

# On The Record . . .

Official Newsletter of BERTOLINO  
LLP

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## Firm Announcements

### Seasons Greetings from Team Bertolino!

With the holidays upon us, we at BERTOLINO LLP wish you and your family a Merry Christmas, Happy Chanukah, Happy Kwanzaa, and, overall, Happy Holidays!

### Live from the "BLAWG": Rules on Physician Advertising

The Texas Medical Board (TMB) has numerous rules addressing physician advertising. Physicians who fail to comply with these rules may be subject to discipline. Because advertising and marketing are a huge part of any business, especially medical practices, it is therefore important that all physicians are aware of the rules.

What are these rules, you say?

[Read more](#) at our BLAWG to find out!



## Board and Agency Updates

[Fifth Circuit Rules Against the TEA](#)



On November 7, 2018, the U.S. Court of Appeals for the Fifth Circuit issued a judgment in a controversy between the federal government and the Texas Education Agency (TEA) over whether the TEA owed the federal government \$33.3 million because it reduced its spending on special education for the 2012 fiscal year, which the federal government argued violated the Individuals with Disabilities Education Act ("IDEA").

Under IDEA, the federal government, through the Department of Education ("DOE"), grants money to states to provide special education and related services for students with disabilities. Of course, to receive the grants the state must assure the Secretary of Education it has enacted policies and procedures to meet certain conditions contained in IDEA.

One such condition is the "MFS requirement," which bars states from reducing financial support for special education and related services below the amount the state spent in the preceding fiscal year. If a state fails to meet this condition, the DOE must reduce the funding to the state by the same amount the state fails to meet the requirement.

Because TEA reduced spending by \$33.3 million from the 2011 to the 2012 fiscal year the DOE claimed that TEA violated IDEA's MFS requirement. TEA was given an opportunity to seek a waiver of the MFS requirement and did not do so; therefore, the DOE determined that the state was ineligible for the same amount in future grants.

TEA then argued that it had fully complied with the MFS requirement under a "weighted-student model," under which state funding fluctuates "yearly depending on the number of enrolled students and their unique instructional arrangements." In turn, TEA argued that what occurred in 2012 was not a decrease in the "support for special education, but rather the special education needs of children with disabilities."

Alternatively, TEA argued the MFS

requirement violated the Spending Clause of the U.S. Constitution because it did not provide sufficient notice "that reductions in aggregate and per capita funding were forbidden."

After an Administrative Law Judge ("ALJ") determined the plain language of the statute did not provide for the use of the weighted-student model and found that the statutory language was clear and unambiguous, the ALJ ruled in the federal government's favor. Texas appealed, seeking a review of the DOE's final order. The Fifth Circuit essentially agreed with the ALJ's conclusions and denied TEA's Petition for Review.



### SOAH Experiencing Exodus of ALJs

According to a [report](#) from the *Austin Chronicle*, morale at the State Office of Administrative Hearings ("SOAH") is at an all-time low. Traditionally viewed as a stalwart of judicial economy and stability, some believe SOAH has experienced turmoil under the leadership of Chief ALJ, Leslie Ginn.

Such turmoil apparently stems from how Ms. Ginn handled the controversy between an ALJ and the Texas Medical Board ("TMB") wherein the TMB attacked now-former ALJ Hunter Burkhalter's credibility and character after he issued a Proposal for Decision adverse to the TMB. In response, Ms. Ginn dismissed ALJ Burkhalter and thereby created the appearance that she was siding with TMB over the ALJ.

Since that time, several current and former ALJs, some writing anonymously, have reached out to the Governor's office and the Senate Committee on Nominations, asking them to take action against Chief ALJ Ginn. Additionally, a few ALJs have left their posts at SOAH for the private sector, while others have indicated their intentions to follow suit.

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## Team Bertolino Highlights

The last week of October we turned the conference room into a Halloween/Birthday



Party Room for our Associate Attorney, Jesse Joslin.

We enjoyed delicious treats and shared stories about Halloween traditions. Good times were had by all!



### A Word from the Managing Partner

I can't believe it's already been a year since London's son, Cru, was born and now we've celebrated his 1st Birthday in late October. We had yummy chili, cake, and cookies as we celebrated with friends

and family. Happy Birthday, Cru!



T.R. NT

## Hallmark Achievements - November 2018

### *Texas State Board of Examiners of Psychologists v. A.L.*

A.L. is a licensed psychologist who was alleged to have engaged in sexual improprieties with one of their patients. The Texas State Board of Examiners of Psychologists (the "Board") therefore began in investigation, requested a written response to the allegations, and set an informal settlement conference ("ISC"). After submitting a written response to the allegations, which we found to be completely baseless, we successfully obtained a dismissal of the complaint from the Board. Our investigation of the matter revealed that the complainant was making completely false allegations and had a history of doing so, particularly with regard to making sexually-related claims against licensed psychologists.

### *Texas State Board of Examiners of Psychologists, IMO L.H.*

T.H. is a psychologist who applied to the Texas State Board of Examiners of Psychologists (the "Board") for licensure. Shortly thereafter, T.H. received notice the Board was denying T.H.'s application due to the fact that a gap of greater than two years existed between the date of completion of T.H.'s hours of supervised experience and the date of T.H.'s application for licensure. However, a Board rule allows for a waiver of this two-year gap rule upon a showing of "good cause."

The Board invited T.H. to make a case for such "good cause," which led T.H. to hire our firm to represent them at the Board meeting. We attended the Board meeting with T.H. and presented a case for why good cause warranted a waiver of the two-year gap rule. After successfully making the case, the Board granted the waiver and will issue a license to T.H.



## Upcoming Dates of Interest

- Dec. 7 - National Pearl Harbor Remembrance Day
- Dec. 25 - Christmas Day
- Dec. 26 - Kwanzaa
- Dec. 31 - New Year's Eve

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