Professional Licensing Report

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Highlights in this issue

Licensing

Texas sunset panel calls for "sweep" of dental board over non-public-safety agenda

Issue: Sunset review and structural regulatory reform

After several months of staff reports and hearings, and over the board's objections, the Texas Sunset Commission agreed in October to recommend a "sweep" of the Board of Dental Examiners, slashing its membership from 15 to 11 and reducing the number of dentists on the board from 8 to 4.

The reason, the Commission says: "The unusually large dental board inappropriately focuses on issues unrelated to its public safety mission." The sunset reviewers also found that state regulation of dental assistants is unnecessary and should be discontinued, and that the board lacks key enforcement tools to ensure dentists are prepared to respond to increasing anesthesia concerns.

(See Texas sunset, page 3)

California proposes major licensing reform initiative to address "thicket" of regulation

Issue: Comprehensive licensing reform programs

A liberalization of licensing laws to ease access to lower-income jobs could be on California's plate following the October release of a major study, *Jobs for Californians: Strategies to Ease Occupational Licensing Barriers,* which argues that the state needs a holistic, well-reasoned strategy for regulating occupations.

The study, prepared by the state's Little Hoover Commission, was geared to finding the proper balance between licensing's role in consumer protection and ensuring that Californians have adequate access to jobs and services. The Commission's mission is to promote economy and efficiency in California state government.

Over time, California has enacted a nearly impenetrable thicket of occupational regulation "that desperately needs untangling in order to ease barriers to entering occupations and ensure services are available to consumers of all income levels," said chair Pedro Nava in releasing the report. It includes eight recommenda-tions to start the untangling, by collecting demographic data, easing curbs on credential mobility, joining with other states to consider alternative regulation, increasing staffing for sunset oversight, aiding veterans and military spouses in filling missing

States' Percent of Lower Income Occupations Licensed

Rank	State	% of 102 selected low income jobs licensed
1	Louisiana	70
2	Arizona	63
3	California	61
4	Oregon	58
5	Mississippi	54
5	Nevada	54
7	Connecticut	53
7	Iowa	53
7	Washington	58
10	Tennessee	52
11	Arkansas	51
11	New Mexico	51
13	South Carolina	50
14	Delaware	48
14	Rhode Island	48
14	West Virginia	48
17	New Jersey	47
17	North Carolina	47
19	Alabama	46
19	Idaho	46
19	Wisconsin	46
22	Utah	45
22	Virginia	45
24	Florida	44
24	Nebraska	44
26	Alaska	43
26	Montana	43
26	Pennsylvania	43
29	Hawaii	42
30	Maryland	41
30	Michigan	41
32	Dist. of Columbia	40
33	Illinois	39
33	North Dakota	39
35	Maine	38
36	Massachusetts	36
37	Minnesota	35
38	Kansas	33
38	New Hampshire	33
38	Texas	33
41	Georgia	32
41	New York	32
43	Missouri	30
43	Ohio	30
45	Oklahoma	28
46	Colorado	27
46	Indiana	27
46	South Dakota	27
49	Kentucky	26
49	Vermont	26
51	Wyoming	24

education requirements, and developing interim work and apprenticeship models.

The commission called on the state to:

1. Conduct mandatory collection of demographic information for license applications across all licensed occupations, to determine the impact of licensing requirements.

Anecdotal evidence indicates that minorities are negatively and disproportionately affected by licensing regulations, the commission says. Demographic data is needed to establish whether this is true.

2. Join with other states to attain federal funding to review licensing requirements and determine whether they are overly broad or burdensome to labor market entry or labor mobility.

With federal funding available from the U.S. Department of Labor, the commission believes California should join a consortium of states to conduct a comprehensive review of the state's accumulated rules.

3. Require reciprocity for all professionals licensed in other states as the default and require boards to justify why certain licenses should be excluded.

The commission said California should start by assessing reciprocity in the occupations facing significant worker shortages, such as teaching and nursing.

4. Provide added staff or outside support to assist legislative committees in sunrise and sunset reviews, and request audits of boards when warranted.

The legislature's two business and professions committees "are inundated with information that they must verify and analyze in a relatively short period of time," the Commission found. It called for additional resources to enhance the committees' capacity.

5. Make it easier for people with criminal convictions to get licensed by clearly listing licensing criteria, expediting fee waivers for background checks for low-income applicants, and improving the appeals process.

Most state licensing boards do not list specific convictions that automatically disqualify people, but merely make decisions on a case-by-case basis.

6. Set up a research institute to study ways to ease or waive licensing requirements for veterans and military spouses.

The Commission heard anecdotally that existing programs are not yet working well: veterans and military spouses still face delays in

Percent of Lower-Income Occupations Licensed

The report, *Jobs for Californians: Strategies to Ease Occupational Licensing Barriers*, includes a ranking of states according to the percentage of 102 selected low-income jobs that are occupations licensed by the state (based on an Institute of Justice study in 2012, *License to Work*).

California, where one in five jobs requires a license, is the third highest, following the leader, Louisiana, and Arizona in second place. The state with the fewest low-income jobs licensed is Wyoming. (See table, left)

receiving licenses. However, some new laws—requiring renewal of licenses of people on active duty, requiring expedited licensure for military spouses as well as veterans, authorizing 12-month temporary licenses for military spouses in specific fields including nursing, engineering, and medicine—have only recently taken effect.

7. Require state colleges and training academies to create bridge education programs for veterans and workers trained outside of California to help them quickly meet missing educational requirements.

The state already has a promising model with its veteran field-technician-to-nurse program. Under the model, nursing programs lose authorization to teach nursing if they do not fast-track veterans. The report authors advocate replicating this model for other occupations, starting with those facing worker shortages.

8. Develop interim work and apprenticeship models for people missing some qualifications to work while meeting their requirements.

This recommendation, which would let people earn pay while they upgrade their skills, would require adjustment of some occupational licensing acts, but no loss of consumer protection, since student practicum is already allowed or required in many.

The *Jobs for Californians* study is not the first time the state has attempted a sweeping reform, Nava noted. In January 2005, following a statewide government Performance Review, then-governor Arnold Schwarzenegger sent a Governor's Reorganization plan to the Little Hoover Commission that was a complete overhaul of the state's boards and commissions. However, the plan faced insurmountable hurdles, he said, and Schwarzenegger withdrew it from consideration a month later. Nava hopes that the *Jobs for Californians* approach, a more focused review of occupational regulation, potentially subsidized and supported by the federal government, can avoid the errors of the past.

Licensing

Texas sunset critique calls for sweep of board (from page 1)

According to the Sunset Commission, the board's large size is a relic of days before 2013, when technical complaint reviews started being contracted out to a panel of experts. "With less to do, the board, at the behest of dentist members, pursued significant rule changes more related to business practices than demonstrated public safety problems," the report says.

Leading examples were rulemaking on dental office ownership—ultimately withdrawn—and rules on specialty advertising, which did not survive a court challenge. The Sunset Commission was blunt: "While this board was pursuing these two dead-end rule packages—and still has another regarding sleep apnea being challenged in court—it missed numerous signs that it was on the wrong road."

The dental board has a fractious history in Texas. In 1993 it was abolished through a sunset review—according to the Sunset Commission, because of a "legislative skirmish" not of the board's making. (The board was re-created in 1995.) More recently, the board has faced criticism over its enforcement record plus high turnover of leaders including four executive directors and general counsels in the last five years.

The sunset commissioners believe certification of the state's 50,469 dental assistants is unneeded because there is a very low volume of meaningful complaint and enforcement activity. Gaps in regulatory requirements—e.g. dental assistants may perform x-rays without registering with the board for one year at one dentist's office, then renew that one year exemption at a different office—undermine the promise of public safety too, the report notes.

The board, on the other hand, said it believes regulation of dental assistants is essential to public protection, but it proposed statutory revisions to help overcome the inefficiencies of the certificate program by creating one unified dental assistant registration, and requiring the board to adopt rules to address delegable duties and training or experience needed to perform certain dental assistant tasks. Deregulation could present dangers, the board said. It urged the Commission "to weigh the potential patient harm when services such as dental radiology, nitrous oxide monitoring, as well as pit and fissure procedures could be performed by an unregulated individual."

The board is opposed to cutting its membership as drastically as the Commission proposes, but said it could compromise on an 11-member board. It proposed a makeup of six dentist members (preferably from different practice areas), two dental hygiene members, and three members representing the public.

One area that needs stronger enforcement, the Sunset Commission believes, is anesthesia, the subject of increased patient complaints. Unlike most other states, Texas does not require office inspections for dentists delivering parenteral anesthesia (i.e. intravenous or intramuscular injection). The Commission recommends a new statue authoring such routine, non-complaint-based inspections.

On the anesthesia inspection recommendation, the board said it agreed. However, it objected to the Sunset Commission staff's use of board-compiled data on investigations involving administration of anesthesia. According to the board, its database cannot reliably isolate data from investigations involving anesthesia, and the information is confidential and not disseminated publicly.

Board criticized for failing to flag undocumented immigrants

Issue: State licensing agencies' enforcement of federal immigration law

In its review of the Arizona Acupuncture Board of Examiners, released in September, the Arizona state auditor criticized the board for failing to consistently request documents proving that applicants "are lawfully present" in the country.

Under Arizona law, all licensing boards are required to issue licenses only to individuals who provide documentation of citizenship or alien status, such as a copy of a U.S. passport or certificate of naturalization, to indicate their presence in the U.S. is authorized under federal law.

A random check of 12 initial and 26 renewal licenses and certificates turned up three licensees who were not U.S. citizens and found the board renewed two of the three licensees without obtaining proper documentation. In one case, an applicant provided a copy of his foreign passport but not his visa as is required, and the passport expired six months after the license was renewed.

The auditor also pulled the files of six active acupuncture licensees who were non-U.S. citizens and found the board had failed to obtain correct documentation in two cases. Both applicants provided I-94 forms, which are acceptable under Arizona law but only if accompanied by a photograph. In these cases a photograph was not supplied.

The reviewers blamed the absence of clear guidance for board staff including a lack of written policies and procedures on appropriate documentation. The auditor called on the board to integrate its citizenship documentation into its electronic licensing database, rather than maintain those records separately, so that compliance with citizenship documentation requirements can be tracked.

Applicants with mental illness still must meet basic eligibility standards

Issue: Protection of rights of licensees with disabilities

The Americans with Disabilities Act did not apply to individuals whose mental illness prevents them from meeting the basic eligibility requirements for practice, an appellate court in Ohio ruled September 20. The court dismissed an appeal by a physician who had challenged a board decision to monitor her practice as the result of mental impairment, ruling that (*Flynn v. State Medical Board of Ohio*).

In 2014, following a string of incidents involving erratic behavior, the Ohio medical board notified physician Freda Flynn that it believed she might be impaired due to mental illness. After a psychiatric examination found her unable to continue practicing safely, the board moved to restrict Flynn's license and, following a hearing, the board placed Flynn's license on probation for three years, with the requirement that she submit to board-monitored psychiatric treatment. Flynn appealed and the case eventually went up to a state Court of Appeals in Cincinnati.

In her appeal, Flynn had cited the Americans with Disabilities Act (ADA), arguing that the board could not take action against her for a mental illness. The Court of Appeals, in an opinion by Judge Lisa Sadler, disagreed, writing that the ADA does not prevent the discipline of licensees with disabilities.

Noting both that Flynn had been fired from her job at a hospital due to improper practices that could have harmed her patients and a psychiatrist's finding that Flynn would find it difficult to concentrate due to her mental illness, Judge Sadler wrote that Flynn, in her current state, was a danger to the public and "does not meet the essential eligibility requirements for practicing medicine in Ohio." Because of this, Flynn was not qualified for protection under the ADA.

Flynn also challenged the board's decision on the grounds that it had not provided sufficient evidence that she was impaired, arguing that a list of incidents that prompted the board to require her to undergo a psychiatric evaluation was based on unreliable evidence.

The court rejected this argument, as well, with Judge Sadler writing that not only did the list of incidents indicate a long history of struggle with mental illness, but also that the psychiatric evaluation that followed was sufficient, by itself, to prove the point.

In a last argument, Flynn claimed that the board had violated her right to procedural due process when it failed to produce one of its exhibits—130 pages of records from her previous employment—until the day before her hearing, despite Ohio regulations mandating that documents requested by a party in a board hearing must be presented at least fourteen days in advance of the hearing.

While the court acknowledged that the board had failed to meet that deadline, Judge Sadler also wrote that Flynn could have requested a continuance if she believed she needed more time to review the exhibit, and she had not done so. Further, Flynn was unable to identify any actual prejudice that occurred as the result of the late documents: she failed to identify any witnesses or further documents she would have introduced as a result of the exhibit's admission, and only made "vague allegations of prejudice."

Oklahoma Supreme Court: Military jurisdiction counts for reciprocity

Issue: Military service role in meeting entry requirements

The Supreme Court of Oklahoma, in a September 20 decision, granted reciprocity to a military lawyer who did not otherwise qualify to practice in the state, ruling that his service as a military attorney was equivalent to that of a licensee from another state who sought reciprocal status (*Green v. Board of Bar Examiners*).

The plaintiff, Major James Green, a Judge Advocate in the Marine Corps since 2007, was admitted to practice in Florida, which does not have reciprocity with Oklahoma, and Virginia, where he has been stationed since 2001. Although Virginia does have a reciprocal licensure agreement with Oklahoma, Green has only been licensed there since 2014, not long enough to qualify for reciprocity.

When Green applied for reciprocity in Oklahoma—his home state—in 2015, the state Board of Bar Examiners denied his application on the grounds that Green had not engaged in the practice of law in a reciprocal state for five of the seven years before his application.

The reciprocity requirement from the Rules Governing Admission to the Practice of Law in Oklahoma, Rule 2, Section 1:

Persons who are graduates of an American Bar Association approved law school, have been lawfully admitted to practice and are in good standing on active status in a reciprocal state, and have engaged in the actual and continuous practice of law in a reciprocal state for at least five of the seven years immediately preceding application for admission under this Rule [may be admitted to the practice of law without examination.] The years of practice earned in multiple reciprocal jurisdictions cannot be combined.

Though acknowledging that Green had been practicing law during that time, the board determined that law practice in the military did not qualify as practice in a reciprocal state. Green appealed the decision to the state's Supreme Court.

In his appeal, Green argued that military practice qualifies as a reciprocal jurisdiction for the purposes of Oklahoma reciprocity law, an argument that met with the approval of the justices. Scrutinizing the language of the reciprocity rule, which defines "practice of law," Justice Yvonne Kauger noted that it, in fact, refers to "reciprocal jurisdictions" and is not limited to reciprocal "states."

Taking her analysis one step further, Justice Kauger stated that the believed "that the [reciprocity] Rule should not have used the words 'reciprocal state,' but rather 'reciprocal jurisdiction.'"

"Without this subtle clarification," she wrote, "the Rule would lead to an absurd result." Citing another section of the law that allows reciprocity for military spouses, Justice Kauger noted the apparent inconsistencies:

"For example, if Major Green had been sent to Oklahoma by the military, and if his spouse were also a lawyer who accompanied him here, under Rule 2, the spouse would qualify for admittance to practice law in Oklahoma without an examination and without having practiced or been licensed in any reciprocal state."

"However, Major Green, the person who is actually sacrificing his life and civilian career to serve and defend this country and the State of Oklahoma would be allowed to practice law in Oklahoma under the Board's interpretation of Rule 2… If it is good enough for the United States of America," she concluded, "it is good enough for Oklahoma."

Two justices dissented from the decision, with Chief Justice Joseph Watt writing that "in reaching the result it does, the majority ignores the clear language of Rule Two and long established conditions for the application of statutory construction. Rule Two requires that an attorney applying for admission must have practiced law in a 'reciprocal state.'"

And, he noted, the spousal reciprocity law cited by the majority allows only for temporary reciprocity, dependent on whether the military member is still in active duty in the state. “There is no room for statutory construction to reach what the majority seems to believe is a more palatable result in this case,” wrote Chief Justice Joseph Watt. “I have the greatest respect for Major Green and his service to our country. However, he has not met the requirements for Rule 2 admission."

"The majority opinion is not only contrary to law and our rules but is, in my opinion, an affront to the Oklahoma Board of Bar Examiners, an outstanding group of lawyers who are appointed by each Justice on this Court and in whom we have reposed our trust for over four decades,” the court wrote.

Nebraska ACLU: Drop criminal history from license applications

Issue: Criminal convictions and qualifications for licensure

Even though Nebraska has some of the least burdensome barriers to entry to a license in the country, the state could improve by dropping questions about criminal history which are now standard for the state's 176 licensed occupations, says the state American Civil liberties Union in a report released in September. The ACLU's Campaign for Smart Justice, sponsor of the report, aims to rethink and reform conditions that do not provide a meaningful transition for former prisoners back into communities and the economy.

About 59,000 free Nebraskans with a former felony conviction were counted in 2006, and many would be seeking licensure with a misdemeanor conviction on their record.

The license requirements can prove especially problematic in rural areas where employment opportunities may be limited, the report notes. A range of license applicants may be asked about criminal convictions, including those seeking a license as asbestos worker, body art/tattoo work, aviation mechanic, lead worker, jockey, dining assistant, radon tester, and others.

Despite a 1957 U.S. Supreme Court ruling warning of the potential for terms like "moral turpitude" and "good moral character" to help arbitrarily and discriminatorily deny licenses (*Konigsberg v. State Bar of California*, 333 U.S. 252, 263), use of these vague standards persist, the ACLU says. They can create the perception that an applicant with a criminal record may be automatically considered immoral and untrustworthy. Entry level nursing assistants in Nebraska, for example must report whether they have been involved in a crime of moral turpitude, defined as: "any act or behavior that violates accepted moral standards and in legal terms means anything contrary to justice, honesty, modesty, good morals."

The ACLU is recommending four steps:

• Passage of a state law forbidding discrimination by licensing authorities unless the conviction was directly related to the type of employment. Kentucky, for example, has passed a state law specifically superseding all regulations or prior statutes that required a background check, moral fitness, or ban on someone with a conviction.

• A rewrite of governing regulations to take into account rehabilitation or mitigating circumstances and provide applicants the opportunity to address concerns.

• Removal of ambiguous language like "good moral character" for all Nebraska licensing requirements. This term "appears to be a code to discourage applicants with a criminal history," the ACLU says.

• Banning the box for all employers and all professional licenses. "Prohibiting criminal record inquiries until after an applicant is determined to meet all other occupational requirements completely eliminates any prejudice of an applicant as a result of a criminal history and allows them to be assessed on their merits, the ACLU says.

"Limits on a horse trainer who once shoplifted or a manicurist who had a driving under the influence charged do not reflect an individual's capability with their field," the ACLU said. "Furthermore, having an applicant's entire criminal record reviewed alongside their application allows the specter of

discriminatory practices, where an otherwise qualified individual might be rejected based on unconscious bias."

Court challenges of vague standards in licensing applications could well lie ahead, the ACLU said. "While there have not yet been case rulings on whether a state licensing agency should only be allowed to inquire as to recent past convictions which relate to the occupation, that may be the litigation wave of the future."

Certificate qualifying felons for licensure is limited, court finds

Issue: Criminal convictions and qualifications for licensure

An Ohio court, in a September 29 decision, overturned a lower court's decision to grant an ex-felon a legal document that allows individuals who would otherwise be categorically barred because of a criminal conviction to apply for professional licenses (*In re Tanksley*).

In 2015, Nikko Tanksley, a former felon convicted of aggravated robbery firearm in 2006, applied for a Certificate of Qualification for Employment, a legislatively-created document that lets people with criminal records work or acquire licensure in fields where they would normally be barred. By getting a Certificate, Tanksley hoped to qualify to apply for an accounting license. Although the Franklin County Prosecutor opposed Tanksley's petition, a trial court granted the request. The prosecutor appealed, and the case went up to a state Court of Appeals in Cincinnati

On appeal, the prosecutor argued that Tanskley was not qualified to receive a Certificate of Qualification because he was not subject to a "collateral sanction," defined in state law as "a penalty, disability, or disadvantage that is related to employment or occupational licensing . . . as a result of the individual's conviction of or plea of guilty to an offense and that applies by operation of law in this state"–essentially, an automatic bar under statute for people convicted of certain crimes. The Certificates are only meant to qualify an individual categorically barred from particular work or licensure schemes.

Unfortunately for Tanksley, he failed to cite any specific provision of law that automatically bars a felon in his position from acquiring an accountant's license. "While petitioner's felony convictions certainly would count against him in the overall assessment of good moral character," explained Judge Timothy Horton, writing for the court, the convictions do not specifically prevent him from receiving approval, and like all other applicants, he must satisfy the [accountant] Board that he has 'good moral character.'"

The trial court had erred when it found that Tanksley suffered from a collateral sanction, Judge Horton concluded, and the Court of Appeals overturned the lower court's decision.

Competition

FTC warns boards against requiring in-person initial consultations before employing telehealth

Issue: Pro-competitive regulation of telehealth

In an August 16 staff letter, the U.S. Federal Trade Commission warned the Delaware Board of Dietetics/Nutrition that a proposed regulation of the board, requiring that initial consultations be in person before telehealth services could

kick in, could unnecessarily discourage the use of telehealth. The staff letter referred to the in-person requirement as a "rigid restriction."

> "In at least some situations, dietitians/nutritionists may have enough information about a patient to make an initial evaluation by telehealth," the FTC said. "For example, licensees may receive a patient's diagnosis, lab data, and other relevant information from a referring physician . . . In addition, dietitians/nutritionists often conduct nutritional assessments of patients at nursing facilities, where nurses and other health professionals would be available to assist with a telehealth evaluation. Finally, some sources support the use of self-reported anthropometric data for certain types of telehealth evaluations by dietitians and nutritionists."

Earlier in August, the FTC staff made similar comments on a proposed initial in-person evaluation requirement of the Delaware Board of Occupational Therapy Practice, which decided to withdraw the rule.

These staff letters, sent by the FTC's Office of Policy Planning, Bureau of Economics, and Bureau of Competition, followed others sent in 2016 expressing support for limiting restrictions on telehealth. In March, FTC staff submitted a comment to the Alaska legislature supporting proposed legislation to allow Alaska-licensed physicians located out of state to provide telehealth services in the same manner as in-state physicians.

In 2015, Delaware added telehealth and telemedicine provisions to the practice acts of at least 19 types of health professionals.

"Initial in-person examination or evaluation requirements in the health professions may restrict entry of qualified telehealth practitioners, potentially decreasing competition, innovation, and health care quality, while increasing price," the FTC staff told the Delaware dietetics board. The FTC suggested that licensees should have discretion to determine whether telehealth is appropriate for the initial evaluation as they are permitted to do for subsequent visits.

The FTC notes that several physician organizations, among others, have recognized the need for flexibility as to the initial evaluation of a patient and have adopted telehealth policies permitting remote examination during an initial encounter so long as a practitioner is held to an in-person standard of care.

SC Supreme Court reverses course, overrules earlier ban on employment of physical therapists by physicians

Issue: Link between employment ban & prohibitions on referral fees

The Supreme Court of South Carolina, in a surprising reversal of its own precedent, reversed a 2004 case that prohibited physicians in the state from employing physical therapists in their practice, ruling that the treatment of physical therapists as unemployable by physicians was a violation of equal protection (*Joseph v. South Carolina Department of Labor*).

The case involves the interpretation of a section of South Carolina law that prohibits fees for referrals to licensed physical therapists. In 2011, the South Carolina Board of Physical Therapy issued a position statement declaring that the rule was inapplicable to employer-employee relationships between individual physical therapists or a physical therapist group.

The 2011 position statement appeared to conflict—at least tangentially—with a 2004 position statement issued by the board that endorsed a state Attorney General opinion that the referral prohibition law acted to prevent the employment of physical therapist by physicians.

Although a group of plaintiffs sought a court declaration that physicians could employ physical therapists, the state's Supreme Court, in *Sloan v. South Carolina Board of Physical Therapy Examiners*, eventually dismissed their case, essentially affirming the Attorney General's opinion on that point and holding that the board had not engaged in improper rulemaking when it issued that 2004 statement.

Following issuance of the 2011 statement, a group of plaintiffs filed suit again challenging the board's position. The argument of the plaintiffs was, essentially, that either the board's position was incorrect or, if it was correct, its reasoning should also apply to employment relationships between physicians and physical therapists.

The plaintiffs also explicitly challenged the earlier holding, in *Sloan*, prohibiting those relationships. After a state circuit court held for the board, the plaintiffs appealed and the case eventually made its way up to the South Carolina Supreme Court, which issued an opinion authored by Acting Justice Jean Toal, who had been the Chief Justice of the Court and a dissenter when it decided *Sloan*, but had since retired.

The Court agreed with the plaintiffs, overruling *Sloan*. "The underpinning of *Sloan* is the assumption that physicians who refer patients to physical therapists under their employ will act in bad faith or be mired in a conflict of interest because of the financial remuneration they receive from the provision of such service," wrote Justice Toal. "We choose to make no such assumption concerning our brothers and sisters in the medical profession."

Turning to the procedural aspects of the case, the court also ruled that the position statement issued by the board in 2011—allowing employment relationships between physical therapists—was actually a case of improper rulemaking, in violation of the state's Administrative Procedure Act. Although the lower court had ruled that the position statement was not a regulation, Justice Toal wrote that, because the statement "was intended to have the force of law," it "constitutes a binding norm." As such, the board was required to go through the formal rigors of rulemaking, which it had not done.

Discussing the Fourteenth Amendment's Equal Protection Clause, Justice Toal wrote that "we now find that the classification, which distinguishes PT's from other licensed health care professional, has no rational relationship to the legislative purpose of the statute–to protect consumers and government-sponsored health care programs from conflicts of interest and potential misuse of medical services."

"The overarching prohibition created as a result of the Court's opinion in *Sloan* is arbitrary and not calculated to avoid the legislative purpose of prohibiting the unethical behavior of receiving or giving illegal kickbacks and participating in referral-for-pay agreement."

Noting that physicians may employ several other categories of licensed medical professionals, Toal wrote that "neither the *Sloan* opinion nor appellants have articulated any plausible reason as to why PTs are so different from other health care professionals that they must be singled out and provided disparate treatment for self-referral purposes."

"Accordingly, the Court's interpretation in *Sloan* constitutes an equal protection violation . . . As interpreted in *Sloan*, [the law] appears merely to be anti-competitive protectionist legislation intended to protect personal financial interests, which is driven by reimbursement purposes, rather than actual benefits to patients." The statute, she concluded, prohibits only actual referral-for-play situations, not employment relationships.

Missouri court upholds entry standards for African-style hair braiders

Issue: Entry requirements for non-traditional fields

An appellate court in Missouri, in a September 20 decision, rejected a challenge by two practitioners of African-style hair braiding to a state law that requires them to have a full cosmetology license (*Niang v. Carroll*).

The hair braiders had argued that the law—which would require them to complete thousands of hours of training unrelated to hair braiding—was a violation of their equal protection and rights to due process, but the court rejected those arguments, ruling that the state had a rational basis for requiring them to obtain the licenses.

Most practitioners of African-style hair braiding perform only hair-braiding services— as opposed to more traditional holistic cosmetology or barbering that involve cutting or the use of chemicals or dyes. However, Missouri statutory law includes the practice within the greater umbrella of the practice of cosmetology, and thus requires a full license to engage in the practice for compensation, and the Missouri cosmetology board has engaged in efforts to enforce those license requirements, often disciplining the license of a salon that employs unlicensed braiders.

Obtaining a cosmetology license in Missouri can involve up to 3,000 hours of training or entrance into a formal program for 1,500 hours of class time, with an average cost of $11,570. In addition, the mandatory curriculum for cosmetology license applicants includes many form of cosmetology practice, such as treatment of nails, cutting and hair coloring, and permanent waving and relaxing of hair, but does not include training in African-style hair braiding.

In their complaint, the plaintiff braiders claimed that application of the state's cosmetology requirements to their work violated their right to substantive due process, on the grounds that requiring them to undertake more than a thousand hours of training in practice unrelated to their work was not rationally related to a legitimate government interest.

They also claimed violations of their constitutional rights to equal protection, arguing that their *similar* treatment to differently situated parties was unconstitutional—that treating African-style hair braiders as similar to barbers and cosmetologists was a violation of their right to equal protection.

The federal district court judge hearing the case did not agree with the plaintiffs' interpretation of the Equal Protection Clause. Judge John Bodenhausen wrote that "Plaintiffs are asking for an extension of equal protection doctrine that has no support in controlling case law, inverts the traditional understanding of equal protection jurisprudence, and is largely irrelevant because the rational basis inquiry under the substantive due process framework is identical to that which Plaintiffs propose under equal protection guise."

In making this decision, Judge Bodenhausen declined to follow the rulings of two other federal courts that ruled in similar hair braiding cases and cited with the Ninth Circuit, which had rejected the argument. The support for the plaintiffs' equal protection claims in all three cases came from a 1971 Supreme Court case, *Jenness v. Fortson*, 403 U.S. 431, in which the justices wrote that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike."

Judge Bodenhausen wrote that reliance on that citation was taken out of context, noting that the quote itself was actually dicta and that the holding in that case was not that differently-situated parties *must* be treated differently, only that they *may* be treated differently.

Addressing the plaintiffs' due process claims, the court noted that under rational basis review, under which the state must only provide some "reasonably conceivable state of facts" to justify the existence of a law, the licensing requirement would survive challenge.

In defense of the statute, the state argued that, although mandated cosmetology training does not teach African-style hair braiding, the sanitation, business, and safety practices taught in cosmetology training were relevant to hair-braiding practitioners. The statute was, therefore, related rationally to legitimate state interests.

The court agreed. The plaintiffs' burden was to show that no "reasonably conceivable state of facts that could provide a rational basis for the regulation" existed, and they had failed to meet that burden. "The record demonstrates that issues of public health and consumer protection are present," wrote the judge, "and that the licensing regime at least minimally promotes those interests . . .

"ASHB presents general concerns of sanitation, the effects of prior or parallel use of chemicals, instrument sterilization, disease recognition and control, long-term scalp damage, and other health and safety concerns which are just as much involved in African-style hair braiding as in any other hair arranging and dressing technique." In addition, the testing and cosmetology-license application process includes background checks used "to screen for a variety of issues such as criminal history, or whether an applicant has been discipline in another state . . . These are rational means of carrying out the State's interest in consumer protection."

In upholding the law in the face of a due process challenge, Judge Bodenhausen again broke with other courts that had ruled on the issue of licensure for hair braiders. Those courts, explained the judge, subjected state rationales for including braiding under the umbrella of cosmetology licensing to "stringent review," scrutiny which the judge believed "is not consistent with Supreme Court case law which holds that those connections are 'not subject to courtroom fact-finding.'"

"Although there is no doubt a common sense persuasive force to aspects" of the contrary decisions, Judge Bodenhausen concluded in dismissing the case, "those decisions would not pass muster in the Eighth Circuit if subjected to the deferential standard of review" required there.

Discipline

Nevada auditor: Scrap charitable contributions as part of complaint settlements

Issue: Permissible components of consent agreements in discipline cases

The Nevada State Board of Dental Examiners and the state legislature, in response to a state audit of the board, locked horns during 2016 over whether the board may permit licensees to make charitable contributions to outside organizations as part of a "corrective action" agreement with a licensee.

The auditor did not agree with the board that the costs it assessed are reasonable. According to the auditor, 46% of licensees were overcharged and 54% were undercharged. "Any amount recovered in excess of an actual cost attributable to a specific licensee's investigation is not a reasonable cost Furthermore, the board determines assessments through a negotiation process that is not documented. As a result, the board has no documented basis for why one licensee was overcharged and another was undercharged. The negotiated process results in significant variation among licensees."

At least two licensees paid charitable organizations $50,000 each as part of provisions imposed in board-approved stipulation agreements. Such agreements have generated controversy because they benefit the licensees in terms of public image as well as tax breaks.

The audit, conducted from February to March 2016, was initiated at the state legislature's request, because legislators were receiving complaints about the board's overcharging licensees to settle contested cases. The auditor noted several weaknesses in board practices, including failure to track investigation costs by licensee, and recommended scrapping the use of charitable contributions.

In fact, the terminology itself is at issue. What the board calls a "Corrective Action Non-Disciplinary Stipulation Agreement," the state legislative counsel maintains, may be an informal disposition of a contested case, but it is inherently disciplinary. But both the legislative counsel and the state auditor agree that the board is not authorized to include a contribution to a charitable organization as part of such an agreement settling a complaint.

In an April 22 letter to the state auditor the legislative counsel said that the sanctions authorized by statute include a requirement that a licensee be supervised or reimburse a patient for the cost of treatment, and they include a requirement that a licensee perform community service without compensation. This does not extend to charitable contribution.

The board, noting that the licensees had agreed to the amounts that were charged, refused to agree that any overcharges had occurred. But the auditor stressed that the any amount the board recovers in excess of an actual incurred cost is an overcharge, regardless of licensee consent. The recovered costs can only include costs from investigative proceedings, not estimated amounts for future monitoring of licensees.

Disciplinary history may be considered in weighing doctors' testimony in disability benefits cases

Issue: Relevance of disciplinary histories as evidence in administrative proceedings

A federal court in Alaska, while ultimately rejecting the claim of a rejected Social Security applicant that a judge inappropriately relied on medical evaluations by doctors who had been the subject of disciplinary actions, did acknowledge that disciplinary histories could be used when evaluating the weight to be accorded those opinions (*Gurnett v. Colvin*).

When Michael Gurnett applied for Social Security disability benefits, he claimed, among other disabilities, post traumatic stress disorder and severe anxiety stemming from witnessing the killing of a customer at a hotel where he had worked in 2002, spinal disc degeneration and misalignment, and Horner's Syndrome, caused by nerve damage in the neck. However, an administrative law judge, doubting the credibility of some of his ailments, rejected his claim, and he appealed to a federal district court, which issued an opinion September 30.

Among Gurnett's arguments on appeal was that the ALJ's decision inappropriately relied on analyses by two neurosurgeons who had both been disciplined by their state medical boards, essentially arguing that their disciplinary sanctions disqualified their medical evaluations for the purposes of his case.

Judge Sharon Gleason, hearing the case, disagreed, writing that, while the doctors' disciplinary histories may be considered in an evaluation of the weight to be accorded to their medical opinions, those sanctions did not categorically disqualify those opinions, and they were properly considered by the ALJ hearing the case. Because neither doctor had opined outside the field of their expertise, and because both were licensed and able to practice at the time they provided their evaluations, those evaluations were not inappropriately relied on.

Limiting continuances in discipline cases not due process violation

Issue: Due process and delays of proceedings

A Pennsylvania appellate court rejected an appeal from a physician who challenged a reciprocal disciplinary decision by the state's medical board after failing to receive a continuance and skipping his disciplinary hearing (*Johan Zeb Mir v. Bureau of Professional and Occupational Affairs*).

Noting that the licensee had received many continuances over several years, the appellate court ruled that his procedural due process rights had not been violated when a hearing examiner denied his requests for further delays.

In 2011, the California board moved to revoke physician Johan Zeb Mir's license on the grounds that he had failed to meet probation requirements from an earlier disciplinary decision, and the medical boards of New York and Pennsylvania followed with reciprocal disciplinary charges. Both New York and California revoked Mir's licenses.

From the date that the Pennsylvania board issued its charges against Mir, he engaged in a successful series of efforts to get continuances for hearings scheduled in his case. Finally, two days before his May 2014 hearing, and after having a continuance request denied, Mir filed yet another request for a continuance, asking for 120 days notice for any future scheduling in order to work around his California court dates and prepare expert witnesses in his Pennsylvania discipline case.

Mir used a series of excuses for his continuances in Pennsylvania, and they succeeded for years. He first cited several federal lawsuits he had filed regarding his discipline in California and New York. He then cited the fact that he lived in California and was not practicing in Pennsylvania. Finally, in July 2013, a Pennsylvania hearing examiner granted Mir one last delay and filed an order prohibiting him from any further continuances.

Then, in August of that year, Mir filed a motion seeking to have the Hearing Examiner in his Pennsylvania case disqualified and asking for another continuance, on the grounds that a hearing date in his California lawsuit was scheduled in conflict with the hearing scheduled in his Pennsylvania discipline case. Despite her earlier order, the hearing examiner granted Mir another last continuance. This happened twice more over the next year before the Hearing Examiner denied a continuance request in May 2014.

The board did not formally rule on this last request before the hearing was scheduled to occur, and the hearing went ahead, although Mir did not attend. After evaluating the prosecuting attorney's evidence and noting the New York and California revocations, the hearing examiner made a decision on the merits, revoking Mir's Pennsylvania license as a matter of reciprocal discipline. Mir appealed, and the case went up to the Commonwealth Court of Pennsylvania, which issued a decision on July 8 upholding the revocation.

In his appeal, Mir argued that the Hearing Examiner had abused her discretion when she denied his last requests for continuances, claiming that he had provided good cause for those request, but the court did not agree. The Hearing Examiner granted nine continuances to Mir over the life of the case, noted Judge Kevin Brobson, and "was under no obligation to do so in perpetuity."

"Mir gave no indication that the proceeding before the board was of sufficient character and significance for him to make an effort to appear and defend." Mir could have appeared before the hearing examiner to argue that he should not be subjected to reciprocal discipline, but he chose not to do so. He also failed to appeal the decision, instead choosing to bring a collateral attack.

Although Mir argued that the last denial of continuance requests amounted to a violation of his rights to procedural due process, Judge Brobson disagreed, writing that Mir "received notice after notice, opportunity to be heard after opportunity be heard, and continuance after continuance . . . Mir received all of the process that he was due under the Fourteenth Amendment."

Mir also argued that the Pennsylvania charges amounted to double jeopardy and a violation of collateral estoppel, the legal doctrine that holds parties to the results of an earlier decision. A prosecuting attorney had originally filed reciprocal discipline charges in 2007, after the California board had initially revoked Mir's license for the events that led to the current case.

However, Mir successfully appealed that decision, and the Pennsylvania prosecutor accordingly dropped the reciprocal charges, only bringing further charges after the California board eventually disciplined Mir successfully. Because those earlier charges and the later reciprocal charges were based on the same initial set of events, Mir argued that the dropping and re-filing of reciprocal charges amounted to charging him twice for the same activity.

The court rejected this argument. “Collateral estoppel,” explained Judge Brobson, "would only apply to preclude the Board from re-litigating an issue or fact litigated in a prior proceeding that was necessary to a judgment on the merits in that prior proceeding.” Because the earlier charges were dropped prior to litigation, they could not be subject of collateral estoppel. And the Double Jeopardy Clause of the Constitution did not apply here because the charges were not criminal.

Mir also attacked the sufficiency of the board’s evidence, but because he had not contested that evidence—having skipped his disciplinary hearing—Judge Brobson ruled that he could not contest it on appeal.

In addition, although Mir argued that the charges were for activity too remote in time to discipline him now, Judge Brobson noted that the initial charges in this case were filed by the California medical board only three years after the relevant events, and only because of appeals, procedural delays, and a violation of probation did the California board actually revoke Mir’s license and the Pennsylvania board filed its reciprocal charges.

Subpoena challenge rules not retroactive, court finds

Issue: Retroactive application of jurisdictional rule

An appellate court in Kansas overturned the dismissal of an action by a chiropractor challenging a subpoena from the state medical board, despite the fact that a new law invalidated the procedure by which the licensee filed the challenge. The court held September 9 that the retroactive application of such a statute to strip subject matter jurisdiction from a court was impermissible. (*Jernigan v. State*).

In 2014, the Kansas State Board of Healing Arts received a complaint alleging that someone was creating fictitious posts on Internet forums extolling the virtues of the Hansa Center for Optimum Health, a chiropractic clinic run by licensed chiropractor named Keith Jernigan. The complainant alleged that the individual making the posts was connected with the Center, and also claimed that the center had a reputation of “taking people’s money in large amounts and offering little in the way of tangible help.”

This complaint prompted an investigation by the board. As part of that investigation, the board served Jernigan with a subpoena requesting that the clinic provide the medical records of five patients of the center “who have received holistic and conventional chiropractic treatment.”

Jernigan objected to the subpoena on the grounds that it sought information irrelevant to the board’s investigation. Eventually, Jernigan filed an action in a Kansas court seeking to quash the subpoena.

After a hearing on Jernigan’s petition, but while the decision was pending, the state legislature passed an amendment to the board’s enabling statute requiring persons subpoenaed by the board to exhaust all available administrative remedies before seeking to quash such a subpoena in court.

The court hearing Jernigan's case subsequently dismissed his action, ruling that the new rule should be applied retroactively in the case. Jernigan appealed and the case went up to the Court of Appeals of Kansas. That court agreed with Jernigan that the newly amended statute should not apply retroactively to his case. Reading the relevant statutory scheme in its entirety, the court noted that, in order to appeal a board subpoena, the subject of the order must do so within five days of receiving it.

Given that the new rule did not take effect until almost six months after Jernigan filed his petition, "at the time this action was filed," the court noted, "Dr. Jernigan was not required to seek relief from the Board before applying to the district court to attempt to revoke the subpoena served on him by the board."

At the time the petition was filed, the district court had jurisdiction over the matter and, because, once acquired, subject matter jurisdiction cannot be "divested by subsequent events," the district court would maintain that jurisdiction throughout the length of the case. As to the merits of the subpoena, the court was doubtful it was relevant to the investigation, noting that even the district court had found the complaint letter received by the board did "not appeal to relate to requested medical records."

Under Kansas law, the board has the burden of showing that the subpoena is relevant to an investigation which, itself, must not be too vague in nature. In initiating its investigation into Jernigan, the court had listed a number of possible grounds for discipline, including unprofessional conduct, exceeding the scope of permissible chiropractic practice, and substance abuse. Jernigan argued that those charges were not alleged by the letter that prompted the investigation.

The court agreed. "Certainly, the Board is entitled to conduct investigations into allegations of unprofessional conduct or deviations from the appropriate standard of care. But the Board has not shown how the medical records of the five random patients—evidently to be selected by Dr. Jernigan—would advance its investigation." Holding that the record before the Court of Appeals was insufficient to determine whether the lower court correctly determined that the subpoena was permissibly issued, the court returned the case to the lower court, where the board would be required to make a showing of relevancy.

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