

Legal Issues Update

ASPPB Annual Meeting

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RULES AND REGULATIONS

Ultra Vires . . .

In a 2001 decision, the Wyoming Supreme Court, in reviewing the revocation of an outfitter's license, pens a lengthy decision relative to the propriety of rules promulgated by the Wyoming Board of Outfitters (board). The court begins that part of its decision by noting that administrative agencies are limited in authority to powers legislatively delegated.

The court then points out examples of how this particular agency had acted outside its authority. It notes that the board adopted certain rules permitting disciplinary sanctions to be issued for violations of any local, state and federal laws and regulations pertaining to wildlife, game and fish. It then points out that the relevant statute Wyo. Stat. Ann. § 23-2-416 (a)(iv) provides that a license may be revoked only for violations of "any significant federal or state law or related regulations pertaining to wildlife."

This, the court says, expanded the power of the board without the appropriate statutory authority. The court noted the same failure to adhere to statutory authority when the board adopted a regulation making the breach of any contract grounds for license sanctions. The relevant statute restricted the board's authority to discipline of a license for a substantial breach of contract. The court declared both rules invalid. However, the court also says that even though the rules are invalid that does not mean that the board is precluded from utilizing the comparable statutory provisions. Billings v. Wyoming Board of Outfitters, 30 P.3d 557 (Wyo. 2001).

In a 2002 decision, the Missouri Court of Appeals reviewed the propriety of a rule promulgated by the state's Board of Therapeutic Massage. The court held that the board did not err in adopting a rule requiring license applicants to provide a transcript showing the completion of a massage therapy program. The court said the rule had a rational relationship to a legitimate state interest. Therapy Inst. v. Missouri Bd. of Therapy, 65 S.W. 3d 601 (Mo. Ct. App. 2002).

APPLICATION AND INITIAL GRANT OF LICENSE

Character and Fitness . . .

In a 2001 opinion, the Court of Appeals of Texas considered an appeal brought by the state's Board of Law Examiners from a trial court's reversal of a board order that recommended the issuance of a probationary law license to an applicant rather than a regular law license. The

board had concluded that the applicant had a possible chemical dependency and that such might lead to his failure to discharge his duties as a lawyer.

A trial court reversed the board's decision holding that the board erred because it had no proof of current chemical dependency. The appellate court agreed and in its opinion went to significant lengths to point out that past chemical dependency did not equate to current chemical dependency. Further, the court said the board was clearly unable to present any evidence linking the applicant's behavior and the likelihood that he might not discharge his duties as a lawyer. Board of Law Examiners v. Coulson, 48 S. W. 3d 841 (Tex. App. - Aus. 3rd Dist. 2001).

A former police officer for the city of Huber Heights, Ohio (Williams) was a student at Capital University Law School. He filed an application to register for admission to practice law in Ohio. During the application process, Williams stated that his reason for leaving employment with the city was "disability retirement." In an interview with two members of the Dayton Bar Association, Williams said the information on his application was true.

During a background check by the National Conference of Bar Examiners, it came to light that the applicant had been asked by the police department to resign. This triggered further inquiries and a hearing which revealed the applicant had been injured on the job, but had also been allegedly involved in, at least, some indiscreet activities with an eighteen year old female. Eventually an agreement was reached whereby Williams was allowed to resign and the city did not contest his disability claim. The young woman and her mother also agreed not to press criminal charges.

An Ohio Bar admissions panel concluded, that in his application and interview, Williams did not disclose in a forthright and honest manner the details surrounding his resignation from the Huber Heights police force. Thereafter, the panel concluded that Williams failed to show by clear and convincing evidence that he possessed the character and fitness required for admission to the practice of law in Ohio. The panel recommended that he not be allowed to reapply for admission until the February 2004 bar examination. The board adopted the panel's findings and conclusions, as well as its recommended decision. The Supreme Court of Ohio affirmed. In re Application of Williams, 766 N.E.2d 143 (Ohio 2002).

The issue of an applicant's good moral character was the focus of a decision rendered by the Supreme Court of South Dakota in 2001. The case involved an applicant for the practice of law in that state. This particular applicant had graduated from an accredited law school and had passed the South Dakota bar examination. He was denied admission on the basis of his past transgressions which included two DUI arrests, being fired for failing a drug test, alleged acts of physical abuse of a girlfriend that resulted in the issuance of two temporary restraining orders, and allegations of interference with a divorce proceeding.

In its decision, the court gave great weight to the fact that there were three evidentiary hearings and that after the second, the Board of Bar Examiners (board) recommended that the applicant be admitted to the state's Bar on a conditional basis. However, the court itself rejected the recommendation. Further, the court says that following the third hearing the board unanimously recommended admission. The court then reviews the evidence submitted by the applicant at the

third hearing on the issue of good moral character and concludes the individual should be admitted, but only on a three year conditional basis. In Re Ogilvie, 623 N.W. 2d 55 (S. D. 2001).

ADMINISTRATIVE SEARCH AND SEIZURE

Administrative Searches in Closely Regulated Professions . . .

The issue of the search of a public official's drug prescription records and the disclosure of those records to law enforcement authorities by the Washington State Pharmacy Board was the subject of a lawsuit resulting in a 2003 decision of the Court of Appeals of Washington. Generally speaking, after a pharmacist notified the Board's Executive Director that she suspected a county Sheriff of being addicted to painkillers, for which he had multiple prescriptions, an investigation ensued in the county's 39 pharmacies. The results of the investigation revealed that the sheriff had filled 265 prescriptions at eight pharmacies over a 17-month period. The prescriptions were written by ten different prescribers for opioid narcotics, muscle relaxants and anti-depressants. The results of the investigation were turned over to the county prosecutor's office and charges were filed against the sheriff. The criminal case was subsequently dismissed because the trial court ruled that the board's actions violated the Sheriff's right to privacy since there was no search warrant.

A civil suit was then filed by the Sheriff and his family members who sued the pharmacy board on a number of theories. A trial court jury awarded them over \$3 million. On appeal, however, the Court of Appeals reversed finding the board had statutory authority to conduct a warrantless search of an individual patient's prescription information. The court then went on to further hold that the pharmacy statute allowing the board warrantless access to prescription information did not violate the privacy protections of the federal and state constitutions. Finally, the court held that the disclosure of the prescription information to the county prosecutor was not improper. Murphy v. State, 115 Wn.App. 297 (2003).

EXAMINING THE CANDIDATES

Limits on Number of Examinations . . .

Boston was a graduate of a program of physical therapy education and had taken the physical therapy assistant licensing examination three times and each time failed to achieve the minimum score necessary to pass and obtain her license. In October 1999, Boston applied to take the physical therapy assistant licensing exam for a fourth time. The state's Physical Therapy Board (board) denied her application pursuant to a recent amendment to a state statute which barred candidates from taking the physical therapist assistant licensing examination more than three times. The Commission reviewed the matter and ruled in Boston's favor, ordering the board to admit her to the examination. The board appealed to the trial court, which ordered that Boston be allowed to take the exam. The board then appealed to the state appellate court.

On review, the appellate court noted that prior to the amendment, the statute did not include any provision barring candidates who had previously taken the exam and that Boston had taken the exam three times prior to the amendment having passed. Thus, the appeal involved the statutory interpretation of the amendment and a determination of whether the amendment would be applied retrospectively, to applicants who had taken the exam three times prior to the effective date of the amendment. In reviewing the issue, the court stated that restrictions surrounding the practice of the medical profession are for the benefit of society, not the practitioner and that given the overriding interest in protecting the public, licensing statutes confer no substantive rights upon applicants seeking licensure. Thus, the court found, Boston had no vested right to take the physical therapist assistant licensing examination. The court held that Boston could not avoid the application of the amendment and that the amendment applied to all candidates who failed the exam three times, whether or not those failures occurred prior to the enactment. State Board of Registration for the Healing Arts v. Boston, 72 S.W.3d 260 (Mo. App. W. D. 2002).

Disclosure of Questions and Answers . . .

An applicant for a medical license in Florida failed the qualifying examination. He filed an action and requested access to the exam questions and answers. A reviewing appellate court noted that the post-exam and pre-hearing statutes and rules did not contemplate disclosure of questions and answers to anyone other than the examinee and his attorney as specified. However, the court also said there was no prohibition in the statutes or rules against disclosure of the challenged questions and answers to expert witnesses at the administrative hearing, with appropriate restrictions. Additionally, the Florida Legislature had provided restrictions for disclosure of questions and answers, balanced in favor of the exam's integrity as protected by the Department. Department of Health v. Grinberg, 795 So.2d 1135 (Fla. App. 1 Dist. 2001).

DISCIPLINARY ACTIONS INVOLVING LICENSED PROFESSIONALS

Due Process Requirements in General. . .

After an investigation and a 12 day hearing, the Minnesota Board of Psychology (board) revoked a psychologist's (Appleman) license to practice psychology on the grounds of professional misconduct and incompetence. The misconduct included altering client records, unprofessional conduct in client interactions, billing for services not provided, failing to give required warnings, administering and billing for non-standard tests, failing to coordinate services, improperly releasing confidential information, misdiagnosing a client, substandard interpretation of administered tests, inappropriately administering tests, failing to reconcile test results with diagnoses, substandard treatment techniques with sex-offender clients with revocation of probation, providing unreasonable or unnecessary services, taking inadequate histories, substantial documentation, failing to maintain test protocols, failing to provide adequate support for professional judgments, substandard documentation of treatment plans, substandard documentation of sex-offender treatment plans, failing to keep relevant client correspondence, and inadequate documentation to substantiate billings.

On appeal, Appleman made several due process arguments, such as the investigator was biased, he failed to receive proper notice of charges, that he was not provided timely notice of new charges, and that the board had failed to commence the proceedings with a verified complaint. On all of these arguments, the court found that Appleman's assertions were without merit. The psychologist further argued that he had been denied the opportunity to depose the board's experts and an opportunity to be heard at the hearing. However, the court found that the board had discretion to determine that, because the written expert opinions were so extensive, Appleman failed to show depositions were necessary. Additionally, the court concluded that Appleman had had sufficient opportunity to be heard, the hearing was fair and reasonable, and there were no due-process violations.

On a review of the evidence, the court concluded that the board's decision was supported by the evidence and that it was within the board's expertise to evaluate the weight and credibility of the expert's evidence. Lastly, Appleman argued that the board's revocation of his license was too harsh. However, the court noted that "the nature and duration of the discipline is best determined by his or her fellow professionals, who are in the superior position to evaluate the breaches of trust and unprofessional conduct." Further the court provided that the purpose of a license revocation is not to punish the individual, but to protect the public from "dishonest, immoral, disreputable or incompetent practitioners." The court found that the board had substantiated more than 60 violations of the Minnesota Psychology Practice Act and board rules by Appleman's conduct. In re of the Psychology License of Appleman, C6-02-142 (Minn. App. 7-16-2002)(unpublished decision).

Form of the Hearing . . .

In a 2002, Idaho Supreme Court case, the court reviewed the state medical board's disciplinary actions and proceedings against a physician. The physician had been charged with eight counts of violations of the standard of care. From the hearing before a hearing officer, the hearing officer found only minor violations. However, the board rejected the hearing officer's findings and recommendations, and found eight violations of the standard of care and reprimanded the physician and ordered her to have a physician monitor where she worked. On appeal, the physician argued that she was entitled to a hearing before a panel of licensed physicians, instead of a hearing officer. However, the appellate court found that the statutes in effect at the time authorized hearing officers to conduct evidentiary hearings and make recommendations. On review of board's findings, the court found that three counts of misconduct were based upon facts that there not plead, and thus, the physician had not received adequate notice. The court also found one count was not supported by the evidence. The court remanded the case for the board to consider what disciplinary action was appropriate in light of the appellate court's reduction in the number of violations. Pearl v. Board of Professional Discipline of Idaho State Bd. of Med., 44 P. 3d 1162 (Idaho 2002).

Fair and Impartial Tribunal . . .

A physician (Orens) was charged with professional misconduct arising from his care and treatment of several patients. At a pre-hearing conference, Orens objected to the composition of

the three-member panel. He argued that the panel did not include a “lay member” as required by an applicable statute. The administrative law judge (ALJ) overruled the objection and after a hearing, Oren’s license to practice medicine was revoked. Another physician (Mayer) was also charged with numerous charges of professional misconduct. At the evidentiary hearing before the professional conduct committee, he too objected to its three-member composition claiming that the “lay member” could not be a physician’s assistant. The ALJ overruled the objection and ordered the hearing to proceed. At the conclusion of the hearing, Mayer’s license was revoked.

The two doctors appealed the decision and the court ultimately combined the two cases. After a trial court reversed the decision, finding that a physician’s assistant could not be a “lay member,” the board appealed to the New York Court of Appeal. That court stated that the case was only a question of statutory interpretation and found that upon a review of the particular statute and other statutes regarding the medical board, the term “lay member” includes all non-physicians. The court further explained that the legislature had amended different portions of the law regarding the medical board to clarify that other health care workers were within the disciplinary reach of the board. However, the court found, the legislature did not amend the statutory references to “physician” or “lay person” in the sections dealing with the composition of its review committees. Therefore, the court stated that had the legislature intended to exclude physician’s assistants from serving on the board as “lay members,” it could have done so easily by directing that a lay member not be a licensee as defined in the statute. The court ultimately reversed the lower court’s opinion and found that under the relevant statutes, a physician’s assistant could serve as a “lay member.” In the Matter of Orens v. Novello, 783 N.E. 2d 492 (N. Y. App. Ct. 2002).

Protection Against Self-Incrimination . . .

An Ohio physician appeals the State Medical Board of Ohio’s (board) revocation of her license to practice medicine. The facts revealed that the physician had been operating a weight loss clinic, where she prescribed and dispensed medications without taking a medical history or doing physical examinations of the patients. An administrative hearing was held and the board ultimately revoked the physician’s license. Prior to the hearing, criminal charges were filed against the physician. The physician appealed to the trial court which affirmed the board’s decision.

The physician then appealed to the state appellate court, arguing that the board’s decision should be reversed because, she argued, the hearing examiner failed to continue the hearing to permit her to safeguard her privilege against self-incrimination due to her criminal charges. On appellate review, the court found that the hearing examiner was not required to continue the hearing based upon her criminal indictment. The court further stated that the physician was free to assert her Fifth Amendment privilege and refuse to testify. The record reveals that she clearly took the stand on direct examination of her own accord, did not assert her privilege during questioning, and was not compelled by the state to forego her privilege. The court also explained that the potential loss of a medical license does not, in and of itself, raise a claim of compulsion by the state. The physician also made several arguments of due process violations, however, the court reviewed the arguments and found no violations of due process.

The physician also argued that the board's order should be reversed because, the expert evidence essential to reach an administrative determination was provided by the board itself rather than an expert witness capable of being cross-examined. The court found that the expert who testified was qualified to be an expert. Additionally, the court explained that the board may supply the requisite medical expertise itself through the board's authority to rely on its own knowledge when making a decision, noting that eight of the twelve members of the board are licensed physicians who possess specialized technical knowledge. Walker v. State Medical Board of Ohio, Unpublished Decision (2-21-2002).

Informal Dispositions . . .

In a 2002 opinion, the Court of Appeal of California issued a decision holding that, absent extraordinary circumstances, a dental licensee who stipulated to a disciplinary order with a licensing agency motivated by the existence of a criminal conviction, could not avoid that order just because the conviction was later vacated. Stermer v. Board of Dental Examiners, 115 Cal. Rptr. 2d 294 (Cal. App. 2002).

DISCOVERY IN PROFESSIONAL DISCIPLINARY CASES

Subpoenas . . .

The West Virginia Supreme Court of Appeals has held that the West Virginia Board of Medicine (board) does not need to establish probable cause in order to subpoena medical records during its investigations. The court said that West Virginia law and the board's regulations allow the board to issue subpoenas during investigations without probable cause as a part of the board's investigatory power.

The case involved a podiatrist who sought to quash the board's subpoena of 30 medical records randomly selected from his office. Apparently, the board was investigating a complaint that alleged a patient had been overcharged for the services rendered. The provider maintained that a "fishing expedition" through his records would violate patient privacy rights. The board countered his argument with the proposition that a probable cause determination, in many cases, can only be made after an investigation is complete and the court agreed. Feathers v. West Virginia Bd. of Med. 562 S.E.2d 488 (W.V. 2001).

Patient's Privacy Rights and Privileged Communications . . .

The Supreme court of Illinois, in a 2002 decision, rendered an important opinion regarding the ability of the state's Department of Professional Regulation (Department) to subpoena records of dental patients. The Department sought the records of two patients and the patient appointment schedules of the two dentists being investigated.

When the two dentists refused to comply with the subpoena, the Department filed an action in circuit court seeking to enforce the subpoena. The trial court granted summary judgment to the Department and ordered the dentists to comply. On appeal, the Appellate Court of Illinois agreed that the appointment schedules should be produced, but reversed as to the two patient's records.

This court held that since the dentists were surgeons, the records were protected by the physician-patient privilege.

The case was then appealed to the Supreme Court of Illinois. That court affirmed rejecting the Department's argument that the board's investigating powers bestowed upon it by the Illinois General Assembly in the state's Civil Administrative Code prevail over any assertion of the physician-patient privilege that a subject of an investigation might raise.

The court noted that the legislature did not expressly state in the Civil Administrative Code that the investigating powers given to the Department override the physician-patient privilege that exists in Illinois. Further this court said the legislature had codified the physician-patient privilege including ten exceptions, however none of those exceptions refer to the investigatory powers of the Department.

The court then addressed the Department's assertion that dentists are not physicians and should not be entitled to invoke the privilege. The court agreed that dentists did not meet the definition of physician, but that the privilege applied to physicians and surgeons and that under the state's Dental Practice Act dentists were allowed to operate and that the definition of the word operate is "to perform surgery." Consequently, the court held the Department could not enforce the subpoena. People v. Manos, 202 Ill. 2d 563 (2002).

EVIDENTIARY MATTERS

Decision Based on the Evidence . . .

In a 2001 decision, previously unreported, the Court of Appeals of Oregon, reviewed a case in which the Oregon Veterinary Medical Examining Board (board) suspended a veterinarian's license for professional misconduct. The issue on appeal related to a letter submitted by a neighbor of the veterinarian who was privy to some of the facts surrounding the complaint, but who had been unavailable to testify in person. The letter was sent to the board and forwarded to the Hearing Officer after the record was closed. The letter was clearly considered by the board in its decision making process. The appellate court reversed because the letter was not part of the record and the record was not reopened for its receipt. The court noted statute(s) and rule(s) that were violated by consideration of the letter. Smith v. Veterinary Medical Examining Board, 27 P. 3d 1081 (Or. App. 2001).

Standard of Proof . . .

The Supreme Court of South Dakota, in a 2002 decision, reaffirmed that the standard of proof in cases involving potential license revocation, is clear and convincing evidence. The case involved a physician who was alleged to have testified falsely as an expert witness in a malpractice case against another physician. In re Medical License of Setliff, 645 N.W. 2d 601 (S. D. 2002).

The Washington Supreme Court, in a 2001 decision, held that revoking a physician's license for alleged misconduct based on a "mere preponderance" of the evidence violates the due process

clause of the 14th Amendment to the U. S. Constitution. This court said that the consequences of taking away a license are so great, that the decision to do so requires a higher burden of proof, a “clear” preponderance of evidence so as to minimize the risk of error.

This court, as many others have, noted that a medical license is a property right and that the 14th Amendment precludes states from depriving any person of life, liberty, or property without due process of law. The trial court, as well as the state’s intermediate appellate court had affirmed the decision of the Washington State Department of Health. However, the Supreme Court ordered the department to reconsider the case based on “clear and convincing proof.” The court compared a physician’s interest in his or her license to a civil suit and said that interest is “obviously much greater than that which would be implicated by a mere money judgment.”

Three of the eight justices participating in the decision dissented. They argued that 14th Amendment property and liberty protections did not apply to the physician in such a case and said that public protection would be better served using the preponderance of the evidence standard. Nguyen v. State, 144 Wn.2d 516 (2001).

GROUND FOR DISCIPLINARY ACTIONS

Conviction of Crimes . . .

Clearly there are jurisdictions in which professional licenses can be sanctioned for crimes committed by the licensee that don’t directly relate to the licensee’s practice. For example, in a 2002 decision, the Delaware Supreme Court imposed an 18-month suspension on a lawyer who ignored a family court’s order to stay away from his estranged wife and destroyed evidence relating to that violation.

The lawyer pleaded guilty to violating a protection-from-abuse order and hindering a criminal prosecution by destroying his wife’s journal, which was arguably evidence of his violation of the order.

A panel of the state’s Board of Professional Responsibility recommended a one-year suspension, but increased the suspension to 18-months. The court acknowledged that there was no violation of an ethical duty to the client and no harm apparently resulted to the estranged wife. Nevertheless, the court said the lawyer’s criminal conduct violated his duties to the general public and undermined public confidence in the integrity of the legal profession. As an experienced public defender, the court said the lawyer held a special position of public trust. The court also said the preservation of evidence is essential to the orderly administration of justice and this lawyer’s deceitful attempt to suppress evidence adversely reflects on his honesty and trustworthiness. In re Melvin, 807 A. 2d 550 (Del. 2002).

Fraud and/or Misrepresentation . . .

A Massachusetts appellate court has reviewed and affirmed an order of the Massachusetts Board of Registration of Medicine (board) which imposed a fine of \$5,000 against a Massachusetts

psychiatrist. The board imposed the fine when it found the psychiatrist had improperly billed insurance carriers for psychotherapy sessions with patients and their spouses that did not actually occur. Fisch v. Board of Registration in Medicine, 769 N. E. 2d 1221 (Mass. 2002).

Negligence, Incompetence, Malpractice . . .

The New York Supreme Court, Appellate Division, has affirmed a decision of the state's Bureau of Professional Medical Conduct (BPMC) finding a physician guilty of negligently treating a cardiac patient on more than one occasion. The physician saw a patient in May 1997 who had chest pains, anxiety panic attacks and shortness of breath. An EKG was performed, chest x-rays ordered and the patient referred to a cardiac specialist. The physician also ordered a test for cardiac enzymes, but the results were not available for several days. He prescribed asthma medication and sent the patient home.

Less than a week later the patient returned complaining of continued chest pain. The physician arranged a consultation with a cardiologist that day. The cardiologist reviewed the patient's medical history, performed an EKG, reviewed the earlier EKG and concluded that the patient had suffered "a myocardial infarction followed by post-infarction angina." The patient was hospitalized immediately.

On the day of the disciplinary hearing, the physician did not appear and consequently did not rebut the BPMC's expert witness. That physician expressed the opinion that the physician's response to the patient's symptoms in May 1997, and a week later, failed to meet medically acceptable standards of care. The committee that heard the case sustained the charge of negligence on more than one occasion. The physician's license was suspended for two years, but the suspension was stayed and his license placed on probation. The physician appealed.

The reviewing appellate court ruled that the record disclosed that on the patient's first visit he exhibited documented risk factors for cardiac disease. Further, the steps the physician took demonstrated the physician suspected his patient was experiencing cardiac problems. The court agreed with the expert witness that negligence occurred on the first visit. Further, when the physician referred the patient to a cardiologist, rather than immediately admitting him to the hospital, a second act of negligence occurred. Thereafter, the court found the committee's conclusions were supported by substantial evidence. Bell v. New York State Dept. of Health, 738 N.Y.S. 137 (A.D. 3 Dept. 2002).

Revocations Involving Substance Abuse . . .

In a 2003 decision, the California Court of Appeal held, that the failure by a physician to successfully complete a substance abuse diversion program is inadequate, by itself, to support a medical board's disciplinary action. Further, the court said the fact that the physician did not complete the program was insufficient absent an independent determination of unprofessional conduct or impairment.

This court noted that California's Business and Professions Code Section 2354 establishes the substance abuse diversion regime as a way of addressing or resolving fitness to practice

concerns. However, it also noted that nothing in Section 2354 gives a participant notice that failure to successfully complete diversion qualifies as a cause for bringing a disciplinary action against a physician's license under Section 822. Further, there was no language in the diversion agreement the physician signed to notify him that failure to complete the program would provide an independent basis for disciplinary action.

This court finally concluded that to meet constitutional due process considerations, Section 2354 must provide some reasonable indication that a failure to complete diversion successfully constitutes unprofessional conduct before it may be applied to impose discipline solely on that ground. Medical Board of California v. Superior Court, Cal. Ct. App., No. A101128, (unpublished 7/25/03).

Sexual Intimacies with Clients or Patients. . .

In this 2003 case, the complainant (S.L.) was in therapy with a psychologist (Stein) from 1984 until 1986. In late 1996, she contacted the American Psychological Association (APA) to complain that Stein had engaged in sexual misconduct with her. She was told by the APA that it had a ten-year limitation on investigating claims of sexual misconduct so she contacted the Wisconsin Department of Regulation and Licensing and filed a complaint in January, 1997.

An administrative law judge (ALJ), on Stein's motion, issued a proposed decision dismissing the relevant counts of the complaint on the ground of laches, or rather, too much time had elapsed between the time of alleged misconduct and the filing of the complaint. The Board of Psychology (board) rejected that proposal, holding laches did not apply to professional disciplinary cases. The board also found that Stein failed to show how the passage of time prejudiced his defense. The ALJ then conducted an evidentiary hearing finding there had been at least one sexual encounter between therapist and patient before therapy was terminated. The board agreed and also found that because the complainant's husband was initially involved in the therapy sessions, Stein was guilty of gross negligence in the practice of psychology by engaging in sexual intimacies with the spouse of a client. Stein's license was suspended for a year.

The Court of Appeals of Wisconsin considered the case on appeal. This court agreed with the board that laches was not a defense since the case involved a proceeding brought by the state in its sovereign capacity to protect a public right. Then the court reviewed Stein's claim that the passage of time violated his rights to procedural due process, but again agreed with the board that prejudice must be shown and Stein failed to do so. Stein v. State Psychology Examiners, 668 N.W.2d 112 (Wis. App. 2003).

A psychologist, was sanctioned by the Connecticut Board of Examiners of Psychologists (board) for negligence, incompetence and wrongful conduct. The sanctions were imposed following an investigation and two hearings into a complaint filed with the Department of Public Health by the mother of two of the psychologist's clients concerning an alleged social and sexual relationship she had had with the psychologist. The relationship began after the complainant's older son ended his treatment with the psychologist and reached the age of majority, and ended within a few days of the psychologist's provision of psychological services to the complainant's

younger son. The psychologist appealed to a trial court which dismissed his appeal. Thereafter, he appealed to the Connecticut Court of Appeals. On appeal, the psychologist raised several claims, such as, the court improperly dismissed his appeal because the board failed to base several of its findings on substantial evidence, sanctioned him where only one member of its hearing panel had heard witnesses testify, violated his constitutional rights to due process and to fundamental fairness, and imposed a penalty that was excessive and unsupported by good cause.

The appellate court affirmed the lower court's dismissal of the appeal, finding that there was substantial evidence in the record to support the panel's finding that the sexual relationship had occurred, and, furthermore, the panel's decision could be sustained on the basis of the psychologist's own admission that he had had a social relationship with the complainant and there was evidence that the relationship compromised the older son's ability to further his treatment with the psychologist. The court further provided that there was no merit to the psychologist's claim that because only one of the three panel members had heard the testimony of the witnesses, he was deprived of procedural due process, when the express presumption of the applicable statute was that a board member need not be present at a hearing if the member acquaints himself sufficiently with the issues raised and the evidence and arguments presented at the hearing. Towbin v. Board of Examiners of Psychologists, 801 A.2d 851 (Conn. App. 2002).

Disciplinary Actions in Other Jurisdictions . . .

The New York Supreme Court, Appellate Division, has held that New York medical licensing authorities properly relied upon a facially valid order by Texas licensing authorities revoking a physician's license to practice medicine in Texas. This court held that where, as in the case at bar, the physician waived an adjudication on the merits of the complaint and stipulated to the disciplinary order, that raised an inference that the allegations of the complaint were meritorious, precluding a finding that the New York licensing board's determination to suspend the physician's license for three years was arbitrary. Heberman v. Novello, 720 N.Y.S.2d 626 (A. D. 3 Dept. 2001).

Improper or Inadequate Record Keeping . . .

The New York Supreme Court, Appellate Division, in a 2001 decision, affirmed a case in which a physician's license had been revoked. The court specifically noted the testimony offered by the medical board's expert that detailed deficiencies in the physician's care and treatment of patients, as well as inadequacies in his record keeping skills. The court also noted the expert's testimony regarding the physician's failure to obtain and/or document a complete medical history from another patient and held the testimony was sufficient to sustain specifications relating to inadequate patient records and negligence on more than one occasion. Alexander v. State Bd. of Prof. Med. Conduct, 731 N.Y.S.2d 797 (A. D. 3 Dept. 2001).

The Maryland Court of Appeals issued a 2001 opinion which held that the Maryland State Board of Physician Quality Assurance decision to discipline an obstetrician for the negligent postpartum care of a patient was reasonable and that the board based its decisions on substantial evidence. Further, this court said that the board had consistently held that the creation of an accurate medical record was part of the standard of care required of all physicians. Additionally,

the records which the physician created with respect to certain days violated the standard of care since the records were inaccurate relative to the time of certain tests and because the record on one of the dates incorrectly stated that the patient had refused a transfusion. Gabaldoni v. Board of Physician Quality Assurance, 785 A.2d 771 (Md. App. 2001).

DEFENSES TO DISCIPLINARY ACTIONS

Double Jeopardy . . .

Dr. Smith, an osteopathic doctor, failed to renew his medical license and pay the required renewal fee. As a consequence, Dr. Smith's license to practice osteopathic medicine was automatically suspended. Apparently, Dr. Smith was not aware of his failure to renew and continued to practice medicine until law enforcement officers raided his office, based upon his practicing without a license. Following the police raid, Dr. Smith immediately went to the Ohio Medical Board (board) and paid his renewal fee and late charges. His medical license was reinstated that day.

Dr. Smith was then criminally charged with twenty-five counts of practicing osteopathic medicine without a license and with various violations of drug statutes based upon his prescribing medicines while his license was suspended. Dr. Smith entered a plea of no contest to the twenty-five misdemeanor counts, stipulated to findings of guilt regarding those counts, and paid court costs and a fine of \$10,000. Thereafter, the board sought to take disciplinary action against Dr. Smith based on his practicing medicine while his license to practice was suspended and based upon the judicial findings of guilt.

An administrative hearing was held and the board ultimately reprimanded Dr. Smith. Dr. Smith appealed and the trial court reversed the board's disciplinary action finding that Dr. Smith's license was appropriately suspended for his failure to comply with the renewal process and that subsequently, Dr. Smith came into compliance and the board reinstated his license. The court found that once the board had reinstated Dr. Smith's license with no restrictions, the board could not impose further disciplinary sanctions on Dr. Smith. The board appealed and the appellate court agreed with the trial court, holding the board was barred from imposing further discipline on Dr. Smith's license for his practicing without a license after the board had already suspended and reinstated his license due to the same violation. Smith v. State Medical Board of Ohio, Unpublished Opinion (3-21-2002).

Grave Injustice . . .

A Pennsylvania Supreme Court case, decided in 2001 is remarkable, in that, it identifies several potential defenses such as res judicata and collateral estoppel, explores them in depth and disregards them as inapplicable to the case. After rejecting most known defenses to the matter of reciprocal discipline, it then holds in favor of the respondent.

The case involves a New Jersey attorney who was disbarred in that state in 1989 due to a shortfall of monies in his trust account. After almost a decade of trying, the Pennsylvania Bar

admitted him to its bar exam, licensed him when he passed, then sought to disbar him on the basis of the New Jersey disciplinary action in 1989, which it was well aware of when he was licensed in Pennsylvania in 1999.

The court reviews the expletory lifestyle the respondent led between 1989 and 1999 and concludes that it would be a grave injustice to allow the respondent to begin practicing in Pennsylvania and then revoke his right to do so. In the Matter of Inlo, 746 A. 2d 535 (Pa. 2001).

Statute of Limitations or Laches. . .

In this 2003 case, the complainant (S.L.) was in therapy with a psychologist (Stein) from 1984 until 1986. In late 1996, she contacted the American Psychological Association (APA) to complain that Stein had engaged in sexual misconduct with her. She was told by the APA that it had a ten-year limitation on investigating claims of sexual misconduct so she contacted the Wisconsin Department of Regulation and Licensing and filed a complaint in January, 1997.

An administrative law judge (ALJ), on Stein's motion, issued a proposed decision dismissing the relevant counts of the complaint on the ground of laches, or rather, too much time had elapsed between the time of alleged misconduct and the filing of the complaint. The Board of Psychology (board) rejected that proposal, holding laches did not apply to professional disciplinary cases. The board also found that Stein failed to show how the passage of time prejudiced his defense. The ALJ then conducted an evidentiary hearing finding there had been at least one sexual encounter between therapist and patient before therapy was terminated. The board agreed and also found that because the complainant's husband was initially involved in the therapy sessions, Stein was guilty of gross negligence in the practice of psychology by engaging in sexual intimacies with the spouse of a client. Stein's license was suspended for a year.

The Court of Appeals of Wisconsin considered the case on appeal. This court agreed with the board that laches was not a defense since the case involved a proceeding brought by the state in its sovereign capacity to protect a public right. Then the court reviewed Stein's claim that the passage of time violated his rights to procedural due process, but again agreed with the board that prejudice must be shown and Stein failed to do so. Stein v. State Psychology Examiners, 668 N.W.2d 112 (Wis. App. 2003).

SANCTIONS IMPOSED FOR PROFESSIONAL MISCONDUCT

The General Rule . . .

The New York Supreme Court, Appellate Division held, in a 2002 decision involving a physician's license, that the decision to revoke his license was not unreasonable in light of a finding that the physician showed no remorse for his conduct. The court also said, that if he was allowed to return to practice, there was potential for repetitive conduct and possible danger to the public. The court ignored the fact that the physician was offering his service pro bono, saying residential facility patients were entitled to the same degree of care that any patient compensating a physician for his services should expect. In re Peress, 743 N. Y. S. 2d 577 (A. D. Dist.3 2002).

Penalties Overturned or Modified on Appeal . . .

The Idaho Supreme Court agreed with a physician that the state's Board of Professional Discipline erred in revoking his license in light of the evidence presented at the inquiry concerning his treatment of nine patients. However, the court acknowledged that there was substantial competent evidence supporting the board's conclusion that the physician failed to provide proper medical care with respect to two of those patients. Consequently, the court ordered the case remanded for a new determination by the board as to the appropriate sanction that should be imposed. Laurino v. Board of Prof. Discipline of Idaho State Bd. of Medicine, 51 P.3d 410 (Idaho 2002).

And the South Dakota Supreme Court in another 2002 decision, agreed with a trial court which reversed the medical licensing board's decision to revoke a physician's license. The case involved alleged false testimony in a malpractice case. This court noted that the defendant's attorney was allowed to use all of the information regarding a second opinion requirement to impeach the physician's credibility, which was appreciated by the jury, who found in favor of the defendant. However, this court said that merely because a jury failed to agree a hundred percent with the physician's interpretation did not equate to false testimony. In re Medical License of Setliff, 645 N.W.2d 601 (S. D. 2002).

APPEALS FROM DISCIPLINARY SANCTIONS

Scope of Review . . .

In a case decided in late 2001, the Alabama Supreme Court reversed the state's Court of Civil Appeals in a case involving the Alabama Board of Nursing (board). The case began when the nurse involved (Stejskal) was convicted of a felony and her license was subsequently revoked. Several years later she reapplied and was granted a license on probation, subject to certain terms and conditions. The following year allegations arose that the nurse had violated several terms of her probation. The case was heard before a hearing officer who recommended that Stejskal be reprimanded and her probation extended by a year. The board, however, rejected the hearing officer's recommendations and revoked Stejskal's license.

An appeal was taken to a circuit court which reversed the board's decision saying the decision to revoke Stejskal's license was not supported by the evidence. The Alabama Court of Civil Appeals affirmed the trial court's order.

The Alabama Supreme Court granted certiorari and reversed the lower courts decisions. The state's highest court held that pursuant to § 34-21-25, Ala. Code (1975), the board, not the hearing officer had the authority to revoke or suspend any license issued by it upon proof of unprofessional conduct. And, this court held, the record revealed sufficient evidence to support the board's decision. Ex parte Alabama Board of Nursing, 835 So. 2d 1010 (Ala. 2001).

The Court of Appeals of New Mexico issued an important decision in early 2003 involving the revocation of a psychologist's (Land) license. The case involved charges of sexual intimacies

between a psychologist and patient, later a former patient. Land was originally charged with sexual misconduct with both a current and former patient. Prior to the beginning of the evidentiary hearing Land stipulated to having been sexually involved with a former patient (in 1994) and the charge involving sexual intimacies with a current patient were dropped.

On appeal, Land's attorney raised for the first time whether APA Code Section 4.07 which she had stipulated that she violated, was in effect in 1994. The trial court allowed her to do so, found the section was not applicable in 1994 and reversed. The appellate court viewed the legal issue differently.

That court, after a lengthy review of the record, held the issue was not raised prior to the appeal to the trial court and could not therefore be considered for the first time on appeal. Consequently, this court said that in entertaining the issue on appeal which was not raised below, the trial court "exceeded the limited review that characterizes an administrative appeal."

Land also asserted that even if the issue was not raised before the board, "fundamental error" occurred allowing her to raise the issue on appeal for the first time. The appellate court rejected that argument noting Land never denied the relationship with the patient and thereby violated several established board rules independently of the APA Code. And the court noted that Land was formally charged with violating those rules and those charges were not dismissed when the "current patient" charge was dismissed. Finally, the appellate court admonished the trial court for failing to defer to the board's construction of its own rules. New Mexico State Bd. of Psychologist Examiners v. Land, 62 P.3d 1244 (N.M. App. 2003).

REINSTATEMENT OF A LICENSE

Burden of Proof . . .

In a 2001 decision, the Supreme Court of Kentucky set out its standard for reinstatement of licenses to attorneys previously disbarred. One of the issues addressed in the opinion concerns the burden of proof relative to reinstatement petitions.

This court made it absolutely clear that any such petition has the burden of proving by "clear and convincing" evidence that he/she possesses the requisite character, fitness and moral qualifications for re-admission to the practice of law.

The court also said that such applicants are to be held to a substantially more rigorous standard than a first time applicant and that the proof presented must be sufficient to overcome the prior adverse judgment. The judgment of disbarment continues to be evidence against the applicant and he/she may overcome it with the most persuasive proof.

In this particular case the matter of the reinstatement petition was first addressed by the Character and Fitness Committee of the Kentucky Bar Association (Committee). After a lengthy hearing involving many witnesses and exhibits, the committee recommended the reinstatement

of the attorney's license. The matter was then referred to the Board of Governors of the Kentucky Bar Association (Board).

Despite the fact that bar counsel presented no proof to rebut the evidence presented at the hearing before the Committee, the Board drew diametrically opposite conclusions from the same testimony. The Board on a vote of sixteen to zero rejected the Committee's recommendation. The Board, in its communication with the Supreme Court denied the petitioner had met the requisite burden of proof and recommended to the court that the application for reinstatement be denied. However, the court noted that the Board failed to give a reasoned and rational explanation for its rejections of the Committee's recommendation. Consequently, the court determined that the petitioner had met the burden of proof and granted the reinstatement petition. Hubbard v. Kentucky Bar Association, 66 S. W. 3d (Ky. 2001).

Americans with Disability Act . . .

While the following case is not a professional regulatory case, it could have implications outside employment law. The case is another Ninth Circuit U. S. Court of Appeals decision. The plaintiff resigned from his job in 1992 when he tested positive for cocaine. In 1994, he reapplied for employment and was denied for prior drug use and lack of evidence indicating successful drug rehabilitation.

A district court agreed with the employer, but the Ninth Circuit reversed. That court said "a policy that serves to bar the re-employment of a drug addict, despite his successful rehabilitation, violates the Americans with Disabilities Act." Hernandez v. Hughes Missile Systems, Co., 298 F.3d 1030 (9th Cir. 2002). The U. S. Supreme Court has granted certiorari. Raytheon v. Hernandez, No. 02-749.

FOREIGN GRADUATE ISSUES

Educational/Experience/Examination Requirements . . .

Johnson, a Caribbean medical school graduate, applied for an license to practice medicine with the Colorado State Board of Medical Examiners (board). The board denied her application on the grounds that Johnson had not graduated from a medical school approved pursuant to the state Medical Practice Act and that her education and training was not equivalent. The state Medical Practice Act required licensees to be graduates from an approved medical school or have an equivalent education and training as determined by the board. Johnson had received her medical degree from the American University of the Caribbean, but she received her medical training at other locations. She completed her first two years of coursework at the University of Missouri at Columbia and completed subsequent clinical rotations in the United States in programs approved by the Accreditation Council of Graduate Medical Education (ACGME). She also received more than three years of postgraduate training and board certification in anesthesiology. Johnson requested a hearing on the denial and thereafter, the Administrative Law Judge (ALJ) found that Johnson was essentially a United States trained professional and, thus, concluded that the board had abused its discretion. The board then sought review and the ALJ's conclusions were rejected.

Johnson then appealed that decision, contending that the board arbitrarily and capriciously denied her application. The appellate court disagreed, finding that the only real issue was whether her education and training had provided her the qualifications equivalent to those provided by a degree from an approved school as provided in the state Medical Practice Act. The court found that the board had not erred in denying Johnson's application after the board determined that she had not graduated from an approved medical school and that the board's conclusion that her education was not equivalent to the training received from an approved school was supported by sufficient evidence. State Board, Med. Exam. v Johnson, 68 P.3d 500 (Colo. App. 2002).

UNAUTHORIZED PRACTICE OF A PROFESSION

Criminal Charges . . .

A defendant was found guilty of the unlicensed practice of psychology. The facts show that although the defendant was not a licensed psychologist, he held 13 alleged therapy sessions with a client. At the first session, the defendant told the client that he was a clinical psychologist. The client eventually concluded that the sessions were not helping him and stopped meeting with the defendant. The client sent a letter regarding the defendant to the Illinois Department of Professional Regulation (department). The department responded that the defendant was not a licensed psychologist. The client confronted the defendant regarding the department's response and the defendant informed the client once again that he was a clinical psychologist. The defendant was ultimately charged with the unlicensed practice of psychology. At trial, the state only presented the testimony of the client regarding the defendant's misrepresentations and an official certification to establish the defendant was not a licensed psychologist. The trial court found the defendant guilty and, thereafter, the defendant appealed.

On appeal, the defendant argued that the state failed to meet its burden of proof because it did not present expert testimony to prove that his actions during the sessions were the unlicensed practice of psychology. The appellate court found that, under the applicable statute, a person is guilty of the unlicensed practice of psychology if that person holds himself out to the public as a psychologist when in fact he is not. It was undisputed that the defendant had represented that he was a psychologist, when in fact he was not. Thus, the court found expert testimony was not needed and affirmed the trial court's conviction. People v. Clayton, 203 Ill. App. 3d 220 (1998).

Suits for Injunctive Relief. . .

As more and more cases are brought against individuals or business entities for the unauthorized practice of a profession, we can expect more litigation over the issue of standing to bring such lawsuits. A classic "standing" decision was issued by the Appellate Court of Illinois in 2002.

The suit was brought against a company called Myinjuryclaim.com by a personal injury law firm in Illinois. The defendant allegedly gave would be plaintiffs advice over an internet web site for

a fee. In fact, the company allegedly offered to evaluate claims and settlement offers and provide personalized demand letters.

A circuit court dismissed the unauthorized practice of law claim for lack of standing and the plaintiff law firm appealed. The appellate court noted that the sole issue on appeal was the matter of standing and it discusses the doctrine of standing at length. The court identified other cases in which lawyers, and some health care professionals, had been allowed to file suits against individuals or entities allegedly practicing their professions unlawfully. The court pointed out that licensed professionals have property interests in their licenses that can be infringed upon if unlicensed individuals or entities can perform services the general public is not allowed to perform. The court reversed the lower court saying that because the practice of law by an unlicensed entity constitutes an infringement upon the rights of those who are properly licensed, attorneys and law firms have standing to bring a cause of action for such unauthorized practice. The court also dismissed the defendant's suggestion that only bar associations may bring such actions saying such an assertion was unsupported by any cited legal authority. Mallen v. Myinjuryclaim.com Corporation, 769 N.E.2d 74 (Ill.App. 2002).

AMERICANS WITH DISABILITIES ACT AND PROFESSIONAL REGULATION

Requests for Accommodations Under the ADA . . .

Hason, a medical doctor, applied for a license to practice medicine in the state of California. The California Medical Board (board) denied his application for a license due to mental illness. Thereafter, Hason sued the medical board and various members of the board, in both their official and personal capacities, alleging violations of his rights under the U. S. Constitution and the Americans with Disabilities Act (ADA). The federal district court dismissed his complaint, finding that his claims were barred by the 11th Amendment and that Hason failed to state a claim upon which relief could be granted under the ADA. The claims against the board members in their individual capacity were dismissed for failure to timely serve them. Hason appealed to the 9th Circuit Court of Appeals.

On appellate review, that court held that the 11th Amendment prohibits a private party from suing a non-consenting state or its agencies in federal court, but that the 11th Amendment does not prevent a private litigant from suing a state or its agencies in federal court where Congress has abrogated state sovereign immunity. The court further stated that previous opinions have held that in enacting Title II of the ADA, Congress validly abrogated state sovereign immunity, and thus states and their agencies may be sued pursuant to Title II.

The defendants argued that under the U. S. Supreme Court case, Bd. of Trustees of Univ. of Alabama v. Garrett, 531 U. S. 356 (2001), it was decided that Congress did not validly abrogate state sovereign immunity in enacting Title I of the ADA. Finding that Garrett did not address Title II claims, the court concluded that Garrett was not binding and that the 11th Amendment did not bar Hason's Title II claims. The court also found that the lower court erred in finding that Hason's federal civil rights claims against the various individual state officials were barred by the 11th Amendment. The court stated that the 11th Amendment does not bar suits for prospective

injunctive relief brought against state officers “in their official capacities, to enjoin an alleged ongoing violation of federal law.” Hason’s complaint sought to enjoin the individual defendants’ refusal to issue him a medical license. Therefore, the court found that his claims seeking such prospective injunctive relief were not barred.

As to Hason’s ADA claims, under the ADA “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” On review, the appellate court found that medical licensing was a service of the licensing board and that “medical licensing is without a doubt something that the medical board does.” Therefore, the court concluded that medical licensing fell within the scope of Title II. The court also determined that Hason was a “qualified individual with a disability as required under the ADA. “‘Qualified individual with a disability’ means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” Hason admitted he suffered a mental illness, but alleged that at the time of the board’s rejection, he had received treatment and was capable of practicing medicine. Accepting these allegations as true, the court found that Hason was a qualified individual with a disability and reversed the lower court decision and remanded the case for further consideration. Hason v. Medical Board of California, 294 F.3d 1166 (9th Cir. 2002).

The ADA as a Defense to Disciplinary Actions . . .

The Colorado Court of Appeals rendered a difficult decision in 2002 involving the Americans with Disabilities Act (ADA) as a defense to disciplinary charges brought against a physician (Ogin) by the Colorado State Board of Medical Examiners (board). Ogin admittedly suffered from idiopathic central nervous system hypersomnia, which caused him to become drowsy and fall asleep in environments of low stimulation. At the disciplinary hearing there was sufficient evidence to prove that Ogin fell asleep while administering anesthesia to patients during surgery and accidentally caused three pneumothoraces while administering interventional pain management (IPM).

An administrative law judge (ALJ) ruled that despite a recognized disability, Ogin was subject to disciplinary sanctions. The ALJ did recommend that Ogin be allowed to continue practicing IPM, but the board disagreed and decided that license revocation was warranted. The board acknowledged the disability but chose revocation because it found that the physician posed a significant risk to his patients’ safety because of his disability and that no reasonable accommodation could be made that would permit him to practice medicine safely. And the reviewing appellate court found the board’s conclusion on the matter of reasonable accommodations had a reasonable basis in law and was supported by substantial evidence in the record.

As to Ogin’s ADA claim, this appellate court said that no otherwise qualified individual with a disability shall, because of a disability be subjected to discrimination. However, the court said while there exists a duty to provide reasonable accommodations, that duty does not require a

public entity to fundamentally alter the nature of the service it provides and does not prevent professional licensing agencies from imposing discipline if the offender is not a qualified individual with a disability.

Likewise, this court said, the ADA does not protect an individual with a disability who by virtue of the disability, is a direct threat to public safety. A person who poses a direct threat to public safety is not a qualified individual with a disability if reasonable modifications to the public entities policies, practices or procedures will not eliminate the risk. The court then affirmed the sanctions as consistent with substantive procedural requirements and dismissed the appeal. Colorado State Board of Medical Examiners v. Ogin, 56 P.3d 1233 (Colo. App. 2002).

CRIMINAL ACTIVITIES

The defendant therapist was treating a patient and her husband for alcoholism. The patient also suffered from depression and an eating disorder. The patient and her husband jointly saw the therapist together for a short period and then began seeing him separately, with the patient seeing the therapist several times a week at evening appointments. During the last four to five years of therapy, the patient met the therapist in various hotels to have sex with him. The evidence showed that the therapist had wanted her to meet with him at these hotels because he wanted to teach her how to have sex with men, because he believed that the "failures" in her life stemmed from the fact that she "wasn't doing the right things for men to make them happy." She also testified that once the therapist gained her trust, he began to control her. The victim denied that she had any romantic feelings toward the therapist while in therapy with him, but stated that she believed that the defendant had romantic feelings toward her.

The patient reported the therapist's conduct to the state police and a licensing agency. As a result of the reports, the therapist was charged and convicted by a jury of two counts of sexual intercourse under the pretext of medical treatment, and two counts of second-degree criminal sexual conduct. He was sentenced to concurrent terms of two to fifteen years imprisonment for the convictions.

On appeal, the appellate court affirmed the therapist's convictions of second-degree criminal sexual conduct, finding that the coercion element was satisfied because the therapist had engaged in sexual contact with the patient through the use of an unethical or unacceptable manner of treatment. The court reversed his convictions of sexual intercourse under the pretext of medical treatment on procedural grounds. People v. Alter, 659 N.W. 2d 667 (Mich. App. 2003).