Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue

Discipline

Disciplinary record of rape victim may not be used to attack her credibility

Issue: Relevance of professional discipline history to a witness's credibility

A Washington State court, in a July 16 decision, rejected an attempt by a man convicted of rape to use his victim's professional disciplinary record to attack her credibility. The court ruled that, because the victim had not contested her disciplinary case, the revocation was not relevant to her truthfulness (*State v. Witthauer*).

*See **Discipline**, page 5*

Federal File

A third U.S. court rules that tour guide licensing scheme is unconstitutional

Issue: Constitutionality of occupational licensing laws

The license program for tour guides maintained by the city of Savannah is an unconstitutional violation of First Amendment free speech guarantees, a federal court in Georgia ruled May 20 (*Freenor et al. v. Mayor and Alderman of the City of Savannah*).

The U.S. District Court for the Southern District of Georgia ruled that the city did not provide adequate justification for its licensing scheme to overcome the presumption that its abridgement of free speech violates the First Amendment.

The suit was filed in 2014 by Michelle Freenor, a licensed tour guide in Savannah, joined by her husband who was not licensed because he did not want to take the exam required, and others.

To qualify as a "walking tour guide," applicants were required to pay a fee, take a physical examination, pass a criminal background check, and pass a 100-multiple-choice-question examination on the history and architecture of the city.

The city actually repealed the licensing scheme in 2014, while the suit was proceeding, changing to a simple registration requirement with no fee. The city then argued that the repeal rendered the plaintiffs' claim moot.

Normally, the court said, a repeal of an ordinance is an event that makes it absolutely clear that the allegedly wrongful behavior could not recur.

The Georgia ruling is the third by a federal court against municipal tour-guide licensing in cases filed by the advocacy group Institute of Justice. Washington, D.C. and Charleston, South Carolina had ordinances that were struck down, and in 2018 Williamsburg, Virginia, like Savannah, repealed a similar licensing requirement to avoid a lawsuit against it. In New Orleans, Louisiana, however, a federal court has upheld a similar licensing law.

In this case, the court chided the plaintiffs for their gambit—adding a claim for $10 in retrospective compensatory damages—to get around the fact that the case had already been decided and the issue was moot, saying, "It appears to this court that Plaintiffs are akin to litigants that seek a 'psychic satisfaction' that their cause is a worthy one."

However, the strategy worked; the court found the charge that the licensing violated the First Amendment was not moot, giving the court jurisdiction to rule on the constitutionality issue.

Freenor argued that the city's licensing scheme is a content-based regulation of speech that falls under a strict scrutiny standard of review. That requires a compelling government interest and a law that is narrowly crafted to achieve that interest.

The city of Savannah argued that the licensing scheme served two governmental interests: ensuring that guides "have the knowledge and proficiency to guide individuals who are visiting around our community," and "are not criminals and could not potentially harm visitors or individuals who are taking a tour."

The court accepted these interests but found that the city had not met the burden to show that the licensing rules served the interests. "The city fails to provide evidence that unknowledgeable guides are an issue for the city and pose a threat to the safety and enjoyment of tourists."

The court also found the exam and the background check are not narrowly tailored to serve the government's interest.

Such evidence could include studies or an expert opinion or evidence relied upon by other jurisdictions.

Some anecdotal evidence about the homeless population scamming tourists by pretending to be tour guides or selling spaces in public parking lots was submitted, but no evidence that the licensing would prevent scams.

A collection of news articles called "News Reports Regarding Problems with Unscrupulous Tour Guides in Tourist Destinations" was offered by the city but failed to impress the court.

"A handful of anecdotes is not sufficient to sustain the City's burden to demonstrate that the tour guide licensing scheme actually serves its interests," the court concluded.

Federal court blocks law requiring licensure for online auctioneers as improper restriction on commerce

Issue: Constitutionality of state regulation of online professions

A federal judge in Tennessee, in a July 23 ruling, issued a preliminary injunction blocking new legislation which would extend licensure requirements to auctioneers making a sufficient amount of money through open-ended internet auctions.

The court held that the state's attempt to regulate such remotely-controlled activity was an improper restriction on interstate commerce (*McLemore v. Gumucio*).

While professional auctioneers in Tennessee require licenses, state law creates an exemption for eBay-type sites that do "not constitute a simulcast of a live auction."

In 2019, the state legislature passed a bill that would exclude from the exemption Internet auctions where additional bidding activity extends the time of the auction, thus making the event more like a traditional auction, although certain auctions, such as those conducted by governmental or charitable entities, or auctions conducted by individuals that receive less than $25,000 per year from online auctions, were still exempted from licensure requirements.

In response, the plaintiffs in this case—two auction companies which conduct online extended-time auctions that generate more than the $25,000 yearly limit and employ non-licensed people to conduct these auctions, plus an advocacy organization created in response to the proposed bill by the owner of one of two plaintiff companies—brought suit against the state to challenge the amendment.

Among other things, they claimed that the proposed amendment would improperly burden interstate commerce.

Judge Eli Richardson of the United States District Court for the Middle District of Tennessee agreed with the plaintiffs, issuing a ruling granting a preliminary injunction against enforcement of the new rules.

In claiming that the new law improperly regulates interstate commerce in violation of the U.S. Constitution, the plaintiffs argued that, because the law would apply to any online auction in which a resident of Tennessee could participate, the new amendment would attempt to improperly regulate commercial activity outside of the state. Judge Richardson agreed.

The judge rejected the state's argument that the new law applied only to auctioneers physically present in Tennessee, noting that the statute's language contained no geographical limitation on its enforcement, and thus the new law would impose restrictions on any auction in which a person in Tennessee may bid.

Because internet auctions have, essentially, unlimited geographic reach, the law would thus apply to any online auction originating from anywhere in the world, amounting to an improper restriction on commercial activity between people located in different states.

"Wittingly or unwittingly, Tennessee has projected its legislation into other states and directly regulated Commerce therein," wrote Judge Richardson. "Perhaps the State could change the result via statutory amendments inserting express, specific geographical limitations, but it cannot change the results by

insisting that the statute obviously contains geographic limitations that in fact manifestly are not there."

In addition, Judge Richardson held that the burdens such a law would place on out-of-state auctioneers far outweighed any benefits that would accrue from its enforcement, as every person conducting an online auction who met the $25,000 yearly threshold would have to acquire Tennessee licensure and maintain an escrow account in the state.

Referencing the results of a task force set up by the state legislature to investigate the need for such a law, Judge Richardson noted that consumers filed only three complaints in the three years studied by the task force regarding extended-time online auctions.

The judge also noted the many exemptions to the new law, which he said undercut the state's argument that the new restriction was needed to protect the public.

"As a whole," he wrote, "these facts suggest that the State's purported concerns in fact are illusory, thus severely undercutting the State's position."

". . . There is considerable support for Plaintiffs' contention that the actual purpose of the regulation is likely not consumer protection, and thus the Court does not find that the State has a strong local interest in implementing the statute."

After concluding that damages to the plaintiff auction companies from implementation of the statute would be irreparable, the court issued the injunction sought by the plaintiffs.

California latest state to end questions about attorneys' mental health

Issue: License application questions on mental health

A requirement that prospective lawyers indicate their mental health and sign over related medical records was ended in a bill (SB 544) passed unanimously by the state legislature July 30.

The measure, sponsored by Disability Rights California, was introduced by Sen. Thomas Umberg (D), who stated its purpose is "to reduce the stigma of mental health issues and to help mitigate any chilling effect that prevents law students from getting treatment for mental health issues, including sexual assault and post-traumatic stress disorder.

"There are candidates who do not seek honest and warranted professional help, out of fear they have to divulge those records," Umberg said.

The law will stop the State Bar of California, which regulates lawyers, from asking for access to those records in most cases, Umberg said.

Neither the bar nor the examining committee can seek, consider, or review an applicant's medical records relating to mental health when deciding whether an applicant is of good moral character under the new law, which takes effect January 1, 2020.

Similar prohibitions on seeking attorneys' mental health records have previously been enacted in Virginia, Washington, and Louisiana.

Scope of Practice

Should optometrists do more surgeries? Arkansas plan to decide issue on 2020 ballot may or may not happen

Issue: Scope of practice decisions by popular vote

An unusual process is tentatively slated to take place in Arkansas in the 2020 election: a referendum that would allow voters to decide whether optometrists should be allowed to perform a broader range of surgeries under an amended definition of the practice of optometry.

Voters could choose to support a law passed in 2019 to expand optometrists' practice or overturn the law.

Following submission of the required signatures by registered voters, on August 20 the state Board of Election Commissioners certified the title and popular name of the ballot issue as meeting the standards of state law.

But the other requirement—certification that the ballot measure sponsor has obtained enough valid signatures to get the proposed referendum on the ballot—formed a roadblock when the Secretary of State in charge of that certification said correct procedures were not followed so there were not enough valid signatures.

The new election law requires sworn statements that they do not have convictions that would prohibit them from collecting signatures before they collect signatures.

The measure, Act 579, would authorize setting requirements for optometrists to be certified to administer injections around the eye, remove lesions from the eyelids, and perform certain types of laser surgery now performed by ophthalmologists, who are physicians, but would not allow optometrists to do cataract surgery or radial keratotomy surgery or sell prescription drugs.

Backers and opponents have significantly unequal war chests. Arkansans for Healthy Eyes, the pro-optometrist group, had raised $97,675 in contributions by August while Safe Surgery Arkansas, opposed to the scope-of-practice expansion, raised $656,200 in contributions.

Supporters of the referendum say it would allow optometrists to use more of their training and ease patient access to eye care in remote areas. Opponents contend that the measure would put patients' safety at risk. The question of the referendum's appearance on the 2020 ballot to settle the issue, however, is in the courts and remains to be decided.

Discipline

Disciplinary history not relevant to assault victim's credibility

from page 1

The case concerns Ronald Witthauer, a Washington man convicted of drugging and raping his niece, a former licensed pharmacy technician. During his criminal trial, Witthauer attempted to attack his victim's credibility by introducing evidence of the revocation of her license by the Oregon Board of Pharmacy.

The board had initiated an investigation against the victim after receiving an allegation that she had used patients' prescriptions to obtain oxycodone for her own use, and when the licensee failed to respond, the board issued a default order revoking her license.

Under Oregon evidentiary rules, a party may raise questions about a witness's credibility by inquiring about past conduct where it is relevant to the issues of the case.

Because it determined there was some probative value in the question of whether the victim illegally used her patient's prescriptions, the trial court permitted Witthauer to ask her whether she had diverted oxycodone for her own use, but it would not allow follow-up questions or inquiries or external evidence regarding her license revocation.

In denying Witthauer's attempt to introduce the revocation, the court noted that because the victim simply defaulted and had not contested the charged, the revocation lacked information about the substance of the allegations and was not probative of her credibility.

After the jury convicted Witthauer of rape and other charges, and the court sentenced him to 144 months to life in prison, he appealed. He argued, among other things, that the court had violated his rights by limiting his cross-examination of his niece regarding her license revocation.

The Court of Appeals agreed with the trial court's analysis of the issue. "Testimony or evidence that actually demonstrated that [the victim] committed dishonest acts would be relevant to her truthfulness . . . but the Board's default order shows only that she was accused of dishonesty and did not contest the resulting disciplinary proceeding," wrote Judge Rebecca Glasgow.

"Such evidence is not relevant. Nor would it be reliably probative of whether she actually committed the acts she was accused of because parties default for reasons other than guilt."

Having rejected Witthauer's arguments about the license revocation, and several other claims not related to professional licensure, the court upheld his conviction.

Board member's online research during deliberations sinks discipline of overprescribing nurse

Issue: Compliance with rules of evidence in discipline hearings

Christina Collins, a nurse accused of writing wildly excessive prescriptions for opioids while working at a pain clinic that state officials say was a pill mill, was allowed by the Tennessee Board of Nursing, following 2018 proceedings, to keep her license.

But after it emerged that a board member on the disciplinary panel had done online research during deliberations and used the information to guide her decision against suspension or revocation of Collins' license, a judge with Davidson County Chancery Court in Nashville ordered the board, in July 2019, to conduct new proceedings.

His order was in response to an unusual request by the state Department of Health and the attorney general's office to reconsider Collins' case.

Collins, the ninth highest-volume opioid prescriber in the state in 2012, prescribed between 275,000 and 470,000 pills to hundreds of patients over a period of two years, often to patients she never examined, according to the state nursing board.

She became notorious for once prescribing a single patient 51 pills a day, far beyond what would be a fatal prescription.

A state Department of Health report described her as "a machine that dispensed prescriptions without regard for any professional responsibility. Her own lawyers argued that Ms. Collins engaged in patient-led prescribing, simply giving patients whatever dangerous drugs they requested."

The three members of the panel had decided in February 2019 to put Collins's license on probation for two years, fine her $5,500 and prohibit her from working in another Tennessee pain clinic.

According to the *Tennessean* newspaper, which obtained a transcript of board deliberations via a public records request, the panel members agreed that Collins was guilty of dramatic overprescribing but did not believe she had overprescribed intentionally.

One panel member stated during the deliberations that she did not think Collins is a danger. "I think she stopped when she realized that this is not correct. I just think it should have been recognized sooner."

The State Health Department disagreed and petitioned board members to reconsider, stating that probation was "little more than a slap on the wrist." But when the board failed to act on the petition within 20 days, it was automatically denied.

Failure to provide evidence of licensee's dependence on alcohol dooms disciplinary order

Issue: Evidence to support disciplinary decisions

A Pennsylvania court, in a July 24 ruling, reversed a decision by the state to discipline a nurse for alcohol dependency, holding that the state and its expert witness had failed to show that the disciplined licensee actually suffered from dependency (*Seibert Thim v. Bureau of Professional and Occupational Affairs*).

Following the arrest of registered nurse Jamie Seibert Thim for driving under the influence in June 2016, the Pennsylvania Board of Nursing ordered her to undergo a mental and physical examination to determine whether she was fit to continue practicing.

Based on that evaluation, Pogos Voskanian, the examining psychiatrist, determined that Thim suffered from depression and alcohol abuse and recommended that her practice be monitored. No evidence showed that Thim practiced under the influence.

In May of 2017, Pennsylvania's Department of State initiated disciplinary proceedings against Thim. Voskanian testified as an expert during her hearing, stating that he believed Thim dishonestly downplayed the amount of drinking she was actually engaged in and concluding that she was unable to practice safely due to her alcohol use.

Voskanian's testimony was surprisingly flawed. Despite his statement that Thim abused alcohol, Voskanian acknowledged that she did not actually have a physiological dependence on alcohol and expressed uncertainty as to whether she was psychologically dependent.

Dependency is a necessary element for the discipline of licensees in Pennsylvania for alcohol abuse, so Voskanian's state of uncertainty should have been a blow to the state's case.

Separately, Voskanian bizarrely cited an old romantic relationship that Thim had with a man with alcohol abuse issues as relevant to whether Thim, herself, had an issue, stating his belief that people are attracted to people "with whom we share interests."

Finally Voskanian diagnosed Thim as having an alcohol use disorder under the *Diagnostic and Statistical Manual of Mental Disorder*s, but failed to elaborate as to which criteria were the basis for that designation.

Following the hearing, the board placed Thim's license on three years' probation. She appealed, and the case went up to Pennsylvania's Commonwealth Court, which reversed the board's discipline.

On appeal, Thim argued that the board's findings were not supported by substantial evidence, claiming that the board never proved that she suffered from an alcohol use disorder or that she was a danger to patients, and pointing to the fact that Voskanian failed to tie any of her alleged offending behavior to criteria in the *Diagnostic Manual,* and that the hearing examiner in her case also failed to set forth those criteria.

The court agreed. "It is not clear what those criteria might be, which facts in the record demonstrate Licensee has met those criteria, or whether the Hearing Examiner even knew what those criteria are," wrote the court. "For its part, the Board adopted the Hearing Examiner's findings of fact and conclusions of law, and its Final Adjudication and Order provides no more illumination on this subject than does the Hearing Examiner's proposed resolution."

"The Board likewise predicates its suspension of Licensee's nursing license on Dr. Voskanian's diagnosis of an alcohol use disorder under the DSM-V, despite his utter failure to articulate the criteria required for that diagnosis and to explain how Licensee's behavior met those criteria," the judge continued.

"His reasoning that Licensee's DUI at age 38 was related to her having dated an alcoholic bartender while in her college years is unsupportable at best. Dr. Voskanian's opinion can only be read as implying that Licensee abuses alcohol because she previously dated someone who abused alcohol."

Judge Ceisler also noted that the board had found that Thim had a psychological dependence on alcohol, despite testimony from Voskanian that he was uncertain. "In the absence of unequivocal testimony that Licensee has a psychological dependence on alcohol, the Board's finding to the contrary is, at best, baffling," the judge wrote.

Because the board had not shown that Thim had a dependence which would subject her to discipline under state nursing law, its disciplinary decision could not stand.

Having rejected the substantive bases of the board's discipline, the court reversed the order disciplining Thim.

Sexual misconduct complaints against doctors surge 62% in California

Issue: Misconduct complaints against licensees

Complaints filed by the public against California physicians for sexual misconduct rose by 62% between Fall 2017 and June 2019, the *Los Angeles Times* reported August 8.

Based on the *LA Times*' analysis of California Medical Board data obtained through a public records request, the newspaper found that sexual misconduct allegations against physicians are among the fastest-growing complaints.

In fiscal year 2017-18, there were 280 complaints filed against physicians for sexual misconduct and in fiscal year 2018-19 there were 279—compared to 173 in fiscal year 2016-17. In 2018-19, the most recent year for which there is data, the medical board saw the highest ever total number of complaints against physicians: 11,406. The state licenses more than 140,000 physicians.

Since the end of fiscal year 2016-17, California has revoked 23 physicians' licenses for sexual misconduct.

Absence of patient harm no defense against revocation for massive insurance fraud

Issue: Nexus between criminal conviction and disciplinary action

A dentist convicted of defrauding insurance companies to the tune of $345,000 was rightfully punished with license revocation, the New York Appellate Division, Third Department decided July 18 (*Matter of Epelboym v. Board of Regents of the State of New York*).

The court affirmed the Board of Regents' decision to discount the mitigating factors of patient support and the absence of harm to patients and to revoke Dmetry Epelboym's license because of the gravity of his offense.

Epelboym pleaded guilty in 2012 to the crime of first degree scheme to defraud, over allegations that between 2005 and 2011 he billed private insurance companies for services he claimed were performed in Manhattan but were actually provided at his Brooklyn office, garnering for Epelboym a significantly higher reimbursement rate.

He paid back $345,002 in restitution and was sentenced to five years of probation and 300 hours of community service. Charges of professional misconduct followed.

In his appeal of the revocation, Epelboym had argued that a less severe penalty should have been imposed due to the fact that no patients were harmed and that he had provided quality care to patients for 25 years.

But the Regents expressly found that he did not accept responsibility for his conduct, attributing the fraud to a billing error. His character witnesses were unaware of the details of his conviction and in some cases ascribed the billing error to an employee acting without his knowledge, the court noted.

Texas: 6th state to end license suspension for unpaid student loans

Issue: License suspension as punishment for unpaid student loans

The story of Roderick Scott, a middle-school teacher who suffered financial ruin in order to hang on to his teaching license, helped fuel a public backlash in 2019 against the Texas's law requiring occupational license suspension of people with past-due student

loans. The law bans Texas agencies from denying , suspending, or revoking a borrower's occupational license simply because they had defaulted on their student loans.

Threatened with license suspension when he fell behind on loan payments, Scott had to borrow money to immediately repay the loan collector, forcing him to stop paying his rent, which led to eviction, garnishment of his bank accounts, and bankruptcy.

Amid widespread outrage, dozens of Texas trade associations, unions, and advocacy groups joined to promote repeal of the three-decade-old law. A bill, SB 37, passed the Texas legislature with close to unanimous consent and was signed into law by the governor June 10, to repeal the law.

With the signing of the bill, Texas joined Arkansas, Georgia, Iowa, Kentucky, and Mississippi in repealing; only eight states can still deny licenses over unpaid student debt.

In 1989 Texas was one of the first in the nation to pass a default suspension statute. At the time, staffers on the state Sunset Advisory Commission maintained that such a law could "provide a powerful incentive for a person to stay current on his loan payments."

But the price has been high. An investigation by the *Texas Tribune* found that in recent years 530 nurses and almost 250 teachers could not renew their licenses because of their student loan debt.

The bill's sponsors said, "By threatening a person's ability to work by suspending or failing to renew his or her professional license, such policies not only threaten a person's employment and financial security, but also inhibit his or her ability to repay the student loan debt." Lenders will continue to have the ability to garnish wages, seize tax refunds, and use other methods to collect on their loans.

Board is disallowed injunction and costs in case against unlicensed private security provider

Issue: Awards of attorney fees in certain licensing cases

The Supreme Court of North Dakota, in an August decision, upheld a lower court's denial of injunctive relief and legal costs to the state's Private Investigative and Security Board, holding that the board had provided insufficient evidence that an unlicensed practitioner who had since left the state intended to return and continue his unlicensed activity (*North Dakota Private Investigative and Security Board v. TigerSwan*).

The subject of the case, Patrick Reese, owns TigerSwan, a security consulting firm that worked for Energy Transfer Partners, the company that was constructing the Dakota Access Pipeline during the recent protests by Native American and environmental advocacy grounds surrounding that construction.

Reese and TigerSwan are not licensed to provide private security services in the state, and thus the board brought unlicensed practice charges against him in June of 2017.

The board sought, among other things, an injunction against Reese and his company's continued operation in the state. In response, Reese applied for licensure in the state, but when that application was rejected, he fought the board's action while simultaneously removing all his employees from the state.

A state district court dismissed a motion by the board for injunctive relief on the grounds that, since the company had left the state and with no indication that it would return, the motion was moot. It further dismissed a board motion for administrative fees, on the basis that such fees must be accompanied by an injunction, which the court had denied for mootness. The case was then dismissed. The board appealed, and the case reached the Supreme Court of North Dakota, which issued a decision upholding the district court August 22.

Chief Justice Gerald VandeWalle, writing for the court, agreed with the district court that the board had not provided sufficient evidence that Reese intended to return to North Dakota to again provide security services, rejecting as insufficient the board's argument that Reese's failed attempt to apply for licensure indicated his possible intent to continue operating in the state.

A possible important factor leading to this failure by the board was that it had not actually finished discovery in the case by the time of the trial court's decision; the lower court had denied the board's motion for additional time for discovery, a decision the Supreme Court did not disturb. The justices also rejected the board's argument that it need not prove a future intent to operate in the state in order to obtain an injunction against a previous bad actor.

State caselaw, Justice VandeWalle wrote, "may support a court's ability to issue an injunction based solely on prior illegal activities…[but does not] require that a court do so"; so the lower court was within its authority to deny the injunction.

Despite the district court's rejection of the board's case, it did show some sympathy for its substantive claims. The justices rejected Reese's cross-claim for attorney fees, noting "that the Board's claims were not frivolous."

Board authorized to discipline licensee for faking credential in ad

Issue: Licensee-created professional certification entities

The Ohio State Chiropractic Board was acting within its authority when it disciplined a licensee who advertised himself as having a credential that was issued by an organization which he, himself, created, and which was inherently deceptive, a state appellate court held in August (*Wilson v. Ohio State Chiropractic Board*).

In 2015, chiropractor Michael Wilson advertised on television and in print, identifying himself as a doctor and stating that he was qualified to treat, among other things, hormone and thyroid issues, as well as diabetes.

Uniquely, the advertising also identified Wilson as a "D.NMSc," which stands for Doctor of NeuroMetabolic Sciences, a credential not recognized by the state chiropractic board and, in fact, issued by an organization, the International Association of NeuroMetabolic Professionals, that was created and directed by Wilson, himself, and headquartered in his office.

In August 2016, the board began a disciplinary process against Wilson for failing to clearly identify himself as a *chiropractic* doctor and for making other misleading claims. While the ads did append the letters "DC"—for Doctor of Chiropractic—to his name, the board considered this as insufficiently clarifying to the public, given that Wilson identified himself as a doctor and many people are not familiar with "DC."

Following a hearing, the board suspended Wilson's license for 90 days and fined him $2,000. Wilson appealed, and the case eventually went up to a state Court of Appeals for the 10th District, which reversed the board action August 13.

On appeal, Wilson argued that board's decision to discipline him based on his use the D.NMSc credential was a violation of his constitutional right to free speech, but the court disagreed, concluding that Wilson's use of the credential was misleading and thus not protected by the First Amendment.

Although Wilson argued the appellation was a valid credential, Judge William Klatt noted that the credential was bestowed upon appellant by the IANMP—an organization he and his colleagues formed—and one that is unlicensed by any Florida or Ohio entity governing academic accreditation of doctoral programs.

"A member of the public upon hearing or reading that appellant holds a doctorate would assume that appellant has completed a standardized course of study to obtain the degree when in fact appellant created both the credential and the organization that bestowed the credential," wrote Judge Klatt. The use of the term was "inherently misleading."

Wilson also argued that the board's had violated his procedural due process rights to reasonable notice and a fair hearing. At Wilson's disciplinary hearing, the director of the board, Kelly Caudill, testified that no specific rule prevents a chiropractor from using a certification not recognized by the board; Wilson thus claimed that he had no warning that his conduct would warrant discipline.

The court again disagreed. The issue was not that the board had punished Wilson for using a non-recognized credential. The issue was that Wilson's use of the credential was misleading, and the board had provided him adequate notice of that basis for his discipline.

Wilson argued that his use of "DC" in his advertisements was sufficient to inform viewers and readers that he was a chiropractor, and not a Medical Doctor. However, the court, surveying the statutory and regulatory landscape, concluded that, under Ohio law, chiropractors are explicitly required to use a variation of word "chiropractic" to identify themselves as distinguished from medical doctors, and upheld the board's finding that Wilson had violated this requirement.

Finally, Wilson challenged those disclosure requirements as another violation of his First Amendment rights, but the court rejected this argument, as well. The board's "position that it is deceptive to advertise for healthcare services without revealing the type of healthcare professional providing such services is reasonable enough to support a requirement that such information be disclosed."

"In our view, a requirement that a chiropractic physician disclose in an advertisement for chiropractic services that he or she is indeed a chiropractor is neither unjustified nor unduly burdensome."

Court may not force board to enforce subpoenas in action between private parties

Issue: Court jurisdiction to force boards to enforce subpoenas

On August 20, the Supreme Court of Pennsylvania reversed a lower court which had ordered the state's medical board and Bureau of Professional and Occupational Affairs to enforce a subpoena for medical records.

The court found that, because the proper subjects of the petition were the private medical providers holding the records, and not the state, the court had no power to hear the petition (*In re: Petition for Enforcement of Subpoenas Issued by Hearing Examiner in a Proceeding Before the Board of Medicine*).

After a psychiatrist submitted a complaint against Sarah DeMichele alleging deficient care of a mutual patient, the medical board initiated disciplinary action.

During preparation for her disciplinary hearing, DeMichele requested that the hearing examiner for the case issue subpoenas for the patient's statements and medical records from several other medical providers. However, the patient refused consent to the release of those records, and the providers refused the subpoena.

In response, DeMichele filed a petition against the board and the state's Bureau of Professional and Occupation Affairs with the Commonwealth Court of Pennsylvania, asking the court to order those agencies to enforce the subpoenas.

The Court granted that petition, and the patient, who had filed to intervene in the case, appealed and the case went up to the Supreme Court of Pennsylvania, which reversed the lower court's decision.

Before the Commonwealth Court and on appeal to the Supreme Court, the patient argued that the lower court did not properly have jurisdiction of the case, as Pennsylvania law requires that, for a state court to exercise jurisdiction in a case like this, the state must be an "indispensable party."

DeMichele had not filed for relief against the state, the patient argued, but against the private parties holding the patient's medical records, and thus the state entities were not properly the subjects of the suit.

The justices of the Supreme Court agreed with the patient, holding that the lower court improperly assumed jurisdiction of DeMichele's petition to enforce the subpoenas where no basis for jurisdiction of the petition existed.

First, wrote Justice David Wecht for the majority, the lower court did not have appellate jurisdiction of the case because the hearing examiner in the administrative proceeding had not yet filed a final order that DeMichele could have appealed.

Second, and in response to the patient's argument, the lower court could not have original jurisdiction of the case because the state was not a necessary party to DeMichele's claims.

"In short," wrote Justice Wecht, "this was an action neither by nor against the Commonwealth, the Commonwealth was not an indispensable party, and the [Medical Practice Act] provides no authorization for private parties to bring subpoena enforcement action in the Commonwealth Court."

The Bureau of Professional and Occupational Affairs had responded to DeMichele's court petition, a fact that the lower court noted in deciding that the state was an indispensable party to the case. But Justice Wecht pointed out that "the Bureau did not assert its own rights, but, rather, questioned the validity of the subpoenas absent a court order or [the patient's] consent to the release of her records . . . That is, the Bureau argued on behalf of [the patient's] rights and interests, not its own."

"Although the Commonwealth may have a generalized interest in issues surrounding the enforcement of subpoenas and the protection of privileged material, the Commonwealth's interests are not essential to a determination of the subpoenas' validity and enforceability," he continued.

"As such, the Commonwealth's interests in this matter are too attenuated to warrant a finding that either the Board or the Bureau is indispensable to this action between private parties."

Licensing

Added factual findings not required to deny license to doctor out of practice for 15 years

Issue: Due process and grounds for license denial

On July 3, an appeals court in Tennessee upheld a decision by the state's medical board to deny the licensure application of a doctor who had maintained licensure in other states but had not actively seen patients during a recently-ended 15-year period. The court held that the board was not required to make an extensive factual finding for purposes of appellate review where the facts of the case were not in dispute (*Perez v. Tennessee Board of Medical Examiners*).

The physician in the case, Andres Perez, practiced emergency medicine for more than a decade, but in 1999, he began working for private companies in an administrative and advisory capacity, becoming board-certified in preventative medicine but ceasing any direct patient care.

In 2015, Perez filed for licensure in Tennessee, asking to be certified in emergency medicine and general practice. In an attempt to mitigate his 15 years away from patient care, Perez began participating, under supervision, as an emergency doctor in Michigan and Kentucky, eventually submitting letters of recommendation from supervising physicians at those locations.

However, the state's Board of Medical Examiners, concerned about his lack of practice in emergency medicine and noting that his short program of reintegration into emergency medicine was simply not enough to remedy his long absence from the field, denied the application. The board did not completely rule out licensing Perez, stating that he could meet the state's requirements if he successfully completed a formal assessment within the next year.

Perez appealed, arguing that the board had improperly failed to create a formal report of its findings sufficient for appellate review, that its decision was not supported by the evidence, and that it had improperly presumed Perez's incompetence for practice due to his long period of inactivity.

After a state trial court held in favor of the board, Perez appealed to a state Court of Appeals in Nashville, which issued a decision affirming the denial.

Regarding his claim that the board maintained an inadequate record of his case for appeal, Perez argued that the board had failed to cite the specific grounds it had based its rejection on. However, the judges of the Court of Appeals disagreed, noting that "the Board clearly explained" that Perez had not seen a patient since 1999, then referred back to that fact when stating that was denying his licensure application.

That citation was simple, but no more was needed because the facts of the case were not in question, Judge Steven Stafford wrote in his opinion. "The contested case hearing at issue here was simply not the kind 'wherein issues of fact are sharply contested and the proof is conflicting,'" wrote Judge Stafford, citing a prior case.

"Rather, here, the facts underlying Appellant's application for licensure were never in dispute, nor were the facts regarding the approximately 15-year gap in his emergency medicine practice. The only dispute was whether based upon those facts the Appellant was qualified, in the Board's discretion, for medical licensure in Tennessee."

Regarding Perez's argument that the board erred in finding that he had spent an extensive time outside of the active practice of medicine, since he had engaged in preventative medicine in an advisory capacity during the 15 years he ceased seeing patients, the court again disagreed.

"Appellant has cited no law to undermine the Board's apparent conclusion that Appellant was required to engage in actual patient care to meet this definition," wrote Judge Stafford. "Affording the Board the proper deference, we cannot conclude that it lacked substantial and material evidence to make this finding."

"The record is undisputed that Appellant was not solely and directly responsible for any patient's care for more than one and one-half decades . . . Appellant cites no law that persuades us that this decision was outside the bounds of the Board's discretion or was not based on any sound course of reasoning or exercise of judgment, and we thus conclude that the Board's ruling was not arbitrary and capricious."

Association of licensing boards is shielded from litigation over publication of disciplinary action

Issue: Immunity from prosecution for publicizing disciplinary actions

The Federation of State Medical Boards is entitled to protection under a Texas statute protecting defendants from lawsuits filed in response to the legitimate use of First Amendment rights to free speech in matters of the public interest, regardless of its size and resources relative to an individual plaintiff, a Texas appellate court ruled June 26 (*Day v. Federation of State Medical Boards*).

In 2011, after physician Calvin Day, Jr. was indicted for sexual assault and several other people came forward with similar complaints, the Texas Medical Board temporarily suspended Calvin Day's license and began an investigation.

Day was eventually convicted of sexual assault, but, after an incident of prosecutorial misconduct came to light, that conviction was set aside.

Several of the complainants then refused to cooperate with the board's investigation, prompting it to reach a settlement with Day lifting his suspension but imposing restrictions on his license.

After the settlement, the Federation posted the existence of the order on a page of its publicly-available national physician database, noting further that the settlement was the result of unprofessional conduct on the part of Day. Day complained to the Federation that the "unprofessional conduct" label was inaccurate.

However, the Federation consulted with the board, which concurred with the label, and then rejected Day's request to remove the label. Day then sued the Federation.

At trial, the Federation moved to dismiss Day's suit under the Texas Citizens Participation Act, which authorizes defendants to petition a court to dismiss legal claims that infringe on their right to speak as a matter of public concern. The Act is intended to protect individuals from intimidation by litigation.

If a defendant can show that the challenged legal action was filed in response to the exercise of their First Amendment Rights, then the burden shifts to the plaintiff to show "by clear and specific evidence a prima facie case for each essential element of the claim in question" in order to keep the claim alive.

The trial granted the Federation's motion, dismissing Day's complaint and imposing $83,000 in attorney's fees. Day then appealed that decision to the Fourth Court of Appeals in San Antonio, which issued a decision in favor of the Federation.

On appeal, Day claimed that the trial court had inappropriately applied the Participation Act to his claim, arguing that, because the Act was intended to protect small actors from deep-pocketed litigants seeking to suppress First Amendment rights through litigation, the Federation, a large national organization, could not use the Act to nullify his claim.

This argument did not sway the court. "Day misstates the criteria for determining the applicability of the TCPA," Justice Irene Rios wrote in the court's decision. Justice Rios noted the requirement that a defendant need only show that a lawsuit was filed in order to infringe on their rights to free speech in matters of public concern.

Justice Rios wrote that the Federation's statement labeling Day's discipline as one stemming from unprofessional conduct was just that—a communication regarding a state licensing board's action. The Federation had, regardless of its size or amount of resources, established its case to protection under the Act.

Evaluating the substance of Day's case—and whether he could meet the burden under the Act to prove the elements of his claim—the court was similarly skeptical. The language of the settlement agreement between Day and the board indicates that the basis of the order was Day's unprofessional conduct, even using that specific phrase in more than one instance.

The justices of the appeals court upheld the decision of the trial court dismissing the case and allowing the imposition of legal costs.

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