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Prohibited practice not prohibited

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Boards of social work are statutorily created and delegated with the authority to regulate the profession by enforcing the practice act in the interest of public protection. In general, boards are empowered through legislative action and can only undertake actions that fall within the scope of the delegated authority. As part of this authority, boards promulgate rules/regulations that provide an additional layer of specificity using the expertise of the board members. Once duly promulgated, these rules/regulations have force of law and licensees found to have violated them are subject to administrative (and sometimes criminal) sanction(s). At times, statutes enacted by the legislature and signed into law by the executive branch are subject to legal scrutiny. The checks and balances of government as applied by each respective branch ensure that legislation meets constitutional criteria. Consider the following.

California Senate Bill 1172 (SB 1172), codified into the California Business and Professions Code, prohibits state licensed mental health providers from engaging in "sexual orientation change efforts" with minor patients. In previous litigation [***Pickup v. Brown***, 740 F.3d 1208 (9th Cir 2014)], SB 1172 was upheld as an appropriate legislative enactment. Multiple mental health providers (Plaintiffs) alleged that the law violated the First Amendment free speech rights, was overly broad, and violated fundamental parental rights. While the ***Pickup*** case upheld SB 1172, the Court remanded the matter to the United States District Court for the Eastern District of California for additional review under different constitutional challenges.

On remand, the Plaintiffs argued that SB 1172 violated the *Establishment and Free Exercise clauses* of the First Amendment and violated the privacy rights of the minor clients. The *Establishment and Free Exercise clauses* of the First Amendment state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof... ." The Plaintiffs continued to assert that SB 1172 entangles the State with religion in violation of the First Amendment. The District Court held in favor of the State and again upheld the validity of SB 1172. The court held that SB 1172 survived legal scrutiny because it was rationally related to a legitimate government interest of protecting the well-being of minors. A rational relation test is the "lowest" standard and is met when the challenged legislation

merely meets a test that rationally supports its basis. The Plaintiffs appealed this second ruling to the 9th Circuit Court of Appeals.

Before the 9th Circuit, the Plaintiffs argued that the District Court should have applied a "strict scrutiny" test to assess the sustainability of the law under the *Establishment and Free Exercise clauses* of the First Amendment. Under a strict scrutiny test, the State must establish that a compelling governmental interest exists and the law must be narrowly tailored to achieve that interest. This strict scrutiny test is the "highest" standard and is applied when fundamental rights are at stake.

In rejecting this argument, the 9th Circuit noted that the Plaintiffs are mistaken about the scope of SB 1172. Rather than regulating all conduct, SB 1172 applies only in the confines of the counselor-client relationship. The legislation regulates therapeutic treatment provided by a licensed mental health professional acting within the scope of that professional relationship, not expressive speech. To buttress this point, the 9th Circuit referenced that the State repeatedly and expressly "disavowed Plaintiffs' expansive interpretation of the law." Specifically, the State asserts that SB 1172 does not apply to members of the clergy "who are acting in their roles as clergy or pastoral counselors and providing religious counseling to congregants." The law specifically exempts pastoral counselors and clergy so long as they do not hold themselves out as operating pursuant to a professional license. "In sum, because SB 1172 does not regulate conduct outside the scope of the counselor-client relationship, the law does not excessively entangle the State with religion."

Next, the Plaintiffs argued that SB 1172 violates the *Establishment Clause* of the First Amendment because the law has the "principal or primary effect of advancing or inhibiting religion." In rejecting this argument, the 9th Circuit noted that the stated purpose of the law was to protect the physical and psychological well-being of minors, including the lesbian, gay, bisexual, and transgender community, against the harms caused by sexual orientation change efforts (SOCE). Such a secular purpose, along with the fact that the law regulates only the conduct of state-licensed mental health providers, offsets any argument that SB 1172 advances or inhibits religion. As noted, a prohibition against SOCE applies regardless of the motivation for seeking treatment. The 9th Circuit rejected Plaintiffs' arguments justifying an application of the First Amendment because some of those seeking SOCE treatment may be motivated by their religious beliefs. Without an exclusive focus on religion-driven decision-making, the legislature has the right to enact laws whose application may have an ancillary effect on a subset of the population. Indeed, the court cited numerous studies that identify many nonreligious bases for persons seeking SOCE. A prohibition of such secular treatment does not run afoul of the First Amendment.

Finally, the Plaintiffs argued that SB 1172 violated the right to privacy of the clients. The court characterized Plaintiffs' argument that these minor clients have a substantive due process right to receive a particular form of treatment from a particular class of persons, namely California licensed mental health providers. The 9th Circuit quickly disposed of this argument, citing case law that finds that substantive due process rights do not extend to a type of treatment or to a particular type of mental health provider. Consequently, the 9th Circuit again affirmed the District Court and upheld SB 1172.

Legislation prohibiting an identified type or modality of treatment creates significant legal and practical issues. Properly drafted laws that apply across the spectrum of all practitioners and clients will likely be undisturbed by constitutional challenges. However, challenges will occur based upon the volatile nature of the rights at stake.

Welch v. Brown, 2016 U.S. App. LEXIS 15444 (9th Cir. 2016)

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