Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue

Licensing

One doctor, 50 licenses? Yes. De facto national licensing becoming a reality through telepractice

Issue: Shift to remote and virtual professional services

As remote delivery of professional services through telepractice becomes increasingly common, the prospect of national licensure, so long feared by many, is looking more likely all the time. But it's not happening through a targeted federal program; in medicine, it's popping up where licensees in one state decide to pursue licenses in all the rest.

With the surge in telemedicine, some physicians have sought and secured a license in all or nearly all U.S. jurisdictions. The companies CirrusMD and Lemonaid are examples of virtual primary care providers that have hired or contracted with doctors who have 50 licenses and can offer, via the Web and smartphone apps, essentially a nationwide practice.

*See **Licensing**, page 15*

Testing

Consternation, alarm after 1,400 California pharmacy exam scores cancelled over leaked answers

Issue: Examination security and response to compromised items

For many pharmacist candidates, it was the last step on the road to a pharmacy license. But unfortunately, when thousands of people took the California Practice Standards and Jurisprudence Standards in late July, a problem arose.

Allegations that more than 100 questions, along with answers, had been exposed online in advance, surfaced and proved correct. The state Board of Pharmacy was faced with a difficult choice.

The board launched an investigation about the alleged leak and announced that exam scores would not be released. While the board initially hoped the subversion involved limited acts, the board found instead "numerous acts that resulted in widespread exposure of the exam questions." More than 100 test questions were compromised, the investigation showed, through the sharing of exam questions on the web.

The board's decision—after several months of delay in releasing results—was to invalidate 1,400 tests from the batches deemed compromised and require that those prospective candidates retake the exam. Its letter to candidates stated: "In September 2019, the board obtained credible information about acts subverting the examination, which also indicated the validity and reliability of the CPJE may have been compromised."

As a result of the significant public exposure of the test questions, those scores were cancelled. "Those questions no longer validly measure applicants' knowledge, skills, and ability to safely practice as pharmacists."

"Although we recognize the difficulty this delay presents for applicants, the Board's priority is to ensure applicants can reliably demonstrate they possess the proper knowledge, training and skill necessary to provide competent pharmacy care for consumers."

Protests from pharmacist candidates and groups like the California Pharmacists Association included accusations that the board had failed to do its job of securely administering the exam and criticized the broad-brush punishment of the many for the suspected misbehavior of a few.

Said the association: By further delaying the process and penalizing those who are not under investigation, "The action taken by the Board does not allow pharmacists who completed their exam ethically and satisfied all other requirements for licensure to receive their license."

The board offered candidates the option of re-taking the examination at no charge at two later administrations of the test.

Discipline

Board must justify good moral character requirement

Issue: Constitutionality of good moral character requirements

The Commonwealth Court of Pennsylvania, in a December 9 decision, rejected a request by the state cosmetology board to dismiss a suit brought by two former license applicants seeking to invalidate the state's requirement that cosmetology licensees be of good moral character (*Haveman v. Department of Professional and Occupational Affairs*).

Pennsylvania's State Board of Cosmetology denied cosmetology licenses to the two plaintiffs in the case on the grounds that their past criminal histories indicated a lack of good moral character. One had been convicted of a series of misdemeanors, while the other had convictions relating to drug crime.

Having turned their lives around somewhat, both applicants had finished cosmetology education programs and had been offered jobs, and both claimed not to be able to afford a lawyer to appeal their denials.

Faced with the prospect of an unfavorable appellate process, the plaintiffs filed suit, arguing that the board's denials of any license application on the grounds of lack of good moral character resulting from past criminal convictions not otherwise connected to fitness to practice cosmetology are in violation of the Pennsylvania Constitution because such denials are unreasonably oppressive and the state has no legitimate state interest in making them.

Before a state Commonwealth Court, the board filed a preliminary objection seeking to dismiss the case on several different grounds, but the court rejected the motion, holding that the board was obligated to answer the plaintiffs' claims.

In response to the board's argument that the plaintiffs' claims were not ripe because they no longer had license applications pending, the court disagreed. It held that because the plaintiffs had made a broad constitutional challenge and were not appealing the denial of their own applications, and because they were challenging a policy that the board was actively enforcing and it would cause hardship to them were they to re-apply, their claim was ripe and did not require further development.

"The Board argues that Petitioners cannot establish harm because they do not currently have applications pending before the Board," wrote Justice Renée Cohn Jubelirer, "but this overlooks the relief Petitioners seek, which is a declaration that this requirement is unconstitutional and a prohibition against the Board from using the requirement when reviewing applications in the future."

Regarding the plaintiffs' standing to bring a case, the judge wrote that the time and financial hardships facing the plaintiffs were such as to make their interest in the case substantial and that the board's likely enforcement of the moral character requirement, as evidenced by its past enforcement, was direct and immediate enough to harm the plaintiffs if their constitutional argument was correct.

The board also challenged the suit on the grounds that the plaintiffs were making an inappropriate collateral attack on the denials of their applications, and that they should have brought the arguments made in the current suit to the attention of the board in response to its denials of their application, and then made a direct appeal if they did not succeed.

However, the court noted that the board would not actually have had the authority to declare the moral character requirement unconstitutional, and thus the outcome of the administrative process leading to the denial of the plaintiffs' applications could not prevent the suit challenging the requirement here. The suit simply did not seek to litigate the issues that were up for challenge in the denial of their applications, the court said.

Licensee who defrauded client can be disciplined, court rules

Issue: Licensee self-dealing and professional discipline

An appellate court in California, in a November 20 decision, upheld a decision by the state's Real Estate Commissioner to revoke the license of a real estate agent who had fraudulently sold his clients his own interest in a shaky investment, holding that the fraudulent transactions were sufficiently related to his practice to warrant discipline (*Martin v. Bell*).

The case involved Chad Martin, a licensed real estate agent, who recommended that several of his clients invest in promissory notes secured by real estate.

In 2007, Martin sold clients his own investment in a promissory note secured by a housing development. In doing so, Martin lied about the property associated with the note, telling his clients that homes had been built when none actually had, and that the borrower for the note had been reliable, even though that borrower had already defaulted on payments owed on the note.

Predictably, the arrangement fell to pieces. Four months after Martin sold his clients on the note, the borrower defaulted on his interest payments. Another lender with a higher priority than Martin's clients then foreclosed on the property, extinguishing the clients' interests—$243,000 total. The clients then filed suit against Martin for fraud and breach of his fiduciary obligations, and a court agreed, finding Martin had committed fraud.

Following that decision, an official with the state's Real Estate Commission filed a disciplinary accusation against Martin, setting up a disciplinary case based on the court's finding that Martin had committed fraud. Following a hearing, the state Real Estate Commissioner revoked Martin's license. Martin appealed, and the case went up to a California Court of Appeals in Sacramento.

Martin's primary argument on appeal was that, although he was guilty of fraud, that fraud was not sufficiently connected to his real estate license to justify discipline. His fraudulent sales of investment interest in the shaky promissory note, he claimed, simply did not involve a transaction that required a real estate license.

In support of this argument, he cited a section of California law which defines a real estate broker as someone who engages in certain specific real estate transactions, which he claimed did not include his transgressive hawking of his own failed real estate investment.

The court did not agree. Judge Cole Blease wrote that a different section of state law specified that a real estate license is required not just when a person enacts real estate transaction, but also when a person *acts in the capacity* of a real estate broker, a wider category of actions that includes actions like advertising and, specific to Martin's case, performing services for owners of promissory notes.

By selling his interest in the promissory note and agreeing to service the note for his clients, "Martin plainly engaged in an activity that required a broker's license," the judge continued. "He agreed to perform services for [the clients], in anticipation of compensation, in connection with their ownership of a promissory note that was secured by a lien on the . . . property."

Martin admitted to fraud in connection with that transaction, and so his fraud was committed in connection with a transaction that required a real estate license.

The court also rejected Martin's claim that, because he only sold his clients his own interest in the note, the proper frame of reference for his action was that of a private party selling their own property, not a broker making a sale for compensation.

Among the actions requiring a real estate license, the court said in upholding the board's revocation of Martin's license, was *assuming* to act as a broker, and he had done this by appearing to be acting as a broker in selling his clients on the note.

Board not required to review entire record before revoking license

Issue: Board discretion in reviewing administrative ruling

The Kentucky Board of Medical Licensure has significant discretion in determining what evidence to admit outside of a hearing officer's recommended order and is not required to review an entire administrative record before issuing discipline, a Kentucky appellate court ruled November 8 (*Kentucky Board of Medical Licensure v. Strauss*).

The board received several complaints against physician Jon Strauss in 2011, alleging erratic and unprofessional behavior. In 2013, after completing an initial investigation, the board ordered a formal disciplinary case and issued an emergency suspension of Strauss's prescribing privileges.

Strauss declined to participate in the hearing process that followed, declaring that it was illegitimate. As a result, the hearing officer issued a default order against Strauss and the board revoked his license.

Strauss appealed and, in 2015, a state circuit court held that, while the substance of the board's case against Strauss was supported by the evidence, the board had improperly declined to review the entire administrative record before making its revocation decision.

That court overturned the revocation and issued an order remanding the case to the board for further proceedings. The board appealed decision, and the case went up to a Kentucky Court of Appeals, which issued a decision reversing the lower court and reinstating Strauss's revocation.

Judge Christopher Nickell, citing a recent case from the Kentucky Supreme Court which also involved Strauss, explained that the board has significant discretion when deciding what evidence to admit besides the hearing officer's recommended order and the parties' exceptions. Under that discretionary standard, the board was not required to review the entire administrative record.

Strauss asked the court to limit the earlier decision cited by the court, but Judge Nickell held that decision binding and overturned the circuit court order remanding the case.

Mistaken appeal of hearing recommendation leads to procedural dismissal of disciplinary case

Issue: Procedural issue surrounding appeals of discipline

A Missouri license applicant who appealed, as a contested case decision, the recommendation of a hearing commissioner in charge of his case did not have standing in the court system because his appeal of the hearing was not the proper method to overturn the state Department of Commerce and Insurane's rejection of his application, a state Court of Appeals ruled December 10 (*Holden v. Department of Commerce and Insurance*).

Michael Holden, previously licensed until 2008 and living in South Dakota, filed for a non-resident title insurance license in Missouri in 2009. The Missouri Department of Commerce rejected Holden's application, finding that he had failed to disclose a period of work with a title insurance firm, Guaranty Land Title Insurance, that had entered into three forfeiture agreements during his time there—in two cases while he was president of the firm. Additionally, it found that Holden had engaged in unlicensed practice as an insurance producer.

Holden appealed the rejection, and the case was eventually affirmed by a state Court of Appeals.

In 2014, while that appeal was pending before the appellate court, Holden filed a second application for the same license, this time including the information about Guaranty whose omission had prompted the Department to reject his earlier application. This strategy did not succeed; the Department denied Holden's second application, citing the same deceptive application and unlicensed practice issues that led to the first denial, and further citing to that earlier case to establish the facts of those transgressions.

Holden again appealed, first to the state's Administrative Hearing Commission, and, after that body found in favor of the Department, to a state circuit court, which overturned the Department's decision.

Because Holden was entitled to apply again, that court said, the Department could not simply deny his second application on the basis of his earlier application, as that would have the improper practical effect of imposing on him a lifetime ban. Instead, the board must make an appraisal of the facts of his case as they stand now, including any potential rehabilitation on his part.

The Department appealed this decision, and the case went up to the Court of Appeals of Missouri for the Western District.

On appeal, Holden reiterated his argument that the Department's decision to deny his second application based simply on his 2009 application denial effectively amounted to a lifetime ban, thus denying him the right to present evidence of subsequent circumstances.

Despite the presence of that interesting legal question, Holden's argument came to nothing because the appellate court eventually rejected his case on slightly complicated procedural grounds.

Although Holden had appealed the denial of his 2014 application as an appeal of a contested case, and the circuit court had proceeded on those grounds, unfortunately for Holden, the Department's denial of his application was not, in fact, a contested case.

"The relevant statutory provisions do not require that the Department hold formal hearings before making its licensing decisions," wrote Judge Alok Ahuja for the Court of Appeals. State law requires only that the Department advise an applicant of the reason for its decision to deny licensure.

Thus, although a denied applicant may request a hearing before the state's Administrative Hearing Commission, the outcome of that hearing is advisory only; the Department's director still has the final decision as whether to grant a license. Even with a hearing, the license application is still not a contested case because the hearing examiner cannot issue a formal, substantive final decision on it.

In an additional wrinkle, although the Department had failed to raise that argument before the circuit court, that failure did not prevent the Court of Appeals from ruling on the issue at this stage of the appeal. "The proper characterization of the underlying agency proceeding as contested or non-contested affects the manner in which this Court conducts its review on appeal," wrote Judge Ahuja.

"The choices of *what decision* we review, on *what record*, and under *what standard*, are all dictated by the nature of the underlying administrative proceeding" . . . In order to properly perform our appellate function in a judicial review proceeding, we must first determine whether the underlying administrative case was contested or non-contested, even if that issue has not been properly preserved and presented in the circuit court, or on appeal" (italics in original).

Holden's mistake had caused the circuit court to review the incorrect proceeding. If he had properly filed his appeal as that of a non-contested case, the circuit court would have been required to determine whether the Department had acted incorrectly in denying his application, Judge Ahuja wrote.

But since this involved an appeal of a *contested* case, the circuit court was instead asked to determine whether the Administrative Hearing Commission had erred; because that body's decision was only an advisory one, such a determination would have no practical effect.

Having determined that Holden's case should not have reached its docket, the court returned the case to the circuit court to allow him to re-file his appeal properly.

Criminal conviction for conduct that was partial basis of earlier discipline can justify further discipline

Issue: Use of single or related misconduct for different disciplinary actions

A dentist who pleaded guilty to criminal charges can be disciplined for that conviction even if the investigation for that case involved patients whose treatment formed the basis of an earlier disciplinary sanction for that licensee, an Illinois appeals court ruled December 20 (*Danigeles vs. Department of Financial and Professional Regulation*).

In 2012, the Illinois Department of Financial and Professional Regulation filed a complaint against dentist Athina Danigeles, accusing her of billing insurance companies for services that she never performed. In 2014, the Department revoked Danigeles's license for five years and issued a $125,000 fine.

Then, in 2015, she pleaded guilty to criminal charges for similar transgressions. Although the criminal investigation involved the same patients whose non-treatment featured in her disciplinary case, her guilty plea covered her actions in the treatment of a different patient.

This was not first set of offenses for Danigeles. Since her initial licensure in 1987, she had been disciplined on three different prior occasions, twice for billing for services she had not performed. During the disciplinary process that followed her conviction, she attempted to explain her repeated transgressions as the result of working long hours while raising a family and not paying attention to the business side of her practice.

Following a hearing on the 2015 charges, the board recommended that the Department again revoke Danigeles's license, this time for eight years, concurrent with the five-year revocation it imposed in 2014. The Department enacted this recommendation and fined Danigeles $10,000.

Danigeles appealed, and the case eventually rose to a state Court of Appeals. She argued that the second eight-year revocation was improperly levied for conduct that had already been punished by the five-year revocation, and that mitigating factors should have led the Department to issue her a lesser sanction.

In support of the first claim, Danigeles argued that, although her criminal guilty plea was for fraudulent billing of a different patient from those whose non-treatment formed the basis of her earlier disciplinary case, because the criminal investigation of her conduct that led to that plea had also focused on the same patients as in that earlier disciplinary case, the more recent 2015 disciplinary case was improperly based on the same conduct that led to her earlier discipline in 2012.

The court disagreed. "While it may be true that the indictment in the federal case encompassed more patients, the offense to which plaintiff entered a guilty plea concerned only" a patient not involved in the earlier disciplinary case, wrote Judge Mary Rochford. Additionally, as the director of the Department had noted in the disciplinary decision, "although the case in federal court involved most of the same patients, 'most' was not 'the exact same.'"

Regarding Danigeles's claim that the eight-year revocation was overly harsh, the court again disagreed with the dentist, noting that the Department had stated that it had considered her mitigating evidence, but based the revocation, in part, on the fact that Danigeles "showed a lack of understanding that her actions defrauded insurers and should not be repeated."

The court affirmed the Department's discipline.

Medication error or reckless homicide? Board declines to discipline criminally charged RN, then changes its mind

Issue: Professional discipline proceedings and criminal charges

Misconduct charges involving a nurse, RaDonda Vaught, who made a medication error that led to a patient death, have drawn press scrutiny and public attention to the Tennessee nurse discipline process throughout 2018 and 2019.

The incident leading to the discipline occurred December 26, 2017, at Vanderbilt University Medical Center. Vaught was the primary nurse for a patient who was prescribed Versed, a tranquilizer. But Vaught instead administered Vecuronium, a paralytic used before surgery.

The patient died and Vaught was criminally indicted for reckless homicide by the Davidson County District Attorney's office; there was also immediate discussion about whether she should be disciplined with a suspension, revocation, or other action against her license.

However, controversy arose over the potential threat to Vaught's license, especially among many in the nursing community who protested that disciplining a nurse for a medication error would set a dangerous precedent for the profession and, by discouraging transparency about errors, would hurt nurses' ability to practice competently.

But the Tennessee nursing board drew new fire from a March 2019 agreement that Vaught's mistake did not warrant professional discipline.

The board notified Vaught that "after a review by the board's consultant and a staff attorney for the Tennessee Department of Health, a decision was made that this matter did not merit further action." The letter further stated that the decision "is not a disciplinary action and no record of it will appear in your licensure file."

This letter was initially confidential but was provided to the newspaper *The Tennessean*, which had published several stories about the case, in April.

Six months after the letter, though, in September 2019, the state agencies involved including the nursing board changed their minds. The state Department of Health filed, before the Tennessee nursing board, charges of unprofessional conduct and abandoning or neglecting a patient that required care.

No reason was given for the change of direction, but Vaught's attorney and others noted the degree of public pressure on the state Board of Health in light of the attention surrounding the incident.

In the meantime, the criminal case continues with charges of reckless homicide and impaired adult abuse pending; Vaught has admitted to making a mistake at the hospital but pleaded not guilty to the charges. Nurse advocacy groups have been vocal critics of the criminal charges, many accusing prosecutors of criminalizing an honest mistake.

A trial is tentatively expected in July 2020. Under Tennessee law, if Vaught is convicted of reckless homicide, her license could be suspended or revoked automatically whether or not the disciplinary process led to a sanction.

Conflicting standards of proof cause reversal of automatic suspension of licensee

Issue: Rules of evidence in disciplinary actions

A California appellate court held November 21 that the state's Bureau of Real Estate improperly used a civil fraud judgment as a basis to suspend a licensee because such judgments were made under a lesser standard of proof than that required for disciplinary actions (*Demoff v. Bell*).

In 2008, a client sued real estate broker Tanja Demoff for fraud, eventually winning a $1.2 million judgment. Unable to get payment directly from Demoff, the client filed an application with the state's Consumer Recovery Account, a fund operated by the state's Bureau of Real Estate that provides money to judgment creditors defrauded by real estate licensees. The client eventually received about $242,000 from the fund.

Under California law, when the Consumer Recovery Account pays out to a creditor, the implicated licensee will be automatically suspended until the amount paid is reimbursed. Accordingly, the Bureau suspended Demoff's license. She contested the decision by filing for a court order to invalidate the fund's payment to the client, and her case eventually rose to the state Court of Appeals for the Fourth District.

On appeal, Demoff argued that the payout to the client was improper because the client failed to notify Demoff that she was going to be making a claim on the account, and California law requires that a fund claimant serve the application to the debtor licensee first.

Much of the case revolved around whether this process service had occurred, with Demoff arguing that, because of various address errors, the client did not properly provide service. For a current licensee, service may be made to the last address on file for the licensee with the state's Bureau of Real Estate, which administers the account.

Day had apparently mailed service to the correct address, with Demoff's full, correct address on the service mailing's envelope, but the client made a mistake on some of the documents contained within the mailing, addressing the actual notice of service to "Pacific Coast Hwy" instead of the more correct "E Pacific Coast Hwy. Despite the apparent insignificance of the error, Demoff argued that the mistake nullified the client's attempt at service and, by extension, her claim on the Account.

The court disagreed, holding that Day's mailing was sufficient as addressed, despite the error. "Although [statutory law] provides the application should be

sent to the judgment creditor at the latest address on file, the statute does not mandate it is the 'only' possible address," Justice Kathleen O'Leary wrote for the court. "The statute, when read in combination with the real estate Commissioner's regulations regarding CRA applications, permits the [Bureau] to consider any application it determines is in substantial compliance."

Taken in its entire context—the envelope and the accompanying certified mail form had the correct address, and postal records indicated that the carrier had actually seemed to locate Demoff's office—the court held that Day's service was sufficient.

In his second argument, Demoff argued that the Bureau improperly allowed the client to file her application for funds twice. The client had submitted an earlier application that the Bureau found deficient because the client had not provided sufficient documentation of her claim, and she declined to fix those deficiencies before the Bureau dismissed the claim and the client filed a second.

The court rejected this claim as well, holding that the Bureau's dismissal of the client's original claim was not a final judgment of its merits and thus did not prohibit the client from filing another.

Demoff also challenged the Bureau's decision to pay her client on receipt of the judgment the client obtained against Demoff, arguing that the Bureau's payment from the Account amounted to a disciplinary action against Demoff's license, and thus required a standard of proof of "clear and convincing evidence," higher than the "preponderance of the evidence" standard under which the client had prevailed in her civil suit against Demoff.

Although the Bureau argued that authorizing suspension of a license until an Account payment is reimbursed was not punitive and thus not disciplinary, the court held that "the CRA program is a hybrid of remedial and disciplinary provisions, and because the proceedings implicate a fundamental vested right, the Commissioner and reviewing trial court must apply a clear and convincing standard of proof."

Demoff had success with this last argument. "Demoff's due process rights were violated when the trial court used the preponderance of the evidence standard in evaluating the evidence in its de novo review of the Commissioner's decision," wrote Justice O'Leary.

The court went further than simply ruling that the Bureau could not suspend Demoff's license, holding that the client would not even be entitled to payment from the Account unless she could prove her case against Demoff by a clear and convincing standard. "Due to the disciplinary component of the CRA program, the victim is unfortunately burdened with the same standard of proof as the Commissioner pursuing a . . . disciplinary action. We cannot legally justify a lesser standard of proof based on who initiates the disciplinary proceedings."

The court reversed the lower decisions and remanded the case for a new hearing applying the appropriate standard of proof.

Revocation overturned where licensee denied formal hearing on relevance of his criminal conduct

Issue: Administrative hearings and due process of discipline

A court in Florida overturned the license revocation of a nurse convicted of fraud after the state's nursing board denied her a formal hearing before issuing the revocation, ruling that the nurse was entitled to

a hearing to determine whether her conviction was related to the practice of nursing (*Galvan v. Department of Health*).

The case involves Maribel Galvan, a licensed registered nurse who ran a group home. In that capacity, Galvan took a bribe from a pharmacy and eventually pleaded guilty to a federal criminal charge of receiving that kickback in connection with Medicaid claims.

Florida law authorizes discipline for licensee convicted of crimes related to health care fraud, so the Florida Department of Health followed Galvan's conviction by filing a disciplinary case with the state's Board of Nursing.

Galvan objected to the disciplinary charges on the grounds that, though still licensed, she did not actually engage in the practice of nursing in her role as the proprietor of the group home, so her conviction was not related to the practice of nursing and thus could not subject her to discipline under the state's nursing laws. However, after an informal hearing, the board denied Galvan's request for further process, including her request for a full formal hearing, and permanently revoked her license.

Galvan appealed, and the case went up to the Florida Court of Appeals for the Third District, which issued a decision November 20.

In her appeal, Galvan again noted that her duties at the group homes were only administrative and argued that her criminal conviction did not relate to the practice of nursing and thus could not be the basis of a license revocation case. Although, following her conviction, she was banned from participating in Medicare and Medicaid, she noted that those bans would still leave room for her to resume practicing as a nurse.

The court found that argument persuasive. Noting that the laws authorizing the board to deny a licensee a formal hearing are penal in nature and must be construed in favor of the licensee where they are ambiguous, Judge Eric Hendon held that the board erred in denying Galvan a formal hearing over whether her conviction was related enough to nursing that the board could revoke her license.

Judge Hendon also noted that the board had not produced evidence to prove the connection between her convictions and her license, and that the investigative report on which the board relied in making its decision had several errors.

"By failing to make any competent and substantial findings of fact regarding whether Galvan's crime is directly related to the practice of nursing, it follows that the Board of Nursing abused its discretion by . . . imposing the maximum sanction of permanent revocation of Galvan's license to practice nursing in Florida.

The court remanded the case back to the board for a formal hearing.

Creation of guidelines for disciplinary referral is not rulemaking subject to open meetings law, says Colorado high court

Issue: Public participation in state agency rulemaking

The Supreme Court of Colorado, in a November 12 decision, held that a set of guidelines developed by the state's Department of Public Health and Environment for referring physicians suspected of providing false diagnoses for medical marijuana patients were not formal rules and their creation was thus not subject to the state's Open Meetings Law or Administrative Procedure Act (*Doe v. Colorado Department of Public Health and Environment*).

The guidelines were created following a 2013 state audit which found that the Colorado department did not have adequate procedures in place to assure that individuals could not obtain medical marijuana prescriptions by means of diagnoses from unscrupulous doctors.

The new guidelines helped identify suspicious activity by physician licensees so that the Department could refer them to the board for investigation. The Department created the referral policy internally, without public input.

Using the guidelines, the Department proceeded to refer several physicians to the board for investigation. Those physicians then challenged the creation of the guidelines, filing open records requests and eventually a legal action claiming that the board violated the state's Open Meetings Law and Administrative Procedure Act in designing the referral policy behind closed doors.

A state district court, while ultimately dismissing the claims on other grounds, nonetheless ruled that the Department had violated the two statutes. A state appellate court reversed that finding, holding, among other things, that the entirety of a state agency like the Department does not constitute a "public body" as that term in used in the state's Open Meetings Law.

This meant that discussions among Department employees were not subject to state open meetings requirements, and that the referral guidelines constituted only interpretive rules and were not actually binding on the Department.

By its own terms, Colorado's Open Meeting Law applies to "all meetings of two or more members of any state public body at which any public business is discussed or which any formal action may be taken. "State public body" is defined as "any board, committee, commission, or other advisory, policy-making, rulemaking, decision-making, or formally constituted board of any state agency."

Under this definition the justices agreed that entire state agencies were not subject to the law. The plaintiff doctors could not assert that the Department is a "kind of advisory, policy-making, rule-making, decision-making, or formally constituted board *of any state agency*," Justice Gabriel continued, "because for the [plaintiffs] to prevail on such an argument, we would have to conclude that the [Department], a state agency, is a body of itself, which would be an absurd result."

The state bodies contemplated in the Open Meetings Law are fundamentally different in make-up from state agencies, in general, and the application of the law to everyday agency employees would be impossible, the court explained.

"Not every state employee has the right to participate in organizational decisions the way the members of a formally created board or commission do. And if every employee of a state agency is deemed to be a member, then an untold number of routine conversations among agency employees would be subject to the OML and would require notice of the meetings, as well as compliance with all of the OML's remaining requirements," the court said.

"The legislature could not have intended so absurd a result."

Addressing whether the state Administrative Procedure Act's formal procedures applied to the creation of the referral guidelines, the Court held that the guidelines were not formal legislative rules, but merely interpretive ones which do not bind an agency, and thus do not require an open process during their creation.

The referral policy, the justice explained, is intended only to guide Department employees in their interpretation of their statutory duty to refer physicians for investigation; the language of the policy is permissive and allows, but does not require, the Department to refer physicians which meet the policy's thresholds for suspicious behavior.

Additionally, the Court disagreed with the physicians' contention that their referrals for investigation were a formal, final agency action and thus subject to judicial review under the Act.

"It is not clear to us that the [Department's] referral constituted 'actions,' as that term is defined in the APA," wrote Justice Gabriel in affirming the lower court. "The referrals were not part of a rule, nor could they be construed as orders because, in making the referrals, the [Department] did not order anyone to do anything. And the referral did not constitute sanctions because the Board, not the [Department], is responsible for determining whether the Doctors' conduct merits discipline . . . The referrals merely began the process by which the Board would review the Doctors' conduct."

"As the legislature has made clear, it is the Board's determination that marks the end of the referral process, and that is the time for judicial review . . . Were we to adopt the position that the Doctors espouse in this case, the focus of the Board's efforts would shift from carrying out its statutory duties of investigating and remedying substantive allegations of improper medical practice to investigating the referral source in every case before pursuing its statutory duties."

"We see no basis for imposing such a requirement on the Board," the court concluded.

Competition

U.S. Court: Requiring RN/MD practice agreement is constitutional

Issue: Collaborative practice requirements and right to practice

A federal court in Kansas, in a September 30 decision, upheld regulations of the state's Board of Nursing that require advanced practice nurses to maintain collaborative practice agreements with a cooperating physician, ruling that the state had legitimate reasons to require such agreements (*Gorenc v. Klaassen*).

The two individual plaintiffs, Julie Gorenc and Kara Winkler, are licensed advanced practice nurses who practice as midwives. Board regulations require that the two have a collaborative practice agreement with a physician as a condition of attending births at a hospital.

Unfortunately, when their agreement with one doctor ended in 2018, they were unable to secure another at the hospital, and were thus unable to attend to their clients, who were forced to find another provider.

Gorenc and Winkler brought suit against Joann Klaassen, the president of the board, arguing that board regulations requiring them to collaborate with a physician violate the state's constitution and statutes by delegating that legislation to the control of the private physicians with whom the nurses must work. The requirement for collaboration agreements, they argued, gives the

physicians—who are competitors of advanced practice nurses—improper control over their actions.

The two nurses argued that the board should pass general regulations that govern their practice without the need for physician input, and that their ability to prescribe, as a normal part of the advanced practice nursing profession, should not be subject to arbitrary restrictions. These requirements, they claimed, were both in violation of state law and of their rights to due process and equal protection under the U.S. Constitution.

First, the court founds that Gorenc and Winkler's state claims were barred by Eleventh Amendment immunity, which prevents suits against states in federal court without their consent. Exceptions to that immunity exist for plaintiffs seeking to gain prospective relief against violations of their Constitutional rights. However, those exceptions do not apply to the enforcement of state law, so the claims were dismissed.

Eleventh Amendment exceptions require plaintiffs to bring suit against an individual government official in their official capacity, and Gorenc and Winkler had brought suit against Klaassen for that that reason. However, the court held that the two had failed to specify how Klaassen, by herself, could remedy the alleged violations of their rights; a suit against all of the board's members as a whole would be necessary to force the board to change its regulations.

As such, their immediate claims against her failed, although the court noted that the two could file an amended suit naming the additional board members.

Regarding the nurses' constitutional claims, Gorenc and Winkler argued that the requirement of a collaborative agreement violated their rights to due process under the US Constitution because such requirements places arbitrary power in physicians to determine what rights they have as nurses, and because those decisions are not reviewable by the board.

Their equal protection claim rested on the argument that the state had no valid reason to restrict the prescribing practices of advanced practice nurses without collaborative agreements.

"Essentially," wrote Judge Daniel Crabtree, "plaintiffs' position is their 'right to practice in their chosen profession' includes the ability of nurse-midwives to make certain medical decisions. If they exercise this right through a [collaborative agreement] with a physician, they argue the liberty/property interest involved should not be taken away without due process."

" . . They should have the right to make such medical decisions and have prescribing authority without a [collaborative agreement] because it is something APRNs are competent to do . . . Thus, placing restrictions around their ability to practice in the statutes and regulations violates their constitutional right to practice in their chosen profession."

The justices, after determining that the case did not involve fundamental rights or a class of people likely to face unjust discrimination, evaluated the nurses' substantive due process and equal protection claims by the rational basis standard, under which a state must only prove that a contested law or regulation is rationally related to a legitimate state interest, a very low bar.

Although the plaintiffs attempted to argue that the collaborative practice rules did not, in fact, further any legitimate state interest, the court disagreed. In the statutes which formed the authority for the challenged regulations, the legislature

had stated that such licensing restrictions were intended to protect the public from professionals without adequate qualifications.

The regulations, Judge Crabtree agreed, "protect the health and welfare of the public, such as mothers and children who may seek the services of a midwife . . . and they further the state's interest in assuring providers are qualified to perform their jobs . . . While some [advanced practice nurses] possibly are qualified to make medical decisions or prescribe drugs, the court cannot say that the requirement of a [collaborative agreement] does not further a legitimate state interest."

The court likewise rejected the nurses' claim that nursing board regulations do not provide them with adequate procedures to protect their collaborative agreements. Although the nurses' argument appeared to have been based on the idea that the board's regulations placed undue arbitrary power in individual physicians who choose to reject or cancel such agreements, the court evaluated their claim from a more removed position.

"One physician's decision to deprive plaintiffs of a [collaborative agreement does not mean the [board] had deprived plaintiffs of a liberty or property interest in their profession," said the court in dismissing the case.

"Plaintiffs do not allege that their nursing licenses are at risk, that they are deprived entirely of the ability to practice as APRNs without a CPA, or that they are deprived of the ability to seek a CPA with another physician if their existing agreement ends."

Licensing

De facto national licensing a reality with telemedicine (from page 1)

Though complete nationwide coverage is still rare—there were only six 50-licensed physicians in 2016, the Federation of State Medical Boards reports—it is on the rise. In 2018, FSMB found the number had risen to 14.

In many cases, the process of obtaining the full gamut of state medical licenses can be jump-started with FSMB's Interstate Medical Compact which has 24 states signed on.

For the remainder of the states, licensing companies such as MedSpoke, based in San Antonio, Texas, offer credentialing as a service; they will complete all of a customer's license applications and keep the licenses current. A 50-state license order could cost on the order of $90,000, according to the company.

Other professions have organized multi-state licensure programs at lesser cost. Licensed engineers, for example, can use a service of the National Council of Examiners for Engineering and Surveying (NCEES), which lets them apply for an NCEES record by submitting their college transcript, employment verification, professional references, and exam results.

With the NCEES record, their credentials can be electronically far and wide. It's an easier and faster way to obtain a license in all U.S. states plus the District of Columbia, Northern Mariana Islands, Puerto Rico, Guam, and the U.S. Virgin Islands, the NCEES says.

Renewal applications subject to same standards of proof as new applications, court rules

Issue: Burden of proof as to suitability for licensure

Current licensees applying for renewal are subject to the same burden of proof regarding their suitability for licensure as new applicants, an Ohio Court of appeals held November 26. The court reversed a decision overturning a state gaming commission's decision to deny renewal to a licensee for omitting information on her application (*Smith v. Ohio Casino Control Commission*).

When the licensee at the center of the case, Vanessa Smith, tried to renew her casino gaming employee license in 2016, the Ohio Casino Control Commission informed her that it intended to deny her application on the grounds that she had provided false information by failing to disclose several legal issues when completing her application, including a DUI, other traffic infringements, civil judgments, corresponding wage garnishments, and a bankruptcy. Following a hearing, the Commission denied her license renewal, and Smith appealed.

On appeal, a state trial court reversed the decision on the grounds that the Commission had applied the wrong burden of proof in Smith's case by erroneously requiring her to prove her eligibility by the clear and convincing evidence standard applied to new license applicants, and ordered the case remanded for the Commission to apply a different burden of proof. The Commission then appealed, and the case went up to a state Court of Appeals.

The Court of Appeals agreed with the Commission and reversed the lower court, affirming the denial of Smith's renewal application and holding that, in terms of the burden of proof for license eligibility, Ohio law did not distinguish between applicants for new licenses and applicants for renewals.

Smith had argued that board rules create such a distinction, and only new license applicants should have to prove their suitability for licensure by clear and convincing evidence. The judge disagreed, noting that the relevant sections of casino licensing law do not make the distinction.

"Because the General Assembly did not single out the 'initial' casino gaming employee license for special treatment . . . the only reasonable conclusion to be drawn from the statutory language is that the burden of proof . . . applies to all applicants for a casino gaming license, including renewal applicants such as Smith." The burden of proof required for all applicants is "clear and convincing."

The Commission's factual findings on Smith's past legal and financial troubles provided an independent reason for the denial of her license renewal, the court added; it remanded the case to a lower court for a decision on the merits.

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