

Legal Issues Update

ASPPB Midwinter Meeting

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AUTHORITY TO REGULATE ADMISSION TO PRACTICE

Scope of Regulation . . .

The Court of Appeal of Oregon has ruled, in a 2001 opinion, that the state's Board of Dentistry lacked the authority to render a declaratory ruling that its proposed administrative rules on dentures did not conflict with the Oregon dentist statutes. This court noted that the board concluded that "dentures" meant prosthetic dental appliances that replaced all of teeth in either the upper or lower jaw of a patient and that rested solely on soft tissue. The dentist association contended that that construction was erroneously constrictive and that the statutory term encompassed all prosthetic appliances that replaced all of the upper or lower teeth regardless of whether the appliance rested on soft tissue. *Oregon State Denturist Ass'n v. Board of Dentistry*, 19 P.3d 986 (Ore. App. 2001).

In a decision rendered in 2001, the California Court of Appeals held that the state's Medical Board, did not have the statutory authority to impose a \$5,000 penalty in an administrative proceeding against a medical group's administrator for failing to file a report regarding the suspension and termination of a physician in the group. This court said the statute establishing that penalties could be imposed against administrators of health care entities for failing to file reports could be imposed only by the state's Attorney General. *Gilliland v. Medical Bd. of California*, 106 Cal. Rptr. 2d 863 (Cal. App. 2001).

In a previously unreported 2000 opinion, the Supreme Court of Georgia reviewed the propriety of submitting to a jury in a civil action, the authority to decide whether a particular physician's assistant (PA) has the requisite skill level and training to perform a task not specifically approved by the State Board of Medical Examiners (board). This court held that it is a matter strictly for the board to determine the nature and scope of the medical tasks for which any PA may be qualified to perform. The court said that given the comprehensive statutory scheme created by the Georgia General Assembly and the all-inclusive role played by the Composite State Board of Medical Examiners in the regulation of PAs, it would be contrary to the purposes and intent of the statute to allow any other entity other than the board to determine whether it is appropriate for a PA to perform any specific type of procedure, whether or not the procedure is contained within the PA's job description. *Cardio TVP Surgical Associates, P. C. v. Gillis*, 528 S. E. 2d 785 (Ga. 2000).

RULES AND REGULATIONS

Ultra Vires . . .

The Tennessee Court of Appeals, in 2001, was called upon to settle a turf battle between physicians and dentists in that state. This court held, that the Tennessee Board of Dentistry improperly expanded the practice of dentistry beyond what the legislature had intended, and its decision was not supported by substantial and material evidence when it issued a declaratory order that dentists had the right to perform various cosmetic procedures involving the face and neck such as face lifts and nose jobs. Further, this court said the definition of dentistry contained in Tennessee Code Annotated Section 63-5-108 (a)(1) did not blanketly authorize a dentist, even a oral and maxillofacial surgeon, to perform such procedures. The court did not hold that an oral and maxillofacial surgeon could never perform any aspect of such cosmetic procedures, nor did it address the parameters under which such procedures could be performed. The court held only that the broad authorization contained in its declaratory order was contrary to Tennessee Code Annotated Section 63-5-108 (a)(1). *Tennessee Medical Association v. Tennessee Bd. of Dentistry*, No. M1999-02279-COA-R3-CV.

The California Supreme Court has upheld a California regulation that requires chiropractors disciplined for professional misconduct to pay for the costs of investigation and prosecution. In reversing the California Court of Appeal, the state's highest court said the regulation did not unconstitutionally violate due process rights. The court rejected a chiropractor's claim that the rule violated his, and other chiropractors due process rights, by discouraging chiropractors from exercising their right to a hearing to contest allegations of misconduct. *Zuckerman v. Board of Chiropractic Examiners*, Cal. No. S096127, 8/26/02.

Proper Promulgation . . .

A Florida District Court of Appeals has held that the state's Board of Podiatric Medicine had the authority to promulgate a rule defining the terms "human leg" and "surgical treatment" as they related to the practice of podiatry. The court said the definition did not enlarge, modify, or contravene statute, and was neither arbitrary or capricious, and was fully supported by competent substantial evidence so as to be a proper exercise of the Board's delegated legislative authority. *Board of Podiatric Medicine v. Florida Med. Ass'n*, 779 So. 2d 658 (Fla. App. 1 Dist. 2001).

APPLICATION AND INITIAL GRANT OF LICENSE

Character and Fitness . . .

In a 2001 opinion, the Supreme Court of Iowa affirmed a decision by the state's Board of Law Examiners (board) to deny an applicant for a law license due to his lack of good moral character. The court duly noted that the applicant had been denied the right to sit for the bar examination in Nebraska. Further, that the Nebraska bar's denial of his application had to do with the applicant's arrest and subsequent conviction for shoplifting. Although the individual pleaded no contest to that charge, he sued the store that had him arrested, and due to spurious litigation the case lasted

almost eight years. The applicant was also arrested for not having proper license plates on his car, giving rise to what the court termed “protracted and vexatious litigation,” spanning a period of six years. *In the Matter of Hanus*, 627 N.W.2d 223 (Iowa 2001).

Effect of a Pardon on Character and Fitness . . .

Gordon was a licensed registered nurse in Louisiana. He was arrested for illegal distribution of narcotics. He pled guilty and received a suspended sentence with probation. Because of his conviction, the State Board of Nursing revoked his license. Gordon later completed his parole and received an automatic first offender pardon. The board ultimately reinstated his license. Gordon was subsequently granted a full pardon by the Governor. Thereafter, Gordon furthered his education and applied for an advanced practice registered nurse license. During the application process, the board reviewed the National Council of State Boards of Nursing Disciplinary Database, and was apprised of the prior disciplinary action based on the criminal conviction. Based upon this information, the board denied Gordon’s request for licensure.

Gordon appealed the board’s refusal and it was ultimately reversed by a district court. The board then appealed to the Louisiana Court of Appeals. The principal issue on appellate review was whether the board could consider Gordon’s criminal conviction and the underlying facts supporting the conviction in the board’s decision to grant or deny his request for licensure. To answer the question, the court explained the difference between an automatic pardon and a pardon by the Governor. The court provided that with a complete gubernatorial pardon, the individual is restored all privileges, rights and innocence. However, with an automatic pardon, innocence is not restored. Ultimately, the court found that the board could not consider the prior pardoned conviction because the individual was restored to innocence by the Governor. *Gordon v. Louisiana State Board of Nursing*, 804 So.2d 34 (La. App. 2001).

DISCIPLINARY ACTIONS INVOLVING LICENSED PROFESSIONALS

Jurisdiction . . .

An attorney (Hawkins) was licensed to practice law in Texas and at one time, had been licensed to practice in North Dakota. Hawkins, however, did not maintain his North Dakota license.

In Texas, a court appointed Hawkins to represent a criminal defendant. Hawkins filed a motion to be excused as counsel, contending he was not competent to practice criminal law. The district court found Hawkins competent and ordered him to continue as counsel. However, Hawkins informed the defendant that he was no longer his attorney. Subsequently, Hawkins and the criminal defendant failed to appear for the trial. A warrant was issued for the defendant’s arrest and a proceeding was initiated to forfeit his bond. The trial court ultimately appointed a new counsel for the defendant.

Thereafter, the Texas Commission for Lawyer Discipline suspended Hawkins from the practice of law for four years, with one year of active suspension and three years of probated suspension. Based upon this discipline, the North Dakota Disciplinary Board, imposed reciprocal discipline. Hawkins appealed, arguing that the court lacked jurisdiction to discipline him because he was not licensed to practice law in North Dakota. The court provided that any attorney admitted to practice in North Dakota was subject to the court's disciplinary jurisdiction and because Hawkins had been admitted to the North Dakota Bar at one time, it had jurisdiction in this case. The court also provided that a final determination in another state that a lawyer has been guilty of misconduct establishes conclusively the misconduct for purposes of a disciplinary sanction in North Dakota. *In the Matter of Hawkins*, 623 N.W.2d 431 (N.D. 2001).

Mulford, an attorney licensed in Iowa and Florida, was indicted on various conspiracy and tax-fraud charges, alleging that he, and several other defendants, were engaged in schemes to promote and sell false and fraudulent tax deductions. A warrant for his arrest was issued. However, at that time, Mulford was living in the Cayman Islands and did not return to the United States for the next ten years. Upon his return to the United States, he surrendered to authorities and entered into a plea agreement, in which, Mulford agreed to plead guilty to criminal contempt for willfully, knowingly and unlawfully, resisting the arrest warrant. Mulford admitted that he was aware of the arrest warrant when it was issued, but claimed he did not return to the United States because he did not feel it was safe and alleged threats from his co-defendants. Mulford was sentenced and served 6 months in prison.

Upon his leaving the country, Mulford had transferred his Florida and Iowa licenses to inactive status. After he completed his sentence, he requested that his Iowa license be returned to active status. The Iowa Bar granted that request. In his request, Mulford did not inform the Iowa Bar of his criminal record. After receiving an active license, Mulford practiced in Iowa, was active with the Bar and even served as counsel for the Iowa legislature.

Through an anonymous source, the Bar received a copy of Mulford's criminal contempt citation. Thereafter, a complaint was filed against Mulford by the Bar's board of ethics. A hearing was held and the board found that a public reprimand should be issued. The state supreme court has automatic review of such decisions.

Upon appellate review, Mulford argued that the Bar had no authority to prosecute him for a violation of the disciplinary rules because he was not acting as an attorney nor was his Iowa license active during the period of time he had disobeyed the arrest warrant. The court found this argument to be without merit. The court provided that authority to discipline a lawyer admitted to practice in that state was not suspended merely because the attorney did not hold an active license. Mulford also argued that because his Iowa license was restored to active status the Bar was estopped from bringing the disciplinary action. However, the court dismissed this argument on the basis that Mulford had not informed the bar of his conviction. Although the court agreed that Mulford should be disciplined, it did not agree with the recommended reprimand. The court found that Mulford had willfully absented himself from the country, that his testimony to the Bar had been evasive and untruthful and that he had insulted the court by arguing that as legislative

counsel, he had worked on the judicial branch budget and had been instrumental in obtaining funds for the court. The court ultimately found that his actions warranted a sanction more severe than a public reprimand and suspended his license indefinitely with no possibility of reinstatement for one year. *Iowa SC Board of Prof. Eth. Cond. v. Mulford*, 625 N.W. 2d 672 (Iowa 2001).

Inadequate Notice . . .

In a 2001 opinion, the Ohio Court of Appeals held that the vagueness and ambiguity of the notice to a chiropractor of disciplinary charges against him precluded him from exercising his due process right to request a hearing. The court said the purpose of Ohio R.C. 119.07 was to ensure that an individual's due process rights were protected. Consequently, the Ohio Chiropractic Board's notice was required to accurately state exactly what the individual was required to do to request a hearing; and because the notice did not specifically state that a request for a hearing was to be received within 30 days, the notice was ineffective and failed to provide a meaningful opportunity to be heard. *Chirila v. Ohio State Chiropractic Board*, 763 N. E. 2d 1192 (Ohio App. 2001).

The Right to a Hearing . . .

The Colorado Court of Appeals, in a 2001 decision, held that the Colorado State Board of Medical Examiners erred in denying an ophthalmologist's request for the initiation of formal proceedings. The court noted that the denial was based on an erroneous interpretation of Colorado Revised Statute Section 12-36-118 (4)(c)(III). That provision, this court said, required the letter of admonition sent to him to contain a notice that he had a right to request formal proceedings within twenty days of the receipt of the letter. Further, that if such a request is made in a timely manner, the letter of admonition shall be deemed vacated, and the matter shall be processed by means of a formal disciplinary proceeding. *Colorado State Bd. of Med. Exam'ers v. Roberts*, 49 P.3d 70 (Colo. App. 2001).

Form of the Hearing . . .

The New York Supreme Court, Appellate Division, reversed an adverse decision involving a New York physician. The court said that after the physician's license was revoked, there was merit to his contention that the Hearing Committee was improperly composed of three medical practitioners whose professions were subject to the disciplinary process provisions of Public Health Law Section 230 (b). By impaneling a committee of three physicians, the department violated the statute, in that, it required the Hearing Committee to "consist of two physicians and one lay member." *Mayer v. Novello*, 733 N.Y.S. 2d 305 (A.D. 3 Dept. 2001).

EVIDENTIARY MATTERS

Standard of Proof . . .

In a 2001 decision, the Wyoming Supreme Court reviewed a decision by that state's Board of Certified Public Accountants (board) to suspend a certified public accountant's (Dorr) license for one hundred days. The twelve page opinion compares the allegations against Dorr to the evidence presented by the board. Perhaps the most important aspect of the case is the court's repeated acknowledgment that the standard of proof for such cases in Wyoming is clear and convincing evidence. Additionally, the court says, "We have defined clear and convincing evidence to be the 'kind of proof' which would persuade a trier of fact that the truth of the contention is highly probable." *Dorr v. Wyoming Board of Certified Public Accountants*, 21 P. 3d 735 (Wyo. 2001).

Sufficiency of the Evidence . . .

A reviewing Missouri appellate court has held that there was no merit to the contention by a doctor of osteopathy that the Administrative Hearing Commission's decision to revoke his medical license involved an abuse of discretion because its findings were against the weight of evidence. The court said that argument was based solely on an assessment of the credibility of the witnesses. Further, that in assessing credibility, the Commission members were free to believe all, part, or none of the testimony of any witnesses. *Dorman v. State Bd. of Registration for the Healing Arts*, 62 S.W.3d 446 (Mo. App. 2001).

In a 2001 New York case, the state's Supreme Court, Appellate Division, reviewed the revocation of a physician's license due to several sexual relationships with patients. As regards the evidence, the court said the committee was confronted with the classic case of he said/she said and in that regard "conflicting evidence and issues of credibility are within the exclusive province of the committee. Further, this court noted that the committee had every opportunity to observe the demeanor of the respective witnesses and to evaluate any inconsistencies in the testimony presented. Finally, the court said that the record as a whole simply did not afford a basis upon which to disturb the committee's resolution of such credibility issues. *St. Lucia v. Novello*, 726 N.Y.S. 2d 488 (A. D. 3 Dept. 2001).

GROUNDS FOR DISCIPLINARY ACTIONS

Sexual Intimacies with Clients or Patients . . .

A social worker engaged in a sexual relationship with a client less than 90 days after the termination of the therapy sessions. The client became pregnant and the social worker and client married. Over six years later, during their divorce proceedings and child custody dispute, the

client filed a complaint with the social worker licensing board alleging that the social worker had violated the ethical principle that forbids a sexual relationship less than 90 days after the termination of therapy. The board revoked the social worker's license and fined him \$5,000. The social worker appealed to the circuit court, which reversed the board's decision, finding that the social worker's conduct had not caused the client actual harm.

The case was then appealed to the Michigan Court of Appeals, which reversed the circuit court, finding that proof of actual harm is irrelevant as to whether the social worker violated the law. The social worker presented several constitutional arguments, claiming his right to marry and procreate had been violated. However, the court provided that the social worker's license was not sanctioned because he married or because he had a child, but because he violated the law regarding sex with a client. The social worker also raised the issue of laches, which can bar a claim if after passage of time the enforcement of the claim would be inequitable. The court rejected this argument, finding that the board could not be penalized due to the client's failure to timely file her claim. The social worker then appealed to the Michigan Supreme Court, which reversed and remanded the case for a determination of whether the sanction was an abuse of the board's discretion. *Budde v. Michigan Dept. of Consumer & Ind. Service*, 643 N.W. 2d 573 (Mich. 2002).

DECISION MAKING IN CONTESTED CASES

Finding of Fact and Conclusions of Law . . .

Courts are generally fairly lenient with findings of fact and conclusions of law drafted by or for agencies in contested cases. Not so however in a 2001 case involving the Wyoming Board of Outfitters (board). After a four-day hearing in 1998, the board issued its findings of fact and conclusions of law. The Wyoming Supreme Court's opinion contains the findings verbatim as well as some conclusions. As regards the latter the court points out that the conclusions of law are virtually identical to the stated findings of fact.

To paraphrase the more important aspects of the lengthy discourse on the inadequacy of the findings and conclusions, the court says that Wyoming statutes require agencies to articulate basic facts from which ultimate findings of fact are determined in order to facilitate judicial review. Further, it is insufficient for an agency to state only ultimate facts, that each ultimate fact or conclusion must be thoroughly explained in order for a court to determine upon what basis each ultimate fact or conclusion was reached. The court then explains why several of the findings are insufficient to explain to the court why a conclusion was reached. In one example, the court noted that the board found the outfitter (Billings) violated a significant federal regulation by failing to properly dispose of a mule carcass, but did not identify how Billings failed to properly dispose of the carcass. In another instance, the court said the board found that Billings "breached his contracts with clients," but that this finding does not articulate which clients were affected, the terms of the contracts, or even which contracts were breached. A number of other issues were addressed on appeal after which the case was remanded to the district court with instructions to

enter a judgment vacating the order of the board and remanding the proceeding to the board for further proceedings consistent with the opinion. *Billings v. Wyoming Board of Outfitters*, 30 P. 3d 557 (Wyo. 2001).

SANCTIONS IMPOSED FOR PROFESSIONAL MISCONDUCT

The General Rule . . .

On an appeal involving a New York psychiatrist, the New York Supreme Court, Appellate Division held that the penalty of license revocation and an \$80,000 fine was not excessive nor an abuse of discretion. This court noted that the psychiatrist was found to have had repeated sexual contact with a patient and that courts had uniformly upheld license revocation as the proper penalty for such misconduct. The court, for similar reasons said the imposition of the maximum permissible fine was appropriate under the circumstances. However, the court also held that there had been an error in the calculation of the fine since the Hearing Committee's determination stated that the maximum fine was being imposed for each sustained charge and because only seven specifications were sustained, the amount of the fine would be reduced to \$70,000. *Singer v. Novello*, 733 N.Y.S. 2d 301 (A.D. 3 Dept. 2001).

APPEALS FROM DISCIPLINARY SANCTIONS

Scope of Review . . .

In a 2000 decision, the Idaho Supreme Court addressed the standard or scope of review on an appeal to that court from a decision by the state's Board of Medicine to sanction a physician's license. The court agreed that it should defer to the agency's findings of fact unless those findings are clearly erroneous. Further, that court may not substitute its judgment for that of the agency as to the weight of evidence presented in the record. Further, the court said the agency's findings must be affirmed unless the findings are not supported by substantial evidence on the record as a whole or the findings are arbitrary, capricious or an abuse of discretion.

However, the court then noted that where the agency's findings disagree with those of the hearing panel the court should scrutinize the agency's findings of fact more critically. The court then went on to say that while substantial and competent evidence supported the majority of the charges against the physician, there were five instances where the evidence in the record did not support the findings made by the board. Thereafter, the court remanded the case to the Board of Medicine to consider the proper sanction(s) to be imposed, excluding those findings by the board not supported by substantial competent evidence. *Paul v. Board of Prof. Discipline of Idaho State Bd. of Medicine*, 11 P. 3d 34 (Idaho 2000).

REINSTATEMENT OF A LICENSE

Effect of Reciprocal Sanction . . .

The Florida Supreme Court issued an interesting opinion in 2000 involving an attorney's reinstatement petition. The lawyer (Simring) was disbarred in 1993 due to multiple trust account violations and alleged contempt of the court's emergency suspension order. Based on his disbarment in Florida, he was subsequently disbarred in New York in 1994.

In early 1999, Simring sought application for reinstatement documents from the Florida Bar, but was advised that he was not eligible to apply for readmission in Florida until he was eligible for readmission in New York. Under New York rules a disbarred attorney may not apply for reinstatement until at least seven years from the date of disbarment, and in Simring's case 2001.

Simring filed a petition asking the Florida Supreme Court to amend or waive the rule in question (2-13.1) and to declare Rule 2-27, requiring a \$5000 application fee for disbarred attorneys, unconstitutional. The court noted that the New York disciplinary sanction was a reciprocal disbarment, based exclusively on the misconduct in Florida. The court then said it would be unfair to prevent Simring from applying for readmission in Florida simply because New York imposed a longer standard of disbarment period than that imposed in Florida. To do so it said would effectively result in a harsher discipline than that which resulted from the final disciplinary proceedings in Florida. The court, in effect, then waived the application of the rule as to Simring.

However, the court denied him relief on the claim that the \$5000 readmission fee was unconstitutional. The court acknowledged the ability to pay the fee has no direct bearing on one's actual fitness to practice law. At the same time, the court said the fee requirement is rationally related to another legitimate state interest, that being the state's interest in investigating and verifying the present character and fitness to practice law of a formerly disbarred attorney. Additionally, the court added, it was only fair that the disbarred attorney, rather than members of the bar in good standing, bear those costs. *Florida Board of Bar Examiners Re: Simring*, 802 So. 2d. 1111 (Fla. 2000).

COLLATERAL ATTACKS IN STATE AND FEDERAL COURTS

Governmental Immunity Under the 11th Amendment . . .

The U. S. Supreme Court has recently issued an important decision relative to states ability to defend cases based on the 11th Amendment. That Amendment bars suits against states unless the state consents to the suit.

The case at issue involved a university professor who sued a university alleging its officials placed allegations of sexual harassment in his personnel file. The defendant had the case removed from state court to federal court and moved to dismiss, arguing it was immune from suit in federal court under the 11th Amendment. The trial court denied the motion, finding the defendant waived its 11th Amendment immunity by removing the case to federal court. The Eleventh Circuit Court of Appeals reversed.

The U. S. Supreme Court heard the case and reversed the Circuit Court of Appeals. The Supreme Court said that it would be inconsistent for a state to invoke federal jurisdiction, thereby agreeing that the judicial power of the United States extends to a case, while at the same time claiming 11th Amendment immunity, which would deny that it extends to the same case. Further, the court agreed with the district court that a state's voluntary appearance in federal court amounted to a waiver of 11th Amendment immunity. *Lapides v. Board of Regents*, 122 S. Ct. 1640 (2002).

RESTRICTIONS ON ADVERTISING PROFESSIONAL SERVICES

Direct Mail Solicitation . . .

A group of attorneys, chiropractors, and a commercial newspaper, filed suit to challenge two Kentucky statutes, one restricting access to police accident reports and the other allowing the state custodian of nonexempt public documents to charge commercial users a reasonable fee for producing copies of the reports. The district court permanently enjoined the enforcement of both statutes, finding that they violated the plaintiffs' First Amendment right to freedom of expression. On appeal, the 6th Circuit Court of Appeals affirmed the district court's injunction regarding the statute restricting access to police accident reports, but vacated and remanded the decision regarding the statute allowing fees to be charged to commercial users for copies of the reports. The case was then appealed to the United States Supreme Court which vacated the 6th Circuit Court's decisions and remanded the case to that court.

On remand, the Circuit Court addressed whether the plaintiffs could bring a facial challenge to the statute that regulates access to police accident reports in Kentucky. In its review, the 6th Circuit Court explained that, if a facial challenge is upheld, then the state cannot enforce the statute against anyone. On the other hand, an "as-applied" challenge consists of a challenge to the statute's application only to the party before the court. If it is successful, the statute may not be applied to the challenger, but is otherwise enforceable. Relying on a recent United States Supreme Court opinion, the court found that the Kentucky statute restricting access to police accident reports was not subject to a facial challenge because it did not carry the threat of prosecution for violating the statute and it did not restrict expressive speech, but simply regulated access to the state's accident reports. The Circuit Court further reversed as to the other statute, finding that the lower court had made a procedural error and ordered that court to make findings of fact for appellate review. *Amelkin v. McClure*, 205 F.3d 293 (6th Cir. 2000).

Advertising a Specialty . . .

The Eleventh Circuit Court of Appeals has held, in a 2002 decision, that dental advertising restrictions that require Florida dentists to include disclaimers when advertising specialty areas or credentials that are not approved by the state do not violate the First Amendment. According to the appellate court's decision, the disclaimers required by Fla. Stat. § 466.0282 are no more burdensome than necessary to serve the state's substantial interests in maintaining uniform licensing standards and protecting the public from incompetent dentists and misleading advertising.

This court said that Florida dentists are not prohibited from advertising membership in credentialing organizations that are not approved by the state or specialization in an area not recognized by the state. Dentists in that jurisdiction can advertise both, provided they explain that the organization or specialty is not recognized by the state or the American Dental Association. The court noted that the statute involved was amended after an earlier version that totally banned advertising of non-state approved specialties was declared unconstitutional.

In reaching its decision, the court applied the four-part test of *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U. S. 557 (1980). Since the court found first, that the advertisements were not false or inherently misleading, it looked to and agreed that the state had articulated a valid, substantial interest in regulating dental advertisements, i. e. protecting its citizens from unqualified and incompetent healthcare professionals.

The court then noted scientific telephone surveys that the state used to demonstrate that the challenged regulation advances its interest in a direct and material way. It noted that in one survey 63.8 percent of the respondents believed that dentists who advertise as being "certified by a board in a particular area" have been directly or indirectly certified by the state. As to the issue of whether the restriction is narrowly tailored to the state's purposes, the court said the disclaimer, when compared to the previous outright prohibition, is "no more extensive than necessary to serve the state's interest and not especially long or burdensome, but simply an effective manner to convey necessary information to the public." *Borgner v. Brooks*, 11th Cir., No. 01-12098, 3/6/02.

UNAUTHORIZED PRACTICE OF A PROFESSION

Generally . . .

The Georgia Court of Appeal, in a 2001 decision, held that it was undisputed that no Composite State Board of Medical Examiners approved physician had supervised a physician's assistant in the treatment of a patient and his ordering of prescription drugs for the patient. Consequently, the

patient had shown that a health maintenance organization violated the Physician's Assistant Act. *Rockefeller v. Kaiser Foundation Health Plan of Georgia*, 554 S. E. 2d 623 (Ga. 2001).

A chiropractor was licensed in 1966, but let his license expire in 1993, and did not renew it. In 1997, the former chiropractor was operating a clinic as a doctor of "Developmental Alphabioticist." He treated a patient several times by having the patient lie on an inclined table while he placed his hands under her neck and turned her head from side to side. At her last treatment, the patient became very ill. The patient filed a complaint, as she believed he was a chiropractor and had told her he had been a chiropractor for 20 years. The Commission of Chiropractic Quality Assurance (Commission) ultimately, ordered him to cease and desist from all actions falling within the practice of chiropractic medicine and fined him \$30,000. The former chiropractor appealed.

On appellate review, the former chiropractor argued that the Commission did not have jurisdiction over him because his license had expired and that the freedom to practice his religion prevents the state from regulating his practice. The appellate court found that the Commission did have jurisdiction "over all licenses issued by the Commission and over all holders of and applicants for licenses" and "such jurisdiction is retained even if an applicant requests to withdraw the application, or a licensee surrenders or fails to renew a license." To support his freedom of religion argument, the former chiropractor testified that during his treatment of the patient, he was performing the alphabiotic alignment process, and not a chiropractic adjustment. He also testified that the alphabiotic alignment process is a sacrament of the Alphabiotic Church. The court affirmed the Commission's findings that the treatment was a chiropractic procedure, that he practiced chiropractic medicine without a license, that he misled the patient into believing he was licensed, and that his treatment of the patient was severely negligent. *Brown v. State*, 110 Wn. App. 778 (2002).

Criminal Charges . . .

The California Court of Appeal has held that a physician conducted the unlawful practice of medicine in the state when he met with a patient suffering from apotemnophilia, the desire to have a limb amputated, and thereafter agreed to amputate his leg. The court said that as a part of that practice, he made preparations in California for the amputation of the leg even though the physician and patient went from California to Mexico to perform the procedure. Further, this court said that following the amputation, the physician brought the patient back to California and provided postoperative treatment. Moreover, the patient died in California, at least nominally in the physician's care. Further, the physician had the state of mind required for conviction of implied malice murder and had carried out in the state non de minimus acts of preparation and direct involvement in, a legitimate basis to prosecute him for murder. *People v. Brown*, 190 Cal. Rptr. 879 (Cal. App. 2001).

AMERICANS WITH DISABILITIES ACT AND PROFESSIONAL REGULATION

Requests for Accommodations Under the ADA . . .

The 6th Circuit Court of Appeals issued an important decision in 2000 regarding test takers rights under the Americans with Disabilities Act (ADA). The case arose when a medical student (Gonzales) sued the National Board of Medical Examiners (NBME) after the entity refused his request for accommodations in taking the United States Medical Licensing Exam (USMLE). He sought an injunction against the NBME, but the requested relief was denied by the federal district court judge who, after a four-day evidentiary decision, held he was not disabled.

The appellate court noted that the only issue in the case was whether Gonzales was disabled under the ADA. The court said that under the statute an individual is disabled if that individual suffers from “a physical or mental impairment that substantially limits one or more major life activities of such individual.” 42 U. S. C. A. § 12102 (2) (A).

The court’s opinion reviews the expert testimony presented by psychologists both for the plaintiff and the NBME. Eventually, the court held that there was ample evidence in the record to support the district court’s conclusion that Gonzales did not have a reading disability for purposes of the ADA. The court also affirmed those parts of the lower court’s opinion that the plaintiff did not have a writing disability, nor was he disabled in the major life activity of working. *Gonzales v. National Board of Medical Examiners*, 225 F. 3d 620 (6th Cir. 2000).