Professional Licensing Report

Licensing, testing, and discipline in the professions

March/April 2010
Vol. 21, Numbers 9/10

Highlights in this issue:

Plus: *Certified documents, character references, drug abuse, public information on discipline, unlicensed practice, bizarre psychologist, title act limitations, reciprocity, criminal records.*

Professional Regulation

Board lapses blamed as diverse courts scuttle revocations, rules, test scores

It's not a new trend. But in a striking number of recent cases, oversights and documentation errors by licensing boards have led state appellate courts to reverse board decisions on discipline, adoption of new rules, and even licensing exam results. Following are four cases in which errors led to the upset of rules or licensing and discipline decisions in March and April.

Under the wire

Candidate wins last-chance exam retake over board non-compliance with law

Issue: Passing scores

Failing the licensing exam four times in California is normally the end of the road for a medical school graduate. But, because of a board omission, a candidate who had exhausted the maximum number of tries on her medical licensing exam without passing won the right to one final retake (*Yvette Marquez v. Medical Board of California*), in a March 1 ruling of the Court of Appeal of California. This time, she passed.

The candidate, Yvette Marquez, charged correctly that the Medical Board of California had failed to comply with state law requiring it to establish a passing score by board resolution. Instead, the board had accepted the recommended minimum passing score for the exam as established by the administrator, the Federation of State Medical Boards.

Marquez took Part III of the three-part U.S. Medical Licensing Exam (USMLE)—the last exam required to obtain a license—for the fourth time on May 13, 2008. The recommended FSMB passing score had been changed that month from 184 to 187.

Marquez received a 184, and the board informed her that she was not eligible for a license. It denied her request for a waiver of the four-attempt limitation, and also denied her request for a formal hearing.

When Marquez filed suit, a trial court acknowledged that the board had never established a passing score by resolution, but that the board had "implicitly" adopted the FSMB recommendation when it adopted the USMLE exam in the early 1990s. The board itself believed it no longer had the authority to set the passing score because it had delegated that authority to FSMB.

The appellate court disagreed. To the contrary, the court said, the board never explicitly delegated the authority to set the passing score; it simply approved adoption of the exam. This omission invalidated the passing score.

"Ignoring a statutory mandate nullifies the legislature's valid purposes and results in tangible harm. If a statute requires an agency to dot its 'I's' and cross its 'T's', the legislature's will must be done," the appellate court said.

The court rejected Marquez's argument that it should order the board to declare her score of 184 a passing score, since 184 was no more valid a score than 187. However, the court said, with no established passing score Marquez's May 2008 exam "was in effect a futile act." "It would be unjust to treat such an examination as a legitimate and in plaintiff's case last attempt to become licensed to practice medicine."

In the appeal, said Marquez's attorney Justin Sanders, the court was receptive to the point that the failure to adopt a passing score invalidated the test result. "The court said we believe you and how should we fix this. I asked them to order the board to issue her a license, and they refused. But what they did was reach a middle ground to give her another chance."

The trial court had ruled against Marquez partly out of concern that a decision in her favor would "open the floodgates" for other candidates who had failed the test the maximum number of times, Sanders said. "Obviously anybody else in a similar situation would have a case." But, as he argued to the appeals court, "there aren't that many people in that situation. Ninety-six percent of people pass the test on the first try."

Marquez took the exam a fifth time while the case was still pending, and received a score of 188. "So once we won the appeal, the medical board said she had already received a passing score, and they licensed her."

Board spokesperson Candis Cohen confirmed that the board does not plan to appeal the ruling, and now annually sets a passing score as state law requires.

Regulations cancelled due to lack of supporting explanation

Issue: Promulgation of rules

A New Mexico appeals court cancelled adoption of new acupuncture rules by the state Board of Acupuncture and Oriental Medicine for lack of supporting reasoning, in an April 1 decision (*Glenn Wilcox v. New Mexico Board of Acupuncture and Oriental Medicine*).

Despite 800 pages of evidence offered by the board to support the new rules, which relate to acupuncturists' scope of practice, the Court of Appeals of New Mexico set them aside in an unpublished opinion, finding for Glenn Wilcox, a Doctor of Oriental Medicine and former member of the board, who had appealed the decision to promulgate the rules.

In making its decision, the court rejected several arguments from the board. Foremost among them was the assertion that, because no statute required the

board to supply reasoning in support of its rules, no reasoning was necessary. Reasoning was still required, the court explained, because the law authorizes judicial review of promulgated regulations, and "[t]here must be something in the record to which we can point as explanation for why the board deemed it necessary to amend its regulations."

The court acknowledged that there was "a good deal of information in the record." But, it said, "there is nothing in the record explaining the board's reasons for adoption of the regulations in the face of what appears from the record to be some strong opposition."

Due process requirements also apply to the adoption of regulations by the board because, "although there is no fundamental right to due process before an agency adopts a rule, . . . the general notions of notice and opportunity to be heard have been made applicable by statute."

Revocation lacked fact-finding to justify it, court rules

Issue: Formal decision requirements

A Missouri court rejected the discipline of a doctor March 30 because a board failed to include findings of fact related to its decision (*Krishnarao Rednam, M.D. v. State Board of Registration of the Healings Arts)*. The physician, Krishnarao Rednam, was disciplined following a criminal conviction, with the State Board of Registration for the Healing Arts revoking his medical license and imposing a seven-year ban on application for reinstatement.

Because the board offered no evidence or reasoning in support of the latter punishment, the Court of Appeals of Missouri, Western District, overturned a lower court decision and remanded the disciplinary case to the board for further action.

In 2008, Rednam pled guilty to obstruction of justice following a criminal inquiry into his reimbursement practices. Following this, and without argument from Rednam, the Board held an automatic revocation hearing, at which Rednam was stripped of his license to practice medicine.

The board itself conceded that there was "no question" that its order contains no specific findings of fact related to the mandatory hold on Rednam's applying for reinstatement.

The court said that it was possible to understand why the board ruled as it did, but that the court was "not permitted to make such inferences."

During the hearing, much was made of Rednam's charitable works, his skill as an ophthalmologist, his post-obstruction cooperation with the investigation against him, and his seemingly sincere attempts at rehabilitation. With this information as his support, the doctor asked the board not to exercise its discretionary power to forbid, for up to seven years, his application for reinstatement.

The board was unmoved. Citing the exhibits offered in support of Rednam's fine, and the serious criminal behavior that led to revocation of his license, it proceeded to impose the full seven-year prohibition on application for reinstatement without any further finding of fact. Rednam successfully appealed this decision to a circuit court, who ordered the board to remove the constraints on his ability to apply for reinstatement.

The Court of Appeals overturned both prior decisions. It said the board's order barring Rednam from applying for reinstatement for seven years was not supported by any evidence and was therefore invalid, and the lower court overstepped its authority when it ordered the board to remove all constraints on Rednam's ability to apply for reinstatement.

Rejecting the lower court's decision to mandate board action as overstepping its authority, the Court of Appeals returned the case to the board so that it could change the order barring Rednam's re-application.

Discipline rejected for lack of certified documents

For lack of a sworn affidavit, the case was lost. So ruled the Supreme Court of Ohio in March, when it rejected, for lack of proper certification of documents, a disciplinary action by the Cincinnati Bar Association (*Cincinnati Bar Association v. Newman*).

After Cincinnati attorney George Newman III pled guilty to bank fraud in September 2007, the Cincinnati Bar Association moved to have his law license indefinitely suspended. Newman failed to respond or participate in the process, and the bar association filed for a default judgment.

The proceeding did not go as planned. Instead of default judgments suspending Newman's license, the court rejected the suspension. For default judgments, the Bar Rules require "[s]worn or certified documentary prima facie evidence in support of the allegations made." This requires either certification of a copy, "usually by the officer responsible for issuing or keeping the original," or attachment of the papers to the affidavit, "coupled with a statement therein that such copies are true copies and reproductions."

The bar association did neither. "Based on the foregoing, we reject the findings of fact, conclusions of law, and recommendation of the board, because the record before us lacks sufficient sworn or certified documentary prima facie evidence in support of relator's allegations." The court returned the case to the board, where it would have a second chance to submit the necessary documents.

Testing

Test-taker with speech disorder gets text-to-speech accommodation

Issue: ADA accommodations for licensing examinations

For the first time, a medical student with a severe stuttering block, also known as a stammer, has won the right to employ an electronic "text-to-speech" accommodation in taking Part II of the U.S. Medical Licensing Exam, a test involving interaction with standardized patients, which is required for state licensure (*Aaron L. Hartman v. National Board of Medical Examiners*).

A federal court ordered March 22 that the National Board of Medical Examiners (NBME) allow the student, Aaron L. Hartman, to use a text-to-speech device to take the clinical skills examination. However, in deference to the NBME, which insisted use of the device would fundamentally alter the exam, the U.S. District Court for the Eastern District of Pennsylvania also required that Hartman be tested a second time without the accommodation.

Hartman, a fourth-year medical student at SUNY Stony Brook School of Medicine, has a profound stutter that can result in pauses between syllables, called blocks, ranging from several seconds up to half a minute or more. He failed the USMLE Step 2 clinical skills exam once, and failed the Communication

and Interpersonal Skills component of the test which uses trained standardized "patients" to assess questioning skills, information-sharing skills, and professional manner and rapport.

He requested several accommodations for the retake of the exam, and the NBME agreed to provide him double time for each patient encounter, and in-person encounters instead of telephone encounters, but it refused him permission to use a text-to-speech device during in-person patient encounters. Hartman wished to use the device intermittently when he has severe stuttering blocks.

When he sued, the court noted there was not much dispute that Hartman was disabled and that his ADA accommodation requests had been denied. The remaining criterion that accommodation requests must meet is reasonableness.

Under the Americans with Disabilities Act, to modify an exam, it is a plaintiff's burden to show there is a reasonable accommodation available. The test maker has the opportunity to prove that the modification is an undue burden or fundamentally alters the exam.

The U.S. Department of Justice has held that, under the ADA, use of a text-to-speech device for a licensing examination is a reasonable accommodation so long as it does not preclude assessment of the particular skills the examination purports to measure, thereby fundamentally altering the examination.

The court found that use of the device was reasonable. During his testimony, the court said, Hartman demonstrated that he can use the text-to-speech device in a way that "ameliorates his most severe blocks or speech disfluencies but does not replace his normal speech."

"Hartman spoke in his own voice clearly and articulately. Intermittent use of the text-to-speech device will not hinder the standardized patients' ability to grade how and with what skill Hartman can speak in the English language."

But to address the NBME's view that the device is a fundamental alteration, the court agreed that NBME "has the option of requiring that Hartman also take the examination with only the accommodation of double time and the replacement of telephone patient encounters with in-person patient encounters." NBME could thus elect to provide two scores for Hartman, along with an explanation of the accommodations provided at each test administration.

Because scoring of the exam is carried out through a "cohort process" in which each test-taker's results are normed against the others' results over a several-week period, the court ordered that the NBME and Hartman create a joint proposed order implementing the testing arrangement well in advance of the March exam.

As it turned out, Hartman took both the regular exam and the exam with the text-to-speech accommodation, reports Charles Weiner, a disability rights lawyer who argued his case. Hartman passed the exam without the accommodation.

Nevertheless, Weiner said, the ruling is "certainly a win for people with disabilities, particularly those with stutters." The case shows that there are reasonable accommodations for such people, and they work, he said.

Discipline

Character reference and rehab fail to compensate for failed drug test

Issue: Discipline for substance abuse

A dentist did not show sufficient cause why the Missouri Dental Board should not revoke his license, even though he entered a rehabilitation program and voluntarily stopped practicing dentistry,

the Court of Appeals of Missouri, Western District, held March 9. (*David L. Moore v. Missouri Dental Board*).

The licensee, David Moore, tested positive for cocaine on August 31, 2007, following a drug test that had been required by the board as part of discipline imposed on Moore in an earlier disciplinary proceeding.

At a hearing, the board counsel confirmed with Moore that he had failed the drug test, then rested his case. Moore's attorney admitted exhibits relating to Moore's rehabilitation efforts and a character reference by Ira Davis, director of the Missouri Dental Well Being Program, who opined that Moore should be permitted to return to practice. The board, however, voted to suspend his license for one year.

On appeal, Moore contended that the revocation was not supported by competent and substantial evidence. He suggested that the board was bound to follow the recommendation of Davis who contended Moore was being successfully rehabilitated. But the court said Moore "simply disagrees with the Board's decision."

"Moore failed to satisfy the terms of his probation and expressly violated the most compelling term of his probation—to remain drug free," the court noted. "The board was not obliged to believe that Moore would not relapse again and, given its obligation to protect the public, acted prudently in revoking Moore's license for at least one year."

Board cannot scrub discipline of former licensee from board site

Issue: Public discipline records

The Medical Board of California has a statutory requirement to publish disciplinary information about former medical licensees as well as current licensees, a court ruled in April (*James E. Fulton, Jr. v. Medical Board of California*).

Rejecting the appeal of James Fulton, a former licensed physician who had argued that the board did not have the power to publish the discipline of former licensees, the Court of Appeal of California, Second Appellate District, ruled that the legislature intended that the board disclose information about past licensees when it passed the statute in question.

Fulton was a licensed physician in California until 2003, when he voluntarily surrendered his license to settle discipline actions initiated by the Medical Board. At that time, several other state boards had also initiated complaints against Fulton.

Under a policy initiated that year, the board now publishes not only its own disciplinary actions, but the actions of other state boards, as well as felony convictions, and malpractice suits occurring during a doctor's licensure period in the state. This meant that the whole gamut of disciplinary actions initiated against Fulton could be viewed through the website of the board.

Fulton sued to stop the listing of his disciplinary actions, claiming that the board was not required to publish such information about former licensees. In the intervening years, Fulton had been lecturing on skin diseases, answering questions about skin conditions through a website, and otherwise promoting skin care products for two dermatologically-focused companies.

During this work, several promotional documents listed him as an M.D. In his suit, he claimed that the information on the website caused the loss of job opportunities and resulted in "public and private ridicule and embarrassment." A trial court rejected his claims and Fulton appealed.

The Court of Appeal upheld the ruling of the lower court; the language of the statute in question, as well as its legislative history, indicated that the board was actually *required* to publish the information in question.

The key part of the statute was the requirement that the board disclose license revocations and other enforcement actions for ten years after the information became known, the court said. "By definition, in the case of revocations, the board was required to post discipline information about former licensees. To rule otherwise would defeat the purpose of the statute.

Further, the court stated, "[t]he facts of this case illustrate the correctness of the board's interpretation of the statutes….The public has an interest in the professional disciplinary history of an individual who affiliates with the practice of medicine, and the board's disclosures further the public safety and welfare."

Constitutional search & seizure protection does not apply to licensee

Issue: Licensees under investigation

A physician has "no reasonable expectation of privacy in patient records," the U.S. District Court for the Southern District of Ohio ruled April 23 in the case of a psychiatrist who was being investigated by the state medical board *(Bernard DeSilva v. State Medical Board of Ohio, et al.*).

The state medical board wrote to the psychiatrist, Bernard DeSilva, in 2007, asking him to meet with a Quality Intervention Panel over some concerns with his prescribing practices. The board also sent an investigator, Mark Demeropolis, to DeSilva's office. Demeropolis asked for information about a patient but he did not have a warrant. The board also sent several investigators with a warrant who also sought patient records.

DeSilva sued the board, the enforcement attorney for the board, and the board secretary, maintaining that they have damaged his career and reputation, that if the disciplinary action is made public his insurance will be cancelled or become prohibitively expensive, he will lose his livelihood, his patients will be without a physician, and he will suffer pain and mental anguish.

The court noted that a confidential complaint had been filed against DeSilva and an investigation commenced, but no hearing or other disciplinary proceeding had been announced.

The fact that DeSilva voluntarily complied with the subpoenas and permitted Demeropolis and other inspectors to conduct their investigation of his office "obviates the need for a warrant or a finding of probable cause," the court said in dismissing DeSilva's complaint.

While the Fourth Amendment to the U.S. Constitution says "searches conducted without a warrant issued upon probable cause" are "per se unreasonable," the protection is subject to a few exceptions, the court said. One exception has developed for "pervasively regulated business" and "closely regulated industries." A pervasively regulated business is one that has "such a history of government oversight that no reasonable expectation of privacy could exist."

No Ohio court has held that the practice of medicine is a "pervasively regulated business," but the Ohio Supreme Court has held that a physician cannot rely on the physician-patient privilege to prevent the board from compelling production of patient records in an investigation, the court said.

Lawyer whose own research "exonerated" him is a threat to public

Issue: Unlicensed practice

An attorney's own research, showing that as a licensed chiropractor he could legally charge for examinations and injections of patients, demonstrated that he was a threat to the public, the Supreme Court of Ohio held April 8 (*Mahoning County Bar Association v. Theisler*).

Upholding the indefinite suspension of the law license of Charles Theisler, the court found that he had violated ethical standards incumbent on Ohio lawyers. In 2005, the attorney/chiropractor had been convicted of 98 counts of corrupt activity, drug trafficking, illegal processing of drug documents, and practicing medicine or surgery without a certificate.

The chiropractic board revoked his license as a result of the felony convictions, and his law license came under a cloud as well. In a hearing before the bar association's discipline panel, Theisler testified that during his employment with Pain Management Associates he was working as a "medical assistant," not a chiropractor, and he had erroneously concluded that that status allowed him to perform medical exams, give injections, and do any other clinical work that the physician might delegate to him under supervision.

The discipline panel decided to indefinitely suspend Theisler's law license without any credit for time served during his interim felony suspension.

On appeal, Theisler argued this punishment was too harsh and punished him disproportionately to others. The board, he pointed out, had noted that he was remorseful and that no patients were harmed by his conduct.

The court, however, found that 98 felonies warranted an indefinite license suspension. "A lawyer who (allegedly) researches an issue and, in reliance on that research, is convicted of 98 felonies, is as much of a threat to future potential clients as a lawyer who researches the law and knows his conduct is wrong but nevertheless commits the felonies," the court said.

Unusual behavior by psychologist was “willful and malicious”

Issue: Legal status of professional misconduct

The bizarre acts of a former Pennsylvania psychologist whose license was revoked were “willful and malicious” acts, a federal court ruled in March, barring him from using bankruptcy to avoid paying court-ordered damages (*In Re: Bruce L. Fechnay*).

The United States Bankruptcy Court for the Eastern District of Pennsylvania found that Bruce L. Fechnay committed an intentional tort with malice when he engaged in an unusual series of inappropriate sexual intimacies with one of his patients.

The allegations which form the basis of the case stem from a 2004 therapy session, when the client saw Fechnay, alone, as part of a couples therapy program. The nearly six-hour session eventually involved a treatment Fechnay called “touch therapy,” which involved, among other things, reading a children's book to the patient.

But the patient alleged that Fechnay had made inappropriate comments and physical advances, and she left, distraught, eventually seeking treatment from another psychologist for the trauma of the earlier session.

Later, a complaint was filed with the Pennsylvania State Board of Psychology and a civil suit was filed against Fechnay. He declined to respond to either, which resulted in the loss of his license and default judgment in the civil case. Fechnay later filed for bankruptcy, in hopes that it would block the damages awarded against him.

Although Fechnay disputed the plaintiff's version of events, the court found her completely credible. It credited the consistency of her story and the real trauma she seemed to have suffered from the encounter. The court also declined to give credence to Fechnay's theories as to why the patient might lie.

Besides not being convinced by his logic and the circumstances of the patient, the court that Fechnay's "treatment notes" (parts of which appeared to have been created in expectation of an adversary proceeding) indicated that he had begun "to indulge in fantasy," and that the notes more likely reflected the "debtor's own misplaced fantasies." Fechnay's failure to participate in the disciplinary process or civil trial also influenced the court.

Explaining that the bankruptcy laws do not protect against debts incurred "for willful and malicious injury by the debtor," the court held Fechnay to be liable for the damage award. The plaintiff, the court said, had successfully shown that the psychologist's actions constituted the intentional tort of battery. As "an experienced clinical psychologist," Fechnay "surely was aware . . . that engaging in the sexual intimacies or misconduct that he did on December 28 would cause (as it did) emotional injury to the plaintiff."

Citing a 2004 case*, In re Roe*, the court explained that malice may be inferred in a situation where a party knows that an action would injure another. Therefore, Fechnay had caused a willful and malicious injury, and his bankruptcy would not protect him from the plaintiff's damage award.

Personal relationship with client is conflict of interest—even for CPAs

Issue: Conflicts of interest

An accountant who carried on an affair with the wife of a client while he was preparing their tax joint returns was not wrongly disciplined by the state accountancy board, the Supreme Court of Idaho held April 23 *(Michael A. Duncan v. State Board of Accountancy*).

The American Institute of Certified Public Accountants' ethics rule on conflict of interest provides that it "may occur if a member performs a professional service for a client or employer and the member or his or her firm has a relationship with another person, entity, product, or service that could, in the member's professional judgment, be viewed by the client, employer, or other appropriate person as impairing the member's objectivity. If the member believes that the professional service can be performed with objectivity, and the relationship is disclosed and consent is obtained from the client...the rule shall not operate to prohibit the performance of the professional service."

The court ruled that the Idaho State Board of Accountancy reasonably concluded the accountant was required to either terminate services or disclose his conflict of interest to both parties and obtain their consent for the continued provision of tax services.

The accountant, Michael Duncan, had prepared tax returns for Randy and Evelyn Forsmann since 2001. In 2004, Evelyn asked Duncan to recommend a divorce attorney, and the two of them formed a personal relationship that developed during the course of the divorce.

Randy Forsmann filed a verified complaint with the state accountancy board, alleging that Duncan had continued to work on a joint tax return for the Forsmanns after the personal relationship began, and that this constituted a conflict of interest in violation of state rules and the ethics code of the American Institute of Certified Public Accountants.

Following a hearing, the state board held that Duncan had a conflict of interest that he failed to disclose, and it ordered him to pay $1,000 in administrative penalties, pay $2,000 in administrative costs, and undergo four hours of ethics training. A district court upheld the ruling.

In his appeal, Duncan argued that the ethics rule does not require an accountant to disclose a conflict of interest when all parties are already aware of it, and that he was not giving tax or financial planning advice to the Forsmanns. He also contended he could not have violated the ethics rule because he performed no substantive work after the time when the conflict arose; he filed for a tax extension.

The board decided that Duncan had indeed performed tax services during the period of time after his relationship with Evelyn began. The court found that the board's reading of the AICPA on conflict of interest is reasonable and "consistent with sound public policy."

"If the accountant were allowed to make the determination that the parties knew or may have known of his conflict, the client is at the accountant's mercy, dependent on the accountants' subjective understanding of the client's thoughts and concerns. Professional standards should not be dependent on the accountant's subjective understanding of what he may think the client understands…The burden of disclosure of the conflict is on the agent."

The court noted that requiring affirmative disclosure by the accountant and assent by the client serves the rationale of repose, "preventing a potential conflict from hanging over the parties' heads while the accountant makes an attempt to ascertain whether the conflict was discovered and impliedly acquiesced in by the clients."

Court rejects 30-day grace period for billing mistakes

Issue: Offenses subject to discipline

Chiropractors are not entitled to an automatic 30-day grace period to correct all billing mistakes in order to avoid discipline, the Court of Appeal of California, Third District ruled in April (*Paul Jeffrey Davis v. Board of Chiropractic Examiners*).

In the unpublished opinion, the court ruled that the wording of a board regulation requiring restitution within 30 days to clients who were overbilled did not create a "safe harbor" for committing mistakes. It also ruled that chiropractic regulations prohibiting excessive treatments were not void for vagueness and upheld an order to reimburse the board for the costs of disciplinary proceedings.

Chiropractor Paul Davis appealed the discipline of the California Board of Chiropractic Examiners: a stayed revocation, three years' probation, and $72,000 in costs imposed for negligence in billing and excessive treatment. Citing a board regulation declaring that failure by a licensee “within 30 days after discovery or notification of an error which resulted in overbilling, to make full reimbursement constitutes unprofessional conduct,” Davis asked the court to provide a “safe harbor” for chiropractors to make billing mistakes, as long as they are corrected within 30 days.

Unconvinced that the regulations were intended to give blanket impunity to chiropractors for billing mistakes, the court rejected the argument, finding the 30-day provision to be a negative commandment. While a delay of over 30 days in

correcting a billing error would be unprofessional, the regulation did not convey the opposite—that a billing error was unprofessional only after 30 days.

The regulation in question, the court said, explicitly imposes a duty to ensure accurate billing. "We will not presume that the board intended to create such a gaping loophole for negligence at the same time it found a need to impose a strict liability on chiropractors to make sure all billing for chiropractic services is accurate."

Davis also attacked a board regulation defining, as unprofessional conduct, "[t]he administration or the use of diagnostic procedures which are clearly excessive as determined by the customary practice and standards of the local community of licensees" as unconstitutional for vagueness.

"Excessive treatment," Davis argued, was so vague that he had to guess as to its meaning and "people of common intelligence differ as to its application."

As evidence, he offered the conflicting testimony of the two sides' expert witnesses in the case. Davis' own witness, Michael Martello, described a course of treatment involving 160 treatments for a single patient as a "wonderful treatment plan."

Assessing the challenged regulation in the context of the case, the Court of Appeal rejected Davis' arguments as "nothing but a disguised factual challenge to the sufficiency of the evidence" supporting the finding of excessive treatment. In assessing the local standard of treatment, the trial court had sided with the board's expert, Phillip Rake, who testified that a course of treatment, if failing to improve a patient, should be discontinued.

The court seemed to sympathize with Davis, since the patient had suffered two industrial accidents at two different workplaces, each with a different insurer, resulting in a unusually complicated billing plan. But having rejected his arguments, it upheld the full $72,242.80 in costs imposed by the board.

"Name-clearing hearing" for disciplined licensees not required

Issue: Professional reputation

Rejecting a request by a disciplined doctor for a "name-clearing hearing," the Court of Appeal of California, Third Appellate District, ruled March 12 that such "name-clearing hearings" are not available to professionals who had an initial right to a hearing. (*Nizar Yaqub v. Medical Board of California*).

Nizar Yaqub, faced with a disciplinary hearing in spring of 2003, entered into a settlement with the Medical Board of California, in which he signed away his right to hearing. His medical license was suspended for one year, he was placed on 10 years' probation, and was subject to other education and monitoring requirements. In March 2008, Yaqub asked a trial court to force the medical board to provide a "name-clearing hearing," in which he could contest the accusations made against him in the original disciplinary action.

The Court of Appeals rejected Yaqub's argument for a hearing. The case Yaqub had cited in favor of his proposition, *Katzberg v. Regents of University of California*, involved a professor who was removed as a department chairman by university officials. The professor successfully brought a claim to a "name-clearing hearing," citing a constitutionally-protected liberty interest to be free from stigmatizing charges.

As the court pointed out, however, the *Katzberg* case involved an individual with no statutory right to a hearing. Initially, Yaqub did have such a right—the California Administrative Procedure Act provides for a formal hearing process—but he waived it by signing the settlement in 2003. The court declined to afford Yaqub a second chance for a hearing.

Licensing

ACLU to represent applicants in challenge of mental health questions

Issue: Information requested on license application

The American Civil Liberties Union is an appropriate class representative to represent takers of the Indiana bar exam in a class action against the state board of law examiners, the U.S. District Court for the Southern District of Indiana held March 25 (*Amanda Perdue et al. v. The Individual Members of the Indiana State Board of Law Examiners*).

The ruling was the latest of several in the case that bar applicant Amanda Perdue and others filed last year to challenge the questions applicants must answer as to whether they have ever been treated for a mental illness.

In January, the same court declined to take up the issue of whether the ACLU was an appropriate class representative, and requested the board and the plaintiffs to file briefs on the issue. Five members of the ACLU submitted affidavits attesting that they (1) are members of the ACLU, (2) plan to take the bar exam in the appreciable future; and (3) will have to answer at least one of the challenged questions in the affirmative.

In its March decision, the court agreed that all five of these individuals "will suffer an injury in fact that is traceable to" the board's conduct.

The individual board members argued that the ACLU is not an appropriate class representative because it may have an antagonistic or conflicting claim, and it could withdraw its support for this litigation at any time.

The court dismissed this reasoning as speculative.

Company's name not violation of licensing law

Issue: Variations of protected titles

A company with the word "Survey" in its name was not attempting in any way to practice land surveying in Louisiana, but only seeking bids to have survey work done, the Court of Appeal of Louisiana held February 10 (*Survey America Inc. v. Louisiana Professional Engineering and Land Surveying Board*).

"Even though the word 'survey' is used in the name of the business and a survey tripod is used to form the letter 'A' in 'America,' such use does not tend to convey the impression that Survey America was a professional 'land surveyor' or 'land survey' firm practicing or offering to practice in Louisiana," the court said.

Agreeing with a district court, the appeals court found that the state land surveying board had clearly abused its discretion in finding that the company Survey America Inc. violated state licensing laws.

The case arose when Survey America, a foreign corporation with its principal place of business in Indiana, faxed four registered Louisiana surveying firms in 2006

soliciting price quotes for land survey work it needed done in Louisiana. It hired and paid two of the firms for their services. An employee of one of the four firms was a member of the state engineering and land surveying board, and he submitted a complaint to the board.

He contended that Survey America, by using the symbol of a tripod on its letterhead and using the word "survey" in its business name, had violated state licensing law. The board held an informal conference call with Survey America but failed to resolve the matter, and in September 2007 it found that by using a derivative of the term "land surveyor " in its name, it was considered to have offered to provide professional services in the state without a license. A fine of $5,000 was imposed, plus $6,087 in costs.

The district court and now the appellate court agreed that the board was in error. "It would be absurd" to think that an out-of-state land surveyor would have to obtain a state license merely to hire a land surveyor in Louisiana, the court concluded.

Veterinarian fails in bid to force board to accept reciprocity

The West Virginia Board of Veterinary Medicine has powerful discretion to decide whether reciprocity will be granted and may deny licensure to experienced veterinarians who fail to submit current National Board Examinations (NBE) scores, even if evidence of past NBE scores, submitted to other states, is available, the Supreme Court of Appeals of West Virginia held April 1 (*James Michael Casey v. Virginia Board of Veterinary Medicine*).

The court overturned a trial court's decision requiring the board to interview him as the last step in obtaining a Virginia veterinary license.

Casey, who is licensed in eight other states, had applied to obtain a West Virginia license through examination, one of three possible routes to licensure. The board allowed Casey to sit for the state examination, and the doctor fulfilled all the requirements for West Virginia licensure except for the transmittal of an NBE score.

That score was never transmitted and, with the board refusing Casey a license, he successfully filed suit to force the board to grant him a license.

At trial, however, Casey did not contest the board's rejection of his application for lack of an NBE score. Instead, he argued that reciprocity principles obligated the board to grant him a license. The trial court agreed, citing Casey's history of practice in eight other states and stating that Casey "has surpassed the requirements for licensure in the State of West Virginia."

On appeal, the Supreme Court rejected this line of argument. "Dr. Casey asks this court to disregard the legislature's specific grant of discretion to the board to determine when admission by means of reciprocity will be permitted." The court cited the testimony of Wanda Goodwin, the board's executive director, that in the 28 years of her tenure, the board had never accepted reciprocity applicants without qualifying NBE scores.

At one point in the trial, Casey's attorney argued that Casey's prior NBE score, submitted to Georgia in 1987, should be sufficient for West Virginia. At trial, Casey maintained that the ability to transmit scores through a national testing service was not available in 1987. Instead, his NBE score was submitted

by the Georgia Secretary of State. After reviewing the evidence, the trial court found that the scoring criteria for Georgia and West Virginia were "essentially the same in 1987," and ruled that Georgia's standards were actually more stringent.

The writ of mandamus had been granted because the board's rejection of the evidence of Casey's 1987 NBE score was "arbitrary and capricious." Goodwin replied that the board had no way of determining Georgia's scoring method, and stated "It's not up to Georgia to determine West Virginia's scoring criteria."

The Supreme Court agreed with the board, simply stating that "Appellee offers no evidence…to support his contention that the board's failure to grant him a license was arbitrary or capricious."

Board may use felony to deny license, despite expungement

Issue: Grounds for discipline

Even though her felony-theft conviction was expunged, the state board regulating teachers could legitimately use an applicant's conviction to deny her a license, the Court of Appeals of Arkansas held April 14 (*Deborah Landers v. Arkansas Department of Education*). The decision upheld a circuit court ruling.

Landers pled no contest to theft of property in 2005, based on misappropriation of $36,000 from the Faulkner County Conservation District. She was ordered to pay full restitution and was sentenced to 60 months' probation.

Under Arkansas law, convictions of first offenders in which the sentence is probation are automatically expunged upon successful completion of probation, and the individual's underlying conduct shall be deemed as a matter of law never to have occurred. The individual may state that the conduct never occurred and no such records exist.

Landers contended that the decision of the board to consider her properly expunged conviction in her license application is in direct violation of Arkansas law. While the statute makes an exception for the crime of sexual or physical abuse of a child, the fact that theft of property is not listed as an exception means that in legal terms she has no longer committed any offense. In fact, state law also provides that the only time the "clean slate" effect does not apply is when "specifically provided by law."

The court found, however, that licensure is a different case. Because the Board of Education is allowed to consider nolo contendere as well as guilty pleas in applications for licensure, "It is clear that the General Assembly intended" for all such cases to be prohibited from receiving a teaching license regardless of whether their record has been expunged.

The board said it had considered Landers' request for a waiver upon consideration of factors such as her age, character and circumstances surrounding the crime or incident, but her "criminal conduct and lack of remorse" plus lack of support from her employer, were factors in the board's rejection of Landers' request. The court agreed that the board's denial of the waiver is supported by substantial evidence.

Bid to skip test based on "grandfather" principle fails

Issue: Waiver of entry requirements

A speech pathologist who sought to skip New York's entrance test because the test had been waived for him under a "grandfathered" license in Illinois was denied reconsideration by the U.S. Court of Appeals for the Second Circuit in a February 22 decision (*Patricio R. Mamot v. The Board of Regents, New York State Education Department and University of the State of New York*).

The pathologist, Patricio Mamot, worked as a consultant to the New York City Board of Education from January 1988 to 1996. In 1996 he was informed that his professional certification as a speech pathologist in Indiana was not recognized in New York, and he would have to pass a licensing reexamination.

Mamot's challenge of New York's law was rejected in 2001 but in 2005 he launched a new challenge, seeking by letter to reopen the case. He argued that he should be certified in New York because Indiana, where he was already certified, uses the same licensing exam.

However, he never took the exam because he was certified in 1973 before the exam was required—i.e., he was "grandfathered."

The court said it would try to judge Mamot's case less stringently because he was acting as his own lawyer, but it again concluded that federal court did not have any subject matter jurisdiction to decide his claim. Even if it did, the issues were the same ones Mamot raised in his previous challenge, and "he may not re-litigate claims previously decided by the court because they would be barred by the doctrine of res judicata," the court said.

California requires large-type notices of state physician regulation

Effective June 27, the information must read:

NOTICE TO CONSUMERS
Medical doctors are licensed and regulated by
the Medical Board of California
(800) 633-2322
www.mbc.ca.gov

Doctors have been added to nine other California groups of licensees that must directly inform their patients or clients that they are licensed by the state.

One of three methods can be used: prominently posting a sign in an area of the physician's office conspicuous to patients, in specified type; including the notice in a written statement, signed and dated by the patient and kept in the patient's file; or including the notice on letterhead, discharge instructions, or other document, with the notice placed immediately about the patient's signature line in specified type.

The medical board president, Barbara Yarolslavsky, commented that "it will take very little effort for physicians to comply" with this public protection requirement. The state pharmacy board, contractors board, and board of optometry are other state agencies that have similar disclosure requirements.

Take Note

Board, not executive director, authorized to hire and fire staff

The executive director of a medical board was not authorized to fire a human resources administrator who worked for the board, the Court of Appeals of Ohio,

Tenth Appellate District, held December 3, 2009 (*Gary J. Holben v. Ohio State Medical Board*).

The appeals court agreed with a lower court that the State Personnel Board of Review should not have dismissed the appeal of Gary Holben, the fired employee.

The situation began with several meetings between Holben and his supervisor, Richard Whitehouse, executive director of the Ohio State Medical Board, in which Whitehouse indicated the medical board members were dissatisfied with Holben's job performance.

In August 2006, Holben submitted a letter to Whitehouse and the board notifying them of his "intent to resign" his employment. Whitehouse responded with a letter stating, "On behalf of the state medical board of Ohio, your resignation has been accepted."

However, Holben submitted a letter on November 30, 2006, advising that he was rescinding his earlier letter and that it "in no way constituted a relinquishment of my employment." Whitehouse and the board denied the attempt to rescind, and Holben's last day of active employment was December 22, 2006. Holben then appealed to the state personnel board, which turned him down.

Now, two courts have said the personnel board was wrong because Whitehouse lacked the authority to formally accept Holben's resignation on the board's behalf. The board's yearly resolution appointing Whitehouse as executive director "authorizes him only to sign on the board's behalf in personnel action's and to do so only 'following resolution of the board to take such action.'"

Given that the resolution by the board regarding Holben did not take place until January 2007, Holben should have been permitted to rescind or withdraw his resignation in November before it became effective, the court held.

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: 206-250-5609. Fax: 206-526-5340. E-mail: plrnet@earthlink.net Website: www.plrnet.org Editor: Anne Paxton. © 2010 Professional Licensing Report. ISSN 1043-2051. *Subscribers may make occasional copies of articles in this newsletter for professional use. However, systematic reproduction or routine distribution to others, electronically or in print, including photocopy, is an enforceable breach of intellectual property rights and is expressly prohibited.* Subscriptions: $198 per year, $372 for two years, $540 for three years. Additional subscriptions mailed in the same envelope are $40 each per year.