Professional Licensing Report

Licensing, testing, and discipline in the professions

July/August 2012
Vol. 24, Numbers 1/2

Highlights in this issue:

Discipline

Prosecutors' 5 delays of trial bring dismissal of unlicensed-practice case

Issue: Unlicensed practice and right to speedy trial

The New Mexico Supreme Court approved the dismissal of an unlicensed-practice-of-architecture case that had been delayed multiple times by prosecutors. The July 19 decision was based on the constitutional right to a speedy trial, and was made despite the fact that each delay had been approved by the district court hearing the case (*Marc Alan Spearman v. State of New Mexico*).

The criminal case against the alleged unlicensed architect, a licensed architectural draftsman named Marc Alan Spearman, never actually went to trial. Spearman was accused of practicing architecture without a license in December of 2008. He maintained his innocence, saying that the changes he had made to an architectural plan, which were the focus of the case, were approved by a licensed architect.

(*See **Discipline,** page 4)*

Testing

Oral exam of out-of-state candidate proper

Issue: Use of non-standardized oral examinations

An Arizona engineer who took and failed an oral engineering exam to be licensed in Minnesota lost his appeal of his license denial, in a July 2 unpublished decision by the Court of Appeals of Minnesota (*In the Matter of the Professional Engineering License Application of Michael P. Opela Sr.*).

In considering applications for licensure by comity, the state licensing board has "wide latitude" to compare the requirements for licensure in Minnesota with those in a jurisdiction where an applicant was originally licensed, the court said. It also rejected the argument that the oral engineering exam needed to be a standardized test in order to be valid.

The engineer, Michael Opela, had an accounting/computer science degree, not an engineering degree, but had received his Arizona license as a structural engineer in 2004 after passing three eight-hour written

Examinations—the National Council of Examiners for Engineering and Surveying Fundamentals Exam and two NCEES structural exams.

In 2010, Opela applied for licensure by comity in Minnesota but the state Board of Architecture, Engineering, Land Surveying, Landscape Architecture, Geoscience, and Interior Design told him he did not qualify to be licensed because his postsecondary degree was not an accredited engineering degree and he had not completed required engineering-related coursework.

Opela argued that the Minnesota board had granted licenses without examination to other engineers licensed in Arizona, and it was arbitrary and capricious to require him to take an oral examination that other applicants did not have to take.

However, the board offered to give Opela an oral exam to evaluate his competence and qualifications for licensure. Opela requested information about the passing rate of the exam and was told no such information was available because the oral exam hadn't been given for at least ten years. Opela then took the exam and failed with a 43% score.

Opela filed suit, arguing that he should be granted a license for several reasons: 1) He holds a valid Arizona license that was granted under stricter licensing requirements than those of Minnesota; 2) The Minnesota rules do not require an applicant to have an engineering degree in order to receive a license by comity; 3) The board has granted licenses by comity to engineers who are licensed in Arizona; and 4) The board acted in an arbitrary and capricious manner when it required him to take an oral examination that has not been required of other applicants.

The Minnesota board's decision to deny Opela a license by comity turned on whether the licensure requirements in each jurisdiction were equal at the time of licensure by the other state. The board concluded that Arizona's license requirements in 2004 were not equal to Minnesota's licensing requirements in 2004. While Opela argued that other similar Arizona applicants had in fact been licensed by Minnesota, the court found those applicants were originally licensed before 2004, so Opela could not show the board's decision in his case was arbitrary or capricious on this ground.

It is clear from the record, the court said, that the oral exam Opela was given was not standardized, since no nationally standardized oral examinations for professional engineer licensure are available, and the board designed the oral exam specifically for Opela. "But determining whether a standardized examination is appropriate is within the board's discretion." Moreover the court added, "We observe that a non-standardized examination is not unfair per se."

"Sole discretion" provision allows examiners to deny request for admission without exam

Issue: Licensure by endorsement v. examination

Justices of the Ohio Supreme Court did not have to provide any explanation when they denied the request of an out-of-state lawyer to be admitted to the Ohio state Bar without an examination, the U.S. District Court for the Southern District of Ohio found August 10 (*Douglas J. Raymond v. Maureen O'Connor*).

The candidate, Douglas Raymond, holds a law license in Colorado and was previously admitted to the Michigan and Missouri bars without examinations. In 2005, Raymond applied to become a member of the Ohio bar without examination.

The Ohio Supreme Court Justices, exercising their "sole discretion," denied his application without providing any explanation, and Raymond brought suit challenging the constitutionality of the court's "rules, regulations, policies, procedures, and practices" governing admission to the practice of law in Ohio.

Raymond contended that the had a property interest in admission to the practice of law, that the Supreme Court's procedures damaged his professional reputation and right to pursue a lawful career, and that the Justices denied his application without affording him procedural due process in the form of notice, hearing, and explanation.

"Raymond lacks a protected property interest in gaining admission to the Ohio bar *without examination*," the court said. "His only interest that is protected by due process and relevant to this case is in not being *completely* excluded from admission to the Ohio bar."

The federal court noted that under state law, the Justices "shall review the application and in their sole discretion shall approve or disapprove the application." That includes considering "whether the applicant's past practice of law is of such character, description, and recency as shall satisfy the Court that the applicant currently possesses the legal skills deemed adequate for admission" to practice in Ohio without examination.

The court also rejected Raymond's argument that the denial of his application affected his professional reputation because he had to disclose the denial to his legal malpractice insurance carrier and to other states where he practices. Referring to this as "speculative reputational harm," the court said Raymond's allegations "do not specify how his reputation will be damaged or become known to the public."

Only if Raymond could show that his denial was based on a "suspect criteria or the impairment of a fundamental right" could Ohio's procedures be deemed unconstitutional, if they are rationally related to a valid state objective, the court added. Dismissing Raymond's action with prejudice, the court said, "Raymond has been treated no differently than most other attorneys who practice law in Ohio, who were required to take the bar exam."

Retroactive application of exam-passage rules invalid

Issue: Retroactive enforcement of regulations

An accreditation case of Kentucky's Board of Nursing fell apart when a state appeals court judge invalidated the board's decision, retroactively applying a regulation concerning exam-passage rates, to place a nursing education program on probationary status (*Spencerian College v. Kentucky Board of Nursing*).

The case centered around a program administered by the nursing board to monitor pre-licensure nursing education programs. The Applied Science Degree in Nursing program of Spencerian College, a Louisville-based, for-profit school that is monitored by the board, was placed on probationary status in 2010, after the college failed to maintain an 85% pass rate for first-time takers of the National Council Licensure Examination (NCLEX).

The College appealed the decision, and the case went before the Court of Appeals of Kentucky, which issued an opinion August 24 written by Judge Janet Stumbo.

In its appeal, the College chiefly argued that the board had improperly used the 85% rule retroactively. The current form of the rule, which requires that 85% of first-time test-takers have passed the NCLEX, did not exist until 2009. However, the board, when evaluating the College program's success, applied the percentage to the years prior to 2009.

Previously, the rule had only specified that 89% of a program's graduates must have passed the NCLEX, meaning that an aggregative count including candidates who passed after multiple sittings would keep the board out of trouble. The rules also changed the frequency with which that percentage was monitored, increasing it from every three years to every year.

The board claimed that the interpretation of the rules in previous years had been to the same effect as the explicit wording of the rules written in 2009. But, Stumbo noted, "this interpretation is in direct conflict with the actual language of the old version of the board's regulation. We can only enforce the law as written."

Discipline

Prosecutors' many trial delays lead to dismissal of unlicensed practice case *(from page 1)*

Over the next year and a half, prosecutors for the state asked for and received four delays of the trial and at least one delay of a motion hearing, in two instances because certain personnel would be away and unable to attend. Finally, in March 2010, Spearman filed a motion to dismiss the trial for a violation of his constitutional right to a speedy trial.

The judge hearing the case granted the motion, while expressing annoyance at the state's delays and even chastising the prosecution for its "dilatory pursuit" of the case. The state appealed and the case made its way to the Supreme Court.

For the most part, the justices of the high court upheld the lower court's decision, but they added an important note on whether Spearman had been prejudiced. The trial court and an intermediate appellate court which had overruled the earlier decision had both agreed that although several factors of the mandated legal test for an unconstitutionally long delay of trial must be weighed against the state, prejudice to Spearman was not one of them. Spearman's defense, both courts had held, was not handicapped by the delay, and so he was not prejudiced.

The Supreme Court overruled this point, noting that, although Spearman's defense had not been compromised by the delays, other negative impacts must be considered in deciding whether a delay had prejudiced a defendant. In this case, Spearman claimed that, as a result of the pending felony charge against him, he had lost his job and could not find another, had filed for bankruptcy, and was forced to move.

"If these allegations are true," wrote Justice Richard Bosson, Spearman "undeniably suffered some prejudice as a result of the pending charges against him."

Discipline fails over use of hearsay evidence

Issue: Admissibility of hearsay in disciplinary hearings

A Pennsylvania dentist's suspension for performing pseudo-science while engaging in his profession was based on inadmissible hearsay, the Commonwealth Court of Pennsylvania ruled July 13 (*Gerald H. Smith v. State Board of Dentistry*). The decision overturned discipline imposed by the state dental board.

In July 2008, the board brought a case against dentist Gerald Smith based on a report from a patient of Smith's to a physician, Sarah Buchanan, that Smith had told the patient to stop taking thyroid medication prescribed by another doctor and replace it with another prescription medication, Armor Thyroid.

Buchanan also reported that Smith had advised the patient to use progesterone cream to counter the carcinogenic qualities of the patient's birth control medication, and that Smith had performed kinesiology, a procedure the court deemed "a type of pseudo-science muscle test."

Smith was accused of prescribing Armor Thyroid to another patient in 2006, based on records acquired from a Rite Aid pharmacy.

When this evidence was produced during his disciplinary hearing, Smith objected that both the testimony of Buchanan and the Rite Aid pharmacy records were hearsay and could not be used as evidence against him. Smith denied most of the actions ascribed to him, but he did admit both that he wrote a prescription for Armor Thyroid in 2004, which he believed was legitimately relevant to orthodontic work he was performing, and that he had entered into a consent agreement with the board in 2006 after admitting that he performed kinesiology on a patient.

The dentist's discipline was reversed because the board failed to comply with the "hearsay" exceptions by properly certifying the origin of some documents, and establishing the evidential necessity of others.

A hearing examiner dismissed Smith's hearsay objections and, at the conclusion of the hearing, the board issued a 90-day suspension of Smith's license, to be followed by three years of probation, 20 hours of continuing education, and a $4,000 fine. Smith appealed.

In the appeal, Smith again introduced his hearsay objections, this time meeting with some success. For instance, in the case of Dr. Buchanan's testimony relating statements from Smith's patient, the board had admitted the evidence based on a hearsay exception which allows statements made for the purpose of medical treatment. But the court, citing older cases, ruled that because the board had failed to establish that knowledge of Smith's identity was necessary for Buchanan to provide treatment, it was therefore not included within the hearsay exception.

Regarding the Rite Aid records, the state Bureau of Professional and Occupational Affairs had only claimed the documents met a hearsay exception because the "pharmacy records speak for themselves."

However, "unfortunately for the Bureau," noted Judge Mary Hannah Leavitt in the court's written opinion, "the document does not speak for itself." The board had failed to document the provenance of the documents and, thus, they could not be admitted under the exception to hearsay for business records, because that exception requires that the records be certified by their custodian. No one had certified the Rite Aid records, and thus, "the bureau simply failed to present a foundation for admitting the Rite Aid summary as a business record."

In addition, although Smith had admitted recommending progesterone cream for his patient, Judge Leavitt noted that "the bureau did not offer any evidence that Smith's recommendation was contraindicated or was a recommendation that could not be made by a dentist."

Without that, and without the evidential foundations which would have allowed the board to introduce the hearsay evidence, the court ruled that the board had failed to prove that Smith had done anything that could incur discipline. The decision of the board was reversed.

Secrecy of discipline information was never promised

Issue: Public information relating to discipline actions

Nothing in a physician's discipline agreement with the New Mexico state medical board provided that information about the doctor's conduct would be kept secret, the Court of Appeals of New Mexico ruled August 14.

In the case, *George R. Schwartz v. New Mexico Medical Board*, the court affirmed the trial court's dismissal of the case in favor of the board.

The case goes back to 2005, when the board issued a notice of contemplated action (NCA) against physician George Schwartz, stating that it had sufficient evidence to restrict, revoke, or suspend his medical license. The board alleged that Schwartz had filed to maintain adequate medical records for at least 55 patients, had obtained and could not account for more than 1,000 doses of controlled substances, and was not justified in prescribing large amounts of controlled substances for certain patients.

Following a public hearing in 2006, the board ordered that Schwartz's license to practice medicine be revoked. Schwartz appealed and a district court reversed the board, finding that it should have granted Schwartz additional continuances to retain counsel.

Before a new hearing could take place, Schwartz negotiated an Agreed Order providing that he surrender his New Mexico license and not practice anywhere in the United States now or in the future. Schwartz confirmed his understanding that the Order would be reported to the National Practitioner Data Bank.

Documents relating to Schwartz's licensing issues were available for inspection through the board's website within 24 to 48 hours after they were filed. In 2009, Schwartz filed suit alleging breach of contract and defamation.

In answer to Schwartz's charge that his Agreed Order did not provide for release of the records, the court found that none of the board's actions in releasing the records violated the New Mexico Inspection of Public Records Act, and nothing in the Agreed Order barred release. Nor did Schwarz request that any court proceedings or documents be sealed.

While Schwartz pointed to a statutory provision making written and oral communications relating to disciplinary action confidential, the court noted that those materials indeed remain confidential, but notices of contemplated actions, motions, and other pleadings, and board decisions are public records. The court affirmed the district court's grant of summary judgment in favor of the board.

Random drug test discipline restored on appeal

Issue: Random drug-testing and discipline of licensees

A state board's decision not to restore the license of a harbor pilot who, in a random drug test, tested positive for cocaine use after 33 years of piloting was valid, the Court of Appeals of Virginia held July 10.

In upholding a decision by the state's Board for Branch Pilots to refuse reinstatement of a harbor pilot who had tested positive for cocaine use, the court overturned a lower court's decision to reinstate the pilot and award him attorney's fees (*Virginia Board for Branch Pilots v. Walter H. McCrory, Jr.*).

The court upheld the denial of a license to Walter H. McCrory, who had been a licensed pilot in Hampton Roads, a harbor in southeastern Virginia formed by the James River flowing into waters of Chesapeake Bay, for 33 years until 2008. That year, he was ordered by a dispatcher to report for a random drug test, and tested positive for cocaine use.

Although branch pilots are required to report to a testing center within two hours of such an order, McCrory did not arrive at the center for five hours, according to the court, "having spent the intervening time picking up one of his children, answering phone calls, and reading the newspaper."

After arriving at 4:30 PM, and before he went into the testing center, McCrory called and left a voicemail for a representative of the Virginia Pilots Association,

the employer of all branch pilots, saying that he had already taken the test. He was then told that the testing center was done testing for the evening, returned home, and did not show up to take the test for two days, at which time he tested positive for cocaine and subsequently surrendered his license.

One year later, McCrory had completed a rehabilitation program and submitted an application for re-licensure. He was denied by the board. His failure to timely arrive at the testing center, his false statement to the VPA, and his positive test for cocaine indicated to the board that he would be a threat to public safety. McCrory appealed.

A circuit court, hearing the initial appeal of the case, sided with McCrory and not only vacated the board's decision but awarded attorney's fees to the victorious branch pilot. The board's decision, the circuit ruled, was unreasonable.

The Court of Appeals, hearing the next level of appeal, was not so generous to McCrory. Judge Rosemarie Annunziata, in her written opinion for the court, noted that nothing in the board's factual findings indicated that it would take an unreasonable mind to deny McCrory a license.

"The board," she wrote, "mindful of the need of need for Branch Pilots to be free of mind-altering substances while guiding large commercial and military vessels on busy waterways, concluded that a positive test for cocaine less than two years prior to the date of the hearing did present a threat to the public health, safety, or welfare." The board's decision would be upheld.

In revocation case, Texas court sides with board on jurisdiction

Issue: Procedural errors in disciplinary appeals process

On August 31, an appellate court in Texas reversed a lower court's jurisdictional ruling against the state's Board of Nursing and dismissed most of an appeal by a nurse whose license had been revoked for an improper relationship. (*Texas State Board of Nursing v. Bernardino Pedraza Jr.*). The case centered around a prematurely filed notice of appeal.

The nurse in the case, Bernardino Pedraza Jr., had his license revoked by the board on July 23, 2010. On August 12, he filed a timely motion for rehearing. A motion for rehearing is a prerequisite to filing an appeal, and the motion must be decided before the appeal is made.

In Bernardino's case, the court did not take action on the motion, and it expired automatically forty-five days later, on September 6. Bernardino, however, jumped the jurisdictional gun and filed his appeal on August 11, too early.

The board argued as much before the circuit court which heard the appeal, but to no avail. Despite Pedraza's error, the court rejected the board's motion to dismiss the case for lack of jurisdiction and enjoined the board from revoking Pedraza's license in the meantime. The board appealed the decision to the Court of Appeals of Texas in Corpus Christi.

The Court of Appeals, after adding up the days, reversed the decision of the lower court and dismissed Pedraza's claim for lack of jurisdiction.

However, the court did allow some of Pedraza's claims to continue. In his appeal of the board's decision, Pedraza had also brought due process claims and a claim of defamation against the board. Although the defamation claim was dismissed on immunity grounds, the court gave Pedraza the opportunity to re-plead his due process claims in the trial court.

State did not show MD with personality disorder posed threat to patients

Issue: Proving licensee's mental instability is threat to patients

Because state law allows discipline for mental instability only where a physician's continued practice poses a threat to public safety, the Court of Appeal of California for the Third District gave a psychiatrist a reprieve from probation and monitoring, in a July 31 unpublished decision. The ruling was made despite the psychiatrist's having been caught with an arsenal of illegal weapons and psychotropic drugs in his car, and despite a court's acknowledgement that his "odd, aberrant, and even troubling" behavior could make him an ineffective therapist (*Medical Board of California v. Michael J. Menaster*).

The psychiatrist whose license was at issue in the case, Michael Menaster, has a troubling history of instability. In what seems to be the most egregious of his actions, Menaster, while attending college classes in 1999, was arrested for possessing a personal arsenal in his car. After receiving a tip and searching Menaster's vehicle, police confiscated three handguns—one a .40 caliber semiautomatic—and ammunition, a "bayonet-type" knife, a helmet, a loaded AK-47, and packages of psychotropic medication.

A subsequent mental evaluation found Menaster diagnosed with "a mental illness, personality order not specified with histrionic, immature, and paranoid features."

The piece of law with which the board chose to charge Menaster, Business and Professions Code, Section 822, allows for discipline in the case of mental instability only where a doctor's continued practice poses a threat to public safety. The court noted that although Menaster showed instability, because his problems had never overtly spilled over into his patient-practice, he could not be considered a danger to the public.

Menaster admitted to sleeping with a gun under his pillow and to carrying a concealed weapon during patient sessions. And, in what he described as a "Halloween prank," Menaster entered two guns stores dressed in camouflage fatigues, brandished a semiautomatic rifle, and yelled violent threats.

Although these incidents did not have a direct bearing on Menaster's practice, one doctor who diagnosed him with a mental disorder noted that Menaster had filed 50 small claims debt collection actions against his patients and made unsolicited attempts to hug and kiss female co-workers, behavior which seems especially questionable given the context of Menaster's more serious actions.

The impact of this behavior on his Menaster's license at the time was a suspension and a five-year probation.

After the end of this first probation period, he began working for California's Department of Social Services. His tenure there was not happy and involved what a later board accusation called "inappropriate and disruptive workplace behavior." Menaster, the accusation claimed, "inappropriately socialized, gossiped, shouted, and used profanity in the office; he broached personal topics with and made suggestive comments to female employees."

His employment with the department culminated in an incident where, Menaster, upset about a bake sale in the office, called his supervisor and "began to rant, yell, and use profanity over the phone. At one point during the call, Dr. Menaster 'let out a very loud and disturbingly frightful scream' and, as his supervisor was trying to calm him, Dr. Menaster hung up on her."

Menaster resigned in March 2006, and the Department reported him to the board. A hearing followed, after which the board revoked Menaster's license but stayed the revocation and placed him on three years' probation and a program of evaluation, therapy, and monitoring.

Although the board acknowledged that Menaster had recognized his problem and was taking steps to manage his disorder, it did not think he could practice without supervision.

Menaster appealed, and in the first level of the appeals process, a trial court overturned his discipline. "I think anybody who hears Dr. Menaster's situation is going to say to themselves, well, what this guy could use is some psychiatric evaluation, some continuing psychotherapy, and perhaps a practice monitor," the judge hearing the case noted, adding that "the need for those conditions of probation and the desirability of those conditions . . . frankly, I think, are established." But the judge nevertheless ruled that the board had not produced enough evidence to discipline Menaster under the statute that it had chosen to pursue the case, Section 822 of the Business and Professions Code.

This sentiment had been echoed by three doctors who had evaluated Menaster for the case, although, as one of those doctors acknowledged, because Menaster had seen a limited number of patients during the period which the board was investigating, there was simply a lack of information about how Menaster would perform.

The board appealed from this decision, and the case went before the Court of Appeal of California for the Third District, which upheld the lower court's decision.

"We agree," wrote Presiding Justice Vance Raye, "that Dr. Menaster's behavior at the DSS could be described as 'odd, aberrant, and even troubling,' but that is not the test for discipline under section 822."

In order for the board to have successfully used that part of the law to discipline Menaster, Raye continued, "His behavior must be linked to safety concerns through expert testimony demonstrating that his disorder is likely to manifest itself in ways that actually risk causing harm to patients." Violence and threatening behavior, the court concluded, were strong indicators of possible harm, and Menaster did not show that behavior towards his patients.

Justice Louis Mauro, in a concurring opinion, noted that although it is possible that Menaster "may not be an effective psychiatrist, there is insufficient evidence that he is currently an unsafe psychiatrist."

"Stated another way," he continued, "while there may be concern that Dr. Menaster does not adequately help his patients, there is no evidence that he currently harms them. Given the language of section 822, substantial evidence supports the trial court's ruling."

License revocation of convicted human trafficker overturned

Issue: Nexus between criminal convictions & licensing

A second defendant involved in a criminal trafficking and forced labor scheme in Pennsylvania has had the revocation of his license by the state board of cosmetology overturned because, as the Commonwealth Court of Pennsylvania explained, the board improperly imputed to him a co-defendant's criminal guilty plea (*Duc Cao Nguyen v. Bureau of Professional and Occupational Affairs*).

The decision by the court, published July 12, overturned the revocation of nail technologist Duc Cao Nguyen, who along with his girlfriend and co-defendant, Lynda Phan, participated in a scheme to fraudulently bring two Vietnamese women to the United States to work in Phan's nail salons.

In order to facilitate their entry into the United States, Nguyen and another man entered into sham marriages with the women. Then, after the women had arrived in the United States, Phan paid for cosmetology training and license applications, confiscated the women's immigration documents and forced them to work 71 hours per week without pay, ostensibly to repay her for the expenses she had incurred on their behalf.

After one of the women fled and reported Phan to the authorities, criminal charges were filed against both her and Nguyen. Phan eventually pled guilty to human trafficking with respect to forced labor and both Phan and Nguyen pled guilty to marriage fraud, a felony.

Following the criminal convictions, the cosmetology board brought professional discipline charges against the pair. A hearing followed, after which a hearing examiner recommended a two-year suspension for Phan and a one-year suspension for Nguyen.

The board, unimpressed, revoked the licenses of both, and their subsequent appeal of that decision eventually led to the July 12 ruling by the Commonwealth Court.

The court found that although Nguyen had helped use cosmetology licensing to obtain the involuntary labor of Vietnamese women as part of a trafficking scheme, his license could not be revoked solely on the basis of his criminal history.

In revoking Nguyen's license along with Phan's, the board had cited both Phan's statements and criminal convictions. It concluded that, although Nguyen had only pled guilty to marriage fraud, he was nonetheless complicit in Phan's scheme to obtain the forced labor of the two women.

"The consequences of [Nguyen's] crime—T.V.'s (the victim's names were not made public) use in Phan's criminal scheme—were in plain view of appellant because he lived with Phan and T.V.," the board wrote.

"The board sees a federal felony conviction that resulted in harm to a young victim, a year's probation, and massive forfeitures of property traced to the offense to compensate the victim. . . . The board finds a criminal scheme the object of which is to utilize the board's licensing program to obtain involuntary labor unacceptable."

Nguyen challenged the board's decision to revoke his license on the grounds, among other things, that the board impermissibly based its decision on the conviction of his co-defendant, Phan. Judge P. Kevin Brobson, writing for the court, agreed with Nguyen.

The state's Beauty Culture law would allow the board to revoke a license for dishonest or unethical practices, Brobson noted. But the board did not base its decision in Nguyen's case on that law. Instead, its decision to bring charges against Nguyen was made on its powers under another act, the Criminal History Record Information Act, and solely on the basis of his felony fraudulent marriage.

Although "it is obvious that Phan's conduct, for which she pled guilty, and Nguyen's conduct, for which he pled guilty, are related to and, to a certain extent, overlap," Phan was decidedly more culpable than Nguyen, Brobson wrote. That assertion was borne out by the fact that only Phan, and not Nguyen, was found guilty in the broader human trafficking scheme.

Because the board had not charged Nguyen with anything more than his fraudulent marriage and, because it had relied so heavily on Phan's statements and conviction in also sanctioning Nguyen, no proper evidence existed in the record to discipline Nguyen for being complicit in Phan's scheme.

The case was remanded to the board.

Licensing

Federal court overturns cosmetology license requirement for hair braiders

Utah "irrationally squeezed" two professions together, decision says

Issue: Relation between practice act and actual practice

The state of Utah's requirement that African hair braiders obtain cosmetology licenses in order to practice their skill is not rationally related to any legitimate state interest and is unconstitutional as applied to African hair braiding, the U.S. District Court for the Central District of Utah held August 12 (*Jestina Clayton v. Mark Steinagel*).

"Utah's regulations do not advanced public health and safety" in this case, "because Utah has irrationally squeezed two professions into a single identical mold,' by treating hair braiders—who perform a very distinct set of services—as if they were cosmetologists," the court noted.

The plaintiff in the case, Jestina Clayton, wished to perform African hair braiding in the state but objected to the requirement to obtain a cosmetology license. She brought suit against the state under the Fourteenth Amendment's Due Process, Equal Protection and Privileges or Immunities clauses. The court granted summary judgment to the state on the latter claim, preserving it for possible Supreme Court review, but found in favor of Clayton on the other claims.

The scope of Clayton's activities is distinct and limited when compared to cosmetologists, the court said. "She does not use chemicals, shampoo, cut or color hair, or do facials, shaves, esthetics, or nails. Even if she were defined as a cosmetologist, the licensing regimen would be irrational as applied to her because of her limited range of activities." Most of the cosmetology curriculum is irrelevant to hair braiding, the court added, and even the relevant parts are at best minimally relevant.

Under the state's rules, 1,400 to 1,600 of the 2,000 hours of the mandatory curriculum are irrelevant to African hair braiding, the court said. The state admitted that the practical exam required for a cosmetology license is irrelevant to African hair braiding and said that it has no idea whether its written exam requires any knowledge of natural or African hair braiding. The state also admitted that it has never investigated whether African hair braiding is a threat to public health and safety.

Clayton challenged the licensing scheme only to the extent that it applies to African hair braiding, not as part of a quest to deregulate cosmetology, the court said.

It found that the cosmetology/barbering license scheme is "so disconnected from the practice of African hair braiding, much less from whatever minimal threats to public health and safety are connected to braiding, that to premise [Clayton's] right to earn a living by braiding hair on that scheme is wholly irrational and a violation of her constitutionally protected rights."

Self-created "internship" doesn't meet license requirements

Issue: Sham compliance with licensing requirements

A candidate for a social worker license failed to meet licensure requirements when he spent his mandatory internship time as an intern with his own company, the Supreme Judicial Court of Maine ruled July 3 (*Steven R. Danzig v. Maine Board of Social Worker Licensure*).

The licensure candidate at issue in the case, Steven Danzig, completed a master's degree in social work in 2007 and began to amass the requirements for a social worker's license, which included a clinical internship with 96 hours of

consultation with a current license holder over the course of two years, concurrent with 3,200 hours of social work employment.

Having already worked as a substance abuse counselor, including time as a Licensed Alcohol and Drug Counselor, Danzig had experience in the field and ran a licensed outpatient center through a corporation he had started in 2004, Danzig Counseling Services.

In order to meet the licensing requirements, Danzig got creative. As executive director of Danzig Counseling Services, he hired Barbara Harding-Loux, a licensed social worker, to be his practitioner consultant on a part-time basis, while Danzig continued providing counseling services under the umbrella of the corporation.

Unfortunately for Danzig, however, the rules of Maine's Board of Social Work Licensure will not allow for self-employment to count towards its internship requirements, with the relevant statute stating that "credit will not be given for practice with formal or informal affiliations of licensees or self-employed licensees." The board denied him a license and even found that he had engaged in the unlicensed practice of social work, though it declined to sanction him for it.

Undaunted, Danzig fought on, appealing the board's ruling and arguing that as an "employee" of his incorporated entity, he did not meet the definition of "self-employed," at least as the Internal Revenue Service uses that term.

The board countered that the IRS definition which Danzig relied on was irrelevant. Danzig was the executive director of Danzig Counseling Services, it noted, as well as the only licensed counselor it employed on-site, and had the power to fire his own practitioner consultant, from whom he hoped to get his internship consultation. In the board's opinion, Danzig was self-employed.

A lower court agreed with the board's decision and reasoning—the board was under no obligation to use the IRS definition of "self-employed"—and Danzig appealed to the Supreme Court.

That court also found in favor of the board. No competent evidence, the court declared, compelled it to overturn the board's decision, and the rejection of Danzig's license application would stand.

Court rejects distance doctoral program as basis for licensure

Issue: Online educational programs and licensing requirements

The state board of psychology did not act arbitrarily when it denied a license to a candidate because her online doctorate program, with no residency requirements, required classes, or grades, did not meet Pennsylvania requirements for a psychology license, the Commonwealth Court of Pennsylvania ruled August 13 (*Barbara Therese O'Toole v. State Board of Psychology*).

The licensure candidate, Barbara Therese O'Toole, completed a doctoral program in psychology at Union Institute and University, a distance learning school. The program is not accredited by the American Psychological Association and, while such programs can still be sufficient for licensure in Pennsylvania, they must meet certain criteria.

Unfortunately for O'Toole, Union's program for her was missing several of the necessary criteria. For example, while Pennsylvania requires that unaccredited doctoral programs in psychology have a core program designed by the school, O'Toole was allowed to create her own course of study, in many cases attending

conferences and programs intended for continuing education of license holders and having Union assign credit for them after the fact.

O'Toole also only met with faculty from the school for a total of 67 days, 11 of which involved a trip to the Galapagos Islands with seemingly unrelated coursework. Nor did she receive any grading or other assessments of her work.

When O'Toole applied for licensure, Pennsylvania's Board of Psychology denied her application. O'Toole appealed, and the case went before the Commonwealth Court.

Before the Commonwealth Court, O'Toole argued that the board had acted in an arbitrary fashion—that it had committed an abuse of discretion in denying her a license. The court, in an opinion by Judge James Gardner Collins, disagreed.

Pointing to the discrepancies between O'Toole's doctorate program and the requirements for that doctoral program to be sufficient for licensure in the state, Collins noted that "denial of licensure for failure to meet reasonable educational requirements in Board regulations does not constitute an abuse of discretion or arbitrary action."

"There was ample evidence," he wrote, "to sustain the Board's findings that Applicant's Union program failed to meet three requirement for valid doctoral degree under the Board's regulations."

And to the extent that O'Toole was challenging the regulations themselves, Collins confirmed that all of the relevant regulations were substantially and reasonably related to the board's mission of assuring adequate education and training in the profession of psychology.

Board overstepped bounds by forbidding non-licensee advertising

Issue: Restrictions on advertising by licensees

The Massachusetts Board of State Examiners of Electricians overstepped its authority when it forbade general contractors and other businesses from advertising for the installation of solar panels, a state court ruled July 20 (*John Carroll, et al v. Massachusetts Board of State Examiners of Electricians*). The case was heard by Justice Edward Leibensperger of the Superior Court of Massachusetts in Suffolk.

The case was brought by several general contractors in response to a recent adopted position by the electricians' board that only licensed electricians may install solar panels; therefore they are the only ones who may advertise installation. The board issued a memorandum on the subject and began to investigate claims of unlicensed practice, which resulted in proceedings against at least one general contractor.

Several general contractors brought the case in response to the electricians' board position that only licensed electricians may install solar panels; therefore they are the only ones who may advertise installation.

Although electricians are necessary to perform the wiring on solar panels, the collaborative nature of the work of installing panels means that general contractors who advertise for such installations and contract for the electrical portion of the job are not engaged in the unlicensed electrical work.

The board had modified its position by the time of the suit against it, in that it acknowledged that portions of solar panel installation, such as those involving their physical emplacement on rooftops, must be performed by professionals holding general contractor licenses. But the board nevertheless maintained that only if "the overall project is not electrical in nature" could general contractors advertise for the installation of the panels.

The statute that gives the electricians board its authority contained two paragraphs relevant to the suit. The first paragraph gives it authority over professionals engaged in a number of different types of electrical work. The second pertinent paragraph contains an exception to the first: That the board authority will not apply to anyone who contracts for the services of a licensed electrician.

The board of electricians claimed that the first paragraph ruled the issue; it argued that because the installation of the solar panel systems is fundamentally electrical in nature, no unlicensed person can engage in the business of such installations.

Judge Leibensperger disagreed, citing earlier case law. "In interpreting a similar plumbing statute," he noted, "the Supreme Judicial Court held that 'one becomes engaged in the business of a master plumber only when he 'performs plumbing work' either with his own hands or by the hands of journeymen who are under his control."

"When plaintiffs advertise or contract for a[n] . . . installation, they are engaged in the business of being a general contractor . . . and not in the business of being an electrician," he continued. If the second paragraph of the statute, creating exceptions from the first, were to have meaning, Leibensperger said, it "must apply to persons engaged in comprehensive projects, where some of the work is 'electrical' and some of it is not."

Further, Leibensperger concluded, no quantitative test exists for defining whether a total project involved a sufficient amount of electrical work to place it outside the realm of a general contractor, as long as the actual electrical work was done by a licensed professional. "The board's jurisdiction does not depend on whether the 'overall project' is 'electrical' in nature."

Take Note

Regulations challenged by former head of acupuncture board held valid

Issue: Procedural challenges to board regulations

Final regulations adopted by the New Mexico acupuncture board were valid, even though the board had initially implemented the regulations through an improper emergency proceeding, the Court of Appeals of New Mexico held August 8, over the objections of a former head of the board who had brought a lawsuit seeking to overturn those regulations (*Glenn Wilcox v. New Mexico Board of Acupuncture and Oriental Medicine*).

A practitioner and former board chairman, Glenn Wilcox, brought a lawsuit in 2010 when the board, having had a set of recent regulations covering expanded practice by its licensees overturned by a court for a lack of a written basis, instituted a set of emergency regulations which it felt were warranted because of the unclear status of *any* regulation in the field after the court case. Wilcox contended that no actual emergency existed at the time, and that therefore, the board had improperly used its emergency powers.

In any case, later in 2010, the board passed a set of permanent regulations, to which Wilcox also objected, and he filed a challenge in a lawsuit against the board. The new permanent regulations, he claimed, improperly restricted practitioners' ability to administer many substances and methods of treatments, and imposed a new fee scheme without providing a reasonable basis for the change.

The Court of Appeals, in an opinion written by Chief Judge Celia Foy Castillo, tackled the issue of the emergency regulations first. Surveying the board's empowering statutes and past case law, Foy Castillo wrote that no emergency of the kind that would allow the board to make such a change existed.

While the board was indeed in a state of confusion following the overturning of its regulations in 2009, that court decision simply returned the regulatory situation to its state before the implementation of the rejected rules, a state that had existed for a period of two-and-a-half years prior.

"We conclude," she wrote, "that the Board's own state of confusion fails to qualify as an 'emergency' of the same kind or class of events as characterized in the statute and as commonly defined." The emergency regulations were invalid.

The permanent regulations passed in late 2010, however, *were* valid. Foy Castillo addressed several of Wilcox's arguments against the regulations, but found none of them persuasive. The board, she said, had been well within its authority when it created the new rules. The regulation of the use or non-use of the substances affected by the rules and noted by Wilcox, she wrote, was within the board's statutory authority, as was the new fee scheme the rules implemented.

Although the board had provided relatively little explanation for the fee increase—cited in the opinion were two brief statements by a board member just prior to the vote on the fees—Foy Castillo noted that it had still provided enough.

"If the Board expands or otherwise alters the certification or license renewal process for those involved in expanded practice, the Board is obligated to set fees for those administrative requirements. As the Board explained at its hearing, such certification takes up time of the Board and its staff and brings an added expense."

"We conclude that the fees added under the challenged regulations, none of which exceed limits established in the Practice Act, are authorized by the statute and that the Board adequately justified its reasons for implementing the fees."

Suit against American Board of Optometry dismissed

A judge in California dismissed a lawsuit against the American Board of Optometry which accused it of false advertising (*American Optometric Society v. American Board of Optometry*). The suit, brought by the American Optometric Society, had accused the Board of creating a credential process that was intended to fool the public into believing certified optometrists were specialists above and beyond the level of most licensees, similar to the board certification process for physicians.

Initially, the AOS had met with success in its lawsuit against the ABO. In a June 12 decision, presiding judge A. Howard Matz of the U.S. District Court for Central California rejected the ABO's motion for summary dismissal, writing that genuine issues of fact existed as to whether the organization was engaging in false advertising.

Much changed between June and August, however. In the subsequent trial, the AOS failed to prove its case. "In fact," Matz wrote in dismissing the suit August 23, "in a number of instances, the AOS presented evidence that negated elements of its claim." The plaintiff organization failed to prove that the Board made false statements or even that any of its members were likely to be injured as a result of the actions of the Board.

Matz ruled that no evidence existed that the Board had broken the law and the case was dismissed.

Following state lead, U.S. appeals court restores immunity in Alabama

Issue: Immunity for board members as state agents

The U.S. Court of Appeals for the 11th Circuit, following the lead of the Supreme Court of Alabama, has reversed a decision it made last year denying immunity to the Board of Dental Examiners of Alabama on the grounds that the board was not a state agency (*Natalie Versigilio v. Board of Dental Examiners of Alabama*).

The July 13 decision was an expected outcome of the case, given the court's obvious reluctance to issue its earlier contravening decision.

The case against the board was brought by employee Natalie Versigilio under the Fair Labor Standards Act. When the board objected to the suit, noting its status as a state agency and its concomitant immunity, Versigilio's attorney objected, pointing to the recently decided case, *Wilkinson v. Board of Dental Examiners*.

That case, a decision of the Court of Civil Appeals of Alabama, had found that despite several factors weighing in its favor, the dental board was not an arm of the state and was thus not entitled to immunity from suit.

In the *Versiglio* case, the 11th Circuit, in a decision by Chief Justice Joel Frederick Dubina, devoted three of its four-page opinion to reasons why the dental board should be considered an arm of the state. On the fourth page, however, Dubina reluctantly noted that "despite the strength of the Board's claim of sovereign immunity, . . . one fact weighs heavily against it."

That factor was the decision of the Court of Civil Appeals, which created the prospect of an adverse 11th Circuit decision being "diametrically opposed to the findings of the state's highest court to consider the issue," Urbina said.

"Such a ruling," he continued, "would also create the incongruous result of having a 'state agency' that is immune from suit under federal law but not under state law." The court affirmed that the dental board was not a state agency.

Flash forward to July. The Supreme Court of Alabama overturned Wilkinson, and, having anticipated the decision, the 11th Circuit withheld the mandate that would normally issue from one of its decisions. The court, freed from its earlier constraints, decided to hear the case again, and this time made a different decision.

Echoing his earlier ruling, Dubina now wrote: "Finding now that that the Board is not entitled to sovereign immunity would require this court to interpret Alabama law in a way that is diametrically opposed to the findings of the highest state court to consider the case. We decline to do so."

Professional Licensing Report is published bimonthly by **ProForum**, a non-profit organization studying public policy and communications, 4759 15th Ave NE, Suite 313, Seattle WA 98105. Telephone: 206-364-1178. Fax: 206-526-5340. E-mail: plrnet@earthlink.net Website: www.plrnet.org Editor: Anne Paxton. Associate Editor: Kai Hiatt. ISSN 1043-2051.
Subscriptions, which include both printed and PDF copies of each issue, are $198 per year, $372 for two years, $540 for three years, $696 for four years. Additional print subscriptions mailed in the same envelope are $40 each per year and include a license to distribute a PDF copy. Licenses to distribute extra PDF copies only are $15 each per year. Back issues are available for $40 each. For an index to back issues, please see our website at www.plrnet.org.