Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue

Competition

U.S. Supreme Court rocks licensing

Boards lose antitrust immunity if not "actively supervised" by states

Issue: Active state supervision of state licensing boards

In a key ruling on competition in professional services, the U.S. Supreme Court found February 25 that a state dental board that ordered non-dentists to stop whitening teeth does not have state-action immunity from Federal Trade Commission antitrust enforcement. (*North Carolina State Board of Dental Examiners v. FTC).* The FTC had charged the board with an anticompetitive and unfair method of competition.

However, implications of the ruling, which affirmed an earlier U.S. Fourth Circuit Court of Appeals decision, will extend far beyond dentistry or teeth-whitening operations. On a 10-point scale, many believe, the decision may be an "8" or "9" as far as its potential impact on professional licensing.

The reason: In their 6-3 decision, the high court justices found that state professional licensing boards that regulate their competitors are only protected from antitrust scrutiny when supervised by state government. In the court's view, supervision didn't happen in this case. And it may, in fact, be a rarity among most state licensing boards.

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Discipline

Amid spread of firearms, guns getting go-ahead for some board investigators

Issue: Arming of investigative personnel for enforcement

As U.S. gun shops continue to rack up record sales, pharmacies and medical offices are becoming more and more likely to have firearms in their facilities, and some state boards are considering a "fight fire with fire" approach in ensuring that their investigators remain safe.

Since 2011, more boards have become receptive to the option of arming their board investigators. "It is something we would like in the future … It is part of our strategic plan," said Yvette Yarbrough, executive

director of the Texas Board of Chiropractic Examiners in 2013, testifying before a state legislative appropriations committee. Why arm investigators? Yarbrough was asked. She answered: "Even though we have statutory authority to inspect facilities…sometimes if you meet resistance…this would help us in that regard; and additionally help us in obtaining some information."

Texas Attorney General opinion on guns for investigators

In 2013, Mari Robinson, executive director of the Texas Medical Board, in a letter to the Attorney General, Greg Abbott, inquired about the legality of arming board investigators.

Abbott replied, "Texas law does not prohibit the Texas Medical Board from allowing its investigators who are not commissioned as peace officers to carry a concealed handgun pursuant to the concealed handgun law while the investigators are on duty."

However, Abbott also pointed out that it's unclear how a court would rule concerning an employer's responsibility if an employee negligently used a licensed firearm.

Today, more boards are considering arming their investigators, according to Molly Marsh, the membership and training coordinator at CLEAR (Council on License, Enforcement and Regulation). "This is certainly an important topic for many boards right now and we have incorporated information regarding investigator safety into our National Certified Investigator & Inspector Training (NCIT) programs," Marsh said.

Medical boards have authorized their investigators to be allowed to carry firearms in the past.

In 2011, the Ohio Medical Board unanimously voted for board investigators to be allowed to carry guns on the job. The board cited the growing influx of "outlaw pain-pill practices" and the likelihood that pill mill locations contained hidden weapons as reasons for the allowance of their investigators to carry guns.

"This is not something that anyone is particularly excited about," executive board director Richard Whitehouse said after the vote passed. He pointed out that investigators would only need to carry guns for dire situations in which danger could be foreseen.

Whitehouse also noted that although no medical board investigators have been harmed on the job, it has become much more common for investigators to encounter armed employees at professionals' places of practice.

Michael Ferjak, director of the Human Trafficking Enforcement Prosecution Initiative of the Iowa Department of Justice, is senior instructor for CLEAR's NCIT program. Ferjak says that while it's still rare for investigators to carry guns, some boards are more likely than others to arm their investigators.

Pharmacy board investigations, for instance, often handle drug enforcement and criminal investigations. These boards typically employ agents who are sworn peace officers, which allows for the carrying of firearms during a criminal investigation of a pharmacy.

Still, Ferjak pointed out that armed investigators are generally a rare occurrence. "I rarely find regulatory agencies that allow their investigators to go armed," stated Ferjak. He also noted that arming investigators has never been common, and that, from a historical perspective, arming investigators has been "sporadic."

However, Ferjak added, a board investigator's work can be dangerous, even in seemingly routine circumstances. "There are multiple accounts of regulatory investigators being physically and sexually assaulted or killed while performing seemingly routine duties including record gathering, inspections, interviews, etc."

Ferjak pointed to several incidents in the last 15 years where investigators have been victims of retaliation by individuals under board investigation.

In 2000, for instance, the owner of a California meat processing plant shot three state health inspectors. The inspectors were conducting a scheduled re-inspection of the plant after the facility had failed an annual inspection. The owner shot each investigator in the chest with a .357 magnum pistol at point-blank range, killing them.

In 2011, a Louisiana insurance agent fatally shot two insurance investigators. The investigators had arrived at the insurance agency's premises to investigate a fraud claim.

In response to those who contend that violent altercations involving board investigators are uncommon, Ferjak suggests that the uncertainty surrounding an investigator's job makes it a complicated issue.

"No one can accurately or consistently predict how another person will react under a given set of circumstances at any given time," said Ferjak, "Everyone is capable of violence under some circumstances. The problem is the regulatory investigator is never going to know if that day is today."

As for the procedure of firearm licensing for investigators, it varies by state, but "in most states there are generally two types of weapon permits: professional and non-professional," stated Ferjak.

"Professional permits are primarily issued to law enforcement personnel and rarely anyone else. Non-professional permits are issued to members of the general public after being cleared by a background check and showing proof of completing some type of course of instruction."

Many boards that voted to allow their investigators to carry a firearm require them to undergo a minimum of 40 hours of training. In Ohio, for example, investigators must train at the Ohio Peace Officers Academy and obtain re-certification annually.

Unarmed board investigators are taking an incredible risk that even trained law enforcement officers are not willing to take, Ferjak pointed out. "Generally licensees do not fully or accurately understand the authority and powers of a regulatory investigator and may react if a threat to liberty or employment is perceived."

When he teaches classes, he asks: "How long would it take for your boss or office to notice you were missing? The answer (after some uncomfortable joking) is usually at least the next day. How many let the office know where they are, especially when entering a private residence or business? Does anyone check to see if they are ok and when? Minimal responses."

Given the proliferation of firearms in the field and in professional offices, "Letting someone know where they are going is a precaution that investigators should strongly consider," Ferjak believes.

$9.95 per discipline search? Free is better, says public interest group

Issue: Open access to state discipline records

Investigative journalists at the New York-based organization ProPublica announced in January the online publication of two comprehensive state-by-state guides to researching disciplinary actions, one for doctors and one for nurses.

A simple fact prompted ProPublica to assemble the "recipe" for researching disciplinary records, says the public interest group: "There is no free and open national database that allows the public to scrutinize the qualifications of doctors and nurses."

In compiling their guides, the ProPublica journalists found that every state licensing board provides the public with basic license verification, often including whether or not practitioners have been disciplined. But 16 medical and nursing boards withhold key details of misconduct and errors. A 2010 study by ProPublica found that the federal database, the National Practitioner Data Bank, also falls far short of complete, likely omitting thousands of disciplinary actions.

Some boards say the fees from requests for disciplinary searches are necessary because they rely on the income —also the reason cited by the Federation of State Medical Boards for its $9.95 per search fee, ProPublica reports.

A few boards provide a one-sentence summary of disciplinary action without details, while some see a difference between "public" records and "publicized." "We just don't put it out there probably because of privacy issues," said one board administrator.

The ProPublica guides for discipline research, including all links to recent board actions, are available at: http://www.propublica.org/nerds/item/reporting-recipe-how-to-investigate-health-professionals.

ProPublica publishes online guidebook on how to research discipline of physicians and nurses

(Available at http://www.propublica.org/nerds/item/reporting-recipe-how-to-investigate-health-professionals)

State (click to look up a doctor)	Full disciplinary history available?	How to contact state medical boards	Lists of recent board actions
Alabama	Yes	For more information, contact Alabama's medical licensure commission at (334) 242-4153 or bme@albme.org.	List of recent disciplinary actions
Alaska	No	Disciplinary documents are not available online. To access doctors' records, contact Alaska's medical licensing department at (907) 269-8163 or debora.stovern@alaska.gov.	Lists of disciplinary actions since 1985
Arizona	Yes	For additional information, contact Arizona's medical board at (480) 551-2700 or Arizona's Board of Osteopathic Examiners at (480) 657-7703. For recent actions from the Board of Osteopathic Examiners, visit their central database.	List of recent disciplinary actions
Arkansas	No	Disciplinary documents are not available on Arkansas' medical board website. To access the documents, contact look up Arkansas' medical board at (501) 296-1802.	Lists of disciplined doctors since 2007
California	Yes	Disciplinary documents for recent violations are available on each doctor's license verification page. For older violations, contact California's medical board at (916) 263-2525 or complete the online request form. For recent actions from the California's Osteopathic Examiners Board, visit their central database.	List of disciplined doctors
Colorado	Yes	Most disciplinary documents are available on each doctor's license verification page. If a document is missing, contact Colorado's medical licensing department at (303) 894-2430 or DORA_MedicalBoard@state.co.us.	Lists of disciplinary actions
Connecticut	Yes	For additional information, contact Connecticut's medical board at (860) 509-7603 or oplc.dph@ct.gov.	List of recent disciplinary actions since 2010

Mississippi: License denial for marijuana conviction is unconstitutional

Issue: Past marijuana conviction and disclosure

The Supreme Court of Mississippi, in a January 22 ruling, overturned a decision by the state's Department of Insurance to deny a license-renewal application by a bail agent based on his conviction for marijuana possession more than 30 years prior (*Chunn v. Mississippi Department of Insurance*).

The bail agent, Richard Chunn, pled guilty to a felony charge of marijuana possession in 1981. A little over a decade later, Chunn, who has no other criminal convictions on his record, began working as a licensed bail agent. He continued in the profession for 20 years without problem, until 2011, when the Mississippi legislature passed a law categorically forbidding felons from possessing a bail-agent license.

When Chunn applied to renew his license that year, the department rejected his application, and Chunn filed suit to challenge the constitutionality of the law. The case eventually rose to the state's supreme court, which issued an opinion written by Justice Jess Dickinson.

The court agreed with Chunn, ruling that the statute's categorical prohibition on the holding of bail-agent licenses by felons violated the Equal Protection Clause of the Constitution. While noting that the law did not implicate a fundamental right and would thus only need to stand up to "rational basis" review, the court concluded the law failed to meet even that low standard.

Justice Dickinson noted that, while Mississippi had a legitimate interest in prohibiting some felons from possessing bail agent licenses, any law that would prohibit Chunn—whose only conviction was more than 30 years old, for an activity now legal in several states—went too far. The state was unable to show a legitimate interest in such a prohibition.

In an attempt to supply that interest, the state had only argued that a person convicted of any felony loses "some of the trust of society," a rationale that the court rejected, noting that it "utterly fails."

While some felonies do call into question the offender's trustworthiness, Justice Dickinson wrote, the statute also reached felonies that bore no relation to trustworthiness.

"Because the statute fails to account for the differences in particular felonies and the relationship between particular felonies and fitness to hold a bail-agent license," Dickinson wrote, "and because it has no time limits for when the felony was committed, we must conclude that the statute, as applied to Chunn, violates the Equal Protection Clause."

"A person's God-given, constitutional liberty to engage in a profession should not so easily be extinguished by the government," Dickinson wrote.

The court also rejected a second rationale for the Insurance Commission's denial of Chunn's license—that Chunn had failed to disclose his convictions during his 1990 and 1991 license renewals.

While the court acknowledged that state law allows the Commission to deny a license renewal based on material misrepresentations in the renewal process and that Chunn's non-evasions were likely material to the 1990 and 1991 applications, the materiality of those non-disclosures expired with the original infractions. Chun's decades-old misrepresentations were not material to his current license renewal application, the court said.

Texas: Board properly used "discipline matrix" to impose sanction

Issue: Discipline for violating standard of care

An appellate court in Texas, on January 30, upheld discipline imposed by the state's dental board on a dentist who failed to inform the board that one of his patients had been admitted to a hospital for facial inflammation a day after he removed her wisdom teeth (*Kim v. State Board of Dental Examiners*).

Following dentist Sejoon Kim's extraction of the wisdom teeth, the patient was kept in the hospital for six days with facial inflammation. During a follow-up visit, the patient informed Kim of the hospitalization, but Kim, believing the inflammation was unrelated to the procedure he had performed, did not report the hospitalization to the state dental board.

This action violated Texas dental regulations and led the state dental board to file a complaint against Kim for his failure to report the incident. In eventually deciding to issue Kim a warning, the board used its disciplinary matrix—a chart of potential sanctions based on the nature and seriousness of the offense—to select a specific sanction.

Although a failure to report a patient's hospitalization is not a named offense in the matrix, and the board specifically noted that Kim had not violated the standard of care, it used a catch-all entry in the matrix, violation of "a law relating to the regulation of dentists," to select the warning.

Kim appealed, arguing that the board had misapplied the matrix. A failure to report hospitalization, Kim claimed, was listed only as a first-tier—or lowest-level—violation, and could result in only either a dismissal or a fine for a violation unrelated to patient care.

To bolster his argument, Kim noted that the matrix explicitly included a similar, but more serious violation—for death or injury requiring hospitalization—that amounted to a second-tier offense. Therefore, he argued, the decision of the board not to pursue the less-serious charge of simply violating a dental regulatory law meant that his discipline must fall on the lower tier of violations.

For its part, the board argued that Kim's conduct, while not a violation of the standard of care, was still directly related to patient care, as a failure to report hospitalization had the potential to result in patient harm, and that widespread application of Kim's watered-down interpretation of the possible sanctions for his conduct would create little incentive for dentists to report hospitalizations, since the worst possible consequence would be only a small administrative penalty.

The court agreed. Citing the deference owed to agencies in construing their rules, the court affirmed the board's interpretation of its own disciplinary matrix, saying that the board could not be said to have misapplied the regulations. The warning was upheld.

Kansas: Armed robbery, aggravated battery convictions justify revocation

Issue: Proof of rehabilitation required to regain license

The Kansas medical board had substantial evidence to revoke the license of a physician who was convicted of two felonies—armed robbery and aggravated battery—in Illinois, the Court of Appeals of Kansas held February 6 (*Shushunov v. Kansas State Board of Healing Arts*).

On May 17, 2011, Sergey Shushunov, a board-certified pediatrician, broke into the home of Jeffrey Larson, whom Shushunov believed to be having an affair with his wife. Shushunov, armed with a handgun, asked Larson's two daughters

where their father was. Shushunov made his way to the upstairs bedroom, discovered Larson on the phone with his wife, and pointed the gun at Larson. Shushunov then began to assault Larson, striking him repeatedly in the face with his fist. Shushunov took Larson's cell phone and left the premises.

Police soon after arrived at Shushunov's residence, and Shushunov admitted to knowing his wife was having an affair with Larson, whom his wife met through the dating site Match.com. It was also discovered that Shushunov had helped set up the account for his wife to satisfy her "physiological needs."

Shushunov was convicted of attempted armed robbery and aggravated battery in September of 2012. Shushunov's license was subsequently revoked in the state of Kansas where he was licensed to practice.

The board, in December 2013, issued its formal decision to revoke Shushunov's license, stating that Shushunov did not present "clear and convincing evidence that he will not pose a threat to the public in his capacity as a licensee and that he has been sufficiently rehabilitated to warrant public trust."

Shushunov appealed the board's decision, contending that the board did not have substantial evidence to justify revocation. After the Shawnee District Court denied Shushunov's appeal, Shushunov appealed again.

In the appeal, Shushunov reiterated his claims that the board did not have sufficient evidence to revoke his license, and that the board erred in not obliging his request to convert the conference hearing into a formal hearing.

The court disagreed on both claims.

Concerning Shushunov's claim that the board did not have substantial evidence to revoke his license, the board noted that it was Shushunov's burden to prove that he was "rehabilitated," given his undisputed criminal history.

"Shushunov submitted the affidavits from his professional and personal colleagues primarily as endorsements of his personal character "rather than as specific evidence of rehabilitation," the court stated.

The court continued: "Although Shushunov has cited evidence that might detract from the decision reached by the Board of Healing Arts, we find its final order to be based on factual determinations that are supported by evidence that is substantial when viewed in light of the record as a whole."

Rhode Island: Court sides with state health director against board over penalty for former state senator's professional misconduct

Issue: Discretion of health director versus board authority

A Rhode Island state health director's decision to revoke a doctor's license with multiple misconduct lapses was overruled by a Superior Court judge in a December 22 ruling (*Blais v. Rhode Island Department of Health and Michael Fine*).

The case arose when the state health director considered a board penalty against the doctor, who was a state politician, too mild, and tried to stiffen it to revocation.

Leo Blais, a former Republican senator, mistakenly prescribed morphine to an 11-month year old infant in late 2012. Blais' license was suspended in March of 2013 and he appealed the decision to the Board of Pharmacy.

Pharmacy inspectors had found that Blais' pharmacy was "disorganized and disheveled, making it difficult for a pharmacist to safely and effectively prepare prescriptions."

Before an evidentiary hearing on the issue, Blais reached a consent agreement with the board for a two-year suspension with the second year stayed.

However, on March 27, state health director Michael Fine rejected the agreement. The rejection prompted hearing officer Catherine Warren to issue an amended recommendation a month later to suspend Blais' license for two and a half years, with half of the time stayed.

Judge Nugent, concurring with hearing officer Catherine Warren's recommendation of a two and a half year suspension, reiterated that the state health director had no legitimate grounds to contradict Warren's findings; Fine's decision was made due to "mere philosophical differences." These differences, in Nugent's estimation, "served as the fulcrum upon which he uprooted Hearing Officer Warren's well-grounded sanction."

Fine rejected Warren's recommendation as well, deciding instead to revoke Blais' pharmacy license due to Fine's concerns that Blais' lengthy history of misconduct could lead to loss of life.

Additionally, Fine did not agree that Blais' error was simply caused by newly implemented safety measures to prescription dispensing as Blais claimed.

Citing a 1999 report in which Blais admitted to disseminating incorrect medication, Fine stated that Blais "should have become vigilant about proper safeguards after the 1999 incident. He did not, and a baby and an infant child improperly consumed morphine as a result."

Superior Court Judge Stephen P. Nugent, in the December 22 opinion, disagreed with Fine's assertion, contending that Fine abused his discretion. "Where a hearing officer is able to examine evidence and live testimony first-hand, the law accords more weight to his or her findings than to a reviewing administrative official," Nugent wrote.

Nugent seemed to side with Blais' explanations that newly installed safety measures caused the dispensing mishap. Nugent also noted that at least since 1980, the state has never suspended a pharmacist for a dispensing error.

Nugent argued that a person "cannot simply find — without pointing to evidence in the record to the contrary — Mr. Blais' lengthy explanations of newly installed safety measures' unpersuasive."

As to whether or not the department was planning to appeal Judge Nugent's decision, Christina Batastini, Chief Officer of Health Promotion, declined to say. "Unfortunately, the department does not comment on pending litigation," stated Batastini.

Ohio: Daily injection of opiates leads to permanent curb on anesthesiologist

Issue: Permanent license restriction justified by drug abuse

Expert opinions, plus an anesthesiologist's admission that he had been injecting opiates daily for three months, were enough to justify a permanent restriction on a physician's license, the Court of Appeals of Ohio held January 27 (*Clark v. State Medical Board of Ohio*).

Dustin M. Clark became eligible for an anesthesiologist license in 2007, after obtaining a medical degree in 2006.

In his second year as an anesthesiology resident in Texas, Clark admittedly began to "use and misuse opiates, including Fentanyl, Sufentanil,

Hydromorphone and Midazolam." Clark also admitted to falsifying documents in order to receive opiates.

Soon after, Clark received treatment for his addiction and doctors diagnosed him with "opiate dependence." Several months later, Clark participated in a drug treatment program, approved by the board, in Atlanta, Georgia.

Clark was discharged in February of 2010, and in April, he resigned from his anesthesiology residency.

In 2010, Clark reached a Step I consent agreement with the Ohio board, which suspended his license for 18 months, with an opportunity for license reinstatement. Under the agreement, Clark obtained written reports from three medical practitioners (two physicians and one psychiatrist) proving he was fit to practice medicine.

Three permanent restrictions were placed on Clark's Ohio certificate to practice medicine and surgery :

1. Dr. Clark shall not participate in any anesthesia residency program.
2. Dr. Clark shall not order or personally administer general anesthesia.
3. Dr. Clark may order moderate sedation, but he shall not personally administer moderate sedation.

The board provided two steps for reinstatement of Clark's license. The second step stipulated that Clark must abide by whatever probationary terms determined by the board were appropriate. Clark and the board could not reach an agreement in regard to Step II, but Clark agreed "to abide by any terms, conditions, and limitations imposed by the board after a hearing" as part of the Step I agreement.

On May 8, 2013, Clark was notified of a scheduled hearing by the board to determine if any limitations or conditions should be placed on his certificate. The board determined that a permanent restriction on Clark's certificate, preventing him from administering anesthesia or participating in an anesthesia program, was appropriate.

Clark appealed the board's decision, contending that the board violated the Step I agreement and imposed disciplinary terms without any factual foundation. The court rejected Clark's arguments, noting that, as part of the Step I agreement, Clark "had agreed to abide by any terms, conditions, and limitations imposed by order of the board following the administrative hearing."

As to Clark's claim that the board lacked "factual foundation" to implement a limitation or restriction upon Clark's certificate, the court cited doctor testimony and Clark's own testimony at the hearing to demonstrate why the board was justified in putting a restriction on Clark's certificate.

The testifying doctor, Dr. Sachs, recommended that Clark "not return to the practice of anesthesiology due to the availability of Fentanyl." Dr. Sachs noted that Fentanyl has remarkable addictive qualities, and that being around it daily would create "a higher frequency of relapse."

At the hearing, Clark conceded that near the end of his drug use, he abused Fentanyl "nearly daily."

The Court also heard from board members, such as Dr. Steinbergh, who said the decision to restrict Clark from the practice of anesthesiology was to "protect Clark and his patients."

Steinbergh noted that Clark would still be able to practice medicine and supervise nurse practitioners in the administration of anesthesia, but that allowing Clark to administer anesthesia himself would create too great of a risk of relapse. The court, echoing Steinbergh's testimony, upheld the board's decision.

Arizona: Board members don't need independent clinical evaluation to discipline

Issue: Board expertise in evaluating discipline recommendations

The Court of Appeals of Arizona, Division One, in a February 26 ruling, affirmed a trial court's ruling that the Arizona dental board had sufficient evidence to reprimand a dentist with multiple practice complaints (*Lipton v. Arizona State Bd. of Dental Examiners*).

Two complaints from two patients were levied against Arizona dentist Jack Lipton, alleging medical malpractice. The board's investigative panel concluded that Lipton "provided inadequate treatment planning, performed inadequate crown and bridge work on several teeth, and performed inadequate endodontics on one tooth." The board subsequently ordered Lipton to pay over $6,000 in restitution and complete 16 hours of continuing education.

When Lipton appealed, the court rejected Lipton's argument, which he also presented before the board, that one of the patient's complaints was illegitimate due to their own poor dental hygiene.

The presiding judge, Judge Downie, asserted that the board was not obligated to accept Dr. Lipton's contention as truth. "Where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached."

Further, Downie reasoned that the board had ample evidence to support its decision. The board appointed an independent clinical evaluation of one of the patients ("E.C."), and determined that Dr. Lipton's crown work was "inadequate" and that the patient needed corrective treatment.

Lipton then argued that the board should have also conducted an independent clinical evaluation of the other patient ("R.H."). However, Judge Downie noted that the board had no obligation to do one. "A patient may be referred for a clinical evaluation at the discretion of the board," wrote Downie, "The board… could have reasonably concluded that an independent examination was unnecessary."

Downie also pointed out that it is acceptable and common for board members to rely on their own expertise in making important investigative decisions.

Lipton also contended that the board failed to review all of the evidence, specifically, R.H's x-rays. Downie highlighted the fact that the court always presumes that an administrative board "considers all relevant evidence before it."

Even so, evidence showed that a board member "did review the records very thoroughly" and found "a continuing pattern of crown and bridge issues." Based on that, the appeals court affirmed the board's decision to discipline Lipton.

Virginia: Discipline may not be used to force licensee to provide restitution

Issue: Standing of complainant to challenge discipline decision

A homeowner who filed a license complaint against a construction company responsible for his leaky house does not have standing to challenge a discipline decision by the state contractors board because the relief he demanded—that the construction company fix the house—was beyond the power of the board to grant, the Virginia Court of Appeals ruled January 27 (*Holmes v. Culver Design Build, Inc.*)

Culver Design Build, the homeowner alleged, failed to fix deficiencies as ordered by city officials, who subsequently made the homeowner responsible, and, in 2011, Holmes himself filed a complaint against Culver with the Virginia Board of Contractors, requesting that the company's license not be renewed unless it fixed the home and asking that he be added as a party to the disciplinary proceeding. The board denied Holmes standing and concluded the case by fining Culver $500.

Holmes then challenged the decision, arguing that the board should have granted him standing because of his direct interest in having the home fixed. The case eventually rose to Virginia's Court of Appeals.

The court, in an opinion written by Judge Rossie Alston, Jr., knocked down Holmes' standing argument. Under case law, parties who wish to challenge a disciplinary decision must be "aggrieved" by the decision, Ralston wrote.

"Holmes' claim," he continued quoting from precedent, "does not come within the meaning of 'aggrieved' . . . because the board's limited, disciplinary proceeding neither denied Holmes a 'personal or property right' nor imposed upon Holmes a 'burden or obligation' … In the proceeding below, the only issue before the board was whether Culver committed a prohibited act that warranted discipline under the regulations governing licensed contractors. It was not a proceeding to determine who was responsible for correcting the violations observed in Holmes' residence."

Holmes' requested relief, Ralston noted, exceeded the board's authority because it was not authorized to enforce building codes or require Culver to fix its mistakes.

In addition, Ralston wrote, Holmes' desire for a disciplinary outcome that he could use to force Culver into fixing the home did not represent a "direct interest" in the proceeding. While Holmes' had an "interest" in seeing Culver held responsible for the problems, the interest was not related to the disciplinary proceeding, and thus did not come within the board's authority.

Licensing

California audit slams $92 million ill-functioning licensing data system

Issue: Online database management in professional licensing

With 1.2 million license renewals and 300,000 applicants to process every year, California's Department of Consumer Affairs (DCA) hoped in 2009 that a $28 million contract with the company Accenture for a new information technology system would speed and streamline online processing.

Known as BreEZe, the system was slated to handle primary functions and responsibilities for 37 of the department's 40 regulatory entities—including most of the state's licensing boards.

But six years and $92 million dollars later, BreEZe has fallen well short of that goal. Only ten agencies are now using BreEZe, their reviews of its functionality are negative, and BreEZe's future looks uncertain.

In a highly critical audit released in February, the California State Auditor analyzes the situation and what went wrong, and the auditor's basic conclusion can be summed up in the report's title referring to BreEZe: "Inadequate Planning

and Oversight Led to Implementation at Far Fewer Regulatory Entities at a Significantly Higher Cost."

The auditor assigns major blame to the DCA for failing to adequately plan, staff, and manage the project —e.g., by selecting a commercial "off the shelf" system as the system's foundation—and to the state Department of Technology for failing to intervene and for approving more funding, even after independent oversight raised nearly 180 significant concerns about the project in September 2014.

The ten boards or commissions that have been using BreEZe are generally dissatisfied with their experience, the auditor also notes, mainly due to deficient testing and training and unsatisfactory reporting capability. Most executive officers reported that BreEZe had decreased their agency's operational efficiency.

If DCA receives necessary funding to continue implementing BreEZe, the autditor recommended, it should analyze the costs and benefits of moving forward with the project versus suspending or terminating it.

Competition

State boards without supervision lose antitrust immunity (from page 1)

"A state board on which a controlling number of decision makers are active market participants in the occupation the board regulates must satisfy active supervision requirements in order to invoke state action antitrust immunity," the court said.

What kind of supervision would be enough for a board's actions to be considered "state action" and thus be immune from antitrust scrutiny? The court listed four specific criteria :

• State officials must review the substance of the anticompetitive decision, not just the procedures that produced it.

• State supervisors must have the power to veto or modify particular decisions to ensure they comply with state policy.

• The potential for state supervision is not an adequate substitute for a decision by the state.

• The state supervisor may not itself be an active market participant.

The board believes the Supreme Court ruling threatens to massively disrupt professional regulation, and board officials have predicted that all professional regulatory boards in the country will eventually have to change their structure, the way they are supervised, and the activities they perform. (However, it should be noted that North Carolina uses a relatively uncommon appointment process; dental board members are selected through an election conducted by the state professional association.)

Despite being formally designated as a state agency, the board was suppressing competition without state supervision, the court said. In effect, the court ruling implies that the board, consisting mostly of dentists or "market incumbents," acted as a rogue state regulator in attempting to keep competing non-dentists off dentists' traditional turf.

For boards to retain a "state action" exemption, the Supreme Court said, day-to-day involvement or micromanagement of board operations is not necessary. The issue is "whether the state's review mechanisms provide realistic assurance that a non-sovereign actor's anticompetitive conduct promotes state policy."

The case drew strong advocates for both sides. Supporters of the North Carolina dental board included established independent professions such as

medicine and dentistry, who view the licensing boards' role as protecting the public, not opening the door to competition in professional services.

In an amicus brief, the American Medical Association warned that "Requiring active state supervision of a dental or medical licensure board is impractical. Any supervising body composed of competent and experienced professionals would be equally subject to the FTC's proposed supervision requirement. Thus the state would have to supervise its supervisors. And any non-professional supervising body would lack the expertise necessary for a meaningful evaluation of the complicated and technical decisions made by the board."

Siding with the FTC on loosening occupational regulation to increase competition: consumer groups like AARP who view competition as widening consumer options for affordable services in health care and other areas, libertarian groups like the Cato Institute and the Institute of Justice, and many nursing and nurse specialty groups who question a medical monopoly that limits their ability to practice in their field.

Together with the Citizen Advocacy Center, a non-profit representing consumer interests, several of the nursing groups submitted a joint amicus brief defending the FTC action against the dental board.

The entire field of professional regulation is rife with anti-competitive practices, in the view of David Swankin, president and CEO of the Citizen Advocacy Center. In many cases where boards move against competing services, "It has nothing to do with safety. It's about money," he said. In the case of North Carolina's dental board, the cease and desist orders were geared to stopping inexpensive teeth whitening services in shopping malls, he believes.

Most licensing boards are full of "market participants," with only one or two, at most, being public members, Swankin says. To comply with the "active supervision" requirement the Supreme Court demands, boards would need new state laws—which legislatures would be unlikely to pass. "If the composition of boards won't change, they'll have to set up some sort of independent review to keep boards in line. Just policy oversight isn't enough."

A special session at the 2015 annual meeting of CLEAR (the Council on Licensure, Enforcement and Regulation), to be held in Boston September 17-19, will address the implications of the Supreme Court ruling from both sides of the safety/ competition debate.

Supreme Court ruling in NC Dental Board case fuels push for deregulation in professional licensing—but there will be pushback

Issue: Is more regulation needed, or more competition among providers?

It's become commonplace to hear that occupational licensing has led to a quagmire of over-regulation and excessive fees, with licensing boards more interested in their profession's well-being than protecting the public.

Proponents of less regulation believe pro-competitive reform would reduce red tape for prospective licensees, lower barriers to job growth, and create more opportunities for entrepreneurs' businesses to bloom.

Advocates for traditional professional regulation, on the other hand, defend it as necessary for many occupations in order to protect the public and ensure licensees are appropriately qualified to practice their profession. Some point out that deregulation proponents selectively highlight occupations with licensing requirements that seem blatantly excessive given the mundane obligations of the

job, but their broader anti-regulation agenda could potentially target even regulation of professions like medicine, psychology, accounting, dentistry, and architecture.

At the center of the controversy is the state of Michigan, where an anti-regulation climate has taken hold. Michigan Governor Rick Snyder (R) has suggested many regulations that are in place are unnecessary, existing "only to provide commercial advantage to their advocates."

Snyder's "Office of Regulatory Reinvention" has moved to have dozens of fields completely deregulated, including respiratory care, acupuncture, consumer financial services consultants, dietitians and nutritionists, polygraph examiners, insurance solicitors, landscape architects, and speech pathologists.

The same office believes that 19 of the 24 regulated health professions in Michigan pay too much for their licenses, and the fix will require altering the fee structure and installing more efficient licensing mechanisms, such as online license renewal, longer periods between renewals, and elimination of "duplicative" tests.

Organizations like the Institute for Justice echo Snyder's sentiments, and would like to see many occupations completely deregulated. The IFJ has filed numerous lawsuits, many of them successful, to challenge state barriers to offering services in hair-braiding, tour-guiding, equine dentistry, and other fields.

Interior design is one area the IFJ considers particularly over-regulated. In some states, interior designers are required to pass an exam, pay a fee, and obtain six years of education and apprenticeship to become fully licensed. This, despite research showing little payback in public safety, says IFJ.

Supporters of deregulation, on the other hand, lack strong data to show its benefits. Bruce Bartlett, an economist who worked in the Reagan administration, has said that the idea that job growth will occur from cutting regulations in areas like licensing was "Just made up," the *Huffington Post* reports. The Congressional Budget Office has asserted that deregulation has no effect on job growth.

Landscape architects have been targeted for deregulation in Michigan, after a concerted effort just five years earlier led Michigan to join the 49 other states with licensing laws for the profession.

Marie Donigan, who served six years in the Michigan State House, cited her success in winning passage of licensure for landscape architects as one of the highlights of her legislative career. She maintains that landscape architecture entails much more than meets the eye, because landscape architects design all sorts of structures that could jeopardize public safety.

More potential deregulation is being considered at the national level. President Obama has proposed that states review their licensing requirements, particularly in obvious areas where overly stringent entry requirements don't make a lot of sense.

But some observers note that deregulation of fields like respiratory care and speech pathology, as some competition fans have proposed, will likely prove much more controversial than deregulating hair-braiding, and will force lawmakers and the public to make hard decisions about where the line between competition and safety should be drawn.

Advertising

New Jersey: Lawyer advertising may quote judge's accolade

Issue: Free speech rights and professional advertising

A New Jersey lawyer may post quotes of approving comments from unpublished judicial opinions in his advertisements, the 3rd U.S. Circuit Court of Appeals in Philadelphia ruled August 11, 2014 (*Dwyer v. Cappell*).

The case has sparked an active First Amendment discussion and debate over how licensed practitioners can present themselves to the consumer via remarks made by another—and whether remarks made by an individual of perceived esteem (such as a judge) could reasonably be taken as "blanket statements" by the consumer.

Prior to the 3rd Circuit's ruling, Andrew Dwyer, a lawyer practicing in Newark, New Jersey, received a complaint from a judge who made a positive comment about Dwyer in an unpublished opinion. The judge asked Dwyer to take down the quotation from Dwyer's website so that his comment wouldn't be viewed as a "blanket endorsement" to consumers.

As a result of the complaint, the New Jersey State Bar Association's Committee on Attorney Advertising (NJSBACAA) created a guideline (titled "Guideline 3"), which was affirmed by a district court, that disallowed Dwyer from posting select comments made in unpublished judicial opinions on his performance as a lawyer. Dwyer could, however, post the entire judicial opinions instead, the district court ruled.

The reasoning behind the decision by the district court was that the select quotations could be construed as misleading speech and therefore could potentially have a negative impact on consumers.

The 3rd Circuit court overturned the district court's decision, contending that it is reasonable to expect consumers not to view the quotations as blanket endorsements. Furthermore, the court cited the guideline created by the NJSBACAA, upon which the district court relied to make its decision, as "constitutionally flawed" and unduly restricted speech.

Testing

Test prep company illegally copied exam items; passing score revoked

Issue: Licensing exams and commercial test preparation

An international medical graduate's passing exam score was rightly rescinded by the National Board of Medical Examiners when he relied on improperly obtained test preparation materials, the U.S. District Court for the Eastern District of Pennsylvania held February 13 (*Thomas, Jr. v. National Board of Medical Examiners*).

Matthew Thomas Jr. is a U.S. citizen who attended medical school outside of the United States. As an international medical graduate, Thomas was required to pass the United States Medical Licensing Examination (USMLE) in order to obtain licensure in the U.S. Thomas passed the USLME in December of 2007.

However, in 2008 the test developers conducted an investigation of a test preparation company called Optima University. The National Board of Medical Examiners (NBME) and the Federation of State Medical Boards (non-party) subsequently filed a civil lawsuit against Optima University in 2009. The U.S. District Court for the Western District of Tennessee granted summary judgment in favor of the NBME, finding that Optima University copied USLME questions and provided them to Optima students via test preparation material.

As a result, Thomas's 2007 examination score was deemed invalid. "After reviewing all of the materials and hearing testimony from Plaintiff, the Committee determined that it could not certify that the December 31, 2007 score was a valid measure of Plaintiff's ability."

Thomas was given an opportunity to take the exam again for free "with the proviso that if he passed that exam, the December 31, 2007 score would be deemed valid." But Thomas failed the exam in 2011. Thomas also had six failing scores by this time, and was barred from retaking the examination. Under USMLE rules, examinees are limited to six unsuccessful attempts to pass any Step or Step component of the exam.

Thomas amended his complaint to the District Court of Pennsylvania, alleging that the defendants' standard of proof was "poorly defined," and that he was falsely accused of wrongdoing simply because he was associated with Optima University. Thomas claimed the defendants' were "negligent and discriminatory."

In granting summary judgment for the defendants, the court ruled that they did not act negligently. Thomas claimed the defendants had a duty to warn him and other international medical graduates to avoid being associated with Optima. However, the court found that the alleged duty was "too ill defined" and even if there was a legitimate, provable duty on the defendants' part, Thomas took his exam in 2007, before the investigation had made any conclusive findings.

Further, the court noted, Thomas failed to demonstrate how a breach caused him commensurate injury; and his discrimination claim that he was singled out because he was "of eastern origin like the founder of Optima" was unfounded.

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