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Discipline

Board investigator's implied threat of sanctions excludes use of his interview of licensee as evidence in criminal case

Issue: Board investigations' role in criminal prosecutions

A state medical board investigator who cooperated with local law enforcement, using the implicit threat of license sanctions to coerce testimony from a physician that led to his criminal conviction, violated the physician's Fifth Amendment right to freedom from self-incrimination, an Ohio appellate court ruled June 24. The ruling made evidence from the interview inadmissible (*State v. Gideon*).

In 2017, the Ohio State Medical Board cooperated with local law enforcement in an investigation of physician James Gideon for alleged inappropriate touching of his patients. Gideon denied the allegations to criminal authorities, and a board investigator, Chad Yoakam, after consulting with the police officer in charge of the case, went to question the doctor, evidently hoping to get more incriminating answers.

Because he was a licensed physician, state law required Gideon to cooperate with the board and provide truthful answers to questions, or else face license discipline. Yoakum shared the results of his interview with the police.

*See **Discipline**, page 4*

Reciprocity

Vermont board would take 23% fiscal hit by signing on to interstate compact

Issue: Interstate agreements to recognize other states' licenses

Interstate compacts—agreements among states to accept other states' occupational licenses, in the same way that states' drivers' licenses are accepted—are good policy, but can mean extra costs for licensing boards and higher fees for licensees, a Vermont study of the interstate nursing compact (eNLC) found in March.

That's because the pool of people paying licensing fees would shrink. In simplified terms, the Vermont Secretary of State reported to the

legislature: The cost of a Vermont license "is determined by regulatory expense divided by active licensees." Because Vermont nurses licensed elsewhere may not need to pay for a license, active licenses would drop, while expenses, driven by Internet technology, administrative personnel, investigation, and discipline, would remain unchanged.

The report authors estimated that the reduction in total license fees would mean a loss of $932,575 of revenue to the state nursing board, against a roughly $4 million budget per biennium—roughly a 23% hit to the board's budget.

On the plus side: interstate licensing may help to ease nursing shortages by allowing multi-state licensees to travel and more easily fill vacancies. This labor market fluidity, though, does not guarantee inflow, the report notes. Trained nurses will be more portable but whether compact participation will increase the supply of trained nurses is unknown. Add the transition costs of communication and outreach to stakeholders, and updates to Internet technology infrastructure, forms, and administrative processes, and the policy benefits may not outweigh the fiscal impact.

Geographic location and size of the states affects their likelihood of joining the Compact. "The eNLC enjoys excellent penetration in the mid-Atlantic, Midwest, and Mountain West, but poor penetration in new England and on the West Coast." Only Maine and New Hampshire, among the New England States, participate in the nursing compact, and the report authors say that few or no observers expect that New York or California will sign on, while Massachusetts has considered bills but not adopted them.

The result: "Our most populous regional neighbors are not sources of Compact nurses and Vermont nurses holding Compact licenses would be unable to realize the benefits of portability in most states closest to us."

The Vermont Board of Nursing voted to support joining the Compact in 2017. But despite supporting the Compact in principle, given both the benefits and costs, the state's Office of Professional Regulation said it is offering a "neutral action" recommendation on the question of whether to join the Compact, for now.

Licensing

Court upholds licensing of applicant with 21 felony convictions

Issue: Limits on use of convictions to deny license

A real estate office employee who applied for a salesperson license won his appeal of the state Real Estate Commission's decision to deny him a license because of his 21 criminal convictions, in a May 28 ruling by the Missouri Court of Appeals.

The applicant, William Held, completed requisite coursework and passed the licensing exam, but in 2015 the real estate board found that his criminal convictions involved dIshonesty and moral turpitude and denied him a license.

Held appealed, and following an evidentiary hearing, an administrative law judge granted his application for licensure subject to a three-year probation. A circuit court reversed, and the state Court of Appeals in turn reversed the circuit court by reinstating the judge's decision to grant Held a probated license

Held pleaded guilty to 21 felonies relating to drug possession and trafficking as well as theft and weapons violations between 1998 and 2014, and was on

probation for some of the offenses when he applied for his real estate salesperson's license.

However, when he appealed the initial license denial by citing his now-ended substance abuse problem as the cause of his criminal behavior, the Administrative Hearing Commission (AHC) said that although his criminal past tended to show a lack of good moral character there was no evidence of his failing to comply with his supervised probation, and "we must take into account that over three years have passed since his most recent conviction." His supervising broker also testified to Held's reputation for honesty, integrity, and fair dealing.

The AHC concluded it had discretion to issue Held a probated license, which would entail his employer's maintaining electronic records of his entering and leaving homes of prospective sellers, and his own obligation to report any arrest and to submit to drug screening.

The Real Estate Commission appealed and the circuit court agreed with the Commission, finding that the AHC lacked statutory authority and competent evidence to find that Held possessed the requisite moral character.

The Court of Appeals found, however, that in its review of professional licensing decisions, the administrative hearing commission acts in lieu of the licensing agency; it is not required to defer to the decision of the licensing agency. "The commission actually steps into the [Department of Labor and Industry]'s shoes and becomes the department," the court wrote; the AHC has the same authority as the underlying agency.

On the second point raised by the Real Estate Commission—that a decision that Held had the requisite moral character was arbitrary, capricious, or unreasonable—the court found that "competent evidence supports the AHC's decision that Held is a person of good moral character." The court cited Held's acceptance of responsibility for his criminal conduct and his record of recovery steps to prevent similar behavior in the future.

Finally, the court rejected the board's argument that the reputational issue was decided by relying on the testimony of Held's sponsoring broker, and "reputation is based on the opinion of the community as a whole rather than the personal estimate of an individual." The court said Held and his broker could reliably testify as to his reputation in the community of being an honest person—"particularly when the Real Estate Commission made no objection to any of that testimony when it was offered."

Court refuses to give pro-life group abortion provider licensing info

Issue: Exceptions to public information on licensees

Citing the risk of harassment and assaults, a panel of a Pennsylvania Commonwealth Court ruled July 11 that the names and professional license numbers of abortion providers and their staffs are shielded from public release and will not be divulged (*Crocco v. Pennsylvania Department of Health*).

The decision upheld a ruling of the state Office of Open Records, which blocked the Pro-Life Action League from obtaining the licensing information from the state Department of Health under the Right to Know Law.

The Open Records Office was correct, wrote Judge Robert Simpson, in finding the requested information should be protected from pubic release under a personal security exception of the public information law.

Documented instances of harassment including threats, physical attacks, and firebombing of abortion facilities support the ruling, Judge Simpson said. In the

past, the personal security exception has only rarely been applied to justify redaction of licensing information, and only in the context of prison settings. However, "given the allegations of significant harm to individuals who provide services to abortion providers in some capacity, application of the security exception is warranted."

But the ruling stressed that shielding of licensing information is intended to be "rare and limited to the unusual circumstances" of this case.

Fewer than 1% of otherwise eligible license applicants denied over past convictions, Illinois says

Issue: Licensing of applicants with past criminal convictions

Prior convictions are rarely the cause of a license denial, said the Illinois Department of Financial and Professional Regulation (IDFPR) in a May 1 report. It tallied total licenses issued in 2018 across the full range of occupations it regulates, including the number of people with convictions, and found only a few license denials were based on convictions.

The Department's report provides counts of the number of people licensed in regulated occupations in Illinois in 2018, and the number with convictions who were licensed. A partial list:

Architects 2 with criminal convictions of 464 licensed
Athletic Trainers 3 with criminal convictions of 219 licensed
Clinical Psychologists 4 with convictions of 127 licensed, 1 denied
Barbers 22 with criminal convictions of 132 licensed
Cosmetologists 13 with convictions of 1,502 licensed
Dentists 1 with a conviction of 437 licensed
Dietitian/Nutritionists 1 with a conviction of 267 licensed
Massage Therapists 10 of 555 licensed
Chiropractic Physicians 2 of 113 licensed
Physicians/Surgeons 13 of 2,662 licensed
Registered Nurses 178 of 9,002 licensed; 3 denied
Optometrists 2 of 109 licensed; 2 denied
Pharmacists 5 of 650 licensed
Physician Assistants 1 of 403 licensed
Professional Counselors 15 of 520 licensed; 2 denied
Professional Engineers 5 of 450 licensed
Certified Public Accountants 4 of 1,676 licensed
Respiratory Care Practitioners 8 of 225 licensed
Clinical Social Workers 8 of 373 licensed; 1 denied
Speech Language Pathologists 1 of 111 licensed
Structural Engineers 1 of 82 licensed
Veterinarians 4 of 154 licensed

(The Department notes that applicants who were ineligible for licensure on another basis, such as having submitted false credentials, would not be included in these figures.)

In 2018, the state passed legislation requiring the department to report data related to criminal convictions and license applications. The goal was to minimize barriers to occupational licensure for individuals who have served time in the criminal justice system.

The department supported that initiative and is committed to that goal, acting IDFPR secretary Deborah Hagan stated in releasing the report.

A redesign of the department's communications is underway to make it easier for potential licensees with criminal convictions to complete their applications. The department also supports training programs in the Illinois Department of Corrections to provide bridges to occupational licensure and reintegration of prisoners into the workforce following their release.

Discipline

Board cooperation with law enforcement dooms criminal case, *from page 1*

Because he was a licensed physician, state law required Gideon to cooperate with the board to provide truthful answers to questions, or else face discipline. Following this interview, Yoakam shared the results with the police.

During the criminal trial that followed, Gideon challenged the use of his interview with the board investigator as evidence, arguing that, because he had no choice but to cooperate with the board, the statements were involuntary and their use a violation of his Fifth Amendment rights to due process.

The trial court denied the motion, holding that Gideon's interview was done voluntarily. A jury found Gideon guilty of sexual imposition, and the court sentenced him to 180 days in jail and ordered him to be listed as a sex offender. Gideon appealed, and the case went up to the state Court of Appeals, which issued a decision overturning his conviction.

A U.S. Supreme Court case, *Garrity v. New Jersey*, holds that the government may not penalize the assertion of a suspect's Fifth Amendment privilege, including through the use of civil sanctions. Despite this ruling, in Gideon's case, the trial court had concluded that, although Gideon believed he would be penalized—through the loss of his license—if he refused to answer the board investigator's questions, his belief was not objectively reasonable, and *Garrity* was not applicable for his defense.

Here, the Court of Appeals did not agree, holding that the lower court was wrong to hold that Gideon unreasonably believed he would be penalized if he did not cooperate with the board investigator's interview request.

Ohio statutory law, the court explained, permits the board to discipline medical licenses if a licensee refuses to cooperate in board investigations, and the court held that this disciplinary power did amount to the type of penalty on non-cooperation envisioned by *Garrity*.

"The evidence in the record reflects that the circumstances surrounding the administrative investigation at issue in this case show some demonstrable, coercive action by the state beyond the general directive to cooperate," the court said. The statute allowing the board to discipline licensees for a refusal to cooperate in board investigations put licensees on reasonable notice that they could be penalized by invoking their Fifth Amendment privileges.

Noting Yoakam's purposeful cooperation with criminal law enforcement, Judge William Zimmerman wrote that, "while there is nothing inherently wrong with Investigator Yoakam and law enforcement's agreement to share information, the evidence in the record reveals that Investigator Yoakam exceeded statutorily permissible collaboration by taking demonstrable steps to coerce Gideon to provide him an incriminating oral and written statement in reliance on Gideon's duty to cooperate. In other words, Investigator Yoakam was posing as a 'straw man' to effectuate law enforcement's criminal investigation."

Taken as a whole, the court wrote, "Yoakam's actions created an impression that Gideon's refusal to cooperate with his investigation would result in the type of penalty prohibited under *Garrity*." Because Gideon's belief that he would be penalized if he refused to cooperate was reasonable, his statements were not voluntary.

The judgment of the lower court was reversed, and the case remanded for further proceedings.

Lower court overstepped by slashing discipline against licensee

Issue: Statutory limitations on a court's ability to overrule board's actions

An appeals court in Alabama, in a May 17 ruling, threw out a decision by a state circuit court that had drastically reduced disciplinary sanctions imposed by the state's Board of Pharmacy against a licensee who operated some of her pharmacy locations

without a permit or a licensed pharmacist on site. The lower court had acted outside of its authority by substituting its judgment for that of the board, the appeals court found (*Alabama State Board of Pharmacy vs. Parks*).

The trouble in this case stemmed from several pharmacies in Alabama run by pharmacist Demetrius Yvonne Parks. When one of Parks's pharmacies closed because the building housing it was condemned, Parks re-opened in another location, but failed to obtain a pharmacy permit for that new location. This indiscretion led to a complaint from the state's Medicaid agency, prompting the State Board of Pharmacy to begin an investigation.

When a board investigator visited the new location, he found only a single, unlicensed employee, who told the investigator that, upon receiving prescriptions from patients, she would forward them to one of Parks's other pharmacies and would later pick up the filled prescription and deliver them to the patients.

Parks made other questionable decisions regarding her pharmacies' licenses and operation. Investigations revealed that a second pharmacy was also unattended by a licensed pharmacist while filling prescriptions, and an inspector turned up several inaccurate or improperly-processed records for controlled substances in various Parks locations. In 2014, she closed two pharmacies in Montgomery, prompting the board to end their permits, but then Parks re-opened one of the pharmacies, using the now-defunct permit of one of the two locations.

The board later determined that Parks engaged in this permit shuffling in order to avoid paying a $300,000 Medicaid recoupment order. Last, one of the pharmacies purchased controlled substances using an invalid controlled-substance registration number on almost two-dozen occasions.

After a disciplinary process, the board found Parks and her pharmacies in violation of the state's Pharmacy Practice Act, eventually suspended her pharmacist license for five years, fined her $27,000, placed the permits for two of her pharmacies on probation for five years, and fined them a collective $47,000.

Parks appealed to a state circuit court, who, despite finding that Parks had violated the Practice Act and that the board's decision was supported by substantial evidence, ruled that the sanctions imposed by the board on Parks were unreasonable. The court reduced the penalties, cutting Parks's five-year suspension to only three months and completely striking her administrative fine, and reduced the pharmacies' probation from five years to one while reducing their collective fines to only $4,000.

The board appealed this decision, arguing that the circuit court improperly substituted its judgment for that of the board regarding the penalties imposed against Parks. The case rose to the state's Court of Civil Appeals.

In its ruling, the appellate court reversed the decision of the circuit, holding that the lower court had overstepped its authority. "In this case," Judge William Thompson wrote, "the circuit court did not state a reason as to why it believed that the penalties imposed were unreasonable. . .The board found that Parks and the pharmacies were guilty of the 46 charges alleged against them," as well as additional violations. The circuit court had agreed with those findings.

Noting the deferential standard required of courts reviewing a decision by the pharmacy board, Judge Thompson wrote: "The board had the statutory authority to suspend Parks's license, to place the pharmacies on probation, and to impose the administrative fines against Parks and the pharmacies. Under our standard of review, we cannot say that the board acted in an unreasonable, arbitrary, or capricious manner in imposing those sanctions." He remanded the case to the circuit court for further proceedings.

Licensee's use of unproven diagnostic device is cause for discipline

Issue: Unprofessional conduct and false advertising accusations

A Pennsylvania court, in a May 8 decision, upheld discipline imposed by the state's Board of Chiropractic on a licensee who advertised the use of a miraculous diagnostic tool in his practice, claiming, among other things, that the device was capable of diagnosing types of cancer and infectious diseases using minimal physical input (*Bennett v. Bureau of Professional and Occupational Affairs*).

The case concerned the use by chiropractor Lawrence Bennett of a device called the Asyra, a "bio-energetic screening system" advertised as being able to diagnose a patient for several conditions.

Despite the fact that the only patient input was the holding of two brass handles attached to the device, Bennett advertised that the use of the device could determine a patient's "overall state of health," as well as "the number of toxins being stored in your body . . . [and] which organs these toxins are being stored in," and, in more conventional chiropractic purview, the device could determine whether particular parts of the body were "misaligned."

The board received a complaint about Bennett's ad in 2012, and, after investigating for two years, filed several charges. After the conclusion of disciplinary proceedings, the board concluded that Bennett had committed unprofessional conduct by advertising and using the Asyra.

In particular, the board determined that Bennet advertised the device to diagnose and treat conditions outside the scope of chiropractic medicine, noting that Bennett had claimed, among other things, that the device was capable of diagnosing breast cancer. It suspended Bennett's license for three years, albeit with only 3 of the 36 months as an active suspension, and fined him $10,000.

Bennett appealed, and the case went up to the state's Commonwealth Court, which affirmed the board's decision. Bennett argued that the board had overstepped its bounds by disciplining him for the use of the Asyra and claiming that he had used it only for nutritional counseling, a subject outside of the board's authority and not subject to any licensing restrictions.

This defense was a major mistake on the part of Bennett and his attorneys. Although the act of nutritional counseling does not require a chiropractic license, the use of nutritional counseling by a licensed chiropractor *is* included within the definition of "chiropractic" in Pennsylvania's Chiropractic Practice Act. Bennett's claim to the contrary, wrote Judge Robin Simpson, "ignores the plain language in the Act . . . Nutritional counseling is expressly within the scope of chiropractic that is subject to Board regulation and discipline when that activity is performed by a licensed chiropractor."

From section 102 of the Chiropractic Practice Act, defining "chiropractic":

The term shall also include diagnosis, provided that such diagnosis is necessary to determine the nature and appropriateness of chiropractic treatment; the use of adjunctive procedures in treating misaligned or dislocated vertebrae or articulations and related conditions of the nervous system, provided that, after January 1, 1988, the licensee must be certified in accordance with this act to use adjunctive procedures; and nutritional counseling, provided that nothing herein shall be construed to require licensure as a chiropractor in order to engage in nutritional counseling.

Additionally, on the facts of the case, Judge Simpson noted that Bennett's use of the device was not limited to nutritional counseling. "As described in the Newsletter and his testimony, Licensee did not separate nutritional counseling from chiropractic care."

"Rather, the Device was a part of the regular care he provided to his patients" as a chiropractor, the judge wrote. Thus, the board had not overstepped its authority by disciplining Bennett for his activities in that field.

Reviewing Bennett's argument that the board did not have sufficient evidence to hold that he had

engaged in unprofessional conduct, the court noted that Bennett claimed, in his newsletter, to be able to treat both cancer and infectious diseases, two conditions not within the scope of chiropractic care.

The court also agreed with the board that the device was not approved by the board for use in chiropractic and that Bennett had no specialized training in its use, a fact that he admitted to. All of these facts were established, and were sufficient to discipline Bennett.

In addition, the court held that the board had substantial evidence that Bennett had engaged in false advertising. Bennett had included a disclaimer in the advertising stating the information therein was not medical advice. But the disclaimer's location—away from the ad proper, below information about bus schedules—and reduced size removed it sufficiently from the ad's contents as to render its effect null, the court said.

"In reviewing the Newsletter, the Board was permitted to consider the patient testimonials and misleading impressions from same as having more impact on the reader, creating overall false impressions that would not be allayed by the disclaimer."

District court entitled to review statutory argument even though brought up for first time on appeal

Issue: Standard of review of disciplinary decisions on appeal

The Supreme Court of Montana, in a June 25 decision, upheld a lower court's reversal of a disciplinary decision by the state's Board of Plumbers, holding that a disciplined licensee was entitled to raise a defense at the appellate stage arguing that he had not actually violated state plumbing law because of a statutory exception for permitting requirements (*Hill v. Montana State Board of Plumbing*).

Montana plumber Jeffrey Hill was working as a subcontractor for a firm run by a man named Mark Murphy when, in 2017, Murphy's clients sued, claiming that Murphy had performed work for which he was not licensed, and had charged for more work than he had actually done.

This led to trouble for him, as, after reviewing the allegations, the Montana Board of Plumbers brought a license complaint against Hill, claiming that he had failed to obtain proper permits in his subcontracting work for the client. In December of that year, the board held that Hill had, in fact, failed to obtain the proper permits for his work, and it placed his license on probation.

Hill appealed, and a state district court reversed the board's decision. The board appealed that decision, and the case went up to Montana's Supreme Court, which issued a decision in favor of Hill.

In his defense on appeal, Hill had argued that the un-permitted work for which he was charged actually fell under a "minor repair" exception for plumbing permit requirements in Montana. However, the board claimed that Hill had failed to raise this defense during his initial board proceedings, and improperly raised it for the first time before the district court, thus foreclosing that defense on appeal.

This claim did not succeed, with the high court finding that the lower court was, in fact, obligated to determine whether the board had charged Hill for a non-existent offense. "While we generally will not consider issues raised for the first time on appeal," Justice Ingrid Gustafson wrote for the court, "the Board cannot credibly assert [that] the District Court was not permitted to consider the statutory

Failure to file electronic death certificate not cause for discipline

Issue: Statutory loopholes that may limit discipline of a physician

The Supreme Court of Texas, in a May 24 decision, held that a physician's failure to file a death certificate through the state's electronic system, while a violation of the law, was not an action subject to professional discipline. The ruling overturned sanctions imposed on the physician by the state medical board (*Aleman v. Texas Medical Board*).

Texas law requires that persons in charge of filing a death certificate do so using a system known as the Texas Electronic Death Registration. When a patient of physician Ruben Aleman died in June 2011, because Aleman was not registered with the system, a paper certificate was mailed to him to complete.

This became a problem two years later when the board filed a disciplinary complaint against Aleman for improperly failing to use the electronic system to complete the 2011 death certificate. Aleman contested the charges, but an administrative law judge found him guilty of violating the state's death certificate rules and, by extension, the state's Medical Practice Act. Adopting that decision, the Board imposed remedial requirements and a $3,000 fine on Aleman.

Aleman appealed. After two appellate courts affirmed the board's decision, Aleman took his case up to the Supreme Court of Texas, which held that Aleman could not be disciplined for his failure to use the state's electronic filing system.

Aleman made two arguments on appeal. First, he argued that the board had erred procedurally when filing its complaint because the board attorney who filed the complaint against him lacked personal knowledge of the events leading to the charges, and the complaint was thus not "made by a credible person under oath," as required by Texas regulatory code.

The court did not agree. Justice Debra Lehrmann wrote that a different section of code allows the initiation of disciplinary proceedings by a representative of the board, and the latter provision "would make little sense if personal knowledge were required because board representatives typically will not have such knowledge of the facts underlying an alleged Medical Practice Act violation."

Second, and with more success, Aleman argued that the Medical Practice Act did not authorize disciplinary action for a physician's failure to file a death certificate via the electronic registration system. The board had determined that the filing of a paper death certificate is a violation of state law connected to the practice of a physician and, thus, the proper subject of professional discipline. Aleman challenged that supposed nexus by arguing that a failure to file such certificates on the electronic system was not the type of act contemplated by the Act for discipline.

Here, the court agreed, holding that the Medical Practice Act did not authorize the board to discipline Aleman for his filing failure. Justice Lehrmann agreed with the board that Aleman had violated state law by submitting a paper death certificate, but questioned whether Aleman's filing impropriety was, in fact, connected to his practice such that it could authorize discipline.

Surveying the regulatory structure which authorizes discipline for legal violations connected to a physician's practice, Justice Lehrmann noted that the specific regulation allowing discipline for legal violations connected to physician practice was grouped with a list of other acts sanctionable as "unprofessional or dishonorable conduct that is likely to deceive or defraud the public."

This grouping, the court held, indicated the type of action contemplated by the legislature as qualifying for discipline, and removed sanctionable acts that did not involve deception.

"We therefore hold that an act that violates state or federal law is subject to disciplinary action by the Board under the Medical Practice Act only if the act is connected with the practice of medicine in a manner that makes it likely to deceive or defraud the public," wrote the judge. Because Aleman's signing of a paper death certificate "clearly does not qualify as an act that is connected with the practice of medicine in a manner likely to deceive or defraud the public," he could not be disciplined for that act.

"Requiring electronic certification may address inefficiencies in the process, but it in no way addresses fraud or deception. And we fail to see how disciplining a decision for failing to comply with that requirement comports with the express policy behind the Act: 'to protect the public interest.'"

The decision was not unanimous, with three justices taking strong issue with the principles of statutory construction applied by the majority. One justice, Jimmy Blacklock, filed an extensive concurring opinion delving into the weeds of statutory interpretation and citing both William Blackstone and Alexis de Tocqueville; Justice Jeffrey Boyd filed a dissenting opinion calling Aleman's case a slam-dunk and extensively citing F. Scott Fitzgerald.

The court returned the case to the appellate court for further proceedings.

Lack of physician member does not invalidate board decisions

Issue: Effect of a board's quorum on disciplinary decisions

The failure of the state physical therapy board to have a physician member, though required by Louisiana statute, did not invalidate decisions made by the board during that time, the Supreme Court of Louisiana ruled June 26. The court upheld a disciplinary sanction issued by the board against a physical therapist (*Bias v. Louisiana Physical Therapy Board*).

The board filed a complaint against physical therapist Kevin Bias after he was arrested for aggravated assault while driving. The following disciplinary process was straightforward, except that, at the time of Bias's hearing, the board lacked a physician member as required under Louisiana statute.

Although the board made that deficiency known to Bias and his attorney during the meeting, neither objected, the hearing continued, and the board suspended Bias's license on the conclusion of the disciplinary process.

Bias appealed, arguing, among other things, that the board's failure to have a physician member at the time of his hearing invalidated its decision. A state appellate court agreed with Bias, reversing the board's decision. The board then appealed, and the case went up to the state Supreme Court, which issued a decision in favor of the board.

Citing language in the board's authorizing legislation stating that "any four members of the board shall constitute a quorum for any business before the board," the court determined that the board was, thus, intended by the legislature to perform business without the presence of the mandated physician member. Even if the board had a physician member, that member's presence was not necessary for the board to engage in its business.

Although Bias argued that this section of law cited by the court applied only to regular board meetings, as opposed to meetings in which the board was

engaged in its disciplinary authority, the justices concluded that no basis existed to make that distinction.

The citation in question states that four members are required for board *business*, and "clearly, the Board's authority to impose discipline under [the statute] is part of its rightful concern and falls within the scope of the Board's business."

"By using the phrase 'any four members,' it is obvious the legislature did not intend to place any restriction on the composition of the quorum of members through which the Board may transact its business. Mr. Bias's interpretation would force us to ignore this language and find the board is precluded from acting unless its entire seven-member composition is present. We decline to adopt this interpretation, as it would render the phrase 'any four members' in [the statute] meaningless."

The Supreme Court reversed the judgment of the lower court, remanding it for further consideration.

Psychologist's actions, despite mandate to report child abuse, warrant professional discipline

Issue: Professional conduct in compliance with mandatory reporting

An appellate court in Pennsylvania upheld discipline imposed by the state's Board of Psychology against a licensee who had engaged in an improper one-sided child-custody evaluation, holding that regardless of whether the psychologist was justified in believing the children in question were abused by their father, her actions went farther than what was required for an abuse report (*Pittman vs. Bureau of Professional and Occupational Affairs*).

In 2013, Pennsylvania psychologist Lauri Pittman was hired by a woman undergoing a divorce to perform a custody evaluation for her three children. Although, under Pennsylvania law, the consent of both parents is required for such an evaluation, the woman showed up alone with the three children and gave Pittman photographs of injuries to one of the children allegedly caused by the father. Pittman immediately switched gears, determining that, as a mandatory abuse reporter under state law, she had an obligation to interview the children and evaluate the claim of abuse, which she proceeded to do.

Pittman, who never evaluated the father or contacted him to obtain his consent to the mother's evaluation, drafted a lengthy custodial report following her evaluation, recommending, among other things, that the mother be awarded sole custody of the children, and that the father be prohibited from spending time with them until he underwent a therapy program. Pittman did not mention that she had never spoken to the father regarding the custody evaluation.

Pittman also filed a report of child abuse to state authorities, who, contrary to her report, found the allegations of child abuse unfounded. In line with that finding, the mother did not obtain sole custody of the children, and the custody matter ended.

The state then began an evaluation of Pittman, eventually filing four counts of unprofessional conduct based on her custody evaluation. Pittman objected to the charges, claiming that, after having been shown credible accusations of abuse, she was required to become an "advocate" of the children and had a mandatory duty to report suspected abuse, and that she could also not obtain the father's consent to a custody evaluation because he was the alleged perpetrator in her abuse report. She denied that she had performed an actual custody evaluation.

After a disciplinary process, the board concluded that Pittman had, in fact, performed a custody evaluation, eventually finding her complicit in four disciplinary charges and suspending her license indefinitely, although the board stayed that suspension for three years of probation. Pittman appealed, and the case went up to the Commonwealth Court of Pennsylvania, which issued a decision upholding the discipline against her.

On appeal, Pittman argued that she qualified as a good-faith mandatory reporter of child abuse, a status which would afford her immunity under state law, but the court disagreed. It was not her reporting of suspected child abuse to the state's abuse hotline which had prompted the board's discipline, Judge Michael Mojcik explained, but Pittman's issuing of a custodial report in violation Pennsylvania's professional rules.

The information Pittman collected from the family exceeded that required by the mandatory reporting laws, and Pittman did not provide that excess information to the hotline, instead giving the report to the mother. Although Pittman claimed an emergency exception to requiring consent from both parents in order to create a custody report, the court noted that she had provided no evidence of an emergency, and rejected that claim as well.

One judge dissented from the majority's opinion, arguing that Pittman was, in fact, entitled to immunity under the mandatory reporting law.

U.K.-licensed doctor must meet U.K. professional standards even though alleged misconduct occurred in India

Issue: Applying differing professional standards in different nations

A British oncologist, found to have committed professional misconduct in his treatment of a patient while working as a Consultant Medical Oncologist in Mumbai, India, tried to argue before the U.K.'s High Court this year that his conduct should be judged by reference to local standards and practices in India.

But in a May ruling, the High Court held that doctors registered with the GMC are expected to comply with its standards rather than standards for Indian doctors, even when the behavior in question has occurred in India (*Sastry v. General Medical Council* [2019] EWHC 390 (Admin)).

The physician, Pantula Sastry, performed a stem cell treatment on a cancer patient while knowing that the conditions were not suitable for that treatment; resulting in the patient's death. After the patient's son complained, the Medical Practitioners Tribunal Service (MPTS) took expert evidence from U.K. specialists and found that Sastry had known the chemotherapy he ordered was inappropriate and had failed to obtain fully informed consent. The tribunal agreed that Sastry had also repeatedly sought to mislead the tribunal and there was a risk of repetition. It decided to erase Sastry from the register, an action akin to revocation.

On appeal, Sastry argued that the tribunal had failed to appropriately consider the Indian context of the treatment, that it was wrong to apply the law of informed consent, very established in the U.K., to a country that adopted a different position, and that the tribunal had relied on expert evidence from the U.K. that Sastry's actions amounted to misconduct, but there were no relevant guidelines in India that could be applied.

The U.K.'s High Court, upholding the tribunal's decision to erase Sastry, found that the GMC's key guidance, the principles of Good Medical Practice,

were sufficiently high-level that they could be adapted to apply to practice in another country.

The High Court's Mrs. Justice May (Dame Juliet May) commented that ultimately "the Indian context was of marginal relevance, given the tribunal's unchallenged findings based on Sastry's own evidence." There was no independent duty of the regulator to gather evidence, providing that the registrant had a fair hearing based on all the facts of the case.

The court said the tribunal "was right to use General Medical Council as a reference by which to judge Dr. Sastry's behavior, albeit being careful to take into account local conditions. A doctor may not practice in the U.K. without a license but doctors practicing wholly outside the U.K. do not need to hold a license. Indeed they need not be registered with the GMC at all. However, the Guidance is clear: if doctors choose to be registered with the GMC they must follow GMC."

Commentators noted that it is unusual for a U.K. regulator to bring proceedings relating to acts that take place entirely overseas, but professionals should recognize that their actions overseas could affect their U.K. registration.

Attorney seeking reinstatement cannot claim indigence to escape fees

Issue: Licensees cannot avoid court fees in disciplinary proceedings

The Tennessee Supreme Court, in a May 7 decision, held that a state law that allows impoverished defendants to access the court system if they are unable to pay court fees does not apply to attorney reinstatement proceedings, as those proceedings are under the sole purview of the Court under the Tennessee Constitution (*Brooks v. Board of Professional Responsibility*).

The case stems from disciplinary proceedings begun in the late 1990s, when attorney Nathan Brooks, faced with potential discipline, entered into a settlement with the state's Board of Professional Responsibility in which he admitted guilt on various disciplinary charges and accepted a two-year suspension of his license, along with restitution and costs totaling about $10,000.

In 2002, Brooks filed for reinstatement, but claimed that he was unable to pay the costs and restitution he had agreed to because he was now indigent. Based on that lack of payment, Brooks was denied a reinstatement hearing, but he appealed that decision, arguing that, by denying him even a hearing based on his failure to pay restitution, the state's court system was denying him due process. The case went all the way up to the Tennessee Supreme Court, which rejected his claim.

In 2015, Brooks tried again. This time, he declined to pay an advanced cost deposit on his earlier financial penalties, required for reinstatement petitions under Tennessee Supreme Court rules, again claiming indigence. The board filed a motion seeking dismissal of Brooks's application, noting that the reinstatement provisions do not provide for a waiver of the cost deposit due to indigence. A hearing panel dismissed the case.

Brooks appealed this latest rejection by the board, arguing that Tennessee statutory law allowed for the filing of civil actions without costs on a litigant's claim of inability to pay. A trial court found in favor of the board, holding that Tennessee rules governing the filing of civil actions under a poverty claim do not apply to attorney reinstatement applications. Brooks appealed again, and the case again went up the Supreme Court of Tennessee.

Brooks's argument on appeal was that both Tennessee statutes and the federal constitution require that he not be denied access to the court based on a lack of funds, and that such denial is also a violation of his rights to due process.

The court did not agree. Assessing the separation of powers under the Tennessee constitution, the justices determined that the Tennessee Supreme Court Rule requiring a cost deposit for reinstatement applicants was unaffected by the Tennessee statute which provides for the cost-free filing of civil actions by impoverished litigants. The court noted that the Tennessee Constitution places authority to create rules governing the reinstatement of attorneys with the Court.

"Mr. Brooks's preferred application of [the law] would in effect have the General Assembly override a Supreme Court rule regulating the practice of law. This prospect would raise the spectre of violating our Constitution's provisions on separation of powers," wrote the justices in a unanimous decision. Rather than rule the statute unconstitutional, the court simply interpreted it not to apply to attorney disciplinary proceedings.

Regarding Brooks's due process arguments, the court first noted that, under Tennessee law, the practice of law is a privilege, not a right, and its denial is subject to a very low level of review for substantive due process. As such, the justices held, the requirement of a cost deposit for attorney reinstatement applications does not violate due process.

"Having occasioned the suspension of his law license by admittedly engaging in serious misconduct involving multiple clients, Mr. Brooks is not denied procedural due process by requiring him to pay, in advance, a deposit on the costs of the reinstatement proceedings his misconduct necessitated."

Board's flawed case did not mean licensee was guiltless, court finds in denying fees and costs

Issue: Reasonableness of disciplinary charges and award of fees and costs

An appellate court in Illinois upheld the denial of costs and fees claimed by a gaming board licensee who successfully appealed a suspension of his license on the grounds that the state's gaming board had switched its basis for disciplinary charges in the middle of is disciplinary process (*Swinney v. Illinois Gaming Board*).

In October 2014, Grand River Jackpot, the gaming company employer of Mark Swinney, licensed by the Illinois Gaming Board as a terminal handler—a professional who services and sets the payout percentages of video gambling machines—reported him to the board for professional misconduct.

Grand River alleged that it had fired Swinney after he and other company employees that he supervised had been increasing the maximum payout settings on machines they serviced, then returning to those machines later and playing them in order to cash-in on the higher payouts. Swinney denied playing machines that had been serviced in such a way, but he admitted to playing at least one unaltered Grand River gaming terminal for a gain of about $100, a violation of company policy.

In July 2014, the board moved to revoke Swinney's license, filing several disciplinary charges based on those allegations. Swinney countered by claiming that many Grand River employees played the company's games, that he had never played any machines that were set to a maximum payout, and that the company actually had fired him after a pattern of company harassment, including the apparent singling out of Swinney for driving on the grass at the Grand River office.

The board's case against Swinney appears to have been deeply flawed. During his disciplinary process, Swinney challenged the allegations against him, noting that, despite charging him with playing Grand River machines after they had been set to maximum payout, the board had not actually presented any evidence.

He also pointed out that the board had not actually charged Swinney with playing his own company's machines, the offense for which he was fired. The administrative law judge hearing his case agreed and recommended summary judgment for Swinney.

Notwithstanding that recommendation, the board revoked Swinney's license on the grounds that he had played Grand River's machines in violation of the company's rule handbook, which, it concluded, was done with "a flagrant disregard for the interests of his employer and the integrity of video gaming in Illinois," and was therefore unprofessional conduct. Additionally, the board found that Swinney had been dishonest during the board's investigation.

Swinney appealed the revocation, repeating his argument that the board had improperly altered its basis for his disciplinary action in the middle of the proceedings, and he filed for legal fees and costs against the board for making that mistake.

A circuit court found in favor of Swinney, reinstating his license and holding that the board had violated his due process rights, but denying Swinney's motion for costs and fees, holding that the board had acted reasonably. Swinney appealed the decision to deny him costs and fee, and the case went up to a state Court of Appeals.

The court held against Swinney. Judge Thomas Welch noted that, under the rules guiding its review of the circuit court's decision to deny costs and fees to Swinney, the higher court would only reverse the lower court if no reasonable judge would have denied Swinney's motion for financial sanctions.

This was not a standard that Swinney could meet. Although Judge Welch noted that "a sounder course of action would have been to amend the disciplinary complaint to reflect" the board's focus on Swinney's violation of Grand River's employee handbook, "that does not mean that the Board's actions were illogical or done in bad faith, as Swinney's admitted conduct could reasonably be the subject of discipline."

Because the board's actions were reasonable, the circuit court's denial of Swinney's sanctions motion was also reasonable.

Unprofessionalism, sloppiness, and rudeness of surgeons linked to patients' post-op complications

Issue: Unprofessional conduct and patient outcomes

The patient outcomes of surgeons who had been reported by coworkers for unprofessional behavior were significantly worse than those of surgeons with no such reports, in a study by researchers at Vanderbilt University Medical Center, which was published in June in *JAMA Surgery*.

Patients of surgeons who had one to three reports of unprofessional behavior had an 18% higher risk estimated for complications such as wound infections, pneumonia, blood clots, renal failure, stroke, and heart attack. That rose to a 32% higher risk for patients of surgeons with four or more reports. However, there was no difference in the percentage of patients who died, who were readmitted within 30 days, or who needed additional surgery.

Included in the unprofessional behaviors cited were shoddy operating room practices, disrespectful communications with coworkers, and failing to follow through on professional responsibilities such as signing verbal orders.

The data was drawn from the National Surgical Quality Improvement Program for two academic medical centers, and covered 202 surgeons who operated on 13,600 patients.

Low public awareness found in online survey about discipline of doctors

Issue: Public awareness, understanding of professional regulation

More than half of U.S. adults appear to be unaware that state medical boards are in charge of licensing and regulating doctors, according to results of a State Medical Boards Awareness Study conducted by the Harris Poll and released in May.

The survey respondents were more than 2,000 adults who had previously been recruited to participate in surveys. Only 27% knew how to determine whether their physician had been disciplined for misconduct and 51% were unaware of state medical boards' role.

However, the survey didn't find that respondents would consider discipline unnecessary. Almost a fifth of those answering the survey said they had experienced a situation in which their physician was acting "unethically, unprofessionally, or providing substandard care." (Women were twice as likely to report such an experience as men.)

If those patients complained about misconduct, as a minority did, about a third were directed to state medical boards, 31% to the physician's office, and 25% to a lawyer.

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