Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue:

Licensing

Barring felons from licensure is unconstitutional, federal judge rules

Issue: Criminal convictions and eligibility for licensure

A state law categorically barring felons from holding a license to deal in precious metals was unconstitutional; the law had no rational connection to its stated purpose of preventing fraud in the profession, a federal judge in Connecticut ruled September 26 (*Barletta v. Rilling and The City of Norwalk*).

Michael Barletta, whose Connecticut precious metals license expired in 2003, was convicted of narcotics dealing in 2006. After serving three years in prison, he applied for a precious metal dealer's license with the office of the police chief of the city of Norwalk. However, the chief denied his application based on a state law that prohibits convicted felons from holding such a license.

*(See **Licensure**, page 8)*

Discipline

Appeals court reinstates discipline for sexual relationship ended 28 years before

Issue: Discipline for decades-old misconduct

An appellate court in Alabama reinstated discipline imposed on a psychologist for an inappropriate relationship initiated 28 years before, on grounds that the plaintiff did not show why the long delay would make the discipline unfair.

The September 27 decision in *Alabama Board of Examiners in Psychology v. Hamilton* reversed a lower court decision to throw out the case for the delay in prosecution.

In 2010, a patient accused psychologist C. Fletcher Hamilton of beginning a sexual relationship with her while acting as her therapist in 1982. A board action followed the complaint, but during the administrative hearing, Hamilton objected to the process, claiming that the actions he was accused of occurred too long ago to be the basis of discipline.

In his appeal, Hamilton made the same objection and a state circuit court agreed that 28 years was too long a delay. It reversed the board's decision. The board appealed that ruling, and the case went up to the Court of Civil Appeals of Alabama.

That court, in an opinion written by Judge Scott Donaldson, overturned the ruling of the lower court. When a party claims that the passage of time should bar a discipline action, he or she must show that the long delay would cause the proceedings to be unfair; Hamilton, Donaldson explained, had not shown that he would be placed at such an unfair disadvantage.

A party who claims that the passage of time should bar a discipline action must show that the long delay would cause the proceedings to be unfair, the court said.

Although Hamilton claimed that the routine destruction of patient and business records from 1982 compromised his ability to defend himself, the court ruled that he had failed to specify how those records could have helped him prove his case.

The surviving office documents actually showed that Hamilton formally ended the doctor-patient relationship with the woman before their romantic relationship had begun. But the administrative law judge who oversaw Hamilton's hearing had found, through the use of calendar entries and correspondence, that Hamilton continued to treat the woman with therapeutic advice *after* the date on which he had stopped keeping formal treatment records for her. Those records would therefore be irrelevant.

In a separate argument involving the long passage of time, Hamilton also argued that the "rule of repose," which bars civil actions made after 20 years, should prevent the discipline. However, Judge Donaldson noted, the state legislature had not included that rule when it created the state's Administrative Procedure Act, and no evidence existed to show that it applied to administrative proceedings. The board did not act incorrectly when it refused to apply the rule to its proceedings, the court found.

Closed-door session violates freedom-of-information law

Issue: Compliance with public records law

The Supreme Court of Connecticut upheld a ruling of the state's Freedom of Information Commission October 15, castigating the state's medical board for holding a closed-door session in violation of the state's Freedom of Information Act (*Chairperson, Connecticut Medical Examining Board v. Freedom of Information Commission*).

The board claimed that it went into executive session to discuss legal strategy regarding administration of the death penalty. In January 2009, the state Office of the Chief Public Defender submitted to the board a request for a declaratory ruling on the question of whether it would allow Connecticut physicians to assist in the execution of inmates in the state.

The following month, the Public Defenders Office sent a letter to an assistant attorney general, Thomas Ring, who would potentially represent both the board and the state's Commissioner of Public Health, noting a possible conflict of interest in the two clients and suggesting that the board be represented by an outside attorney. After the letter about Ring arrived, the board convened a short closed-door meeting to discuss it.

This action prompted the Public Defenders Office to file a complaint with the state Freedom of Information Commission claiming that the board had violated the state's Freedom of Information Act and seeking an order to force the board to disclose the contents of the meeting.

Although the board claimed that it had rightfully held the closed-door session to discuss a strategy to deal with an impending legal claim—an exception under the Act—the Commission found that the Public Defenders Office had purposely phrased its letter to avoid the implication that it was filing a legal action, and that the board had not actually discussed legal strategy during the meeting. The Commission ordered the board to "strictly comply" with the Act in the future.

The board appealed, and the case eventually made its way to the state supreme court, which issued an opinion written by Justice Peter Zarella.

In its decision, the court ruled in favor of the Commission, finding that the letter had not been notice of a pending legal claim. "The letter in the present case," Zarella wrote, "does not contain either a demand for legal relief or evidence of an intent to institute an action in an appropriate forum if the board does not grant that relief."

Zarella noted that, even if the Public Defenders Office had filed a conflict-of-interest claim against Ring, the board would not have been a party to that claim. Further, the conflict-of-interest posited by the Office was hypothetical only and its letter did not actually demand any legal relief or threaten legal action.

"The letter is not addressed to the board, does not require that the board take any action, and does not state an intent to bring an action in an appropriate forum if the board does not comply," Zarella wrote. "The board improperly convened in executive session to obtain legal advice regarding the issue raised in the complainants' letter."

Default judgment approved against licensee for skipping hearing

Issue: Due process in discipline hearing procedures

In an October 7 ruling, the Supreme Judicial Court of Massachusetts approved a default judgment entered by the state board of pharmacy that revoked the license of a pharmacist who did not show up for the second day of his hearing, claiming problems with securing his witnesses caused the absence (*Lawless v. Board of Registration in Pharmacy*).

Leo Lawless, a pharmacist, was fired from his job at Hanscom Air Force Base for "multiple patient safety adverse events." He had allegedly failed to accurately fill prescriptions, threatened his coworkers, and even left the pharmacy unattended on occasion. In response, the board summarily suspended his license and convened a hearing to determine if it should discipline him.

To prepare for his trial, Lawless subpoenaed witness from the Air Force base. However, a judge advocate at the base denied the subpoenas; this caused the administrative hearing officer in charge of the case to segregate the hearings. The first two days of the four-day hearing would be devoted to the prosecution's case in order to give Lawless time to procure his witnesses.

Although Lawless attended the first day of his hearing, he skipped the second without notice. As a result, at the end of the prosecution's case, the hearing officer approved a default judgment against the absent pharmacist. Shortly afterward, the board revoked Lawless' license for two years.

Lawless appealed to the state's supreme court, arguing that the board erred when it issued a default judgment. His failure to appeal, he claimed, was the result of his witness problems, and should not have been held against him.

The court did not agree. In its written opinion, it noted that none of Lawless's problematic witnesses were scheduled to appear during the first three days, and

Lawless had been given sufficient notice that a failure to appear would result in a default. The board was within its authority to sanction him and its decision would be upheld.

Court okays reciprocal reprimand issued with new license

Issue: Due process in issuing reciprocal reprimand

The Ohio medical board acted within its authority when it reprimanded a new licensee based on reprimands issued by another state, a state appellate court ruled September 26 (*Weiss v. State Medical Board of Ohio*).

Weiss is a radiologist who, until 2004, practiced primarily in Arizona. In 2005, the Arizona medical board reprimanded Weiss after he failed to diagnose a cancerous breast mass; the board then issued a second reprimand after he misdiagnosed a spinal injury. The second reprimand was issued after Weiss entered into a consent agreement with the board in which he admitted his failing. The California medical board, where Weiss was also licensed, followed the Arizona board and issued a reciprocal reprimand.

In both cases, Weiss entered into agreements with the boards in which he accepted their portrayal of the facts of the case; each agreement also contained language that prohibited the use of those stipulated facts in other government proceedings.

In 2008, Weiss applied for an Ohio medical license. While his application was accepted, the Ohio medical board informed him that, based on his reprimands in California and Arizona, it intended to discipline him as well.

Unfortunately for Weiss, at his hearing, when asked by the hearing examiner if he would object to the use of the stipulated facts from the earlier disciplinary actions, Weiss' lawyer replied, perhaps erroneously, "I don't think that there's any way that you can be prohibited from considering that."

In his appeal, Weiss's new attorney argued that the board had exceeded its statutory authority when it attached a reprimand to Weiss's new license. A reprimand, Weiss claimed, could only be issued to an existing license holder, and not to an applicant. But the court did not agree.

At the conclusion of the hearing, the board granted Weiss an Ohio license. However, it simultaneously issued him a reprimand. Unhappy, Weiss appealed, claiming that the board violated his constitutional and statutory rights. An appellate court upheld the board's order and Weiss, who by this time had gotten a new lawyer, appealed again, this time to the Court of Appeals of Ohio in Columbus.

In his written ruling, Judge Thomas Bryant noted that the section of the licensing regulations that allows the board to impose sanctions also allows it to refuse licensure. This linkage, Bryant wrote, mean that sanctions could be imposed on applicants. Bryant also noted that even if the regulation could be read differently, the board's interpretation was reasonable and, as such, was owed deference.

Weiss also argued that the board had violated his constitutional due process rights by using the earlier reprimands to automatically discipline him. However, Judge Bryant noted that the regulation that Weiss claimed compelled the board to automatically suspend his license, in fact, only *permitted* the board to take action; discipline had not been mandatory. And, because Weiss was afforded a hearing, he had received due process.

In response to Weiss's claim that the board had erroneously relied on the stipulated facts from the earlier reprimands, Bryant noted that Weiss's first attorney had conceded that those stipulations could be used. As an afterthought, the judge also noted, "The pertinent fact for purposes of [the regulation] was simply that the Arizona board reprimanded appellant." The case was dismissed.

Discipline decision deadline 'directory,' not mandatory, court says

Issue: Due process and adherence to hearing deadlines

A board's failure to adhere to a statutory deadline could not be used to invalidate a discipline decision, a Connecticut court ruled September 18. The statute directing the state's medical board to produce a decision within 120 days of notifying a licensee of a discipline hearing was "directory" only, the court said (*Sternstein v. Connecticut Medical Examining Board, et al.*).

In 2010, the Connecticut medical board investigated physician Gerson Sternstein's apparently cavalier attitude to dispensing prescription painkillers.

In September 2011, after a hearing, the board issued a decision in which it noted incriminating aspects of Sternstein's treatment of several patients. Sternstein, it found, had failed to actually examine patients before prescribing painkillers, had kept unprofessional and incomplete records of treatment, and had repeatedly prescribed an excessive amount of oxycodone and continued doing so even when patients, some of whom had a history of substance abuse, began to show signs of abusing the painkillers.

Sternstein even prescribed opioids to one patient who sought treatment for addiction and had admitted use of heroin, crack cocaine, and painkillers.

The physician was a "serious threat to the health and safety of his patients," the board declared. It revoked his license and issued a $50,000 fine. He appealed and the case went up to a state superior court in New Britain.

In his appeal, Sternstein argued that delays by the board, which had twice extended a statutory deadline for making a decision within 120 days after it had notified him of his hearing, made its final decision illegitimate.

The argument was not successful. Judge Henry Cohn, in his written opinion, wrote that Sternstein could not use the delay against the board. If he had been truly concerned about the delay, Cohn noted, Sternstein's proper action would have been to request the Superior Court to order a more timely decision. When he did not make that request, he waived any claim to relief from the delay.

In any case, Cohn noted, the deadline, through written into statute, was only "directory," not mandatory, and could not be used to invalidate the board's decision. Sternstein's appeal was dismissed.

Discipline should not be used for faults in interpersonal skills, court says in questioning five-year license suspension

Issue: Appropriateness of disciplinary sanctions

Professional discipline should be limited to purposes of public protection, the Supreme Court of Vermont said in an October 25 ruling. In the case, (*Whittington v. Office of Professional Regulation*), the court upheld several misconduct charges but partially overturned discipline against a nursing home administrator who had incorrectly second-guessed a resident's wish to be removed from life-sustaining treatment.

The court said that to rule otherwise would be to discourage an administrator's proper level of engagement in life-or-death matters.

Leslie Anne Whittington, the disciplined licensee, worked as a nursing home administrator in Ludlow, Vermont. Sometime after 2010, the state charged Whittington with several professional violations related to her allegedly sloppy and confrontational administration of the home.

Whittington seems to have created much ill will among her associates and assessors; among other things, the state inferred that some of Whittington's contested actions were "possibly due to mental or psychological instability."

After several days of hearings, an administrative law officer found that Whittington had committed professional misconduct on several grounds: by interfering with psychiatric treatment of patients at the home–which she was not qualified to do—physically forcing an ombudsman out of the facility, forcing a dying patient to change clothes and get out of bed, and creating a work environment so hostile that it created an environment of "unsafe and unacceptable patient care."

"As a practical matter, a five-year license suspension in this case appears to be tantamount to a revocation, as it essentially forces respondent to change careers—at least temporarily," the judge said. She noted "our concern that the professional discipline process not be used as a means for punishing people with bad interpersonal or managerial skills but, rather, be limited in its scope to reasonable public protection."

The primary instance of Whittington's improper interference with patient treatment involved a woman who had decided to discontinue a medication necessary for her survival. After the medication was discontinued, Whittington told the patient's doctor that he must resume it, as the patient wanted to live; this prompted another consultation, in which the patient confirmed the decision. The doctor, for his part, believed that Whittington had acted improperly by recommending that the patient continue the medication.

In another instance, Whittington was accused of telling a psychiatric nurse practitioner to give a patient a diagnosis that would allow the patient to be sent to a psychiatric center. In a third incident, Whittington had told a patient not to undergo an assessment that a doctor had prescribed.

The hearing officer suspended Whittington's license for five years, imposed a $5,000 fine, and imposed educational conditions on her eventual re-application.

Whittington appealed, and the case went to the state's supreme court. Justice Beth Robinson wrote the court's opinion, which upheld most of the discipline rulings against Whittington.

However, the court overturned the determination that Robinson had acted improperly by inserting herself into a decision to end life-sustaining care. The practice restrictions imposed on "a nursing home administrator's qualification are not so broad as to preclude patient advocacy, such as reasonably questioning doctors about the withdrawal of life-sustaining care," Robinson wrote.

To find otherwise, she continued, "would be to discourage a level of engagement concerning life-or-death matters that is appropriate for a nursing home administrator, even if her concerns ultimately prove ill-founded."

A second issue on which Whittington prevailed was in the administrative law officer's reliance on a negative institutional review of the nursing home to impose discipline. The deficiencies found in that review had been held against Whittington on the ground that, as the home's administrator, she was the person responsible for its failings.

Justice Robinson wrote that "the ALO could assuredly prescribe disciplinary sanctions for deficiencies to the extent they are tied to an administrator's actions or omissions—direct or supervisory—but it cannot presume a violation of professional standards merely from the fact that a deficiency exists."

"None of [the statutory bases for discipline] includes a Division of Licensing and Protection finding of deficiency, a process closely bound with nursing home administration and therefore easily includable if the Legislature so intended."

The court also questioned the length of the suspension imposed on Whittington's license. While the state's Office of Professional Regulation had requested only a one-year suspension, the law officer in charge of the hearing had imposed five years. The disparity "raises red flags," Robinson said, noting that reasonable public protection should be the primary goal.

With two of the bases for Whittington's discipline and the length of the sanction in question, the case was remanded to the administrative law officer.

License revocation of key expert witness not cause for new trial

Issue: Discipline status of state's expert witness

A California prisoner failed in his effort to have his conviction for attempted robbery and kidnapping overturned due to the revocation of the license of a key expert witness in the trial. In a September 5 decision in *Rincon v. Mullin*, the U.S. District Court for the Eastern District of California denied the petition of Eduardo Ramirez Rincon.

In the case, Rincon filed a petition for a writ of habeas corpus while serving a fourteen-year prison sentence. He argued that in his trial, the prosecution's expert witness, a psychologist, testified against the prisoner while the state psychology board was considering whether to revoke the psychologist's license for sexual misconduct.

Rincon, who was charged in 2007 with attempted robbery and kidnapping during an attempted robbery, entered a plea of not guilty by reason of insanity. The trial court appointed two psychologists to examine Rincon and prepare a report. One psychologist concluded Rincon was legally insane at the time of the offenses, while the second, J. Stanley Bunce, reached the opposite conclusion.

The defense argued that Rincon did not actually form the mental state required for the crimes due to mental disorders he suffered and called a third psychologist to testify, who opined that Rincon was legally insane.

"Although Dr. Bunce's testimony was arguably the strongest evidence against appellant in the sanity phase of his trial, the newly discovered evidence that Dr. Bunce was facing disciplinary charges on an unrelated matter did not directly refute his testimony concerning appellant's mental state," the court said.

The jury found Rincon guilty and also found that he was sane at the time the offenses were committed. Two months later, Rincon filed an application for a new trial based on newly discovered evidence: an administrative law judge, at the time of Bunce's testimony, had issued a 25-page proposed decision to revoke Bunce's license for having multiple improper relationships with a patient—in the judge's view an extreme departure from the standard of care that amounted to gross negligence. The state Board of Psychology later agreed and ordered the revocation.

The trial court denied Rincon's petition for a new trial, noting there was additional evidence that Rincon had the requisite mental state. The court cited a standing principle that newly discovered evidence does not warrant a new trial if it "goes solely to impeach the credibility of witnesses."

The appeals court agreed. The court said it did not wish to minimize the seriousness of Bunce's conduct, but "we nonetheless cannot ascribe to it the devastating impeaching power suggested by appellant . . . Dr. Bunce did not have his license revoked because he was not properly trained or educated, or because he was shown to render inaccurate or improper diagnoses."

Even if the jury had known about the factual findings regarding Bunce's conduct, "we do not believe the information would have been so damaging to his credibility as to cause the jury to reject" his evaluation of Rincon, the court stated.

Court reinstates case dismissed for lack of specificity

Issue: Lack of detailed findings to justify discipline

In an October 30 ruling, an appellate court in Arkansas reinstated a discipline case that had been dismissed by a lower court because the state's chiropractic board failed to make detailed findings when it imposed discipline (*Arkansas State Board of Chiropractic Examiners v. Currie*).

In 2009 and 2010, the Arkansas State Board of Chiropractic Examiners received several complaints about Keith and Natalie Currie, married chiropractors and owners of a spinal care clinic, concerning their patient care, rates, and advertising.

After a series of hearings, the board ruled that the couple were guilty of professional violations, placed their licenses on two years' probation, and imposed a total of $24,000 in fines.

The Curries appealed, successfully, and a state circuit court overturned the discipline and dismissed the case. The board then appealed and the case went up to the state Court of Appeals, Division 1.

In their appeal, the Curries had argued that the board failed to make several required findings, failing to connect hearing testimony to the regulations the board ruled they had violated, to formally state the standard of care, and to identify which of the clinic's doctors provided treatment to individual patients who had filed complaints or who had been responsible for the actions complained of.

The Court of Appeals agreed with the Curries that the board had made several errors by not issuing specific findings in the case. But it disagreed that dismissal of the case was the appropriate remedy. The board had provided *some* fact-finding and the Curries had not actually contested the substance of the evidence. The appropriate action, the court ruled, was to send the case back to the board.

Licensing

Barring felons from licensure is unconstitutional *(from page 1)*

Barletta brought suit against the city and the Police Chief, Harry Rilling; Barletta claimed that the law, by categorically denying all felons a precious metals license, violated the Fourteenth Amendment's Equal Protection and Due Process clauses. The case went before Judge Stefan Underhill of the state's federal District Court.

Judge Underhill acknowledged that neither a fundamental right nor a suspect classification—which would have triggered stronger constitutional protections than the standard he eventually used to evaluate the case—was implicated and that the statute was intended to further the "reasonable goal" of decreasing fraud. But he nonetheless ruled that the statute was unconstitutional.

"The Connecticut Legislature has made the existence of a felony conviction a proxy for an examination of an individual's background, character and suitability for license," Underhill explained. "The State's goals are legitimate, but the ban is so far-reaching that its service of these goals is diluted to the point of coincidence. A proxy that serves its purpose only by happenstance is arbitrary and fails rational basis review."

"Placing limitations on employment opportunities for a person convicted of a felony through occupational licensing regimes is an unfortunately familiar legislative device."

In this case, he continued, "by substituting a felony conviction for an individualized determination of suitability for licensure, the legislature rendered [the statute] standardless."

Noting that the statute allowed people actually convicted of misdemeanor fraud involving precious metals to retain a license, Underhill wrote that the statute was "both grossly over-inclusive and grossly under-inclusive as a proxy for serving the State's stated goals."

Federal felonies include mishandling of environmental pollutants, draft dodging, and certain offenses involving fish, wildlife and plants. State felonies include violating a sexton's burial duties, illegally assisting a disabled voter, injuring a peace officer animal, and violating pollutions requirements.

Felonies like these, the judge believed, had "no tendency whatsoever to predict unsuitability for licensure."

"To survive even rational basis review, the defendants and the State must do more than suggest that *some* felons would be unsuitable for licensure. Most irrational classifications, for example, left-handed people, obese people, people with tattoos, people born on the first day of the month, divorced people and college dropouts, will include *some* persons properly excluded from licensure . . . A rational nexus between a conviction for any and every felony and the fitness to act as a precious metals dealer simply does not exist," the court said.

Having ruled the statute unconstitutional, Underhill issued a permanent injunction preventing its enforcement. Barletta, he stated, was free to reapply for a license. However, the judge noted, if he did, the police chief could still use Barleta's felony conviction as a "significant factor" in denying him a license.

Court dismisses challenge to law denying license over student loan default

Issue: Licensing and student loans

An October 24 decision by an Illinois appellate court dismissed an accountant's constitutional challenge to a state law that links repayment of student loan debt to continued licensure (*Gutraj v. Department of Financial and Professional Regulation*).

In May 2012, the Illinois Department of Financial and Professional Regulation denied an application to renew the license of Bryan Gutraj, an accountant. Gutraj, who owed $63,000 in student loans, had defaulted on his debt and the Department refused to renew his license until he established a payment schedule it believed was acceptable.

The judge did not agree that the statute deprived Gutraj of his procedural due process rights. Although the accountant claimed that, with notice of the department's impending action, he would have entered into a repayment program and, with a hearing, could have addressed his failure to pay, the court noted that the department did not have any responsibility for Gutraj's ability to track his loan payments and status.

Illinois law requires the department to refuse, without a hearing, the renewal of a licensee who is in arrears on his student loan; Gutraj therefore did not receive one. In response, he filed suit against the department, claiming that he had received no notice of the impending refusal, and that, along with the lack of a hearing, violated his constitutional rights to due process.

The appeal eventually rose to the Fourth District Appellate Court in Springfield, which issued a decision written by Justice James Knecht.

In making his constitutional challenge, Gutraj pointed out that the department had noted his discipline on its website, in a directory of licensed professionals, and Gutraj claimed that the publicly-accessible notation that he had been disciplined was a sort of "permanent discipline."

However, the justice noted that the court's review would not allow it to take notice of the information published on the department's website indicating that Gutraj had been disciplined because that information was not in the department's record of the case. And, because the licensing statute requires licenses to expire and because Gutraj would still be able renew his license were he to meet the statute's conditions, Knecht concluded that the maintenance of the accountant's license was a "diminished interest," subject to less stringent protections.

Further, although administrative appeal procedures—the proper way to challenge the decision—were available, Gutraj had not used them, instead choosing to bring suit against the department.

Gutraj provided no evidence that he had, in fact, been paying his loans and his license was not set to expire until September of 2012. So, by informing him in May that it intended to deny his license renewal, the department had provided adequate warning and time for Gutraj to correct his situation.

"It is difficult to understand how there is a 'risk of deprivation,'" Knecht wrote, "where plaintiff does not even argue he was paying his loans, he was not in default, and had several months *before* his license expired to ensure he could renew his license, which he does not argue he attempted."

Denied license no ticket for discharge of student loans

Issue: License denial and legal status of student loan debt

A federal district court in Tennessee rejected a bankruptcy filing by a law school graduate who failed to find work because he spent his time after graduation fighting the denial of his admission to the state's bar (*Marlow v. United States Department of Education*).

The bar applicant, Robert Marlow, who had accumulated both $250,000 in student loans to pay for four different degrees and a history of alcohol and vehicle citations, applied for admission to the Tennessee Bar in 2010, but purposely omitted a recent arrest for public intoxication. After Marlow rejected monitoring agreements proposed by Tennessee's Board of Law Examiners and skipped a hearing in lieu of a trip to Japan, the board denied his application.

To successfully discharge student loans under the district's interpretation of federal bankruptcy law, a debtor must meet three qualifications, known as the *Brunner* test, after the 2nd Circuit case in which it originated: 1) The debtor must not be able to maintain a "minimal" standard of living if he or she were forced to pay the debt; 2) this difficult life standard must be expected to persist for a long time; and 3) the debtor must have made good faith efforts to pay.

Marlow appealed to the Tennessee Supreme Court; and, when that court rejected his claims, filed an unsuccessful appeal request with the U.S. Supreme Court. He then went on to file civil suits against the board, the state attorney general, the city of Knoxville, and the police officer who had arrested him there.

While fighting the denial, Marlow bounced between a number of temporary and part-time jobs, relying on his father for support and stopping payment on some of his loans. In 2011, he filed for bankruptcy. After his request was denied, he appealed the decision to a federal District Court in Eastern Tennessee.

Marlow, wrote Judge Karen Caldwell, the district judge in charge of the case, could not meet any of the elements of the three-part *Brunner* test for discharging student loan debt. To show that the debt would cause him undue hardship, a debtor would first need to show that he had "maximized his income" by seeking the best work he could find.

However, Marlow, who had spent a significant amount of time fighting the denial of his bar application, had spent only a small amount of time on trying to find work. And, although he cited the denial of his license application as a reason for his poor financial situation, Caldwell noted that, with his many degrees and extensive training, Marlow was still very employable. Because he was unable to meet the requirements for the discharge of student debt, Judge Caldwell dismissed Marlow's appeal.

No expungement of discipline for failure to renew

Boards do not have an obligation to distinguish between citations for a failure to renew and a more serious professional lapse, or to provide a method of expungement for minor citations, a Pennsylvania appellate court stated September 9 (*Poskin v. State Board of Nursing of the Commonwealth of Pennsylvania*).

Joel Poskin, a registered nurse in Pennsylvania, accidentally allowed his license to lapse in 2008 when he moved and a renewal notice was sent to his old address. Poskin was unaware of the lapse until October of 2010, when his employer discovered that his license was not valid and fired him. The state board of nursing subsequently cited and fined Poskin $1,000 for a year's worth of unlicensed practice.

Poskin paid the fine without issue but sought to remove the citation from his record. Unfortunately, no mechanism exists for the removal of a discipline record issued by the board; it therefore denied his request.

Poskin claimed that the board's inability to expunge citations or differentiate between minor citations, like failing to renew, and major ones, like substandard care, violated his rights under the state constitution. He also argued that the board's refusal to expunge a sanction for failure to renew was not reasonably related to its mission of ensuring quality in the nursing profession.

Poskin then filed a judicial complaint against the board. After some confusion over jurisdiction, the case made its way to the Pennsylvania Commonwealth Court, which issued a decision written by Judge Bonnie Leadbetter.

Although Poskin had ended up in the correct court—the Commonwealth Court—he had not filed his claim properly, Judge Leadbetter wrote, as he had filed a claim seeking to order the board to fulfill his request instead of filing an appeal of the board's decision. Poskin's case would have to be dismissed for his failure to file correctly.

However, the judge did consider Poskin's argument in a footnote. Defending the serious treatment by the board of Poskin's failure to renew, Leadbetter noted that the nursing license renewal forms require licensees to disclose whether they have fulfilled their continuing education requirements or have been the subject of any criminal charges or professional discipline since their last renewal.

The collection of that information, Leadbetter wrote, is reasonably related to the board's mission and the maintenance of a citation is a rational deterrent to a licensee's failure to provide this information.

Scope of Practice

Court rejects $6.355 million unlicensed practice fine

Issue: Penalties for breaching practice act

Citing the improper use of estimation in determining a fine, on October 30 a state appellate court reversed an immense $6.355 million unlicensed practice fee (*Rawdon v. Tennessee Board of Medical Examiners*).

Following accusations in 2004 and 2005, the Tennessee Board of Medical Examiners charged pharmacist Larry Rawdon with the unlicensed practice of medicine. After a hearing, the board ruled that Rawdon was guilty of unlicensed practice of medicine and illegally practicing naturopathy, and fined him $1 million.

Rawdon appealed to a state chancery court, which ruled in his favor and remanded the case to the board, ordering it to provide details in support of the million-dollar fine.

Obstinate on remand, the board actually *increased* the penalty, to $6.355 million, a number it reached by fining Rawdon $500 for an estimated 12,710 charges of the unlicensed practice of medicine—roughly once for each time he treated a patient.

The trial court, unswayed by the board's aggressive accounting, again rejected the fine, finding it unwarranted.

"The penalty," the trial court noted, was "unwarranted in law and/or without justification in fact." The numbers relied upon by the board, it wrote, were speculative, not based on the evidence. The appeals court agreed.

The board appealed the decision and the case went to the state Court of Appeals in Nashville, which upheld the lower court's decision.

Judge Richard Dinkins, writing for the Court of Appeals, agreed with the trial court, noting "that the board's determination that Dr. Rawdon was guilty of 12,710 violations was based on the number of days in various time periods during which he either saw patients or treated patients, rather than the actual number of patient visits or treatments."

"The number of days in each time period measured by the board," Dinkins continued, "is not substantial and material evidence in support of its finding of the number of violations . . . The board cannot overlook the evidence of the actual number of dates of visits or treatments, as contained in the patient records and testimony."

In addition, Dinkins wrote, the board failed to articulate the factors that guided its judgment.

Remanding the case to the board, Dinkins concluded, "We do not take issue with the board's concern as to the severity of the conduct in which Dr. Rawdon was engaged, we hold only that the determination of the number of penalties was not supported by the evidence and that the Board did not articulate the factors it considered in assessing the penalty."

In-state license not necessary to testify as expert, court rules

Issue: Scope of practice of out-of-state licensees

The Nevada Supreme Court upheld September 19 the dismissal of an unlicensed practice citation issued by the state's private investigator licensing board to an expert witness who performed private investigator-type work as part of his preparation for testimony (*Private Investigator's Licensing Board v. Tatalovich*).

Dwayne Tatalovich, a private investigator licensed in Arizona, was hired as an expert witness in a lawsuit against a Nevada property owner who allegedly failed to provide adequate security for his premises; the plaintiffs were injured by what they claimed was a preventable crime that occurred on the property. To prepare for his testimony, Tatalovich investigated the crime scene and performed background checks.

When the Nevada private investigator board learned of his work, it cited Tatalovich for unlicensed practice. However, a district court dismissed the

citation, ruling that, because Tatalovich's actions were performed as part of his expert testimony preparation, they were not subject to the private investigator laws.

The board appealed and the case went up to the Nevada's Supreme Court, which held in favor of Tatalovich.

"The Board's reading of the licensing statutes gives them greater reach than their text and evident purpose allows," wrote Justice Katrina Pickering in the court's published opinion rejecting the board's appeal.

The statute's reference to advertising, Pickering wrote, "suggests that the statute regulates those who solicit and accept employment for the purpose of providing the professional services named, not just anyone who incidentally undertakes activities also commonly performed by the those professionals en route to providing a different service—here, forensic consulting or expert opinion testimony."

The licensing statute, Pickering said, "governs professionals providing a primary service to clients who either rely or act upon that service for their own safety or welfare." No similar purpose is achieved by extending the licensing requirement to expert witnesses, whose work would be evaluated in court.

The private investigator licensing statute mandates a license for any person who is "engage[d] in the business of" or "advertise[s] his or her business as" a private investigator, which is defined to include a person who investigates "the cause or responsibility for fires, libels, losses, accidents or damage or injury to persons or property" or "secur[es] evidence to be used before any court, board, officer or investigating committee," among other things.

The board argued that Tatalovich was different from other expert witnesses because he was not licensed in a separate profession, which would have ensured that his activity were regulated. However, Justice Pickering responded, "work by forensic experts, even work not subject to other professional licensing requirements, is not unregulated. It is limited by the rules of the court, the judge's approval of the expert's qualifications to provide the opinion, and the judge's determination of what testimony, if any, to allow."

The board's interpretation of the statute was so broad, she wrote, that it would encompass other professions, such as reporters doing legitimate journalistic investigation.

"Is a plumber who inspects a drain to determine whether a lost wedding ring is lodged in a sink's pipe acting as a private investigator" by obtaining information about the location of lost property? Pickering asked, citing another enumerated activity in the statute. "What about a prospective employer who calls past employers to learn an applicant's work history?"— since acting as a private investigator includes obtaining information with reference to the "honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, reputation or character" of any person.

The court found that the legislature has not endorsed the Board's expansive view of what constitutes private investigation.

"Subjective belief" no defense to unlicensed practice charge

Issue: Defenses to unlicensed practice allegations

A dentist who mistakenly believed the state dental board had received his license renewal forms could not use that belief as a defense against a charge of unlicensed practice, the Iowa Court of Appeals ruled September 5 (*Hagen v. Iowa Dental Board*).

The dentist, Marc Hagen, has continually practiced in Iowa since 1996. With his license set to expire in August 2010, Hagen attempted to mail his $315 license fee and renewal forms. However, the board never received them.

Then, in March of 2011, an insurance company inquired with the board about Hagen's license, which had, by that time, lapsed. Hagen immediately ceased practicing. However, the damage was done; the board filed unlicensed practice charges against the dentist in December 2011. After a hearing, the board cited Hagen and fined him $500.

Hagen, concerned about the insurance ramifications of the board's decision, appealed; eventually the case reached the state Court of Appeals.

In his appeal, Hagen claimed that his alleged posting of the renewal paperwork created a legal presumption, on his behalf, that the board had received it. However, Judge Mary Tabor wrote in her opinion for the court, for license renewals, in order to benefit from the "mailbox presumption," as the legal presumption is called, proof of the mailing must be provided.

Although Hagen had purchased a check payment from his bank and kept his receipt, he was unable to produce any evidence that he had actually mailed his paperwork. With no evidence that he had mailed his renewal forms, Hagen could not benefit from the presumption.

Hagen also argued that the board erred when it sanctioned him despite his good faith effort to renew his license; his subjective belief that he had renewed, he claimed, should have protected him from a charge of unlicensed practice.

In response, Judge Tabor noted that the express language of the unlicensed practice statute did not require the board to consider Hagen's state of mind but only whether he had, in fact, practiced while not in possession of a current license.

If the board was required to consider whether Hagen knew he had not renewed his license, she continued, "any licensee who inadvertently forgot to take the necessary steps to renew his license would be immune from disciplinary action."

Court rejects board's drug dispensing rules

Issue: Administrative procedures for rulemaking

New formulary rules written by New Mexico's chiropractic board were invalidated July 31 after the state's pharmacy and medical boards challenged them in court, saying the rules were improperly enacted without their approval (*International Chiropractors Association v. New Mexico Board of Chiropractic Examiners*).

In 2010, the New Mexico Board of Chiropractic Examiners created new rules governing the recently authorized field of advanced practice chiropractic, a certification established by the New Mexico legislature in 2008 that empowers specially-certified and trained chiropractors with prescription authority.

The new rules did not provide authority to chiropractors to administer many controlled substances but, instead, allowed the dispensing of herbal and homeopathic medicines and other alternative medicines, and included injections as a method of delivery.

The board's decision was not received favorably by either the state's medical or pharmacy boards, who, along with the International Chiropractors Association, a chiropractic advocacy group opposed to the use of drugs in chiropractic practice, brought a suit against the board to overturn the new rules.

Under New Mexico law, a certified advanced practice chiropractic physician may prescribe, administer, and dispense herbal medicines, homeopathic medicines, over-the-counter drugs, vitamins, minerals, enzymes, glandular products, protomorphogens, live cell products, gerovital, amino acids, dietary supplements, foods for special dietary use, bioidentical hormones, sterile water, sterile saline, sarapin or its generic, caffeine, procaine, oxygen, epinephrine and vapocoolants.

The board is authorized to develop and approve a formulary that includes all substances listed above, including compounded preparations for topical and oral administration, and injectable drugs where they are authorized under the chiropractors' scope of practice

Dangerous drugs or controlled substances, plus certain other drugs, must be submitted to the medical board and pharmacy board for approval.

The entities challenging the new rules argued that New Mexico law required the approval of both the state's board of pharmacy and board of medicine before the new chiropractic formulary could be enacted.

In answer to the challenge, the chiropractic board provided an argument of statutory interpretation, claiming that, although the act required the approval of the other boards in order for chiropractors to administer "dangerous" drugs and drugs through injection, those constraints did not apply to the list of specifically-enumerated drugs provided to chiropractors under the act.

The court did not agree. While the state's chiropractic act does allow for the possibility of chiropractors' administering drugs by injection, Judge James Wechsler wrote that such authority could be granted only with the approval of the other boards. He acknowledged that, while the statute was at times redundant, its intent, especially in the context of similar acts passed by the state legislature, was clear.

The chiropractic board objected to this interpretation of the statute and asked the court to re-punctuate the sentence of the law requiring approval in a way that would allow the board to authorize injection without the approval of the other boards. The board argued this change would bring the letter of the law into harmony with the legislature's intent to exclude all "natural" substances from those requiring approval.

Judge Wechsler rejected the idea, saying that it would be an improper revision of the law. Having found the new rules in violation of the chiropractic statute, the court set them aside.

Testing

Federal court orders $87,000 fine for exam copyright violations

Issue: Copyright violations of certification/licensing exams

A test-preparation company must pay a $1,000 fine for each of 87 items the company forced the examination provider to retire due to copyright infringement, the U.S. District Court, Western District of Texas, San Antonio Division, ruled August 26, 2013 (*American Registry of Radiologic Technologists v Bennett)*.

The company, Limited X-Ray Licensure Course Providers, owned by defendant Diane Bennett, was started in 2007 to provide tutoring assistance to help students pass examinations to become radiologic technologists.

According to the American Registry of Radiologic Technologists (ARRT), which sued Bennett, she obtained access to copyrighted examination questions by asking the students she taught to send her questions they saw on ARRT exams. ARRT alleged copyright infringement, breach of contract, tortious interference, and misappropriation of trade secrets.

Items from two exams were implicated: the Limited Scope of Practice in Radiography Examination and the Bone Densitometry Equipment Operator Examination. ARRT maintains a bank of about 1000 test items, using them repeatedly in successive years as well as across multiple exam sites, so the confidentiality of the exam items is carefully protected.

Twenty of the 28 states that require individuals to be licensed to practice limited scope radiography use the ARRT examination. Fifteen states use the ARRT bone densitometry exam.

Although not identical, the copyrighted question and the infringing question are substantially similar, the court found in comparing them side by side.

For example, one of the copyrighted questions in the ARRT Test Item Bank asked:

According to the NCRP (National Council on Radiation Protection and Measurements), which of the following has the highest occupational radiation exposure limit?

a. thorax
b. head
c. hands
d. trunk
Answer: c.

Defendant disseminated a question that read:

Which can handle the most radiation according to the NCRP?

Answer: Torso, Head, Hand.

Candidates must agree not to disclose any exam items and click to accept the following statement:

"This exam is confidential and is protected by trade secret law. It is made available to you, the examinee, solely for the purpose of assessing qualifications in the discipline referenced in the title of this exam. You are expressly prohibited from disclosing, publishing, reproducing, or transmitting this exam, in whole or in part, in any form or by any means, verbal or written, electronic or mechanical, for any purpose, without the prior express written permission of ARRT."

But to conduct her exam prep business, the court found, Bennett asked her students who took the exam to recall any items they could and send them to her. She applied pressure if the student pleaded forgetfulness.

In an email quoted by the court, Bennett wrote to one student: "You have GOT TO REMEMBER some questions! You must! Sit down right now and call Tina and you both try to come up with some!!! They do really help!!! Even if you could just remember the questions, you don't have to remember all the choices! Email me those as soon as you can!"

Based on such actions, the court found that Bennett improperly acquired ARRT's examination questions, which constituted trade secrets, willfully distributed ARRT's copyright-protected questions for profit, showing a reckless disregard for ARRT's rights as examination developer, and used ARRT's questions without authorization.

As a result of Bennett's actions, the court found that ARRT was forced to retire 87 questions from its Test Item Bank at a cost of $1,000 each. Course Providers filed for bankruptcy in 2010, but Bennett planned to conduct a similar business through a separately incorporated firm. The fine of $87,000—$1,000 for each item ARRT was forced to retire—would compensate ARRT and deter Bennett from committing this sort of misconduct again, the court said.

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