July, 2011

Advocacy for the Disabled and State Sovereign Immunity, the case of: Virginia Office for Protection and Advocacy v. Stewart, Commissioner, Virginia Department of Behavioral Health and Developmental Services, et.al.

News: The United States Supreme Court, on April 19, 2011 overturned the Fourth Circuit Court of Appeals decision concerning a state's claim of sovereign immunity in the matter of a dispute between two state agencies. The Supreme Court ruled that the Virginia Department of Behavioral Health and Developmental Services could not use the claim of sovereign immunity to withhold investigative records such as risk management, baseline analysis reviews and Peer to Peer review records from the Virginia Office for Protection and Advocacy (VOPA) in its quest to investigate three possible cases of abuse, harm, and neglect of patients in state-run facilities. The lower court accepted the state's claim of sovereign immunity. Sovereign immunity is the privilege of a sovereign not to be sued without its consent. The Commonwealth of Virginia hoped to shield itself from the need to disclose those records; however, the US Supreme Court in its application of **Ex parte Young** and **Verizon Maryland, Inc. v. Public Services Commission of Maryland,** overturned the lower court's decision.

Why is this of interest to forensic psychiatrists? First, this case demonstrates important issues relevant to any state's sovereign immunity and its waiver through the passage of new laws to create agencies to prevent and punish cases of discrimination in the name of advocacy for the disabled. The topic of sovereign immunity, federal, state, tribal, foreign or local governmental immunity has a fascinating history dating back to the original Thirteen Colonies, the writing of the U.S. Constitution and inclusion of the Eleventh amendment. The Eleventh Amendment reaffirmed state sovereign immunity and states are thus viewed as co-sovereigns. Second, all fifty states now have agencies similar to VOPA, and all fifty of these agencies are pressing to investigate mishaps in state- run facilities throughout the country.

How is VOPA structured? The agency was established by state legislation. VOPA consists of a director, financial coordinator, and variety of support staff, nine attorneys, a paralegal and six disability rights advocates. Presently, there are no physicians on staff at VOPA, which makes it anomalous as an agency that independently investigates cases of patient neglect, abuse, and medical mistreatment. Clearly, VOPA and the newly created agencies like it are structured for conflict resolution and litigation.

What are VOPA's goals? The scope of the VOPA's goals is ambitious, and it receives public input from two advisory councils from which its independent governing board approves goals and objectives. VOPA has published its six major goals as well as its case selection criteria for litigation. The goals are: 1) people with disabilities are to be free from abuse and neglect, 2) children with disabilities must receive an appropriate education, 3) people with disabilities are to have equal access to government services, 4) people with disabilities live in the most appropriate

integrated environment, 5) people with disabilities are employed to their maximal potential, and 6) people with disabilities must have equal access to appropriate and necessary health care. Each of these six goals has multiple areas of focus. The published criteria VOPA uses to evaluate the level of service and the potential for it to enter into litigation on behalf of the disabled are as follows: 1) severity of harm, 2) imminence of risk, 3) potential of a case to facilitate systems change, 4) availability of other resources to help the individual address the alleged violation, 5) self-advocacy ability of the client or family, 6) availability of other independent investigatory authorities, 7) availability of agency resources, and 7) the legal merit or other available remedy.

It appears that VOPA wants to utilize protected documents to sue the state on behalf of the three disabled patients in state-run facilities, and the state is seeking to avoid having its own investigative and quality assurance protected documents used for that purpose. The author assumes that police investigation records are discoverable in this specific matter.

How did the Supreme Court decide this case? The Supreme Court found that the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD act) and the Protection and Advocacy for Individuals with Mental Illness Act (PAIMI act) offers states federal money to improve medical care for persons with developmental disabilities or mental illness. A required condition for this funding is the establishment of a protection and advocacy (P&A) system to protect the rights of all persons with disability. States that elect to receive those monies may appoint either a state agency or a private non-profit entity as its P&A system, but the agency must have authority to litigate and be free from control of other state agencies and officers. Virginia is one of eight states that elected to establish an independent state agency to provide the P&A functions. In Virginia, the independent state agency was established and named the Virginia Office for Protection and Advocacy.

In this case, VOPA sought to investigate the suspicious deaths of two patients and harm to a third in state-run facilities. When it requested protected records from the Department of Behavioral Health and Developmental Services, the release was denied. The Commonwealth of Virginia claimed that existing state law prohibited the disclosure of those records, and it claimed sovereign immunity concerning any possible court intervention regarding the disclosure of the requested records. These records relate to risk-management and mortality reviews and serve an important function in the management and improvement of the quality of the healthcare delivered throughout the state system. This category of record was by design protected from disclosure and is different and separate from the patient's actual health care record.

The U.S. District Court ruled in favor of VOPA, but the Fourth Circuit Court of Appeals recognized "special sovereignty interests" that would bar one state agency from suing another in federal court. The US Supreme Court ruled on April 19, 2011 that VOPA's lawsuit did not offend the distinctive interests protected by the sovereignty immunity of the Commonwealth of Virginia. While state sovereign immunity is both robust and the recognition of pre-ratification sovereignty, there are exceptions.

The prior Supreme Court case **Ex parte Young**, 209 U.S. 123 (1908) allows federal courts to enjoin, restrain by injunction, enforcement of state or federal statutes that are unconstitutional. It held that "A lawsuit seeking an injunction against a state official did not violate the sovereign immunity of the state, because the state official was not acting on behalf of the state when he sought to enforce an unconstitutional law." In other words, the state does not have the power to authorize an official to act in a way that violates some part of the U.S. Constitution. This 1908 case concerned Edward T. Young, who was the attorney general for Minnesota. Minnesota had passed laws limiting what railroads could charge in freight and established penalties for violators. Shareholders of the Northern Pacific Railway filed lawsuits claiming that the law was an unconstitutional violation the Due Process Clause of the 14th Amendment. They sued the railroads to prevent them from complying with the law, as well as Young to prevent him from enforcing the law. The federal court ruled against Young, who on the next day filed an action in state court to force the railroads to comply with the railroad statute, anyway, citing the Eleventh Amendment guarantee of state sovereign immunity. The judge held Young in contempt of court, and he was threatened with incarceration, but he was allowed to file a writ of habeas corpus in the U.S. Supreme Court in the case that now bears his name.

In deciding whether the **Ex parte Young** doctrine applied in the case of VOPA, the court utilized its decision in **Verizon Md. Inc. v. Public Services Commission of Md.**, 535 U.S. 635 (2002), which states "…a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." VOPA's suit satisfied that inquiry.

The Supreme Court rejected the state's claim that VOPA's suit diminished the state's dignity in bring a lawsuit against another state agency. The Commonwealth had, after all, accepted federal monies and created VOPA's power to sue as a consequence of Virginia's own decision to establish the required P&A system. That Virginia can regain this measure of loss of sovereign immunity by removing the law that established VOPA is clearly implied in Justice Kennedy's concurring opinion, in which Justice Thomas joined:

> First, and most important, state law must authorize an agency or official to sue another arm of the State. If States do not wish to see their internal conflicts aired in federal court, they need not empower their officers or agencies to sue in a federal forum. And if state officers are not by state law empowered to sue, they may invoke federal jurisdiction only in their personal capacities.

The justices who dissented, Chief Justice Roberts and Justice Alito, pointed out that in this case both sides were acting for the state, and that the state will both win and lose. They expressed the view that the mere establishment of VOPA did not mean that Virginia had waived sovereign immunity in the specific matter originally sought by VOPA, to acquire the otherwise protected documents. These justices expressed great concern that this 6-2 decision (Justice Kagan did not participate) will bring on an onslaught of cases in which one state agency would sue another state

agency in federal court over policy conflicts defeating the intent of the Eleventh Amendment, in matters that the state itself should solve.

What is left to be decided, and what does this decision mean? The issues of whether other laws will keep VOPA from receiving these protected records still needs to be litigated as these records generally have an added layer of protection from disclosure beyond the actual record of the patient's treatment. Nothing prohibits VOPA from investigating these matters and reaching its own conclusions about neglect, abuse, and inadequate care entirely apart from the protected records and the work of other agencies within the state. In contrast, state boards of medicine, departments of mental health, and quality assurance agencies employ expert physician reviewers in making relevant, independent, and actionable decisions about abuse, harm, and neglect, and they do so from the patient's treatment record, which is made available through properly executed medical release forms.

All fifty states have newly established agencies similar to VOPA, and an increase in disability rights litigation is anticipated. Forensic psychiatrists will be more frequently called upon to evaluate a wide range of cases in disability related litigation unless states elect to revisit the legislation that created the conflicts described in this article.

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