Professional Licensing Report

Licensing, testing, and discipline in the professions

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Discipline

2017 Pulitzer Finalists

Sweeping newspaper probes on sexual misconduct highlight data banks' failures

Issue: Media coverage of professional discipline and role in reform

Recent investigative stories by two nationally prominent newspapers, focusing on sexual misconduct by doctors and teachers, have been recognized as finalists for the 2017 Pulitzer Prize, re-igniting public attention to the problem of professionals being disciplined in one state but continuing to practice with impunity in other states.

A ten-part series in the *Atlanta Journal Constitution* on doctors' sexual misconduct—and licensing boards' limited success in addressing it—ran from July through December 2016, and a six-part February and December 2016 *USA Today* series entitled "Dishonor Roll" explored similar misconduct by teachers.

These investigative journalism projects were notable for their use of computer search techniques to collect and analyze very large databases of all states' regulatory and judicial activity to compile their findings.

*(See **Discipline**, page 2)*

Competition

Licensing slammed as "Brother, May I?" scheme

FTC chief vows wide-ranging deregulation in professions

Issue: Federal role in imposing curbs on professional licensing

Maureen Ohlhausen, acting head of the Federal Trade Commission (FTC), advocated for a wide-ranging deregulatory effort in the licensed professions in a February 23 speech in Virginia.

Speaking at a symposium on antitrust issues at George Mason University's Scalia Law School, Ohlhausen criticized the loss of “economic freedom” caused by increases in professional regulation in recent years. Her speech, a paean to free-market ideology, was directed at "significant government barriers that restrict participation in the economy.” She described such barriers as a "Brother, May I?” problem, which occurs

when “a competitor controls market entry of others, often through some kind of regulatory permission. More generally, she said, the “Mother, May I?" problem involves an innovator's needing any kind of government permission to enter a market.

In support of her argument, Ohlhausen cited a report from the Heritage Foundation, the conservative think tank, which argued that the United States had sunk in the rankings of “economic freedom.”

Citing the regulation of interior designers in some states as her primary example, Ohlhausen argued that occupational licensing represents a “particularly egregious” erosion of economic liberty, and that “the public safety and health rationale for regulating many of those occupations ranges from dubious to ridiculous." Licensure bodies, she believes, have been captured by economic actors with an interest in rent-seeking anticompetitive behavior.

“I am particularly concerned,” she said, "that occupational licensing disproportionately affects those seeking to move up the lower and middle rungs of the economic ladder, as well as military families and veterans.” Not only do licensing requirements prohibit new entrants from practicing a vocation, she continued, but the differing state regimes cause hardships for military families and veterans, who move frequently and can find themselves the holders of a license not valid in their current state of residence.

In response to these concerns, Ohlhausen stated that she was going to create an “Economic Liberty Task Force” to advance the deregulation of occupational licensing. Among the potential changes she mentioned: the increased use of telehealth and expanded roles for advanced practice registered nurses and physician assistants.

Ohlhausen approvingly cited actions by Iowa governor Terry Branstad to veto a proposal to license four additional counseling occupations and by Vice President Mike Pence, in his former role as the governor of Indiana, to veto licensing requirements for diabetes educators, anesthesiologist assistants, and dieticians.

Aside from the task force, she left the door open for more direct FTC enforcement, saying that “the question revolves around whether the state is actively supervising . . . board actions that displace competition.”

Discipline

National stories on discipline for doctor, teacher misconduct *(from page 1)*

"Broken discipline tracking systems let teachers flee troubled pasts" was the headline for the *USA Today* story, which charged that a "fragmented system" for checking teachers' backgrounds, involving a patchwork of inconsistently enforced laws, is leaving students at risk.

Following a one-year data gathering effort that used open records laws to compile a list of millions of certified teachers in 50 states and cross-matched that list with the discipline database maintained by the National Association of State Directors of Teacher Education and Certification (NASDTEC), *USA Today* found:

• 9,000 names of teachers disciplined by state officials were missing from the NASDTEC database. At least 1,400 actions were permanent revocations, 200 of them prompted by allegations of sexual or physical abuse.

• In several dozen cases, state education officials found out about a person's criminal conviction only after the teacher was hired by a school district and already in the classroom. Eleven states, *USA Today* found, do not require checking criminal backgrounds before issuing licenses.

• Egregious misconduct included the case of Alexander Stormer, who was disciplined and prosecuted in Georgia for violence against students and improper text messages to the, including nude photos and requests for sex—yet was able to obtain teaching licenses in North Carolina and South Carolina.

National discipline data banks—intended to control state-hopping by licensees charged with misconduct—have a long history, largely originating with investigative stories by newspapers beginning in the 1980s. Shocking exposés on "dangerous doctors" who continued to practice on unknowing patients in other states lay the groundwork for the launch of the National Practitioner Data Bank in 1990.

• Some disciplinary actions were taken only recently, after school systems were questioned by journalists about particular teachers' past disciplinary actions in other states.

• One case took missed signals to new levels. Florida teacher Lainie Wolfe was suspended in 2006 for allegedly failing to follow policies after receiving a student's suicide note and forging a parent's signature on a consent form. But before final discipline action, she obtained a teaching license in Colorado, working there for several years before the state discovered the Florida suspension and stopped her teaching. Then she returned to Florida and was hired by Miami Dade Public Schools; that job ended after she allegedly slapped a student.

• A Texas math teacher, Stanley Kendall, lost his license for allegedly soliciting sex from a student and was even interviewed on NBC's *To Catch a Predator*. But subsequently he was hired as a substitute teacher in Indiana and worked there until someone spotted him in a rerun of the TV show, leading to revocation of his license.

Following the *USA Today* reporters' inquiries, some states including Texas, Georgia, and Iowa, launched efforts to add new oversight of teacher licensing. But *USA Today* noted that many concerned child advocates believe a federal database should be initiated. A Florida Congressman introduced a bill in 2009 to develop a public national database, to be maintained by the U.S. Department of Education, of teachers found to have engaged in sexual misconduct. Although that bill did not advance here, the United Kingdom maintains such a system.

Physician misconduct is a frequent subject of newspaper investigative reports, and several articles over the years have won Pulitzer nods. Pulitzer finalists have included the *Indianapolis Star* in 1991 for a series on medical malpractice, the *Plain Dealer* in 1995, the *Hartford Courant* in 2001 for a story on cloaking of medical discipline, and the *Seattle Times* in 2007 for a sexual misconduct story.

The *AJC* series "Doctors & Sex Abuse," following in that tradition, featured alarming accounts of physician misconduct, rankings of state medical boards on their regulatory oversight, and illustrations that borrow heavily from graphic novels.

Like the *USA Today* investigative reporters, *AJC* journalists spent a year collecting data and tracking cases, eventually analyzing more than 100,000 medical board orders related to disciplinary action against doctors since 1999. They concluded that every state in the nation tolerates physician sexual misconduct to some degree.

Key findings of the multimedia project include:

• Secrecy prevails in state disciplinary approaches to sexual misconduct. A history of private consent orders and private agreements with the licensing board often precedes formal discipline for sexual misconduct. Private measures lay stress on rehabilitation and may involve therapy, ethics classes, include polygraph testing, chaperones, and boundary courses. Perhaps reflecting the underlying attitude, the *AJC* reported, the Federation of State Medical Boards lists its policies on sexual boundaries under "Impaired Physicians," not under "Conduct and Ethics." Nevertheless, re-offending is common.

• Of 2,400 physicians publicly disciplined for sexual misconduct, half still have active medical licenses today. In some states, that proportion is significantly higher: two thirds in Georgia and Kansas, nearly three fourths in Alabama, and four out of five in Minnesota. One Alabama order quoted by the *AJC* could reflect the attitude underlying this apparent laxity : "It would be a great loss to the medical community, and to the public in general, if a physician of [such] obvious skill and ability would never again be able to practice medicine."

• The national tracking maintained by the National Practitioner Data Bank fails to show the extent of physician misconduct. Since hospitals are required to report any disciplinary action lasting more than 30 days against s physician's privileges, the American Medical Association estimated that upwards of 10,000 reports a year should be coming in to the Data Bank, but the average is only about 650 a year.

• In addition to numerous instances in which state boards failed to report to the Data Bank, many violations are misclassified to conceal the scope of the physician's sexual misconduct. Among the shocking cases that could not be found in the Data Bank was that of pediatrician Earl Bradley, estimated to have assaulted as many as 1,000 young patients before being sent to prison.

In the wake of the series, several states including Georgia, Oklahoma, West Virginia, Alaska, and Mississippi, the *AJC* reports, initiated measures to reform how boards handle this chronic and vexing discipline problem.

The *AJC* encourages the public to access its 50-state database of sexual misconduct discipline, court cases, and other information on physicians at ajc-data-share.herokuapp.com. The newspaper's "Doctors & Sex Abuse" series is at doctors.ajc.com.

Reduced discipline upheld for RN who let patient walk to his death

Issue: Proper use of context in evaluating unprofessional conduct

The Supreme Judicial Court of Maine, in a February 27 decision, upheld the reduction—from revocation to suspension—of discipline imposed on a nursing supervisor who let a potentially impaired patient walk out a hospital and to his death during a winter blizzard (*Zoblotny v. State Board of Nursing*).

Although the tragic and unusual circumstances of the case seemed to call for strict sanctions, the court acknowledged that the entire context of the nursing supervisor's actions significantly mitigated his liability for the patient's death.

The nursing supervisor, John Zablotny, was working a night shift at a hospital in Machias, Maine, in 2008, when a patient being treated for severe abdominal pain and on large doses of narcotic painkillers, requested to leave the premises against medical advice. Although a nurse believed that the patient was confused and needed restraint, a daytime nursing supervisor had found the patient to be rational and mentally competent.

However, when the patient initially requested to leave—to walk to a friend's house without winter clothing—the nursing supervisor refused, based on the patient's mental state and the blizzard conditions. Sometime during the day, a nurse had noted suicidal comments made by the patient on a daily report, but the report was misfiled.

When Zablotny arrived that evening to take over as nursing supervisor, he decided to let the patient leave. Zablotny consulted with the on-call physician, but failed to mention that the patient wanted to leave the hospital on foot in clothing not suitable to the weather conditions.

After signing a release form, the patient left the hospital, walking into a blizzard dressed only in pants, a shirt, and slippers. Shortly after, Zablotny came across the misfiled daily report containing information about the patient's suicidal comments. He then called the patient's wife and the local police to inform them of the situation. The police found the patient the next day, buried in the snow less than 400 feet from the entrance to the hospital, dead from hypothermia and opioid toxicity.

Following the death, the state's nursing board brought a disciplinary action against Zablotny, revoking his license for two years. Zablotny appealed, and the case went up to the Supreme Judicial Court of Maine, which reversed and remanded a lower court's decision to uphold the revocation on the grounds that the lower court had conducted an improper review.

On remand, the lower court determined that Zablotny had engaged in unprofessional conduct by inadequately informing the patient of the risks he faced by leaving the hospital against medical advice. It reduced Zablotny's discipline to a suspension, the board appealed, and the case went up to the high court again.

On appeal, the board argued that the facts of the case showed that Zablotny had committed unprofessional conduct by failing to fully inform the on-call physician of the patient's condition and by not immediately informing the police after the patient left the hospital.

However, the Court, looking at the evidence as a whole—including the missing report that noted the suicidal comments and the fact that Zablotny did not have any legal authority to stop the patient from leaving—deferred to the trial court's decision to reduce the suspension. "The District Court," wrote Justice Jeff Boyd, "was not compelled, as a matter of law, to find that Zablotny violated Board rules or professional standards of care."

Barber who earned license in prison loses it over later felony conviction

Issue: Relevance of criminal conviction to licensed status

A Pennsylvania barber who earned his license as part of a vocational program while in prison lost that license when it was revoked by the state's barber board after he was convicted of a felony after his release (*Gonzalez v. Bureau of Professional and Occupational Affairs*). A state appellate court upheld the revocation in an October 14, 2016 decision.

While in prison, Junior Gonzalez entered a barbering program and obtained a license in 2010. However, in 2014, after he had been released, he pled guilty to two drug felonies and was sentenced to 4 to10 more years in prison. In 2015, the State Board of Barber Examiners moved to discipline Gonzalez based on those convictions. Although Barber requested a hearing, he did not hire an attorney, and attended the telephonic hearing pro se. After the hearing, the board revoked his license and he appealed.

On appeal, Gonzalez argued that, although the board revoked his license under the rubric of Pennsylvania's Criminal History Record Information Act, the notice it sent to him concerning the discipline charges stated that he was subject to discipline under the state's Barber License Law. He also argued that he could not be disciplined under the Barber Law because none of his convictions was related to the practice of barbering, and that the board violated his right to due process by denying him an attorney.

Gonzalez did not get far with these arguments. The notice sent to Gonzalez actually stated that the board intended to discipline him under both the Barber Law and the Criminal History Act, noted Judge Robert Simpson, writing for the majority.

Further, Judge Simpson wrote that Gonzalez demonstrated awareness of the legal bases for his potential discipline during his legal process, at one point acknowledging that he received notice of the filing of charges under the CHRIA. The court also rejected Gonzalez's argument that the board should have provided him with an attorney, noting that no provision of the law provides for a state-appointed attorney in a civil case, such as a disciplinary proceeding.

Unfortunately for Gonzalez, the court held that he had not properly presented his argument that the board did not have the power to discipline him for convictions unrelated to his practice.

Judge Joseph Cosgrove, dissenting from the majority, expressed concern about the contradiction the revocation created. He argued both that Gonzalez's pro-se brief, although "inartfully drafted," did present the issue to the court and that the issue was an important one which the court should address.

The dissenting judged noted the obvious fact that Gonzalez acquired his barbering license *in* prison, as part of a program intended to give inmates with long sentences a profession when they are released. "But while one governmental body [the Department of Corrections] extends this vocational possibility to felons, another . . . takes it away."

"For the Board, it appears that despite DOC's efforts to provide vocational proficiency for inmates, the felony conviction Petitioner earned, in and of itself, now requires revocation of the license to practice that vocation," the judge said, a result with which Cosgrove could not agree.

The case was dismissed by the court.

Revocation proper for breaking contract with mentally challenged man

Issue: Appropriate severity of sanctions for licensees' offenses

A Mississippi real estate broker who reneged on a rent-to-own deal with a mentally challenged man lost an appeal of his license revocation, with the court viewing the evidence against the broker as self-evident (*Ryan v. Mississippi Real Estate Commission*).

Alan Ryan, a licensed real estate broker in Mississippi, rented out a home he owned to a mentally-challenged tenant with whom he eventually entered into a lease-to-own agreement. However, at the end of the ten-year contract period, during which the tenant kept up his payments as required, Ryan refused to transfer the property because he still owed $16,000 on the mortgage of the property and wanted the tenant to pay that amount.

Ryan then persuaded the tenant's cousin, who was representing the tenant in his dealings with Ryan, to pay an additional four months of rent. But Ryan

reneged again and persuaded the cousin to void the lease-to-own contract and create a new contract which did not provide the tenant with title to the house.

Following this exchange, the tenant's cousin filed a complaint with the Mississippi Real Estate commission, which then moved to discipline Ryan. Based on Ryan's actions in dealing with the tenant, his failure to provide the cousin with required disclosure forms, and complaints that Ryan had failed to make significant repairs to the home, requiring the tenant to spend his own money to do so, the board revoked Ryan's license.

Ryan appealed, arguing that the board's decision was not supported by substantial evidence and that revocation was too severe a penalty. Among other things, Ryan claimed to have a verbal agreement with the tenant's cousin at the signing of the original contract requiring a large payment at the end of the ten years to pay off the remainder of Ryan's mortgage, despite the fact that the written contract contained no such clause The case eventually reached the Court of Appeals of Mississippi, which issued a decision January 31.

Reviewing the facts of the case, Judge Jack Wilson, writing for the court, stated that extensive evidence existed to show that Ryan engaged in improper dealing and made misrepresentations in his dealing with his tenant. Although Ryan challenged the credibility of the cousin's testimony against him, the court refused to second-guess the Real Estate Commission's judgment of the evidence.

"The MREC, as the fact-finder, was entitled to reject Ryan's testimony and find [the cousin] credible," wrote Judge Wilson. This is particularly true since . . . the testimony was consistent with the parties' original contract, whereas Ryan's testimony was not." The court also refused to entertain Ryan's claim that the second, coerced contract, was valid and should have been respected by the Commission.

Responding to Ryan's argument that revocation of his license was too severe a penalty, Judge Wilson, citing the fairly egregious facts of the case, wrote that the decision to revoke was justified under the circumstances.

Court overstepped in setting licensees' recordkeeping requirement

Issue: Limits of courts' standard of review of board actions

A district court acted improperly when it vacated a discipline decision by the state's private investigator board after incorrectly determining that licensed investigators in Louisiana are not required to maintain client files for longer than three years, the Court of Appeal of Louisiana ruled February 17 (*Frank v. Louisiana State Board of Private Investigators*).

In October 2008, Frank was hired to find the identity of an 18-year-old client's biological mother. In January 2009, Frank met with the client and informed him that he had made progress but the client would need an additional retainer in order to continue his search. The client declined.

Tragically, in 2012, the young client committed suicide. Afterwards, the client's father informed Frank that he wanted to resume the investigation, but Frank informed the father that he typically destroyed client files after three years and that he probably no longer had the file. Frank asked for $5,000 plus a new retainer fee in order to restart the investigation.

The father, unhappy with the prospect of paying a large amount of money on top of the $2,500 already paid to Frank by his son, filed a complaint with the

state's private investigator board, which moved to discipline Frank on the grounds that he had misled a client and acted unprofessionally.

Following the hearings, the board concluded that Frank did, in fact, have the file when the client requested it, and thus had failed to produce the file to his client, an act the board classified as deceptive and unprofessional. The board revoked Frank's license and ordered him to pay $22,000 in fines, fees, and restitution.

Frank appealed, and a state district court reversed the board's decision after finding that Frank was only required to keep his client records for a period of three years. Because more than three years had passed between the time the initial action in the case was discontinued and the time that the client had requested the file, Frank had no obligation to produce it. The board appealed that decision and the case went up to the Court of Appeal.

The board argued in its appeal that no provision of law supported the district court's finding that investigators are required to keep client files for a mandatory period of only three years. The Court of Appeals agreed. While board regulations mandate that an investigator maintain copies of contracts for services for a period of three years, no law or regulation governs the retention of client files. By ruling in favor of Frank, the district court impermissibly created a three-year prescriptive period that would effectively limit the liability of professional investigators.

The Court of Appeals then took the unusual step of conducting a complete *de novo* review of the case and—noting that the district court failed to review the "ample evidence" supporting the board's finding that Frank had violated numerous statutes and regulations—moved to affirm the board's order on its own.

The court cited Frank's lack of credibility in his testimony and his "appalling" record-keeping practices, noting that Frank was unable to provide even basic details about his investigative practices in the case at hand, insisting that he would need to view the file, which he claimed to no longer have.

Noting the strength of the board case, Judge John Pettigrew wrote that "the transcript [of the board's proceedings] as a whole fully supports a finding by the board that Frank's conduct and behavior in conducting the investigation at issue and communicating with his clients was violative of at least one (incompetence) if not several other standards imposed upon him by law."

Legislature "relied on six anecdotes" to enact law

Court holds ban on doctors' gun discussions is unconstitutional

Issue: Free speech rights of licensed providers

The Eleventh Circuit Court of Appeals, in a February 16 decision, issued what should be a definitive final ruling in a long-running battle over the state's ban on physicians asking their patients about gun ownership (*Wollschlaeger v. Governor of Florida*). After several back-and-forth court decisions, the appellate court ruled the ban unconstitutional, saying that it improperly restricted the speech rights of physicians in the state.

In 2011, responding to a handful of anecdotal reports of doctors harassing patients about the dangers of gun ownership in homes with children, the Florida legislature passed a law that forbade physicians from discussing firearm ownership with their patients, with some exceptions. In response, a group of

plaintiffs sued the state, seeking to overturn the law on First Amendment grounds.

A federal district court permanently enjoined enforcement of several important sections of the law. But, on appeal, a three-judge panel of the U.S, Court of Appeals for the Eleventh Circuit—in three successive decisions, each using a different standard of review for First Amendment issues—reversed the lower court and reinstated the law. The full court then voted to rehear the case.

The practice of asking patients about the presence of firearms in the home and of warning patients of the risks of unsecured firearms to children has a history dating back to at least the 1980s, when the American Medical Association enacted a policy explicitly encouraging its members to broach the topic with their patients. The American Academy of Pediatrics and the American Academy of Family Physicians also promote the practice.

Four provisions of the new law were at issue in the Eleventh Circuit case: a ban on creating a record of any disclosure about firearm ownership by a patient if the "information is not relevant to the patient's medical care or safety, or the safety of others;" a ban on asking about firearm ownership unless the physician has a "good faith" belief that the question is relevant to the safety of the patient or others; the prohibition of discrimination by a physician based on the firearm ownership of a patient; and a ban on harassment of patients about firearm ownership.

If the gun-discussion-ban were allowed to stand, the court said, "The government could—based on its disagreement with the message being conveyed—easily tell architects that they cannot propose buildings in the style of I.M. Pei, or general contractors that they cannot suggest the use of cheaper foreign steel in construction projects, or accountants that they cannot discuss legal tax avoidance techniques, and so on."

Although the relevancy provision theoretically protects doctors who have a supportable belief about the possibility of danger, the ban effectively prevented general inquiries, such as a question on a new-patient intake form. Violations of the law are punishable as professional disciplinary offenses.

The full court of appeals, like the district court and the panel before it, held that the ban was, in fact, a ban on protected speech and required a higher level of scrutiny than a normal restriction on professional practice: "The record-keeping and inquiry provisions expressly limit the ability of certain speakers—doctors and medical professionals—to write and speak about a certain topic—the ownership of firearms—and thereby restrict their ability to communicate and/or convey a message. As a result, there can be no doubt that these provisions trigger First Amendment scrutiny."

The court also rejected a First Amendment approach that would have labeled the prohibited firearm inquiries as merely "conduct" or "professional speech," so that curbs on it would be deserving of a lower "rational basis" standard of First Amendment scrutiny.

"If rationality were the standard," wrote Judge Adalberto Jordan, "the government could—based on its disagreement with the message being conveyed—easily tell architects that they cannot propose buildings in the style of I.M. Pei, or general contractors that they cannot suggest the use of cheaper foreign steel in construction projects, or accountants that they cannot discuss legal tax avoidance techniques, and so on."

Applying the standard of "heightened scrutiny"—which requires that the state must show that a law "directly advances a substantial governmental interest"—the court questioned the strength of the state's evidence. "Here, the Florida Legislature, in enacting [the law], relied on six anecdotes and nothing more," wrote Judge Jordan. "There was no other evidence, empirical or otherwise, presented to or cited by the Florida Legislature."

The court addressed the concerns proffered by the state to justify the ban. The first, to protect Floridians' Second Amendment rights to bear arms from "private encumbrances," was supported by "no evidence whatsoever," wrote Jordan.

"This evidentiary void is not surprising because doctors and medical professionals, as private actors, do not have any authority (legal or otherwise) to restrict the ownership or possession of firearms by patients . . . The Second Amendment right to own and possess firearms does not preclude questions about, commentary on, or criticism for the exercise of that right."

The court was also skeptical of another proffered justification, the protection of patients' privacy. Judge Jordan pointed out that any patients concerned about their privacy did not have to answer questions regarding their firearm ownership, and that medical records were already protected from disclosure.

The state also offered its significant interest in regulating the professions as a motive for the ban, but Judge Jordan wrote that "there is no claim, much less any evidence, that routine questions to patients about the ownership of firearms are medically inappropriate, ethically problematic, or practically ineffective. Nor is there any contention . . . that blanket questioning on the topic of firearm ownership is leading to bad, unsound, or dangerous medical advice."

And, instead of addressing claims that some patients had been given false information regarding firearm disclosure and Medicaid benefits by prohibiting that false speech, the Judge noted that the legislature chose "to pass provisions broadly restricting truthful speech based on content."

While the speech restrictions were struck down, some of the law did survive. One provision of the statute—the prohibition of discrimination against firearm owners—did meet constitutional standards. Because the provision could be applied to many types of behavior—refusing to schedule appointments, not returning messages—that could not be considered speech, the provision could be enforced without running afoul of the First Amendment. Several other provisions of the law were not being challenged before the Eleventh Circuit; the court ruled that the offending sections could be severed from the remainder, leaving the rest of the law in force.

Licensing

Board defamed licensee in seeking arrest for unlicensed practice

Issue: Danger of defamation in carrying out professional discipline

A Louisiana appellate court upheld $300,000 in damages awarded by a jury to a private investigator who sued the state investigators board. The investigator, Dwayne Alexander, successfully alleged the board defamed him when it sent a copy of a cease-and-desist letter to law enforcement, urging that he be arrested for unlicensed practice (*Alexander v. Louisiana State Board of Private Investigator Examiners*).

By providing a copy of the letter without determining whether the investigator was subject to an exemption from licensure, the board had committed defamation, the court said in its February 17 decision.

Alexander held a Louisiana private investigator license from 1997 to 2006 and, in 2000, he began investigating worker compensation cases for the city of

New Orleans. Although he let his investigator license expire in 2006, he continued to investigate worker's compensation claims for the city under contract with a third-party claims administrator until 2009. He believed that that contract status statutorily exempted him from the need for a license.

In 2009, another investigator, Wayne Centanni, filed a third complaint against Alexander, alleging that he was improperly investigating without a license in the course of his work for New Orleans. Centanni compiled a large binder of professional and personal information about Alexander, including information about expunged arrest records and information obtained from the board through a public records request, and sent copies of the information to the board, the city, Alexander's employer, and even a local television station. On receipt of the file, Alexander's employer ended his contract.

The board reacted to the receipt of the file by sending a cease-and-desist letter to Alexander ordering him to stop his investigation work due to his lack of a license. In response, Alexander filed suit against the board, among others, accusing it of improperly disclosing information about him to Centanni and sending him the cease-and-desist letter without first granting him a hearing, but the case was dismissed in 2010.

Alexander continued to provide investigative services under contract for another governmental entity, the St. Charles Parish School Board. However, in 2011, the New Orleans Metropolitan Crime Commission contacted the School Board to inform it that Alexander was improperly operating without a license and that he had been issued a cease-and-desist order by the investigator board. The School Board's superintendent then contacted law enforcement to request an investigation into whether Alexander had violated the law when he performed investigatory work for the School Board.

After being contacted by the St. Charles Parish sheriff, the investigator board provided him with a copy of the cease-and-desist letter, informed the sheriff that Alexander would have been in violation of private investigator laws if he had worked as an investigator for the school board without a license, and urged the sheriff to take legal action against Alexander. Based on that information, the sheriff successfully applied for a warrant for Alexander's arrest; Alexander turned himself in after learning of the warrant. *The New Orleans Times-Picayune* reported on the incident.

In 2013, Alexander filed a second suit against the investigator board, claiming that it defamed him and violated his constitutional rights when it sent the cease-and-desist letter in 2009 and that it had violated state public records laws by disclosing his expunged criminal record to Centanni. After a trial, a jury found the board liable to Alexander for defamation and abuse of process, awarding him $300,000 in damages, but it rejected his claims for intentional infliction of emotional distress and Constitutional violations.

Unhappy with the outcome of the trial, Alexander filed to annul the verdict, alleging that the board defendants presented perjured testimony and fraudulent documents at trial. The court dismissed Alexander's petition, and both parties appealed the final decision. The case made its way to the Court of Appeal of Louisiana for the Fourth Circuit, which issued a decision February 17.

Judge Rosemary Ledet, discussing the substance of Alexander's suit, ruled that, by contacting the St. Charles Parish sheriff's office and urging them to prosecute Alexander for unlicensed practice, the board had committed defamation.

During the trial, board director James Englade was asked about the possibility that Alexander was subject to an exemption to the state's licensure requirements. He responded that the board never answered the exemption questions before it sent the cease-and-desist letter or before a board investigator contacted the St. Charles Parish sheriff's office to inform them that Alexander was investigating in violation of the law. Because the board defendants were unable to prove, at trial, that the statements contained in the cease-and-desist order were true, Judge Ledet wrote; their actions constituted defamation.

And, although the board was normally entitled to a raft of different privileges and immunities when it disseminates information of the type on the cease-and-desist order, by disregarding the possibility that Alexander's investigatory actions were exempt from licensure, it had engaged in "willful, wanton, and reckless misconduct." Thus, the court held, the board had lost the ability to claim those exemptions from liability.

The board defendants also claimed that the $300,000 jury award was excessive but, noting the high level of publicity surrounding Alexander's arrest and the subsequent damage to his reputation and investigator career, the court determined the amount reasonable.

Scope of Practice

Alcohol & substance abuse counselors may not practice psychology

Issue: Limits of courts' standard of review of board actions

The Court of Appeals of Nevada, in a January 30 decision, rejected the appeal of an alcohol and substance abuse counselor who had been enjoined from using psychological testing and diagnosis on his patients (*Hopper v. Board of Psychological Examiners*). The court ruled that the regulations controlling the licensed alcohol and drug counseling profession do not allow those licensees to engage in the practice of other licensed professions.

David Hopper, an LADC counselor, had a habit of treating the scope of his licensure liberally, testing and diagnosing some of his clients with psychological disorders despite not being licensed to practice psychology, referring to himself as a "neuropsychologist," and engaging in the use of biofeedback.

After learning of Hopper's activities, the board filed a legal complaint to prevent him from using psychological testing and diagnosing, referring to himself as a psychologist, and using biofeedback in his practice. This was not Hopper's first brush with the negative aspects of licensing law; in a 2009 Nevada Supreme Court case, the Court held that Hopper had illegally practiced unlicensed psychology and suggested, but did not hold, that the use of biofeedback may require a psychologist license.

After a state district court granted the board an injunction, Hopper appealed, offering the novel argument that, because he was trained in psychological and psychometric testing and because state regulations allow alcohol and substance abuse counselors to "conduct testing for which the counselor was trained," without mention of the need for further licensure, Hopper was within his rights to engage in those tests.

This argument did not succeed. Despite the regulations' failure to specifically mention the need for further licensure, the court noted that "nothing in these regulations suggests an intention to overrule every other licensing requirement that exists in Nevada law."

Reading the relevant regulation in the context of the rest of Nevada licensing law, the court said that "the mere fact that the [regulation] permits an LADC to engage in certain testing does not mean that the LADC is therefore automatically exempt from any other licensing requirement that may also apply to that testing."

"To read the regulations otherwise . . . would be to effectively read [them] as overriding the licensing requirements of any other statute, which would permit an LADC, but only an LADC, to engage in all manner of medical, psychological, and scientific practices without a license while prohibiting anyone else from doing so," an unreasonable result.

The counselor made other, also unsuccessful, arguments. He argued that, while he was prohibited from calling himself a "psychologist," the prohibition said nothing about the term "neuropsychologist." But the court held that the legal prohibition on the use of "psychologist" by non-licensees applied to variations of the phrase, as well.

Hopper noted that other licensing boards—the medical and family therapist boards, in particular—allow their licensees to use biofeedback, but the court said that the injunction at issue in the case was still valid, as the district court found that Hopper's use of biofeedback was inappropriate under the specific circumstances of his case.

The lower court's decision was affirmed and the case dismissed.

Family therapists okayed to do "diagnostic assessments"

Issue: Nature of diagnosis as restricted practice

In a February decision, a Missouri appellate court rejected a challenge by the Missouri Medical Association to a rule, adopted by the state's marriage and family therapists board, that allows licensees to conduct "diagnostic assessments" of mental disorders as part of their work (*Texas State Board of Examiners of Marriage and Family Therapists v. Texas Medical Association*).

In 1994, the therapists' board adopted a rule allowing its licensees to provide "diagnostic assessments" based on the Diagnostic and Statistical Manual of Mental Disorder. The board based this rule on Texas' Therapists Act, which states that therapists may engage in "the evaluation and remediation of cognitive, affective, behavioral, or relational dysfunction in the context of marriage or family systems." Marriage and family therapists are trained and are required to show proficiency in such assessments during their licensure testing.

In 2008, the Texas Medical Association filed a suit seeking to declare the diagnostic rule invalid. The association argued that the Texas Medical Act limits diagnostic assessments to holders of medical licenses. After a trial court declared the rule invalid for exceeding the scope of the Therapists Act, the board appealed, and the case eventually rose to the Supreme Court of Texas, which issued a decision February 25 upholding the rule.

Looking at the language of the Therapists Act, the court, in an opinion by Justice Jeff Boyd, determined that the Act provided the board with the authority to allow its members to engage in diagnostic assessments. The language of the Act explicitly allows therapists to make "evaluations," which the court held was akin to an "assessment."

In the context of the Therapists Law, Justice Boyd wrote, the "evaluation and remediation" performed by therapists includes a "diagnosis." "A therapist who merely examines, assesses, or reviews a client's condition without making a determination regarding the nature of that condition cannot adequately

'remediate' the condition as the Therapists Act requires. And the determination regarding the nature of a dysfunction is commonly known as a diagnosis . . . We conclude that by authorizing MFTs to 'evaluate and remediate' their clients' dysfunctions, the Therapists Act authorizes MFTs to provide a 'diagnostic assessment' as the Therapists Board's rule uses that phrase."

The ability of therapists to make diagnostic assessments, the court held, was still limited by the Act's language that any evaluation made by therapists "involves applying family systems theories and techniques . . in the context of marriage or family systems" and language in the corresponding rule that limits therapists to making diagnostic assessments "within his or her professional competency." This would prevent therapists from diagnosing mental disorders with medical components beyond their expertise.

The Medical Association also argued that, because the state's Medical Practice Act prohibits the diagnosis of medical disorders without a medical license, the board's rule created an impermissible conflict between that act and the Therapists Act. In support of this argument, the association noted that the Medical Practice Act provides several *express* exceptions to this rule, none of which include marriage and family therapists.

However, the board pointed out that several sections of the state's broader Occupations Code expressly *prohibit* certain professions from making medical diagnoses; because the state legislature did not include such a prohibition in the Therapists Act, they argued, the legislature had consciously refrained from prohibiting therapists from making diagnostic assessments. The court, essentially determining that these inconsistencies cancelled each other, held that the language of the Therapists Act would control.

"Dry Needling" case to decide turf of PTs vs. acupuncturists

Issue: Exclusive rights to perform certain procedures

A federal complaint brought by physical therapists against North Carolina's acupuncture board, accusing the board of engaging in anticompetitive behavior in attempting to prevent the state's physical therapists from performing needle therapies, was cleared by a district court to continue, in a January 30 decision (*Henry v. North Carolina Acupuncture Licensing Board*).

The issue of whether physical therapists may use needles in their practice has been debated at the state level for a number of years. In 2011, the North Carolina attorney general, responding to a request from the acupuncture board, produced an advisory opinion declaring that the state's physical therapy board had the authority to declare dry needling within the scope of practice for physical therapists.

Despite that opinion, in 2012 the acupuncture board posted a document on its website in which it claimed that physical therapists' practice of dry needling was endangering the public, potentially subjecting them to legal action.

In 2013, the board escalated the conflict by sending cease-and-desist-letters to physical therapists using dry needling. In 2015, the board brought suit against the state's physical therapy board, seeking to have a court declare that dry needling done by physical therapists constituted the unlawful practice of acupuncture.

The group of physical therapists and other plaintiffs then filed their suit challenging the board's attempts to halt the practice by non-acupuncturists, arguing that its actions were anticompetitive and a violation of their constitutional right to equal protection.

In response, the board defendants argued that any legal action concerning the federal anticompetitive claims should be delayed until the resolution of their earlier state court case on the substantive issue of whether physical therapists could engage in the practice.

However, the court noted that the two cases considered different questions of law—the state case asked a court to determine the scope of practice, while the federal case claimed anticompetitive behavior in violation of federal statutes—and that it was entirely possible that the case would continue even if the state lawsuit determined that dry needling *was* acupuncture. Assessing the other elements of the plaintiffs' claim, Judge William Osteen held that the physical therapists had made sufficient arguments to protect the case from dismissal.

Osteen did reject the plaintiffs' equal protection claims, holding that the plaintiffs did not provide sufficient "support for their contention that they have a Constitutional right to perform dry needling."

Accreditation

Board can't delegate accreditation without formal rulemaking

Issue: Online license application processing

A court in Pennsylvania, in a January 31 ruling, invalidated a policy statement on entry standards issued by the state medical board (*Cary v. Bureau of Professional and Occupational Affairs*).

The policy statement would rely on two national education accreditation agencies to determine which graduate schools met sufficient standards to qualify graduates for a behavioral specialist license, the court said. The board had treated the accreditation agencies' decisions as binding, which would require it to follow formal rulemaking procedures.

Since 2008, Pennsylvania statute has required licensed behavioral specialists to be licensed, and to have a degree from a "board-approved, accredited college or university." To define "approved," the board—through the mechanism of an informal policy statement—deferred to the accreditation decisions of the Council for Higher Education Accreditation and the U.S. Department of Education.

When Cary, who had been employed as a behavioral specialist in Pennsylvania since 2005, applied for a behavioral specialist license in 2013, the board denied her application on the grounds that the school where she had obtained her master's degree, Emmanuel Baptist University, was not accredited by either the CHEA or the USDE and thus her degree was not from a board-approved institution.

Emmanuel Baptist had closed since Cary graduated in 1990. Cary, who was terminated from her job after failing to acquire a license, appealed to the state's Commonwealth Court, arguing that the board's reliance on CHEA and USDE accreditation was both a violation of her right to due process and a violation of state rulemaking procedures.

The court agreed with Cary that the board had acted arbitrarily. The relevant statute "grants the board the authority to determine, independently and on its own initiative, the educational merits of any particular school," wrote Judge Patricia McCullough.

Emmanuel Baptist had been accredited by three different organizations before it closed, and "the Board could have examined these accreditations, along with Cary's course work, and performed some kind of comparative analysis to determine" whether the school was "accredited" or should be "board-approved," as required by statute.

Noting that the board had never undertaken a formal rulemaking process before delegating its educational-evaluation responsibilities, Judge McCullough wrote that the policy delegating accreditation decisions to the CHEA and USDE nonetheless had "all the characteristics of a binding norm or substantive regulation, with the purported force of law," which required that it be promulgated pursuant to formal procedures spelled out by state law.

As a result, the policy statement was void and could not be used to deny Cary a license. Judge McCullough also noted that the board's decision to rely on CHEA and USDE accreditation was undertaken without providing any reasoning or evidence for the decision, making it arbitrary and capricious, and, thus, illegitimate.

The court reversed the board's decision and ordered it to issue Cary a license.

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