Professional Licensing Report

Licensing, testing, and discipline in the professions

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Discipline

Expungement of $89,000 theft conviction does not wipe slate clean for licensing

Issue: Grounds for license denial

The state board of education had the power to deny a teaching license to an applicant who was earlier convicted and disbarred from the legal profession for felony theft, despite the fact that his criminal conviction had been expunged, the Court of Appeals of Kansas ruled January 20 (*Douglas S. Wright v. Kansas State Board of Education*).

Although the judges seemed to sympathize with the license applicant—with one judge even writing a separate concurring opinion that scathingly criticized the board's reasoning—the court nevertheless upheld the license denial.

The applicant at the center of the case, a former attorney named Douglas Wright, saw his trouble begin in 1998, when he stole $86,000 from the accounts of his great aunt and $3,000 from the Topeka Lawyers Club, where he had been treasurer.

(See "Expungement" on page 4)

Felon's "rehabilitation" no ticket to license reinstatement

Issue: License reinstatement

The state board of pharmacy may deny the reinstatement of a former pharmacist whose license was revoked after the commission of a felony, even where the board has determined the former licensee to be rehabilitated, the Court of Appeals of Colorado ruled January 5 (*Colorado State Board of Pharmacy v. Loren M. Priem*).

Although state law does not allow a board to deny licensure for the simple fact of a felony on an applicant's record, the circumstances surrounding the conviction of the former pharmacist raised legitimate concerns about his fitness and allowed the board to deny him licensure.

The applicant, Loren Priem, was licensed as a pharmacist in Colorado until 2006, when he was convicted of two felonies related to stealing and

illegally dispensing more than $5,000 worth of prescription drugs and relinquished his license. The state pharmacy board rejected his 2009 application for reinstatement and Priem appealed to an administrative law judge, who declared him rehabilitated and recommended reinstatement of his license. Although the board accepted the finding that he had been rehabilitated, it again decided to deny Priem licensure, and he appealed.

In his appeal, Priem made two primary arguments. First, he argued that, because the board's chief inspector—who investigated Priem and advocated for the denial of his license—was present during the board's deliberations, Priem's right to due process had been violated. Priem also argued that his rehabilitation entitled him to a mandatory reinstatement.

Judge Diana Terry, writing for the court, acknowledged that the court was "troubled by the presence of the Chief Inspector during the Board's deliberations." However, despite Priem's objections, Terry noted that the appropriate remedy for that possible due process violation was a remand to the board, an avenue that Priem had admitted he would decline as not worth the costs.

Priem's alternate argument, that his rehabilitated status entitled him to reinstatement, did not meet with success. In response to his claim that the board had the burden to show that the denial of his application was merited by evidence that he was not rehabilitated, Terry noted that, on the contrary, a license applicant, as the proponent of an order in an administrative setting, bears the burden of proof and that, in any case, the board's recognition that Priem was rehabilitated did not preclude a denial of his application.

In the board's words, its "concern is that Priem violated laws *pertaining to drugs*, that his violation [of those laws] related directly to the professional dispensing of prescription drugs, that he used his pharmacist license to perpetrate those crimes, and that he now seeks licensure in the same professional arena" (italics in original).

A license applicant *not* convicted of a felony who was found by the board to have engaged in such activities would be subject to denial, wrote Terry, so Priem's argument that rehabilitation entitled him to reinstatement would have the "absurd" effect of providing an advantage to those actually convicted of a felony.

Board has no duty to compile information for public records request

Issue: Public information and records requests

Boards do not have a duty to create new records by compiling information from older records in response to a public records request, an Ohio court ruled on December 20 (*State ex rel. Welden v. Ohio State Medical Board*).

The decision came after the Ohio State Medical Board responded to a request under the state's Public Record Act by a physician named Scott Welden who was attempting to reinstate his license. Welden was unsatisfied by the board's response to his request and filed a petition in a state trial court to compel the board to produce the records he requested. After the trial court ruled in favor of the board, Welden appealed to the Court of Appeals of Ohio, Tenth Appellate District, Franklin County.

In his appeal, Welden first argued that the board had failed when it responded to his request for a report detailing earlier complaints which led to the revocation of his license for substance abuse. Welden complained that the description of the allegations against him contained in the report were not sufficiently detailed.

However, Judge John Connor, writing for the court, noted that Welden "simply has no clear legal right to demand a particular amount of specificity to his satisfaction." The level of specificity was a decision within the power of the board.

Welden had also requested the addresses of every licensed physician in Ohio, a request the board turned down. The court upheld that denial, with Connor noting that fulfillment of such a request would actually entail the creation of *new* records, compiled from the old. The board had no such duty to create those records.

Among the records Welden had requested were letters directed to the board regarding his fitness to practice medicine, obtained by the board during its investigation of his case. Although the letters concerned Welden, because they were part of the investigative record they were confidential and not accessible through a public records request.

One of Welden's claims did meet with some success. On his first appeal, the trial court had failed to individually evaluate a redacted record of complaints lodged against one of its investigators. To dismiss his claim without greater scrutiny was incorrect, and that issue was remanded to the trial court.

$6.2 million award against board justified, court rules

Issue: Board member liability for gross negligence

A $6.2 million judgment against members of the Missouri chiropractic board, for gross negligence in its handling of a disciplinary case against chiropractor Gary Edwards, was upheld in a unanimous ruling by the Court of Appeals of Missouri on January 31.

In the case (*Gary Edwards v. Lawrence Gerstein, et al.*), Edwards claimed that the board members failed to conduct a thorough and impartial investigation before filing a formal complaint against him, and that they were grossly negligent, causing him harm. A jury agreed with Edwards and a circuit court imposed the judgment against the board.

According to the court, the investigator, William Burton, said he was hired with an agenda in mind: gathering evidence of violations of the medical practice act. "It wasn't my job to establish that [the chiropractor, Gary Edwards] wasn't doing those things. It was my job to establish that he was doing those things."

The investigation of Edwards stemmed from a 1996 story in the *Kansas City Star*, alleging that Edwards used a worthless machine to diagnose and mislead Mennonite patients—in particular, that he had promised to cure an AIDS patient, Duane Troyer. To investigate, the board retained William Burton as investigator, but did not instruct him to conduct an unbiased probe of alleged violations.

In their appeal, the chiropractic board members first argued that as a matter of law, they did not owe a duty to Edwards to conduct a thorough and impartial investigation before filing a complaint against his license, and that their only duty was to protect the public.

The appeals court disagreed. The primary purpose of professional regulation is public protection, the court said, but that does not mean the board members owe no duty to anyone else—especially since state law provides that any person injured by the gross negligence of board members is entitled to recover damages from them.

The board also argued that the circuit court erred by excluding evidence that the Administrative Hearing Commission had found that cause existed for the board to discipline Edwards' license—specifically, that he was found guilty on five of six charges. But since the board agreed not to disclose that fact to the jury, the appeals court said, it could not bring the issue up on appeal.

Expungement (from page 1)

Then, during an ensuing investigation by disciplinary authorities, Wright perjured himself by lying about his activities. In 2003, he pled guilty to felony theft, was sentenced to a year in prison, and had his attorney license revoked.

After Wright was released, he studied to become a teacher, and applied for a license in 2007. Then, in 2009, his criminal record was expunged. Nonetheless, the State Board of Education denied his application, saying Wright had not sufficiently proved his rehabilitation. He then appealed.

On appeal, Wright's arguments were three-fold. He argued that the board erred by considering the actions that led to his conviction and disbarment because those actions were more than five years old and his criminal record had been expunged. He argued that the board's decision to deny him was not supported by substantial evidence if the record was viewed as a whole. And he argued that the board's decision was arbitrary and made for improper reasons.

Wright's first argument was rejected quickly. The statute which he cited for the prospect that the board may not consider conduct more than five years old, wrote Judge Stephen Hill for the court, "clearly states the Board *may* issue the teaching license, implying the discretion to deny an application, and the rehabilitation must be for *at least* 5 years, implying the Board could require a longer term of rehabilitation before issuing a license."

As for the expungement of Wright's conviction, the board did not need to rely on that conviction to take note of Wright's misconduct, as the record of his disbarment, which cannot be expunged, was available and detailed the misconduct.

In a concurring opinion, Judge G. Gordon Atcheson gave a scathing review of the board's decision.

"In many respects," he wrote, "the Board supports its determinations with factual distortions, specious legal interpretation, and lofty sounding rhetoric signifying little of substance." Atcheson believed that the board acted, in part, because it believed that "granting a license to Wright—as a convicted felon and a disbarred lawyer, would demean the teaching profession," an assertion supported by the initial decision of the board's Professional Practice Commission on Wright's application, which stated that teaching is not "a safety net for person who have been barred from other professions."

Atcheson also criticized the board's lack of advice to Wright as to why his efforts at rehabilitation were not satisfactory. "The Board," he wrote, "has granted itself a roving commission—authority exercised without defined limitations or standards." By failing to share its criteria for determining Wright's success, Atcheson said, "the Board has slyly created a game without discernible rules, and such a game can never be won."

Wright's claim that the decision was not based on substantial competent evidence was also rejected. Examining the record, Hill noted the seriousness and repeated nature of Wright's crimes, as well as the board's reasonable perception that, by making statements which appeared to minimize the seriousness of his conduct and which indicated a lack of remorse, "Wright was missing the point." Given these factors, Hill concluded, the board's decision was reasonably decided on substantial evidence.

For his third argument—that the board's decision was based on improper considerations and, therefore, arbitrary—Wright relied on statements made by the individual board members during the license denial.

Members of the board, discussing the case at a board meeting, made several statements indicating that, although they believed Wright to be rehabilitated, they were inclined to deny him a license for, among other things, the concerns some parents might have with Wright as a teacher and because he had been disbarred. One board member was on the record as saying that "I don't feel that we can license someone that's been denied from another profession."

However, while Judge Hill admitted that the statements by the board members indicated they were relying on factors not contained in the relevant licensing

regulations, he also wrote that "Frankly, all of these individual comments appear to be the musings of Board members grappling with an important decision."

"In its written decision," he wrote, "the Board applied the law and supported its decision by substantial competent evidence."

Board member "gone rogue"? Board has immunity, court says

Issue: Due process in disciplinary proceedings

Although a state board had issued a discipline order against an appraiser without formal motion or vote, it was still entitled to immunity, the Montana Supreme Court ruled January 10, rejecting a suit against the state's board of real estate appraisers for malicious prosecution (*Joe Seipel v. Tim Moore*).

The disciplined real estate appraiser, Joe Seipel, came before the board in 2006, after a complaint was filed alleging he had signed off on a faulty appraisal completed by his son. Although the board failed to make any formal motion or vote, a suspension order was nonetheless processed by the board's counsel and signed by board member Tim Moore.

Seipel successfully appealed the order on the basis of the board's procedural failing and, after the case was remanded for a new administrative hearing, Seipel won on the merits as well, as a hearing examiner concluded that the board had failed to prove its case. The board then dropped the case.

Seipel then sued the board for malicious prosecution, arguing that Moore had "gone rogue" in signing the unauthorized suspension order. However, a state district court granted summary judgment for the board, and Seipel appealed to the state's Supreme Court.

The Montana Supreme Court, in an opinion by Chief Justice Mike McGrath, ruled that the board was protected by quasi-judicial immunity, granted to administrative agencies who act as adjudicators. Moore may have been incorrect in signing off on Seipel's disciplinary order, McGrath wrote, but quasi-judicial immunity "is not dependent upon acting correctly." The board was acting within its discretion in the context of a controversy or adversarial proceeding, and was therefore protected from suit.

Discussion that revealed doctor's application lie was not privileged

Issue: Omission of adverse information on application

An attorney's admission, during a phone call to schedule a case resolution conference, that his physician client had a court date for a malpractice suit was a legitimate basis for disciplinary action, and the doctor's subsequent discipline should be upheld, Maryland's highest court ruled November 29 (*Charles Y. Kim v. Maryland State Board of Physicians*).

The Court of Appeals of Maryland also ruled that the physician's failure to mention the malpractice suit on his license renewal forms was an action within the legal definition of "practice of medicine" and therefore subject to discipline by the board.

The physician, Charles Kim, immigrated to the United States in 1973. He has been practicing in Maryland since 1977 and is a board-certified obstetrician/gynecologist. In June of 2005, a malpractice suit was filed against Kim. While the case was pending, Kim needed to renew both his hospital privileges and his medical license. While he acknowledged the malpractice suit on his hospital

privilege renewal form, he failed to mention the suit when he submitted his renewal for licensure.

Then, in November of 2006, an attorney representing Kim in an unrelated discipline matter had a phone conversation with an attorney for the board for the purpose of scheduling a case resolution conference to settle the matter. During the conversation, Kim's attorney told the board attorney that Kim would not be available on a certain date because Kim had a court date elsewhere. Suspicious, the board investigated the matter and found that Kim was being sued for malpractice.

"The Board is entitled to expect truthful submissions, particularly with respect to information concerning suits for malpractice, given that such suits directly raise questions regarding a physician's fitness to practice," the court said.

The board then brought charges against Kim for unprofessional conduct, making a false report or record in the practice of medicine, and making a false representation when making an application for licensure.

At his hearing, Kim put forward three primary arguments. First he claimed that, because the use of information gained during case resolution conferences is privileged, the information about his malpractice court date gained during the scheduling call was an improper basis for an investigation. Second, Kim argued that the second charge, making a false report or record in the practice of medicine, did not apply to his omission, as filling out a license renewal form should not be considered part of the "practice of medicine." And third, he claimed that his actions were not willful, as required for discipline, but instead were accidental omissions, brought about by a language barrier.

Notwithstanding his objections, the board fined Kim $5,000, placed him on six-months' probation, and required him to take an ethics course. Kim appealed and, after two lower courts upheld the discipline, the case went up to the Court of Appeals.

The court, in an opinion by Judge Mary Ellen Barbera, rejected all three of Kim's arguments and upheld the discipline.

In rejecting the argument that the investigation was based on improperly-obtained information, Barbera noted that "a statement relating solely to the scheduling of a [case resolution conference] is not 'commentary,' an 'admission,' a 'fact revealed,' or a 'position taken,'" at a conference, and not subject to the protections afforded those kind of settlement statements. Also, she noted, Maryland regulations do not prevent the use of information gained during a resolution conference if that information was available elsewhere, as the existence of the suit against Kim was because it was a matter of public record.

Kim's claim to have only omitted the information accidentally, because of his difficulty with English, was initially found by the board not to be credible, and the court declined to upset that decision.

Responding to Kim's arguments that his omission could not fall within the "practice of medicine," as that term is defined, Barbera noted that the court has "consistently recognized that 'in the practice of medicine' applies not only to diagnosing and treating patients, but also to misconduct relating to the effective delivery of patient care."

"We appreciate that the board must be able to rely on the accuracy of information conveyed in license applications in order to investigate and determine physicians' fitness to practice medicine. A physician's submission of false information regarding malpractice claims in license renewal applications impedes

the Board's ability to make accurate determinations about a physician's continued fitness. Although, at best, false information might merely delay investigation, at worst, false information could form the basis upon which the Board renews or grants a license, potentially to an unfit candidate."

Complainant rights don't include explanation of dismissal of complaint

Issue: Rights of complainants

A person who files a complaint against an attorney member of the Board of Professional Responsibility does not have the right to receive a copy of the attorney's response to the disciplinary complaint or an explanation of the dismissal of the complaint, said the Tennessee Attorney General Robert E. Cooper Jr., in a February 21 opinion.

State law provides that all state records be open for public inspection, "unless otherwise provided by state law," and the laws adopted by the state Supreme Court in its authority to regulate the practice of law mandate that certain records be maintained as confidential, the opinion noted—including all information, minutes, records, files, or other documents relating to an investigation.

"The purposes underlying confidentiality are obvious," the Tennessee Supreme Court has stated. "Foremost, the rule serves to protect both the complainant from possible recriminations and the attorney from unsubstantiated charges while a thorough investigation is conducted. Moreover, removing or unnecessarily qualifying the confidentiality requirement would eliminate many sources of information and reduce complaints received by the Board from lay citizens, litigants, lawyers, and judges. Finally, the rule serves to protect public confidence in the judicial system by preventing disclosure of a charge until the directives of Section 25 [regarding disciplinary of attorneys] are satisfied."

The confidentiality of an attorney's response to a complaint is required unless to some extent the completion of the investigation may require that reference be made to information derived from the response, the opinion stated.

There is no requirement that a complainant be informed of the reasons that led to dismissal of a disciplinary complaint as approved by the board or the Chief Justice of the Supreme Court. The only rights a complainant has are to file a written disciplinary complaint, receive notice if the recommended disposition of the complaint is dismissal, and appeal such a recommendation to the board or the chief justice, the attorney general said. "The complainant has no further right of appeal or review."

5-year suspension upheld for civil engineer who practiced surveying

Issue: Penalties for violating scope of practice laws

A California court has upheld a five-year suspension of the license of a civil engineer for, among other things, engaging in land surveying, a practice condoned by the law of many of the state's municipalities but forbidden by its licensing board (*Rudolfo Ventura Dimalanta v. Board for Professional Engineers and Land Surveyors*). The licensee, Rudolfo Dimalanta, was also cited for negligence in the February 6 decision by the Court of Appeals of California, First Appellate District, Division Four.

In 2003, Dimalanta prepared a tentative parcel map—a map intended to show the feasibility of a project—for the development of four houses in Oakland. The tentative map both contained serious errors and appeared to include boundary lines that can only be made by a licensed land surveyor.

Based on the map, the state's Board for Professional Engineers and Land Surveyors filed charges in 2008 and, after a hearing, an administrative law judge imposed a five-year license suspension on Dimalanta for negligence and incompetence in the profession, the unlawful practice of land surveying, and unprofessional conduct. Dimalanta appealed and the case went before the court, which issued an opinion written by Justice Maria Rivera.

During the administrative hearing, Dimalanta had objected to the finding that his work was incompetent. The map he had created, he argued, was a tentative one—only done to determine the feasibility of a project—and any mistakes were irrelevant, as they would be corrected in a later map.

However, an expert witness for the board noted that Dimalanta's mistakes were so significant that any developers relying on the map for feasibility would find their costs much higher when the actual project was undertaken, and the ALJ relied on this statement to support the finding of incompetence.

The court agreed with the decision. Rivera noted that the ALJ hearing the case had determined that the board's expert witness was more credible than Dimalanta's expert, who was the supervising civil engineer for the city of Oakland, and worked primarily in an administrative capacity. Rivera even went so far as to say that the opinion of Dimalanta's expert that the map was accurate enough for its purposes was of "dubious provenance."

Also upheld was the ALJ's ruling that Dimalanta had wrongly engaged in the unlicensed practice of land surveying. Several cities, including Oakland, have ordinances which allow civil engineers to engage in unlicensed land surveying, based on a state law called the Subdivision Map Act, which allows municipalities to regulate and control the design and improvement of subdivisions.

However, the judge stated that the Subdivision Map Act and local ordinances were not relevant in a license discipline case. "To the extent the Subdivision Map Act and the various municipal ordinances upon which Dimalanta relies appear to be at odds with the Business and Professions Code, it is well established that the state has preempted the field of regulating and licensing persons entitled to engage in certain occupations, including civil engineering and land surveying, and that municipal codes purporting to regulate this field cannot stand."

New Mexico has ADA immunity for professional licensing actions

Issue: ADA accommodations

Professional licensing cases do not implicate fundamental constitutional rights sufficient to strip a state of sovereign immunity and expose it to suits filed under the Americans with Disabilities Act (ADA), the U.S. Court of Appeals for the 10th Circuit ruled January 11 (*Stuart T. Guttman v. G.T.S. Khalsa*).

However, the court left open the possibility that the doctor disciplined in the case, Stuart Guttman, would be able to apply for prospective injunctive relief against the individual officers of the state board in their professional capacities.

Guttman suffers from depression and post-traumatic stress disorder and, as a result of these ailments, has a history of trouble interacting with others. As a result, when he applied for a New Mexico license in 1993, the state medical board granted him a qualified license which subjected him to quarterly inspections.

In 1999, faced with several complaints about Guttman, the board had him meet with an Impaired Physician Committee. When questioned about a second medical license he maintained in Texas, Guttman told the committee that no complaints had been filed against him in that state.

However, when the committee investigated, it found there had been several complaints in addition to a malpractice suit, and that a hospital had once denied Guttman staff privileges. Based on these findings, the board summarily suspended

Guttman's license and then—after a three-day hearing—revoked it, saying that Guttman's mental health problems were a danger to patients.

Guttman first appealed the decision in state courts, going so far as to file a petition for review with the New Mexico Supreme Court. However, while that court's decision on the petition was pending, Guttman filed a parallel suit in federal court. A series of confusing decisions and appeals followed in both a district court and the 10th Circuit, including a U.S. Supreme Court decision changing the law under which the case would be decided. The latest decision in the case was made by the 10th Circuit with the opinion written by Judge Timothy Tymkovich.

> The right to practice a chosen profession, the court wrote, is not a right that invokes heightened scrutiny under the Fourteenth Amendment. Nor did Congress intend the ADA to right a historical pattern of disability discrimination in professional licensing. And as a solution to disability discrimination in professional licensing, "the abrogation of sovereign immunity here would require states to justify a significant range of rational, everyday licensing decisions that would otherwise be constitutional."

The first issue the court tackled was the board's claim that, because it had ruled on Guttman's competency to practice and the impossibility of rehabilitation, and its decision had been upheld by a state court, Guttman was precluded from raising the issue in federal court, therefore making his ADA claim irrelevant.

However, wrote Tymkovich, Guttman was seeking "reasonable accommodation" under the ADA, and this was not the same as deciding on whether treatment would be effective in helping Guttman, which is what the board had actually done. "Rather," Tymkovich wrote, "it may be possible to accommodate a disability without resolving the disability itself" and, as such, Guttman still had a possible claim under the ADA.

The court then discussed New Mexico's sovereign immunity under the 11th Amendment, because Guttman had sued the state itself under the ADA, as well as individual officers of the board.

"Ultimately," the judge summarized, "we are presented with a right that is not fundamental, very little evidence of a widespread pattern of irrational state discrimination in professional licensing, and a wide-reaching statute that inhibits a state's ability to safely and efficiently make professional licensing decisions. [The ADA] prohibits a significant range of state action in this realm that would easily survive rational basis review." Therefore, the statute could not abrogate sovereign immunity in the context of professional licensing.

Despite that ruling, Guttman was still able to press for some relief under the ADA. Citing the U.S. Supreme Court case of *Ex parte Young*, which created exceptions to Eleventh Amendment immunity for suits seeking an injunction against individual state officers to stop ongoing violations of federal law "by proceeding on the fiction that an action against a state official seeking only prospective injunctive relief is not an action against the state itself," Tymkovich ruled that Guttman could indeed press on with ADA claims against the individual regulatory officials.

The case was remanded to determine if Guttman was entitled to such prospective relief.

Advisory letter is public, can't be challenged, court rules

Issue: Appellate review of discipline

An Arizona doctor cannot challenge the state medical board's decision to issue an advisory letter stating that he engaged in unprofessional conduct, a state appellate court ruled February 21 (*Glenn M. Lipton v. Arizona Medical Board*).

The doctor named in the advisory letter, Glenn Lipton, became the subject of a board investigation after a complaint was filed alleging that he was engaged in inappropriate advertising. At the close of its investigation, the board did not pursue discipline, but instead filed an advisory letter, accessible to the public, stating that Lipton had committed unprofessional conduct by failing to adequately disclose his board certification qualifications in his advertisements.

In response, Lipton filed a complaint in state court, claiming that, by issuing the letter, the board had exceeded its authority and violated his constitutional rights. A lower court dismissed the case for lack of subject matter jurisdiction and an appeal by Lipton brought the matter before the Court of Appeals of Arizona, Division One, Department B.

Judge Donn Kessler, writing for the court, wrote that the advisory letter was not a "decision" by the board which could be challenged because it did not legally require anything of Lipton.

When Lipton countered that the letter—available to the public and, for a time, posted on the board's website—was damaging to his reputation, Kessler noted that an earlier case had ruled that a "physician's claim of possible reputational harm from an advisory letter was 'purely speculative' and did not affect the physician's legal rights." The dismissal of the case was upheld.

Dishonest expert testimony exposes licensee to discipline

Issue: Discipline for ethical breaches as expert witness

A state board may discipline licensees for the content of their expert testimony in legal cases, an appellate court in Kentucky held February 2 (*Kentucky State Board of Licensure for Professional Engineers and Land Surveyors v. Joseph B. Curd, Jr.*).

Although the land surveyor disciplined in the case, Joseph Curd Jr., had argued that the statutes relied on by the board were unconstitutionally vague, the Court of Appeals of Kentucky ruled that Curd should have known that his testimony would expose him to discipline.

The trouble began in 2003, when Curd was retained to give expert testimony in a land dispute. In his testimony, Curd made several professional assertions which the state engineering and land surveying board claimed were intentionally incomplete and misleading. Curd asserted that his counterpart for the other side in the dispute, a licensed land surveyor named James West, had not done any research to support his findings, an assertion the board claimed was dishonest.

After the trial, the board moved to discipline Curd based on his testimony. Curd was charged with violation of two sections of the licensing statute and three sections of the regulatory code. While four of the laws with which Curd was charged were general proscriptions against unprofessional conduct and fraud, one, a section of the state's Code of Professional Practice and Conduct, prohibited dishonest testimony.

After a three-day discipline trial, the board suspended Curd's license for six months. However, an appeal to a circuit court ended with a victory for Curd, which ruled that the laws used to discipline him were unconstitutionally vague as applied to his case. The board then appealed, and the case went to the Court of Appeals.

The court revisited Curd's previously successful constitutional argument. In an opinion by Judge Michael Caperton, the court agreed that the laws forbidding

unprofessional conduct and fraud were unconstitutional as applied to testimony given by a licensee, due to the uncertainty of the provisions as applied and the chilling effect they would have on expert testimony.

Nevertheless, the Court of Appeals reversed the lower court's decision and restored the board's discipline based on the section of the surveyor regulations which prohibit the giving of false testimony before a court. "It appears to this court," Caperton wrote, "that any reasonable professional land surveyor in Curd's situation could reasonably have understood what was required of him based upon the use of ordinary common sense. One's testimony is either truthful or untruthful, and the latter is clearly in violation of the mandates."

The case was remanded to the lower court for discussion of the non-constitutional issues in the case.

Enron CPAs did not prove "illegal secret deliberations" by board

Issue: Open meetings laws and executive sessions

The accountants accused of violating professional standards in the long-running Enron case, *Texas State Board of Public Accountancy v. Bass,* lost the most recent round when the Court of Appeals of Texas reversed a trial court judgment that had voided sanctions the board had imposed. In a February 24 ruling, the appeals court said the accountants had not established that the board violated the state Open Meetings Act in their disciplinary proceedings, and remanded the case to the trial court.

Carl Bass and two other CPAs were employees of Arthur Andersen and participated in the 1997 and 1998 audits of Enron Corporation's financial statements. The audits came under scrutiny after Enron's collapse and the state accountancy board initiated disciplinary action, leading to votes to revoke two of the Andersen CPAs' licenses and suspend the license of the third.

In their suits for judicial review, the accountants charged, among other things, that the board violated the open meetings law by deliberating on the proposed disciplinary actions "almost exclusively" in "lengthy closed sessions" and immediately voting during the open session, without any meaningful discussion in open sessions.

The board's "impermissible, secret deliberations" were violations of the state open meetings act, the CPAs charged, asking the trial court to void the board's orders and prohibit the board from taking father action against the accountants. The trial court agreed, found the three disciplinary orders to be void, and permanently enjoined the board from re-prosecuting the accountants.

But the appeals court said it was incorrect to assume that proving a meeting violated the Act rendered all related subsequent actions by governmental body void. It said the accountants did not show that the board's executive sessions were not protected by the exception for attorney consultation, and the board's public votes on the disciplinary orders satisfied the requirement that final action be made in an open meeting.

There are still several other claims by the accountants to be considered. The appeals court ruling "un-voids" their disciplinary sanctions and sends the case back to the trial court for consideration of those other arguments.

Discipline data bank duplication targeted in proposed federal rule

Issue: Federal oversight of state professional regulation

Overlap and duplication of two federal disciplinary data banks would be reduced if a proposed rule of the HHS Health Resources and Services Administration becomes final.

Announced for public comment February 15, the revised rule (HRSA-0906-AA87), required under the health insurance reform measure, the Patient Protection and Affordable Care Act of 2010, would merge the Healthcare Integrity and Protection Data Bank (HIPDB) into the National Practitioner Data Bank (NPDB).

The first discipline data bank, the NPDB, was set up in 1986 in response to widely publicized scandals about lax physician discipline and suspended doctors who simply pulled up stakes and started a practice in another state. The law's scope was expanded in later legislation requiring that each state file reports of adverse licensure actions against physicians, dentists, and other providers.

The second databank, the HIPDB, was created as part of HIPAA, (the Health Insurance Portability and Accountability Act of 1996) to combat fraud and abuse, but it also required reporting of adverse licensing and certification actions.

After a period of transition, the HIPAA data bank will cease operations under the proposed rule. State agencies and officials will continue to have access, through the single database, to all final adverse actions in licensing and certification, criminal convictions and civil judgments in federal or state court relating to delivery of health care services, exclusions from federal health care programs, and other adjudicated actions or decisions.

Licensing

Federal court affirms denial of license to online-school grads

Issue: Accreditation of schools for licensed professions

Rules forbidding correspondence-school students from taking a licensing exam do not implicate any fundamental right, said the U.S. Court of Appeals, 2nd Circuit, in a February 16 ruling (*Frank Alain Bazadier v. John J. McAlary*). Upholding New York State's policy of barring correspondence-school law graduates from taking the state's bar exam, the decision stated that such rules must only pass "rational-basis" review. In other words, a state must simply show that the rule is rationally related to a legitimate end, a threshold which the state was easily able to reach.

The rules do not aim to discriminate against correspondence school students on free speech grounds, but instead discriminate based on the schools' method of legal instruction, the court said.

The license applicant who challenged the law, Frank Bazadier, graduated from Northwestern California School of Law, an online school, and is already a licensed attorney in California, which accepts graduates of correspondence schools. In 2008, Bazadier applied to take the New York bar exam and was turned down when he asked for a waiver from the rule barring correspondence-school students.

Bazadier then filed suit in federal court, claiming that the practice of barring correspondence-school students was a violation of his constitutional rights to equal protection and free speech. Specifically, Bazadier argued that the rule

should be subject to a strict scrutiny because it implicated the First Amendment speech rights of correspondence school students, who were thus being unconstitutionally discriminated against.

Judge Gary Sharpe, who heard the case in its first stage, rejected Bazadier's argument that the New York rules deserved a high level of scrutiny, noting that the rules do not indicate that they aim to discriminate against correspondence-school students on any speech grounds, but instead discriminate based of the method of their legal instruction.

Sharpe then applied the lower "rational basis" standard, evaluating the state's given reasons for the existence of the rule. The state, Sharpe noted, "contend[s] that correspondence-based study lacks the kind of direct, in-person supervision typical of traditional, classroom-based legal education" and that "this difference is significant because absent in-person supervision, there is less assurance that the work being performed in a correspondence school program is actually being done by the enrolled student and, by extension, less assurance that the student has an adequate legal education."

Bazadier appealed, but the 2nd Circuit upheld the lower decision, substantially agreeing with the reasoning of Sharpe.

Mandatory CE has unacknowledged price tag, study finds

Issue: Impact of mandatory continuing education

If a profession with lots of part-time practitioners wants to trim its numbers, an effective means of accomplishing that might be to adopt a continuing education requirement, a study at the Beacon Hill Institute suggests.

Entitled "Massachusetts Real Estate Licensing Requirement Benefits Agents, Not Consumers," the study by the Suffolk University-based institute takes a look at what has happened in the state since 1999, when the Massachusetts legislature adopted a requirement that agents complete 12 hours of board-approved CE training in the 24 months prior to renewing their licenses.

At the time, the Massachusetts Association of Realtors argued that a CE requirement was necessary to weed out agents who were incompetent and had not kept up with the changing laws and norms of the profession. Forty-nine other states have similar requirements.

The study authors estimated the impact of the requirement on the number of practicing real estate agents, quality of service, and agent income.

Massachusetts' active real estate agents have varied widely in number—from 140,000 in 1990 to 50,000 in 2001—and the study authors attribute some of the flux to depressed housing markets. "However, by far the most dramatic change is the large drop in the number of active agents that occurred at the time of the implementation of continuing education," the study notes. Once other factors were controlled for, "we found that continuing education reduced the number of active agents by 58 percent."

Because there was no associated drop in complaints about agents or discipline of agents, the study also found "there is no indication that the classes themselves increased the quality of the remaining agents."

An important effect of the requirement seems to be increased income, as well. After controlling for the total number of real estate sales and the real average value

of home sales, which affect commissions, the study found that "the introduction of continuing education was statistically significant and increased the incomes of remaining agents by 17 percent."

The study authors conclude that the CE requirement "poses a major hurdle to part-time agents who might not make enough sales to justify gong through the expense and time of continual training. Full-time agents may be able to enhance their income by driving part-time agents from the occupation."

Dentists may pursue salon if board sees violation, court rules

Issue: Association prosecution of unlicensed practice

The state dental association may pursue an unfair competition complaint against a tanning salon that offers teeth whitening, if the state dental board agrees that the salon is engaged in the unlicensed practice of dentistry, the Superior Court of New Jersey, Appellate Division, held February 24 *(New Jersey Dental Association v. Beach Bum Tanning*).

Reversing a ruling by a lower court which dismissed the unfair competition complaint, the court said that, with the state board's concurrence, the New Jersey Dental Association (NJDA) was not barred from pursuing its request for an injunction prohibiting Beach Bum Tanning from offering teeth whitening.

The tanning salon contended that, as a professional association, NJDA is without standing to pursue relief on behalf of its members, and is unable to pursue a private remedy for breach of a statute—the state dental practice act—that does not provide for private enforcement. The court disagreed with the first claim, noting it had previously affirmed a decision that a professional association has standing to bring an action on behalf of its members to prevent unfair competition.

As to the second claim, the court decided that the State Board of Dentistry should determine whether the association could pursue its common law claims. "The State Board unquestionably has both expertise in the practice of dentistry and the primary authority to police its practice. We therefore transfer this matter to the State Board for an administrative determination of whether or not defendant engaged in the unauthorized practice of dentistry."

Penalty upheld for failure to register corporation as "fictitious name"

Issue: Fictitious name registration requirements

Sanctions levied against a dentist for failing to register the name of his professional corporations as a "fictitious name" with the state's dental board were properly imposed, the Commonwealth Court of Pennsylvania held January 27 (*Steven B. Goldberg v. State Board of Dentistry*). The decision requires all dentists with properly registered corporations to further register the names of those entities with the state's Board of Dentistry.

The licensee argued that the name "American Dental Solutions," while not his proper name, was not a fictitious name under the meaning of the dental statutes because it was a properly registered corporation, and its name was not "fictitious" under the meaning of the dental practice laws.

The disciplined dentist, Steven Goldberg, registered American Dental Solutions, Inc., a corporation under which he organized his dental practice, with the state in 2002. In 2009, the Board of Dentistry pursued discipline against Goldberg for having failed to register American Dental Solutions' name with the board, a requirement when a dentist practices under a "fictitious name."

Goldberg objected to the charges; the name American Dental Solutions, he said, while not his proper name, was not a fictitious name under the meaning of the dental statutes because it was a properly

registered corporation and its name was not "fictitious" under the meaning of the dental practice laws.

The board disagreed. The name of Goldberg's corporation, proper or not, was not *his* name, it held, and thus the law required him to register that name with the board. The board then fined Goldberg $1,100. He appealed, and the case went to the Commonwealth Court.

The court upheld the board's decision, stating that "while 'American Dental Solutions' is the proper name of Dr. Goldberg's professional corporation, it is not *Dr. Goldberg's* proper name, any more than 'Steven B. Goldberg, D.M.D.' is American Dental Solutions' proper name." When Goldberg practiced under the name of his corporation, therefore, it was fictitious, and Goldberg should have registered the name with the board.

The court did not have perfect consensus on this issue, however. In a dissenting opinion that was longer than that of the majority, Judge Mary Hannah Leavitt assailed the board's interpretation of the law. Leavitt noted that Pennsylvania's Fictitious Names Act, on which the board relied for its definition of a fictitious name, defines the term as something other than a proper name, which can, in turn, be the legal name of a corporation. In Judge Leavitt's analysis, then, a properly registered corporate name cannot be a fictitious one.

Goldberg, Leavitt said, "wears two hats," as a dentist and a corporate representative. When he actually engaged in practice, his license is displayed and the name is known to his patients. Further, Goldberg and American Dental Solutions are two different entities. As it is illegal for two entities to claim the same name, requiring Goldberg to register American Dental Solutions as his fictitious name would cause him to violate the law, the dissenting judge wrote.

Take Note

Increased uniformity of state laws has been positive trend, says FARB director Dale Atkinson

Issue: Standardized, defensible professional regulation

State licensing boards, unified as members of associations, have been pivotal in the trend towards increased uniformity of state regulation in the professions, says Dale Atkinson, who since 1999 has been executive director and general counsel of the Federation of Associations of Regulatory Boards (FARB), an umbrella group representing boards of nearly a dozen professions.

"The collective voice and collective input from across the country—and in some cases provinces and even internationally—have been very important in developing standards and promoting uniformity," Atkinson said in an interview with ***Professional Licensing Report*** at the FARB annual meeting in January.

FARB's members, the board associations, have the ability to appoint delegates from a wide variety of jurisdictions, form committees, and take model licensing legislation through a process of development and vetting and presentation to a delegate assembly before being finalized, he explains. Most individual state boards are prohibited by law from lobbying, but their board federation's policy development process helps them promote uniform standards that state legislators can then

decide on. "The great thing a federation can do is provide information to boards at no charge, so they have the data at hand to make a decision in licensure cases."

In the 24 years that he's been observing state professional regulation, Atkinson says one of the most important developments has been the formation of the board associations or federations that form FARB's membership (which now include boards regulating accounting, veterinary medicine, pharmacy, contractors, optometrists, occupational therapists, chiropractic, psychology, massage therapy, funeral service, and long term care administrators).

"When I was starting out as a lawyer in the 1980s, there weren't as many board associations. And they've been probably most significant in developing uniform licensing exams that can be validated legally. But recently they've also begun providing added services in application or renewal processing, continuing education program approvals, and other areas. These are things that have to be done, and the help relieves some of the burden on state boards, because boards have little money."

That's been especially true recently, as state legislatures have dealt with dwindling revenues by cutting regulatory budgets. "There are always economies that can be had, but lack of state funding is hurting public protection, because if boards still exist without dollars they can't do their jobs. Or they get deregulated, and then they're not doing the job at all. I think that's damaging."

The most significant court ruling in professional regulation in the last year was the U.S. Supreme Court decision upholding the constitutionality of an ethics law in Nevada (*Nevada Commission on Ethics v. Carrigan*), Atkinson believes. "Unfortunately some of the other significant case rulings were against FARB members."

For example, the National Association of Boards of Pharmacy lost an appeal of a ruling against it concerning its exam copyright (*NABP v. Board of Regents of the University System of Georgia*). "You cant sue a state entity in the federal courts; that's constitutionally prohibited. So because NABP was suing a state university to get copyright relief, it lost. It's a very significant ruling in that it limits exam holders from using certain avenues to protect their copyright interests."

He predicts that more court challenges regarding complainants and their rights, reciprocal discipline, and applications of the Americans with Disabilities Act are likely to be filed in coming years. "The standard by which ADA accommodations in testing are judged may be moving toward what best tests candidate aptitude rather than 'reasonable accommodations,'" he says.

As far as reciprocal discipline cases go, "Some boards are bashful about taking action against licensees, and they are coming up with alternatives to discipline—non-disciplinary sanctions that may not have to be reported to the National Practitioner Data Bank. I've seen a lot of cases lately about whether the action is really considered 'discipline,' especially if there is no admission of wrongdoing by the licensee." Many of those issues await resolution in the courts, he said.

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