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☞ Details: Audit requests, 2005

(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

2005-06
(session year)

Joint
(Assembly, Senate or Joint)

Committee on Audit...

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (July 2012)

STATE OF WISCONSIN
BEFORE THE DEPARTMENT OF REGULATION AND LICENSING

IN THE MATTER OF A PETITION FOR AN ADMINISTRATIVE INJUNCTION INVOLVING :

GENIA ILECKI KADILE,
RESPONDENT. :

NOTICE OF FILING
PROPOSED DECISION
LS0304221UNL

TO: Genia Ilecki Kadile
1538 Bellevue St.
Green Bay, WI 54311-5608

Genia Ilecki Kadile
5613 County Hwy T
Whitelaw, WI 54247

Arthur Thexton, Attorney
Department of Regulation and Licensing
Division of Enforcement
P.O. Box 8935
Madison, WI 53708

PLEASE TAKE NOTICE that a Proposed Decision in the above-captioned matter has been filed with the Department of Regulation and Licensing by the Administrative Law Judge, William Black. A copy of the Proposed Decision is attached hereto.

If you have objections to the Proposed Decision, you may file your objections in writing, briefly stating the reasons, authorities, and supporting arguments for each objection. If your objections or argument relate to evidence in the record, please cite the specific exhibit and page number in the record. Your objections and argument must be received at the office of the Department of Regulation and Licensing, Room 281, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708, on or before January 18, 2003. You must also provide a copy of your objections and argument to all other parties by the same date.

You may also file a written response to any objections to the Proposed Decision. Your response must be received at the office of the Department of Regulation and Licensing no later than seven (7) days after receipt of the objections. You must also provide a copy of your response to all other parties by the same date.

The attached Proposed Decision is the Administrative Law Judge's recommendation in this case and the Order included in the Proposed Decision is not binding upon you. After reviewing the Proposed Decision, together with any objections and arguments filed, the Department of Regulation and Licensing will issue a binding Final Decision and Order.

Dated at Madison, Wisconsin this 8th day of January, 2004.

William Black
Administrative Law Judge

Enclosure 46

STATE OF WISCONSIN
BEFORE THE DEPARTMENT OF REGULATION AND LICENSING

IN THE MATTER OF A PETITION FOR AN ADMINISTRATIVE INJUNCTION INVOLVING GENIA ILECKI KADILE, RESPONDENT.	: : : : : :	PROPOSED FINAL DECISION AND ORDER Case No. LS 0304221 UNL

The parties to this proceeding for the purposes of Wisconsin Statutes, sec. 227.53 are:

Genia Ilecki Kadile
1538 Bellevue St.
Green Bay, WI 54311-5608

Genia Ilecki Kadile
5613 County Hwy T
Whitelaw, WI 54247

Arthur Thexton
Division of Enforcement
Department of Regulation & Licensing
1400 East Washington Ave. #194
Madison, WI 53708-8935

PROCEDURAL HISTORY

1. This proceeding was commenced by the filing of a Notice of Hearing and Petition for Administrative Injunction ("Petition") on April 22, 2003, which was served upon the respondent by mail on April 23, 2003.

2. A prehearing conference was held in this matter pursuant to Wis. Admin. Code § RL 2.11, on June 17, 2003, via teleconference, commencing at 9:15 a.m. Participating were Arthur Thexton, attorney for the Division of Enforcement, and the undersigned. A motion for default brought by the department was denied. The respondent's June 16, 2003, "Demurrer to Motion for Notice for Default with Challenge of Authority of Issuing Official" was deemed an answer denying the material allegations of the complaint.

3. The evidentiary hearing on this matter was held on July 24, 2003, at 1:00 p.m. in room 131 of the Department of Regulation and Licensing, located at 1400 East Washington Ave., Madison, Wisconsin. Appearing was the attorney for the complainant, Arthur Thexton. The respondent did not appear. Based upon the record herein, the Administrative Law Judge recommends that the Department of Regulation and Licensing adopt as its final decision in this matter the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Genia Ilecki Kadile, (the respondent) dob 01-20-1944, is employed by her husband, Eleazar M. Kadile M.D. in his medical office located at 1538 Bellevue Street, Green Bay, Wisconsin. From 1990-1993 she was a Registered Speech Language Pathologist. Other than that credential, she has never held or applied for, and does not hold, any credential issued by the department or any board or other body attached to the department. She resides at 5613 County Hwy T, Whitelaw, Manitowoc County, WI 54247. (Deemed a constructive admission of paragraph one of the *Petition* based upon the respondent's failure to deny in her "demurrer" filed in this action.)

2. 1993 Wis. Act 443, created the Dietitians Affiliated Credentialing Board and, in part, imposed restrictions on the use of certain titles. The title restriction provisions of 1993 Wis. Act 443, took effect on July 1, 1995. (Administrative notice)

3. On December 7, 1995, the respondent appeared at a public seminar for approximately 40-50 people in Green Bay Wisconsin. The seminar was offered by the respondent's husband, Eleazar M. Kadile, M.D. An advertisement for the seminar described the seminar as, "LEARN HOW TO FEEL BETTER EVERYDAY, THROUGH: PREVENTATIVE & THERAPEUTIC USE OF VITAMINS IMPROVING CIRCULATION THROUGH CHELATION THE HEALING POWERS OF DMSO- the modern aspirin of the 20th century." (Exh. 1)

4. At the December 7, 1995, seminar, the respondent stated she was a "Clinical Nutritionist." She stated (among other things); "You cannot get all of the vitamins and minerals you need from eating vegetables, fruits and meats and other foods. There is no doubt, you must take supplements." (Exh. 1)

5. At the December 7, 1995 seminar, the respondent also stated words to the effect that eating breads, pastas, and other carbohydrates had negative effects upon the body. She represented that a "Zone Diet" was the best way to eat, which involves high protein consumption. (Exh. 1)

6. Literature distributed at the December 7, 1995, seminar, on behalf of Eleazar M. Kadile, M.D., stated in part;

> What you eat is not necessarily what you utilize and absorb; therefore, nutritional therapy is the cornerstone of our success in restoring patients to good health. New research data is continuously supporting our approach. We offer the newest testing available to diagnose nutritional deficiencies. We also treat a variety of health problems with simple nutritional changes. Our Certified Clinical Nutritionist is available to discuss [nutritional] needs with you. (Exh. 1)

[NOTE- The word "nutritional" indicated by brackets in this finding of fact, is included in the petition for injunction pleading paragraph 3. However, Exh. 1, containing a photocopy of the brochure, does not contain the word "nutritional" preceding "needs".]

7. The respondent made entries in patient health care records of patients of her husband, Eleazar M. Kadile, M.D., in which she provided diet advise and noted after her name the initials "CCN": September 2, 1992; May 18, 1993; May 24, 1994; (month), 23, 1994; October 27, 1994; June 11, 1996; July 16, 1996; December 17, 1996; and December 23, 1996. (Exh. 2)

8. The respondent is currently certified by the Clinical Nutrition Certification Board. (Exh. 5, 6, 8)

9. The initials "CCN" are deemed to represent the title, "Certified Clinical Nutritionist". (Exh. 5, 6, 8)

10. On April 15, 2003, an advertisement was published by the Center for Integrative Medicine, Eleazer M. Kadile, director, in *The Door County Advocate*, that identified the respondent as a "Clinical Nutritionist". (Exh. 3)

11. A testimonial page for an internet website for the book, "Dr. Bernstien's Diabetes Solution", obtained by the complainant's attorney as printed from the internet on July 7, 2003, contains a testimonial by the respondent wherein she uses the title, "Certified Clinical Nutritionist". (Exh. 4)

12. The respondent is currently a certified dietitian/nutritionist in the state of New York. The credential was granted on March 7, 1996. (Exh. 8)

CONCLUSIONS OF LAW

1. The Department of Regulation and Licensing has jurisdiction in this matter pursuant to Wis. Stats. § 440.21.

2. The evidence in the record is insufficient to establish that by engaging in the conduct described in the findings of fact the respondent engaged in a practice or used a title without a credential required under Wis. Stats. Chs. 440 to 480.

ORDER

NOW THEREFORE, IT IS ORDERED that the Petition is dismissed.

OPINION

I. Applicable Law

Wis. Stats. § 440.21 provides in part:

> (1) The department may conduct investigations, hold hearings and make findings as to whether a person has engaged in a practice or used a title without a credential required under chs. 440 to 480.
>
> (2) If, after holding a public hearing, the department determines that a person has engaged in a practice or used a title without a credential required under chs. 440 to 480, the department may issue a special order enjoining the person from the continuation of the practice or use of the title.

Wis. Stats. § 448.76 provides:

> Except as provided in s. 448.72 (1) (e) and (2) to (6), a person who is not a certified dietitian may not designate himself or herself as a dietitian, claim to provide dietetic services or use any title or initials that represent or may tend to represent the person as certified or licensed as a dietitian or as certified or licensed in a nutrition-related field.

II. Ruling on Motion and Notice for Relief re: Failure to Appear at Deposition

A telephonic hearing in this matter was held on July 9, 2003, commencing at 3:30 p.m. Participating were Arthur Thexton, attorney for the Division of Enforcement, Genia Ilecki Kadile and the undersigned. On July 8, 2003, Genia Kadile served via email on the undersigned a "demurrer" to a notice of deposition and deposition subpoena served upon her by Arthur Thexton via United States mail on or about June 17 or 18, 2003.

Both parties agreed to participate telephonically in the July 9, 2003, hearing on the respondent's "demurrer" to the notice of deposition and specifically Mr. Thexton indicated he was prepared to participate orally without filing papers in opposition to the "demurrer".

At the close of the July 9, 2003, telephonic hearing, the "demurrer" to the deposition subpoena was construed as a motion for protective order pursuant to Wis. Stats. § 805.07 (3). [i]

The deposition subpoena was modified as follows:

a. "Bullet" points two and three were quashed.
b. The respondent was ordered to produce the documents requested by "bullet" point one, that were in her possession or control.
c. The respondent was ordered to produce the documents requested by "bullet" point four.
d. The respondent was ordered to appear for her deposition on Friday July 11, 2003, at 10:30 a.m. at the offices of Bay Reporting Service, 200 S. Monroe St., Green Bay, Wisconsin.

The respondent did not appear for her deposition on July 11, 2003.

On July 14, 2003, the attorney for the complainant, Arthur Thexton, filed and served on the respondent by mail a *Motion and Notice for Relief re: Failure to Appear at Deposition*. By notice, Mr. Thexton informed the respondent that he intended to bring on the motion at the July 24, 2003, evidentiary hearing in this matter, as a result of the respondent's failure to appear at her July 11, 2003, deposition.

The motion by Thexton sought relief including the department's costs associated with the deposition, a request for striking the respondent's pleadings and a finding of default, and precluding the respondent from offering evidence on her behalf at the evidentiary hearing.

[i] Designated incorrectly in the order as section 805.07 (3) instead of 804.01 (3).

Wis. Admin. Code § RL 3.12 provides as follows:

> RL 3.12 Discovery. The division and the respondent may, prior to the date set for hearing, obtain discovery by use of the methods described in ch. 804, Stats., for the purposes set forth therein. Protective orders, including orders to terminate or limit examinations, orders compelling discovery, sanctions provided in s. 804.12, Stats., or other remedies as are appropriate for failure to comply with such orders may be made by the administrative law judge.

The complainant's motion is denied based on the following grounds:

A. Even were the respondent's default declared, the findings of fact do not make out a proper case for the issuance of an injunction for use of the phrase "clinical nutritionist".

In the instance of default, findings may be made upon the basis of the petition and other evidence. (Wis. Admin. Code § RL 3.13) In the present matter this hearing examiner has made findings on the basis of the petition and additionally admitted all evidence offered by the department at the evidentiary hearing.

A decision on the motion for default was withheld until the close of the evidentiary hearing to allow the department to make its case and present argument regarding the use of specific titles.

Therefore, in the instance of the use of the title "clinical nutritionist", it simply doesn't matter how many more instances of the use of that title the department could uncover in a deposition. The department would still fail to receive the requested injunction, because that title is permissible to use.

B. The respondent's failure to appear at the evidentiary hearing makes it a moot point to further order that she is foreclosed from presenting evidence on her behalf

Owing to the fact that the respondent did not appear, she has effectively precluded herself from presenting evidence. Further sanction from this forum is moot.

C. The unique procedural history of this case and the related case against the respondent's husband, Dr. Eleazar M. Kadile, does not make it credible to argue that the department was foreclosed from obtaining discovery of the use of the title "certified clinical nutritionist".

The department had in its power to check the respondent's medical records to discern whether the respondent has used the title "certified clinical nutritionist" in Wisconsin since 1996 in the patient treatment context. This is due to the fact the investigation against the respondent's husband (Dr. Eleazar M. Kadile M.D.; LS 0112061 MED) was opened in 1994 and the respondent worked for her husband. (R.T. pp. 32-35).

As noted below, the department indicates that one object of taking the respondent's deposition was to obtain the respondent's admission that she had used the title "certified clinical nutritionist". Of course, the exhibits currently in evidence reveal that this is true even without further questioning:

MR. THEXTON: Exhibit -- Exhibit -- no there are more in -- in the chart than here, but what we have is -- the two-sided copy which I had marked as Exhibit 2 are sufficient to demonstrate the point, in my view. I would also represent to the tribunal that I have examined a number of other charts of this -- of this office, and Mrs. Kadile's signature frequently appears in other charts. **And -- and I believe that had she come to the deposition, and were she here today, she would readily agree that yes, she has made many entries in patients charts over the years and yes she has signed her name in this manner.** Now, if we can just look at -- at the Bates stamped Page 27, we'll see that the entry at the top dated 12/17/96, is signed G. Kadile, MA, which I believe means Master of Arts, but it may not, it may mean medical assistant, stroke CCN, Clinical – Certified Clinical Nutritionist. And there -- we see then the entry for December 23rd '96 signed the same way and on Page 28, which is the back side of the exhibit, we see two more entries also in '96 signed in the same manner. **And I have every reason to believe that if she had attended the deposition as required she would have admitted that yes, this is her handwriting, yes, this is her signature, yes, she appended those initials, intending it to be the use of a title Certified Clinical Nutritionist.** (R.T. pp. 11-12) [emphasis added]

The patient charts in question comprising Exhibit 2, are from her husband, Eleazar M. Kadile's medical practice and they are deemed to be the respondent's use of "CCN" representing the title "Certified Clinical Nutritionist".

There was no separate investigative file originally opened on the respondent rather, only her husband, Dr. Kadile. The investigation of Dr. Kadile is a 1994 file:

MR. THEXTON: No, there was not a separate investigative file opened on Ms. Kadile. The file at that time was opened on Dr. Kadile. (R.T. p. 10)

MR. THEXTON: I'm sure there was, because the Dr. Kadile case is a '94 file, and I believe the original attorney assigned to that case was Mr. Lubcke. At a later date, which I do not recall offhand, I became assigned. (R.T. p. 10)

The ability to investigate has been in the department's control at all times and is not dependent on the respondent's deposition testimony. As explained in this opinion the out of date nature of the allegations concerning the use of "certified clinical nutritionist" were not convincing to support a finding that a title use violation had occurred warranting the issuance of an injunction. A medical records check by the department might or might not have resulted in evidence being obtained detailing more recent usage than contained in Finding of Fact #7, (1992-1 instance; 1993-1 instance; 1994-3 instances; 1996-4 instances), however, the department proceeded instead with a petition containing these essentially stale allegations.

The respondent's matter was presented to a screening panel on August 19, 2002, and opened for investigation on February 27, 2003. (R.T. pp. 31-32) The formal petition was filed on April 22, 2003:

LAW JUDGE: Well, did you supply the materials that went into the screening panel in August?
MR. THEXTON: I'm sure I did.
LAW JUDGE: What did you -- what did you supply at that time?

MR. THEXTON: I supplied a memorandum dated June 6th of 2002.
LAW JUDGE: Did it cite any evidence in there?
MR. THEXTON: Yes. It cited the -- the evidence of the brochure which is Exhibit 1 and investigator Johnson's report and the law. (R.T. p. 32)

If, therefore, additional records were desired to be sifted for title usage violations by the respondent, the department had ample opportunity to investigate Dr. Kadile's files had it chosen to do so. Instead it chose to file the petition. The respondent herself could not have released such records in any event under Wis. Stats. Ch. 146. Questioning the respondent's recollections as to records would have meant little, given the records themselves existed and the department could have accessed them at any point had it seriously desired to do so.

In the unique context of prosecuting Dr. Kadile's case, the respondent's case became interwoven, and at some point the two cases became linked for a combined settlement of a sort.

LAW JUDGE: Okay. How was the decision made to file a formal complaint in this matter?
MR. THEXTON: Well, the petition was drafted, and all petitions and formal complaints before they are filed must be approved by the supervising attorney of the unit, and so in this case it was -- I submitted it to Mr. Berndt and he approved it.
LAW JUDGE: Okay.
MR. THEXTON: Because it's an unlicensed practice case there's not a case advisor from the relevant board, as there would be if the person were licensed and to be accused of unprofessional conduct. And, you know, I -- I feel compelled to say for the record that I -- I don't believe that these issues are particularly relevant to the issue of whether or not unlicensed use of a title has occurred. **But I will say that clearly this case is a companion case to a pending hearing in the matter of Dr. Kadile, the respondent's husband and employer, and some of the decisions in this case were made in conjunction with the failure of settlement talks in that case.**
LAW JUDGE: I don't understand.
MR. THEXTON: So -- well, there was a settlement proposed and tentatively agreed to that Dr. Kadile would take steps to insure that Mrs. Kadile did not use a title as prohibited by 448.76. But those -- that agreement fell through, and therefore this case proceeded.
LAW JUDGE: So that was an agreement or a proposed agreement prior to the filing of this complaint?
MR. THEXTON: Prior to the filing of the petition, yes.
LAW JUDGE: Oh, it's petition. Well, how could he have agreed on her behalf? I guess I'm - - I guess I'm a little confused.
MR. THEXTON: Well, in -- in the context of – of settlement, many things occur that may gloss over details because that's the nature of settlement. You know, you --you try to create a global solution. I -- I would only say further that I was satisfied that had Dr. Kadile signed the agreement that this problem would not have continued.
LAW JUDGE: How so?
MR. THEXTON: Because Mrs. Kadile would not have continued to represent herself as a clinical nutritionist or a certified clinical nutritionist to the public.
LAW JUDGE: Why not?
MR. THEXTON: Because she is employed only by her husband and only at his clinic, and there is – I felt in the context of our settlement negotiations that -- and in

particular what Dr. Kadile told us about his wife's role in the settlement negotiations and in his practice and in his life, that that would be adequate. So I understand that the days of women of -- as property are -- are 150 years gone and dead and I'm grateful for it, but even so, my expectation and belief was in the con -- if we had been able to settle with Dr. Kadile, Mrs. Kadile would have in fact agreed to this and complied. Because we could also – we always could have brought it in the future had there been future violations, so. (R.T. pp. 32-35) [emphasis added]

LAW JUDGE: Okay. I'm just curious as to how the case -- what happened to make the case open on February 27--
MR. THEXTON: Uh-huh.
LAW JUDGE: -- of 2003.
MR. THEXTON: It is a -- one reasonable inference is that it was because of the breakdown in settlement negotiations. (R.T. p. 37)

MR. THEXTON: **Well, it's opened now. I -- I think that it's -- it's opened now because we did not settle with Dr. Kadile,** and it -- the matter -- the complaint was filed upon receipt of evidence that her use of this type of title continues, as shown by the newspaper advertisement in April. So -- (R.T. pp. 38-39)

LAW JUDGE: I'm just curious what happened to make this case become opened by Mike Berndt on February 27, 2003.
MR. THEXTON: Well, I -- I think February 27th is an arbitrary date but -- and is just when -- if you've ever seen Mr. Berndt's desk, it is -- it is piled high and deep with files. So February 27th is likely when he finally got to it. But in terms of getting -- it being in the file of things to be gotten to --
LAW JUDGE: Uh-huh.
MR. THEXTON: -- I believe it's there because the settlement negotiations with Dr. Kadile had broken down and he had rejected entirely the settlement which had been tentatively agreed to in November. (R.T. p. 40)

The goal of the department's attorney was therefore to bind the rights of the respondent in her husband's case, a case to which she was not a party. In that failed context, the present petition was filed.

It cannot seriously be posited by the department that it could not have reviewed Dr. Kadile's medical records in the present matter had it chosen to avail itself of the option. I am not convinced the department has provided a minimally viable rationale for deposing the respondent. (*See highlighted argument quoted previously*: R.T. pp. 11-12)

In any event, the instances of offending title usage were represented by the department to in fact be from the 1992 to 1996 time frame and the department apparently did have those records:

LAW JUDGE: Sorry. I had a thought and it's gone. Let me focus one moment. Do you have any examples with any other patients?

MR. THEXTON: I do, but I did not prepare them for this hearing.

LAW JUDGE: Can you represent that generally they're from that time frame?

MR. THEXTON: Yes. They are generally from the '92 to '96 time frame and they are multiple other patients. **And I have, because of the way the investigation developed, I have only one patient chart from a post-'96 time period and that is for a six-year-old child, and I do not believe that her signature appears at all in that child's chart, so -- that child was you know, there for allergy treatment so wouldn't -- I -- I don't view that as being -- I wouldn't expect to see a nutrition consultation in a child there for allergies.** So that didn't -- (R. T. 13-14) [emphasis added]

By the respondent's failure to appear the department's evidence is admitted without objection to establish the title usage in question. This defacto default by the respondent makes the department's motion for default moot. Based upon the extensive colloquy quoted above regarding the department's knowledge of the contents of the medical records in question combined with the proffered rationale for further deposing the respondent, the department has not been hindered from putting on its case.

D. Costs

I also decline to enter an order awarding costs incurred by the department. First, the motion is incomplete as the costs in sum certain are not listed. Without the ability for the respondent (party to be charged) or this forum to review the costs sought, I will not order an award as a sanction. Second, and bearing more weight, upon review of the procedural history of this case and evidence presented at the evidentiary hearing, coupled with my re-review of the respondent's responsive pleadings, and the respondent's "demurrer" to the deposition notice, I believe the specific equities of this case support a decision not to award costs. I am cognizant that orders of any adjudicating forum must be respected and followed and appropriately enforced, however, this is a fact specific determination confined to this unique case. I find that in this instance the circumstances make an award of expenses as a sanction unjust.

III. Analysis of the evidence

A. The department's basis for seeking an injunction.

At the evidentiary hearing, the complainant's attorney stated he was seeking the relief stated in the prayer of the petition;

LAW JUDGE: Uh-huh. Okay. Well, so you're seeking the relief stated in your prayer?

MR. THEXTON: I am. (R.T. p. 44)

The relief sought in the prayer of the petition is as follows:

"...that the Department of Regulation & Licensing issue a special order enjoining Genia Ilecki Kadile from using any title which tends to represent that she is certified or licensed in a nutrition-

related field including but not limited to the titles of Certified Clinical Nutritionist or Clinical Nutritionist, and from doing any other act which may constitute an activity for which a credential is required from the Dietitians Affiliated Credentialing Board or another board attached to the Department, unless she obtains such credential." (emphasis added)

The department has presented no argument that the respondent has done any act constituting an activity for which a credential is required, aside from title infringement. Indeed, the department's argument presented at the hearing was directed to title infringement, and paragraph 8 of the petition sets forth in quotation marks the two titles at issue, "Certified Clinical Nutritionist" and "Clinical Nutritionist":

MR. THEXTON: It is my view that what she is doing does con -- constitute the use of this title, a title – let me just think of the exact wording of the statute here. The exact wording of the statute is that she can't use any title -- and it is a broad title act. It is not narrow – for example, like the massage therapists have a much more narrow title act than this. But the -- the title act in this case in Section 448.76 prohibits people who are not licensed here or credentialed here to use, and I quote, any title or initials that represent or may tend to represent the person as certified or licensed -- and here I omit some other extraneous language -- in a nutrition-related field. **And if holding yourself out as a certified clinical nutritionist or as a clinical nutritionist public and in seminars and in patient charts does not represent or tend to represent her as certified in a nutrition-related field, I just don't know what does. And so --**

LAW JUDGE: Your –

MR. THEXTON: -- it is --

LAW JUDGE: I'm sorry. Go ahead.

MR. THEXTON: It is my view that the use of the titles either **certified clinical nutritionist** or **clinical nutritionist** as we see more recently, is a violation of the title act that the special order should issue. (R.T. pp. 24-25) [emphasis added]

The above quoted argument by the department in support of the issuance of an injunction does not amount to a legal argument, but rather an unsupported conclusion based upon the attorney's "view". The department bears the burden of proof. Never the less, this hearing examiner will analyze the titles at issue given that the respondent did not appear at the hearing and move for dismissal at the close of the department's case.

A petition for an injunction must be specific as to the form of relief requested and the grounds therefore, with the department bearing the burden of proof. Therefore, only the titles "certified clinical nutritionist" and "clinical nutritionist" are at issue.

Any other factual or legal basis for granting the requested petition is waived as not being raised at the evidentiary hearing. The hearing examiner is not required to sift the record to create implied factual violations, and create legal arguments to support those violations. "Trial courts need not divine issues on a party's behalf. It is therefore unfair and certainly illogical to expect trial courts to discern and resolve every `argument' that could have been but was not raised in resolving an issue." *Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶11, 261 Wis. 2d 769, 661 N.W.2d 476, *review denied*, 2003 WI 91, 262 Wis. 2d 502, 665 N.W.2d 376 (Wis. May 5, 2003) (No. 02-1413).

B. Use of the title "CCN", or "Certified Clinical Nutritionist"

It is reasonable to conclude that use of the title "CCN", or "Certified Clinical Nutritionist", does;

"tend to represent the person as certified or licensed as a dietitian or as certified or licensed in a nutrition-related field." Wis. Stats. § 448.76

This conclusion is reached because Wis. Stats. §448.70(1m), uses the word "certified" in combination with the word "dietitian" to create the title protected class of "certified dietitian". Therefore, using "certified" preceding "nutritionist" reasonably will tend to represent that the person is certified or licensed in a nutrition-related field, based on the use of the word, "certified".

The term "Credential" means, "...a license, permit, or certificate of certification or registration that is issued under chs. 440 to 480." Wis. Stats. §440.01 (2)(a).

Therefore, "certified" or variations such as "certificate" or "certification" are statutorily created terms of art which Wisconsin uses to designate certain classes of government issued credentials.

The respondent made entries in patient health care records of patients of her husband, Eleazar M. Kadile, M.D., in which she provided diet advise and noted her name with the initials, "CCN" : September 2, 1992; May 18, 1993; May 24, 1994; (month), 23, 1994; October 27, 1994; June 11, 1996; July 16, 1996; December 17, 1996; and December 23, 1996. (Exh. 2)

The other instances of similar title usage were represented by the department to be from the 1992 to 1996 time frame as well:

> LAW JUDGE: Sorry. I had a thought and it's gone. Let me focus one moment. Do you have any examples with any other patients?
>
> MR. THEXTON: I do, but I did not prepare them for this hearing.
>
> LAW JUDGE: Can you represent that generally they're from that time frame?
>
> MR. THEXTON: Yes. They are generally from the '92 to '96 time frame and they are multiple other patients. **And I have, because of the way the investigation developed, I have only one patient chart from a post-'96 time period and that is for a six-year-old child, and I do not believe that her signature appears at all in that child's chart, so -- that child was you know, there for allergy treatment so wouldn't -- I -- I don't view that as being -- I wouldn't expect to see a nutrition consultation in a child there for allergies.** So that didn't -- (R. T. 13-14) [emphasis added]

The title restriction at issue, codified at Wis. Stats. § 448.76, was created by 1993 Wis. Act 443. which took effect on July 1, 1995.

Therefore, the initials, signifying "Certified Clinical Nutritionist", used prior to July 1, 1995, cannot provide the basis to grant an injunction in this case. (September 2, 1992; May 18, 1993; May 24, 1994; (month), 23, 1994; October 27, 1994)

As to the four instances of using of "CCN" in mid and late 1996, bringing the present petition on the basis of using such abbreviations one year to one and a half years after the effective date of 1993 Wis. Act 443 raises a concern in my opinion.

While it is true that Wis. Stats. § 440.21, allows the bringing of a statutorily authorized suit for an injunction, injunctions are still matters of equity. The rule of common courtesy and the policy of this department has in the past been that education and voluntary compliance are the preferred means to protect the public; as opposed to prosecution. Discretion in the exercise of equity compels that citizens of this state be assisted to comply with a new regulatory scheme.

This rule of reason requires some reasonable cut off point between education with voluntary compliance, versus concluding that a nonconforming citizen is a scofflaw, suitable for prosecution. Here, the respondent's use of "CCN" should fall on the side of discretion not to prosecute or grant an injunction given the out of date nature of the department's claim, and the proximity of the offending title usage to the effective date of 1993 Act 443.

The remaining evidence for the respondent's use of the title, "Certified Clinical Nutritionist" is a testimonial page for an internet website for the "Dr. Bernstien's Diabetes Solution", printed July 7, 2003. This webpage contains a testimonial purportedly by the respondent wherein she uses the title, "Certified Clinical Nutritionist". This webpage testimonial similarly provides no basis for the issuance of an injunction. The department provides no argument as to why Wisconsin law should trump title usage on websites viewed worldwide. I decline to issue an injunction on these bare facts where the department has failed to present any jurisdictional analysis.

C. Use of the title "Clinical Nutritionist"

The final issue to be decided is whether "Clinical Nutritionist" is a protected title under Wis. Stats. § 448.76, such that an injunction should issue. I conclude that "Clinical Nutritionist" is not a protected title and accordingly, no injunction should issue.

I first note that, section 448.76, prevents a non certified dietitian from using any title that represents or may tend to represent the person as "certified" or "licensed" as a dietitian or as "certified" or "licensed" in a nutrition-related field. Therefore, an offending title is offending precisely because it either explicitly claims or implies a credential. However, what the credentialing statutes give under Wis. Stats. Chapters 440-448, they also constrain.

Credentialing in Wisconsin uses terms of art. These terms of art are the commonly used terms, "license", "permit", "certificate" or "registration". The public recognizes these terms of art as representing a credential that typically the government issues as a privilege based upon meeting some public protection standard. This public meaning is evidenced by the common meaning ascribed to these credentials:

"License" is defined in part as, "authorization by law to do some specified thing." *New World Dictionary*, Second College Edition.

"Permit" is defined in part as, "a document granting permission; license; warrant". *New World Dictionary*, Second College Edition.

"Certificate" is defined in part as, "a document certifying that one has met specified requirements, as for teaching." *New World Dictionary*, Second College Edition.

"Registration" is defined in part as, "an entry in a register". See also, "registered nurse", "a nurse who has completed extensive training and has passed a specific State examination qualifying [him] [or] her to perform complete nursing services." *New World Dictionary*, Second College Edition.

Contrasted to these credentialing terms of art, the word "clinical" does not address governmental sanction or qualifications but rather the substance of practice, and is defined in part as, "having to do with the direct treatment an observation of patients, as distinguished from experimental or laboratory study." *New World Dictionary*, Second College Edition.

Wisconsin law recognizes the same distinction for the word "clinical" as relating to the substance of practice:

Wis. Admin. Code § HFS 40.03 Definitions.

(6) "Direct clinical services" means face to face patient contact.

Wis. Admin. Code § HFS 129.03 Definitions.

(4) "Clinical setting" means a practice setting where care and treatment of clients occur.

The legislature is certainly free to convert the word "clinical" into a credentialing term of art for dietitian practice should it deem appropriate to do so. However, for purposes of interpreting Wis. Stats. § 448.76, I decline to range so far a field given the demonstrated substantive meaning in common parlance for the term. The department has presented no argument to read "clinical" so broadly to create an implied title class at odds with its generally used common meaning.

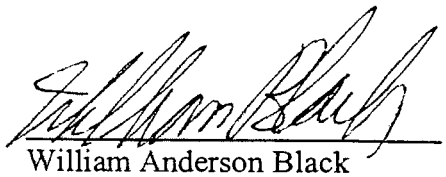
The department's position at hearing presents an interesting view of the law resulting in the argument that while an act may indeed be legal under a title protection statute, it cannot lawfully be advertised. This appears to be a mis-reading of the commercial speech doctrine, and the department has presented no case law in support of this approach. The department's view is tantamount to re-writing Wis. Stats. § 448.76, which explicitly states that a person may designate themselves as <u>something,</u> however, under the department's analysis <u>no designation</u> would be proper:

> MR. THEXTON: It is my view that the use of the titles either certified clinical nutritionist or clinical nutritionist as we see more recently, is a violation of the title act that the special order should issue.
> LAW JUDGE: What would be an acceptable title?
> MR. THEXTON: You know, I -- I have -- it occurred to me that you might ask, and I -- I am not sure.
> LAW JUDGE: That poses a problem, doesn't it?
> MR. THEXTON: I'm not sure that it does. I --
> LAW JUDGE: -- protection --
> MR. THEXTON: No. Doesn't the legislature have the right to prohibit deceptive advertising practices and that holding it out to the use of the public is really what this about.

LAW JUDGE: But you have -- if the -- if the act is -- is legal --
MR. THEXTON: Uh-huh.
LAW JUDGE: -- you have a commercial right to somehow let the public know you do it. So there – there has to be some means for her to communicate her lawful act to the public. And I'm -- I'm just positing for you --
MR. THEXTON: I -- I am not sure that that is true.
LAW JUDGE: You're not?
MR. THEXTON: No.
LAW JUDGE: So you make the act legal but you can't advertise it?
MR. THEXTON: I do not think there is a constitutional prohibition to that.
LAW JUDGE: Really. (R.T. pp. 24-26)

Given that the word "clinical" does not represent "certified or licensed", by extension for purposes of section 448.76, coupling "clinical" with "nutritionist" does not create a title that runs afoul of the title protection provision. This assumes that the word "nutritionist" standing alone doesn't imply certification or licensure in a nutrition-related field. The department specifically pleaded and argued only that the quoted terms "certified clinical nutritionist" and "clinical nutritionist", were titles sufficient to support the issuance of an injunction. The department provided no analysis or argument that any other quoted words standing alone or in combination provided sufficient grounds for the issuance of an injunction. A petition for an injunction must be specific as to the form of relief requested and the grounds therefore, with the department bearing the burden of proof. All other variations not raised as issues and briefed are deemed waived.

Dated: January 7, 2004



William Anderson Black
Administrative Law Judge

LRB–2479/1
PJH:jld:rs

2003 ASSEMBLY BILL 397

June 10, 2003 – Introduced by Representatives ALBERS, SERATTI and VAN ROY, cosponsored by Senator SCHULTZ. Referred to Committee on Health.

AN ACT *to amend* 448.06 (2); and *to create* 448.015 (1c), 448.02 (3) (am) and 448.02 (3) (i) of the statutes; **relating to:** chelation therapy.

Analysis by the Legislative Reference Bureau

Under current law, the Medical Examining Board licenses physicians to practice, investigates allegations of malpractice or unprofessional behavior by a physician, and imposes discipline on a physician who commits malpractice or acts unprofessionally.

This bill permits a physician to practice chelation therapy. Chelation therapy is a medical treatment in which a chemical is introduced into a patient's body for the purpose of binding and either removing or rearranging metallic elements. Under the bill, the Medical Examining Board may not deny a license, investigate, or take disciplinary action against a physician solely because he or she practices, or wishes to practice, chelation therapy.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 448.015 (1c) of the statutes is created to read:

448.015 **(1c)** "Chelation therapy" means a medical treatment in which a chemical is introduced into the body for the purpose of binding, and removing or rearranging, metallic elements in the body.

Enclosure 47

SECTION 2. 448.02 (3) (am) of the statutes is created to read:

448.02 **(3)** (am) If the board receives an allegation of unprofessional conduct or negligence involving the practice of chelation therapy, the board shall consult, as part of its investigation under par. (a), with at least one physical who devotes a significant portion of his or her practice to chelation therapy.

SECTION 3. 448.02 (3) (i) of the statutes is created to read:

448.02 **(3)** (i) The board may not investigate or take disciplinary action against a physician solely because the physician practices, attempts to practice, proposes to practice, or holds himself or herself out to the public as one who practices, chelation therapy.

SECTION 4. 448.06 (2) of the statutes is amended to read:

448.06 **(2)** DENIAL OF LICENSE OR CERTIFICATE. The board may deny an application for any class of license or certificate and refuse to grant such license or certificate on the basis of unprofessional conduct on the part of the applicant, failure to possess the education and training required for that class of license or certificate for which application is made, or failure to achieve a passing grade in the required examinations. The board may not deny an application for a physician's license and may not refuse to grant a physician's license solely because the applicant practices, attempts to practice, proposes to practice, or holds himself or herself out to the public as one who practices, chelation therapy.

SECTION 5. Nonstatutory provisions.

(1) The medical examining board may not investigate or take disciplinary action against a physician solely because the physician practices, attempts to

practice, proposes to practice, or holds himself or herself out to the public as one who practices, chelation therapy before the effective date of this subsection.

(END)

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New inquiry to examine woman's medical treatment

Credibility of a second investigation led by the same examiner is questioned

By TOM KERTSCHER
of the Journal Sentinel staff

Last Updated: July 8, 2002

The state Medical Examining Board said Monday that it is conducting a second investigation into the treatment of Lori Schmitz, a former La Crosse-area woman who suffered permanent brain damage after being given massive doses of the painkillers morphine and methadone.

But one of Schmitz's lawyers, Daniel Rottier of Madison, immediately questioned the credibility of the second investigation, which is being led by medical board attorney Arthur Thexton.

The first investigation also was led by Thexton and ended with a finding that Schmitz's doctor had committed no wrongdoing. Two months later, Schmitz - without having been notified of the investigation - suffered a seizure and the brain damage.

Thexton "is an open advocate for higher opioid use," Rottier said, referring to morphine and methadone, "and he botched the first investigation."

"It was handled inappropriately the first time around," added Leslie Even, a workers compensation attorney whose complaint about Schmitz's massive morphine doses led to the first investigation. "I question why they're having the same investigator do it and wonder why they would not have an independent (investigator) look at it."

Thexton said he decided to deviate from medical board policy not to discuss ongoing investigations because of an article about Schmitz in Monday's Journal Sentinel. He said records reviewed in the first investigation showed Schmitz's treatment by Jeffrey Menn, a Viroqua pediatrician, "was a textbook-perfect case" of using escalating amounts of morphine.

However, Thexton added that in retrospect, investigators should have interviewed Schmitz as part of the first investigation. Instead, investigators relied on medical records and interviews with Menn and his consulting pharmacist, Kristin Hillman, who now practices in West Bend.

Schmitz and her family will be consulted as part of the second investigation, Thexton said.

Thexton said the second investigation would not be completed for at least a few months. He said any complaint about his handling of the second investigation should be made to the medical board.

Schmitz suffered debilitating pain after a 15-pound meat hook fell on her at work in August 1993. After various treatments failed, Menn prescribed morphine, which reached up to 12,000 milligrams per day, an amount that national medical experts said is staggering.

After the complaint that led to the first investigation, Menn began the process of moving Schmitz from morphine to methadone, a less expensive alternative. During that process, in August 1998, she suffered the brain damage and now is staying in a $1,000-a-day institution in Louisiana.

Lori Schmitz

Photo/File

Lori Schmitz suffered brain damage after being given massive doses of painkillers.

Related Coverage

Painful Journey: Woman's family didn't learn about probe of doctor until her seizure 1 1/2 years later

A medical malpractice suit filed by Rottier and La Crosse attorney Thomas Fitzpatrick led to an $11.9 million settlement, one of the largest in state history for medical malpractice cases.

Schmitz's husband, Carl Schmitz, said he was glad to hear that his wife's treatment is being reviewed again. He lives with the couple's two daughters in Cashton, southeast of La Crosse. They visit Schmitz about every six weeks.

"I really believe that there was a lot of neglect," he said.

Menn could not be reached for comment.

Appeared in the Milwaukee Journal Sentinel on July 9, 2002.

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In pain, in the dark

Woman's family didn't learn about probe of doctor until her seizure 1 1/2 years later

By TOM KERTSCHER
of the Journal Sentinel staff

Last Updated: July 7, 2002

A year and a half before Lori Schmitz suffered massive brain damage, the state Medical Examining Board began investigating why her doctor was giving her 120 morphine pills a day - a dosage that according to one expert was "in outer space."

Painful Journey

Lori Schmitz meets with Carl and their daughters, Nichole, 16, and Heather (right), 17, when she returned home in June for her first visit since August 1998.

The doctor, Viroqua pediatrician Jeffrey Menn, was ordered to complete a 40-hour pain management course. But Menn had committed no wrongdoing, the medical board concluded, and in June 1998 the case was closed.

Two months later, Schmitz, by then on methadone as well as morphine prescribed by Menn, was brought to a hospital, where she suffered a seizure and permanent brain damage. The emergence of violent mood swings and other problems was so severe that she was moved from one Wisconsin mental institution to another, before finally being placed at a $1,000-a-day facility near New Orleans, some 1,100 miles from home.

The ordeal led to a lawsuit and an $11.9 million settlement last August, one of the largest medical malpractice payments in state history.

But to this day, the nature of the Medical Examining Board investigation remains in question.

The medical board had reviewed Schmitz's medical records and interviewed Menn and other medical professionals about the morphine. But no one ever talked to Schmitz or her family. In fact, the board never notified the family that it had received a complaint about the morphine or that it had investigated Menn.

Schmitz's husband, Carl, acknowledges that he and Lori had great trust in Menn, who had been the family physician for nearly 20 years. But Carl said they might have made other decisions had they been told that Menn's competence had been called into question.

"In my opinion," he said of his wife's brain damage, "it shouldn't have happened."

On-the-job accident

Carl Schmitz, 44, grew up on a farm in Cashton, a rural town southeast of La Crosse; Lori Schmitz, 39, was born in Valentine, Neb., but was raised on a farm in Viroqua, about 35 miles from Schmitz. They met as young adults at yet another farm and were married about a year later, in May 1983.

"She was a country girl, looked like she was a hard-working girl," Schmitz said. "A lot of connections there, had a lot of mutual interests."

The couple had two daughters, Heather, now 17, and Nichole, 15. Carl, a farm implement mechanic, said Lori enjoyed her work boning meat at Pine Valley Meats in Cashton.

"She always liked the competition." Schmitz said. "She thought she was able to do it just as good as any man."

In August 1993, a 15-pound iron meat hook fell on Lori. She was wearing a hard hat, but the blow knocked her out, and she suffered injuries that caused pain to her neck and shoulders, as well as severe headaches.

Menn spent many hours trying to treat Lori, Schmitz said. He tried everything from Darvon, steroid injections, and pain patches to acupuncture, massage therapy and anti-depressants. But 21/2 years after the accident, after Lori returned to work but had to quit again, she was still in near-constant, debilitating pain.

"She always complained it was like a real hot spot and somebody always jabbing you with a pin," Schmitz said.

So in January 1996, Menn consulted with pharmacist Kristin Hillman, who at the time headed a loosely organized chronic pain program in the Viroqua area. Hillman had taken her first pain management course less than a year earlier.

Enter morphine

Menn and Hillmanagreed to start Schmitz on morphine and within seven months, in August 1996, she was taking 12,000 milligrams of it a day - in addition to dozens of other pills to counteract morphine's side-effects, according to court records.

William Brose, a national pain management expert and former professor at Stanford University, later testified that uncontrollable "myoclonic jerking" that Schmitz was experiencing - within the first three months of taking the morphine - was clear evidence that she was taking too much.

Menn was "in outer space instead of on Earth," Brose said of the dosages prescribed. And experts from Harvard, Yale and the University of Minnesota, who like Brose were hired by Schmitz's attorneys, agreed.

For his part, Menn testified in the malpractice suit that he had prescribed morphine in the past, although he had no special training and didn't know whether Hillman had experience with morphine. He and Hillmanalso testified, however, that the medical community has put no maximum dosage on morphine, and they contended that, at least intermittently, Lori Schmitz reported less pain and a better quality of life as her dosage increased.

Carl Schmitz recalled, however, that his wife spent most of her time sleeping or writhing in pain, hardly able to interact with her family. She spent some days in a darkened room, screaming out in agony if someone even opened the door.

The morphine regimen continued for a total of 21/2 years, at a cost of some $300,000, according to Schmitz's attorneys. Then in July 1998, Menn decided to gradually reduce the morphine and put Schmitz on methadone, another potent opioid.

"You could see her going from bad to worse. I just knew something had to change," Schmitz said.

Initially, the transition to methadone improved Schmitz's condition, but soon she was throwing up, and suffering from muscle cramps and heavy sweating, her husband said. In August 1998, a month after the transition began, Lori couldn't lift her legs, and Carl took her to the hospital. Two days later, she suffered the seizure and brain damage and went into a coma.

Schmitz emerged from the coma within a week, but then suffered violent episodes that required up to six caregivers to restrain her. A stint in a nursing home was followed by the series of mental institutions and, eventually, the highly specialized facility near New Orleans.

Insurer raised flags

The Medical Examining Board had investigated Menn's morphine prescriptions beginning a year and a half before Schmitz's brain damage. It had received a complaint from attorney Leslie Even, who represented the insurance company that provided worker's compensation coverage for Lori Schmitz's employer.

Even said she did research after Schmitz's morphine bills reached $5,000 a week. She said experts had told her that taking 12,000 milligrams of morphine a day, Schmitz"should no longer be living."

The medical board concluded, however, that all Menn needed was to complete the 40-hour pain management course, which he did.

"A physician who handles unusual cases requiring unusually high doses of controlled substances should be especially well-informed about controlled substances' uses, abuse risks and legal issues," the medical board's report said. So the morphine treatment continued.

The board's decision not to take further action "seemed real minor in comparison to what this doctor had been doing." Even said, "I think he was sincerely trying, but I think he just didn't have the knowledge to do it."

Menn, who still practices in Viroqua, did not return calls seeking comment. His insurer paid $1 million toward the settlement, most of which was paid by the doctor- and hospital-funded state Patients Compensation Fund.

Hillman was not sued in the malpractice case and was cleared of any wrongdoing in May by the state Pharmacy Examining Board, which uses the same staff as the Medical Examining Board. Now a pharmacist in West Bend, Hillman declined comment.

One of Schmitz's lawyers, Thomas Fitzpatrick of La Crosse, said that once the state determined that Menn needed more training in pain management, it should have informed Schmitz of its investigation.

"That ought to be obvious, especially when the treatment's ongoing," he said.

"I think the seizure would have been prevented, and I think the brain damage would have been prevented, and it never would have cost them $12 million."

Patient, family not contacted

Michael Berndt, who supervises the prosecuting attorneys for the Medical Examining Board, said he was not familiar enough with the Schmitz case to comment on the board's action on Menn. The attorney who handled the case was not available.

It is not clear why the medical board made no contact with the Schmitz family.

Records show that Darold Treffert, a semiretired Fond du Lac psychiatrist who heads the medical board, reviewed Schmitz's medical records at the request of the worker's compensation carrier in 1996, before the medical board began its investigation. He determined that it appeared that the morphine was being prescribed under the proper conditions, the records show.

Late last month, Treffert said that although he joined the medical board before it opened the Menn investigation in February 1997, he could not recall the case or explain why the family was not notified. But he speculated that it was an oversight.

Most investigations are initiated by a patient complaint, and so the patient is kept informed about the investigation, Treffert said. But since the Schmitz investigation was initiated by the worker's compensation attorney, another step would have been needed to notify the family, he said.

Treffert conceded that it was unusual that Schmitz and her family were not interviewed as part of the investigation.

"More often than not, it typically would involve some contact with the patient," he said.

The pharmacy board investigation of Hillman was prompted by a complaint filed last August by Schmitz's other lawyer, Daniel Rottier of Madison, after the settlement of the lawsuit.

He also asked the medical board to conduct a new investigation of Menn.

It is not known, however, whether Menn is under investigation again. The medical board will acknowledge the existence of an investigation only after it is completed.

Appeared in the Milwaukee Journal Sentinel on July 8, 2002.