Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue

Competition

Traditional licensing: Storm clouds ahead?

Issue: Competitive delivery models vs. regulatory traditions

The traditional appointed-board model for regulating the professions has been a fixture of state government for well over a century. But new models of delivering services, plus a pro-competition climate at the state and federal level, may be threatening the classic regulatory structure.

The February 25 U.S. Supreme Court ruling in *North Carolina Board of Dental Examiners v. Federal Trade Commission* surprised many in requiring that board members who are "market participants" have clear state supervision in making decisions affecting competitors. Board members who are members of the profession being regulated can't have state action immunity for their actions without a state supervisor, the court said.

But what exactly this means in practical terms is up in the air. In June, FTC Commissioner Julie Brill told *Modern Healthcare* magazine that the FTC plans to offer guidance to states on how to meet that standard.

Meanwhile, three consumer advocacy groups joined forces to alert states that the ruling calls for a re-thinking of current policies and procedures. They sent a joint letter to all 50 state attorneys general, maintaining that the states must change the way they conduct professional licensing.

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Discipline

When private conduct threatens licensed status

Ethics of a glass of wine while on call

A state medical board failed to provide adequate notice when it altered the basis for disciplinary action against a physician who drank some wine while on call, a judge for the Oregon Court of Appeals ruled April 29 (*Murphy v. Oregon Board of Medicine*).

James Michael Murphy, a board-certified cardiac anesthesiologist, was reprimanded for having a glass of wine while on call with the company

Tuality Healthcare. The incident occurred while Murphy was under contract with Tuality. Under his services agreement, beginning in 2008, Murphy became a member of the medical staff of Tuality Community Hospital as a sole practitioner providing anesthesia services, including 24-hour cardiac call coverage on a rotating basis with two other anesthesiologists. Employees were prohibited from using or having alcohol in their systems while on call.

On September 4, 2009, Murphy was on call when he went out to dinner with his wife and a colleague who was living at their house. At some point early in the evening, Murphy consumed one or two glasses of wine. Later in the evening, an altercation between Murphy and his colleague occurred, which subsequently led to Murphy's arrest.

The Oregon Board of Medicine, notified of Murphy's arrest, discovered that Murphy had consumed alcohol while on call, violating board policy, and warranting sanction.

In the complaint, the board contended that consumption of alcohol, even one glass of wine, "might" have compromised Murphy's skill as a practitioner, and therefore violated the Quality Community Hospital's Drug Free Workplace policy.

"[Petitioner's] consumption of alcohol while on call constitutes unprofessional or dishonorable conduct," the complaint read.

However, the administrative law judge found that the board had "no grounds on which to sanction" Murphy, since Murphy did not consume enough alcohol to render his medical ability or judgment compromised.

Agreeing with the ALJ's finding of fact, but disagreeing with the ALJ's conclusion, the board issued an amended order, which was fully adopted into the final order, asserting that the consumption of alcohol was a breach of ethical standards.

The Oregon Court of Appeals took issue with the board's final order and adopted interpretation of Tuality's policy as "a reflection of a recognized community ethical standard." Not only was the adopted interpretation "theoretical," in the court's estimation, but the interpretation also diverged from the basis for disciplinary action in the board's complaint, which was "unprofessional and dishonorable conduct."

In reversing the board's decision, the court also suggested that the board had set unreasonable standards for Murphy's defense. "The board's own order makes clear the prejudice to petitioner," the court said, because the board remarked that in the course of the contested case hearing, Murphy had failed to produce a physician to testify that they consumed alcohol while on call at a hospital, or thought it was appropriate to do so.

When private conduct threatens licensed status

Assault conviction held not to "directly relate" to barbering

Issue: Nexus between criminal conduct and license to practice

The Commonwealth Court of Pennsylvania, in a June 10 decision, overturned a decision by a state licensing board to revoke the license of an individual who assaulted a 10-year-old girl (*Randy Kirkpatrick v. State Board of Barber Examiners*).

Randy Kirkpatrick, a licensed barber and barber manager, was charged in 2012 for an alleged child molestation incident that took place a decade earlier in 2002. Kirkpatrick pled no contest to a lesser charge of indecent assault of someone under 13, and was given 24 months of probation.

As part of Kirkpatrick's probation, he was required to post a sign in his establishment stating no person under the age of 16 was allowed to enter the premises unless accompanied by a parent or guardian.

After the guilty plea, a review of Kirkpatrick's license was conducted, and a state hearing examiner found that license revocation wasn't a prudent course of action. The examining board, however, disagreed, and overturned the hearing examiner's conclusion.

Under Pennsylvania law, the eight circumstances under which a Board may suspend or revoke a license include "engaging in unethical or dishonest conduct." But in his appeal, Kirkpatrick argued that since his criminal offense had nothing to do with his barbering practice, license revocation was unwarranted.

Judge Renee Jubelirer concurred. She found that there was no evidence a criminal offense took place inside his barbershop or involved Kirkpatrick's customers. Moreover, the judge said, no-contest pleas or guilty pleas in criminal cases do not create automatic grounds for license revocation. "It is clear that the Legislature "did not grant unlimited discretion to the (barbering) board to impose discipline," Jubelirer wrote.

The court also stated, "Had the General Assembly intended a barber licensee be subject to professional discipline based on a conviction, guilty plea, or plea of nolo contendere to a crime generally or a particular type of crime, it would have included language in the Barber License Law to authorize discipline on that basis."

Although the state barber licensing statute specifies that a license may be revoked or suspended for engaging in "unethical or dishonest" conduct, Judge Jubelirer found that any discipline imposed upon barbers for misconduct must concern misconduct that directly relates to the practice of barbering.

When private conduct threatens licensed status

Leaving foster son in car not "gross neglect" needed for license denial

Issue: Nexus between private conduct and professional conduct

A school counselor who allowed her foster son to stay in her car in the school parking lot during work hours was improperly denied renewal of her teaching license, school psychologist license, and a school counselor license, the Court of Appeals of Oregon held May 6 (*Eicks v. Teacher Standards and Practices Commission*).

Reversing a decision of the state Teacher Standards and Practice Commission, the court said the panel failed to establish a sufficient nexus between the counselor's conduct and her professional responsibilities, and should not have denied her the licenses.

The counselor, Robyn Eicks, was guardian for a foster son whose behavior frequently required her to take leave to care for him. In 2007, when the teen, aged 13, had a minor illness, Eicks brought him to school with her for two days and had him stay in her car outside an occupied classroom.

An aide reported Eicks to the sheriff's office for suspected abuse, and the sheriff found the teen comfortable, unharmed, and not neglected. But the teacher standards commission issued a final order to revoke her license charging "gross unfitness" because Eickes's conduct allegedly constituted criminal mistreatment.

Eickes challenged that order, arguing that the conclusion she engaged in gross neglect of duty was erroneous because allowing the teen to stay in her car while she worked did not constitute conduct related to her professional duties.

The court agreed that the TPSC had not established a sufficient nexus.

"Conduct on school grounds does not always establish a required nexus to a professional duty," the court noted.

It also found that the counselor made the decisions at issue when faced with unusually challenging personal circumstances.

"The fact that her job also required her to make difficult decisions does not turn her questionable personal judgments into a gross neglect of duty."

Nor does the fact that the decisions at issue involved a child, the court added.

Licensee obligation to act with personal integrity and honesty *at all times*?

Teachers do not have an obligation to act with "personal integrity and honesty" at all times, the Court of Appeals of Oregon held in a 2007 case (*Teacher Standards and Practices v. Bergerson*).

In that ruling, the court found that a teacher who had rammed her car into her husband's truck during a suicide attempt and been convicted of criminal mischief should not have been suspended for gross neglect of duty.

The legislative intent was that "there must be a clear nexus between the conduct at issue and the teacher's professional responsibilities," the court said. Professional duties "are specific to a profession and are distinct from the moral and civil obligations of al citizens to behave ethically and to obey the law at all times."

On the other hand, in 2013, the court found that the TPSC did not err in suspending a teacher for writing a disrespectful letter to a parent mocking his concern about his teaching, because the conduct had a specific and demonstrable nexus to the teacher's professional duties.

When the same teacher, after working at a different school, left a book entitled *The Girl's Guide to Being a Boss (Without Being a Bitch)* in the office of his former principal, the court found that was a private expression of his opinion as a former employee, and did not have a nexus with professional duties.

"Conditional suspension" not an option while criminal appeal pending

Issue: Authority to strengthen penalty pending criminal case outcome

A board did not err in choosing to revoke a psychologist's license once it learned that a conditional indefinite suspension, with jurisdiction to revoke, was not possible, the District Court of Appeal of Florida held June 6 (*Kale v. Department of Health*).

The board hoped to retain jurisdiction to revoke the license of psychologist William Kane if Kane's underlying criminal conviction was not overturned on appeal. But the state Attorney General's office said the statute did not allow this, so the board followed the prosecuting attorney's recommendation for revocation and a $10,000 fine, plus costs.

Kane, who was convicted in 2013 of two counts of health care fraud, argued that the board counsel's advice was incorrect. But the court, in affirming the action, held the disciplinary statute for health professionals listed suspension and revocation as alternate penalties to each other. Nothing in the statute suggested the board could suspend and then up the penalty to a revocation later.

Citing the need for finality in administrative actions, the court said the board had the option of revisiting the penalty if there were a material change in circumstances that warranted it. If Kane's conviction is overturned, he may petition the board to vacate its final order, the court added.

No reversal of investigator's 8-year revocation over GPS tracking

Issue: Credibility determinations in discipline appeals

A private investigator whose license was revoked for eight years for placing a global positioning system (GPS) device on the car of an acquaintance's former partner was properly disciplined, the Court of Appeals of Washington, Division I held June 1 (*Cummings v. Washington State Department of Licensing*).

The licensee, Lisa Cummings, had appealed a final order of the state Department of Licensing, which established that she violated multiple governing statutes by engaging in certain activities as a private investigator.

Cummings had a client named Shaun Duncan, with whom she worked as a "Clarity" coach. Duncan also had a recently terminated relationship with Christine Peddle, who had petitioned for, and received, several protection orders against Duncan.

Cummings installed a GPS device on Peddle's car in June 2011 and did not notify law enforcement. Peddle's private investigator discovered the device, and in 2012, Peddle commenced an administrative proceeding with the Department of Licensing against Cummings, alleging Cummings was following her and reporting the information to Duncan. That led to an administrative hearing and the eight-year sanction against Cummings.

In her appeal, Cummings argued that she did not have a private-investigator-client relationship with Duncan and she did not know about the no-contact orders. The court rejected these arguments and others Cummings made.

Cummings' contention that she had only a "coach-client" relationship with Duncan was not credible because she placed a GPS device on Peddle's car and carried out surveillance, the court said.

Cummings pointed out that the case lacked typical signs of an investigator-client relationship such as a contract, receipts, a retainer, a client file, progress reports, or other documentation. But the court said that "while such evidence may be typical," there was no authority for the claim that the absence of such evidence is dispositive.

"Cummings asserts, 'Placing a GPS device on a car or otherwise tracking a person does not make someone a private investigator,'" the court noted. "But as the Department points out, if a person performs the functions and duties of a private investigator, then the person must be licensed. Thus, this argument does not advance Cummings's position."

The court found there was substantial evidence supporting the department credibility determinations, which did not favor Cummings's arguments.

Doc cites "one bite rule" in winning reversal of revocation

Issue: Reasonableness of sanction for reporting discipline

The Court of Appeals of Ohio, Tenth District, in a May 5 ruling, reversed the Ohio Medical Board's decision to revoke a physician's license, finding that the board did not act with sufficient probative

evidence (*Mansour v. State Medical Board of Ohio)*.

Physician Waleed Mansour was indicted on 86 drug-related felony counts involving controlled substances in 2010, for which he pled guilty to two drug-possession charges. The charges were reduced to misdemeanors and Mansour did not have to serve jail time as part of the plea deal.

Later that year, Mansour cooperated with board investigators regarding the indictment, and then submitted his biennial renewal application to practice medicine in the state of Ohio. When asked whether at any time since signing his last application for renewal, "Has any board, bureau, department, agency, or any other body, including those in Ohio other than this board, filed any charges, allegations or complaints against you?" Mansour answered "No."

The board concluded that Mansour's answer had violated R.C. 4731.22(B)(5) by making a "false, fraudulent, deceptive, or misleading statement in his license renewal application" and suspended Mansour's license for one year. The board agreed the probationary term should be doubled to at least two years due to concerns over Mansour's mental state.

The panel rejected Mansour's request for the board to produce Mansour's interrogatory responses to investigators, which Mansour claimed would demonstrate his cooperation and transparency prior to filling out the renewal application.

The disciplinary measures were affirmed in September by the Franklin County Court of Common Pleas. Mansour appealed to the 10th District Court of Appeals in October.

In appealing the court of pleas decision, Mansour argued that he did not intend to deceive the board, and that the allegations made by the board regarding his mental state were baseless.

Mansour said that he "understood and believed" that his circumstances fit within the "one bite rule" which allows impaired licensees who seek and complete treatment with a board-approved provider to remain in the private sector for monitoring so long as their acts do not result in a criminal conviction or put patients or others at risk of harm.

On the issue of whether Mansour intended to deceive the board, the court noted that "even a well educated person" could have reasonably thought that a grand jury indictment did not apply to the question, which Mansour claimed to be the case. Moreover, Mansour did submit a written statement that he did not believe the question pertained to a grand jury indictment.

The board had no obligation to believe Mansour's claim that he had no intent to deceive the board, the court of appeals wrote. However, other than Mansour's answer on the application, there was no evidence deception was Mansour's intent, given that the words "grand jury indictment" were not included in any way with the question.

The court was admittedly "troubled" by the claim made by the board's president that Mansour's mental state was of concern and a reason to extend his suspension.

"The board's decision to increase a proposed penalty for another violation (that of making a false statement) was based on no more than one member's 'concerns' about a matter that was not the subject of any discipline."

In overturning the board's decision, the Court of Appeals upheld the board's finding that Mansour had not intended to deceive the board.

Furthermore, the court found that "as a matter of law" the Board erred and the trial court erred when it upheld the Board's decision to quash Mansour's request for a subpoena to produce his interrogatory responses to board investigators.

Board correctly took emergency action against MD in egregious case

Issue: Sufficient grounds for emergency license suspension

A state medical board's decision had merit and it did not abuse its discretion in the disciplinary proceedings that ultimately led to the revocation of a physician's license, the Court of Special Appeals of Maryland held May 29 (*Geier v. Maryland Board of Physicians*).

Since 2011, Mark Geier, a former licensed physician, has had his licensed suspended or revoked in every state in which he held a license.

Geier's misconduct allegations include irresponsible treatment methods involving autistic patients, lying to patients' parents regarding the treatment plan, and falsifying his credentials to the Maryland Board of Health.

In April 2011, the Maryland State Board of Physicians initiated an “emergency action” to suspend Geier's license over concerns that he was endangering autistic patients. The board found that Geier's methods did not hinge on any proven scientific data or research and that he misdiagnosed countless patients.

The board found that Geier lied to a patient's parents that he was administering an approved drug for chelation therapy when he was, in fact, administering an unapproved drug. Geier also lied about his credentials by telling the board he was a certified geneticist and epidemiologist.

In August 2012, the Board issued a Final Decision and Order, and Geier's license was revoked. The primary finding by the board was that Geier treated his patients with Lupron, a drug only approved by the FDA for use on adults, not on children “in the absence of precocious puberty.” Geier also did not perform adequate examinations to reach a conclusion if his patients did, in fact, have precocious puberty.

Geier petitioned for judicial review in three jurisdictions: the Circuit Court for Baltimore City, the Circuit Court for Baltimore County, and the Circuit Court for Montgomery County. Geier voluntarily dropped his petitions in Baltimore, and the Maryland Board moved to dismiss. The Circuit Court of Montgomery County denied the Board's motion to dismiss, but affirmed the Board's decision on the merits.

On appeal, Geier posed numerous questions to the Maryland Court of Special Appeals (which the court consolidated). The questions included if there was substantial evidence that Geier engaged in professional misconduct, if evidence and testimony was properly given to the court, and if the court abused its discretion in denying Geier a motion to stay.

The Special Appeals Court found that the board and the lower courts neither abused their discretion nor made judgments on insufficient evidence.

The court highlighted evidence found by the board that Geier falsified documents, misled parents regarding the treatment of their children, and failed to give proper examinations to his patients.

“Geier treated Patient I for nine months without any physical examination and in fact without seeing him and without even documenting this patient's height and

weight. He treated Patient B for almost three years without a physical examination and before ever seeing him, and he also treated Patient G without first physically examining him or even seeing him in person," the court stated.

Notably, Geier did not deny diagnosing patients with precocious puberty, nor did he deny not conducting physical examinations of his patients. Instead, Geier argued that he was "not required to diagnose his patients with precocious puberty or conduct a physical examination before administering Lupron 'off-label' to treat autism."

However, the court found that claim too, to be a lie, citing the board's findings. "Geier explicitly documented that he was using Lupron to treat precocious puberty, the 'on label' use for Lupron for children. The fact is Dr. Geier diagnosed his patients with precocious puberty, but he never performed the evaluations necessary for the diagnosis, and then he treated his patients with Lupron under that diagnosis."

The board also found that Geier prescribed chelation therapy to patients who "failed to display the need for chelation." Geier would then begin the therapy without proper documentation or adequate evidence of informed consent.

The board concluded and the special appeals court concurred that Geier "displayed... an almost total disregard of basic medical and ethical standards by treating patients without properly examining or diagnosing them, continuing treatment without properly evaluating its effectiveness, and providing "informed consent" forms that were misleading and in at least one case blatantly false."

Competition

Traditional licensing: Storm clouds ahead? (from page 1)

The May 4 mailing, entitled "Open Letter of Inquiry and Request for Documents," refers to the "critical practical significance" of the Supreme Court's decision, which said boards with "market participants" lose their antitrust immunity if not actively supervised by their state.

Although the case involved the state board's attempt to shut down non-dentist teeth-whitening operations, the decision renders unlawful what has become common regulatory practice across all 50 states, said the Center for Public Interest Law, Consumers Union, and the Citizen Advocacy Center.

Since virtually all state boards are directly controlled by members of the trade or profession they purport to regulate, the advocacy groups say state attorneys general should notify members of boards and commissions that their decisions might expose them individually to criminal and civil liability under federal antitrust law.

The groups also argue that states must now recognize the implications of this ruling and change how they regulate and license professions and trades. Either the composition of these boards must be changed to a super-majority of non-conflicted "public members," or all actions of a board dominated by active market participants must be subject to a state supervision mechanism that "provide[s] 'realistic assurance' that a non-sovereign actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests.'"

"State bars controlled by attorneys rarely discipline for excessive billing or intellectual dishonesty," the groups pointed out in their letter. "Each of the many agencies within your state is empowered to carve out momentous exceptions from federal antitrust law, and those decisions in particular require a level of independence from the implicit focus of current practitioners."

The Supreme Court ruling is already having an impact on the regulatory community. Suits alleging antitrust violations are on the rise, placing greater pressure on courts to adapt to an evolving occupational licensing climate.

Some, such as David Swankin of the Citizen Advocacy Center, praise the decision, contending that the ruling will help make boards more neutral and cognizant of the consumer. But others, such as the American Dental Association, have been highly critical; in a press release, the ADA called the Supreme Court ruling "a violation of established law."

Dale Atkinson, an attorney who has been working in the regulatory field for 27 years, representing numerous associations of regulatory boards in occupational licensing, believes that the Supreme Court ruling needs to be met with a degree of caution.

"There's concern about an overreaction to the opinion," Atkinson said, "and that there may be a legislative or political knee jerk reaction that is undertaken by the politicians, which I think would be a mistake."

Atkinson considers the letter sent out to state attorney generals by the Center for Public Interest Law, the Consumers Union, and the Citizen Advocacy Center an example of hysteria, calling the letter "rather alarming."

The letter focuses on a lack of "active state supervision," which in turn, allows active professionals on state licensing boards to act in a fashion that does not serve the public's best interest," he contends.

Atkinson ridiculed the letter's "scare-mongering." He contends that everyone on a licensing board is a consumer.

"That letter is somewhat saying ‘oh, all the boards are operating unlawfully’, etc. Of course that's just not the case. Most of the boards will probably have to do nothing because they have sufficient state oversight. In my world, everybody is a consumer member that sits on the board. Some happen to bring expertise to the board as licensees. And that's needed; that's necessary in order to efficiently and effectively regulate a profession."

Atkinson did concede that a few boards might have to modify policies in the wake of the ruling, and that it could have a significant impact on the regulatory world of licensing. In fact, two recent legal cases were spawned by the Supreme Court ruling.

In the first case, the Texas company Teladoc sued the state medical board over new rules restricting telemedicine. Teladoc claims the board's new rules were instigated because the board saw telemedicine emerging as a competitive threat.

Teladoc, which recently won an injunction against the rules (see story below), contends that the same lack of oversight and anti-competitive behavior the Supreme Court found in the North Carolina case is occurring with the Texas Medical Board.

The other case, out of Mississippi, concerns the owners of Axcess Medical Clinic Inc., a pain clinic that is suing the state medical board over a rule that prohibits pain clinics from being run by non-licensed physicians. The clinic, in an April 24 lawsuit, claimed that the rule is anticompetitive and caused the clinic to shut down.

The Mississippi rule, which requires that pain clinics be run by a hospital or licensed physician, was created in 2011. Since the clinic opened in 2010 before the rule was in effect, the clinic says it should be exempt from the rule.

Atkinson thinks lawsuits like these will keep coming, and it may give the impression that there is a widespread antitrust predicament in the U.S. He says that is simply not so.

Both the *Teladoc* and the *Axcess* plaintiffs contend that a medical board being made up mostly of practicing professionals inherently causes a conflict of interest. This was a point of emphasis in the February Supreme Court ruling as well.

However, the only way the make-up of a board is going to change is through new legislation, asserts Atkinson.

"We're certainly hearing a lot that's going on legislatively about addressing the make-up of the regulatory boards. Should that change? Can it stay the same? Who should be on those boards? What's an active member?" One question the Supreme Court failed to address, when it asserted the North Carolina dental board lacked active state oversight, was the definition of "active oversight."

"We're not sure what it is. I'm not sure anybody knows what it is. We'll have a little bit different interpretation on that."

Atkinson notes that state oversight will differ depending on the state and their regulatory structure.

But the fact that the "vast majority" of professional boards are made up of active professionals does suggest that boards may need more transparent state supervision.

Ultimately, Atkinson has no qualms about stating his concerns over the Supreme Court ruling. But he also laments the dental board's methodology in issuing the cease-and-desist orders to the teeth-whitening operations.

"They had alternative options for sending out cease-and-desist letters. They just chose to not follow those options, good or bad. They have the statutory authority to seek injunctive relief. That likely would have solved the problem."

Nonetheless, the board thought its actions were justified, Atkinson says, and the Supreme Court took issue.

Atkinson stressed that he hopes the ruling doesn't cause an abrupt overhaul of licensing boards. "It's an important ruling, and I'm afraid there's too much potential toward, 'Oh we have to change the make-up of the board.' And I'm not a subscriber to that. I think you may have to look at some of the policies and procedures undertaken by the boards, but I don't think there's a need to overreact or panic."

$40-per-exam Teladoc wins federal injunction against strict medical board curbs on telemedicine

Issue: Telemedicine versus face-to-face services

Physicians would suffer irreparable harm if forced to comply with new Texas rules requiring face-to-face physical examination of patients prior to prescription of any dangerous drug or controlled substance, the U.S. District Court for the Western District of Texas held May 29 (*Teladoc, Inc. v. Texas Medical Board*).

The ruling, a win for advocates of telemedicine, included a preliminary injunction against Texas Medical Board rules adopted April 10 that require a "defined physician-patient relationship," including a documented physical examination, before certain drug prescriptions.

Under the enjoined rule, examination would have to be performed in either a face-to-face visit or in-person evaluation requiring the provider and patient to be "in the same physical location or at an established medical site."

The company Teladoc registers individuals either by telephone or online and allows subscribers to upload their medical records, then receive a phone consultation by a physician who has received specialized training in treatment and diagnosis by telephone.

Teladoc brought suit in 2011, after receiving a letter from the medical board stating that the board considered the company to be engaging in prohibited practices. After the state Court of Appeals found the board's letter procedurally invalid, the board formally adopted new rules April 10.

Teladoc then filed an action charging that the board's New Rule violated antitrust law as well as the Commerce Clause of the Constitution, and seeking a preliminary injunction preventing enforcement.

The federal court ruled that Teladoc's challenge succeeds under both "prima facie" and "rule of reason" antitrust analysis. Teladoc's evidence, said the court, "shows the average costs of visits to a physician or emergency room are $145 and $1,957 respectively, and the cost for a Teladoc consultation is typically $40.

The court considered evidence offered by the medical board including a study performed in California which found that Teladoc physicians are unable to use visual cues to aid in diagnosis and that Teladoc's model could actually further fragment health care. However, Teladoc provided an affidavit from one of the two researchers who conducted the study stating that the medical board mischaracterized his conclusions.

In sum, the court found, "[Teladoc has] presented significant evidence which undermines the [board's] contention that the quality of medical care will be improved" by the telemedicine restrictions.

In imposing the injunction against the rules, the court noted that Teladoc had shown specific evidence of the financial harm it would suffer, likely including destruction of its business model and ability to do business in Texas. The medical board presented "only anecdotal evidence" of possible harm, the court said, while Teladoc produced evidence that consumers will face higher prices for medical care as well as reduced access. The balance of respective interests of the parties and the public, the court concluded, weighs in favor of a preliminary injunction against the telemedicine curbs.

Safety cited in Alabama ruling against non-dentist teeth-whitening

Issue: Professional practice vs. commercialized services

Teeth-whitening services should be limited to dentists only, the Alabama Supreme Court agreed in a June 5 ruling, upholding an earlier ruling (*Westphal v. Northcutt).*

The ruling is in contrast with the federal Supreme Court's landmark February decision in *North Carolina State Board of Dental Examiners v. FTC*, in which the high court held that a dental board erred in issuing cease-and-desist order to teeth-whitening establishments run by non-dentists.

Non-dentists Keith Westphal and Joyce Osborn Wilson argued that the Alabama Board of Dental Examiners was operating in an unconstitutional manner by prohibiting non-dentists from performing teeth-whitening services, which the Supreme Court ruled was okay in North Carolina.

But the Alabama Supreme Court, citing public health and safety, stated that only dentists should be allowed to perform teeth-whitening services, ruling in favor of the dental board.

"Teeth-whitening is a form of dental treatment that requires the application of a chemical bleaching agent directly to the customer's teeth. The evidence in the record indicates that the procedure is relatively safe but that it is not without potential adverse effects," the court wrote.

The ruling was immediately met with displeasure by some, such as the attorney for Westphal and Wilson, who deemed the Alabama Supreme Court's decision as baseless, hinging on a frivolous technicality.

In the lower court ruling, the Jefferson County court ruled that teeth-whitening products, which contain 16 percent or more of hydrogen peroxide, are harmful to the consumer. Westphal and Wilson's teeth-whitening products contained a 16 percent and 12 percent hydrogen peroxide concentration—a two percent difference from Food and Drug Administration regulations.

Testifying for the dental board, a licensed dentist provided anecdotal evidence for the claim that licensed dentists were necessary for teeth-whitening services since there is a risk of infection and burns.

Witnesses in support of Westphal and Wilson, on the other hand, remarked on the number of unregulated practices in the state of Alabama, such as tongue piercing, that are significantly more dangerous than teeth-whitening services. In court, Westphal and Wilson argued their practice is safe and never jeopardized the health and safety of the consumer.

But the court rejected this claim, contending that teeth-whitening services are clearly a dental treatment that should be conducted by licensed dentists, despite the fact that the Board of Dental Examiners has "never received a complaint that any person was harmed by any teeth-whitening procedure performed in Alabama."

The court acknowledged that teeth-whitening services conducted by non-dentists are significantly cheaper than teeth-whitening services conducted by dentists. In fact, Westphal and Wilson's services were approximately six times cheaper than those of two active dentists serving on the Board of Dental Examiners.

Nonetheless, the court did not consider Westphal and Wilson's arguments that the Board was acting in an anti-competitive manner, calling the issues a matter of “public policy.”

"We cannot say that limiting the performance of teeth-whitening services to licensed dentists violates the due-process protections of the Alabama constitution," the court wrote, upholding the Jefferson County court's decision.

Licensing

Revocation too severe a penalty for error in reporting CE credits

Issue: Proper sanctions for reporting errors

An appellate court in Utah, in an April 19 decision, overturned the license revocation of a nurse who had completed, but failed to properly report, her required continuing education credits, and then declared herself eligible on license renewal forms (*Cook v. Department of Commerce, Division of Financial and Professional Regulation*).

Although the nurse, Monica Cook, regularly completed continuing education courses, she also regularly failed to report them. As a result, she twice lost her certification with the National Certification Corporation, a requirement for renewing a license in Utah. Cook renewed her license anyway, each time falsely certifying that she did, in fact, have the certification.

When Cook realized her mistake, she contacted the state's Board of Nursing, relinquished her license, and offered to pay a fine. Unsatisfied, the board charged her with unprofessional conduct, and the state's Division of Occupational and Professional Licensing (DOPL) eventually revoked her nursing license and prescribing license, fined her $5,000, and published the disciplinary action. Cook appealed, and the case eventually reached the Court of Appeals of Utah.

While the court upheld DOPL's finding that Cook engaged in unprofessional conduct and rejected her argument that the Department abused its discretion by fining her and publishing the discipline decision, it held that the Department was wrong to have revoked her license.

The court cited several factors in making this decision. First, neither the Department nor the court could find any cases where a professional license was revoked in Utah for an unintentional false statement on a renewal application. In fact, in cases where the Department had decided to revoke a license, it was usually acting on egregious conduct that posed a danger to others.

Second, and in contrast to these other cases, Cook's actions appeared to be unintentional and did not pose a danger to others.

"DOPL opted to apply the harshest punishment available under the statute without a stay or probationary period to give Cook the opportunity to correct the situation," wrote Judge Kate Toomey.

"Its decision to promptly revoke Cook's licenses, when compared to the Department's past disciplinary decisions, suggests she has engaged in especially egregious conduct, and it has prevented Cook from obtaining employment as an APRN."

In light of the Department's past disciplinary decisions and the nature of Cook's unprofessional conduct, it was outside the bounds of reasonableness to

revoke her licenses without staying the revocation pending recertification or first placing her on probation or suspension, the court said.

Testing

Canadian RNs allege American bias in cross-border licensing exam

Issue: International use of national licensing exam

Canada's adoption of the American licensing exam for registered nurses is causing controversy north of the border. Linda Haslam-Stroud, President of the Ontario Nurses Association, says that the new licensing examination for prospective nurses in Canada (the NCLEX, developed by the National Council of State Boards of Nursing) is not "Canadianized" and is filled with medical terminology unfamiliar to medical professionals in Canada.

More immediately for Ontario nursing candidates, the pass rate has fallen to just above 70%—much lower than before adoption of the U.S. test.

Use of the American NCLEX was a result of a political rift between the regulatory bodies of Canada and the Canadian Nurses Association (CNA). The regulatory bodies formalized their own national board two years ago, says Haslam-Stroud, and that created tension with the CNA.

The regulatory bodies, under their new national board, decided to cut off the CNA from being part of the development of a new nursing exam. "They made the determination to not use the CNA for the development and the oversight of the Canadian nursing exam," Haslam-Stroud said.

The repercussion of the decision, according to Haslam-Stroud, is an incoherent exam with an alarmingly high failure rate. It is not the test-takers' fault, she maintains, since the exam's curriculum is not meant for a Canadian test-taker, despite what the exam's website may say.

In the NCLEX website's FAQ section, in response to a question of how the Canadian exam would be streamlined from the diction and terminology of the America exam, the answer read: "During item development, all items undergo a continuous and multi-layer review process to ensure the exam remains psychometrically sound and content relevant. This rigorous process ensures that all NCLEX operational items are free from bias."

But bias—more specifically, American bias—is rampant throughout the exam, according to Haslam-Stroud. "I'm being told by students who wrote the exam that it is not as Canadianized as it should be. There are even job titles in this exam that aren't job titles known in Ontario or Canada. There are also medications that aren't even approved in Canada that are used in the exam."

Another concern Haslam-Stroud mentions is the new nursing requirements that were implemented in conjunction with the new exam. Now, a registered nurse must complete a four-year degree in nursing from a university in order to be eligible to even take the exam. If the nursing graduate fails the test three times, he or she cannot take the exam again and cannot become a nurse.

The result of these restrictions is fewer nurses in places that desperately need them, says Haslam-Stroud. "The College is reducing the number of RNs that are able to successfully work in Ontario. And we have the second-worst RN ratio per patient of any province in Canada, so it is a huge concern for us."

Stroud contends that a lot of these issues could have been fixed if people had worked together. "We at ONA never supported the regulatory body's going to the U.S. We believe that the exam should have continued with the Canadian Nurses Association and if the regulatory body thought there needed to be some amendments to it, we believe that the CNA, the national nurses association, should have worked with the regulatory body and made that happen."

For the foreseeable future, however, aspiring Canadian nurses will have to obtain a four-year degree and pass the NCLEX to become a registered nurse.

200-point higher cutoff for foreign medical grads could be justified

Issue: Cut scores and licensing exam content

Requiring a 200-point higher passing score on the Puerto Rico Medical Licensing Examination than on the U.S. Medical Licensing Exam could be rationally related to substantial differences between the two exams, even though both are prepared by the same organization, the First Circuit U.S. Court of Appeals held June 17 (*Mulero-Carrillo v. Roman-Hernandez*).

The ruling in a civil rights action filed by 20 foreign medical graduates affirmed a federal court's dismissal of the case. The court found that because graduates of foreign medical schools who took Puerto Rico's test were not "similarly situated" to takers of the USMLA, the differing test scores were not sufficient to demonstrate plausible equal protection violations.

Calling the plaintiffs' comparison of the two exams "apples-to-oranges," the court noted that the 200-point difference could be rationally related to substantive differences between the exams.

Puerto Rico has had a special exam for foreign graduates since 2008, following a massive medical licensing scancal involving nearly 100 unqualified doctors who were illegally admitted to practice. An investigation showed that for thousands of dollars in bribes, some former members of the then-existing board allegedly doctored exam scores to license unqualified applicants.

New legislation required the medical board to employ an outside organization like the NBME to prepare the exam, but the board was allowed to establish the passing score.

In a footnote, the court said the ruling "is not to say that the Board can come up with a passing score 'out of thin air.' Indeed the board has to comply with several requirements under Puerto Rico law." But the court does not address those requirements in this case, "because federal courts are constrained by the Eleventh Amewndment from forcing the Commonwealth to comply with its own laws."

Accreditation

Revocation of school's accreditation backed by substantial evidence

Issue: Private group authority to revoke accreditation upheld

A federal appeals court sided with an accreditor's earlier decision to revoke the accreditation of a Missouri massage school due to substantial evidence of improper management, in a March 24 ruling (*Professional Massage Training Center v. Accrediting Alliance of Career Schools and Colleges*).

In March 2012, the Accrediting Alliance of Career Schools and Colleges decided to revoke the accreditation of the Springfield Missouri Professional Massage Training Center due to a lack of "administrative continuity and management capacity."

The AACS found that just eight of the 16 administrators had worked at the training center for more than a year. The AACS also found constant overturn of management positions, and that the center failed to conduct background checks and verify credentials of numerous staff members. Thus, the AACS decided to revoke the Missouri training center's accreditation.

The Springfield massage training center subsequently sued, and the accreditation's revocation decision was overturned by the U.S. District Court in Alexandria, Virginia. The court found that the AACS's decision was unreasonable and was predicated on unclear standards. The court also awarded the center more than $400,000 in damages.

AACS appealed the district court's ruling to the U.S. Court of Appeals for the Fourth Circuit, which found that the original ruling to revoke the Missouri massage school's license was well supported and not arbitrary or capricious.

Judge J. Harvie Wilkinson III, in the opinion for the appellate court, wrote that the lower court unnecessarily deemed itself the primary finder of fact, "and went far beyond the focus on procedural fairness to refashion the accreditation decision on the merits."

Judicial review of private accreditation decisions is deferential, Judge Wilkinson III said. He noted that government bodies, such as accrediting agencies, have expertise that a court does not, and a reason did not exist for the court to reject the accreditation's findings.

As a result, the district court's ruling was "a wholesale substitution of the judgment of the court for that of the agency," Wilkinson III wrote.

In overturning the lower court's decision and reverting to the accreditation's determination, the court said, "The district court was remedially aggressive not only in its awarding of a large amount of damages… [but] also in ordering that the institution in question be re-accredited, thereby overturning the judgment and expertise of an agency that in this case rested on a sound and supportable basis."

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