



The Good, the Bad and the Crazy: The most intriguing recent legal cases

This article is based on a presentation by Jennifer Ancona Semko, Partner at Baker & McKenzie LLP, at the 2015 FSBPT Annual Meeting.

The theme for presentation was, "Life is too short to be serious all the time, even when your job is to sue people."

The presentation was divided into serious and silly. It covered:

- Never underestimate the creativity of hungry lawyers
- Discipline and the First Amendment
- You can sue anyone for just about anything
- Fallout from the North Carolina State Dental Board
- Exam Program — State Actor?
- A few other silly things

Lawyer advertising billboards kicked off the presentation. There was one from the Magic Lawyer with the slogan, "Dealt a Bad Hand? Play Your Cards Right ..."

Then there was MyBaldLawyer.com with the slogan, "Injured? Don't pull *your* hair out!"

One billboard asked if you had been killed or injured. One had a *Shades of Grey* theme. Another law firm billboard admonished passers-by not to hire a lawyer from a billboard.

From there the presenter moved into a serious discussion about discipline and the First Amendment with the question, "Could disciplinary action be a restriction on free speech?" It depends.

Offered up were two cases in which the judges took polar opposite views.

The first case involved Ronald Hines, a retired Texas veterinarian who began posting articles on his website about pet health and care. That evolved into targeted guidance to specific pet owners for a flat \$58 fee, which he waived for indigents. Hines never prescribed medication and refused to advise clients if he believed a medical exam was necessary.

Texas law, however, requires an on-premises physical examination of an animal before treating. The Texas Board of Veterinary Medicine, therefore, initiated disciplinary action. Hines initially agreed to the prescribed punishment but then changed his mind and sued, in part, on the grounds that his First Amendment right to free speech was violated. The trial court agreed, but the appellate court ruled in the Board's favor.

The appellate court said the rule may have an incidental impact on the veterinarian's speech, but that is permissible under the First Amendment. The Texas statute does not regulate the content of any speech, require veterinarians to deliver any particular message, or restrict what can be said once the rule is satisfied. Furthermore, states have a "broad power to establish standards" for licensing practitioners and regulating professions.

The second case involved John Rosemond, a licensed psychological associate in North Carolina. On the side, Rosemond writes a nationally syndicated Dear-Abby-type column on parenting. In the tag line, he called himself a family psychologist. A couple of parents wrote to complain about their teenage boy. He was spoiled, he didn't listen, and he was getting in trouble, they wrote. Rosemond responded in his column that, yes, this kid is a spoiled brat, you need to take away all his electronics, and he needs to learn a lesson. Apparently that advice offended someone and a complaint was lodged with the Kentucky Board of Examiners of Psychology. Subsequently, the Board issues a cease and desist order based on Rosemond not being licensed in the state of Kentucky.

Rosemond sued, alleging a threat to end publication of his column violated his First Amendment rights. The parties disputed whether the state rule prohibiting unauthorized practice in this case was "content-based" restriction on speech or a professional regulation barring conduct with an incidental impact on speech. The trial court ruled in favor of Rosemond, that is was a content-based restriction. It did that because the Board admitted it would not have intervened if Rosemond was providing general advice. The Board action, then, was taken based on what he said. It rejected the Board's argument that this was commercial or professional speech, which is less protected under the law, although it did allow that "at what point professional regulation becomes an unconstitutional restriction on speech is a difficult question to answer." But in this case, the court ruled, the speech was not about a commercial transaction — even though Rosemond was paid for the syndicated column — or a patient relationship.

Even if Rosemond was potentially misleading his readers by holding himself up to be a psychologist, he has a right to make those statements in a non-commercial setting, the court ruled. The Board's restriction failed the "strict scrutiny" test because there was no compelling state interest or evidence of harm, and the restriction was not "narrowly tailored" because Rosemond could have easily changed his tag line. The court suggested there were other ways to remedy the situation, for example publishing the names of all licensed psychologists in Kentucky whereby interested parties could see Rosemond's name was not on the list.

Under questioning from attendees, the presenter allowed that the cases may have turned out differently because Rosemond, while paid for writing the column, was not paid for specific advice and the veterinarian in Texas was.

The presentation then returned to the absurd.

A family sued Orlando Sea World for millions of dollars after a 27-year-old man — who had long dreamed of swimming with what he called “killer whales” — hid in the park until it closed, then stripped and jumped in the orca tank. The killer whale killed him. The family argued the park failed to sufficiently warn their son that killer whales were dangerous.

A Southern California attorney sued GTE California when his name was inadvertently listed under the “Reptiles” heading in the Yellow Pages. He sought more than \$100,000 in damages, claiming the mistake caused him to be the target of bad jokes and rude phone calls.

A visitor to Universal Studios’ Halloween Horror Nights sued for \$14,000 because the haunted house was too scary and caused her to suffer from post-traumatic stress.

And, a San Diego man sued the city for \$5.4 million after attending a concert at City Hall after being traumatized for seeing a woman in the men’s public bathroom.

All those cases were thrown out. Many suits filed in the wake of the North Carolina State Dental Board U.S. Supreme Court ruling are still pending. Basically, the court ruled that “if a state wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity ... is to be invoked.”

In a 6-3 decision, the majority ruled that because a “controlling number” of the North Carolina Board’s decision-maker are “active market participants in the occupation the Board regulates,” the Board must be treated as a private actor and must show active supervision by the state.

The court ruling was handed down in February 2015 and by April 2015 suits began to be filed.

Axcess Medical Clinic filed an anti-trust suit against the Mississippi State Board of Medical Licensure challenging new rules imposed on pain management clinics. The clinic opened in 2010 and in 2011 the Board adopted a rule that pain clinics had to be owned by a hospital or licensed physician. The suit charged that the rule forced the owner to give a majority interest in the clinic to a doctor without compensation. Then the clinic was forced to close when the Board imposed new rules requiring certain education and certification for physician owners.

The anti-trust claims centered on two issues, that the rules exclude non-physicians from ownership of pain clinics and require state approval before operating, and that the rule imposes educational and certification requirements on clinic owners that are not required of other physicians. The clinic owner sought \$700,000 in damages, treble damages, and attorney’s fees. Although the case was voluntarily dismissed without prejudice, it raises some important issues.

The board is composed of nine physicians. The plaintiff alleged the board members are market participants and acted without a state supervisor with veto authority.

None of the Board members are in the pain clinic market but they are doctors. Guidance issued by the Federal Trade Commission (FTC) would seem to indicate that anyone with a medical license in Mississippi is an active market participant. It does not matter whether you’re an OB/GYN, a pediatrician, or a pain clinic owner, you’re all active market participants. But what

happens if a board imposes a rule that impacts a very narrow sliver of the market? If the board imposes a rule on acupuncturists, are they in fact market participants if none of the board members are acupuncturists? It's not clear from the Supreme Court ruling or the FTC guidance. The FTC guidance is that anyone on the board who has been issued a license is in the market, but that doesn't seem quite logical when talking about a rule that might apply outside of what their profession actually does. This is likely a question to be answered in future litigation.

In another case, Teledoc, Inc., a national telemedicine provider, sued the Texas Medical Board in April 2015, seeking to stop a rule requiring doctors to meet new patients in person before writing prescriptions. It alleged the Board only adopted the rule when Teledoc began to be a competitive threat to traditional practices.

Teledoc noted that the Board includes 12 practicing physicians and two non-physicians, and the Board voted 13-1 for the rule, with one of the non-physicians voting no. Evidence also was submitted showing that 203 of 206 public comments opposed the new rule. Of the three statements in favor, two were submitted by the Texas Medical Association.

In defending the rule, the Board argued it actually clarifies and expands opportunities for telemedicine. Its only objective is to prohibit the treatment of an unknown patient without objective diagnostic data or the ability to follow up with the patient.

In May, the court granted a temporary injunction against enforcing the rule. The state has submitted a motion to dismiss asserting state action immunity and sovereign immunity. The motion is pending.

John Robb filed a federal anti-trust suit in June against the Connecticut Board of Veterinary Medicine and its members, for attempting to discipline him for giving lower levels of vaccinations to smaller dogs, which he claimed was safer. In his filings, Robb also asserted his authority comes from God, which supersedes the Board's authority. He characterized the Board as "competitors" — three of the five board members are veterinarians — seeking to prevent a threat to a significant aspect of veterinary practices. He sought a temporary restraining order, which was denied, and compensatory and treble damages. A motion to dismiss is pending.

Attendees questioned if the FTC guidance has the force of law. It does not and it also does not mean the five FTC commissioners agree with it. However, in speeches they seem to be fine with staff guidance.

The fact is we are going to see suits from single individuals. They probably won't have legs, but boards are going to have to deal with nuisance suits.

The session then turned to more levity with more bizarre cases. One involved a DC administrative judge who was displeased when a local dry cleaner lost his favorite pants. In response, he sued under the city's consumer protection statute because the cleaners did not live up to the sign in the window stating, "Satisfaction Guaranteed." He sued for \$64 million. His case eventually was dismissed, but not before the family business nearly bankrupted.

In another case, a man claimed he was often mistaken for Michael Jordan, even though he was

seven inches shorter and 10 years older. He complained he couldn't live a normal life for the past 15 years because of constant harassment. So he sued Jordan and Nike's founder for \$416 million each for making Jordan so famous.

In New York City, a proctologist who called himself M.D. Tusch, advertised, "No pain. No bleeding." in subway ads. He owned a lavender Bentley and threw lavish parties in the Hamptons. His thriving practice bottomed out when patients began to sue him for malpractice, alleging he failed to use anesthesia. In the ensuing court battles, it was disclosed the doctor's license had been previously suspended in Washington state and he was under investigation for tax evasion. He is now a used car salesman.

The International Conference of Funeral Service Licensing Boards has a very similar structure and function as the FSBPT. The Conference, like the Federation, administers licensing exams — for funeral directors and embalmers though — and its members are state regulatory boards.

The Conference discovered a decades-long scheme to harvest and share test questions at a New York mortuary school, considered the Harvard of mortuary colleges with a 97% pass rate on licensing exams. The national average is in the 60s. Through a tipster, the Conference discovered the dean had been gathering up student's recollections of what they had seen on the exam for more than 20 years, packaging it, and distributing it to students who were about to take the test. The dean's bonus and the school's accreditation were tied to the pass rate. Conference filed a federal lawsuit against the school for copyright infringement and theft of trade secrets. It subsequently invalidated scores for several hundred test takers. Those who shared test information in violation of the contract they signed when they took the exam were suspended from retesting for five years. Seventeen lawsuits were filed by former students, including Keith Mattei of Texas, who also sued his state regulatory agency, the Texas Funeral Service Commission.

Mattei sued the Texas Commission, even though it had not acted on his license, because the Conference's actions were detrimental, the Commission was a member of the Conference, and therefore the Conference was acting under state law. As a 501(c)3 organization, the Conference took the position that it is not the government and does not issue licenses. It is not a state actor under the law.

The court agreed and dismissed the case.

In defending itself, the Conference cited at least 22 cases from around the country in which testing programs offering licensing exams were found not to be state actors. The state's reliance on scores was not enough to make it a state actor because it was one of several criteria states use in licensing decisions. There also was no evidence the state influenced the Conference's decision. A previous U.S. Supreme Court case ruled that the existence of state boards as members of a nationwide organization is not sufficient evidence that they are state actors.

The presentation ended with attorney jokes suitable for your next cocktail party, including the line, "Isn't it a shame how 99% of lawyers give the whole profession a bad name?"



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