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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: **PART: 19**

-----X

In the Matter of the Complaint of

STEVEN REISNER,

Petitioner

INDEX NO:  
101154/10

For a Judgment pursuant to Article 78 of  
the Civil Practice Law and Rules,

-against-

LOUIS CATONE, Director of the New York  
Office of Professional Discipline,  
New York State Department of Education,  
THE OFFICE OF PROFESSIONAL DISCIPLINE of  
The New York State Department of Education, and  
THE NEW YORK STATE DEPARTMENT OF EDUCATION,

Respondents,

-----X

**MOTION**

60 Centre Street  
New York, New York 10007  
April 6, 2011

**B E F O R E:**

**THE HONORABLE SALLIANN SCARPULLA,**  
**J U S T I C E**

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BY: KATHY ROBERTS, ESQ.

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**A P P E A R A N C E S:**

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THE COURT: Is Nushin Sarkarati here?

MS. ROBERTS: She is not here.

THE COURT: Are you still pressing her motion to be admitted pro hac?

MR. PENDERGRASS: We are, your Honor.

THE COURT: And you are from the Attorney General?

MR. HERSHLER: Yes, your Honor.

THE COURT: And you are?

MR. REISNER: I am Dr. Steven Reisner.

THE COURT: Okay, please, everyone be seated.

But let me just take a moment.

First, I have a motion to admit Kathleen Roberts and a second attorney, Nushin --

MS. ROBERTS: Nushin Sakarati --

THE COURT: -- Nushin Sakarati pro hac.

You don't have any objection to that; do you, counsel?

MR. HERSHLER: No.

THE COURT: So I am going to grant that motion. I am going to admit those two attorneys, Kathleen Roberts and Nushin Sakarati, pro hac vice just for the purposes of this Article 78 proceeding.

So that takes care of that motion.

Now, this is an Article 78 proceeding seeking to

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compel the New York Office of Professional Discipline of the New York State Department of Education to commence a disciplinary proceeding against Dr. Reisner or Steven Reisner.

Is it Dr. Reisner?

MR. PENDERGRASS: The proceeding would be against Dr. Leso.

THE COURT: You are Dr. Reisner, who is wanting to start the proceeding -- let me start again -- against another doctor.

MR. REISNER: Yes.

THE COURT: Against John Leso, okay.

So, obviously, this is a quite controversial case and so I am going to let the petitioners argue first. I have thought a lot about it, but let me hear what you have to say.

MS. ROBERTS: Thank you, your Honor.

Good morning.

THE COURT: Good morning.

MS. ROBERTS: I am Kathy Roberts, Center For Justice And Accountability, appearing on behalf of petitioner, Dr. Reisner.

THE COURT: Let me just say one thing.

Dr. Reisner, you were never in Guantanamo Bay; correct

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MR. REISNER: I was never in Guantanamo Bay.

THE COURT: So you were never treated by Dr. Leso.

MR. REISNER: Correct.

THE COURT: You have not ever had any direct contact with him; is that correct?

MR. REISNER: That is correct.

THE COURT: Okay.

MS. ROBERTS: Your Honor, petitioner filed a complaint with respondents last July alleging that Dr. Leso committed professional misconduct at Guantanamo.

Respondents refused to open an investigation, in their words, because they could find no legal basis to do so.

The implications of respondent's interpretation of law are far reaching. What Dr. Leso is alleged to have done is no different than if a school psychologist had recommended a general plan of abuse to be applied to school children.

THE COURT: That is so totally ridiculously not true. This is a completely different situation from a psychologist in a school saying to school kids, Everyone should abuse you. This is someone who is in Guantanamo Bay at the behest of our government to interrogate alleged terror suspects. It is a

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completely different situation. It may be that you are correct on the law, but don't say things like that because you don't need to; all right? It's not the same situation. It really is not.

MS. ROBERTS: I understand your point, your Honor.

As far as the implications of respondents' position, there is no way to distinguish those two scenarios.

THE COURT: How about this: I am a psychologist who believes that people who are in pain and terminally ill should be able to take medication to end their own life and I counsel people that way. Should another psychologist who finds out that I do that be able to go to the department, to the Office of Professional Discipline and say you must stop that person from so counseling?

MS. ROBERTS: No. However, it is --

THE COURT: That is, to me, the same thing as you are saying.

MS. ROBERTS: It's not.

THE COURT: How is that different?

MS. ROBERTS: Your Honor, the entitlement is to have an investigation; not a conclusion of an investigation.

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THE COURT: So you are saying that in that circumstance, the other psychologist who doesn't treat with this particular doctor, who doesn't do anything with this particular doctor should be able to go to the medical board and say, Because I am morally disagreeing with what that person is doing and what I think that that person is doing violates medical ethics, you must investigate? Yes?

MS. ROBERTS: Your Honor, that is the -- the law regulates the ethical standards --

THE COURT: I am asking you: Is that what you are saying?

MS. ROBERTS: Yes. What I am saying is that the law says any person can bring a complaint for violations of the professional standards of this profession. Someone who is practicing this profession is particularly well positioned to know what those standards are and what the implications are of having those standards violated.

THE COURT: Okay, that might be true.

MS. ROBERTS: I think that is absolutely true.

THE COURT: So nothing prevents the doctor from asking -- from filing a complaint. I can file a complaint, we can all file complaints. But what you are saying is that the board must open an

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investigation.

MS. ROBERTS: That's what the law says, your Honor.

THE COURT: And you can't just decide that there is no basis for the investigation.

MS. ROBERTS: They absolutely must. I think there is a two-part test that is going to happen at the beginning that the law says that if you receive -- if the respondents receives a complaint for professional misconduct, they shall open an investigation. So, obviously, they have to determine if they have received a complaint for professional misconduct. That is a judgment of law.

THE COURT: Let me ask the Attorney General.

Do you agree that once you receive a complaint, you are obligated to open an investigation?

MR. HERSHLER: If, in the opinion of the Office of Professional Discipline, the allegations constitute professional misconduct in the practice of a profession, they have to make --

THE COURT: So you are saying that first you have to make that determination; that it's not an automatic.

MR. HERSHLER: That is correct. This is a threshold determination.



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THE COURT: Let me indicate to you both that I don't need you to stand. I can hear you perfectly well and I am sure you would be perfectly comfortable sitting and it makes me less anxious when you are sitting.

So, counsel says, first, we have to determine the same way as the Board of Judicial Conduct: Everyone who is dissatisfied with the result of a lawsuit can bring a complaint against a judge. Then we have a board that takes a look at the complaint and is not automatically required to open up an investigation. They look at the complaint and say is this something that we think rises to the level that a formal investigation has to happen? And so do you agree that that is the procedure or are you saying once a complaint is filed, there is no discretion; that you have to open up the investigation?

MS. ROBERTS: Your Honor, as I just stated, I do think that they have to first determine whether there has been an allegation of professional misconduct. However, I think that is a determination of law. At least in this case it is a determination of law. And that determination of law has a real impact on anyone who has a license to practice psychology because it is circumscribed and defined in the profession never in a

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way entered by the legislature and has to be reviewed by a court.

THE COURT: Are you saying I should make the determinations to whether or not this is professional misconduct under O oh I am not a doctor. I am not a psychologist. I have no idea, thank God, what the standards are. I mean, I spent years and years and years -- I could tell you every section of the CPLR, but I don't know, I am not a trained doctor. I didn't go to medical school, I didn't do four years. I leave that to the people that are trained and professionals and can do it. You are telling me that it's my decision, as a matter of law?

MS. ROBERTS: No, your Honor. I am saying it's this court's obligation to interpret the law as passed by the Legislature of the State of New York.

THE COURT: Absolutely.

MS. ROBERTS: And the legislature has defined the profession. Respondents have interpreted that legislation. They have interpreted contrary to the commonplace understanding of that and that's what we are asking you to review it.

THE COURT: So are you agreeing or disagreeing that in the first instance the medical board gets to decide whether or not to open up an investigation?

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That's my first point to you. Yes or no? It's a yes or no.

MS. ROBERTS: It's not a yes or no.

THE COURT: Then you have to answer, "I can't answer that, your Honor, yes or no."

MS. ROBERTS: Yes they decide. No, it isn't discretionary, that decision.

THE COURT: It's subject to arbitrary and capricious under Article 78?

MS. ROBERTS: No, it's de novo review because it is a pure interpretation of law. Their own language was "no legal basis." It is a pure interpretation of law, the decision that they made in this instance, and their determination was that they had no jurisdiction and the law in New York is that an agency that makes a determination that they have no jurisdiction based on an interpretation of a statute is owed no deference. That is a purely legal question and it's one that is properly before a court.

THE COURT: So you are saying to me all I have to do is send it back to the medical board and say make a medical determination as opposed to a legal determination whether or not to open an investigation; is that what you are saying?

MS. ROBERTS: No, that's not correct, your

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Honor. And, actually, I think you drew an analogy a moment ago with the judiciary law and there is one really significant difference between the judiciary law and the law operating in this case and that is the judiciary law inserts a step of discretion as to whether to open an investigation and there is no such discretion in this case. They would have to open the investigation if it is a properly alleged case of professional misconduct, which we think we clearly have here.

As far as how the investigation is pursued, how many resources are put to it, what kind of conclusion is resolved from it, that is all within the discretion of the agency. But whether or not to open an investigation is not within the discretion and I believe the legislature made that choice because of the great importance to the public health -- of having health providers who are free of wrongdoing.

Certainly Dr. Reisner is aware of what the requirements are.

THE COURT: So you are saying to me if I write in a complaint and I said my psychologist sexually abused me for 27 times that I went to see him and that, to me, obviously, is a properly pled complaint of professional misconduct, then the board looked at it

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and just went to the doctor and the doctor said, "I didn't even treat that person. I don't know who that person is, never saw them, look at my book," you are saying to me that they have no discretion -- even under that circumstance, even when the facts show that there is no claim, that they have no discretion as long as they plead -- as long as someone puts in a properly pled complaint, that they have to investigate?

MS. ROBERTS: No, your Honor. Actually, I would say factual determinations are a matter of investigation. Calling that psychologist and asking whether -- that is investigation; right? That's actually determining whether the allegations are true, and how far that investigation goes is discretionary.

THE COURT: Oh, so -- I'm trying to figure out what it is that you think I have to order the board to do. They take a look at this complaint. They say, yes, yes, yes -- and don't get me wrong. As a matter of moral turpitude, I might agree 100 percent that that psychologist should not have done that. I might agree that the psychologist should not counsel his or her client to end their own life even if they are in excruciating pain. It's not my moral turpitude or my moral sense that governs here. That's my whole point.

MS. ROBERTS: Absolutely agree.

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THE COURT: So if the medical board takes a look at it and says this is a political issue, a moral issue and not an issue of whether or not someone is violating -- if they make that determination, then it ends, as far as I am concerned. Maybe not.

Let me hear from the Attorney General for a moment.

MR. HERSHLER: Thank you, your Honor.

Yes, they have looked at the complaint, in detail, and they said, no, this does not constitute the practice of psychology under New York law. We make no determination as to whether it was appropriate or not but it wasn't the practice of psychology.

And they looked at the statute. The statute talks about curative, remedial-type things, therapy, counseling, helping people with mental disorders, dealing with substance abuse; all of these things, helping patients. That's -- when they passed the statute, the legislative history said we want to codify what psychologists do in their day-to-day practice. The allegations in this complaint are totally opposite to that. They are unique. They have nothing to do with the day-to-day practice of ordinary psychologists. If anything, this doctor, Dr. Leso, apparently was asked to use his skills as a weapon; not to help the

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mental health of the detainees at Guantanamo but to  
undermine the mental health to --

THE COURT: To get to help the government. I mean, look, we can debate back and forth whether that is appropriate and we do it every day in the political sphere. That is our job. We do that all the time and we -- believe me, I have strong feelings as a citizen and a taxpayer about that, but that's a completely different thing. And my strong feelings and yours and Dr. Reisner's strong feelings as a citizen and a taxpayer, whether that's appropriate are completely not the issue here.

MS. ROBERTS: Your Honor, I completely agree and nobody has pleaded anything about personal feelings or personal sense of morality but rather about the professional standards to which licensed psychologists are held in this state.

THE COURT: So let me just say: The Attorney General said, We looked at this. We looked at the complaint and and we made a determination that what this person is complaining of is not -- does not involve the practice of psychology. That's our determination and, therefore, they did make a determination.

Now, you are saying to me that I have to decide

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whether or not it is, in fact, the practice of psychology, what he did or didn't do; what Dr. Leso did or didn't do is the practice of psychology? I'm not equipped to do that. I am not a psychologist.

MS. ROBERTS: Your Honor, we are not asking you to weigh facts. We are asking you to look at the statute. The legislature has defined the profession of psychology. It has also, by the way, made it perfectly clear that if you want to practice psychology, you have to have a license. If you practice with that license, you have to obey the standards of professional conduct. If you do something that's not authorized, that's not authorized as the profession of psychology, that, itself, is misconduct.

All of the arguments being made by respondent in this case to avoid, perhaps, a controversial issue are, in fact, not allowed. In this case, the idea -- of course, the presumption is that psychology will be used to heal rather than harm people. It is a healing art. The fact that somebody would then use their position -- or, as we have alleged in this case, use his position and title as a clinical psychologist hired by the government to oversee ethical interrogations, then uses that position to gain access to vulnerable people in order to hurt them --



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THE COURT: Already you are making value judgments, "vulnerable people to hurt them." You have made value judgments which immediately says to me, "Uh-uh. That's not my job to make those kind of value judgments."

MS. ROBERTS: They are not in dispute.

THE COURT: I vote -- I think that --

MS. ROBERTS: Respondents just said that he was using his tools as a weapon. It is no dispute about what the complaint alleges.

THE COURT: No, no, no. Because we haven't even gotten that far. That's why there is no dispute. We are still trying to figure out whether or not I have to do something.

I mean, I understand, believe me I understand that -- I understand that we, as citizens, should try and use whatever we have got, whether it be the court system, our legislature, our executive, to stop practices that we think are improper and to stop people who we think are doing things that are antithetical to us, but that doesn't necessarily translate.

I, as a taxpayer, really would like better things in many ways and I wouldn't spend my taxpayer money a lot of ways that my government does, but I can't sue, I just can't. That's not the law. I wish I

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could. Believe me, I would sue every day if I could, but I can't, so this is the problem that I am having: One, that you are asking me to make determinations that I think are just determinations on a standard of arbitrary and capricious. I don't have to. I don't believe that it is my job to substitute my opinion for the disciplinary board and say, yes, you have to do an investigation even though you had determined that you don't; number one. And all I am supposed to look at in that circumstance is whether their decision not to is arbitrary and capricious, because that's our standard under Article 78 and, two, I don't know that you even have standing to do this.

MS. ROBERTS: Your Honor -- well, a couple of things. You have said a lot there.

THE COURT: I know. I packed it.

MS. ROBERTS: Section 6510 clearly says that any person can file a complaint and that complaint shall be investigated. I would draw your Honor's attention to the case cited in respondent's papers, *Briscoe v. Brown*, where a judge, operating on a similar statute that did not allow for discretion, was ordered to enter judgment for petitioner in that case because there was no discretion provided for in the statute, and I think this case is very analogous to that case.

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Dr. Reisner absolutely has standing. There are four different separate articulable grounds for that standing. First, he was deprived of a statutory right that was granted in Section 6510 --

THE COURT: No, no. Everybody in this room and everybody in the United States and that is not sufficient. Just simply not. He stands in no better position than me, than you in California and everyone else in the United States so, no, that is not a sufficient grounds so try another one.

MS. ROBERTS: He did actually file a complaint, which is --

THE COURT: So could I. So could you. You could have done it for California. He doesn't have any different injury than me and anyone else who objected to the way that the Guantanamo detainees were treated.

MS. ROBERTS: Secondly, Dr. Reisner's property interest in his license has been diminished by respondent's failure to uphold professional standards in the integrity of his profession.

Failure to grant review in this case would insulate respondent's decision from any kind of judicial scrutiny.

These are, by the way, both grounds that are reserved in the Society of Plastics Industry case which

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expressly refers to the Car Enterprises case which allows for standing on a regulated property in absence of or avenues to judicial review, and I have brought copies to that case --

THE COURT: I have read it several times. You are not the first citizen to object to a government action without having personal injury. I don't -- I have to say that I think the diminishment-to-the-license injury is so incredibly speculative that I find that -- okay, so I am not really all that impressed with those first two arguments. The third one is the one that I think works the best here.

MS. ROBERTS: Well, finally, in addition, the outrageous implication of respondent's position cry out for review based on the public interest in seeing that professional standards are upheld. And these are not personal issues. This is all laid out in the law very clearly

THE COURT: No, I do think that it has a very huge moral implication here and it is not our job to do that. Our job, in terms of morality, is to vote for the people we think are doing the right job, is to rally and do things like that. It is not my job.

I analogize, for example, to people who file complaints about people who do abortions because they

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believe that abortions are antithetical to their oath as a medical doctor; that you may not, as a medical doctor, do an abortion. That is a politically charged thing. I don't think that if that came before me that I would order the State Board to open a disciplinary charge against someone who was doing that because I think that this is a very difficult -- let me say this: My sensibility is with you, but I am not sure that the law is on your side.

MS. ROBERTS: Your Honor, how about this: What -- if someone -- you mentioned a second ago that someone could bring a case, file a complaint saying I have been sexually abused by my doctor, 20, 30 times and instead of calling the doctor or calling that person or looking into it at all, respondent said, we don't think sexual molestation is part of the profession of psychology so we're not going to open the case. That's what you are saying is not allowed. That's what we are saying is not allowed.

THE COURT: Then it would come to me and I would say is that an arbitrary and capricious determination. That's it. That's all I look for because the way that we have set it up is we leave it to the board in the first instance and I cannot, every single time that someone files a complaint and thinks that the board

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does not give it appropriate consideration, I can't

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second guess that. I would spend my entire life

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reviewing these kind of things. And not just this

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board: Every board. The pension board, every single

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board that makes a decision. We have decided -- that's

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just the way we have decided to work it. So, I think

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that I have a limited scope of review; not a de novo

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review.

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But, you know, you and I have spoken for so long

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that the poor Attorney General thinks I have forgotten

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about it and I haven't.

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Let me hear what you have to say, counsel.

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MR. HERSHLER: Thank you, your Honor.

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There is no standing in this case. The basic

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principle is that you can't sue the government to get

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them to investigate somebody. The First Department has

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made this clear again and again. It's not a narrow

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statutory principle. It is a basic principle of

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standing. If you make a complaint against someone to

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an agency and they don't follow through and they say we

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are not going to investigate or not going to prosecute,

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you haven't been harmed by that decision, period.

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And the courts are reserved for people who

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have --

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THE COURT: We have all been harmed equally.

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One of us can't say I have been harmed more than anyone else.

MR. HERSHLER: Correct. And that is exactly why there is no standing in this case.

And the statute -- it's interesting. If you look at the statute, it does create an avenue for judicial review. These proceedings are not beyond judicial review, as they have said, but it is narrow and it is specific in time and place. It says when there has been a final misconduct determination by the Board of Regents, who makes the ultimate determination, then the aggrieved party, usually a professional who has been disciplined, can then file a lawsuit in the Appellate Division Third Department. They are very specific about when and where judicial review is available.

The very fact that in drafting this statute they created a specific remedy implies that they did not intend to create a remedy for everyone else who files a complaint.

THE COURT: Well, how am I going to stop this then? How am I, as a citizen of The United States and, in particular, as a psychologist who doesn't want my profession to be associated with something this atrocious, how come I don't get to go into court?

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MR. HERSHLER: Well, at the outset, I think there has been sort of a one-sided presentation of the morality here. I don't want to overemphasize it --

THE COURT: Fair enough. That is fair. Our government sanctioned it.

MR. HERSHLER: Not only that, but the intention here was to prevent another September 11th and that is an important factor that should not be overlooked. You can't just look at the means and ignore what the ends are. I am not going to get into a battle of morality over this.

THE COURT: No, I don't want to either. That is my whole point. I don't want to get into the morality of it.

MR. HERSHLER: But the remedy is as you suggested. The remedy is handled by the legislative process, by the electoral process. And, in this case, there were exhaustive hearings on the very issue here: Whether Guantanamo Bay was right or not. There were senate armed services hearings, public hearings, hundreds of thousands of pages of documents. They interviewed 70 witnesses, the Department of Justice conducted its own inquiry. The U.S. Army conducted an exhaustive inquiry of three years of interrogations. I don't know, 20,000 interrogations took place. They



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found three instances, three out of 20,000 where the army field manual was disobeyed and there was no mention of Dr. Leso in any of those.

There was never a criminal complaint against him, never any suggestion from any of these publicly elected bodies that he was at fault; no complaint to the Office of Professional Discipline.

And in view of that context, it's a little bit unfair to say, "What can we do about this." Our representatives have looked at this thoroughly and that's what the Society of Plastics case said. There are forums available to address grievances. You may not like what they come to the conclusion to, but that doesn't mean that you didn't have a forum. If you don't like what our government does, then vote them out of office. If they make promises and break them, you vote the bums out of office and that's how democracy is supposed to work.

THE COURT: But that doesn't work in this situation. I guess we can't stop this guy by voting. We don't get to stop Dr. Leso, I think, by voting. So the question is how do we get to stop Dr. Leso. Maybe we don't have the right to stop Dr. Leso.

MR. HERSHLER: If he did something so outrageous as they claim, then he could be liable in a criminal

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proceeding, he could be sued for personal injury, he could be brought up to the Hague Convention. There are avenues available, but this did not fit within the confines of a professional misconduct proceeding. Their business is to go after real problems. This happened eight years ago in unique circumstances having nothing to do with New York State or New Yorkers. They go after people like a doctor who abuses his patients or has sex with a mentally disabled patient who is suicidal or someone who goes into a family therapy session and starts yelling and screaming at the patient and her family because they don't want to continue therapy; those are the very cases they rely upon. In these cases, there is a patient-therapist relationship.

There is not one in this situation.

THE COURT: I think standing is a big problem.

MS. ROBERTS: I hear you, your Honor.

Professional standards in medical professions hold their members to a higher standard than the rest of us. Having sex with a patient doesn't violate a criminal standard. It violates a professional standard. Professional standards are higher because --

THE COURT: We're not talking -- he is just saying by way of example. But the point was that the job of the medical licensing board is not to take a

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political position as to whether or not people who participated in the interrogation of Guantanamo detainees --

MS. ROBERTS: Absolutely. And we are not for that, your Honor.

THE COURT: What are you asking -- that's exactly what you want. You want this doctor's license to be pulled because he participated in --

MS. ROBERTS: Not because he participated.

THE COURT: Why?

MS. ROBERTS: Because he violated professional standards in doing so. The military brings psychologists into these situations. They want a licensed professional, they want someone who will be able to act in an ethical way and he didn't do that and he did --

THE COURT: But --

MS. ROBERTS: The complaint lists plenty of specific things that he did.

THE COURT: Except the government has looked at that. The government has had hearings on this. They have added -- you are just not satisfied with those results.

MS. ROBERTS: That's not true, your Honor. In fact, the government -- respondents are the only agency

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that is empowered to enforce professional standards, but it's not accurate to say that the government found no fault with Dr. Leso. In fact, Susan Crawford, who was the chair of the military commission over Mohammed al Qahtani's hearing and he is the one whose abuse is most documented, said the treatment equaled the definition of torture.

THE COURT: Why hasn't the United States Attorney brought any proceedings against him?

MS. ROBERTS: I am sure your Honor is well aware that there are many well-documented abuses and there have been very few prosecutions, but that is not what we are talking about here.

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THE COURT: No, I agree, it is not what we are talking about here, but this -- I have a difficult time -- and I will look at it very carefully, believe me I will because, again, I understand the sensibility behind the lawsuit but I am bound by the law just like you are and I am not sure that the judicial process is the appropriate way to do this.

Thank you very much, counsel. I am going to take it and I will write a decision.

MR. HERSHLER: Thank you, your Honor.

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CERTIFIED THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT OF THE ORIGINAL STENOGRAPHIC MINUTES IN THIS CASE.

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ERIC ALLEN, RPR  
SENIOR COURT REPORTER