Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue:

Licensing

Mental health questions on license apps violate disability law, says Dept. of Justice

Issue: License application questions regarding disabilities

Current questions about mental health on a national form used by the Louisiana state bar to screen applicants for attorney licensing violate the Americans with Disabilities Act (ADA), and the state must change its application policies, the U.S. Department of Justice Civil Rights Division says.

The Louisiana state bar requires candidates to submit a "Request for Preparation of a Character Report" to the National Conference of Bar Examiners. The form asks applicants whether they have been diagnosed or treated for any mental health disorders. At least 25 state bars, and many licensing boards, employ similar questions to screen applicants. The DOJ called the questions "unnecessary, overbroad, and burdensome for applicants."

In a February 14 letter to the state bar, the federal law enforcement agency said that singling out applicants based on their status of having a mental health disability, rather than the applicant's conduct, violates the ADA by setting up "eligibility criteria that screen out or tend to screen out individuals with disabilities based on stereotypes and assumptions about the disabilities and are not necessary to assess applicants' fitness to practice."

*See **Licensing,** page 7*

Discipline

Courts back license denials to noted liar, sex offender over moral character

Issue: License denials based on moral character issues

Pushing moral character into the spotlight, state supreme courts in two January cases upheld high-profile license denials based on claims that the applicants lacked the requisite moral character to be licensed.

In the first case, the Supreme Court of California denied a law license to Stephen Glass, the former *New Republic* reporter who blatantly fabricated a number of stories for the magazine during his tenure there in the 1990s (*In re Glass*). Glass's fabrications, which have been extensively covered by other media, seemed to play to readers' negative stereotypes. In one notable

article from 1996, entitled "Taxis and the Meaning of Work," for example, Glass created entire encounters with three "sources" in order to paint a picture of African-Americans as unscrupulous and unwilling to work.

Another article from 1997 portrayed a non-existent group of young Republicans at the 1997 Conservative Political Action Conference as sexual predators. Sometimes Glass singled out public individuals; a 1998 article in *George* magazine used fabricated sources to portray Vernon Jordan, an adviser to President Clinton, as unethical and sexually aggressive.

Glass was eventually outed in 1998, after a suspicious editor at *The New Republic* began investigating some of his stories. Not one to go easily, he began fabricating evidence to support his fictional stories but, despite his efforts, he was fired and the magazine informed its readers of the deceptions.

From 1996 to 1998, Glass wrote 42 articles for *The New Republic*, nearly all of which contained fabrications, ranging in form from false sources and fictional quotes to entire faked stories. He was thorough in his deception, preparing notes and fake supporting materials to fool *New Republic* fact-checkers into believing the authenticity of his articles.

During this troubled journalistic tenure, Glass was enrolled in law school. He graduated in 2000 and applied for New York licensure in 2002, although he withdrew his bar application after being informed that it would be rejected.

In 2007, Glass applied to the California Bar, and it was not until this time that he fully identified all of the articles that he had fabricated. In his New York application, Glass stated that he had cooperated with his former employers to identify his fabrications. But that assertion was denied by witnesses who had worked at those publications.

Those witnesses testified to the cost and work they incurred while trying to unravel the fictions without help from Glass, and the fact that, although Glass provided a list of his fabricated articles as part of his New York application, the list was incomplete. Glass provided a full account of his malfeasance, containing several new admissions, only when applying to the bar in California.

During hearings on his moral character before the State Bar Court, Glass offered evidence of his rehabilitation. Since 2001, he had begun seeing a psychiatrist, had written many apologetic letters to journalists and his victims, and told his story to forums and classes on journalistic ethics. After graduation, he had actually worked as a clerk for two different judges and, employed by a California firm as a paralegal, spent a significant amount of time helping homeless clients.

Several witnesses–including his law professors, the two judges, and Martin Peretz, the owner of *The New Republic* at the time of Glass's malfeasance–vouched for his rehabilitation. All of this evidence of good behavior seems to have had an effect; at the conclusions of the hearing, the Bar Court recommended Glass for licensure; his application went to the Supreme Court of California for a final decision.

The Supreme Court did not take the same view of Glass's rehabilitation as the State Bar Court. After faulting the lower court for applying an inappropriately low character standard for Glass to meet, the justices ruled that Glass would have to show "truly exemplary conduct over an extended period" in order to make up for his past misdeeds.

The court noted that "Glass's journalistic dishonesty was not a single lapse of judgment, which we have sometimes excused, but involved significant deceit sustained unremittingly for a period of years [and] was motivated by professional ambition, betrayed a vicious, mean spirit and a complete lack of compassion for others, along with arrogance and prejudice against various ethnic groups." The court also noted his extensive cover-up efforts, his failure to help his former employers identify his fabrications, and his misrepresentations on his earlier New York Bar application.

The timing of Glass's efforts at rehabilitation–such as his letters of apology and the publication of a novel based on his story–the court continued, made them appear to be self-serving, intended either to address his own mental or financial needs or to burnish his bar applications.

Glass's witnesses, the justices concluded, "emphasize his personal redemption, but we must recall that what is at stake is not compassion for Glass, who wishes to advance from being a supervised law clerk to enjoying a license to engage in the practice of law on an independent basis. Given our duty to protect the public and maintain the integrity and high standards of the profession . . . our focus is on the applicant's moral fitness to practice law. On this record, the applicant failed to carry his heavy burden of establishing his rehabilitation and current fitness."

In the second case, the Kentucky Supreme Court issued a ruling denying a convicted sex-offender entry to the state bar, reports the Associated Press and the Louisville *Courier-Journal*.

Guy Hamilton-Smith, a graduate of the University of Kentucky College of Law, had applied to take the state bar exam despite being a registered sex offender— a status he obtained after being convicted for possessing child pornography in 2007— but was informed by the state's bar committee that he would not be allowed to sit for the exam. He appealed that decision, which led the Supreme Court to issue its ruling.

According to the AP story, the court expressed concern that, if it granted Hamilton-Smith a license, "our certification could significantly mislead the public into believing that we vouch for (Hamilton-Smith's) character . . . Consequently, a client's subsequent discovery of the registry listing could then justifiably lead him to question the value of this court's certification of the good character of those who are permitted to take the bar examination."

The court stopped short of creating a rule denying all registered sex-offenders access to the bar, saying that cases should be determined on an individual basis.

Board may not issue restraining order

Issue: Scope of board authority

The state board of nursing does not have the authority to prevent a licensee from contacting a former patient, an appellate court in Louisiana ruled February 14. The court said that in its opinion, such an order could only be imposed as a condition for license reinstatement (*Thigpen v. Louisiana State Board of Nursing*).

In 2010, the board received a complaint about registered nurse Jonea Thigpen from the daughter of one of Thigpen's home-care patients complaining that Thigpen had engaged in an inappropriate personal relationship with her father, and had convinced the elderly patient, 90, to lend her money and draw checks from his account. In response, the board started an investigation and provided Thigpen with an opportunity to reply to the allegations.

Thigpen informed the board that the money provided by the elderly patient made up legitimate donations to her company, Care Coordination Center, where, she explained, he was also Chairman of the Board and a "silent partner." She had kept records of the monetary transfers and provided them to the board in her defense.

Notwithstanding Thigpen's record-keeping, the board charged her with improperly gaining monetary benefit from a patient, specifying seven separate transactions from the patient to the nurse totaling more than $22,000 in 2010, several billing charges ostensibly related to care but not supported by documentation, and several instances in which Thigpen used her patient's credit card.

After a hearing, the board suspended Thigpen's license for nine months, imposed $8,600 in fines and costs, ordered her to pay $22,500 in restitution, and prohibited Thigpen from any further contact with the patient. Thigpen appealed, and the case made its way up to the Court of Appeal in Baton Rouge.

In her appeal, Thigpen argued that the state laws that regulate the nursing profession do not prohibit a business relationship between a nurse and patient and that she had sufficiently separated her business dealings from the treatment she provided. She also argued that the board's prohibition of further contact with the patient was an unconstitutional restraint on her freedom of association.

The appeal met with mixed success. The court rejected most of Thigpen's arguments, concluding that she had overstepped her professional boundaries in several ways. However, it agreed with Thigpen's claim that the board's prohibition on further contact with her patient was beyond its authority.

The board, wrote Judge John Pettigrew in the court's opinion, "is empowered to monitor and regulate Ms. Thigpen's actions only in her role as an RN, and in accordance with the Nurse Practice Act . . . The restraining order prohibiting any and all contact with [the patient] is imposed on Ms. Thigpen pursuant to the final amending order during a time in which her license is suspended, and over which the Board has no authority to regulate or monitor."

The court added, however, that If a restraining order had been added as a condition to reinstatement of Thigpen's license, "then it may have passed muster."

Doctor's discipline upheld in sex-for-drugs case

Issue: Professional discipline for patient exploitation

An appellate court in Connecticut upheld a decision by the state's medical board to revoke the license of a physician who told an opioid-addicted patient, via text message, that he intended to make her a "sex slave" (*Bristol v. Connecticut Medical Examining Board, et al.*).

In November 2009, the Connecticut Department of Public Health filed charges against physician Jyoji Bristol, accusing him of incompetence and violations of his patients' sexual boundaries. After a series of hearings, the board revoked Bristol's medical license, noting that he showed "a profound misunderstanding of the practice of medicine."

Bristol appears to have been rather cavalier when prescribing addictive drugs, forgoing physical examinations of his patients and ignoring signs of addictive behavior. He also engaged in improper sexual and personal relationships with his patients; over a five-month period in 2008 and 2009, he sent more than 200 text messages—some sexually explicit, including the "sex slave" message—and made more than 284 phone calls to a woman who received weekly painkiller prescriptions from Bristol and with whom he had sex on more than one occasion.

Another patient was the recipient of medically unnecessary body examinations, which Bristol peppered with sexually suggestive language.

Bristol appealed the decision, acting as his own attorney, and—as often happens in such cases—the court of appeals devoted lengthy sections of its ruling to dismissing many frivolous and inadequately plead claims. However, one aspect of Bristol's appeal—his challenge of the evidentiary use of some of his many text messages—deserved some attention. The physician claimed that the patient to whom he sent the texts had actually stolen his phone during the time in question and sent the texts herself.

The board, he argued, had improperly authenticated the messages as having come from him. The court of appeals, however, after verifying that text messages were an appropriate form of evidence, ruled January 2 that the board had sufficiently demonstrated that Bristol had sent the messages himself.

Several pieces of evidence in the record, including the fact that Bristol had continued paying his phone bill during the months the phone was supposed to have been stolen, supported this finding, the court said, dismissing Bristol's arguments and upholding the revocation.

Loss of projected income not an "excessive fine" in discipline case

Issue: Due process in discipline hearings

A Mississippi dentist whose license was suspended for six years after he continued practicing during a shorter suspension tried to argue that a projected loss of $1.2 million in income constituted an excessive fine. But while he won a partial appeal of his discipline in an appeals court ruling February 11, he did not get his license reinstated (*Holt v. Mississippi State Board of Dental Examiners*).

In 2010, the Mississippi State Board of Dental Examiners accused dentist Edwin Holt of practicing outside the scope of dentistry. To settle the charges, the dentist entered into a consent agreement with the board in which he agreed to a five-year suspension that was suspended for all but six weeks.

Unfortunately, Holt found himself unable to wait out the six-week reduced punishment. He continued to practice during that time, removing a crown, reviewing treatment plans, and directing employees at his clinic. Holt initially lied to the board about this activity – stating that he had only gone to his clinic to feed his horses, then declaring that the work he performed had not been dentistry. He later admitted that "looking back at it, it can be considered dentistry, and I shouldn't have done it."

Holt did succeed with one argument. When the board accused him of excessively sedating his patients, it failed to provide either the dates or the names of the patients it believed Holt had over-sedated. As a result, the lower court had thrown out this basis for Holt's suspension, noting that it is "not fair to withhold both the identities and dates of alleged violations from an accused until it is too late for him to have a reasonable opportunity to rebut the allegations." The Court of Appeals agreed with this reasoning, upholding the dismissal of the charge. But the court still affirmed the six-year suspension.

He also impeded board investigators during a inspection of his office, at one point angrily breaking a lamp in their presence as they worked in his office. As a result of both these breaches and a complaint that Holt had over-sedated patients, the board imposed the full six-year suspension.

Unhappy with the decision, Holt appealed, arguing that the board had insufficient evidence to prove its new accusations and claiming that the board had violated his due-process rights.

On appeal, a chancellor court overturned a finding by the board that Holt had interfered with inspectors at his clinic, and held that the board had violated the dentist's right to due process by failing to provide adequate information about the evidence against him, but otherwise affirmed the decision, and Holt appealed again, this time to the Court of Appeals.

Holt, acting as his own attorney, did not have much success with his arguments. For instance, a claim that the board had violated his right to an attorney during an informal conference was dismissed without merit, as were accusations of prosecutorial misconduct.

A rather unique claim that, because Holt would normally earn $1.2 million per year, a suspension of his license was the equivalent of an excessive fine, was also dismissed, with Judge Larry Roberts noting that "Holt's argument is essentially that if a professional earns a substantial enough income, the suspension of his license is an excessive fine."

Medical advice still "practice"—even when patients don't follow it

Issue: Compliance with board orders regulating practice

A state appellate court in Oregon rejected a physician's argument that a doctor who offers medical advice a patient does not follow cannot be considered as "practicing," as that term is defined in the law (*Gambee v. Oregon Medical Board*). In the February 20 ruling, the court upheld most of the discipline imposed by the state's medical board on a doctor who overprescribed thyroid and testosterone therapy.

The doctor, John Gambee, had a history of trouble; the Oregon Medical Board previously revoked his license in 1994. Although Gambee was later reinstated, he was required to sign an agreement prohibiting him from prescribing thyroid hormone medication without specific test results from a patient.

In 2009, the board opened another investigation of Gambee's practice after a patient complained he had unnecessarily prescribed thyroid medication and recommended that she purchase it from Mexico via the Internet. During the investigation, the board further restricted the circumstances under which Gambee could prescribe both thyroid and testosterone and ordered the doctor to adhere to guidelines recommended in a *New England Journal of Medicine* article about the risks of testosterone replacement therapy.

After hearings, the board again revoked Gambee's license, ruling that his treatment of several patients either violated the limitations on his licensure — including a failure to adhere to the recommendations in the journal article —or fell below the standard of care. Gambee appealed, arguing that the board had erred when it found that he had violated his license limitations with two of the several patients whose treatment the board had investigated.

As part of this claim, Gambee noted that the journal article relied on by the board for treatment guidelines did not actually contain explicit numerical guidelines for determining when to prescribe testosterone and that, when the board relied on an expert witness to provide those numbers, it had reached outside of the restrictions imposed on his license.

The court agreed, finding that because no official document set forth the proper testosterone levels for a diagnosis, the board could not conclude that Gambee violated his restrictions.

Gambee also argued that his treatments were "alternative medical treatments," which, under Oregon law, can be used by a physician even if the treatment is not scientifically accepted, as long as the treatment does not pose a greater risk to a patient than a standard treatment.

As a result, he claimed, the board erred when it ruled that his use of hormone therapy was below the standard of care. A doctor using alternative medical treatment, Gambee argued, can only be held to a "general medical standard of care," such as that prohibiting the use of unsterilized needles.

The court did not agree. The alternative medicine law only allows those treatments that do not pose greater risks than a standard treatment, it noted; and the board specifically found that Gambee's hormone treatments had endangered the safety of his patients.

In a relatively novel argument, Gambee also claimed that the board had erred when it found that he violated the restrictions placed on his license by recommending thyroid treatment to two patients because those patients did not follow his recommendations.

The court found that Gambee had "used" the treatment when he had recommended it to one of the patients. But it ruled that Gambee's advice to the other patient had been sufficiently qualified—since Gambee had recommended that the patient undergo further tests—that Gambee could not be said to have "used" the therapy on that patient.

Because the court had invalidated two of the findings against Gambee, the case was remanded to the board to determine the appropriate sanctions.

MD's revocation upheld for submitting $2.5 million in fraudulent claims

Issue: Professional discipline for insurance fraud

An appellate court in New York upheld the license revocation of a physician who had submitted more than $2.5 million in fraudulent claims (*Huang v. Administrative Review Board for Professional Medical Conduct*).

In 2009, physician Mark Huang pled guilty to criminal healthcare fraud after admitting that $2.5 million in claims he submitted to insurers as care that he claimed was provided by licensed physical therapists was, in fact, performed by non-licensed individuals.

Although Huang's guilty plea spared him from prison time, New York's Board of Professional Medical Conduct followed with its own charges soon after, and Huang eventually found his medical license revoked by an administrative review board.

Huang appealed the decision, arguing that the state improperly revoked his license automatically after his guilty plea, an act which he claimed was an improper usurpation of a legislative function and a violation of his due process rights.

However, in a February 27 decision, Justice Elizabeth Garry of the state Supreme Court's Appellate Division in New York City did not agree that the state had acted automatically when it revoked his license.

She noted that the revocation "was not based solely upon the fact of petitioner's conviction, but was instead expressly premised upon its particular characteristics, including the magnitude of the fraud, its five-year duration, and petitioner's admitted knowledge that his conduct was wrong."

"Considering petitioner's deliberate deceit in submitting false billings amounting to more than $2 million and the consequent significant loss to the programs involved during the five-year duration of this fraud," she concluded, "we find no reason to disturb the penalty."

Licensing

Mental health application questions violate ADA *(from page one)*

The DOJ primarily objects to the fact that the questions discriminate against applicants by treating mental disability differently from physical disabilities and by focusing on diagnoses rather than conduct.

There are five problems with Louisiana's system for evaluating and admitting applicants with mental health disabilities on a "conditional" basis, said the Justice Department. The system discriminates against individuals based on disability in violation of the ADA by (1) making discriminatory inquiries regarding bar applicants' mental health diagnoses and treatment; (2) subjecting bar applicants to burdensome supplemental investigations triggered by their mental health status or treatment as revealed during the character and fitness screening process; (3) making

discriminating admissions recommendations based on stereotypes of persons with disabilities; (4) imposing additional financial burdens on persons with disabilities; (5) failing to provide adequate confidentiality protections during the admissions process; and (6) implementing burdensome, intrusive, and unnecessary conditions on admission that are improperly based on individuals' mental health diagnoses or treatment.

The NCBE's Request for Preparation of a Character Report, required of each applicant, includes the following questions:

25. Within the past five years, have you been diagnosed with or have you been treated for bipolar disorder, schizophrenia, paranoia, or any other psychotic disorder?

26A. Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) which in any way currently affects, or if untreated could affect, your ability to practice law in a competent and professional manner?

26B. If your answer to Question 26(A) is yes, are the limitations caused by your mental health condition. .. . reduced or ameliorated because you receive ongoing treatment (with or without medication) or because you participate in a monitoring program?

27. Within the past five years, have you ever raised the issue of consumption of drugs or alcohol or the issue of a mental, emotional, nervous, or behavioral disorder or condition as a defense, mitigation, or explanation for your actions in the course of any administrative or judicial proceeding or investigation; any inquiry or other proceeding, or any proposed termination by an educational institution, employee, government agency, professional organization, or licensing authority?"

The DOJ began investigating Louisiana's bar admission questions relating to mental health in 2011, after a complaint was filed by the Bazelon Center for Mental Health Law, an advocacy group, on behalf of an applicant known as TQ and, later, another known as JA.

This probe led the DOJ to issue its advice to the Louisiana state bar, in the form of a "Letter of Findings."

If applicants respond affirmatively to Questions 25 or 26, they must complete a form authorizing each of their treatment providers to provide information, "without limitation," relating to mental illness including copies of records, concerning advice, care, or treatment provided. In Louisiana and other states, this can lead to requests for information "of an extremely personal nature," that is irrelevant to the applicant's ability to practice law, the DOJ said.

For example, in the case of applicant TQ, the Admissions Committee reviewed treatment notes including details of intimate information discussed in therapy such as her upbringing, relationships with members of her family, sexual history, body image, and romantic relationships."

Despite the fact that the Louisiana Supreme Court authorizes conditional admission only when an applicant's record shows conduct that may otherwise warrant denial, conditional admission is often imposed for such reasons as "diagnosis with bipolar disorder," in the case of TQ.

Ironically, the DOJ notes, some applicants with substantial misconduct in their background, and even felonies like second degree murder, have been admitted without any condition or oversight whatsoever.

The Justice Department letter makes several recommendations for remedial measures, including refraining from using the NCBE questions, changing admission rules to ensure that only conduct and not mental diagnosis or treatment is considered during evaluation, terminating conditions on admission to current members who do not have conduct-related issues, expunging all documents and records related to such cases, and paying compensatory damages to individuals with mental health disabilities who were subjected to discrimination during the bar admissions process.

Negotiations lie ahead. The DOJ considers the letter a prelude to a mutually agreed solution, arrived at in an "amicable and cooperative fashion," to resolve the agency's concerns, wrote Jocelyn Samuels, acting assistant attorney general in the DOJ's Civil Rights Division.

Largest U.S. state opens some licensing to undocumented immigrants

Issue: Undocumented immigrants and right to licensure

In response to a recently-enacted state law, the California Supreme Court granted undocumented immigrants the ability to acquire a California attorney license (*In re Garcia on Admission*). The court made its January 4 ruling in a case brought by a bar applicant named Sergio Garcia, a Mexican national.

Although born in Mexico, Garcia's parents first brought him to the United States illegally when he was only 17 months old. He spent the next eight years in California, moved back to Mexico, then returned in 1994 after his father obtained permanent resident status; Garcia himself crossed again without documentation.

As a child of a permanent resident, Garcia applied for permanent resident status but, because of the limited number of immigrant visas, he was still waiting a determination 19 years after he filed the application.

In the meantime, Garcia went to school; he received a law degree in 2009 and passed the California bar exam later that year. When Garcia applied for admission to the California bar, the state's Committee of Bar Examiners, which handles admissions, petitioned the state's supreme court for a license on his behalf.

Garcia's application was almost universally supported; a call from the court for amicus briefs brought only three opposing the motion—one from the U.S. Department of Justice and two from individuals—and many that supported him, including someone from the state's attorney general's office.

Then, in September 2013, the state legislature weighed in. The federal law that prevents undocumented immigrants from obtaining a professional license, among other "public benefits," also provides an exception: States may pass their own legislation on the subject; in such a case, the state law would supersede the federal statute. This exception was statutorily enabled by the legislature; a law allowing undocumented immigrants to obtain a law license became effective on the first day of 2014.

Although the passage of the state law would seem to have settled the matter, amicus parties to the case nevertheless objected to Garcia's admission to the bar. One argument the opposition provided was that, as a person whose entry to the country was illegal, Garcia would be in violation of federal law at the time he takes his licensure oath, in which he would promise "to support the Constitution and laws of the United States and of this state."

The court did not agree. Chief Justice Tani Cantil-Sakauye, in the court's written opinion, noted that California case law does "not support the proposition, implicit in amicus curiae's contention, that the fact that a bar applicant's past or present conduct may violate some law invariably renders the applicant unqualified to be admitted to the bar or to take the required oath of office."

Testing

LSAC must stop flagging test results for disability accommodations, court rules

Issue: Testing accommodations under Americans with Disabilities Act

A California court, on January 13, dismissed a challenge by the Law School Admissions Council to a new law that prevents the testing organization from marking the scores of candidates who received disability accommodations when they are sent to schools (*LSAC v. California*).

When the Council, the organization that administers the standardized test used for admission to law school, grants a request for a disability accommodation—most often in the form of extra time—that candidate's score is reported in a different way than those of candidates who took the test without accommodations.

The reported score does not include the percentile ranking of the candidate or rank them in LSAC's predictive index, used to indicate likely first year law school performance. The score is also accompanied by an explanation that "scores achieved with extra testing time tend to over-predict how the examinee will perform in the first year of law school" and that such scores "should be interpreted with great sensitivity and flexibility."

In 2012, California enacted a statute that forbids the LSAC from notifying score recipients–either directly or through an omission–that a candidate had received a disability accommodation and requiring the LSAC to give more weight to evidence of past accommodations given to a candidate in testing situations.

Although the legislation does not mention the testing organization by name, it applies itself exclusively to the "sponsor of the Law School Admissions Test," which, at this time, includes only the LSAC. The different score reporting, one of the bill's sponsors explained, "creates a chilling effect that discourages individuals from requesting testing accommodations."

In response to the legislation, the LSAC filed a complaint for relief in state court, claiming that the new law violated several provisions of the California Constitution. The LSAC argued that the legislature, by directing the law only to it, to the exclusion of other testing organizations, violated its right to equal protection.

A lower court, agreeing, ruled that the statute singled out the LSAC without a rational basis and granted a preliminary injunction against the bill. The state appealed, and the case went to a state appellate court in Sacramento, which issued a decision written by Justice David Hoch.

The appeals court rejected the LSAC's arguments, starting with its equal protection claim. In his opinion, Justice Hoch noted that the legislature appeared to have singled out the LSAC because, unlike other testing organizations, it placed undue burdens on disabled applicants.

In support of his decision, Hoch quoted from a report prepared by the American Bar Association which attributed an under-representation of disabled individuals in the legal profession to the stringent proof of disability required by the LSAC and to its practice of marking test scores from individuals receiving accommodations. Thus, Hoch wrote, the LSAC was not similarly situated to other testing organizations.

In denying the injunction, the court also ruled that, if the statute were to be found constitutional at trial, the potential harm to disabled test-takers would be great if the LSAC's reporting practices were allowed to continue in the interim.

"These applicants will suffer tremendous irreparable harm," wrote Justice Hoch. "They will be faced with the concrete and immediate choice of either having the fact of their disability disclosed to law schools or foregoing the opportunity to have a needed accommodation on the LSAT."

If they choose the latter, they risk earning a score that reflects their disability rather than their aptitude to study the law. If they choose the former, they risk having law schools discount their LSAT scores as 'not hav[ing] the same meaning as scores earned under standard time conditions.'"

Standards of Practice

Boards may ban sexual conversion therapy, federal court rules

Issue: Legislative control of professional practice methods

The government has some leeway to regulate professional conduct in delivery of psychotherapy, the U.S. Court of Appeals for the Ninth Circuit said in a January 29 decision. The ruling denied an injunction to plaintiffs who sought to overturn a 2012 California statute that prohibits licensed therapists from practicing sexual orientation change therapy (SOCE), a method aimed at repressing same-sex sexual desire, on minor patients. The court found that the plaintiffs were unlikely to win their case (*Pickup v. Brown*).

The legislative prohibition was a reaction to changing views of sexuality in American society. Homosexuality has not been listed in the *Diagnostic and Statistical Manual of Mental Disorders* since 1973, and the prohibition statute, passed in 2012 by the California legislature, was prompted by assertions from many mental health associations that the practice was ineffective and risked harming patients.

At least two different suits were filed, with the two that formed the basis of the Ninth Circuit's opinion meeting with different levels of success. In one of the cases, *Welch v. Brown*, a federal district court judge granted a preliminary injunction to the plaintiffs, ruling that the law likely violated constitutional prohibitions on the restriction of speech.

In the other case, *Pickup v. Brown*, a federal judge denied the group's request for an injunction, ruling that they were unlikely to prevail on any of their constitutional claims. Both cases were appealed to the Ninth Circuit, which issued its ruling in favor of the state.

A group of practitioners, advocacy organizations, minor patients, and their parents brought suit seeking to have the new law declared unconstitutional. The methods used by practitioners of sexual change therapy involved in the suit include "reframing" of a subject's desires, redirection of their thoughts, and hypnosis. The challenged bill was intended to prohibit both these and more assertive and physical methods of conversion, such as inducing nausea or pain at the onset of desire.

Citing precedent, the appeals court judges elaborated three core principles that guide constitutional speech claims in the context of mental health treatment: "(1) [D]octor-patient communications about medical treatment receive substantial First Amendment protection, but the government has more leeway to regulate the conduct necessary to administering treatment itself; (2) psychotherapists are not entitled to special First Amendment protection merely because the mechanism used to deliver mental health treatment is the spoken word; and (3) nevertheless, communication that occurs during psychotherapy does receive *some* constitutional protection, but it is not immune from regulation."

The bill did not regulate speech, the court ruled, as it did not prevent the discussion of the therapy with patients or the public, but only the implementation of particular treatment, which the court deemed "professional conduct." According to the statute, "[t]he *only* thing that a licensed professional cannot do," wrote Judge Susan Graber for the majority, "is avoid discipline for *practicing* SOCE on a minor patient."

The court also ruled that the law was not unreasonable and was not subject to being overturned. "The record demonstrates that the legislature acted rationally when it decided to protect the well-being of minors by prohibiting mental health providers from using SOCE on persons under 18," Judge Graber wrote.

He noted that the state had relied on the opinion of mental health professional organizations "which concluded that SOCE has not been demonstrated to be effective and that there have been anecdotal reports of harm, including depression, suicidal thoughts or actions, and substance abuse."

"Although the legislature also had before it some evidence that SOCE is safe and effective," Graber concluded, "the overwhelming consensus was that SOCE was harmful and ineffective."

The plaintiffs also contended that the law violated constitutional protections of the freedom of association, but the court noted that therapist-client relationships are not the kind of association protected by the Constitution.

In response to the plaintiffs' claim that the bill infringed on the rights of parents to make decisions regarding their children's upbringing, Graber wrote, "the fundamental rights of parents do not include the right to choose a specific type of provider for a specific medical or mental health treatment that the state has reasonably deemed harmful."

Unlicensed Practice

Retail giant not guilty of unlicensed practice

Issue: Corporate control of licensees

A Best Buy store in Virginia did not engage in contracting work requiring a license when it sold a replacement gas dryer to a customer and arranged for a licensed contractor to install the device, a state court ruled February 4 (*Board for Contractors v. Best Buy Stores*).

In Virginia, Best Buy has a contract with a licensed contractor, Optima Services Solution, to perform the installation of all the gas appliances sold by the store. However, in 2011, Optima—in violation of its contract with Best Buy—subcontracted with an unlicensed contractor, Washington Home Services, to install a gas dryer purchased by a customer from a Best Buy store in the town of Gainesville. When the customer discovered that the subcontractor was unlicensed, he complained to the state's Board for Contractors, which began an investigation of Best Buy's policies.

After the investigation, the board found that the retail giant had engaged in the practice of gas fitting without a license, imposed an $850 fine, and required a member of its management to complete a remedial class.

The company appealed, arguing that it acted not as a contractor, but only as a retailer when it sold the appliance. Eventually the case went up to the Court of Appeals of Virginia in Richmond, which issued the February opinion.

Before the appellate court, the board argued that its decision to sanction Best Buy deserved deference because the ruling was within the particular expertise of the board. The court, however, noted that the board's decision was based "solely on the statutory language defining 'contractor'" and that such an issue of statutory construction was not within the board's expertise.

The board also argued that, even aside from any question of deference to its decision, the court should rule on the merits that Best Buy was a contractor. The court did not agree. "In this matter," Judge Glenn Huff wrote for the court, "Best Buy was never present at the job site and merely signed a standard contract indicating contractor would be responsible for the installation of the dryer."

Best Buy employees did not supervise any of the installation and the contract specified that any further contracting needs would be between the property owner and the contractor, without Best Buy's participation.

And the replacement of the dryer, itself, Huff wrote, was not contracting as defined by the law, as "installation of a replacement gas dryer does not alter the use

or purpose of the real estate . . . [which] requires the permanent incorporation of materials into a building in such a way that the incorporated material becomes essential to the use and purpose of the building and cannot be removed without damaging the real property."

With the board's arguments dismissed, the court affirmed the reversal of the sanction, ending the case.

Competition

Allegedly outdated funeral director regulations upheld—but not ban on trade names

Issue: Restrictions on ownership, trade names

The state's ban on trade names for funeral establishments is unconstitutional, a federal court in Pennsylvania, ruled February 19. The court rejected almost all aspects of a sweeping challenge to the state's funeral professional regulations brought by a group of funeral professionals (*Heffner v. Murphy*).

The plaintiffs, including funeral directors, funeral service companies, and cemeteries, filed suit against the Pennsylvania Board of Funeral Directors seeking to nullify several provisions of the state's Funeral Director Law, which contains several restrictions on the profession the group viewed as onerous and outdated.

The plaintiffs challenged restrictions on the ownership of funeral homes, restrictions on the number of establishments that licensed professionals may practice at or own, prohibitions on trade names for funeral establishments and commissions to sales agents, and a provision that allows warrantless inspections of funeral establishments. These provisions, the group claimed, violated clauses of the U.S. constitution.

The court agreed that the rules were often archaic in several instances, but it found specific reasons why each provision met the constitutional standard of at least minimal rationality. "There is a fundamental difference between legislative enactments that may be archaic and those that are irrational for purposes of our substantive due process inquiry," the judge said. Although suggesting that the state legislature should revisit the rule, he concluded that "the Constitution is not a lever that we can use to overcome legislative inertia."

After a federal district court struck down several provisions of the law, the board appealed and the case went to the U.S. Court of Appeals for the Third Circuit in Philadelphia, which issued an opinion written by Chief Judge Theodore McKee reversing almost all of the lower court's ruling.

To explain the dramatic difference in the two courts' rulings, McKee "surmise[d] that much of the District Court's conclusions regarding the constitutionality of the FDL, enacted in 1952, stem from a view that certain provisions of the FDL are antiquated in light of how funeral homes now operate. That is not however, a constitutional flaw."

For example, the plaintiffs had argued that, in the funeral industry, warrantless searches were unrelated to the protection of public health. Judge McKee acknowledged that surprise inspections may not be as important in the funeral industry as in other regulated professions; however, he said, that did not negate the need for surprise inspections altogether, a fact that validated the law. "The board," he wrote, "need not show that warrantless searches are the *most* necessary way to advance its regulatory interest."

The challengers also argued that the statute failed to place any real limits on the inspectors' discretion. But the court ruled that the somewhat light restrictions included in the statute–that inspectors must limit their inspection to enforcement of the Funeral Director Law, and that the inspectors must be appointed by the board–were sufficient to meet constitutional requirements.

The court also dismissed a challenge to a lack of time restrictions on inspections, which allowed inspectors to work at any time of day. "The very fact that death is not

restricted to normal business hours or workdays belies any suggestion that administrative searches of funeral parlors should be so restricted."

The plaintiffs also challenged the ownership and location-of-practice restrictions of the law under the Constitution's Dormant Commerce Clause, arguing that the law improperly shielded Pennsylvania funeral establishments from outside competition. This claim met with little success; Judge McKee noted that the laws at issue treated in-state and out-of-state residents alike, applying the same restrictions to both.

A challenge to restrictions on corporate ownership of funeral licenses met with a similar dismissal. Although McKee acknowledged that the rules effectively restricted out-of-state residents and corporations from practicing in Pennsylvania, he noted that "there is nothing . . . to suggest that this is a reflection of anything other than the nature of the funeral business," which, "involving the internment and cremation of consumers' loved ones, is by nature a highly localized enterprise."

Only the plaintiffs 'claim that the law's prohibition of trade names violated First Amendment free speech rights met with success. Although the board claimed that the prohibition was necessary to protect consumers from potentially misleading or fraudulent trade names, McKee wrote that "the [board's] lack of record support for its parade of hypothetical horribles suggests caution before concluding that trade names in the funeral industry are sufficiently misleading" to allow for complete prohibition." The court struck the provision.

Take Note

Applicant database must be disclosed to researchers studying racial factors

Issue: Privacy of testing candidate information

The state bar association must share a database of bar applicant demographic information with academics researching the relationship between race-based law school admission and bar exam performance, the Supreme Court of California ruled December 19 (*Sander v. State Bar of California*).

The State Bar's admissions database sought by the researchers contains a plethora of demographic information about bar applicants, but applicants are identified in the database only by a number; the name of each candidate is confidential.

The Bar has only once shared this information with an outside party, when, at the request of the state's Chief Justice, it supplied information on a study of the relationship between performance in law school and performance on the bar exam.

In 2006, the Bar, citing privacy concerns, denied a request by a UCLA professor, Richard Sander, to access the database for a study of the association between bar exam scores and racial preferences in law school admissions.

Sander, undaunted, filed a formal public records request, specifically seeking the information in a way that would prevent identification of the applicants in the records, but was denied again. He then filed a court petition seeking to force the Bar to provide the records. After a series of conflicting rulings, the case made its way to the state's supreme court.

Before the court, the Bar argued that a State Bar rule making applicant records confidential "unless required to be disclosed by law" prohibited the release of the records to Sanders. However, the court noted both that the rule does not define

"applicant records" and that the sort of "de-identified" records sought by Sander would not fall within the rule.

Using common law principles, the court determined that the records, stripped of identifying information, were subject to disclosure. The public, the court noted, has "a legitimate interest in the activities of the state bar in administering the bar exam and the admission process," and no compelling reason existed to keep the information secret.

Administration

Legislature has authority to appropriate board funds

Issue: Limits of board authority over funds

A state appellate court in Illinois upheld a legislative appropriation of money from the state's Real Estate License Administration Fund. In the February 7 decision, the court rejected a challenge from the Illinois Association of Realtors which argued that the withdrawals constituted an inappropriate tax (*Illinois Association of Realtors v. Stermer*).

The association, which represents 40,000 Illinois-licensed real estate professionals, brought suit against several state officials after the passage of the state's 2007 budget. The budget included an appropriation of $5 million from the Real Estate License Administration Fund—which supports Illinois' real estate licensing scheme through license fees—for the state's general fund.

The association claimed that the transfer was in violation of the state constitution, noting that the fund was legislatively dedicated for licensing administration and that the state had declared its intention to again appropriate money from the fund as recently as this year. The association also claimed that the appropriations followed license fee increases, and that the state had failed to hire an adequate number of license investigation and prosecution staff, all implying that the state was using the money at the expense of licensees/members and the proper functioning of the state's licensing scheme.

To challenge the appropriations, the association argued that because the licensing fees were now levied for purposes other than the needs of the board and were thus higher than if collected for the sole purpose of license administration, the fees constituted a tax that was levied in violation of the Illinois Constitution. "Can the State, through the guise of charging the regulatory fee," an attorney for the plaintiffs posited, "charge substantially in excess of it with the purpose and intent to pay off general revenue debt?"

In 2013, a trial court dismissed part of the association's case, ruling that the organization had no standing to bring its complaint. The court also found that the amount of the yearly license fees paid to the Administration Fund was not dependent on the amount of money available in the fund and that the appropriation of the funds by the legislature did not raise new revenue. The association appealed and the case went to the Illinois Appellate Court, Fourth District, which issued the February decision, written by Justice James Knecht.

The Appellate Court upheld the ruling dismissing the complaint, concluding, in agreement with the lower court, that the Association did not have standing to bring its claim. Although the organization had challenged the transfer under "taxpayer standing"–a legal doctrine which allows taxpayers to challenge the misappropriation of public funds–because the association's "claim is about misuse of a special fund, it must show a special injury," explained Justice Knecht.

The association, he concluded, could not show such an injury; it had not claimed any sort of ownership in the fund, it was unable to formally connect the fee increases to the appropriations and, no law prevented the legislature from redirecting the money. "The fact is," Knecht wrote, "licensees pay the fees as a condition of being licensed to conduct business in Illinois; those fees go into the Administration Fund, which is a public fund; and the legislature can transfer money from the Administration fund."

The association also tried to assert its claim under other doctrines of legal standing, but the court rejected each argument for the reason that the organization could not show that it had suffered an appropriate and actionable injury, often due to a lack of detail in its evidence.

Justice Knecht noted that the organization had failed to provide any evidence expressly tying the fee increases to the appropriated funds or showing–with any numerical detail or specificity–the alleged affects of the transfers; for example, no evidence was provided as to how much money the Department needed to operate, the number of investigation and prosecution staff necessary for enforcement, the amount of excess funds collected by the new higher fees, or whether factors other than the appropriations caused the fee increases.

"Plaintiff's failure," Knecth wrote, "to provide factual allegations about the Administration Fund's finances undermines its contention the fund is connected to the fee amount charged to licensees."

Although the association had pointed to fee increases that occurred three years before the challenged appropriation, in an attempt to show a pattern of earlier increases tied to appropriations, this was too tenuous a connection to be useful to their position.

Without concrete evidence of actual failures on the part of the Department to regulate the profession, the court ruled that association was unable to show an injury that would allow it to bring a claim.

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