's contention," wrote Justice Dennis Aldrich, "it does not follow that a patient's expectation of privacy in his or her controlled substances prescription records is the same as the expectation of privacy in medical records."

"Unlike medical records," he continued, "prescriptions of controlled substances are subject to regular scrutiny by law enforcement and regulatory agencies as part of the pervasive regulation of controlled substances."

"A reasonable patient filling a prescription for a controlled substance knows or should know that the state, which prohibits the distribution and use of such drugs without a prescription, will monitor the flow of these drugs from pharmacies to patients."

The court also ruled that sufficient safeguards existed to prevent unauthorized disclosure of patients' information from the database, noting that the board had legal duties to prevent such disclosures. Although Lewis argued that those duties were not enforceable because no penalties existed for unwarranted public disclosure, the court ruled that the safeguards were nonetheless satisfactory.

The court noted that, even if Lewis had established a stronger right to privacy where information in the CURES database was concerned, the compelling interest of the state in using the information to quickly combat prescription-drug abuse would take precedence, allowing investigators to access the database before demonstrating good cause for doing so.

Delays caused by requiring that the board prove its good cause to access the database would defeat the purpose of the database, Justice Aldrich wrote, noting that, aside from aiding regulators, CURES also allows physicians to instantaneously access their patients' prescription records to determine whether a patient's prescription request is proper.

Failure to set timely hearing ends discipline effort

Issue: Disciplinary procedures and due process requirements

The Supreme Court of West Virginia, in a June 11 decision, ordered the state's real estate appraiser board to cease discipline actions against a former board member whom the board had moved to discipline, after the board failed to hold hearings in a timely manner (*York v. West Virginia Real Estate Appraiser Licensing and Certification Board*).

In 2001, Linda York, a licensed member of the state real estate appraiser licensing board, performed a review of an appraisal by Barbara McCracken, a licensee whose actions had come to the attention of the board. The review caused a complaint to be filed against McCracken, whose license was eventually suspended.

The discipline did not last. On appeal, a state circuit court reinstated McCracken's license and, in 2008, she filed complaints against York and other appraisers who had reviewed her work.

The board dismissed the complaints, noting that appraisers usually kept records for only five years and that no evidence would exist for the case. An anonymous complaint concerning a 2003 appraisal by York was filed that December, but the board dismissed this complaint as well.

State law requires action on complaints within a one-year timeframe, and the board had failed to formally initiate proceedings within that time restriction.

In most cases, this would have been the end of the story. But, after a review of the board's practices by another agency in 2011, it reopened the two 2008 complaints against York, eventually seeking to discipline her and offering her a consent agreement which would have resolved the two complaints, as well as a third, newer complaint.

York, unhappy, challenged the board's ability to reopen the old complaints and requested a hearing to deal with the new one, but the board never formally initiated proceedings.

In July 2012, the board, based on a fourth complaint, again moved to discipline York. However, in doing so, the board failed to hold a hearing, and York objected, arguing that a hearing was required in order for the board to impose discipline.

York eventually filed an action seeking to prohibit the board from taking action, and the case went before the state supreme court.

The court ruled that state law imposed no time limitations for resolving a complaint, but they also held that neither did any statute exist which would allow the board to reopen cases it had previously dismissed. Because the board had previously dismissed the 2008 complaints, it had no authority to pursue them now.

The board's failure to provide York a hearing also irked the court. "Despite the clear and stated procedure allowing for a hearing and other procedures for contesting a complaint, the board has failed to allow the petitioner to seek redress for these complaints."

The court considered such inaction to resolve the complaints, and so issued a writ of prohibition preventing the board from proceeding with charges.

The justices also granted attorney fees and costs to York, ruling that the board's delays had been particularly vexatious.

Preponderance of evidence standard sufficient for license revocation

Issue: Standard of proof for enforcement actions

A federal court upheld the New York Office of Professional Medical Conduct's use of the preponderance-of-the-evidence standard for revocation of professional licenses, in a May 14 decision (*Tsirelman v. Daines*).

The Office of Professional Medical Conduct (OPMC) charged neurologist Gary Tsirelman with insurance fraud in 2007, based on several bills Tsirelman provided for work that was never done. A hearing committee found Tsirelman guilty of the charges, revoked his license, and fined him $100,000. He appealed.

While the appeal was pending, the state's legislature passed a bill that required the state to provide exculpatory evidence to physicians in discipline cases.

After passage of this legislation, Tsirelman attempted to use it to his advantage by asking for reconsideration of his case and requesting, as exculpatory evidence, records of other physicians' billing practices.

Tsirelman argued that, in his practice specialty, billing for certain procedures together was common even when one of the bundled procedures had not occurred.

The judge showed some sympathy for the argument that such an important decision as the revocation of a license should not be made on a standard that makes guilt simply more likely than not. But he ruled that concerns for public safety weight the balance in favor of such a standard.

An administrative law judge denied the request, and Tsirelman filed a federal judicial case seeking reinstatement of his license and the return of the $100,000 fine. The case went before District Court Judge Jack Weinstein.

In his appeal, Tsirelman, aside from the issue of his request for "exculpatory evidence," challenged New York's preponderance-of-the-evidence standard for cases where the state attempts to revoke a medical license for insurance fraud.

Citing cases from other states, Tsirelman argued that, because of the loss of livelihood and the stigma attached to revocation, due process guarantees require a higher "clear and convincing" evidence standard.

Though sympathetic, Judge Weinstein did not agree, writing that the Supreme Court had found the current standard sufficient.

"There is considerable force to plaintiff's position that a physician, after years of training and developing skills, should not be driven from practice on less than an overwhelming probability that he was guilty of serious misconduct demonstrated with the most meticulous procedural protections," Weinstein wrote.

"On balance, the state's policy, based on the need for the public's protection from cheating physicians who add to the high costs of medical care–even if their curative treatment is effective–requires strict enforcement with procedures that provide only reasonable, rather than the highest, protections."

Seizing on the recently-enacted "exculpatory evidence" law, Tsirelman also argued that certain state laws that give disciplinary officials discretion as to whether to reopen a case for reconsideration in the face of new evidentiary laws–instead of requiring them to do so–violate due process.

Judge Weinstein, however, noted that other avenues of appeal exist for the application of new evidentiary laws. He pointed to flaws in the methods Tsirelman used in his attempt to obtain documents—such as a failure to use his right to subpoena the documents—in dismissing both the assertion and the case.

Dentist sent to treatment clinic can't shield diagnosis from board

Issue: Investigation authority and licensee privacy

A substance abuse clinic must provide the state's board of dentistry with a report of a licensee's initial diagnosis from a board-ordered evaluation, despite the licensee's objection that the report would violate physician-patient confidences, an appellate court in Ohio ruled June 10 (*Ohio State Dental Board v. HealthCare Venture Partners*).

The licensee, an oral surgeon identified in court records only as "Dr. J.W.," caught the attention of investigators from Ohio's dental board after performing surgery with a blood alcohol content of 0.184 and subsequently pleading guilty to a DUI with a blood-alcohol content of 0.181.

As part of the investigation, J.W. was ordered to submit to an evaluation at a substance-abuse facility. He did as ordered, signing a release permitting the treatment facility, run by a company named HealthCare Venture Partners, to disclose his information to the board.

A physician from the treatment facility filed a report with the board in which he concluded that J.W. had an alcohol dependency and was impaired in his ability to practice dentistry. After the board issued a summary suspension of J.W.'s license, he requested a full hearing.

In concluding that disclosure was needed, Judge Tyack wrote that "the need in protecting the public from an impaired oral surgeon with a substance abuse problem is intuitively obvious." He added: "Under these circumstances, the potential harm to the public greatly outweighs the potential harm to Dr. J.W. from having his records revealed to the Board."

Before the hearing, J.W. challenged the board's use of the report of his alcohol dependency from the treatment facility, claiming that the release he signed was invalid under federal law.

HealthCare Venture Partners, for its part, agreed with J.W., claiming that federal law prohibits the disclosure of records from substance abuse treatment except pursuant to a court order—issued because the need for disclosure and an inability to otherwise obtain the information in the records outweighs the potential harm to the patient.

Faced with the treatment company's refusal to provide the records, the board filed a judicial action to enforce its subpoenas. The case made its way up to the state's Tenth District Court of Appeals in Franklin County.

During the appeal, the board argued that, because the purpose of J.W.'s evaluation was to provide information on his impairment to the board, J.W. should not be considered a "patient" whose records were protected by the federal statutes. The court disagreed with this argument, ruling that J.W. was, indeed, a patient.

That ruling aside, however, the court agreed that HealthCare Venture Partners was compelled to disclose J.W.'s evaluation records. J.W., the court noted, had agreed that the board had no alternative means of obtaining the information in his records except through a court order. And, Judge Gary Tyack wrote, J.W.'s expectation of privacy in the matter was greatly diminished by the fact that he must have realized the evaluation was for the purpose of providing information to the board.

Scope of Practice

Board can rule out fish pedicures, Arizona court finds

Issue: Board authority to regulate specific practices

An appellate court in Arizona ruled May 27 that the state cosmetology board may ban so-called fish pedicures, an unconventional method of dead-skin removal in which a customer places a foot or hand in a tank containing fish known as "doctor fish," which literally eat away dead skin from the customer (*Vong v. Aune*).

Despite a warning from the state's cosmetology board, Vong began performing fish pedicures at her business, La Vie Nails & Spa, in 2008. After investigators learned that Vong was providing the pedicures, the board sent Vong a letter explaining that the practice violated board regulations, as the fish were not proper instruments that could be sterilized between uses, creating a risk of disease transfer.

Vong objected, stating that the regulations were written prior to the conception of using the fish in pedicures and were, therefore, not applicable. "Applying rules regarding cosmetology implements to fish is flatly irrational," she told the court, noting that the fish are not tools which were subject to the sanitization rules.

Although, under pressure from the board, Vong signed a consent agreement acknowledging her violation of the rules, she subsequently brought an action against the board, arguing that fish pedicures were not within its jurisdiction and claiming the ban of the fish amounted to a violation of her constitutional rights. Eventually, the case came before the Court of Appeals.

Judge Margaret Downie agreed with the board. Disagreeing with an assertion by Vong that the fish were a form of entertainment not subject to cosmetology regulations, Downie ruled that the board had properly qualified the fish as a cosmetology tool.

Judge Downie also ruled that the ban was not unconstitutional. "The record in this case reflects that the board made a considered, deliberative decision about whether and how to regulate fish pedicures," wrote the judge, noting that board staff even attended a national conference on fish pedicures before making a decision.

The deliberations and other evidence at trial showed that the board's decision was rational and, therefore, constitutional. Vong's suit was dismissed.

Board's legal advisory on insulin shots struck down as violation of APA

Issue: Board compliance with Administrative Procedures Act

A state appellate court in California invalidated, on procedural grounds, a legal advisory issued by the state's board of nursing which had purported to allow non-licensed school employees to administer insulin to students (*American Nurses Association v. Torlakson*).

The ruling, issued by the Court of Appeal of California in Sacramento May 8, was mostly a moot point, as California's Supreme Court had recently ruled that state law allowed the practice, regardless of the legal advisory.

In 2005, a group of parents of diabetic children joined with the American Diabetes Association to file a class action suit against the California Department of Education, claiming that it had failed to meet its obligations to administer insulin treatments to diabetic children during the school day due to a lack of school personnel needed to administer the treatments.

In response, the Department issued a 2007 legal advisory stating that unlicensed school employees, with the permission of both the children's parents and physicians, were qualified to administer insulin during school instructional hours if a nurse was not available.

The American Nurses Association, disapproving of the new rules, brought an action seeking to have them thrown out, claiming that it violated the state's Administrative Procedure and Nursing Practices Acts. Two lower courts ruled in

favor of the nurses, saying that the board had, indeed, violated the APA when it issued the advisory.

The case eventually rose to the state's Supreme Court, which ruled in favor of allowing the unlicensed treatment. However, instead of validating the new rules, the court held that state law *already* allowed unlicensed school employees to administer insulin. In doing that, the court refrained from ruling on the validity of the advisory and sent the case back to the lower appellate court for further action.

On remand, the appellate court ruled that the legal advisory was a rule subject to the APA. And, despite the fact that the Department had used the legal advisory to correctly interpret the statute, it had not conformed to the APA when it was issued, so the advisory was invalid.

This meant little, however, as the recent Supreme Court ruling made the fight over the new rules mostly a moot point. Whether or not the Department took an official position, unlicensed school personnel were still able to administer insulin under California law.

Accreditation

Board cannot permanently deny school's approval

Issue: Permanent approval denial and due process

Despite what appeared to be gross incompetencies and dishonest behavior on the part of a new nursing school in Ohio, an appellate court ruled June 5 that the state's board of nursing did not have the authority to issue a permanent denial of the program's approval (*Ohio American Health Care v. Ohio Board of Nursing*).

The Ohio Board of Nursing granted conditional approval of Ohio American's nursing program in 2010, and the school began operating shortly thereafter, but after receiving several complaints about the school, the board initiated an investigation into its practices in 2011.

The investigation uncovered numerous failures by the school to comply with regulations governing nursing programs and comply with the proposals it provided to board in order to get approval.

Among the failings: an administrator was fired after refusing, at the order of the school's owner, to alter failing grades; the school charged $4,000 more for yearly tuition than it had proposed; several instructors were not qualified; curricula were substandard; and the school failed to provide required clinical hours to its students.

After a series of hearings, the board permanently withdrew the school's approval, and the school appealed. After a trial court upheld most of the board's decision but ruled that it did not have the authority to issue a permanent denial of approval, both parties appealed and the case went up to the state Court of Appeals in Franklin County.

Representatives of the school argued that the regulations allowing the board to sanction nursing programs do not sufficiently indicate which sanctions will be issued for which violations, a failing that the school argued made the regulations unconstitutionally vague.

Other programs that suffered from problems similar to Ohio American's, school representatives claimed, were able to enter into consent agreements with the

board, which allowed them to continue operating, instead of receiving a permanent denial of approval.

The court disagreed. "Although the school argues the board treated it differently from other nursing education programs found to have violated the same administrative code provisions by offering consent agreements to those programs rather than withdrawal of approval to operate, the school does not suggest those violations included the same flagrant conduct at issue here," wrote Judge Betsy Luper Schuster.

"The fact that other nursing education programs received different penalties than the school does not render the statutory and regulatory scheme vague where the factual record is distinct for each nursing education program."

The Court of Appeals also upheld the lower court's ruling that the board did not have the authority to permanently deny Ohio American's approval.

Judge Luper Schuster noted that, in issuing the permanent denial, the board had incorrectly used a regulation which allows it to permanently deny a *professional licens*e, but which did not pertain to nursing program approvals.

Because no other law existed which gave the board the ability to permanently deny approval, it had no authority to do so, and would be required to consider future applications from Ohio American.

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