

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
MEDICAL DISCIPLINARY BOARD

In the Matter of Disciplinary) NO. 91-03-0068MD
Action Concerning:) 91-06-0183MD
)
ELLIOTT B. OPPENHEIM, M.D.)
)
Respondent)
JUDGMENT)
)

This case comes before Colleen Klein, Review Judge for the Medical Disciplinary Board (the Board), on Dr. Oppenheim's Motion For Summary Judgment Of Dismissal submitted via facsimile transmittal by his attorney of record at the time, Mr. Anthony Russo and received by the Hearings Unit on August 19, 1992. Mr. Jeffrey Boyer, assistant attorney general representing the Department of Health (Department) submitted the Department's Response to Motion For Summary Judgment dated September 1, 1992 which was received by the Hearings Unit on September 8, 1992. Both parties waived oral argument on this motion.

The Review Judge having reviewed and considered Dr. Oppenheim's Motion for Summary Judgment, Memorandum in Support of Motion For Summary Judgment, Department of Health's Response to Motion For Summary Judgment, and the pleadings and motions previously filed in this case, now hereby issues the following decision and order:

DECISION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

1. PROCEDURAL MATTERS

1.1 On or about December 17, 1991, the Board issued a statement of charges alleging that, while acting as an expert witness, Dr. Oppenheim misrepresented or made dishonest statements about the status of his medical license and credentials in violation of RCW 18.130.180(1) and (13). On or about July 31, 1992, the Board amended the charges to include additional allegations against Dr. Oppenheim under RCW 18.130.180(1) and (13) and a new charge under RCW 18.130.180(9). The alleged violations of RCW 18.130.180(1) and (13) are pertinent to this motion and define unprofessional conduct as:

(1) The commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the act constitutes a crime or not.

(13) Misrepresentation or fraud in any aspect of the conduct of the business or profession;

1.2 In his answers to the charges, Dr. Oppenheim denies the allegations against him. He now asserts in this motion that the charges based on RCW 18.130.180(1) and (13) should be dismissed on the following two legal grounds:

1. The Board has failed to state a claim against Dr. Oppenheim under RCW 18.130.180 because an expert witness is absolutely immune from subsequent legal proceeding arising out of testimony at deposition or trial, or statements made prior to such testimony.

2. The Board has no jurisdiction over the alleged conduct of Dr. Oppenheim because Dr. Oppenheim's activities do not fall within the definition of unprofessional conduct pursuant to RCW 18.130.180.

2. LEGAL ISSUES

2.1 This motion raises the following legal issues:

A. Does the Board have jurisdiction to discipline a physician licensed to practice medicine in Washington if the physician, while acting in the capacity of an expert witness, misrepresents or dishonestly presents the status of his medical license or credentials during the course of, or in preparation for, trial?

B. Is a physician licensed to practice medicine in Washington immune from disciplinary action by the Board if the physician, while acting in the capacity of an expert

witness, misrepresents or dishonestly presents the status of his medical license or credentials during the course of, or in preparation for, trial?

3. ANALYSIS

3.1 The preliminary issue in this case is whether the Board has jurisdiction to take disciplinary action against Dr. Oppenheim for allegedly misrepresenting or dishonestly stating the status of his medical license or credentials. If the Board does not have jurisdiction, then the charges related to these allegations should be dismissed. If, however, the Board has jurisdiction over such conduct, the second issue is whether the immunity afforded to expert witnesses prevents the Board from taking action against Dr. Oppenheim in this case. The following is a discussion of these issues.

3.2 A. Does the Board have jurisdiction to discipline a physician licensed to practice medicine in Washington if the physician, while acting in the capacity of an expert witness, misrepresents or dishonestly presents the status of his medical license or credentials during the course of, or in preparation for, trial?

The Board has jurisdiction to discipline physicians licensed to practice medicine in Washington for unprofessional conduct pursuant to RCW 18.130. Dr. Oppenheim asserts that the Board is without jurisdiction to discipline him for his activities as an expert because those activities are not within the statutory definition of unprofessional conduct. Dr. Oppenheim states that the alleged offenses do not arise out of any physician-patient relationship because he did not treat or examine anyone in Washington or in any other jurisdiction while acting as an expert. Therefore, the alleged conduct does not relate to the practice of medicine and does not constitute unprofessional conduct under Washington law. As a result, Dr. Oppenheim claims that the Board does not have jurisdiction over the alleged conduct in this case. Dr. Oppenheim relies primarily on the Washington Supreme Court case in Haley v. Medical Disciplinary Board, 117 Wn.2d 720, ___ (1991) to support his position.

3.3 In Haley, the Washington Supreme Court adopted a "broad view" of the required relationship between improper conduct under RCW 18.130.180(1) and the practice of medicine. Improper conduct can indicate unfitness to practice medicine without being directly related to the treatment of patients or the specific skills needed to practice medicine. In the context of medical disciplinary proceedings, conduct may indicate unfitness to

practice medicine if it raises a reasonable apprehension that the physician may abuse the trust inherent in the professional status to harm members of the public or if it diminishes the medical profession's standing in the public's eyes. Haley, supra at 733.

3.4 Further, the Supreme Court recognized the importance of preserving both the integrity of the medical profession and the trust of the public in the medical profession.

3.5 As an interest of the State, however, preserving professionalism is not an end in itself. Rather, it is an instrumental end pursued in order to serve the State's legitimate interest in promoting and protecting the public welfare. To perform such duties effectively, physicians must enjoy the trust and confidence of their patients. Conduct that lowers the public's esteem for physicians erodes that trust and confidence, and so undermines a necessary condition for the profession's execution of its vital role in preserving public health through medical treatment and advice. Haley, supra at 733-734.

3.6 Dishonest statements by a physician do not inspire public trust and confidence. To the contrary, such conduct produces the very effect that the Supreme Court expressly sought to prevent. The Department's allegations that Dr. Oppenheim misrepresented or

dishonestly presented the status of his medical license or credentials, if true, would constitute a violation of RCW 18.130.180(1) by raising reasonable concern that Dr. Oppenheim may abuse his status as a physician to harm members of the public or by lowering the standing of the medical profession in the eyes of the public.

3.7 As further support for his position that the Board is without jurisdiction, Dr. Oppenheim relies on the Missouri court of appeals case, Board of Registration for the Healing Arts v. Levine, 808 S.W.2d 440, ___ (1991). In that case, the physician gave false answers under oath about his credentials while testifying as an expert witness. The Missouri court found that the physician's conduct was not prohibited by case law which defined the practice of medicine as the diagnosis and treatment of patients, nor by Missouri statute which required a showing that the misrepresentation or dishonesty occur in the performance of the "functions or duties" of a physician.

3.8 Washington statutes defining the practice of medicine and governing unprofessional conduct are significantly different from Missouri law. RCW 18.130.180(1) does not require that the improper conduct occur within the practice of medicine but only that it relate to the practice of medicine. As previously

discussed, the Washington Supreme Court has adopted a broad view of the relationship that is needed between the improper conduct and the practice of medicine. The relationship is sufficient if the conduct either raises reasonable concern that the individual may abuse the status of being a physician or lowers the standing of the profession in the eyes of the public.

3.9 RCW 18.130.180(13) is significantly different and more encompassing than the Missouri law set forth in Levine. Unlike Missouri law, Washington law does not require that the alleged misrepresentation involve the "functions or duties" of a physician. Rather, under Washington law, the misrepresentation need only involve "any aspect of the conduct of the business or profession."

3.10 In a case factually similar to the case at hand, the District of Columbia Court of Appeals upheld the disciplinary board's action against a physician for making false statements about his credentials when employed as an expert witness. Joseph v. Board of Medicine, 587 A.2d 1085 (D.C.App 1991). Dr. Joseph argued that because the false statements he had made about his credentials were made during his employment as an expert witness, they were not made in the practice of medicine. The court stated:

Dr. Joseph's inflation of his credentials as an expert witness... bore directly on the question whether his medical diagnosis would be credited. In other words, Dr. Joseph lied under oath in his capacity as a medical expert about his own medical qualifications in order to have his diagnosis of the deceased patient's condition accepted by the jury. The false statements in the curriculum vitae could likewise have been intended only to add weight to his medical judgments.

Joseph, supra at 1091.

3.11 The court upheld the disciplinary board's conclusions that Dr. Joseph's misstatements were made in the practice of medicine.

3.12 Likewise, the allegations against Dr. Oppenheim concern statements about his credentials made by him while acting in the capacity of an expert witness. As such, the allegations concern both an aspect of Dr. Oppenheim's conduct as a physician and an aspect of his business of being a physician. Therefore, the allegations fall within the scope of RCW 18.130.180(13).

3.13 In Washington the practice of medicine is defined much more broadly by statute than by Missouri case law in Levine. Under Washington law, the practice of medicine is defined in part as:

Offers or undertakes to diagnose, cure, advise or prescribe for any human disease, ailment, injury, infirmity, deformity, pain or other condition, physical or mental, real or imaginary, by any means or instrumentality;

RCW 18.71.011

3.14 The facts alleged in this case do not reach the question of whether the Board has jurisdiction to take action against a physician expert witness for negligence or incompetence based on the substance of the expert's medical opinion. In this case, the Board's action is based on dishonesty and misrepresentation. The allegations against Dr. Oppenheim do not concern the nature of Dr. Oppenheim's expert medical opinion but whether Dr. Oppenheim misrepresented or dishonestly stated facts about himself as a physician.

3.15 The allegations that Dr. Oppenheim misrepresented or dishonestly stated the status of his medical license or credentials while acting in the capacity of an expert witness, if true, would constitute a violation of RCW 18.130.180(1) and/or (13). Therefore, the Board has jurisdiction to hear and decide these charges against Dr. Oppenheim.

3.16 B. Is a physician licensed to practice medicine in Washington immune from disciplinary action by the Board if the physician, while acting in the capacity of an expert witness, misrepresents or dishonestly presents the status of his medical license or credentials during the course of, or in preparation for, trial?

Dr. Oppenheim contends that he is absolutely immune from subsequent legal proceedings, including Board action, arising from any testimony or statements made by him preliminary to or in the course of judicial proceedings. Dr. Oppenheim argues that any effort by the Board to discipline Dr. Oppenheim would have a chilling effect over the testimony of all medical experts and would result in the distortion of frank expert testimony. In support of his position, Dr. Oppenheim relies primarily on the Washington Supreme Court decision in Bruce v. Byrne-Stevens & Assoc., 113 Wn.2d 123, 776 P.2d 666, (1989).

3.17 In Bruce, the plaintiffs sought damages from an engineer who had provided expert testimony on their behalf in a previous action concerning the cost of certain restoration work. The Plaintiffs relied on the engineer's cost estimate in their original suit. After trial, it was discovered that the engineer's cost estimate was too low and the plaintiffs subsequently sued

their engineer expert witness for damages. The Supreme court held that the engineer was immune from liability for any negligence in his testimony or his work preliminary to testimony.

As a general rule, witnesses in judicial proceedings are absolutely immune from suit based on their testimony...

The purpose of the rule is to preserve the integrity of the judicial process by encouraging full and frank testimony...

Bruce, supra at 125 -126.

3.18 Further, the court noted that the judicial process is designed to guard against false or inaccurate testimony by the witness's oath, cross examination, and the threat of prosecution for perjury. Bruce, supra at 126.

3.19 The facts in Bruce are distinguishable from the alleged facts in Dr. Oppenheim's case in at least two critical ways. First, the Board's action is a regulatory action taken against Dr. Oppenheim's license to practice medicine; it is not an action for damages as in Bruce. Although the court in Bruce noted that the scope of witness immunity is broad, that case and the other cases relied upon by Dr. Oppenheim were derivative actions for damages against the expert witnesses. No cases were cited that extended the grant of immunity to prevent regulatory action

against a professional's license for dishonest statements or misrepresentations concerning the professional's credentials.

3.20 To the contrary, in Silberg v. Anderson, 786 P.2d 365 (Cal. 1990) the California Supreme Court observed that even though expert witnesses were immune from suits for damages based on their communications in judicial or quasi judicial proceedings, other remedies, including professional disciplinary proceedings, existed to deter improper conduct. Silberg, supra at 373. See also Joseph, supra; Moses v. Parwatikar, 813 F.2d 891 (8th Cir.1987); Moses v. McWilliams, 549 A.2d 950 (Pa Super. 1988).

3.21 While Washington courts have not directly addressed this issue, the grant of immunity afforded expert witnesses does not extend to protect experts from criminal proceedings for perjury. Bruce, supra at 126. The reason for this restriction on immunity is to prevent dishonest testimony. Similarly, the immunity afforded expert witnesses should not protect an expert from disciplinary action for dishonest statements or misrepresentations concerning the status of the expert's professional license or credentials.

3.22 Second, Dr. Oppenheim's case is distinguishable from the facts in Bruce because the Board is not alleging that Dr.

Oppenheim was negligent or wrong in his expert medical opinion. Rather, the Board alleges that Dr. Oppenheim was dishonest or misrepresented information about his personal credentials as a physician. A physician has or should have personal knowledge about the status of his or her medical license and credentials. Presenting such factual information is not the same as rendering a medical opinion concerning the standard of care in a particular case which entails an analysis and interpretation of information and the application of medical judgment. The difference between negligently rendering an expert medical opinion about the substance of an action and misrepresenting or dishonestly stating one's professional credentials is significant especially considering the purpose for the grant of immunity to expert witnesses.

3.23 Experts are granted immunity from actions for damages to "preserve the integrity of the judicial process by encouraging full and frank testimony." Bruce, supra at 126. Immunity is offered to encourage witnesses to testify truthfully about their opinions without fear of retaliatory actions for damages from parties who disagree with the expert's opinion. However, the chilling effect of subjecting experts to threatened litigation and liability for their expert opinions does not exist if a physician is not rendering an expert opinion but is merely

testifying as to facts personal to the expert. To the contrary, immunizing a physician from regulatory action against his or her license for dishonest behavior would only foster the very actions that the grant of immunity is designed to prevent.

3.24 Finally, even if immunity extends to statements by physicians about their medical credentials, the purpose for granting immunity to experts is outweighed by the Board's legislative mandate to protect the public from the unprofessional conduct of physicians. The Washington Supreme Court recognized the importance of the Board's duty and interpreted the Uniform Disciplinary act as giving the Board the mandate to "pursue vigorously" its disciplinary task. Haley, supra at 727.

3.25 The immunity from damage suits granted to expert witnesses to encourage full and frank testimony does not prevent the Board from taking regulatory action against the license of a physician expert witness for misrepresenting or dishonestly stating the status of his license to practice medicine. It should be noted that in his motion, Dr. Oppenheim states that the Department has not alleged that he intentionally testified falsely in one situation. Whether Dr. Oppenheim's actions constitute misrepresentation or dishonesty is an issue of material fact for the Board's determination at hearing.

3.26 C. Summary

The Board has jurisdiction to discipline physicians licensed in the state of Washington for their unprofessional conduct pursuant to RCW 18.130. The allegations that Dr. Oppenheim misrepresented or dishonestly stated the status of his medical license or credentials, if true, would constitute violations of RCW 18.130.180(1) and (13). The Board has jurisdiction over the subject matter of this action. Further, the immunity afforded to expert witnesses from subsequent actions for damages does not prevent disciplinary action by the Board against Dr. Oppenheim for allegedly misrepresenting or dishonestly stating the status of his medical license or credentials while acting in the capacity of an expert witness.

4. Decision and Order

4.1 Dr. Oppenheim's motion for summary judgment and dismissal of the charges against him is hereby **DENIED**.

The parties are advised that the decision of the Review Judge may be appealed to the presiding officer within ten days of service of this decision and order on the parties. Appeal is not

required to preserve the record related to this decision and order for judicial review.

DATED THIS 9TH DAY OF OCTOBER, 1992.

/s/

COLLEEN KLEIN
REVIEW JUDGE