Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue

Discipline

Website quality

Consumers Union adapts product rating system to rank licensing board websites

Issue: Accessibility, ease of use, helpfulness of websites

State agency websites don't strive for superior turning ability, extra shine, or spin cycle speed. But anyone who's consulted *Consumer Reports* to compare vacuum cleaners or hybrid cars will recognize the red- and black-dotted rating system the publisher adopted in its recent ratings of state medical board websites.

A Survey and Ranking of State Medical and Osteopathic Board Websites in 2015, released March 29, was a joint project of Consumers Union and the Informed Patient Institute. The report's authors also published their findings in a *Consumer Reports* magazine cover story entitled, "What You Don't Know About Your Doctor Could Hurt You."

Overall, say the authors, who used 61 criteria to produce their ratings, most sites were difficult to navigate, and all sites can be improved to

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Licensing

Federal court rejects challenge to allegedly vague professional conduct standards

Issue: Defining immoral or unethical conduct

Licensees do not have standing to challenge new professional standards for teachers until a teacher is disciplined, the U.S. District Court of the Northern Mariana Islands (Guam) held April 7.

The court rejected a challenge to the new standards, which created a range of new offenses simply defined as involving “immoral conduct” (*Guam Federation of Teachers v. Lisa Baza Cruz*).

After the promulgation of the new rules, the Guam Federation of Teachers, a union representing the island’s teachers, brought suit against the Guam Commission for Educator Certification. The union argued that the new rules, which banned “unethical conduct,” “gross immorality,”

"behavior or conduct detrimental to the health, welfare, discipline, and morality of students," and "conduct done knowingly contrary to justice, honesty, or good morals," violated teachers' First Amendment free speech rights and constitutional due process rights.

The vagueness of these prohibitions, the union contended, would allow teachers to be disciplined for such conduct as having a baby out of wedlock, smoking in public, or engaging in civil disobedience.

In its response to the suit, the Commission argued that the Federation did not have standing to challenge the rules. No teachers had been or were being disciplined under the new rules. Therefore, no injury had occurred. For their part, the Federation argued that the new rules had a "chilling effect" on teachers, altering their speech and conduct.

Judge Ramona Manglona, hearing the case, agreed with the Commission, holding that the union had not suffered an injury sufficient to bring suit. The Federation's claims, she explained, were too hypothetical. Until a discipline charge is brought against a teacher, the rules could not be challenged.

Judge Manglona, reviewing examples of potentially prohibited contact, noted that many—such as smoking or having a baby out of wedlock–were not for expressive conduct and, therefore, not protected by the First Amendment. Actions that were protected, such as engaging in civil disobedience, Judge Manglona wrote, were not specifically targeted by the new rules and could not credibly be considered its targets.

Many of the fears expressed by the plaintiffs, the judge added, "allege a generalized chilling of speech and then offer up each educator's personal nightmare enforcement scenario, without any facts that show a realistic danger of it occurring."

Without credible fears of injury, the Federation lacked standing to bring a pre-enforcement challenge to the rules. Judge Maglona acknowledged the legitimacy of the teachers' concerns, however; he wrote that "the law reporters are littered with cases where school boards fire teachers for 'immoral' conduct that supposedly set a bad example for students."

Most of the teachers' reasonable concerns were not free speech issues, he said, but actually concerns about the potential of the new rules to violate their privacy rights, an issue that would have to be analyzed under a different area of law, as a substantive due process complaint. However, because the Federation had not brought privacy complaints, those concerns were not justiciable in the current case.

Administrative petition must precede court challenge, board is told

Issue: Administrative procedure requirements

The North Carolina acupuncture board improperly brought a court challenge to a legal interpretation issued by the state's physical therapy board, a state court held April 26. The court said that the acupuncture board was required to first petition the physical therapy board and exhaust administrative remedies before coming to court (*North Carolina Acupuncture Licensing Board v. North Carolina Board of Physical Therapy Examiners*).

The North Carolina Acupuncture Licensing Board brought the case to obtain a court declaration involving the practice of dry needling, a procedure similar to acupuncture that uses inserted needles to relieve muscle pain. North Carolina's

law defines the practice of physical therapy quite broadly, and the physical therapy board believed that the broad language allowed physical therapists to engage in the use of needle insertion.

In response to a legal interpretation issued posted on the physical therapy board's website, stating that physical therapists could practice dry needling, the acupuncture board filed suit to obtain a court declaration that dry needling was a form of acupuncture over which it had exclusive licensing authority.

The acupuncture board also filed suit against several physical therapists who offered dry needling, seeking to prevent them from practicing.

The definitions of the two practices under North Carolina law:

Acupuncture, N.C. Gen. State. § 90-451(1):
The "insertion of acupuncture needles . . . based upon acupuncture diagnosis as a primary mode of therapy."

Physical Therapy, N.C. Gen. Stat. § 90-270.24(4):
"[T]he evaluation or treatment of any person by the use of physical, chemical, or other properties of heat, light, water, electricity, sound, massage, or therapeutic exercise, or other rehabilitative procedures, with or without assistive devices, for the purposes of preventing, correcting, or alleviating a physical or mental disability."

The case went to the North Carolina Superior Court in Wake County, where the physical therapy board argued that, as an agency of the state, it possessed sovereign immunity from suit. Judge Louis Bledsoe III, deciding the case, agreed.

Citing federal case law, Judge Bledsoe held that sovereign immunity protected state actors from suit even by other state actors, and thus the court had no jurisdiction over the physical therapy board, preventing the acupuncture board from having its suit heard directly by a court.

Although the state Administrative Procedure Act allows a person "aggrieved" by an action of a state agency to petition that agency for a declaratory ruling, the acupuncture board argued that it was not required to follow this procedure because it was not a person "aggrieved" by an action of the physical therapy.

The physical therapy board, the acupuncturists explained, had not actually issued any final agency action with which the acupuncture board disagreed; there was only the position statement on the physical therapy board's website.

However, the state APA also allows persons to request a declaratory ruling to resolve a conflict regarding an agency's interpretation of a rule or law, ruled Judge Bledsoe, and because the acupuncture board was seeking such a declaration, it was thus "aggrieved," and required to seek that declaratory ruling through the physical therapy board before filing a suit in court.

Judge Bledsoe also rejected the acupuncture board's claims against the private practitioners it accused of improperly practicing acupuncture. The claims, the judge wrote, amounted to a collateral attack on the physical therapy board's interpretation of its statute, and would have to be challenged in the same manner as a challenge of the interpretation itself.

Lost applications, 14-month lag in discipline process found by audit

Issue: State audits of licensing board performance

Oregon Secretary of State Jeanne Atkins released, on January 14, a highly critical report of the Oregon Teacher Standards and Practices Commission, an agency that oversees nearly 20,000 K-12 teacher licenses.

Atkins found numerous "substantial" deficiencies with the small but "crucial" agency, such as the Commission's inability to issue licenses, complete investigations, and its lack of timely responses to educators' questions.

The agency did "generally agree" to the audit's primary recommendations, which centered on fixing its licensure processing, license service, complaint investigations, customer service, working environments, and oversight and accountability.

In all, the audit listed 35 recommendations for the agency, which agreed to comply with all except one.

Perhaps the most glaring deficiency of the audit was the agency's slow response times to licensee applications and disciplinary matters.

"Applicants who filed for licenses in July 2015 faced a four-month wait. Investigation lengths averaged more than 14 months in 2015. Response times to emails from educators… still average more than a week," and getting answers to fundamental inquiries through the agency's website was nearly impossible, the audit states. An additional lapse: a Frequently Asked Questions list (FAQ) wasn't available on the agency's website.

To combat the slow response times, the audit recommended that the agency obtain a case management system and that it clearly define what constitutes an "urgent situation." The audit also noted that investigators need to be better trained in understanding which investigations require more thorough investigations and which do not.

The agency concurred. "The Commission recognizes the need to balance its responsibility to protect students and families with the realities of limited resources."

The one auditor recommendation the agency did not accept called on it to develop a plan "to address issues that could hinder the successful implementation of the online application system."

The commission stated that it disagreed. "The contractor has delivered on all major milestones of the project and we are actively engaged in the launch. The contractor has a long-standing track-record for delivering online applications systems. The transition has been thoughtfully planned to ensure the least impact on stakeholders. The agency has hired a communications person to assist in getting information to educators, districts, and stakeholders. Currently new communication is being delivered through direct email communication, vibrant web changes, and staff training for a consistent message regarding the implementation."

Limited resources have been an issue for the commission since the economic recession began nearly a decade ago. For instance, the agency had to cut six positions and now employs just 26 individuals who are responsible for approximately 19,000 K-12 licenses per year.

One of the problems the agency has faced due to staff shortages is not being able to address its "cumbersome" licensing setup. The agency's licensing process "frequently" lost applications, requiring manual fixing, and significantly contributing to delays. There is also currently no ability for the agency to accept online license applications, according to the audit.

Fortunately, the agency is implementing an upgraded licensing system that should "accelerate license processing." To be installed in three phases, the new system will offer online application and payments, data migration, an improved user interface for license evaluators, an improved license evaluation workflow that allows districts, schools and institutions to submit data to the agency, and connection to law enforcement for background checks.

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The major potential drawback to the new system, however, is that if it fails in some way, licensees may have to resubmit their applications using paper applications.

While the auditor conceded that staff shortages caused by the economic recession have played a role in destabilizing the Commission's workflow, there were nonetheless glaring issues that had nothing to do with a resource shortage.

For example, Atkins chided the agency's management for neglecting to develop "basic building blocks for a successful organization," such as failing to improve communication, develop performance standards, and provide "timely feedback on employee progress."

"The agency still lacks clear expectations and accountability for its performance at all levels, from the Commission through staff," said Atkins.

Several events that occurred in and around 2012 also created a significant amount of staff distrust, the auditor noted, citing "repeated missed deadlines for an online licensing system, a layoff of a union leader in 2012, and voluntary overtime soon after staff cuts."

To soothe the resulting tension, a key recommendation from the audit was for measures to establish timely, open communication, such as labor-management meetings where staff and management could express their concerns.

Discipline

Consumers Union ranks medical board websites *(from page 1)*

Medical Board Website Ratings

Site	Overall Score
California	84
New York	79
Massachusetts	78
Illinois	76
North Carolina	76
Virginia	72
New Jersey	70
Florida	70
Texas	68
Florida Osteopathic	67
Oregon	66
Nevada Osteopathic	61
Colorado	61
Arizona	59
Connecticut	58
Tennessee Osteopathic	58
Maryland	57
Kansas	56
California Osteopathic	56

(continued page 6)

provide the public with easier access to important information about their doctors, especially relating to their history of complaints and discipline.

However, it's clear that in the twenty years since Massachusetts became the first state to mandate online physician profiles, much progress has been made. Today, 92% of state medical boards have a list, somewhere on their site, of board disciplinary actions against doctors.

California's and New York's medical boards top the rankings, with good to excellent ratings of their performance on the eight categories: search capabilities, complaint and board information, identifying doctor information, board disciplinary actions, hospital disciplinary actions, federal disciplinary actions, malpractice payouts, and convictions.

Other highlights of the rankings:

• Many large states' boards were scored as having better websites. In addition to California and New York, these included Massachusetts, Illinois, North Carolina, Virginia, New Jersey, Florida, Texas, and Oregon.

• Correspondingly, states with the lowest scores (Vermont, Arkansas, Washington Osteopathic, Wyoming, Montana, Hawaii, New Mexico Osteopathic, Indiana, and Mississippi) also tended to be among the least populous.

Medical Board Website Ratings (cont.)

Site	Overall Score
Georgia	55
Iowa	53
Nevada	53
Tennessee	53
North Dakota	51
Arizona Osteopathic	50
Oklahoma	49
Ohio	48
Maine Osteopathic	48
Vermont	47
District of Columbia	46
South Carolina	45
Minnesota	45
Maine	44
West Virginia	43
Idaho	42
New Hampshire	42
South Dakota	40
Alabama	40
Kentucky	40
Michigan	39
Michigan Osteopathic	39
Pennsylvania Osteopathic	39
West Virginia Osteopathic	38
Missouri	38
Wisconsin	37
Delaware	37
Louisiana	36
Pennsylvania	36
Washington	36
Nebraska	35
Utah Osteopathic	35
New Mexico	34
Rhode Island	34
Utah	34
Alaska	32
Oklahoma Osteopathic	30
Vermont Osteopathic	29
Arkansas	29
Washington Osteopathic	29
Wyoming	27
Montana	26
Hawaii	22
New Mexico Osteopathic	22
Indiana	20
Mississippi	6

• Malpractice information tends to be limited, with only about a third (35%) of sites having any information about malpractice on their physician profiles. Only six boards—Illinois, Massachusetts, Oregon, Vermont, and Nevada medical and osteopathic)—carry information about all malpractice payouts.

• All but one board (Indiana) was rated at least "fair" on complaint and board information.

• Almost all states (97%) have clear instructions on how to file a complaint, and more than half (54%) now allow consumers to file a complaint online.

• All but one board (Mississippi) was rated at least "fair" on search capabilities.

• A sizable majority of boards (43 out of the 65) were rated "poor" on inclusion of convictions and only nine were rated "excellent."

• Only six boards did better than "poor" on displaying federal disciplinary actions, with just two of those (California and North Carolina) rated as "excellent."

• Only three boards were rated "excellent" on malpractice payouts, while a large majority (42 out of 65) were rated "poor."

Reforms urged by Consumers Union to make websites more customer-friendly include:

• Use of easily understandable search terms on home pages and eye-catching graphics to help consumers quickly find doctor-specific information.

• Including a plain-language summary of any disciplinary actions taken by a medical board on a physician's profile, with the date, reason, duration, and restrictions tied to the order, as well as links to documents with more detailed information.

• In addition to board disciplinary orders, more comprehensive information on all physicians including malpractice lawsuits, disciplinary actions taken by hospitals and federal agencies, and criminal convictions.

• Allowing the public to file complaints online and providing clear information about how complaints are handled, including expected time frames and when and how the complainant will be notified of the outcome.

* Making the National Practitioners Data Bank open to the public and accessible for free by medical boards when checking on licensed doctors.

For the complete report, see: https://consumersunion.org/wp-content/uploads/2016/03/Final-report-for-posting-3-28-16-6PM-ET.pdf.

"Weak oversight" charged in probe of New York nurse regulation

Issue: Hallmarks of effective, ineffective discipline programs

Continuing its periodic investigative reports on state licensing boards, the non-profit journalism organization ProPublica evaluated the state of New York nurse discipline in an April 7 report and found it in need of drastic improvement. The report, entitled "Weak Oversight Lets Dangerous Nurses Work in New York," revealed serious problems.

A few key findings of the report:

• Compared to other large states, New York disciplines "far less often"—in fact, only a quarter to one sixth as many nurses. New York's 350 discipline actions in 2014—about 1 in 1,190 nurses—add up to a fraction of the rates in Ohio, 1 in 153, Texas, 1 in 167, and 1 in 325 California (1 in 325).

• New York is unusual in not requiring applicants for nursing licenses to undergo simple background checks or submit fingerprints. (Thirty-seven states now require background checks, and more are initiating these procedures) The New York Office of the Professions typically does not check on whether an applicant's self-reported claim to have no criminal convictions is correct.

• Automatic alerts, whenever another state disciplines a New York nurse, are sent through NURSYS, a national system run by the National Council of State Boards of Nursing. But ProPublica found that New York routinely did not sanction New York licensees who were disciplined by Connecticut, Pennsylvania, and New Jersey.

• Summary suspension is not available without a hearing; New York nurses must have a hearing and approval of the Board of Regents is necessary to obtain a summary suspension.

• Among several instances of dangerous New York nurses allowed to continue practicing was a nurse arrested and charged in April 2015 with killing a two-year-old by submerging her in a bath so hot that her skin peeled off. A year later, the state still had not taken any action.

"Some level of impairment" not specific enough for discipline

Issue: Standards for imposing disciplinary sanctions

The Supreme Court of Idaho, in a March 23 decision, reversed discipline imposed by the state's medical board against a doctor who the board had simply determined suffered "some level of impairment."

In order to restrict the doctor's license under the state's Disabled Physician Act, the court held, the board was required to name a specific mental illness and determine how that illness made the physician a danger to the public (*Mena v. Idaho State Board of Medicine*).

In 2007, after reports that he might be abusing drugs or alcohol, Idaho doctor Robert Mena underwent a long series of evaluations at several institutions and over the course of five years. Physicians and medical staff evaluating Mena often expressed concern about his mental state, but most determined that he was nonetheless fit to continue practice.

Based on a history of erratic behavior, the hospital for which Mena worked revoked his medical privileges in 2011. Then, in 2013, under the authority of the Disabled Physician Act, the Idaho State Board of Medicine held hearings on

whether to restrict Mena's license on the grounds that he was a danger to patients.

Following the hearings, the board permanently barred Mena from practicing in either obstetrics or chronic pain management and imposed attorney fees, simply stating that he suffered from "some level of impairment," without further identifying that impairment or stating how it affected his practice. Mena appealed, and the case eventually made its way to the state's Supreme Court.

In his appeal, Mena argued that, although the board had brought charges under the Disabled Physician Act (DPA), which allows the board to restrict the license of an impaired but non-culpable physician, it had actually proceeded under the rubric of standard medical discipline under the state's Medical Practice Act, a separate procedure.

Although the hearing was convened under the DPA, the board's final order failed to mention it, improperly citing the Medical Practice Act as grounds for its decision to discipline Mena and impose sanctions. The DPA does not permit either formal discipline, sanctions, or attorney fees.

The board's final order also permanently barred Mena from practicing obstetrics or chronic pain management, despite the fact that the Disabled Physician Act does not allow permanent restrictions. This switch was improper, Mena argued. Justice Daniel Eismann, writing for the court, agreed with Mena, holding that the board had improperly switched one statute for another.

> Speaking of the difference between the two statutes, the judge wrote that "a finding that the physician is unable to practice medicine with reasonable skill or safety to patients due to a mental illness would not authorize the board of medicine to impose restrictions that are sanctions unrelated to the mental illness or its impact upon the physician's inability to practice medicine with reasonable skill or patient safety . . . Sanctions can be imposed as a medical discipline only if the physician engaged in conduct that constitutes a ground for medical discipline."

The court also agreed with Mena's argument that the board had failed to provide sufficient evidence that he was impaired to the point of posing a danger to patients. The board had never identified any specific mental illness from which Mena suffered, instead concluding only that Mena suffered from "some level of impairment."

The board also failed to definitively find that the impairment affected Mena's ability to practice, stating only that the unspecified impairment "may impact" his practice.

In order to impose restrictions under the Disabled Physician Act, the board was required to find, through the use of expert testimony, both that Mena suffered from a mental illness and that the mental illness made him unable to safely practice. Because it had not done so, the court said in remanding the case, the board was unable to impose those restrictions.

Courts veto strategy of relinquishing license to avoid discipline

Issue: Scope of board authority over non-licensees

Courts in two states recently turned down licensees' efforts to pre-empt disciplinary actions by surrendering their licenses.

An appellate court in Tennessee rejected, in a March 15 decision, an argument by a doctor that, because he had voluntarily relinquished his medical license, the state's medical board no longer had power over him (*Wyttenbach v. Board of Tennessee Medical Examiners*).

After the state medical board sent Dr. William Wyttenbach a letter informing him of potential disciplinary charges—based on allegations that Wyttenbach

failed to provide any supervision over the prescription of painkillers by nurse practitioners at a clinic in Knoxville, where he was the medical director—Wyttenbach voluntarily retired his license. Unsatisfied with the doctor's action, the board filed the charges anyway.

After a hearing, at which Wyttenbach failed to appear, the board revoked his license and fined him $4,500. Wyttenbach appealed, and the case went up to the Court of Appeals of Tennessee in Nashville, which issued an opinion written by Judge W. Neal McBrayer.

In his appeal, Wyttenbach argued that, because he had retired his license, the board no longer had jurisdiction over him, and that the notice of charges provided to him by the board was insufficient because the board had not obtained an acceptance receipt from Wyttenbach himself.

Although the board mailed Wyttenbach three copies of the charges via certified mail, each to a different address associated with the doctor, none of the receipts it received in response could be explicitly attributed to Wyttenbach. One copy was returned with an illegible signature, one appeared to have been signed by another person, and the third came back "Unclaimed."

However, despite the fact that Tennessee law generally requires a return receipt signed by the licensee, it contains an exception if the statutes governing a board do not specify that a receipt is necessary and licensees are required to maintain a current address. The medical board's statutes contained such provisions, so service without an adequate receipt was sufficient.

The court also rejected Wyttenbach's argument that the board had no authority over him because he no longer possessed an active license. "Retirement of a license," Judge McBrayer wrote, "does not amount to a relinquishment or surrender of the license. Instead, retirement of a license places it in a status from which biennial renewal is no longer required but reactivation is still a possibility."

"The statute granting the board authority to suspend or revoke licenses does not limit that authority based on the current status of a license," Judge McBrayer continued. "Dr. Wyttenbach's argument would have us read into the statute granting the board authority over medical licenses the word 'active' before the word 'license.' We decline to do so."

In another case, an Oklahoma doctor who tried to avoid discipline charges by voluntarily relinquishing his license found that the state allows such an action, but at a cost to the licensee: admission of guilt. The state's Court of Civil Appeals held that because a doctor had failed to admit his guilt in the charged conduct, he was not eligible to forego prosecution (*State of Oklahoma ex rel. The Oklahoma Board of Medical Licensure and Supervision v. Gregory*).

In July 2013, the state's medical board informed physician Jarrett Gregory that it was going to charge him with various controlled substance offenses. In response, Gregory, while denying the allegations, sent a letter to the board surrendering his license.

Gregory's argued in a letter to the board that, if he had no license, the board no longer had jurisdiction against him, but the board proceeded to file charges against the doctor. After a hearing, it revoked his license. Gregory appealed, and the case went up to the Court of Civil Appeals, which issued a decision March 7.

Gregory's appeal did not get far. Judge Jane Wiseman, writing for the court, acknowledged that licensees in Oklahoma may surrender their license in lieu of prosecution. But, she wrote, the board is not required to accept that surrender, and, in any case, the law allowing such an action requires the licensee to admit and describe the misconduct in question, which Gregory had not done.

Gregory clearly complied with almost all of the provisions of state law to surrender his license voluntarily, wrote Judge Wiseman, "but he did not follow all of the procedures necessary to surrender his license successfully, admit his misconduct, and halt the prosecution to revoke his license." Because of that failure, the board's case could continue.

Racist phone threats by licensee lead court to deny reinstatement

Issue: Abusive behavior outside professional practice

A New York court denied the reinstatement of an attorney who was convicted of aggravated harassment after making threatening phone calls to his black neighbors in 2010 (*In the Matter of Hennessey*). The attorney, James J. Hennessey, made over 200 racist phone calls to 38 people before he was caught, at one point threatening to kill or kidnap people.

Although Hennessey's lawyer claimed that Hennessey had been suffering from mental problems and asked for leniency, at the time of his initial conviction, the Albany *Times Union* quotes Hennessey as stating, "It was almost like a teenage prank thing. I saw how to do it on TV. I made a quick prank call, then a couple of weeks later I did it again. Shortly thereafter, I got carted off."

The calls themselves, as reported in the *Times Union*, were vicious. Hennessey used software to make his calls appear to be coming from the Ku Klux Clan. He threatened to kill a black woman in his neighborhood. And, at one point, he told a victim that "we are going to kidnap the little black boy who plays outside and tie him up."

After his conviction, Hennessey was automatically disbarred under New York law. However, in 2014, the convictions were vacated, after the New York Court of Appeals, in a separate case, found the statute under which Hennessey was prosecuted to be unconstitutional. His criminal case file was then sealed.

Following that decision, Hennessey applied for reinstatement. But the New York Committee on Professional Standards opposed the application, arguing that Hennessey had not been cleared of the actions underlying the conviction.

Initiating a new investigation of Hennessey, the Committee filed new disciplinary charges based on his actions. Hennessey then moved to dismiss the new charges, arguing that they were based on information from his now-sealed criminal case.

However, the Supreme Court of New York, Appellate Division, 3rd Department, hearing the motion, rejected it. The court noted that, although Hennessey's criminal case was sealed, the same information could be obtained from the board's earlier discipline action and was, thus, accessible to the board.

Stealing from firm not related to "practice," rules Alabama Supreme Court

Issue: Courts' interpretation of "practice" of a profession

In a surprising decision, the Supreme Court of Alabama threw out a discipline decision by the state's Board of Examiners of Landscape Architects, which had suspended the license of a landscape architect who

had clients pay him personally and hid the proceeds from his employer (*Ex. Parte Chad Bostick*). The justices ruled March 25 that, because the alleged theft came from the landscape firm that employed the licensee, the act could not be considered to have occurred during the practice of the profession.

After a former employer accused licensed landscape architect Larry Bostick of misrepresenting himself to clients—in order to trick them into paying him personally instead of his firm—the board filed charges, alleging fraud and other violations of Alabama state law and the board's code of conduct.

During a hearing, Bostick seemed to confirm the allegations, admitting to taking the money from clients while simultaneously drawing a salary from his employer for the same work, and denying the payments until confronted with check receipts. At that point, he explained his actions by claiming that his employer owed him unpaid commissions that totaled more than the combined amount of the checks he cashed. The board suspended Bostick's license for one year. He appealed, and the case eventually made it all the way to the state's Supreme Court.

In his appeal, Bostick argued that, regardless of whether his actions were fraudulent, they did not occur during the practice of landscape architecture and, thus, were not punishable by the board.

Surprisingly, the court agreed. Justice Michael Bolin, writing for the majority, noted that no client of Bostick's employer had been harmed by his actions. And, citing the various activities including within the statutory definition of "landscape architecture," Bostick's alleged theft, Justice Bolin held, did not occur while he was engaged in any actual landscape architecture, but "occurred exclusively within the context of the employer-employee relationship, wrongful acts separate and apart from Bostick's performance of professional services as a landscape architect."

"It is not the Board's purpose to wade into disputes arising in the context of the employer-employee relationship; rather, the civil and criminal court are available to handle such disputes . . . This dispute is in the nature of a contract claim suitable for resolution in a court of law, not a regulatory forum," the court said.

Two justices dissented from the opinion. Justice Greg Shaw noted that the definition cited by the majority defines only "landscape architecture," not what constitutes the "practice" of that discipline. "Using one's position as a landscape-architect professional to intercept money from clients owed to another for landscaping services, in my opinion, is an act done while carrying on the profession of landscape architecture."

Justice Tommy Bryan agreed, writing that "Bostick was engaged in the practice of landscape architecture when he received and retained those payments. The receipt and retention of payments is squarely part of Bostick's job and is subject to scrutiny by the Board." The potential for a criminal or civil case arising from these facts, he concluded, does not preclude board discipline.

Licensee who sent attorney to hearing not in default for failure to appear

Issue: Requiring participation of licensee in discipline hearing

A party may send an attorney to a discipline hearing instead of personally attending without risking a default judgment, the Indiana Court of Appeals held April 27 (*Melton v. Indiana Athletic Trainers Board*).

The decision reversed a seven-year license suspension issued to an athletic trainer, after the Indiana Athletic Trainers Board took exception to a licensee's decision to send her attorney to a sanctions hearing in her stead.

In 2013, the Board brought charges against athletic trainer Molly Melton, alleging that she engaged in a sexual relationship with a client. When the board held a hearing on the matter, Melton declined to appear in person, sending her attorney in her place.

She was embarrassed, she claimed, and was upset that the attorney prosecuting her case intended to display nude photographs she had exchanged with the client. The board did not react well to her abstention, issuing a notice of default against her.

Melton appealed the decision and filed a parallel action. contending that the board violated her constitutional rights. She argued that she was wrongly held in default because her attorney's attendance at her hearing, alone, was sufficient.

Judge Elaine Brown, writing on behalf of the court, agreed with Melton. She held that, although the statute used by the board to hold Melton in default specified that the defending "party" must attend the discipline hearing, "party" includes the licensee's attorney.

In explaining the decision, Judge Brown noted that the same statute uses the word "party" in several contexts—such as requiring the "party" to file legal motions—under which an attorney will actually perform those actions. Thus, "party" did not mean the licensee herself.

Therefore, the board erred when it declared Melton in default and, because Melton was not entitled to any further administrative process after such a default, that decision improperly deprived her of her due process rights. The court remanded the case to the board with an order to grant Melton a new hearing.

Investigation was not retaliatory and suit filed too late, court finds

Issue: Strategies for overturning disciplinary sanctions

A dentist's claim that a state regulatory agency initiated a retaliatory investigation—due to a complaint made by the dentist fifteen years prior—was dismissed by the 7th Circuit U.S. Court of Appeals March 1. The court determined that the dentist's speech was not a motivating factor in spurring the agency's investigation (*Gekas v. Vasiliades*).

The dentist, Mark Gekas, began having grievances with the state's Department of Professional Regulation in 1988 when the department's dental coordinator, Michael Vold, investigated the dentist due to concerns that Gekas administered nitrous oxide to a child.

After meeting with Gekas, Vold ordered him to provide information on all prescriptions Gekas issued on a continuing basis. Gekas thought that Vold mistreated him during the investigation and complained to the deputy governor

Fourteen years later, in 2002, department investigator Peter Vasiliades, accompanied by several U.S. Drug Enforcement Administration agents, raided Gekas' office. Convinced Vold was behind the raid, Gekas claimed the incident was a retaliatory act for his statements made to deputy governor Jim Riley in 1988.

In 2003, Mary Ranieli replaced Vold as dental coordinator. She was told by department counsel not to speak with Gekas, shortly after Gekas was issued a cease-and-desist order for unlicensed practice in prescribing controlled substances. The cease-and-desist order was eventually vacated in October 2008.

Again in 2004, for the same actions as the cease-and-desist order was issued, the department's Chief of Health Related Prosecutions filed an administrative action complaint against Gekas and moved to have his dental license "suspended, revoked, or otherwise disciplined."

In March 2010, Gekas filed a federal suit against the defendants, alleging that his First Amendment rights to free speech were violated by the department's retaliatory actions (issuing a cease-and-desist order, filing an administrative complaint, and not letting anyone who worked in the department speak with him).

After a district court granted summary judgment to the defendants—despite finding that Gekas "suffered a constitutional deprivation"—Gekas appealed to the court, limiting his claim to the issue of "whether the district court should have granted summary judgment on the issue of causation as it relates to the prosecution of Gekas that occurred between 2004 and 2008."

But since Gekas' sole contention was that the administrative actions taken against him in 2004 were retaliatory in nature, the court had to determine if the department's actions against him were appropriate and with good reason. The timeliness of Gekas' claim was also considered.

The court noted that in most First Amendment retaliation claims, the statute of limitations clock begins to run once the retaliatory act occurred. On this basis, Gekas' 2010 complaint was "clearly time-barred" by almost four years.

Even if Gekas' claims were not time-barred, they would still fail on their merits, the court found, because "he has produced no evidence of any retaliatory motive underlying either the cease-and-desist order or the administrative complaint." Gekas also could not rebut the department's contention that he improperly prescribed controlled substances to treat a medical condition.

Licensee can be barred from contesting issues litigated earlier

Issue: Using other administrative agency decisions in licensing cases

The state's plumbing board could prevent a licensee from re-litigating factual issues already determined by a different state agency in a different administrative action, the Court of Appeals of Maryland ruled April 26 (*Garrity v. Maryland State Board of Plumbing*).

In 2012, Maryland's Consumer Protection Division charged licensed plumber and plumbing company owner Wayne Garrity with unfair and deceptive trade practices, including the use of unlicensed plumbers in more than 6,000 cases.

After a hearing, the Division found that Garrity had committed more than 7,000 total violations of the state's Consumer Protection Act. The division imposed a fine of approximately $700,000 in restitution, fees, and costs.

Following that decision, the Maryland Board of Plumbing opened its own case against Garrity, primarily relying on the factual record contained in the Consumer Protection Division's final order.

Based on the legal doctrine of offensive non-mutual collateral estoppel—which prevents a defendant from re-litigating matters decided in another case in which they were also a defendant, but with a different plaintiff—the board adopted the earlier decision's findings of fact, determined that Garrity had violated the state's Plumbing Act, revoked his license, and imposed $75,000 in penalties. Garrity appealed, and the case eventually made its way to the Court of Appeals of Maryland.

Garrity's appeal challenged the use of the collateral estoppel doctrine to prevent him from contesting the earlier factual record. But the court, in an opinion by Judge Mary Barbera, rejected this challenge and upheld the board's decision.

The use of offensive non-mutual collateral estoppel in this case, Judge Barbera wrote, "comports with principles of judicial economy and fairness." The board was unable to join in the earlier prosecution of Garrity, she noted. In addition, Garrity had sufficient incentive to defend himself against the charges in the earlier action, the procedures before the two prosecuting agencies were very similar, and the board's decision to seek revocation of his license was a foreseeable consequence if Garrity failed in his defense in the earlier case.

Garrity also argued that, by charging him for the same conduct for which he was already punished by the Consumer Protection Division, the board violated his right to be free from double jeopardy. This argument did not get far. Judge Barbera noted that the double jeopardy doctrine only protects defendants from criminal charges, and neither case involved criminal prosecution

Although Garrity had argued that the Consumer Protection Division's penalties were so large and severe that they constituted a criminal penalty, the court dismissed this argument as well. Because penalties associated with licensing statutes are directed towards protecting the public, those penalties are remedial rather than punitive in nature, and are thus civil penalties.

As to the actual size of the penalty, Judge Barbera noted that Garrity committed over 7,000 violations of the Consumer Protection Act, each of which was subject to at least a $1,000 fine. Although the overall sanction was large, the per-violation sanction was not.

Agency can't appeal decisions concerning sufficiency of evidence

Issue: Standard of review for discipline actions on appeal

An Ohio court dismissed an appeal of the state's Department of Education April 29, holding that the department lacked jurisdiction to challenge a lower court decision that overturned a discipline decision on the basis of inadequate evidence (*Ohio State Department of Education v. Blum*).

In 2014, the Ohio Department of Education brought discipline charges against licensed teacher and school principal Mary Blum, charging her with conduct unbecoming an educator for an incident in which she yelled at a student who she knew to be autistic and suffering from anxiety, and then sent an email disclosing confidential email about that student.

After a hearing, the board suspended Blum's licenses for five years. She appealed, claiming that her rights to due process had been violated, and a trial court found in her favor. It reversed the department's discipline on the grounds that the evidence used to discipline Blum was inadequate and that the department had violated her rights to due process. The department appealed, taking the case to a state Court of Appeals in Cincinnati.

In response to the board's appeal, Blum argued that the board did not have the power to challenge the lower court's decision. The board's appeal argued that the decision was not based on sufficient evidence; Blum pointed out that the statute allowing state agencies a limited right to appeal allowed only for appeals on interpretations of law, not questions of fact.

The Court of Appeals agreed with Blum. Citing the relevant statute, Judge Penelope Cunningham wrote that agencies may appeal "*only* on questions of law, and *only* on questions of law pertaining to the constitutionality, construction, or interpretation of state statutes and agency regulations and rules" (Italics in original). Thus, the court had no jurisdiction to hear the department's appeal.

Under this strict rule, even the lower court's decision that the board had violated Blum's due process rights was not appealable. Although that question was one of law, it did not pertain to the interpretation of a law, the court said in dismissing the department's appeal.

Testing

Candidate with dyslexia offered insufficient evidence for accommodations, court finds

Issue: Test accommodations under Americans with Disabilities Act

A federal court in Pennsylvania, in an April 11 decision, dismissed a lawsuit brought by an applicant to take a Comprehensive Osteopathic Medical Licensing Examination, or COMLEX-I, with accommodations on the grounds that she had a reading disability (*Bibber v. National Board of Osteopathic Medical Examiners*).

Although the court acknowledged that the applicant, a student at the Rowan School of Osteopathic Medicine named Bernadette Bibber, suffered from a reading disability, she had not shown sufficient evidence to prove that her disability caused her to read at a below-average level.

Bibber had scored in the 71st percentile on the GRE's verbal reasoning section when compared to other college students, and scored in the average range on the MCAT's verbal reasoning section for a similar population, all without accommodation. Further, Bibber's un-accommodated score on the COMSAE, a test used to assess whether an applicant is ready to take the COMLEX-I, was rated as "acceptable."

The candidate's decision to take the exams without accommodations was strong evidence that she did not need them, Judge Stewart Dalzell wrote. "Her confidence in taking those exams without even attempting to receive accommodations speaks volumes about whether her dyslexia is substantially limiting when compared to high-achieving groups of people, let along the general population."

Bibber requested extra time to take the COMLEX I examination, required before the third year of medical school. However, the National Board of Osteopathic Medical Examiners, or NBOME, denied her request, and Bibber filed suit under the Americans with Disabilities Act (ADA).

In her request for accommodations, Bibber explained that she is a slow reader—only able to read one word at a time—a condition that her doctors attribute to her being born deaf and suffering from dyslexia. She noted that, throughout her academic life, from grade school to medical school, she had received accommodations for her condition, including extra time on exams.

NBOME based its denial of accommodations, in part, on the basis that, based on her average MCAT and GRE scores, obtained without accommodation, Bibber would also not need accommodation for the COMLEX I, a conclusion supported by the testimony of two doctors who reviewed her case.

Judge Dalzell was sympathetic to Bibber's situation. "This case presents us with two possible outcomes, neither of which is wholly satisfactory," he wrote. "We can deny Bibber's request for accommodations after she has demonstrated a lifelong struggle with dyslexia and that she has a history of receiving accommodations throughout her formal education."

"Conversely, we can grant her request for accommodations after she achieved average scores on all of her post-college standardized tests without accommodations, and has presented us, through her own experts, with psychometric data that shows she reads at an average level."

Weighing these concerns, Judge Dalzell decided that Bibber's dyslexia did not sufficiently limit her abilities to qualify her as disabled under the meaning of the ADA.

Though Judge Dalzell recounted and accepted Bibber's long history of struggling to overcome her reading disability, he concluded that "the record also contains a mountain of evidence suggesting that Bibber's reading and processing abilities are average when compared to the general population," and, thus, not sufficient to warrant protection under the ADA.

"While it is certainly possible that one's reading can be so slow that it substantially limits one's ability . . . when compared to the general population," Dalzell wrote, "Bibber's testimony does not paint this picture. Instead, it evidences someone who is a slow reader who is nevertheless able to read effectively in both academic situations and daily activities."

While the judge acknowledged that, despite her average test scores, Bibber's dyslexia could still be a substantial limitation, he called her "failure to produce sufficient evidence that her reading process is slow, labored, and difficult when compared to the general population" a "fatal" flaw in the case. She had failed to provide concrete evaluations from her academic career and had introduced only minimal live testimony from physicians regarding her condition.

Judge Dalzell limited his holding to the facts of this particular case and expressed sympathy to Bibber, writing that her testimony was credible. His decision, he wrote, "should not be read by NBOME as a license to deny accommodations to individuals with a history of accommodations and a dyslexia diagnosis from childhood."

"But the unique facts of this case lead us to conclude that Ms. Bibber is not disabled as defined by the ADA, since there is insufficient evidence to support the finding that her dyslexia substantially limits her ability to read and process information."

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