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Let's give 'em something to talk about....

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Counsel's Column

Multiple state regulatory boards have recently been challenged with legal arguments that attempt to categorize the practice of certain professions as *speech* protected under the First Amendment, rather than *conduct* that may or may not be subject to constitutional protections. Numerous appealed administrative cases have resulted in judicial opinions with varying results. These opinions have involved a range of professions such as veterinary medicine and pharmacy services. However, a recent case involving a board of psychology is of particular interest.

For almost 40 years, a syndicated newspaper columnist has written a "Dear Abby" question and answer type column. His column offers advice on parenting techniques and appears in more than 200 newspapers across the country, including the *Lexington Herald-Leader* in Kentucky. The questions he selects to answer come from newspaper readers, individuals who attend his parenting seminars, and visitors to his website. No identifying information is disclosed, no follow-up inquiries are undertaken, and no money is exchanged. A typical tagline for the columnist's articles refers to him as a "family psychologist."

The columnist (Plaintiff) has a master's degree in psychology and is licensed by the North Carolina Psychology Board (North Carolina Board) as a psychological associate. Approximately 13 jurisdictions license master's degree applicants as psychological associates. Psychologists, on the other hand, must possess a doctorate degree in order to qualify for licensure. Thus, the Plaintiff did not qualify to be licensed as a psychologist by either the North Carolina Board or the Kentucky Board of Examiners of Psychology (Board). Kentucky, however, does recognize and license psychological associates with a master's degree.

The Kentucky statute prohibits a person from practicing or holding oneself out as a psychologist unless such person is licensed by the Board. The Kentucky practice act defines psychology in an encompassing definition of scope of practice.

Based on a particular February 2013 column containing advice about an unruly teenager that was published in the *Lexington Herald-Leader,* a complaint was filed with the Board. The complainant was a psychologist who characterized the actions of the Plaintiff as "unprofessional and unethical" and further alleged that

the Plaintiff held himself out as a psychologist when he was not so licensed. In May 2013 as a result of the complaint, the Board issued to the Plaintiff a Cease and Desist Affidavit and Assurance of Voluntary Compliance seeking voluntary cooperation to stop publishing his column in Kentucky. The Board found that the February 2013 response to a "specific question from a parent about handling a teenager" constituted the provision of psychological service and thus required a Kentucky license. Rather than comply, the Plaintiff initiated a lawsuit in Federal District Court alleging violations of his First Amendment right to free speech. The Board agreed to withhold administrative prosecution pending the outcome of the litigation.

Because the parties agreed on the material facts in the case, motions for summary judgment were filed. Summary judgment motions allow the court to determine the legal issues based on agreed-upon facts and without the necessity of a fact-finding trial. The Plaintiff argued that the attempted restrictions on his column infringed on his rights to free speech protected by the First Amendment. The Board argued that the actions of the Plaintiff constituted the unauthorized (unlicensed) practice of psychology and that his use of the title "psychologist" violated applicable Kentucky law. The Board argued that the imposed restrictions related to *conduct* and that any effect on speech was incidental.

In its analysis, the court first identified the type of speech involved in the column writing. It engaged in a detailed analysis of the differing types of speech including commercial speech, professional speech, and the messaging content of such speech. Identifying the type of speech dictates the level of scrutiny the court applies to any restrictions on such speech. Restrictions on commercial speech that has the potential to do harm to recipients are subject to a lesser burden and are more easily upheld as enforceable. On the other hand, professional or other types of speech may be less likely to do harm and, thus, governmental restrictions may be subjected to more strict scrutiny in order to be upheld.

The court concluded that the Plaintiff's actions were not solely conduct. It held that the type of speech restricted was based on content within the column and, therefore, was not content neutral. That is, the complaint alleged and the Board's cease and desist letter noted that the advice given in the column might harm Kentucky readers. As a result, the court found that the type of speech was neither commercial nor professional, but was content-based. Thus, the restrictions of such speech through governmental regulation were subject to strict scrutiny, the most substantial burden for the Board to overcome. The court held that the content-based speech applied to both the column advice and the reference to the Plaintiff as a "psychologist."

Defining this strict scrutiny burden, the court held that any restrictions on the speech must be based upon compelling state interest and narrowly tailored to achieve the intended interest. The Board argued that protecting the public health, safety, and welfare provides a compelling reason for licensing and that enforcing a regulatory framework justifies the actions of the Board. However, the court noted that previous case law finds that mere conjecture or speculation of potential harm is not enough to overcome the free speech protections based in the Constitution.

In this case, the court noted and the Board conceded that no harm can be shown from any of the Plaintiff's published articles. The court rejected as unpersuasive the Board's arguments that it need not show actual harm. Next, the court found that even if the Commonwealth had a compelling interest, its restrictions were not narrowly tailored to achieve the purpose. The court focused on the fact that not only is the use of the title "family psychologist" protected by the First Amendment, the Commonwealth's interests in protecting the unlicensed practice is hollow because it does not seek to enforce its laws over books, television shows, newspapers, and the like. As noted, "…it is difficult to understand how Dr. Phil, Dr. Oz, and countless other self-help gurus would not also be in the Government's crosshairs."

Finally, the court stated that it does not seek to "restrain the Board's ability to regulate the practice of psychology. Furthermore, the Court does not question the Board's motives, but '[t]he vice of content-based legislation…is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.' " Accordingly, the court held that the Plaintiff is entitled to express his views and that his lack of licensure does not alter that result. Had he held himself out as a Kentucky-licensed psychologist or established a psychologist-patient relationship, the stakes and results might have been different. The court awarded summary judgment in favor of the Plaintiff and against

the Board.

This case represents an interesting look into the complexities of the First Amendment as applied to the regulation of a particular profession. Where no professional relationship is established, the rigors of the First Amendment may limit the ability of a board to restrict certain activities or enforce title protections.

Rosemond v. Markham, 2015 U.S. Dist. LEXIS 134214 (U.S. District Ct 2015)