

# **Legal Issues Update**

## **ASPPB Midwinter Meeting**

### **February 21-23, 2002**

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#### **AUTHORITY TO REGULATE ADMISSION TO PRACTICE**

##### **Constitutional Challenges . . .**

The U. S. Court of Appeals for the Ninth Circuit, in a 2000 decision, considered a challenge to California's mental health laws brought by psychoanalysts. The court held that California's licensing scheme for psychoanalysts was rationally related to the state's interest in protecting the mental health and safety of its citizens. The court noted that the adverse effects of incompetent psychotherapy could include sexual activity between client and therapist, deteriorating mental health, family, job and other relationships of patients and even suicide. The court held that regulating psychology, and through it, psychoanalysis, was rational because it was within the state's police power to regulate mental health treatment. The court specifically held that the licensing scheme did not violate the plaintiffs' rights under the First and Fourteenth Amendments to the U. S. Constitution. National Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology, 228 F. 3d 1043 (9th Cir. 2000).

#### **RULES AND REGULATIONS**

##### **Privacy Issues . . .**

The Florida Court of Appeals has struck down a Florida rule barring sexual conduct between psychologists and clients "in perpetuity," finding the rule violates the state constitutional guarantee of privacy. The court also held that the rule was overly broad, and was not the least intrusive way for the state to protect the mental health of its citizens.

The court's decision reversed a final order of the Florida Board of Psychology suspending a psychologist's license for a year, giving him probation for sexual misconduct after he engaged in a six-year relationship with a former client that began almost one year after a brief professional relationship between the two had ended. The former client had taken her child to the psychologist for a forensic assessment during a child custody dispute and the professional contact lasted about one month.

Approximately nine months later, the former client contacted the psychologist about some courses she was considering taking, a social relationship began and approximately three months later the sexual relationship started. The couple were involved and even lived together for a portion of the next six years. After they broke-up, the former client filed a complaint with the state's Board of Psychology

On appeal, the court agreed with the psychologist that the state did not use the least intrusive means to protect its compelling interest, and said that a rule that looks to the individual facts of a case “is less-intrusive than a rule that has an irrebuttable presumption of guilt.” The court then held that since it failed the least-intrusive test, and was on its face over-broad, the rule violated Florida’s Privacy Amendment to the state constitution. The court struck the perpetuity clause from the rule, remanded the case to the board with instructions to rescind the sanctions imposed on the psychologist’s license and to remit a \$3,000 assessment against him. Caddy v. Florida Department of Health, 764 So. 2d 625 (Fla. App. 1 Dist 2000).

## **EXAMINING THE CANDIDATES**

### **Invalidating Exam Scores . . .**

In a 2000 decision, the Court of Appeals of Mississippi reviewed a trial court’s decision to reverse the state’s Board of Examiners for Social Workers and Marriage and Family Therapists after the board invalidated the scores of 23 candidates that took the social worker licensure examination in February 1995. The appellate court agreed that the record failed to contain probative evidence that any candidate had obtained a copy of the exam prior to taking it, or had cheated in any way.

The decision of the board was based solely on the testimony of one witness, the Director of the Bureau of Licensure of the Mississippi State Health Department. However, the court noted that her testimony was based only on a telephone call from another administrator without first hand knowledge of the matters in issue, and correspondence from the Association that controlled the exam. The candidates’ attorneys had objected strenuously to the hearsay evidence.

In its opinion, the appellate court agreed with the trial court that a decision based on such unreliable evidence was arbitrary and capricious. The court also found that the board wrongfully denied the candidates their passing scores on the exam and agreed that the trial court’s order reinstating their licenses was the only appropriate remedy. Mississippi St. Bd. of Exm’rs v. Anderson, 757 So. 2d 1079 (Miss. App. 2000).

## **DISCIPLINARY ACTIONS INVOLVING LICENSED PROFESSIONALS**

### **Notice . . .**

The Oregon Court of Appeals, in a 2001 decision, held that in an action taken against a psychologist who had examined a child of divorced parents, the notice of the proposed disciplinary action by the Board of Psychologist Examiners failed to comply with applicable Oregon statutes. The notice, the court said, was defective because it did not allege that the psychologist had violated Principle 4.02, which governed “informed consent” to therapy and provided, in the case of a person legally incapable of giving consent, that the psychologist should obtain consent from a “legally authorized person, if such substitute consent is permissible by law.” Instead, the appellate court wrote, the notice alleged the psychologist had violated six other

ethical principles. In short, the court held the psychologist was on notice that the mother of the child alleged the psychologist had failed to obtain her consent to the evaluation, but that allegation did not inform him, that the mother's allegations, if proven true, would constitute a violation of Principle 4.02. Villanueva v. Board of Psychologist Examiners, 27 P. 3d 1100 (Ore. App. 2001).

## **EVIDENTIARY MATTERS**

### **Necessity for Expert Testimony . . .**

The Supreme Court of Pennsylvania reviewed a case in 2000 involving the issue of expert testimony relative to psychological evaluations. The first issue addressed by the court was whether the state's Psychology Board could substitute its own independent judgment for that of the expert witnesses that testified at the hearing. The Supreme Court found that the Commonwealth Court had erred when it determined that the Psychology Board had ignored or discounted the experts' testimony. It said the board went one step further and reviewed not only the reports at issue but the intake and tests underlying their basis.

The court noted that Pennsylvania courts have long recognized that administrative boards, comprised of members of the profession they oversee, may base their decisions on the collective expertise of those members. Finally, this court held that there was every indication that the Psychology Board filtered the existing expert testimony and ample documentary evidence through the lens of its own collective expertise, which, under the circumstances, was the proper and fair way to proceed. Batoff v. State Board of Psychology, 750 A.2d 835 (Pa. 2000).

### **Sufficiency of the Evidence . . .**

The New York Supreme Court, Appellate Division, in 2000 held that there was sufficient evidence to support a determination by the state board that a psychiatrist's physician-patient relationship was not terminated at the time of his sexual relationship with his patient. Moreover, this court said the state board did not err in crediting the testimony of the patient and her daughter. Further, that it had long been a rule of evidence that issues of credibility, even as to witnesses with psychiatric illnesses, were exclusively for the fact finders. Goldberg v. De Buono, 711 N.Y.S. 2d 81 (A.D. 3 Dept. 2000).

## **DECISION MAKING IN CONTESTED CASES**

### **Finding of Fact and Conclusions of Law . . .**

In an interesting 1999 case, the District Court of Appeal of Florida considered a case in which a graduate of a psychology doctoral program at a non-accredited school, appealed a final order denying her application to the state's Board of Psychology for licensure by examination and provisional licensure. Since the applicant's degree was from a non-accredited school a non-evidentiary hearing was held. At the outset

of the hearing, the board specifically advised the applicant, who was appearing without counsel, that if any material issues of fact arose during the course of the proceedings, the hearing would have to be terminated and referred to a hearing officer at the Department of Administrative Hearings (DOAH).

At the conclusion of the non-evidentiary hearing, the board issued a final order denying the application. On appeal, the court said the issue at the aforementioned hearing was whether the doctoral degree received by the applicant was comparable to a doctoral degree from an accredited school program. Consequently, the court concluded that the issue was a mixed question of fact and law and the board erred in not submitting the matter to a hearing officer at DOAH, as it indicated to the applicant that it would. The court then reversed and remanded with instructions that the matter be submitted to such a hearing officer. Aguilera v. Department of Health, 743 So. 2d 1153 (Fla. App. 3 Dist. 1999).

## **GROUND FOR DISCIPLINARY ACTIONS**

### **Breach of Confidentiality . . .**

The Maine Supreme Court has reviewed and affirmed a decision of the state's Board of Examiners of Psychologists regarding alleged breach of confidentiality. This court held that there was sufficient evidence to support a finding that a psychologist's relationship with the mother of a four-year-old patient rose to the level of a professional relationship. And, further, that the psychologist violated the mother's rights to confidentiality when she shared information gained in the course of that relationship with the patient's father.

This court noted that the record demonstrated that the psychologist elicited personal information from the mother and spoke to her about her personal history, her background, her own sexual abuse, and her treatment history. Furthermore, the court agreed that it was irrelevant whether the mother had communicated the same information to other persons. Seider v. Board of Examiners of Psychologists, 762 A. 2d 551 (Me. 2000).

### **Inappropriate Expert Testimony . . .**

The Oregon Board of Psychologist Examiners disciplined a licensed psychologist for providing expert opinions in two criminal cases. The board found that the psychologist had violated rules of conduct by giving an opinion as to the criminal defendant's guilt and his future dangerousness without an investigation and that his testimony fell out of the bounds permitted psychologists. The psychologist argued that the board's decision violated his constitutional rights of free expression.

Without addressing the constitutional challenge, the Oregon Court of Appeals reversed the board's decision, finding that the board had failed to identify the standard that it employed in determining what type of investigation is necessary before a psychologist may render an opinion as the psychologist did in this case. Further, the court found that the board had failed to explain

how his testimony fell out of the bounds of that permitted psychologists. Additionally, the court added that the board should have to explain why a psychologist should be disciplined for giving expert testimony that was approved and permitted by a court. Cochran v. Board of Psychologist Examiners, 171 Or. App. 311 (2000).

### **Various Other Grounds . . .**

#### **Denying Patients Access to Records . . .**

The New York Supreme Court, Appellate Division, has affirmed a medical board's decision that a physician was guilty of unprofessional conduct when he admittedly violated a New York Public Health Law provision requiring him to provide medical records to patients' authorized representatives. The court noted the evidence showing repeated, written requests by patients' representatives and a pattern by the physician and his office staff of denying timely access to patient information and demanding unreasonable charges for copies of such information Weg v. De Buono, 703 N.Y.S. 2d 301 (A. D. 3 Dept. 2000).

## **APPEALS FROM DISCIPLINARY SANCTIONS**

### **Scope of Review . . .**

In a 1999 decision, the Supreme Court of Pennsylvania reviewed a decision of the state's Commonwealth Court to overturn a decision of the state's Board of Psychology. The court noted the limited scope of review and the reasons courts could overturn agency decisions. The court explained that once the Commonwealth Court decided that the Psychology Board's own collective expertise played an improper role in its conclusions as to the professional violations alleged, the court itself then reweighed substantially the same evidence reviewed by the board and arrived at an opposite result. Noting that it had determined that the Psychology Board could factor in its own independent review of matters within its expertise, the Commonwealth Court may not discount conclusions drawn from such review. Further, since there was no other relevant ground to reverse the board's decision, reversing the board's decision was an impermissible reweighing of the evidence. And finally, in so doing that court exceeded its scope of review, substituting its own opinion for that of an administrative board whose members have special competence germane to the profession under scrutiny. It thereafter reversed the decision of the lower court. Batoff v. Board of Psychology, 750 A.2d 835 (Pa. 2000).

## **COLLATERAL ATTACKS IN STATE AND FEDERAL COURTS**

### **Quasi-Judicial Immunity . . .**

In a 2000 decision, the Montana Supreme Court held that the state's Board of Psychologists was entitled to quasi-judicial immunity for its acts in deciding whether to pursue a professional conduct complaint against a psychologist, how to investigate the complaint and how to prepare

the witnesses for the resulting hearing. Rahrer v. Board of Psychologists, 993 P.2d. 680 (Mont. 2000).

## **REINSTATEMENT OF A LICENSE**

### **Licenses Impaired for Misconduct . . .**

In a 2001 case, a New York appellate court affirmed a decision of the state's Board of Regents denying a physician's application for the restoration of his medical license after it had been revoked for negligently performing five abortions, one resulting in a patient's death. The court noted that the record cited the seriousness of the physician's misconduct, as well as the qualifications expressed by an expert consultant.

Additionally, the court also noted the Board's expressed dissatisfaction with the amount and type of supervision that would be available in a hospital setting. And finally, this court stated, that although the physician felt "sad for what happened to the patients," the Board determined that the physician's statements did not reflect the appropriate degree of remorse for his patients. In the Matter of Nehorayoff v. Mills, 723 N.Y.S.2d 114 (A. D. 3 Dept. 2001).

## **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).

## **OTHER RESEARCH SOURCES**

*Dr. Strangelove: therapist-client dual relationship bans and freedom of association, or how I learned to stop worrying and love my clients.* M. J. O’Laughlin, 69 UMKC L. Rev. 697-731 (2001).

*Telemedicine: the invisible legal barriers to the health care of the future.* H. L. Daly. 9 Annals Health L. Rev. 73-106 (2000).