Professional Licensing Report

Licensing, testing, and discipline in the professions

July/August 2016
Vol. 28, Numbers 1/2

Highlights in this issue

Licensing

Licensee with Adderall Rx who failed drug screen has burden of proving rehabilitation

Issue: Drug screens & compliance with probation requirements

A pharmacist who sought reinstatement of her license, and was denied, lost her appeal August 25. The Commonwealth Court of Pennsylvania ruled that she had not properly demonstrated her rehabilitation and ability to practice pharmacy with reasonable skill (*Markowitz v. Bureau of Professional and Occupational Affairs, State Board of Pharmacy*).

The case concerned Pennsylvania pharmacist Carol Markowitz, who after several years of practice opened her own pharmacy. In 2009, the state Bureau of Professional and Occupational Affairs initiated an enforcement action against her after she attempted suicide by ingesting some diverted oxycodone tablets.

Under a consent decree, suspension of her license was imposed but stayed in favor of probation. She was ordered to undergo a mental health evaluation, drug treatment, and random drug testing, and to abstain from alcohol.

(*See Discipline, page 2)*

Federal File

U.S. Labor Department to spend up to $7.5 million on license portability efforts

Issue: Federal funding of grants on state licensing policy

Following on the White House's recent expression of concern about state over-regulation of licensed fields, the U.S. Department of Labor announced in June that it will spend up to $7.5 million on three-year grants to help ensure that existing and new licensing requirements are not overly broad or burdensome and to increase license portability across state lines.

The Department said it would fund "one or a few" groups for the project, and it was taking applications from national or regional non-profits.

Potential grantees could include an association of governors' offices, an association of state legislatures, a federation of state licensing boards, or a workforce intermediary or technical assistance organization.

The Department invited entities to partner in the effort. As part of any proposal, groups were asked to ensure that at least three and preferably more states would commit to participating. In selecting those states, applicants "are encouraged to consider the current status of any existing efforts to reform or streamline occupational licensing, as well as major legislative, legal, budgetary, or other obstacles and challenges to the implementation of this project."

Possible alternatives to current licensing approaches, said DOL, include:

* Streamlining administrative procedures for applying for licenses
* Recognizing prior learning from education or experience obtained in another state, from the U.S. or military, or in another country;
* Formation of inter-state reciprocity agreements;
* Unilateral recognition of out-of-state licenses;
* Harmonization of licensing requirements across states; or
* Development of accelerated pathways to licensure for workers moving across states.

Projects could involve convening and working with more than one consortium of states that could focus around a specific region of the country, specific industry sectors like healthcare, or specific licensed occupations having significant employment in the states. The extent of demand for workers in particular fields where portability could help meet employer needs should also be described in the proposal, DOL said.

The funding for the grants was authorized by Title I, Division H of the 2016 budget bill under "State Unemployment Insurance and Employment Services Operations."

Discipline

Licensee with Adderall Rx who failed drug screen must prove rehab *(from page 1)*

Issue: Drug screening & compliance with probation requirements

Two months into her probation, Markowitz tested positive for Oxazepam, a controlled substance, and ethyl glucoronide, an alcohol marker. She was directed to a rehab program but did not complete it, and the board vacated the stay of her license suspension, laying out requirements on how she could petition for reinstatement including at least three years of rehabilitation and continuous sustained recovery.

She applied for reinstatement in 2014, submitting a number of random drug testing results, six of which tested positive for amphetamine. Since her psychiatrist had prescribed her the amphetamine Adderall, she stated that the drug tests "showed she was not taking any substance for which she did not have a valid prescription."

But given the test results and Markowitz's failure to submit evaluations from approved providers, the board found that she had not met her burden of proving she was fit to practice pharmacy safely.

On appeal to the Commonwealth Court, Markowitz argued that the Pharmacy Board erred in admitting doctors' reports when the doctors themselves were not

present for cross-examination. The court agreed ,but said it was Markowitz who had the burden of proof in this case and she did not present any physician to testify in person either.

The court expressed concern about the board's demand that Markowitz spend $6,000 on an evaluation. That requirement "does not appear grounded in statute or even fair given her current financial difficulties," the court said.

In addition, the court pointed out, "the statute states that the board may require her examination by 'physicians or psychologists approved by the Pharmacy Board.' . . It does not say she cannot challenge the results of that examination, nor does it condition her reinstatement upon the approval of a Program-approved physician or psychologist."

While upholding the board's denial of reinstatement, the court said, "We are left with a difficult record." Markowitz's doctor prescribed Adderall which showed up in her drug tests. Markowitz was trying to get off the drug in order to get her pharmacy license, but her other doctor thought this was inadvisable.

"Markowitz needs to prove that her Adderall use is appropriate and not an impediment to her ability to work as a pharmacist. She has not done so yet and accordingly, we are constrained to affirm the order of the Pharmacy Board," the court concluded.

Lifetime licensure ban for 30-year-old misdemeanor constitutional

Issue: Nexus between criminal convictions and qualifications for professional license

A permanent ban on licensure, based on discovery of a child care worker's 30-year-old conviction for misdemeanor welfare fraud, does not violate the state Constitution's equal protection or due process guarantees, the Supreme Court of Wisconsin held July 6 (*Blake v. Jossart*).

The ruling, affirming a trial court, said there was a rational basis for the ban. "Although eliminating eligibility for all people with "a record of public benefits fraud, no matter the circumstances, may have been a severe response to rampant fraud in the program, it was not an irrational one," the court said.

Two dissenting judges argued that the statute was disproportionate, draconian, and brutal, and not inspired by the need for public protection. The dissenting opinion author noted that, by contrast with the statute setting a lifetime ban for welfare fraud, there are several categories of offenses that do not lead to permanent ineligibility but only a five-year ban from obtaining certification—including making fake IDs, impersonating government agents, or forging prescriptions.

In the view of the dissenters, the statute is not rationally related to legitimate state purposes. "Although rational basis scrutiny may be deferential," the author noted, "it is not 'toothless.'"

The plaintiff in the case, Sonja Blake, was a state-certified childcare provider in 2009, when the Wisconsin legislature approved a bill that substantially changed the circumstances under which the Department of Children and Families may license and certify childcare providers in the state.

The new law imposed a lifetime ban on licensure and certification for persons who have been convicted of certain crimes. It also states that "no person who has been convicted . . may be permitted to demonstrate that he or she has been rehabilitated."

The previous law created a rebuttable presumption of ineligibility but did not permanently bar people from eligibility based on prior convictions. A new law was promoted in the wake of a Wisconsin newspaper's series showing that there was rampant abuse in the childcare business, and some childcare providers with certification and criminal backgrounds had defrauded the state of hundreds of thousands of dollars.

After the act took effect in 2010, the Racine County Human Services Department conducted a review of providers' criminal

backgrounds to determine whether the new law affected any of them. The county revoked Blake's childcare certification because she had a 1986 conviction for misdemeanor welfare fraud.

She had pleaded no contest to a misdemeanor after originally facing a felony charge for failing to report as assets a car and a motorcycle that she owned. At the time, she thought she did not have to report the car as an asset because it was a gift and it did not run. As a result of the conviction, Blake served two years' probation and paid $294 in restitution for the excess welfare payment she received.

Blake appealed and her constitutional challenges of the statute did not meet success in circuit court or in the court of appeals.

She repeated her arguments on appeal to the state supreme court: that the law violated constitutional guarantees of equal protection and substantive due process, and that it created an "irrebutable presumption" that persons with certain convictions were unqualified.

The court found that the state "merely has rendered ineligible for payment through Wisconsin Shares people who share an objective characteristic, a conviction for an offense pertaining to public benefits fraud." The permanent prohibition "rationally advances the state's objective of eliminating fraud against the Wisconsin Shares program (which controls childcare) "and therefore withstands equal protection review on tits face.

"The sweeping nature" of the new statute "creates harsh results for people such as Blake who have a conviction. . . that is distant in time and involved a relatively small amount of money. However, the majority held, the law does not violate constitutional equal protection or substantive due process guarantees.

"Good intentions" fail to neutralize finding of gross negligence

Issue: Defining gross negligence in disciplinary cases

A physician's good intentions and lack of indifference to a patient's well being did not conflict with the state medical board's conclusion that he was grossly negligent in treating a patient, the Court of Appeals of Utah ruled August 18 (*Martinez-Ferrate v. Department of Commerce, Division of Occupational and Professional Licensing*).

The case involved physician Rodolfo Martinez-Ferrate, who as a specialist in treating sleep disorders, used infrared therapy to promote cell regeneration and encourage healing.

The state Physicians Licensing Board investigated Ferrate for an incident in which a patient being treated for neuropathy of the feet suffered burns from this treatment, which was delivered by a nutrition expert without formal training under the physician's supervision.

The board found that evidence established that Ferrate decided to treat neuropathy of the patient's feet with infrared treatment without first examining the patient or her medical records, left the patient to be attended only by the unqualified nutrition expert, and failed to provide any written information regarding infrared therapy to patient.

Because Ferrate acknowledged liability for the patient's injury, ended his association with the nutrition expert and had no previous similar incidents, the board recommended probation rather than revocation or suspension.

State law prohibits the use of an alternate medical practice, unless there is generally accepted documentation establishing that the practice has a reasonable potential to be of benefit. Here, the board concluded that Ferrate's use of the infrared therapy for promotion of general health, his failure to properly supervise his employee, and failure to advise the patient with a written disclosure of potential risks amounted to unprofessional conduct

In appealing this discipline, Ferrate referred to a Utah court's definition of gross negligence as "the failure to observe even slight care… carelessness or recklessness to a degree that shows utter indifference to the consequences that may result."

Ferrate argued that the board's acceptance that he had good intentions and was not indifferent to the patient were incompatible with the conclusion that he was grossly negligent. He also compared the presence of the nutrition expert to that of prospective medical students.

The court, however, noted that Ferrate relied on the circumstances under which a physician's gross negligence could give rise to punitive damages in a malpractice suit—not to disciplinary action by the state medical board.

"The board's statements that Dr. Ferrate had good intentions and that the board did not find or imply that he was indifferent to the patient's well being shed no light on whether he acted with gross negligence," the court said. "Indeed, physicians can be concerned with a patient's overall well-being yet still be grossly negligent in the application of specific treatments or procedures to that patient."

Noting that the board's order of probation was supported by substantial evidence, the court said there was no irreconcilable conflict between the board's statements and its gross negligence conclusion, and declined to disturb the order.

Ruling against 10-year minimum license suspension for drug convictions reverses precedent

Issue: "Minimum sentencing" in professional discipline

The state's Professional Nursing Act does not require an automatic minimum ten-year suspension of a nurse's license over a felony drug conviction, the Commonwealth Court of Pennsylvania ruled August 24 (*McGrath v. Bureau of Professional and Occupational Affairs, State Board of Nursing*).

The ruling, which affirmed a nurse's automatic suspension by the State Board of Nursing, but not the minimum ten-year length, reversed a 2014 ruling (*Packer v. Bureau of Professional and Occupational Affairs, Department of State, State Board of Nursing*, 99 A.3d 965) upholding the ten-year minimum.

McGrath was convicted in 2013 of a felony under the Drug Act: Acquisition or Possession of a Controlled Substance by Misrepresentation, Fraud, Forgery, Deception or Subterfuge. Her license was automatically suspended.

Shannon McGrath, the plaintiff, argued her appeal pro se. She contended that the board changed its interpretation of the automatic suspension provision of the Nursing Law in 2013 without engaging in either formal interpretation (by promulgating regulations) or informal interpretation (by issuing policy guidelines).

The court agreed, noting that the board changed its application of the nursing law based upon an unidentified 2013 directive from the state Bureau of Professional and Occupational Affairs, and relied on the *Packer* decision to treat McGrath's suspended license as a revoked license, for restoration purposes.

This meant that the board had no discretion to reissue suspended nursing licenses when appropriate, the court said. In addition, where statutes are penal in

nature—as the Nursing Act was—"they must provide a clear and unequivocal warning in language that people generally would understand as to what actions would expose them to liability for penalties and what the penalties would be."

In overruling the *Packer* decision, the court cited "what justice demands and what reason dictates." Precluding individuals from engaging in their profession for ten years before the board has the authority to even review their requests to reissue their suspended licenses prevents the board from exercising its discretion, the court said. In addition, individuals are prevented from earning their livelihood during that time.

Because of the ambiguousness of the Nursing Law, the court also noted, licensees have no guidance regarding what actions result in what punishment, so continuing the ten-year minimum would create "a great injustice or injury" to those individuals.

Two of the court's justices, in a dissenting opinion, opposed the abandonment of *Packer*. "Notwithstanding any perceived harshness flowing from our decision in *Packer*, the decision was not so clearly erroneous to justify unsettling an area of law that this Court settled only two years ago," these justices said.

Revocation motion contained in approved board agenda not source of bias

Issue: Alleged bias against licensees

An appellate court in North Carolina upheld July 5 a board decision to revoke a surveyor's license in the face of allegation of bias by the surveyor (*Herron v. North Carolina Board of Examiners for Engineers and Surveyors*).

In his appeal, the surveyor, Randy Herron, had argued that the board's unknowing approval of a motion to revoke his license unless he requested a formal hearing—contained within a larger board agenda – meant that the board was unable to provide him an impartial adjudication in his discipline case.

In 2004 and 2009, the board sanctioned Herron after determining that samples of his work were of substandard quality. Then, in 2011, Herron failed to timely renew his license, and was suspended until February 28 of the next year, when he belatedly renewed it.

Herron continued to work during his suspension, engaging in the practice of surveying despite his now-unlicensed status. This work prompted an investigation by the board, which confirmed that Herron had engaged in unlicensed practice, as well as determining that the work he had done during this time did not meet sufficient quality standards. The board moved to revoke Herron's license.

In March of 2013, the board summarily passed a motion to approve a "consent agenda" that included a written report from a settlement conference committee that had met with Herron and recommended the revocation of his license unless he requested a formal hearing. The board did not read the details or even the conclusions of the report; it approved the broader agenda in its entirety.

Herron did, in fact, request a formal hearing, and included in that request a motion for the board members to recuse itself from hearing his case and appoint an administrative law judge, on the grounds that the board's passage of his settlement conference recommendations in the previously passed board agenda meant that the members had prejudged his case. The members rejected his motion and revoked Herron's license after a hearing.

Herron appealed, and a trial court reversed the board's decision, finding that the board's practice of using a settlement committee followed by a full hearing, if requested, was a violation of Herron's right to due process by an unbiased adjudicator. The board then appealed and the case went up the Court of Appeals.

The higher court, in an opinion by Judge Valerie Zachary, overturned the lower court's ruling and reinstated Herron's discipline. Reviewing the evidence cited by the lower court, Judge Zachary noted that the record contained no evidence that any of the board members had a personal bias towards Herron.

Judge Zachary noted that the board members had not actually reviewed any information from or discussed Herron's case before voting on the agenda. Although "the wisdom of this procedure, whereby significant decisions are made without discussion or review, may be subject to question," the judge said, the board's procedures did not provide it with the opportunity to prejudge Herron's case, and could not have create a bias towards Herron.

"Facts" versus "Reasons": Licensee deserved hearing on good cause for missing hearing start time

Issue: "Good cause" for missing hearings under administrative law

The Oregon Court of Appeals, in an August 3 decision, granted a hearing to resolve a factual dispute in the case of a physician whose license was revoked by default after he failed to arrive for the beginning of his hearing, in the mistaken belief he could skip the first few hours (*Yankee v. Oregon Medical Board*).

One week before a scheduled hearing on disciplinary charges filed against physician Joseph Yankee by the Oregon Medical Board, Yankee filed a request to postpone proceedings. Yankee explained that his attorney had temporarily dropped his representation after Yankee could no longer afford to pay and, although their relationship had now been renewed, the attorney now was no longer available on the scheduled hearing date.

The board denied Yankee's request, noting that he had failed to previously mention his representation problems during the approximately six weeks since his attorney withdrew. Yankee did not attend the scheduled hearing and the board entered a default order against him.

Before the board could officially disseminate the order, Yankee again asked to reschedule the hearing he had missed, explaining that he had not intended to skip the entire proceeding.

Yankee believed he could arrive late to his hearing, he explained, because he thought he would not be needed for the first few hours, when the board would be questioning witnesses. He did not realize that the board could issue a default if he were not present at the beginning of the hearing.

The board also denied this request, ruling that the facts in the case were not in dispute and that Yankee did not have "good cause" for his failure to appear, which would have allowed the hearing to be rescheduled.

Yankee appealed the ruling, arguing that the reasons for his failure to appear were in dispute and that the board's regulations actually entitled him to a hearing to resolve that dispute. Oregon regulations state that "If the reasons for the party's failure to appear are in dispute, the administrative law judge shall schedule a hearing on the reasons for the party's failure to appear."

The Court of Appeals agreed. Chief Judge Erika Hadlock wrote that, despite what appeared to be a common understanding of why Yankee had not shown up

for the beginning of his hearing, the facts surrounding that failure to appear were, in fact, in dispute.

First, the two parties were in dispute over whether Yankee had access to counsel when making the ill-advised decision to skip the first part of his hearing. Second, the board had based part of its decision on a determination that Yankee had actually been informed that his failure to arrive in a timely manner would result in a default of his case; Yankee claimed that he had not been notified and had made his decision in good faith.

Those two disputed assertions were sufficient to require the board to provide Yankee with a hearing, Judge Hadlock concluded. The case was remanded to the board for further proceedings.

Board does have jurisdiction over lapsed licensee, appeals court says, overruling trial court

Issue: Attempted evasion of jurisdiction by licensee in discipline cases

The Court of Appeals of Tennessee rejected the argument of a disciplined doctor that the state's medical board could not bring a discipline case against him because his license had lapsed during legal proceedings (*Oni v. Tennessee Department of Health*), in an August 23 decision

The decision reaffirmed a common tenet of licensing law—that lapsed licenses do not insulate individuals from disciplinary proceedings—that has popped up in many cases in the last year.

In 2007, the board reprimanded physician Adedamola Oni for inappropriately prescribing a dermatological treatment. Shortly after, the New York medical board revoked Oni's license for failure to report both his Tennessee discipline and criminal burglary and assault charges filed against him in Georgia.

Oni's Tennessee license was then subject to further discipline. In 2011, the Tennessee board filed charges based on Oni's failure to pay his administrative costs and on the New York license revocation.

After a hearing, the board revoked Oni's Tennessee. Oni appealed that decision and the case went up to Tennessee's Court of Appeals, which rejected the order and remanded the case because the board had not provided an independent evaluation of the evidence concerning Oni's New York revocation or articulated why revocation was the appropriate sanction in the case.

Meanwhile, in March 2014, Oni's license lapsed on its own after he failed to renew it. He then filed a motion with the board seeking to dismiss the case as moot, on the grounds that he no longer had a license to discipline.

Although the board rejected this request, again revoking Oni's license in September of that year (this time including a detailed explanation), a state chancery court surprisingly found merit in Oni's mootness claim, and reversed the revocation. The board appealed, and the case went up to the Court of Appeals, which issued an opinion on August 23. The Court of Appeals rejected Oni's mootness argument, overturning the chancery court's ruling.

"Dr. Oni may not have been an active licensee once his license was automatically revoked, but he was and is still a 'licensee' as that term is defined by the Board's regulations," wrote Judge Andy Bennett for the court. Although

Oni's license was not active, Judge Bennett noted that, without further discipline, the doctor would be able to reapply for reinstatement in the future.

"Dr. Oni was and is a licensee, as that term is defined in the Board's regulations, because he has been lawfully issued a license to practice medicine in Tennessee by the Board," continued Judge Bennett. "His status as a licensee is not altered by the fact that his license has been revoked due to a failure to renew his license."

After quickly dealing with Oni's other claims, the Court of Appeals reversed the decision of the lower court and affirmed the revocation.

Rules for reinstatement differ from rules for entry, court says in rejecting doctor's appeal

Issue: Board ability to discipline versus board ability to deny entry

The Supreme Court of Vermont rejected a challenge by a formerly licensed physician to a board decision denying the reinstatement of her license in July, holding that statutory language limiting the ability of the board to deny entry into the practice of medicine applies only to new applicants, not licensees who have been disciplined (*In re Taylor*).

Taylor was first disciplined in 1996, when her license was suspended in response to addiction problems and violation of patient-physician boundaries. She resumed practice in 2000, but quickly ran afoul of the same problems which had plagued her previously. In 2005, physician Stephanie Taylor signed a consent order with the Vermont Medical Practice Board in which she agreed to a "final and irrevocable" surrender of her license.

Despite the "final and irrevocable" language in the consent order, Taylor applied for reinstatement in 2013 and 2014. The board denied these requests, but its decision was reversed by the Vermont Supreme Court, which remanded the case to the board with orders to explain its decision in more detail.

Vermont state law (25 V.S.A. § 3101) sets forth the general policy and purpose of regulating the professions:

It is the policy of the state of Vermont that regulation be imposed upon a profession or occupation solely for the purpose of protecting the public. The legislature believes that all individuals should be permitted to enter into a profession or occupation unless there is a demonstrated need for the state to protect the interests of the public by restricting entry into the profession or occupation. If such a need is identified, the form of regulation adopted by the state shall be the least restrictive form of regulation necessary to protect the public.

On remand, the board again denied Taylor's request for reinstatement, this time issuing a detailed 14-page ruling. Taylor appealed, and the case again went up to the Vermont Supreme Court.

In her first argument on appeal, Taylor asserted that the board erred because it did not determine whether there were less restrictive means to protect the public than maintain her licensed revocation. To support this argument, she cited Vermont statutory language that "all individuals should be permitted to enter into a profession or occupation unless there is a demonstrated need for the state to protect the interests of the public by restricting entry into the profession or occupation."

The Court, in an opinion by Justice Marilyn Skoglund, rejected this argument. By its plain terms, Justice Skoglund wrote, the statute cited by Taylor applies only to *entry* into the professions, and says nothing about later disciplinary actions.

Taylor's second argument was that the board had violated her procedural due process rights by making their requirements for her reinstatement overly vague. However, Justice Skoglund wrote, Taylor herself bore the burden of convincing the board that it should vacate the earlier consent agreement. In its decision, the

board stated that Taylor had not produced sufficient evidence to demonstrate significant rehabilitation from the circumstances that initially led to her discipline.

Licensing

Sunset review criticizes licensee self-audits, missing licensee data, lax continuing education monitoring

Issue: Standards to ensure compliance with regulations

Despite state law authorizing them, the Tennessee Board of Dentistry does not perform on-site inspections of dentists who use general anesthesia, deep sedation, or conscious sedation, says a July 2016 audit by the Tennessee Division of State Audit, Sunset Performance Section. The auditors called on the board to consider dropping its reliance on self-audits by the dentists who run the practices.

The auditors made several additional findings and recommendations regarding board compliance with statutes and rules on tracking and monitoring dental office ownerships, auditing licensees' compliance with continuing education, assuring accurate licensing data, filling board vacancies, and conducting proper meetings.

Self-audits After contacting seven southeastern states, the auditors found that the Tennessee board is the only one that does not require a physical office inspection prior to or after the issuance of an anesthesia or sedation permit.

In January 2015, the auditors note, "the board began having permit holders conduct self-audits, but compliance with rules and regulations has been trending downward since they were implemented." The board "may wish to align its inspection practices with the best practices of its surrounding states," the audit recommends.

Board response

In response to the audit findings, the dental board said it concurred with all of the recommendations on deep sedation practices, continuing education monitoring, tracking licensing data, and board vacancies.

Regarding self-audits of dentists who use deep sedation, the board said it would explore the feasibility of implementing an inspection regime. On continuing education, the board also concurred and noted that it is engaged in a pilot project whereby licensees will be required to participate in a web-based continuing education tracking system.

As for the transition to the new data system, the board said efforts to document the migration and testing in a comprehensive, organized manner were somewhat hampered by turnover in project management, but that the state Information Technology Services Division had appointed new staff to improve implementation and documentation for the project.

Tracking practice data The audit found that the board and staff do not obtain information necessary to locate all dental practices and track and monitor ownership to ensure that all are owned by licensed Tennessee dentists, as required by state law. The board "should strive to ensure that all practitioner profile data, specifically the practice address, is complete and accurate," auditors recommended, and the board should establish disciplinary measures for practitioners who fail to inform the board of changes.

Continuing education "Since 2012, the board has had a low percentage of its licensees compliant with continuing education requirements," the audit reports. Fewer than the required 5% of renewals are being randomly audited, the audit window is too long (an average of 4.9 to 5.4 months), and according to board staff, "noncompliant licensees state that they did not know continuing education was required, though it is clearly conveyed in statute, rules, policies, and the board's website." Auditors called for tighter standards for auditing random licensees' compliance

Licensing data Following a recent transition of licensing data from the Regulation Boards System

(RBS) to the Licensing and Regulatory System (LARS), the state health department did not maintain post-implementation documentation that showed the data was successfully migrated. The auditors recommended maintaining such documentation to assure valid and reliable migration from one system to another.

Board vacancies Vacant board positions are not filled in a timely manner, the audit said, noting that three positions have been vacant for several months, with prior appointees remaining in position to keep them filled, as allowed by statute. Since the governor did not fill the positions within a month, the board has authority to fill the vacancies itself, and should do so, the auditors said. They also called on the board to investigate how to ensure that board terms are staggered so that no more than three terms expire each year."

Meeting procedures "Tele-participation" in board meetings is allowed in order for a board to achieve a quorum, but statements of necessity are required to be included in board minutes and filed with the Secretary of State. The audit observed that the statement of necessity was missing in several instances. These statements, including the facts and circumstances of the necessity, should be formally made every time members are allowed to participate by electronic or other means, the audit said.

Case against Minnesota board's application policies allowed to continue

Issue: Allegedly arbitrary denial of license applications as "quasi-legislative" decisions

A court in Minnesota upheld subject matter jurisdiction for a complaint filed against the Minnesota Board of Teaching by applicants for teacher's licenses who claim the board is improperly denying licenses to applicants who meet the state's statutory requirements for licensure (*Hernandez v. Minnesota Board of Teaching*).

Key to the August 3 decision was the fact that the applicants were not appealing the board's decisions in their individual cases, but were instead challenging board policy in general.

In April 2015, several teacher license applicants filed a complaint against the board, accusing it of arbitrarily denying licenses to qualified teachers who meet the legal requirements for a license. A district court granted partial summary judgment for the plaintiffs, and the board appealed that decision to the Court of Appeals of Minnesota, which issued an opinion on August 8, returning the case to the lower court to continue proceedings.

In its appeal, the board argued that the district court could not have decided the case because the applicants were challenging the board's decisions not to grant them licenses, quasi-judicial decisions that only be challenged in the Court of Appeals on a petition basis. However, the Court of Appeals disagreed, siding with the applicants, who claimed that they were only challenging the board's policies, not its individual applicant decisions.

The "applicants' allegations relate to the board's refusal or failure to apply standards required by statute in processing applications," Judge Renee Worke wrote for the court. "Importantly, applicants do not challenge individual licensing decisions, nor do they request relief compelling the board to issue any licenses . The disputed claim is the practice of arbitrary refusal to consider application of presumably qualified applicants." Such claims, Judge Worke explained, are challenges of quasi-*legislative*, not quasi-judicial, decisions by the board.

The board also challenged the applicants' standing to challenge its decisions. None of the applicants had claimed individual injuries from its actions, the board

argued, and so they could not show the individual injuries necessary to bring a claim.

However, Judge Worke noted that the applicants had shown a specific concrete injury resulting from the board's decisions: "Each is unable to obtain review of their licensure applications under the applicable statutory provision, which results in their failure to obtain teaching licenses."

"While an allegation in the complaint that the board has a 'practice of consistently refusing to follow Minnesota law' and 'arbitrarily deny[ing] licenses to well-qualified teachers who clearly meet the statutory requirements' seems like a claim of wide public significance, applicants have alleged suffering concrete harm due to the board's actions," Worke concluded.

Competition

Federal court overturns dismissal of suit challenging board ban on specialty advertising by general practitioners

Issue: Specialty advertising by general practitioners

A dentist who sued to invalidate Ohio board rules that prohibit general dentists from advertising a specialty won a legal victory August 5, when the U.S. Court of Appeals for the Sixth Circuit ruled that his claims raised legitimate First Amendment issues; the court overturned the dismissal of his case by a lower court (*Kiser v. Kamdar*).

To be recognized as a specialist by the Ohio Dental Board, not only must a dentist complete an appropriate postdoctoral program, the dentist must also practice *only* within the bounds of their specialty. Anyone who does not meet these conditions may not advertise as a specialist in the state.

Dentist Russell Kiser had completed a postdoctoral educational program in endodontics, the area of dentistry dealing with the dental pulp, but, because Kiser did not wish to limit his practice to that specialty, he advertised as both an general dentist and an endodontic specialist.

After learning that Kiser was advertising as a specialist despite the prohibition on general practice by specialists, the board sent him a warning letter. Later, when the board refused to approve of language on his sign that identified him as both a general dentist and endodontist, Kiser brought suit, seeking a declaration that the board's prohibition on his advertising as a specialist violated his First Amendment right to commercial speech.

At the trial court level, the judge hearing the case had rejected Kiser's claims by concluding that, because Kiser was seeking to advertise as both a general and specialist dentist, and because Ohio law prohibited advertising as both, Kiser was asking to advertise for an illegal activity and his speech directed at that goal was not protected.

Applying an intermediate-scrutiny test to the board's restriction on speech, the court noted that the board had the burden of proving that the regulation was justified by a substantial government interest, that the regulation advance that interest "in a direct and material way," and that the prohibition is not more extensive than necessary.

The Court of Appeals disagreed. The underlying activity—practicing both general and endodontic dentistry—was not, itself, illegal, wrote Judge Danny Boggs. The challenged regulation simply prevented him from advertising himself as an endodontist while practicing in both dental areas.

Kiser, the court continued, was not seeking to advertise illegal activity; he was seeking to use illegal terminology to

advertise a legal activity. Because the underlying activity was lawful, the illegal-activity exemption to First Amendment protections would not apply.

Further, the court continued, Kiser was trained in both general and endodontic dentistry, so any advertising that communicated that fact would be truthful. "That truthful, non-misleading information would be useful to patients because it sets Kiser apart from general dentists who are qualified to perform endodontic procedures but lack such specialized training," wrote Judge Boggs.

"The Board's insistence that the word 'endodontist' *must* convey that Kiser is a Board-recognized specialist—because the Board has said so—strikes us as an example of the government using political language to prevent us from considering the nuances of the situation."

The case was remanded to the trial court to give the board an opportunity to defend its regulation.

Scope of Practice

Court rejects unlicensed practice claim against "jailhouse lawyering"

Issue: Exceptions to prohibitions on unlicensed practice

The Vermont Supreme Court dismissed a criminal case of unlicensed practice of law against a prison inmate who routinely provided legal advice to her fellow inmates, ruling that the practice is longstanding and an important source of legal advice to individuals who may not otherwise be able to obtain such services (*In re Morales*).

In February 2016, Vermont filed a complaint against Serendipity Morales, accusing her of the unlicensed practice of law. Morales was in the habit of helping fellow inmates in their legal cases, often by drafting motions and performing legal research, but always without compensation.

Before allowing the case to continue, the state's Supreme Court, which was hearing the case, held a hearing to determine whether probable cause existed to believe that Morales had actually engaged in any unauthorized legal practice.

Surveying the case law, the court noted that, although unlicensed practice had been defined broadly through the years, exceptions to the prohibition were also defined broadly. The court suggested that "the general scope of the prohibition against the unauthorized practice of law may not solely be a function of the tasks an individual performs but also reflects a balancing of the risks and benefits to the public of allowing or disallowing such activities."

Assessing the history of "jailhouse lawyering," the court noted the benefits the practice provides to inmates. Justice Beth Robinson, writing for the court, noted that inmates with legal knowledge have been helping others navigate the legal system for many years, usually without the threat of prosecution.

Semi-official structures even exist for this type of legal advice in Vermont. For example, Justice Robinson noted that the policies of the state's Department of Corrections contains an exception to the normal prohibition of correspondence between inmates: when one of the inmates involved "customarily offers legal advice to other inmates." Morales has also introduced into evidence the transcript of a trial court hearing in which a judge urged a defendant to seek the help of other inmates when filing motions.

"In this context," wrote Justice Robinson, "although there may be some limits on the ways in which an inmate can give legal help to another, we are wary of adopting a definition of unauthorized practice of law that would subject individuals to a finding of criminal contempt for engaging in conduct that has been tolerated and arguably even supported by the state."

Robinson also noted the important role that inmate legal help plays in the administration of justice. "Incarcerated prisoners are not only disproportionately undereducated; their access to a range of legal resources and information is severely limited, and their need may be great."

"Although 'jailhouse lawyers' may pose a risk to the individuals they are trying to help, and to the court system, they may also perform a valuable service in promoting more meaningful access to justice than their fellow inmates would otherwise enjoy. In determining whether the prohibition against the unauthorized practice of law extends to the conduct of 'jailhouse lawyers,' this Court must take into account both sides of this balance."

Given these considerations, the justices determined that Morales' actions did not amount to an unauthorized practice of law.

Court upholds TX chiropractors' expansion of own practice to acupuncture

Issue: Scope of practice expansion by rule rather than statute

The Court of Appeals of Texas, in an August 18 decision, upheld rules recently passed by the state's chiropractic board allowing chiropractors to engage in the practice of acupuncture (*Texas Association of Acupuncture and Oriental Medicine v. Texas Board of Chiropractic Examiners*).

Although the Texas Medical Association recently had success in a challenge of similar rules allowing chiropractors to use needles in their practice, the physical differences between acupuncture needles and the needles used in the Medical Association's case led to different outcomes in the two cases.

In response to a 2005 statutory directive to clarify the breadth of the practice of chiropractic, the Texas Board of Chiropractic Examiners promulgated new scope-of-practice rules that allowed, among other things, the use of needles in acupuncture and other medical procedures.

The new rules quickly brought a suit from the Texas Acupuncture Association, arguing that the state's Chiropractic Act limited that practice to spine and musculoskeletal treatment and prevented chiropractors from engaging in any practice in which medical tools would pierce the skin. The case eventually made its way to the Court of Appeals of Texas in Austin, which issued a decision on the parties' motions for summary judgment.

The Association's primary argument against the new rules was grounded in the state chiropractic act's prohibition on the use of "incisive or surgical" procedures by licensees, subject to certain exceptions. The Association argued that the use of needles in acupuncture was "incisive" and, thus, forbidden to chiropractic licensees.

The Association's suit was not the first challenge to the new rules. When initially promulgated, the rules also contained language allowing chiropractors to use needles for a diagnostic practice called electromyography, or EMG. The Texas Medical Association successfully challenged this provision as impermissibly expanding the scope of chiropractic practice, based on the fact

that EMG needles are beveled, which caused the Court of Appeals to declare their use "incisive" and, thus, forbidden to chiropractors.

Citing the earlier case, Justice Scott Field wrote that the Chiropractic Board's acupuncture rules were a reasonable interpretation of statutory language. "The Chiropractic Board's definition of 'incision,' which recognizes that some needles may be considered 'incisive,' while other needles may not, is consistent with the technical meaning of the term 'incisive' and also with the Legislature's view that acupuncture needles are at least capable of being inserted into the body in a 'nonincisive' and 'nonsurgical' manner." This latter statement was a reference to the state's Acupuncture Act, which defines the practice as using needles in a "nonsurgical" and "nonincisive" manner.

However, the board did not prevail on all of the Association's claims. Addressing the Association's challenge to a different rule—one specifically permitting the practice of acupuncture—–in a consistent but slightly confusing explanation, Justice Field wrote that, although the board had been able to show that it's interpretation of "incisive" as not including all uses of penetrating needles was reasonable, it had not shown that *all* acupunctures needles, as a matter of law, were nonincisive. Thus, the board was not entitled to summary judgment on that claim.

Justice Field wrote that the Acupuncture Act's definition of the practice as "nonsurgical" and "nonincisive" could not be read as applying to the Chiropractic Board's own enabling statute, and was, thus, not language that the board could use to show that chiropractor's use of acupuncture needles would always be nonincisive.

The court returned the case to a lower court to rule on the question of whether the practice of acupuncture can ever involve incisive needles, but Justice Field, acknowledging the contentious and frequently confusing issue of the scope of chiropractic practice, entreated the state's legislature for help.

Conversion therapy ban survives further challenges

Issue: State laws governing professional practices

California's statutory ban on the practice of sexual orientation conversion therapy by licensed mental health providers has withstood another set of legal arguments made by opponents of the ban, who continue to claim that the ban violates First Amendment religious and free speech rights (*Welch v. Brown*).

Welch is the latest iteration of an ongoing challenge, by mental health licensees, to a 2012 California statute that prohibits licensed mental health providers from engaging in "sexual orientation change efforts" – also known as "conversion therapy"–with minor patients.

In an earlier case, *Pickup v. Brown*, the court held that the law, as a regulation of professional conduct, did not violate the free speech rights of practitioners, was not overly vague, and did not impose on parents' rights vis-á-vis their children.

In the current iteration of the challenge, the plaintiffs argued that the law violated the Free Exercise and Establishment Clauses of the First Amendment. To support the claim that the law violated the prohibition of the establishment of religion, the plaintiffs argued that the law would prevent religious counselors and clergy from discussing the religious motivations of conversion therapy with minors, even in an explicitly religious setting.

"The scope of chiropractic vis-a-vis other healthcare fields is a puzzle best solved by the Legislature in a clear and concise manner, rather than leaving these policy-laden questions to the Judiciary for a determination of legislative intent from statutory language that is, to say the least, not the model of clarity," the court said. "We respectfully request the Legislature to solve this problem."

When claims were rejected by a lower court and judgment entered on behalf of the state, the plaintiffs sought appeal, and the case went up to the U.S. Court of Appeals for the Ninth Circuit, which issued an opinion upholding the lower court's decision August 23.

This argument did not persuade the judges of the court. Citing the earlier opinion, the court noted that the prohibition applied only to licensed mental health professionals acting within the counselor-client relationship, and encompassed only therapeutic treatment, not expressive speech.

"Notably," wrote Judge Susan Graber, "Plaintiffs are in no practical danger of enforcement outside the confines of the counselor-client relationship." The state, she continued, has rejected any interpretation of the law that would encompass other relationships, such as that of the clergy acting in the position of a religious counselor.

Because the law affected only licensees and "does not regulate conduct outside of the scope of the counselor-client relationship, the law does not excessively entangle the state with religion."

In a similar argument, the plaintiffs claimed that the law inhibited the religious rights of minor patients seeking conversion therapy with religious motivations. However, although the court acknowledged that a law aimed solely at those with religious motivations would raise constitutional issues, it concluded that the bill encompassed minors who sought the therapy for myriad reasons, including "those who do so for secular reasons of social stigma, family rejection, and societal intolerance for sexual minorities."

Further, while in creating the law, the legislature cited documents that acknowledged that many people who seek conversion therapy are religiously-motivated, lawmakers also cited numerous documents and findings that made reference to non-religious motivations for seeking conversion therapy. The court said the question would be best left to the legislature to resolve.

Professional Licensing Report is published bimonthly by **ProForum**, a non-profit organization conducting research and communications on public policy, 9425 35th Ave NE, Suite E, Seattle WA 98115. Telephone: 206-526-5336. Fax: 206-526-5340. E-mail: plrnet@earthlink.net Website: www.professionallicensingreport.org Editor: Anne Paxton. Associate Editor: Kai Hiatt. ISSN 1043-2051. Listed, *Legal Newsletters in Print*.

Subscriptions, which include both printed and PDF copies of each issue, are $198 per year, $372 for two years, $540 for three years, $696 for four years. Online access to PLR content is included in the subscription price; online-only subscriptions are $179 per year. Additional print subscriptions for individuals (within the same physical office or board only) are $40 each per year and include a license to distribute a PDF copy to a single recipient. Licenses to distribute extra PDF copies only, to individuals within the same physical office or state licensing board, are $15 per recipient per year