

AADB
ANNUAL MEETING
BOARD ATTORNEY
ROUNDTABLE
2016

Panel on Top Cases

2016 Attorney Roundtable Participants

Grant D. Gerber, MD

Lori Lindley, OR

Bobby D. White, NC

Jennifer Putnam, TN

Susan Rogers, OK

Douglas Brocker, NC

Brent Kelly, CO

Participants, cont.

John Hunt, NV

John Tyler, ND

Britany Novotony, SD

Nicholas Panomitros, IL

Nycia Deal, TX

Bill Kellington, WA

Introduction

- Mobility and Portability
- Unauthorized Practice
- Reporting Discipline
- Antitrust
- Turf Wars!

Why is mobility a hot issue?

Physical movement of licensees?

Pressures from the federal government?

Pressures from trade associations?

Pressures from consumers?

Pressure from politicians?

Mobility and Portability

Federalism v. State's Rights

10th Amendment to United
States Constitution

In re Eastwick Coll. LPN–RN
Bridge Program, 225 N.J. 533,
139 A.3d 1146 (2016)

- ▣ The NJ Supreme Court held that “first or second graduating class,” within meaning of regulation conditioning final accreditation on 75% of students in first or second graduating class pass licensing examination, consisted of students who received diploma and took examination in same year. There was no deference to the Board’s interpretation. The court held that the Board thus improperly denied the College full accreditation.

Nat'l Ass'n for the Advancement of Multijurisdiction Practice v. Castille, 799 F.3d 216 (3d Cir.), cert. denied sub nom. (2015)

- ▣ Out-of-state attorneys and public benefit corporation brought action against justices of Pennsylvania Supreme Court challenging constitutionality of Pennsylvania's reciprocal bar admissions rule. Pennsylvania's rule was upheld. The standard did not violate the 1st or 14th amendments.

Required Reading Material

White House report critiquing and evaluating licensing requirements,

Occupational Licensing: A Framework for Policymakers, July 2015.

OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS

July 2015



Additional Reading Material

Aaron Edlin & Rebecca Haw, Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?, 162 U. Pa. L. Rev. 1093 (2014)

IS A COMPACT ON DENTAL LICENSURE THE ANSWER?

To be determined...

UNLICENSED AND
UNAUTHORIZED PRACTICE
OF DENTISTRY

Choong H. Lee, DMD, PLLC v.
Thaheld/Lee-01, LLC, 179 Wash. App.
1047 (2014) (Unreported)

- ▣ Dentist brought action against dental consultant seeking declaratory judgment, injunctive relief, and monetary damages arising from service agreement that provided for consultant's administration of dentist's two dental practices. Consultant counterclaimed for breach of contract, specific performance, unjust enrichment, and breach of employment obligations.
- ▣ The Court of Appeals, held that:
 1. agreement violated statutory prohibition on corporate practice of dentistry, and
 2. no part of agreement was enforceable, regardless of any inconsistency between agreement's terms and conduct of dentist and consultant following agreement's execution.

Wash. Rev. Code Ann. § 18.32.675 (West)

Practice or solicitation by corporations prohibited –

(1) No corporation shall practice dentistry or shall solicit through itself, or its agent, officers, employees, directors or trustees, dental patronage for any dentists or dental surgeon employed by any corporation: PROVIDED, That nothing contained in this chapter shall prohibit a corporation from employing a dentist or dentists to render dental services to its employees: PROVIDED, FURTHER, That such dental services shall be rendered at no cost or charge to the employees; nor shall it apply to corporations or associations in which the dental services were originated and are being conducted upon a purely charitable basis for the worthy poor, nor shall it apply to corporations or associations furnishing information or clerical services which can be furnished by persons not licensed to practice dentistry, to any person lawfully engaged in the practice of dentistry, when such dentist assumes full responsibility for such information and services.

(2) Any corporation violating this section is guilty of a gross misdemeanor, and each day that this chapter is violated shall be considered a separate offense.

Half Dental

- ▣ In December 2014, **Implants Dentures and Dental Inc., doing business as Half Dental Inc., Half Dental WA Inc., Brandon D'Haenens, and Jason McKew** agreed to cease and desist from the unlicensed practice of dentistry. Neither have dentist licenses, which is a requirement for running a dental office in Washington. Half Dental accepted advance payment from patients who were treated or were scheduled to be treated at its Vancouver office.

Nevada's Regulation on Dental Clinical Practice

A model to consider

NAC 631.275

- ▣ Activities which constitute exercise of authority or control over clinical practice. [...]the Board will deem a person to exercise authority or control over the clinical practice of dentistry if the person, by agreement, lease, policy, understanding or other arrangement, exercises authority or control over:

NAC 631.275 Con't

- (a) The manner in which a licensed dentist, a dental hygienist or a dental assistant uses dental equipment or materials for the provision of dental treatment;
- (b) The use of a laboratory or the decision to purchase or not to purchase dental equipment or materials against the advice of a licensed dentist if the dentist reasonably concludes that such use, purchase or failure to purchase would impair the ability of the dentist or a dental hygienist to provide dental care to a patient consistent with the standard of care in the community;
- (c) A decision of a licensed dentist regarding a course or alternative course of treatment for a patient, the procedures or materials to be used as part of a course of treatment or the manner in which a course of treatment is carried out by the dentist, a dental hygienist or a dental assistant;
- (d) The length of time a licensed dentist or a dental hygienist spends with a patient or if the person otherwise places conditions on the number of patients a licensed dentist or a dental hygienist may treat in a certain period of time;
- (e) The length of time a licensed dentist, a dental hygienist or a dental assistant spends performing dental services, against the advice of the dentist, if the dentist reasonably believes that the ability of the dentist, dental hygienist or dental assistant to provide dental care to a patient consistent with the standard of care in the community would be impaired;
- (f) The referrals by a licensed dentist to another licensed dentist or otherwise places any restriction or limitation on the referral of patients to a specialist or any other practitioner the licensed dentist determines is necessary;
- (g) The clinical practices of a dental hygienist regarding appropriate dental hygiene care or the duties that a licensed dentist may delegate to a dental hygienist;
- (h) Patient records at any time to the exclusion of the applicable licensed dentist or the applicable patient;

NAC 631.275 Con't

- (i) A decision of a licensed dentist to refund payments made by a patient for clinical work that is not performed or is performed incorrectly by: (1) The dentist; or (2) A dental hygienist employed by the licensed dentist or a professional entity of the licensed dentist;
- (j) A decision regarding the advertising of the practice of a licensed dentist if the decision would result in a violation of the provisions of NRS 631.348 by the dentist;
- (k) A decision to establish fees for dental services against the advice of a licensed dentist if the dentist reasonably concludes that those fees would impair the ability of the dentist or a dental hygienist to provide dental care to patients consistent with the standard of care in the community;
- (l) A decision relating to the clinical supervision of dental hygienists and ancillary personnel regarding the delivery of dental care to patients of a licensed dentist;
- (m) The hiring or firing of licensed dentists or dental hygienists or the material clinical terms of their employment relationship with a licensed dentist or a professional entity of a licensed dentist;
- (n) A decision regarding the hiring of ancillary personnel against the advice of a licensed dentist or a decision by a licensed dentist to fire or refuse to work with ancillary personnel if that advice, firing or refusal is related to the clinical competence of that ancillary personnel to render dental care to patients, regardless of who employs such ancillary personnel; and
- (o) The material terms of any provider contracts or arrangements between a licensed dentist or a professional entity of a licensed dentist and third-party payors against the advice of the dentist, if the dentist reasonably concludes that the contract or arrangement would impair the ability of the dentist to provide dental care to patients consistent with the standard of care in the community.

REPORTING DISCIPLINE

What is reportable?

The Nevada Model

The Nevada Dental Board enters into remediation plans with dentists to resolve some cases.

Texas Dental Board's Remedial Plans

A public non-reportable remediation plan

Texas Occupations Code Section 263.0077.

REMEDIAL PLAN. (a) The board may issue and establish the terms of a remedial plan to resolve the investigation of a complaint filed under this subtitle.

(b) A remedial plan may not contain a provision that:

(1) revokes, suspends, limits, or restricts a person's license or other authorization to practice dentistry or dental hygiene; or

(2) assesses an administrative penalty against a person.

(c) A remedial plan may not be imposed to resolve a complaint:

(1) concerning:

(A) a patient death;

(B) the commission of a felony; or

(C) a matter in which the license holder engaged in inappropriate sexual behavior or contact with a patient or became financially or personally involved with a patient in an inappropriate manner; or

(2) in which the appropriate resolution may involve a restriction on the manner in which a license holder practices dentistry or dental hygiene.

(d) The board may not issue a remedial plan to resolve a complaint against a license holder if the license holder has previously entered into a remedial plan with the board for the resolution of a different complaint filed under this subtitle.

(e) The board may assess a fee against a license holder participating in a remedial plan in an amount necessary to recover the costs of administering the plan.

(f) A remedial plan is public information.

(g) In civil litigation, a remedial plan is a settlement agreement under Rule 408, Texas Rules of Evidence.

(h) The board shall adopt rules necessary to implement this section.

Antitrust Update

What the heck is active state supervision?

North Carolina State Board of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015)

Although it described the inquiry into the adequacy of State supervision as “flexible and context-dependent,” the Court did specify some requirements:

- (1) The supervisor must review the substance of the decision, not simply the process used to make the decision;
- (2) The supervisor must have the authority to veto or modify particular decisions;
- (3) The potential for State supervision is not sufficient; and
- (4) The supervisor must not be an active market participant.

135 S. Ct. at 1116-17.

DEA Reduces Amount of Opioid Controlled Substances to be Manufactured in 2017

WASHINGTON, DC – The United States Drug Enforcement Administration (DEA) has reduced the amount of almost every Schedule II opiate and opioid medication that may be manufactured in the United States in 2017 by 25 percent or more, according to a Final Order being published in the Federal Register tomorrow and available for public inspection today [here](#). A handful of medicines were reduced by more, such as hydrocodone, which will be 66 percent of last year's level. Demand for these opioid medicines, represented by prescriptions written by DEA-registered practitioners, has decreased according to sales data obtained by DEA from IMS Health, a company that provides insurance companies with data on prescriptions written and prescription medications sold in America.

The Aggregate Production Quota (APQ) established by the Final Order is the total amount of a controlled substance necessary to meet the estimated medical, scientific, research, industrial, and export needs for the year and for the maintenance of reserve stocks. The 2017 APQ has been reduced for oxycodone, hydrocodone, fentanyl, hydromorphone, morphine, and other such medications. Much of this reduction is attributed to the elimination of a 25 percent buffer that was added to the APQ annually in 2013 through 2016 to guard against shortages.

The 2015 National Survey on Drug Use and Health (NSDUH) released last month found 6.5 million Americans over the age of 12 used controlled prescription medicines non-medically during the past month, second only to marijuana and more than past-month users of cocaine, heroin, and hallucinogens combined.

Earlier this year the CDC issued guidelines to practitioners recommending a reduction in prescribing opioid medications for chronic pain. For years, DEA and others have been educating practitioners, pharmacists, manufacturers, and the public about the potential dangers of the misuse of opioid medications.

When Congress passed the Controlled Substances Act (CSA), the quota system was intended to reduce or eliminate diversion from "legitimate channels of trade" by controlling "the quantities of the basic ingredients needed for the manufacture of [controlled substances]." The purpose of quotas are to provide for the adequate and uninterrupted supply for legitimate medical need of the types of schedule I and II controlled substances

E-Bay Dental Supplies



\$10.70
or Best Offer
+\$6.00



10X Dental Titanium Spiral Implant Sterile Sterilized For Internal Hex Lab

\$196.99
or Best Offer
Free



AT&T LTE 1:54 AM 66%

Q dental

3M PROTEMP 4 (PLUS) A2 TEMPORARY CROWN & BRIDGE GARANT DENTAL
\$97.30
Free

50 PCS Nozzles Tips Tube for Dental Air Water 3-way Syringe Metal Alloy Spray
\$21.00
or Best Offer
+\$5.49

10PCS NSK TYPE 10PCS Dental High-Speed Handpiece Push Button 4-Hole Denest UPS BEST
\$109.50
or Best Offer
FAST 'N FREE

10pcs NSK Style Dental High-Speed Handpiece Push Button Type 4 Hole SEASKY-04
\$121.00

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Challenged Regulations

Physicians, who provided health care services over the telephone, brought action against Texas Medical Board and its members in their official and individual capacities, asserting the Board violated antitrust laws and the Commerce Clause by adopting code provision that required face-to-face physical examination of patients prior to prescription of any dangerous drug or controlled substance. Physicians sought preliminary injunction to prevent enforcement of code provision.

Teladoc, Inc. v. Texas Med. Bd., 112 F. Supp. 3d 529 (W.D. Tex. 2015)

TELADOC V. TEXAS

Teledoc v. Texas

- ▣ 1. Teledoc has operated in Texas since 2005 and its clientele currently includes several large public and private health plans and managed care organizations.
- ▣ 2. In June 2011, the Texas Medical Board wrote Teladoc a letter taking issue with “several recent representations by Teladoc regarding its internet program”. The Board advised that physicians that participated in Teladoc’s network providing medical services over the phone without establishing a physician/patient relationship or a “face to face” exam could jeopardize their Texas medical license.

Teledoc v. Texas

- ▣ Texas Administrative Code Rule 190.8(1)(L) includes a requirement that specifically prohibits physicians from prescribing “any dangerous drug or controlled substance without first establishing a proper professional relationship with the patient.”
- ▣ Teledoc argues that a patient relationship can be established through questionnaires online, discussing with the patient the diagnosis and the evidence for it, the risks and benefits of various treatment options and ensuring the availability of the licensee or coverage of the patient for follow up care.

Teledoc v. Texas

- ▣ Requirements for a valid physician/patient relationship 4 requirements.
- ▣ Physical Examination entailed a face-to face examination and the rules reference to “acceptable medical practices such as patient history, mental status examination, physical examination and appropriate diagnostic and laboratory testing and that to establish a “proper” relationship all 4 had to happen.
- ▣ The face-to face physical examination prohibited Teledoc’s diagnosis by telephone.

Teledoc v. Texas

- ▣ New Rules in 2010, required that medical services provided over the internet required and off-site physician to see and hear the patient in real time unless the patient was in a medical facility.
- ▣ Teledoc challenged the “validity” or “application” of the rules for not complying with the Administrative Procedures Act because they did not provide a notice and comment time period before enacting the rule.
- ▣ They put forth an argument that the Board by enacting rules was acting in an anti-competitive manner and had no oversight.

Teledoc v. Texas

- ▣ April 2015 Teledoc sues the Texas Medical Board and its members for Antitrust Violations
- ▣ Teledoc asserted that the Medical Board is illegally limiting competition by requiring an in-person visit before physicians are allowed to treat patients and that Texas physicians have treated patients with no prior in-person contact for decades. Asserted that they were robbing the public of valuable telehealth benefits.
- ▣ FTC weighs in with a letter to the 5th circuit siding with Teledoc.

Teledoc v. Texas

- ▣ Texas files motion to dismiss
- ▣ 5th circuit denies immunity for the Texas Medical Board.
- ▣ Cites North Carolina case and says rulemaking and “mere presence of some state involvement or monitoring does not suffice; Rather active supervision requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.”

Teledoc v. Texas

- ▣ Potential future implications:
- ▣ All rule-making by Boards are subject to challenge.
- ▣ Look at the facts of each situation.
- ▣ Case remains ongoing.

Can one board sue another board in the same state?

This is an interesting question.

N. Carolina Acupuncture Licensing Bd.
v. N. Carolina Bd. of Physical Therapy
Examiners, No. 15 CVS 12012, 2016
WL 1643025 (N.C. Super. Apr. 26,
2016)

North Carolina Acupuncture Licensing Board brought action against North Carolina Board of Physical Therapy Examiners seeking declaration that practice known as “dry needling” was a form of acupuncture. . The court concluded it lacked personal jurisdiction due to immunity and granted the PT Board’s motion to dismiss. The court also held that the Acupuncture Board failed to exhaust its administrative remedies and, therefore, the court lacked subject matter jurisdiction.

Thank you.

