Professional Licensing Report

Licensing, testing, and discipline in the professions

November/December 2014

Vol. 26, Numbers 5/6

Highlights in this issue

Scope of practice

Court invalidates scope of practice rules

Issue: Evaluation not synonymous with diagnosis

Regulations authored by the Texas Board of Marriage and Family Therapists to define its licensees' scope of practice are invalid, the Court of Appeals of Texas held November 21. The court agreed with the Texas Medical Association that the rules impermissibly allowed therapists to engage in the practice of medicine (*Texas State Board of Examiners of Marriage and Family Therapists v. Texas Medical Association).*

The ruling was issued in response to a lawsuit filed in 2008 by the state medical association against the marriage and family therapists' board, which sought to invalidate the regulations.

One of the challenged regulations allowed marriage and family therapists to diagnose patients using two well-known diagnostic guidelines, the Diagnostic and Statistical Manual of Mental Disorders (DSM) and the International Classification of Diseases (ICD). The other simply stated that therapists "shall base all services on an assessment, evaluation, or diagnosis of the client."

*See **Scope of Practice**, page 12*

Licensing

State's voters reject drug testing for doctors

Issue: Random drug testing of licensed professionals

Worker drug testing has become common practice among U.S. employers. But rarely does it apply to licensed professionals. If California's Proposition 46 had been approved in the November 2014 elections, its requirement for random drug testing of physicians would have been a first in American history.

The unusual initiative sought to make numerous changes to the medical system in the state by increasing the cap on non-economic damages in negligence lawsuits from $250,000 to more than $1 million—and requiring drug and alcohol testing of doctors as well. But largely due to opposition from insurance companies, which funneled millions of dollars into defeating the measure, the Medical Malpractice Lawsuits Cap and Drug Testing of Doctors Initiative lost by more than 2 million votes.

One of the most controversial features of the initiative was its yoking of the malpractice cap proposal to the drug-testing requirement. Supporters of the initiative argued that random testing of physicians was the centerpiece of the bill, and the raise in the cap of malpractice lawsuits was an adjustment needed for inflation. They focused on medical negligence as the crisis, and random testing to curtail malpractice as imperative for the safety of patients. Critics, however, argued that the measure was deliberately misleading in presenting drug and alcohol testing of physicians as its primary purpose.

Molly Weedn of the California Medical Association contends that Proposition 46 was a "deeply flawed" measure. "It would have increased health care costs for everyone, decreased access for those who need it most, and taken money directly out of the health care delivery system and put it right into the pockets of trial attorneys," said Weedn, CMA associate vice president of public affairs.

She rejects proponents' claim that the initiative was really about patient safety. "It did everything but [protect patients]," Weedn said. "In fact, provisions around drug testing and mandatory use of a drug monitoring database were included, by the proponents' admission, because they polled well and were the "ultimate sweetener.' This measure was always about increasing the cap on malpractice payouts to fatten the pockets of trial attorneys."

"Fifteen to eighteen percent of doctors will have a substance abuse problem at some point in their careers," said Consumer Watchdog's Carmen Balber. "The measure would have allowed identification of impaired doctors and protected patients who are needlessly being harmed."

The Proposition 46 proposal to require doctors to check California's statewide prescription drug database, called CURES, would save California taxpayers up to $406 million annually, Balber said. The requirement would also give more information to doctors to prevent prescribing to addicts.

She believes Proposition 46 would have had a severe impact on the cost of health care in California. A former legislative analyst estimated that for an average family of four, the cost of health care would increase by $1,000 per year, while the current legislative analyst said the measure could have cost state and local governments up to hundreds of millions of dollars annually.

"It also would have resulted in reduced access to care for patients that need it most," Weedn said, arguing that many specialists would be forced to reduce services or move to states with more affordable malpractice premiums.

Carmen Balber, executive director at Consumer Watchdog, on the other hand, saw Proposition 46 as a patient-safety measure "going after one of the biggest crises in the country." Balber called random drug testing of physicians "a necessity," given statistics that show approximately 140,000 deaths occur in American hospitals from medical negligence. A major reason for these deaths is the fact that doctors are not being drug tested, she said.

Organizations like the CMA criticized the CURES database as an invasion of privacy, but Balber pointed out that the database run by the Department of Justice already existed before the initiation of Proposition 46 and that it posed "very little risk" of infringing privacy. She asserted that the proposition would not have overburdened taxpayers, and called out opponents of the measure for campaigning tactics filled with "bogus rhetoric."

Molly Weedn thinks voters made the right decision and that Proposition 46 should have focused on looking at ways to improve access to safe, quality medical care to ensure people get the treatment they need.

From Carmen Balber's perspective, on the other hand, something needs to be done to mitigate the correlation between physician malpractice and substance abuse. "Proposition 46 sought to take on this crisis in a better, different way, and keep the patient safe."

No licensee "right to know" all details of investigation

Issue: Licensee access to board e-mails & phone records

A sanctioned physician did not have a right to board emails, phone records, and other information pertaining to his disciplinary proceeding, the Commonwealth Court of Pennsylvania ruled December 8. The court denied reconsideration of a sanctioned physician's request for access to the information under the state's Right-to-Know Law (*Glunk v. Department of State*).

Richard P. Glunk, a licensed physician, was found to have engaged in immoral conduct for attempting to influence a board member during a disciplinary matter. The disciplinary matter was dismissed, but the board sanctioned Glunk for his alleged immoral conduct, ordering a 60-day license suspension, a $5,000 civil penalty, and 50 hours of continuing education. Glunk's motion to reopen the record was denied.

In 2012, Glunk filed twelve Right-to-Know Law (RTKL) requests for information regarding his disciplinary proceeding, including all emails, letters, phone records, notes, memos, and messages to and from Mark Greenwald that referred to or involved Glunk in any way. Greenwald is a prosecuting attorney with the state Bureau of Enforcement and Investigation who advised the board on the case. Glunk sought the same information for eight other people.

The court said the essential issues in Glunk's petition for review boiled down to four:

- Does an act of bad faith invalidate all affidavits in opposition to an appeal of a requester by the Department's open records officer?
- Can the Department's open records officer destroy incriminating emails in response to a Right to Know request?
- Can an email chain containing a letter discussing the actions of the medical board ten months earlier and/or reply to an email be denied as a pre-decisional deliberation?
- Is an appointment calendar that confirms other public information deniable under the state's Right-to-Know law?

The court rejected Glunk's charges of bad faith on the part of state employees, and found that the items Glunk sought were either exempt from disclosure under an exception to the Right to Know law or do not exist.

Only request 9 in regard to the vacation times of the hearing examiner (but nothing else) was granted, authorizing disclosure by the state. The Department established that the other records were either exempt from disclosure or do not exist, the OOR said.

In his petition for review, Glunk said Heidi Barry, the Department's open records' officer "attested to a falsehood" in her affidavit or destroyed documents when claiming she could not locate any e-mails related to Glunk, while an administrator of the board did locate one such document. Glunk stated that this legitimately undermines Barry's credibility.

The court, however dismissed the claim, stating, "The fact that [the administrator] located an e-mail chain when searching through a different set of documents than those that Barry reviewed does not tend to undermine Barry's credibility or demonstrate any impropriety on her part."

Furthermore, the court points out that the open records office accepted Barry's affidavits as credible evidence, as was its right, as "the initial fact-finder."

Glunk also contended that the OOR erroneously found that McKeever's work calendar was "exempt as personal notes and working papers." Glunk claimed that McKeever's statements in her affidavit were "conclusory" and "insufficient," and that her supervisor had access to the calendar.

Judge McCullough, however, found that McKeever explained the notes on her calendar in sufficient detail, specifically highlighting how statements illuminate the "personal nature" of her calendar and "include the times and locations of events, meetings, and hearings that she has to attend; leaves of absence that she has scheduled; work tasks that she has to complete; and personal reminders that are unrelated to her employment with the Department." As "personal notes," the calendar was exempt from disclosure, the judge found.

Hepatitis C no excuse for misconduct unless proven link to behavior

Issue: Mitigating factors in setting discipline sanctions

An accountant's shortcomings and a Hepatitis C infection were not reliable mitigating factors in disciplinary recommendations of an attorney who committed nearly two dozen counts of misconduct, the Supreme Court of Wisconsin held August 1 (*In re Disciplinary Proceedings Against Mandelman*).

Attorney Michel D. Mandelman entered into a stipulation, pleading no contest to 22 remaining counts of misconduct. The referee of the court recommended revocation of Mandelman's law license for the misconduct, which included "reckless" accounting and making "false or misleading communications regarding the name and organizational status of his law firm." Mandelman contested the referee's recommendation as a disproportionate sanction.

The attorney claimed that his accountant failed to make a proper evaluation of records and that it was not his responsibility to ensure the records were accurate. However, the court noted that Mandelman had not mentioned the alleged incompetency of his accountant to the referee, and thus it could not be considered. Further, the court ruled, Mandelman did not show that his reliance on his accountant was reasonable.

Mandelman also claimed that a Hepatitis C infection caused chronic fatigue symptoms during the time that the majority of his misconduct took place. But the court found that Mandelman failed to demonstrate that the infection directly caused his misconduct. "A medical condition will not be considered in mitigation of discipline unless that condition is explicitly found to have caused the misconduct."

Mandelman has an extensive history of misconduct dating back to 1990— including seven disciplinary episodes, five of which were serious enough to merit license suspension— and the court noted that this background was a major factor in its decision to revoke his license.

Reckless driving, DUIs not just "traffic violations" when renewing license

Issue: Discipline for failure to disclose criminal convictions

The Court of Appeals of Tennessee, in an October 6 ruling, affirmed a trial court's decision to place a physician's license on probation for five years for failing to disclose a reckless driving conviction and DUIs on his medical renewal license application (*Stubblefield v. Tennessee Department of Health*).

Steven B. Stubblefield has been licensed as a board-certified cardiologist in Tennessee since 1980. In 2008, Stubblefield pled guilty to reckless driving and in 2009, he twice pled guilty to driving under the influence. Stubblefield failed to report these convictions to the board and on October 13, 2011, the Division of Health Related Boards of the Tennessee Department of Health filed a Notice of Charges against Stubblefield.

"A sanction an agency imposes on an individual is not rendered invalid merely because it is more severe than that which was imposed in another case," the court of Appeals asserted.

The Department of Health presented evidence of Stubblefield's license renewal applications, in 2009 and 2011, and noted that in the section of the forms asking whether the applicant has been convicted of a crime, Stubblefield had not circled "YES" on either application.

Stubblefield admitted that he did not circle "YES" on either of his applications, but claimed that he thought the convictions were just traffic violations.

The board imposed a probation of five years on Stubblefield's license, which Stubblefield appealed, claiming before the trial court that other physicians who had committed much more egregious offenses were reprimanded less severely.

The trial court rejected Stubblefield's claim that the penalty was disproportionate and also rejected his contention that the board's sanctions were imposed in violation of proper procedure and that the board lacked enough evidence to satisfy the burden of proof. The Court of Appeals affirmed.

Judge Andy Bennett rejected Stubblefield's claim that the board violated investigative procedure or failed to present sufficient evidence to warrant a five-year probationary sentence of his medical license.

"Dr. Stubblefield has not shown that a reasonable person would necessarily have reached a different conclusion than the board, based on the evidence presented at the contested case hearing," the judge wrote. Even if Stubblefield's objections to the improper introduction of evidence had merit, the judge added, Stubblefield's attorney failed to object at the appropriate time—thus waiving the issue for appellate review.

Denying suspended licensee a hearing was out of bounds

Issue: Due process in disciplinary proceedings

An Oregon appellate court overturned a decision by the state's Teacher Standards and Practices Commission to suspend the license of a teacher who improperly worked as an administrator without the correct license for four years.

In the October 1 decision, the Court of Appeals of Oregon held that the commission failed to include sufficient information to support its decision to deny the teacher a hearing (*Gordon v. Teacher Standards and Practices Commission*).

After completing an administrator program at Lewis and Clark College in 2004, teacher Laurie Gordon applied to the college for documents she needed to obtain an administrator license before accepting a principal position. Gordon believed that Lewis and Clark would process her application and submit its documents to the Teacher Standards and Practices Commission, and the human resources department of her new school district told her it would obtain a copy of her license from the commission's website.

However, in 2011, when she checked into the renewal process for her license, Gordon discovered that it did not, in fact, exist. Since she still possessed a valid teacher license, Gordon moved into a teaching position with her district in the fall after resigning her principal job in June. But the commission, in September of that year, charged her with neglect of duty based on the administrator license incident. Gordon failed to request a hearing on the charges, and the commission suspended her teaching license for a year.

Gordon then hired an attorney and filed a late request for a hearing, claiming that problems with inadequate medication for depression, brought about by a lack of health insurance from the period of temporary unemployment related to the missing administrator license, caused her to be confused about the import of the charges. She had believed they only pertained to her lack of an administrator license and would not affect her teaching license. When her request was denied, she appealed, and the case went before Oregon's Court of Appeals.

State rules allow the commission to accept a late request for a hearing if it believes the circumstances that caused the tardiness were beyond the control of the applicant, and, in her appeal, Gordon argued that the commission did not provide sufficient evidence of its beliefs when it denied her request. She also

argued that, according to state administrative rules, the commission was required to provide her a hearing on her request if it disputed her account of why she had failed to request an earlier hearing.

Judge Doug Tookey, writing for the court, agreed with Gordon, concluding that the commission's order, which only stated that it was "not persuaded by [Gordon's] evidence that the cause for failure to timely request the hearing" was beyond her reasonable control,' provided insufficient information for the court to make a determination whether the commission had erred.

"It is not possible," Judge Tookey wrote, "to determine from the [commission's] order whether the agency was not persuaded because it disbelieved the facts underlying petitioner's submissions or because it concluded that those facts, although undisputed, were legally insufficient."

If the agency disputed the facts behind Gordon's claim, state regulations required it to hold a hearing, but if it simply determined that, assuming Gordon's story was true, she simply did not merit a late hearing, it needed to explain that decision in more detail, the court said. It remanded the case back to the commission.

Public drunkenness is basis for ordering mental/physical evaluation

Issue: Impact of non-working behavior upon licensure status

The Court of Appeals of Iowa, in a November 26 ruling, affirmed a board's order that a pharmacist undergo a mental and physical evaluation based on multiple "second hand" accounts of public intoxication (*Doe v. Iowa Bd. of Pharmacy*).

The pharmacist, John Doe, has been licensed since October 2010. In October 2011, he was charged with operating at pharmacy while intoxicated. Pleading guilty, Doe was sentenced to complete either a 48-hour jail sentence or a treatment program for addiction.

In January 27, 2012, Doe's supervisor contacted the board to determine if Doe had self-reported his conviction to the board, which he was required to do. Doe had not done so, claiming that he thought he did not have to until he applied for renewal of his license.

An investigation revealed that "on many occasions" Doe showed up to work appearing to be hung over from heavy drinking the night before. The board also received numerous "secondhand" allegations that Doe had often been intoxicated in public.

A hearing was held before the board on March 12, 2013. Doe submitted a substance abuse evaluation by an assessment counselor, which concluded, "there was a low probability Doe had a substance abuse disorder." Nonetheless, the board decided to order Doe to undergo a mental and physical evaluation due to a "credible report" that Doe's intoxication was affecting his work performance.

The board also stated that it was not required to wait until a member of the public was harmed by Doe's substance abuse. Doe appealed, contending the board did not have sufficient evidence to order an evaluation.

In an opinion handed down by Judge C.J. Danilson, the court rejected Doe's claim that the board did not have enough evidence to order a mental and physical evaluation. Danilson notes that the board had a "reasonable ground for belief" that Doe had an impairment. But Doe claimed the strongest evidence was his substance abuse evaluation, a piece of evidence rejected by the board. Based on that, Doe alleged the board was wrongly relying on hearsay —the secondhand reports.

The court noted that the board has discretion in regard to expert testimony that is "incomplete," and that the board found the reports by Doe's supervisor and the secondhand accounts more reliable than a single report by an evaluator based on the statements of Doe.

Donilson agreed with the board's findings of probable cause that Doe suffers from a substance abuse addiction which renders him unfit to practice pharmacy.

Board wins appeal after court overturns its discipline of pharmacist

Issue: Jurisdiction not relevant to violations

The Missouri Board of Pharmacy appealed a circuit court's ruling to set aside the decision to discipline a pharmacist who committed multiple violations of the practice act, including distributing substances without a valid license. In a November 12 decision, the Missouri Court of Appeals sided with the board, reversing the circuit court's ruling on jurisdictional grounds (*Peer v. Missouri Board of Pharmacy*).

John H. Peer was licensed by the board as a pharmacist in 1972. In July 2006, Peer entered into an agreement with the board regarding discipline imposed for multiple violations as a working pharmacist. His pharmacist license was put on five years' probation the following month.

On March 10, 2011, the board was notified that Peer's Pharmacy had been operating with an expired license and found that Peer had, once again, committed multiple practice violations.

Peer's violations were failure to:

- maintain the original prescription in the appropriate prescription file;
- maintain the pharmacy in a clean and sanitary condition;
- maintain proper files of prescriptions;
- keep pharmacy inventory separate from outdated supplies;
- keep the daily pharmacist signature log signed;
- keep the compounding area in a sanitary condition;
- properly dispose of controlled substances;
- properly maintain records of controlled substances;
- maintain a Schedule II controlled substance in a secured area;
- maintain separate records of controlled substances; and
- properly maintain records when dispensing controlled substances.

In August 2011, the board replaced the 2006 Settlement Agreement and gave Peer another two years of probation effective immediately. If all requirements of the agreement were satisfied at the end of the two years, then Peer's license would be fully reinstated.

However, in January 2013, the board filed a complaint asserting that Peer had violated the terms of his probated license.

"Peer failed to immediately produce quarterly review of errors reports, and in the reports he did produce, he did not include the steps taken to prevent recurrence of errors," according to the board. The board revoked Peer's license, prohibiting him to reapply for seven years.

Peer appealed the board's decision, contending that the board lacked jurisdiction in placing him under further probation since the probationary period had ended before the onset of the additional discipline the board implemented; that the board's decision to discipline him did have enough factual merit; and that it was "arbitrary, capricious, and unreasonable."

The circuit court found that, under the terms of the 2011 disciplinary order, Peer's probationary period expired August 4, 2013, and the board lost jurisdiction and authority to impose additional discipline as of that date. On that basis, the court nullified the board's 2013 order.

The Missouri Court of Appeals, however, in an opinion by Judge Mark Pfeiffer, disagreed with the circuit court's ruling and sided with the board.

Pfeiffer rejected the jurisdiction claim made by Peer (and upheld by the circuit court), finding instead that the action by the board was within the parameters of the statute.

As for Peer's claims that the discipline handed down by the board was capricious, and any violations committed were due to sleep deprivation or computer errors, Pfeiffer did not show sympathy, pointing out that it was clear errors were made due to Pfeiffer's "egregious" conduct.

"There is sufficient competent and substantial evidence to support the board's finding that Peer violated the terms of probation."

Further, Pfeiffer ruled that the board has discretion to decide how severe additional discipline will be and that the decision to revoke Peer's license was not unreasonable.

Agency neutrality at issue in sexual misconduct case

Issue: Status of agency imposing disciplinary action

A doctor whose license was revoked for having an inappropriate sexual relationship with a former patient less than two years after the professional relationship had ended will get another review of his case, under a September 12 ruling by the Supreme Court of Nebraska (*McDougle v. State of Nebraska*).

Eric McDougle's license was revoked due to engaging in a sexual relationship with a patient approximately one month following the termination of their patient-doctor relationship. McDougle admitted to the prohibited conduct, self-reporting himself to the Department of Health and Human Services. McDougle claimed he wasn't aware that he was in violation of applicable regulations at the time of the relationship. The department investigated and decided to revoke his license.

When an administrative agency acts as the primary civil enforcement agency, it is more than a neutral factfinding body, and thus, is a party of record within the meaning of the statute governing a petition for judicial review, the court said.

McDougle appealed the disciplinary order, arguing that the department was not simply "a neutral factfinding body" and should be construed as a "party of record," since the director of the department was complicit in the decision to impose disciplinary action. Under Nebraska rules and regulations, a petition must be filed by the state attorney general in order for the director of the department to take an active part in disciplinary action.

The district court dismissed McDougle's claim for lack of jurisdiction; McDougle then appealed to the Supreme Court of Nebraska.

In an opinion handed down by Supreme Court Judge Michael McCormack, the court found that McDougle was correct in identifying the Department of Health and Human Services as a "party of record." "We hold in this case that the Department acted as more than "only ... a neutral factfinding body," Judge McCormack wrote.

Further, McCormack asserted that the State ignored "the plain language" of the statute that reads, "in all ... cases [where the agency's role was more than a neutral factfinding body], the agency *shall* be a party of record."

Since "the Department acted as more than a neutral factfinding body when it revoked McDougle's licenses," McCormack wrote, "the Department was properly named as a party to McDougle's petition for review of that decision."

Appraiser revocation for stealing information was valid

Issue: Appropriate sanctions for professional misconduct

The Idaho Supreme Court affirmed a state's board's decision to revoke a real estate appraisal license after determining that the individual had accessed confidential information, in an October 29 ruling (*Williams v. Idaho State Bd. of Real Estate Appraisers*).

In January 2005, a real estate appraiser sent a letter to the state Bureau of Occupational Licenses, charging that Timothy Williams had wrongly gained access to their requests for proposals from Wells Fargo Bank. Williams allegedly used the information he accessed to under-bid bids made by appraisal from Knipe Janoush Knipe, LLC on "numerous occasions."

In September 2006, Tony Orman, an appraiser, also filed a complaint with the bureau, accusing Williams of signing a misleading appraisal report for a property located in Donnelly, Idaho.

On November 21, 2008, Williams sought judicial review via petition, alleging that the board's investigation was not conducted according to law, and asking the district court to dismiss with prejudice all claims filed against him. The district denied Williams' petition, reasoning that the board " had properly delegated to the Bureau the discretion to initiate investigations."

Williams then appealed to the Idaho Supreme Court. After remand, in March 2011, the Bureau filed an amended complaint alleging eight counts of wrongful conduct by Williams, mainly centering around his breaking into a competitor's system.

Williams made 20 claims for reversal of the board's decision, which the court condensed into four arguments: First, the proceedings against him were initiated in violation of law; second, his due process rights were violated because the board was biased and the statutes under which he was sanctioned are unconstitutionally vague; third, there was insufficient evidence to support the board's decision; and fourth, the board abused its discretion in imposing sanctions against him.

Williams claimed that any counts based upon an investigation that was not initiated by a sworn complaint or a formal motion (and vote by the board) must be dismissed. The board, however, following the recommendation of the hearing officer, denied the motion to dismiss.

Williams also argued that there was not any evidence that he was the winning bidder when Janoush repeatedly got underbid. The court cited that argument as "irrelevant" since the violation concerned "logging into the accounts of his competitors." Whether Williams caused provable damage or not "is beside the point," the court ruled.

Williams' argument that there was insufficient evidence to support the board's finding that Williams violated requirements of the USPAP for "personal inspection of property" failed to possess merit, since Williams failed to include the USPAP rules in the record. "Because of this failure, the court cannot review his arguments and must assume the board's decision was correct," the court wrote.

Williams also attempted to argue that the sanctions placed against him were "punitive and inconsistent" with the alleged violations.

The court disagreed, stating that "Williams failed on appeal to engage in any meaningful discussion as to how the board's sanctions were punitive or inconsistent with the alleged violations. Absent argument or authority, this court will not consider the issue."

Full findings of fact not needed for denial of reinstatement

Issue: Due process in justifying refusal to reinstate license

An appellate court in Alabama ruled September 26 that denials of license reinstatement requests by the state's Medical Licensure Commission do not require the same findings of fact and conclusions of law that apply to discipline actions (*King v. Medical Licensure Commission of the State of Alabama*).

The Commission revoked John King's license in 2008. Two times within the next five years, King applied for reinstatement, but the board denied his requests and, in May 2014, King appealed to the Court of Civil Appeals of Alabama.

Primary among King's arguments on appeal was that the commission had erred by failing to include findings of fact or conclusions of law when it denied his reinstatement applications; instead, the order of the commission simply stated that King "has presented insufficient evidence that he is capable of safely practicing medicine in Alabama."

For its part, the commission argued that the Alabama Administrative Procedure Act (AAPA), which controls administrative decisions, does not require those findings when the commission denies a request for reinstatement, and that the evidence King presented in his applications was "woefully inadequate."

The court ruled for the board, writing that the order was, in fact, sufficient to meet the standards required by the AAPA for denials of reinstatement applications. The order, the court wrote, "included both a finding and a conclusion," although the AAPA does not actually require the board to include either for a denial of a license reinstatement application.

Chiropractor discipline upheld in case alleging antitrust violations

Issue: Due process in justifying refusal to reinstate license

In a December 1 memorandum opinion, the District Court of Virginia ruled in favor of a board's decision to sanction a chiropractor, holding that the board did not violate any antitrust laws (*Petri v. Virginia Board of Medicine*).

In February 2013, the Virginia Board of Medicine determined that Yvonne Petrie violated sections of the Virginia Code by advertising and promoting her services in a manner that was false and misleading. The board claimed that Petrie acted outside the scope of her chiropractic practice by "holding herself out as a nutritionist able to 'reverse' Type 2 diabetes and treat thyroid and metabolic disorders."

The board asserted that she did not meet the criteria listed in Virginia law to present herself as a registered dietician and nutritionist, and thus was acting outside the scope of her practice by offering "diet and nutrition counseling, ordering blood, saliva, and urine testing, and performing procedures with a laser." The board fined Petrie $25,000 and suspended her license for six months.

Petrie appealed the board's decision and brought suit against the board, alleging breach of antitrust law, "that the Defendants entered an agreement to allocate the relevant service markets to medical doctors and excluded chiropractors, including Plaintiff, from competing in those markets in violation of the Sherman Antitrust Act." She sought to introduce expert witnesses to show that the board is excluding chiropractors and unfairly limiting their scope of practice; the court disallowed the witnesses.

But in a memorandum opinion, handed down by District Judge Claude M. Hilton, the court disagreed with Petrie's claims. Hilton highlighted the statement within the antitrust act that "the elimination of a single competitor, standing alone, does not prove the anticompetitive effect necessary to establish antitrust injury."

According to Judge Hilton, there was not enough evidence presented by Petrie to demonstrate that what happened to her (even under the assumption of unreasonableness) was a widespread epidemic affecting chiropractors.

Reprimand for reckless accusations against fellow licensees

Issue: Discipline for accusations against professional peers

A criminal defense attorney made reckless accusations of misconduct against other attorneys on the Internet and sent imprudent ex parte letters to several judges, the Wisconsin Supreme Court said August 5 in publicly reprimanding the attorney (*Office of Lawyer Regulation v. Sommers*).

As revealed in letters delivered to the Supreme Court justices, attorney Joseph L. Sommers complained for several years about what he believed to be a "cover-up" of prosecutorial misconduct in Dane County, Wisconsin.

Sommers referenced specific attorneys in the letters, contending they fabricated evidence and suborned perjury. He also posted the letters on the Internet.

In a per curiam opinion, the Supreme Court of Wisconsin held that Sommers violated three provisions of the Wisconsin Rules of Professional Conduct. The court stressed that the Attorney's Oath "should not be invoked to stifle legitimate critique" of matters pertaining to the judicial process. However, the court deemed Sommers' critiques as reckless, reflecting "outspoken contempt for the entire court system."

The referee of the court concluded that Sommers' license should be suspended for 60 days, but in a split decision, the court declined to impose the suspension, instead opting to publically reprimand Sommers.

Chief Justice Shirley S. Abrahamson dissented, asserting that while she did not find Sommers' conduct acceptable, she nonetheless sympathized with "his distress about what he views as injustices."

Licensing

Non-existent school and employment history justify revocation

Issue: Unsubstantiated job and credential history

The state nursing board had substantial evidence in support of its decision to revoke a nurse's license, the Court of Appeals of Arkansas held December 3, affirming the revocation of Winnie Ebel Armiah Obigbo's license (*Obigbo v. Arkansas State Bd. of Nursing*).

An investigator with Arkansas Healthcare Investigations, a private company, was procured by the Arkansas State Board of Nursing after it received an anonymous complaint alleging Obigbo was not qualified to be a nurse. The investigator, Dan West, testified that he was unable to verify that the nursing school Obigbo named on her transcript existed.

West also discovered that Obigbo's claims that she worked as a pharmacy technician in 2001 and 2002 could not be corroborated, as the Texas State of Pharmacy had no record of her.

The board concluded that Obigbo committed fraud since their investigation found no evidence Obigbo attended a nursing school in Cameroon (where she claimed to have gone to nursing school). Nor was the board able to confirm Obigbo's prior places of employment.

On appeal, Obigbo claimed that she went to nursing school in Cameroon from 1994 through 1997, but it was not listed as her permanent address as she was living in a dormitory. Obigbo contended that the reason there was no record of her having worked as a pharmacy technician in Texas during the years 2000 and 2001 was because the pharmacy board did not begin registering technicians until 2004.

Obigbo also claimed that a company that she accused of Medicare fraud made the anonymous complaint in retaliation against her.

Chief Judge Robert J. Gladwin, affirming the board's decision, asserted that the board did, in fact, have enough evidence for license revocation. "The decision was based on the entirety of West's investigation," Gladwin wrote. "The board's decision is supported by substantial evidence."

Gladwin also pointed out that the board was not required to believe Obigbo's explanations for the various inconsistencies in her nursing record.

Scope of Practice

Rule expanding scope of therapists' practice held invalid *(from page 1)*

These two rules, the medical association claimed, impermissibly infringed on the statutorily delineated scope of practice for physicians because only a licensed physician is qualified to "diagnose" mental diseases and disorders.

After a trial court struck down one of the rules and upheld the other, both parties appealed, and the case went up to the Court of Appeals of Texas in Austin. In a decision by Justice Scott Field, that court agreed with the TMA that the rule allowing the use of the DSM and ICD in diagnosing patients was invalid.

Under the Medical Practice Act, Justice Field wrote, "a person who engages in the 'diagnosis' of a mental disease or disorder for compensation is practicing medicine."

Thus, the justice wrote, the therapist board's interpretation—that language in its enabling act that allows therapists to engage in the "evaluation" of patients includes the ability to "diagnose" patients directly—conflicted with the state's Medical Practice Act. In explaining this ruling, Justice Scott distinguished the terms "evaluation" and "diagnose," noting that the two words were not synonymous.

Turning to the second of the two challenged regulations, the court ruled that the broader language it employed—stating only that therapists should base their services on "an assessment, evaluation, or diagnosis"—despite including the phrase "diagnosis," did not suffer from the failings of its overturned sibling.

This second rule, Justice Field wrote, "does not expressly require a marriage and family therapist to diagnose a client—only that the therapist's services be *based on* an assessment, evaluation *or* diagnosis of the client, presumably by some health care professional legally qualified to provide one." The rule, Field noted, does not allow therapists to diagnose clients, and would be upheld.

MA licensees must be supervised by PhDs, court confirms

Issue: Advanced degrees required for practice

The Court of Appeals of Texas, in a July 31 ruling, upheld a board's decision to allow an association's licensed psychological personnel who have a master's degree to practice only if they are supervised by a psychologist with a doctoral degree (*Texas Ass'n of Psychological Associates v. Texas State Board of Psychology*).

In 1993, the Legislature formed the Psychological Associate Advisory Committee (PAAC), which subsequently made several recommendations to the Texas psychology board, including a recommendation that the board eliminate the supervision requirement for psychological associates with a master's degree. The board declined to follow the PAAC's recommendations.

In 2005, PAAC was abolished and the Texas Association of Psychological Associates (TAPA) filed suit against the board, claiming the repeal of PAAC provisions meant the board had no authority to enforce supervision upon them since the repeal of PAAC stripped "all references in the Psychologists' Licensing Act to the supervision of psychological associates."

In deciding whether the board overstepped its delegating power, the court noted that the Legislature "did not set criteria for license-granting process." Rather, the power was transferred to the Commission authority "to exercise a broad discretion in the requirements it would make in this field." Thus, the court found, the board did not overstep its authority in setting a supervision requirement.

Further, the board rejected TAPA's argument that since the Psychologists' Licensing Act stated provisional licensees must practice under the supervision of a licensed psychologist, then the Legislature's intention was only for that specific class of license holder to be required to practice under supervision.

"It is nonsensical that the Legislature would intend for provisional licensees—who have obtained a doctoral degree—to be supervised but intend that psychological associates—who have only a master's degree—have no supervision requirements," the court wrote.

Competition

State can order halt to pet-teeth-cleaning service

Issue: "Agent" not the same as qualified licensee

State regulators may order the non-veterinarian operators of a teeth-cleaning service for pets to cease and desist the unlicensed practice of veterinary medicine, an Illinois appellate court ruled September 18 (*Lee v. Illinois Department of Financial and Professional Regulation)*. The court rejected an argument that the operators of the teeth cleaning service were permissibly acting as "agents" of the pets' owners.

Kristina Lee and Larry Chow operated an in-home teeth cleaning service for pets called Paws n' Claws, which billed itself as an anesthesia-free alternative to traditional veterinary teeth cleanings. Neither Lee nor Chow is a trained veterinarian, though both described themselves as having training in animal care and teeth cleaning.

In January 2011, the Department issued cease-and-desist orders to the pair, ordering them to cease both the teeth cleaning operation and any advertising representations that they were qualified to perform veterinary dentistry.

In response, Lee and Chow filed for review with a state court, arguing that their teeth-cleaning practices fell under an exemption to the state's Veterinary Medicine Act which allows for treatment by an "agent" of an animal's owner, that the department was required, and failed, to consult with the state veterinary board before issuing its orders, and that they had been denied due process because the department did not provide them with a hearing.

After an unfavorable ruling by a state circuit court, Lee and Chow appealed, and the case went up to the Appellate Court of Illinois, 1st District, in Chicago.

Justice William Taylor, writing for the court, noted that although Lee and Chow correctly asserted that the Veterinary Act directs the department to consult with the state veterinary board, that requirement "was not intended to protect the right of unlicensed individuals to engage in practices which may be construed as veterinary medicine."

Accordingly, he said, the requirement that the department consult with the board before enforcing the provisions of the act is directory only, not mandatory, and a failure by the department to engage in consultation does not require the reversal of its actions.

The court also rejected Lee and Chow's "agent" argument, noting that the exemption is not available to those who hold themselves out as "associated with the practice of veterinary medicine." Lee and Chow, because they advertised themselves as trained in veterinary practices and because the forms they used in their procedures contained diagnoses of dental diseases, had so "associated" themselves.

As for their due process claims, Justice Taylor noted that cease-and-desist orders do not require a hearing, and that Lee and Chow had been afforded an opportunity to present their side of the case to the department.

Testing

Exam failure does not trigger requirement of judicial review

Issue: Judicial review of licensing exam results and procedures

The Missouri Court of Appeals, in a November 12 ruling, affirmed a circuit court's decision to dismiss an action by an attorney who failed the bar examination and sought reinstatement. The court found that the attorney's petition was not eligible for judicial review (*Caranchini v. Missouri Board of Law Examiners*).

Gwendolyn Caranchini practiced law for nearly 20 years with a proper license before being disbarred in 1997 due to sanction orders entered in four cases between 1989 and 1992. Caranchini failed the bar examination four times from 2011 to 2013.

Caranchini argued that the trial court should not have dismissed her petition because she has a right to judicial review of both the board's methodology for scoring bar examinations and the board's application of that methodology to the scoring of her exam in particular. She charged that the board acted "arbitrarily, capriciously, and unreasonably, and that it abused its discretion" in regard to the procedure for scoring examination essays and the disallowance of re-scoring her examination.

"Other courts have consistently rejected requests to have examinations re-graded, usually on the premise that the right of reexamination is a sufficient guarantee of fairness," the court said.

In an opinion handed down by the Missouri Court of Appeals, Judge Karen Mitchell noted that Caranchini failed to recognize Section 6 in her petition, which states, "No re-grading or rescoring of any part of the essay portion of the examination will be provided. No appeal or review of exam scores or results is allowed."

Mitchell pointed out that Caranchini has no standing to "litigate" whether the board is using the proper means to accomplish a goal.

Mitchell also declared that several conditions must be met in order to invoke the right to judicial review. First, a party must allege that the challenged action was not "authorized by law"; second, if such a challenge is made, there must also be a demonstration that the action "was undertaken by an administrative officer or body under constitution or bylaw, was judicial or quasi-judicial in nature, and affected private rights."

According to Judge Mitchell, "Caranchini has not alleged that the board was required by law to provide an administrative hearing, so review—if it exists—would be limited to whether the actions complained of are authorized by law."

Further, Mitchell asserted that the board is not an administrative body and that it does not perform a "judicial function" when grading an exam, "Nothing related to merely grading an exam qualifies as "functions traditionally viewed as 'judicial.'"

Given that Caranchini failed to meet the four qualifications for invocation of Article V, section 18, the court stated it had no other choice than to dismiss her petition.

Certificant lacked "grandfather" status & must retake test

Issue: "Grandfathering" dependent upon many factors

A renowned physician licensed to practice in Michigan since 1966 was denied recertification by the national specialty certification board after he failed the certifying examination two times, and filed an appeal.

In an October 29 ruling, the District Court of Michigan granted the American Osteopathic Board of Family Physicians' motion to dismiss the case (*Lieberman v. American Osteopathic Association and American Osteopathic Board of Family Physicians*).

Arthur Lieberman completed his osteopathic medicine degree in 1965. He was licensed to practice in Michigan in 1966 and throughout his medical career has achieved and maintained "good standing and retained full licensure in Michigan," the court noted.

Lieberman established a "very successful" practice affiliated with a "respected teaching institute" and is a member of several professional associations. He also served as an assistant professor, was an "integral part" of numerous teaching programs and "consistently exceeded" requirement related to his field.

When Lieberman began practicing in 1966, certification for family osteopathic physicians did not exist. He took the AOBEP examination in 2002 and passed, but was under the mistaken impression his certification had no expiration date.

Lifetime Certification is only awarded to physicians who obtained certification before 1997 and since Lieberman achieved certification in 2002, he was required to retake the examination every eight years. He learned that his certification expired in December 2010, and sat for the examination, but failed to pass the second part of the examination both times.

He claimed the failure was by a "mere few points" and concerned "topics that are irrelevant" to his current practice. Nonetheless, the board denied re-certification.

Lieberman appealed the board's decision to the District Court in December 2013. He claimed that "a large number of patients" had been "seriously harmed by being deprived of the physician who has treated many families for decades." Seeking monetary damages and permanent re-certification, Lieberman argued that the board violated common law due process and capriciously interfered with his established business relationships.

Lieberman also contended that the board's decision to "grandfather" licensees who gained certification prior to 1997 was unfair and that he should be given lifetime certification due to his substantial career that dates back to 1966. The board moved for dismissal of the suit on February 4, 2014.

The court, while sympathetic to Lieberman's situation, could not find in his favor. Lieberman failed to show the court evidence that the board's decision was "either unreasonable or arbitrary."

"Grandfathering," the court noted, is commonplace concerning certification and licensing policy. District Judge Patrick Duggan pointedly noted that Lieberman could have taken the examination for certification prior to 1997, but did not. In addition, Duggan was not persuaded that Lieberman should be granted any kind of relief since he did not present sufficient facts proving harm.

The court expressed sympathy towards Lieberman's claims, acknowledging his decades-long service to patients and the medical community. It was "unfortunate that several insurance companies have disaffiliated him, thereby requiring many of his patients to seek treatment elsewhere," the court said. However, the court also pointed out that its scope of review was limited to whether the board acted correctly in denying his re-certification. Thus, Lieberman's qualifications were deemed irrelevant.

Professional Licensing Report is published bimonthly by **ProForum**, a non-profit organization conducting research and communications on public policy, 4759 15th Ave NE, Suite 313, Seattle WA 98105. Telephone: 206-364-1178. Fax: 206-526-5340. E-mail: plrnet@earthlink.net Website: www.professionallicensingreport.org Editor: Anne Paxton. Associate Editor: Kai Hiatt. Reporter: Lucas Combs. ISSN 1043-2051.

Subscriptions, which include both printed and PDF copies of each issue, are $198 per year, $372 for two years, $540 for three years, $696 for four years. Online access to PLR content is included in the subscription price; online-only subscriptions are $179 per year. Additional print subscriptions for individuals (within the same office or board only), are $40 each per year and include a license to distribute a PDF copy to a single recipient. Licenses to distribute extra PDF copies only, within the same office or board, are $15 per recipient per year.