

Health Law I

Professor Pope

Nov. 29, 2011

We spent a long time on
malpractice liability

But **just one** legal tool to help
ensure quality

Also: licensure laws

**Licensure:
Gatekeeper
Function**

Licensure vs. Accreditation

License

Required

Cannot practice the profession
without the license.

Overseen by state government

Medical school

Graduate medical
education (residency,
fellowship)

USLME

Accreditation

Private sector body sets standards, gives designation

Voluntary not mandatory

Unlike licensure, does not create an absolute barrier

Consumer can choose

Admiralty and Maritime Law
Appellate Law
Bankruptcy Law
Criminal Law
Estate Planning, Trust and Probate Law
Family Law
Franchise and Distribution Law
Immigration and Nationality Law
Legal Malpractice Law
Taxation Law
Workers' Compensation Law



Miami Herald, 10/29/06

Information on the quality of care provided at individual hospitals is now available online, but "many consumers have a **hard time making sense** of the information,"

What is now available on Web sites . . . is often **confusing and perhaps useless**,"

"It's still a **tower of Babel** out there. We're getting data. We're not getting information. Information is data made understandable."

Private credentialing
Medical schools
Market forces
Malpractice
Staff privileges
Board certifications
Insurer reimbursement

Licensure requirement (“minimum floor”) harmonizes with standard of care in liability context
Here, as there, assume the public is incapable of evaluating the quality of medical services
In liability, means we will have a custom-based standard of care
Here, it means that accreditation is not sufficient

State
v.
Miller

Defendant
charged with
practicing
medicine without
a license

Convicted in Iowa
trial court



Al Miller

Radionics device
Put hair in it
Magnets,
shocks

Were his
"patients"
harmed



"Practice of medicine"

Publicly profess able to
diagnose, treat . . . disease or
condition

Assume duties incident to . .
.diagnosis, treatment

Prescribing/furnishing
medicines for ailments



Tattooing
Magnetism
Faith healing
Electric hair removal
Hypnotism
Massage
Reflexology

Defenses for Miller

Consent by the patient

Patient's constitutional rights

Any person shall be regarded as practicing medicine . . . who treats, or professes to diagnose, treat, operates on or prescribes for any physical ailment or any physical injury to or deformity of another.

Tenn. Code § 63-6-204(a)(1)



Driver deliver baby in backseat



Complain cramps, ask recc

Law student led aspirin



Georgia pre-1993

Only doctors, dentists, podiatrists, and veterinarians can perform surgery, operation, or procedure in which human or animal tissue is cut, pierced, or otherwise altered by the use of any mechanical means, laser, medication . . .

Struck – vague, overbroad

NEWS

United States Department of Justice
U.S. Attorney, District of New Jersey
402 East State Street, Room 430
Trenton, New Jersey 08608



July 2011

**Toms River, New Jersey Man Admits
Posing As A Doctor, Treating Elderly
Patients In Medicare Fraud Scheme**



Scope of Practice

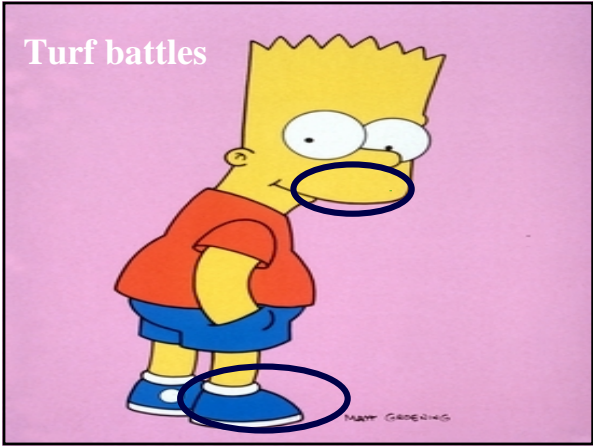
Miller – unlicensed for any health profession

Another type case is where licensed for one health profession but practice another

Nurse not practice
medicine if doing
nursing services - in
scope of nursing
practice

Protect patient health

Establish economic
domains




Hundreds of bills in 2011

APN - anesthesia
Psychologist – prescribe
Pharmacist – prescribe
Midwifery
Chiropractor - inject



Convicted:
Emily Hyatt
Medwin

NC only allows
certified nurse
midwives, not
Certified
Professional
Midwives



SPONSOR: Rep. Maier & Sen. Blevins;
Reps. Hudson, Wagner; Sen. Henry

HOUSE OF REPRESENTATIVES
144th GENERAL ASSEMBLY

HOUSE BILL NO. 106

§ 601. Short Title.

This Act may be cited as the Delaware Certified Professional Midwife Licensure Act.

RingADoc - Healthcare in the Palm of Your Hand

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The doctor will see you now
See a doctor or therapist when you need to, 24/7/365 from anywhere by video, phone or e-mail.
[Get Started](#)

Doctor gets jail time for online, out-of-state prescribing

The decision could give prosecutors broader reach in pursuing criminal charges in such cases.

By AMY LYNN SCORRELL, amednews staff. Posted June 1, 2009.

In a case that could have ramifications for online prescribing, a Colorado physician was sentenced to nine months in jail for prescribing an antidepressant over the Internet to a California teenager who later committed suicide.

San Mateo County prosecutors charged psychiatrist Christian Hageseth III, MD, of Fort Collins, Colo., with a single felony count of practicing medicine without a valid California license.

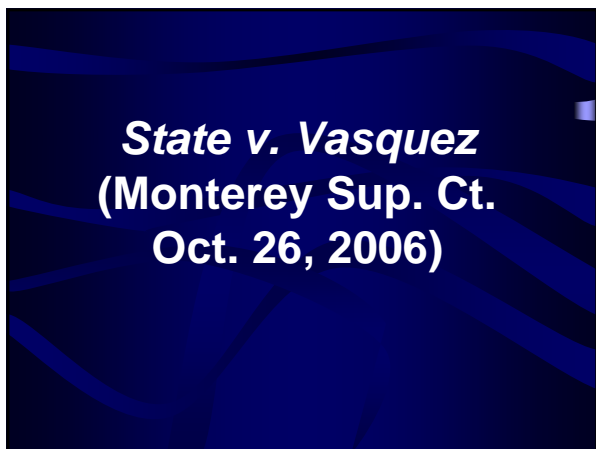
Medical Licensure: Discipline Function

Alcohol/drug
Aiding unlicensed practice
Incompetence
Fail to report (crim, malpr, priv)
Character
Reciprocal

Fine
Community service
Education
Revocation
Suspension
Reprimand







Cosmetologist injects Corn oil into buttocks to enlarge

Vasquez charged thousands of dollars, claiming to be licensed and trained in performing injections of the oil, which she claimed was “French polymer”

15 years in jail



Modi v. WV Bd. Med.

Dr. Modi has a WV license

But patient Bill Abbott brings a complaint

What is the complaint





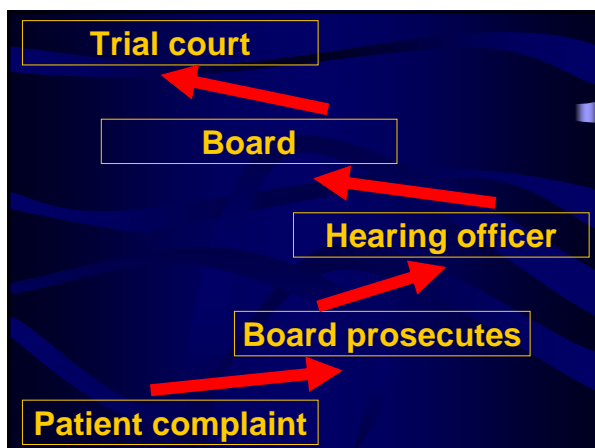
Administrative agency
Draft and promulgate regulations
Investigate, bring charges
Hearing officer
Board
Agency

Legislative

Executive

Trial court
Appellate court

Judicial



Charges:

Reasonably prudent physician would not deem "depossession" acceptable

Experimental procedure without informed consent

False representation to insurance carrier

Unprofessional practice using & billing

- Challenges **final** agency action in court

- Bases:

- Violate statute, constitution
- Exceed authority of agency
- Violate procedure
- Clearly wrong on the record
- Arbitrary & capricious

Health Law I

Professor Pope

Dec. 1, 2011

Provider
licensing

Facility
licensing

Licensure

State
government

Right to
operate

Accreditation

Private,
voluntary

Certification

Voluntary

Qualification for
GOV funding
(Medicare &
Medicaid)

Health facilities regulated:

Hospitals
Assisted care living facilities
End-stage renal dialysis centers
Halfway house treatment
Nursing homes
(and 20+ more)
NOT physician offices

Licensure

TENNESSEE DEPARTMENT OF HEALTH
BOARD FOR LICENSING HEALTH CARE FACILITIES
DIVISION OF HEALTH CARE FACILITIES

1200-8-1-.02 LICENSING PROCEDURES.

- (1) No person, partnership, association, corporation, or state, county or local government unit, or division, department, board or agency thereof, shall establish, conduct, operate, or maintain in the State of Tennessee any hospital without having a license. A license shall be issued only to the applicant named and only for the premises listed in the application for licensure. Licenses are not transferable or assignable and shall expire annually on June 30th. The license shall be conspicuously posted in the hospital.

1200-8-1-.03 DISCIPLINARY PROCEDURES.

- (1) The board may suspend or revoke a license for:
 - (a) Violation of federal or state statutes;
 - (b) Violation of the rules as set forth in this chapter;
 - (c) Permitting, aiding or abetting the commission of any illegal act in the hospital;
 - (d) Conduct or practice found by the board to be detrimental to the health, safety, or welfare of the patients of the hospital; and
 - (e) Failure to renew license.



Independent, non-governmental

But states rely on them

Certification

Will the FED GOV spend Medicare/Medicaid dollars at the facility?



Cospito v. Heckler

- 1973** JCAHO deficiencies
 - Patient treatment
 - Fire safety
- 1974** JCAHO finds the *same* deficiencies
- 1975** What happened



Plaintiffs

- Patients at Trenton Psychiatric Hospital

Defendant

- HHS



Smith v. Heckler

When You Remember
Me (Fred Savage, Kevin Spacey)

14-year old with muscular dystrophy living in nursing home



Fights to improve conditions



Plaintiffs

Class action of Medicaid recipients in Colorado nursing homes

Defendant



What duty does plaintiffs allege that the defendant failed to discharge

Avedis Donabedian

Structure
Process
Outcome



Facilities

- Setting
- Physical structures
- Layout

Equipment

- Instruments
- Supplies
- Sterilization

Personnel

- Appropriate types
- Training
- Licensure

Record systems

Records


- Content
- Completeness
- Availability
- Legibility

Diagnosis

- Appropriateness
- Documentation
- Thoroughness

Patient satisfaction
Oral health status
Oral hygiene
Tooth loss
Periodontitis
Caries

“Underground” Regulations



The image shows three books. On the left is the 'United States Code 2009 Edition'. In the middle is the 'code of federal regulations' with a yellow cover and the number '29' visible. On the right is the 'SSA's Program Operations Manual System' with a white cover. Below the books, there is a small text box that reads: 'primary source of information used by Social Security employees to process claims for Social Security benefits. The public version of POMS is'.

“House rules” -- written and unwritten procedures, rules, guidelines, even e-mail messages

Never noticed to the public via the Federal Register or the state equivalent

- http://www.cms.hhs.gov/manuals/Downloads/so m107ap_v_emerg.pdf

State Operations Manual
Appendix V – Interpretive Guidelines – Responsibilities of Medicare Participating Hospitals in Emergency Cases

(Rev. 46, 05-29-09)

Transmittals for Appendix V

Part I- Investigative Procedures

- I. General Information
- II. Principal Focus of Investigation
- III. Task 1 - Entrance Conference
- IV. Task 2 - Case Selection Methodology
- V. Task 3- Record Review
- VI. Task 4- Interviews
- VII. Task 5-Exit Conference
- VIII. Task 6- Professional Medical Review
- IX. Task 7- Assessment of Compliance and Completion of the Deficiency Report
- X. Additional Survey Report Documentation

Smith v. Heckler: Aftermath

- Statutory and regulatory changes to focus more on outcomes instead of structure
- Nursing Home Reform Act of 1987
 - Certification process includes resident interviews
 - Surveys focus on residents' rights, quality of care, quality of life, and the services provided to residents
