Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue

Discipline

Exam cheating returns to haunt accused licensee in discipline action 30 years later

Issue: Weight of prior misconduct in imposing discipline

A dentist who was caught having a friend take the California dental licensing exam in his place in 1982—but who obtained a California license ten years later—recently tried to argue that it was unfair to hold the 30-year-old offense against him in a new disciplinary inquiry. However, the Court of Appeal, Second District, Division 2, of California disagreed.

In an April 1 ruling, the court found that the board's 2012 decision to revoke the dentist's license over charges of gross negligence and unprofessional conduct was authorized and fell within the board's discretion (*Spennato v. Dental Board of California*).

The dentist, Peter Spennato, Jr., argued that it was double jeopardy to bring up the issue of his having cheated on the dental exam and that he had had a "pristine" record for at least 20 years of his practice as a dentist in California.

See Exam Cheating, page 2

Do "character and fitness" questions really help screen out unethical licensees?

Issue: Screening of licensure applicants for moral character

Few provisions in licensing statutes are more common than the requirement that applicants be of "good moral character."

But actual definitions of good moral character are elusive. What kinds of traits or questionnaire responses are linked to higher chances that a licensee will be disciplined? And, does character and fitness screening of the type sponsored by most state bar associations help reduce the number of disciplinable offenses?

Those were the key questions of a recent study sponsored by the American Bar Foundation, "The Questionable Character of the Bar's Character and Fitness Inquiry," which relied on information disclosed by 1,342 bar applicants and their subsequent disciplinary history. The answers were somewhat surprising.

Some bar application information is associated with an elevated risk of future discipline, but the predictive power of the data is extremely low. It's unclear, say the authors of the study which appeared in the Winter 2015 issue of *Law and Social Inquiry*, whether the data gathered during the character inquiry actually predict lawyer misconduct.

"The questions are not derived from, nor have they ever been validated using psychological assessment tools," they note.

A few responses on the admissions applications are statistically associated with discipline risk, such as having delinquent credit accounts or a history of traffic violations.

However, these variables turn out to be very poor predictors of subsequent discipline because the overall likelihood of discipline is so low (only about 2.5 percent). So if a variable like having defaulted on a student loan doubles the likelihood of subsequent disciplinary action, the probability is still only 5 percent. (Only a tiny percentage of applicants, 0.2 percent, are denied admission based on character and fitness inquiries.)

Sometimes, unintended consequences can result from the screening questions, the authors also point out. For example, law students might avoid getting psychological counseling they might need, in order to avoid having to report it on the bar admissions application.

A decreased risk of professional discipline was found with:

- Higher law school grades;
- Attendance at a more prestigious school
- Being female.

Increased risk was found with:

- Having delinquent credit accounts
- Having been a party to civil litigation, including divorce
- Higher student loan debt
- More traffic violations
- A history of a diagnosis of or treatment for psychological disorders.

Many traits of disciplined licensees appear unrelated to their answers on the character and fitness inquiry filled out at the beginning of their legal careers. Most are middle-aged, a majority are solo practitioners or members of small firms—which traditionally occupy the lower rungs of the legal status hierarchy— and many report depression related to work or life circumstances, alcohol abuse, or family or financial crises, the study found. The average grievance leading to discipline is usually not filed against a lawyer until he or she has been practicing for 10 years.

On the whole, say the authors, the information collected during the character and fitness inquiry "does not appear to be very useful in predicting subsequent lawyer discipline." They admit that the very existence of a character and fitness inquiry might encourage bad actors from ever applying to law school; however, it might also deter those with a history of relatively minor misconduct.

Exam cheating attempt influences discipline decision 30 years later *(from page 1)*

The accusations against Spennato stemmed from his 2004-2005 treatment of a patient for replacement of old crowns and bridges. The board found Spennato had acted with gross negligence, including extreme departure from the standard of care and acts of incompetence, along with other charges.

As an aggravating factor, the accusation also noted that in July 1983, Spennato had entered into a stipulated settlement under which his application to take the dental licensing exam was denied. After failing the 1982 licensure exam, Spennato had attempted to have a classmate impersonate him and take a licensing exam in his place.

Some ten years later, after Spennato complied with penalties imposed by the California board, he was allowed to take the California exam and passed it. In his appeal of the current action based on the allegations of gross negligence he told

the court he had "made his peace" with the board, that he had had a spotless record for 20 years, and that holding the exam impersonation incident against him subjected him to "a new form of double jeopardy."

The court, referring to the exam impersonation attempt as fraud, did not agree. It found no abuse of discretion on the board's part. In imposing revocation, the board properly considered Spennato's prior disciplinary record including the examination incident in California, the court ruled.

NY court affirms revocation for act that only got reprimand in Texas

Issue: Penalties imposed for reciprocal discipline

A psychiatrist who engaged in a sexual relationship with a patient in Texas and received only a public reprimand was properly disciplined with a revocation in New York state, the New York Supreme Court, Appellate Division, Third Department, held March 12 (*In the Matter of Smith v. State Board for Professional Medical Conduct*).

The psychiatrist, Barlow Smith, resides in Texas but has been licensed to practice in New York since 1967. In 2013, the New York medical board initiated a referral proceeding against Smith based upon his sexual relationship with a patient. In Texas, Smith had been publicly reprimanded, directed to complete a course on professional boundaries, and ordered to pay an administrative penalty of $3,000.

Smith's patient had visited his office to obtain a signature on prescription assistance form, a panel of the Texas medical board found. The psychiatrist took advantage of what he perceived as an invitation to intimacy when the patient burst into tears, the psychiatrist cautioned her to remain silent about the sexual encounter, and the two had several more sexual encounters in following months.

In New York, a hearing committee of the state medical board determined that revocation was an appropriate penalty. Smith argued that the sexual relationship involved a former patient, but the court found there was a physician-patient relationship in existence at the time the sexual relationship occurred.

The court also agreed with the board's administrative review panel that Smith's refusal to accept responsibility for prior wrongful conduct should be a significant factor in assessing an appropriate penalty.

Pennsylvania: Murder of wife not "too far in the past" to count against licensee's application

Issue: Criminal history and application for reinstatement

A Pennsylvania appellate court, in a March 30 ruling, upheld a decision by the state's podiatry board to deny license reinstatement to a licensee whose license had been revoked after he was convicted of murdering his wife. (*Long v. Bureau of Professional and Occupational Affairs, State Board of Podiatry*).

In 2003, Karl Long, a licensed Pennsylvania and Massachusetts podiatrist, was convicted of murdering Elaine Long, his estranged wife, and sentenced to five to ten years in prison. The Pennsylvania podiatry board revoked his license shortly after.

After his release from prison in 2013, Long applied to reinstate his license. The board rejected the application, citing the murder as evidence of his lack of moral character, as well as a lack of favorable character evidence. Long

appealed the decision, with the case eventually reaching the Commonwealth Court of Pennsylvania.

In his appeal, Long argued that the murder had occurred too far in the past to constitute evidence of his current character. The court rejected this argument, noting both the seriousness of the crime, and the fact that the board had reviewed Long's subsequent efforts to rehabilitate and to gain parole during his imprisonment before passing judgment on his character.

In response to Long's argument that the board had failed to adequately consider positive evidence of his character, the court, after noting that it could not second-guess the weight assigned by the board to the evidence before it, reviewed the board's efforts, and held that it had no valid reason to overturn the lower body's determinations.

The court also rejected Long's argument that the board erred when a hearing officer denied his request to use telephonic character witnesses, stating that the hearing officer had legitimate concerns about the ability to evaluate witnesses over the phone and the lack of regulations controlling such testimony.

California: Racial discrimination suit against board employee may continue

Issue: Board monitoring of licensee on probation

A federal district court in California, in a March 16 decision, refused to dismiss a suit by a physician who sued the state's medical board and its employees, claiming that they had pursued discipline against him on the basis of his race (*White v. Harris*).

The case began in 1990, when, following accusations of misconduct, the Medical Board of California placed the license of physician Lloyd White on probation for six years, during which time he was, among other obligations, to perform 24 monitored surgeries.

Unfortunately, the monitoring of the surgeries by the board became a point of conflict. According to White, he completed eight of the surgeries and reported their completion, but an employee of the board, Tamara Garver, lost the paperwork, provided him no credit for the surgeries, and then described him as incompetent.

White then suffered several financial and personal losses, which he blamed, at least partially, on the extension of his probation caused by the loss of the reporting paperwork. He also blamed the losses on damaging letters sent from Garver to several nursing homes where he had been contracted to work.

White also claimed that Garver ordered him to provide an unnecessary urine sample, and asserted that the alleged mistreatment occurred because he is African-American.

In 2010, the board revoked his license. White appealed the decision, but was denied by a state court.

In 2013, White applied for the reinstatement of his license. At that time, according to White, Garvey and another employee of the board, Verdeen Richardson, contacted two doctors who had filed recommendations on behalf of his reinstatement application and cautioned them about supplying such recommendations.

Acting as his own attorney, White filed suit against the board, Garver, Richardson, and several unidentified defendants. He charged they had violated his right to be free from cruel and unusual punishment, and sought damages and information on the board's history of discipline. The case went before Judge Cynthia Snyder of the U.S. District Court for the Central District of California.

For her part, Garver sought to dismiss the suit by arguing, among other things that federal-court jurisdiction in the case would be an improper review of the state court decision concerning White's license. Judge Snyder did not agree.

Although White had argued that the state court improperly dismissed his appeals of the board's decisions, she wrote, the actual claim made against Garver in White's federal court was that she acted improperly prior to the board's decision to revoke White's license and deny its reinstatement.

"These are allegations of illegal acts by an adverse party," she wrote, and not an appeal of the license decisions.

And, while Garver, in her official state capacity, possessed immunity from White's suit under the Eleventh Amendment, Snyder ruled that White could still proceed with his suit against Garver in her personal capacity.

Most of White's allegations against Garver were barred by the statute of limitations. Although White had argued that the statute should not have begun tolling until the California Supreme Court refused to hear his appeal in the license revocation case, Judge Snyder rejected the argument.

She noted that she had decided to let White continue with his suit because the two matters—the license revocation and the lawsuit—were separate. That meant that the conclusion of the licensing case would have no bearing on whether White's claims were made too late.

However, Garver and Verdeen's alleged statements—directed at the physicians preparing to file recommendations that White's license be reinstated—occurred within the time limit. And, Judge Snyder ruled, White's claim that Garver had treated him differently based on his race was sufficient to survive dismissal.

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Florida: Strict curbs on physicians bring "pill mill" operations under control

Issue: Practice curbs on physician prescribing for pain management

Florida has been especially troubled with prescription abuse for the last decade. I-75, the freeway that runs north-south through the state, has been known as the "Oxy Express" due to the alarming number of overdoses that are recorded in emergency rooms along the way.

A 2011 report by National Public Radio noted that the state had more of these pill mills than McDonald restaurants. The situation seemed out of control.

But in 2014, Florida's Attorney General, Pam Bondi, campaigned on a claim that all of Florida's pill mills were gone. And according to the Florida Department of Health, Bondi's claim is not far off.

Mara Burger, press secretary for the department, asserted that the state has seen a sharp decrease in pain clinics and prescription drug abuse,

"In 2010, Florida held 90 of the top 100 national oxy purchasers in the country. Today, Florida holds the last spot of the top 100 purchasers and has

Multiple states tackling pill mills through restrictions on prescribing

According to the National Institute on Drug Abuse, 52 million people in the U.S. over the age of 12 have abused prescription drugs sometime in their lives. The U.S. has 5 percent of the world's population, yet consumes 75% of the world's prescription drugs. Every year, approximately 6 million Americans will abuse prescription painkillers.

At the center of the prescription painkiller epidemic in the U.S. are "pill mills" – establishments infamously known for arbitrarily dispensing Schedule II narcotics, such as Oxycodone, to people who often haven't been properly examined. The licensed professionals operating these establishments have been known to dole out thousands of prescriptions for opiate painkillers.

Arkansas and Connecticut are two states that are currently dealing with an epidemic of dubious prescribing practices.

In Connecticut, a nurse practitioner wrote out more prescriptions for Exalgo—a highly addictive opioid—than any other Medicare provider in the nation. She was also the seventh highest prescriber in the country for Oxycontin. Three other physicians have been suspended recently in the state for improper prescribing practices.

Yet, the nurse practitioner was allowed to continue to indiscriminately prescribe lethal medications to thousands of patients for several more years, according to the report, despite the fact that few NPs prescribe Schedule II drugs.

Neither the Department of Health nor the state medical board track the prescription database. Instead, the database is only examined when there is a complaint.

The DEA launched an operation just last summer aimed at raiding "pill mill" establishments across the U.S. The operation, dubbed "Operation Pilluted," has primarily focused on southern states and has resulted in nearly 300 arrests, including dozens of doctors and pharmacists.

Just two suspensions have been issued to the more than 40 accused doctors and pharmacists thus far as a result of the DEA's operation, according to a recent AP report. The accused commonly argue that their discretion is protected by state law.

The state of Arkansas has seen the most law enforcement activity, with approximately half of the operation's 300 arrests occurring there. Arkansas is a leading distributor in controlled substances – with hundreds of millions of oxycodone, hydrocodone, and Xanax pills disseminated annually. "Pill mills," which front as medical clinics or pharmacies, are the center-point of mass distribution of these drugs.

seen its purchases decrease by 99.82 percent since 2010," said Burger. "Florida has 324 pain management clinics today, as opposed to 921 in 2009."

The reasons for the decrease, Burger noted, are newly imposed regulations on physicians and collaboration with law enforcement agencies.

"After July 1, 2011, physicians were no longer authorized to dispense controlled substances except in very limited circumstances, and by January 1, 2012, all physicians, osteopathic physicians, podiatric physicians, and dentists who prescribe controlled substances for the treatment of chronic non-malignant pain had to register their profile and comply with the new standards of practice."

These changes were implemented under the initiative that passed in 2011, HB 7095. But Burger said that's not all that happened to help reduce opiate abuse and prevent doctors from engaging in unprofessional prescribing practices. Burger points out that the Prescription Drug Monitoring Program (PDMP) was also implemented during this time.

"It's a useful tool to help support sound clinical prescribing, dispensing, and use of controlled substances," stated Burger.

The database maintains information that helps expose the patients, facilities, or doctors that are participating in illegal activities, such as improper prescribing and prescription fraud.

"Evidence continues to validate Florida's PDMP as effective in improving clinical decision making, reducing multiple provider episodes, preventing diversion of controlled substances, and assisting in other efforts to curb the prescription drug abuse epidemic."

The difficulty of reprimanding a doctor for improper prescribing practices can vary, according to Burger, but "cases that present an immediate threat to public safety are given priority." However, she says, all cases are investigated promptly.

Ohio: Disorderly conduct conviction had "no nexus" with license

Issue: Criminal convictions and alleged unprofessional conduct

A teacher who was convicted of disorderly conduct was wrongly deprived of her license, the Court of Appeals of Ohio, Third District, held April 13, because the offense had no nexus with her performance as a teacher (*Wall v. Ohio State Board of Education*).

In a domestic dispute in 2011, the teacher allegedly blocked the vehicle of her husband's ex-wife, broke the ex-wife's driver side window with a hammer, and struck the doors of her vehicle.

The education department's Office of Professional Conduct launched an investigation after receiving notice of a "pending criminal charge" against Wall.

Overriding a recommendation by a hearing officer that the board issue a letter of admonishment, the board adopted a resolution in October 2013 to suspend Wall's teaching license for 20 months.

Criteria for determining what is conduct unbecoming a teacher, under State Board of Education rules, include:

- likelihood that the conduct may have adversely affected students or fellow teachers
- the degree of such adversity anticipated
- the proximity or remoteness in time of the conduct
- the type of teaching certificate held by the party involved
- the extenuating or aggravating circumstances, if any, surrounding the conduct
- the praiseworthiness or blameworthiness of the motives resulting in the conduct
- the likelihood of the recurrence of the questioned conduct
- and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.

Under State Board of Education requirements, an elementary teaching license may be suspended for engaging in conduct that is "unbecoming to a teacher."

A trial court reversed the suspension, finding that it was not supported by reliable, probative, and substantial evidence. The court noted that the offense did not involve children, did not occur during school hours, and did not occur on school grounds, and the teacher's students were not aware of the incident or subsequent administrative disciplinary proceedings.

The appeals court affirmed this ruling. However, the court refused to award attorney fees to the teacher. It found that the board was "substantially justified" in initiating an action involving the teacher's license.

Oregon: "Discipline matrix" adequate for informing accused of sanctions

Issue: Due process and board guidelines for disciplinary sanctions

A board's decision to impose a two-year suspension, a $5,000 fine, and $31,768 in contested case costs on a certified public accountant was not made unfair by procedural irregularities, the Court of Appeals of Oregon held April 22 (*Gustafson v. Board of Accountancy*).

The CPA, Kenneth Gustafson, admitted that he had deposited a tax refund check of a client in his own account without authorization, and subtracted his invoice from the amount before conveying the balance to the client—a violation of the Board of Accountancy's standards of professional conduct.

An administrative law judge recommended a 60-day suspension but the state board, comparing Gustafson's action to embezzlement that in the case of an attorney, would merit disbarment, decided on a two-year suspension.

Gustafson requested evidence of the board director's claim that the penalty was based on other cases in which disciplinary orders were not published. The board countered with a penalty "matrix" showing general categories of discipline

and range of sanctions, and a table indicating previous discipline imposed for different licensees' violations of specific rules and statutes, but without the names of disciplined licensees.

When Gustafson sought the board's minutes and final orders in disciplinary cases, the board refused on grounds that complying would be unduly burdensome.

In his appeal, Gustafson contended that the board failed to comply with statutes and rules governing production of information, thus impairing the fairness of the proceedings because he was prevented from meaningfully responding to the board's sanction proposal—in his view, the central issue.

He also argued that the board violated transparency requirements by engaging in off-the-record analysis about a pending case, thus depriving him of a fair proceeding.

The court disagreed, stating that the board adequately responded by supplying its penalty matrix giving its guidelines for disciplinary sanctions.

"Nothing precludes the board from relying on its own knowledge of its prior decisions without placing those prior decisions in the evidentiary record," the court said.

Alabama: Lower court improperly limited its review of board decision

Issue: Accused licensees' rights to board evidence justifying discipline

A dentist disciplined for being a habitual drug user was entitled to considerable discovery in a suit to overturn the board's decision, the Court of Civil Appeals of Alabama ruled April 17. The court found that a state circuit court improperly limited its review of a dental board disciplinary action (*W.A.A. v. Board of Dental Examiners*).

In October 2012, the Alabama Board of Dental Examiners brought charges against the dentist, whom court filings do not identify by name, accusing him of impairment due to drug addiction and illegal prescribing.

After a hearing, the board fined the dentist $30,000 and suspended his license until he paid the fines and entered into a monitoring agreement with the board.

The dentist simultaneously appealed the board's decision and brought a civil action against the board challenging the decision as improper.

During this time, W.A.A. filed several discovery requests, seeking documents related to his discipline. The board fought these requests, claiming various exemptions to disclosure of the documents.

W.A.A.'s discovery request sought "the identity of any persons present and/or the nature, content and procedure of the Board's deliberations on the charges," as well as any documents, recordings, emails, fax-transmittals, letters, correspondences, and/or other extraneous evidence not contained within the administrative record that mention the dentist or matters related to the charges.

A trial court quashed the discovery requests and affirmed the board's discipline, holding that it was limited to deciding only whether the board had substantial evidence to support its decision, and whether that decision was reasonable based on that evidence.

The dentist appealed again, arguing that the trial court had improperly limited its scope of review and had improperly denied his discovery requests, and the case went to the Court of Civil Appeals of Alabama.

The appellate court agreed with the disciplined dentist. State law does not limit the scope of the circuit's court review to the question of whether the board had substantial evidence to support its decision, wrote Judge Craig Pittman, and a licensee challenging board discipline has the right to conduct discovery as to whether the board's decision was unlawful or arbitrary.

The appellate court remanded the case to the lower to determine whether the evidence sought by the dentist could be obtained in a discovery proceeding.

Florida: Ambiguous reporting requirement decided in favor of licensee

Issue: Licensee reporting obligations

A Florida appellate court returned a discipline case to the state veterinary board after holding March 25 that an ambiguity in the requirement that a licensee must report other discipline to the board within 30 days should be interpreted in favor of a disciplined veterinarian (*Deroin v. Board of Veterinary Medicine*).

The veterinarian, Jamie Deroin, holds both a veterinary license and an occupational license that allows her to provide veterinary care to racehorses at betting tracks.

Deroin's second license was disciplined in 2012, after she was late to administer medication to a horse, with the result that the animal had to be removed from a pending race.

After a hearing, a state official fined Deroin $200, but she did not immediately report the discipline to the state veterinary board because she did not receive a formal written order until a month-and-a-half later.

Unfortunately for Deroin, between the time of the hearing and the time of her receipt of the official order, the state veterinary board discovered the discipline, causing it to begin its own disciplinary process based on Deroin's failure to inform it of the other action within 30 days.

Although Deroin requested a formal hearing from the veterinary board, the board denied this request based on the existence of the prior ruling, fined her $1,000, and required her to retake the state's veterinary examination. Deroin appealed, and the case went up to the Court of Appeal of Florida, Fourth District.

The court agreed with the board that Deroin, by law, was required to report the discipline to the board within thirty days of being disciplined. However, it disagreed that this time period began to toll on the date of the conclusion of her discipline hearing.

Because statutes outlining sanctions against a person's professional license are "penal in nature," they must be strictly construed, the court noted. Here, the statute used to discipline Deroin was vague; it simply allowed the board to impose discipline for "failing to report to the board within 30 days." Thus Deroin's stance—that the time period for reporting began only when she received formal written notice of her discipline—must be the controlling interpretation of the law, the court found.

The case was remanded to the board.

Missouri: Omitting some hospital affiliations from license application not unprofessional conduct

Issue: Application omissions not disciplinable offense

The Missouri Court of Appeals, in a March 10 decision, overturned a decision by a state Administrative Hearing Commission that would have allowed the Missouri Board of Healing Arts to pursue discipline against a doctor whose hospital staff privileges were revoked after he failed to disclose all of his previous affiliations on a re-application form (*Chaganti vs. Missouri Board of Healing Arts*).

During a 2006 re-application for hospital staff privileges, physician Surendra Chaganti failed—apparently, unintentionally—to include all of his past hospital affiliations, omitting three of six.

Learning of the omission, administrators at the hospital to which Chaganti submitted the application denied his request, and instead revoked his staff privileges.

Compounding the situation, Chaganti then failed to inform a second hospital that the first had revoked his staff privileges, causing the second hospital to revoke his privileges, as well. Neither hospital allowed Chaganti to appeal the decisions.

The board then filed charges against Chaganti based on the revocations.

Judge Walsh wrote, "We do not find any statutory sections that would put a licensee on notice that his license could be disciplined for 'unprofessional conduct' if the licensee inadvertently failed to list hospital affiliations on a reapplication for staff privileges at a hospital or if the licensee inadvertently failed to update information and report to another hospital that another hospital had revoked the licensee's staff privileges because the licensee had omitted past hospital affiliations on a reapplication for staff privileges."

Although an Administrative Hearing Commission determined that Chaganti had not intended to deceive the hospitals, and thus, that he did not act unethically, it nevertheless held that the revocations constituted "final disciplinary actions . . . related to unprofessional conduct" and that the board had cause to discipline Chaganti.

Chaganti appealed, and the case eventually went up to the Missouri Court of Appeals.

In his appeal, Chaganti argued that, under Missouri law, an omission of information on a re-application for hospital staff privileges did not, in fact, qualify as a "final disciplinary action" related to unprofessional conduct.

The court agreed and overturned the AHC's finding in an opinion written by Judge James Walsh.

According to statute, Judge Walsh noted, the board may only discipline Chaganti for "unprofessional conduct" if the revocation of his hospital staff privileges was itself based on unprofessional conduct.

And, under Missouri precedent, licensees may only be charged with unprofessional conduct if their conduct falls within one of several enumerated grounds in the law governing physician discipline.

Lacking an underlying offense worthy of discipline, the board, Walsh concluded, had no lawful basis under the laws cited in its case to charge Chaganti with unprofessional conduct.

Licensing

U.S. Justice Dept. tackles another state's use of mental health questions

Issue: ADA limitations on licensing application questions

The U.S. Justice Department confirmed in March that it is investigating whether the Florida Bar's questions about applicants' mental health history violate citizens' civil rights under Title II of the Americans with Disabilities Act (ADA).

The probe follows a settlement agreement the federal agency reached August 13, 2014, with the Louisiana Supreme Court, which handles applications to the state bar, over similar questions.

To comply with the ADA, the federal enforcement agency believes state bars must stop asking questions like "Have you ever been diagnosed with a mental illness such as bipolar disorder or depression?" Questions on character and fitness inquiries should focus on conduct rather than diagnosis of mental illness, the Justice Department contends.

Last August's settlement with Louisiana required that the state stop asking applicants to the bar questions about whether they had been diagnosed with a mental illness, stop requiring an independent medical examination except where justified, and stop imposing conditional admission solely on the basis of mental health diagnosis or treatment, unless a history of conduct would otherwise warrant denial of admission or the applicant has a condition currently impairing the ability to practice in a competent ethical or professional manner. All requirements must be reasonably and individually tailored to address appropriate concerns or information that was properly obtained. The agreement also required the court to pay $200,000 to compensate seven people the U.S. asserts were harmed by discriminatory action and ordered that no retaliation take place against any of those individuals.

The standard question forms were developed by the National Conference of Bar Examiners (NCBE). Roughly half of the states use NCBE forms, either for all their applicants or for applicants applying from other states.

In its letter to the Louisiana Supreme Court, the Justice Department focused on three questions in the NCBE forms that asked about the status of an applicant's mental health, alcohol and substance abuse, and whether applicants have emotional or mental disorders that, if left untreated, could affect their ability to practice law.

Applicants who have responded affirmatively to particular questions about their mental health were then asked to provide additional information, including treatment records.

However, an increasing number of states are opting not to use questions pertaining to candidates' mental health diagnoses and treatment as part of their screening process.

Utah: Revocation too harsh for renewal application error

Issue: Severity of sanction for application omissions

An appellate court in Utah overturned, in an April 19 decision, the license revocation of a nurse who had completed, but failed to properly report, her required continuing education credits, and then declared herself eligible on license renewal forms (*Cook v. Department of Commerce, Division of Financial and Professional Regulation*).

Although the nurse, Monica Cook, regularly completed continuing education courses, she also regularly failed to report them. As a result, she twice lost her certification with the National Certification Corporation, a requirement for renewing a license in Utah. Cook renewed her license anyway, each time falsely certifying that she did, in fact, have the certification.

When Cook realized her mistake, she contacted the state's Board of Nursing, relinquished her license, and offered to pay a fine.

Unsatisfied, the board charged her with unprofessional conduct, and the state's Division of Occupational and Professional Licensing (DOPL) eventually revoked her nursing license and prescribing license, fined her $5,000, and published the disciplinary action. Cook appealed, and the case eventually reached the Court of Appeals of Utah.

While the court upheld DOPL's finding that Cook engaged in unprofessional conduct and rejected her argument that the Department abused its discretion by fining her and publishing the discipline decision, it held that the Department was wrong to have revoked her license.

The court cited several factors in making this decision. First, neither the Department nor the court could find any cases where a professional license was revoked in Utah for an unintentional false statement on a renewal application. In fact, in cases where the Department had decided to revoke a license, it was usually acting on egregious conduct that posed a danger to others.

Second, and in contrast to these other cases, Cook's actions appeared to be unintentional and did not pose a danger to others.

"DOPL opted to apply the harshest punishment available under the statute without a stay or probationary period to give Cook the opportunity to correct the situation," wrote Judge Kate Toomey.

"Its decision to promptly revoke Cook's licenses, when compared to the Department's past disciplinary decisions, suggests she has engaged in especially egregious conduct, and it has prevented Cook from obtaining employment as an APRN."

In light of the Department's past disciplinary decisions and the nature of Cook's unprofessional conduct," it was outside the bounds of reasonableness to revoke her licenses without staying the revocation pending recertification or first placing her on probation or suspension," the judge said.

The case was remanded to the board to reconsider the penalty.

Administration

Tennessee: No evidence to prove federation retaliated against employee

Issue: Employment matters of state licensing board federation

The U.S. District Court of Tennessee, Nashville division, in a March 20 ruling, dismissed with prejudice a claim made by an employee of the National Association of State Boards of Accountancy that she was fired due to a discriminatory, hostile work environment (*Conkwright v. National Association of State Boards of Accountancy*).

Joy Conkwright was an employee of NASBA for two and a half years, from August 2007 until February 23, 2010 when she was fired.

Conkwright claimed that, while employed for NASBA, she was paid less and not promoted due to her gender, was sexually harassed by a male employee at a Christmas party, and was ultimately terminated due to the fact she filed a discrimination charge with the Equal Employment Opportunity Commission.

The defendant, NASBA, however, contended Conkwright's discrimination and pay claims were untimely and ultimately abandoned by Conkwright.

The court concurred, stating, "Conkwright's brief is silent concerning her pay discrimination claim, and does not acknowledge, let alone rebut, the defendants' arguments concerning the untimeliness of her failure to promote, pay discrimination, and sexual harassment claims."

The court concluded that since Conkwright did not oppose dismissal of the pay discrimination claim in her Response brief, then that claim had been abandoned and subject to dismissal.

To establish a prima facie case of retaliation, the employee must show that:
(1) she engaged in protected activity;
(2) the employer knew of the exercise of the protected right;
(3) an adverse employment action was subsequently taken against her; and
(4) there was a causal connection between the protected activity and the adverse employment action.

According to performance reports, Conkwright's work performance had become combative, including being unable to work in a compatible fashion with fellow employees, deliberately making poor use of work time, and allegedly sabotaging projects.

The court notes an employee complaint of Conkwright that she "intentionally violated the established process for obtaining certain project estimates, thereby risking damage to the reputation of the Information Technology group within the company and wasting certain employees' time."

Conkwright claims that the work environment was hostile against her, and contended that inappropriate comments were made about her breasts at a work Christmas party.

But the court determined that the comments, although inappropriate, weren't "severe" enough and that given the singular time, place, and manner in which the comments occurred, there was no evidence the alleged harassment was "pervasive."

As for Conkwright's retaliation claim, the court said Conkwright relied on insufficient, circumstantial evidence. The record contains no evidence that anyone at NASBA—let alone the individuals involved in the decision to terminate her—was aware of the charge before Conkwright's termination on February 23, 2010. Absent evidence that NASBA knew about Conkwright's First Charge before it terminated her, Conkwright's retaliation claim fails, the court wrote.

In granting the defendant's motion for summary dismissal, the court noted that not only did Conkwright fail to establish a prima facie case of retaliation, but that her disruptive workplace conduct violated work rules, which justifiably resulted in her termination.

Regulation of Practice

Louisiana: Board is professional association, not state agency, judge rules

Issue: Active state supervision of state licensing boards

A federal district court in Louisiana, in a March 20 decision, allowed a lawsuit claiming that inspectors from the State Board of Cosmetology discriminated against salon owners to go forward, ruling that the plaintiffs had raised a valid claim that the inspectors violated their constitutional rights (*Nguyen v. Louisiana State Board of Cosmetology*).

The plaintiffs, a group of Vietnamese salon owners, filed a complaint against the state cosmetology board claiming that salon inspectors had discriminated against and illegally detained them based on their ethnicity.

Thoa T. Nguyen, one of the plaintiffs, claimed that board inspectors visited her salon in 2013 and, after demanding identification and business licenses, improperly searched the premises without permission and detained Nguyen and her employees in the building for two hours.

Without judging the evidence in the case at this early stage, Judge Brian Jackson of the U.S District Court in Baton Rouge, ruled that Nguyen had raised sufficient unlawful imprisonment, Fourth Amendment unreasonable seizure, and Fourteenth Amendment racial discrimination claims to go forward with the suit.

"An order not to leave the business premises for two hours," he wrote, "can reasonably be understood to constitute a detention as well as a seizure." A regulatory provision cited by the inspectors as the basis of their actions, he further noted, did not authorize inspectors to detain anyone on the premises during an inspection.

Surprisingly, Judge Jackson also ruled that the inspectors had no state immunity because a suit against the Board was not a suit against the state.

When the state legislature created the Board, the judge explained, it stated that the Board "shall constitute a professional association within the meaning of Article VII, Section 9 of the Constitution of Louisiana."

"Under the Louisiana Constitution, professional associations are distinguished from state boards, agencies, and commissions, who must deposit all money received immediately in the state treasury."

Based on the legislature's designation, Jackson concluded, "there is no indication that Louisiana would view the LSBC as an arm of the state," distinguishing it from other professional boards, like the state CPA board.

A second significant factor weighing against the board as a state agency is the fact that it receives no appropriation money from the legislature, instead generating its budget through the use of fees.

Although the legislature regulates the collection of those fees, a judgment paid by the board would not come from the state treasury. A last factor weighing against absolute immunity for the Board was the fact that it is authorized to acquire, hold, and use property.

Judge Jackson also rejected an argument by one of the inspectors that she was entitled to qualified immunity, which provides immunity to government officials acting within the discretion of their office unless those actions violate a clearly established right of the plaintiff which the state official reasonably should have realized.

Although the inspector argued that she had been acting pursuant to Louisiana statute, Judge Jackson noted that the inspector had failed to show that any Louisiana law allowed the type of warrantless inspection that occurred in the case. Because of that, the inspector could not have reasonably believed that she was not violating the plaintiffs' rights.

Texas: Law requiring physical, not online examination of animals is valid

Issue: Regulation of online provision of professional services

In a March 27 decision on telemedicine, a Texas appellate court upheld a state law that requires veterinarians to physically examine their patients before dispensing medical advice from a First Amendment speech challenge by a retired veterinarian who had been dispensing such advice over the internet (*Hines v. Alldredge*).

After veterinarian Ronald Hines retired in 2002, he began a veterinarian advice website that soon morphed into an ad hoc telemedicine practice. Although Hines reviewed veterinary records provided by owners, he nonetheless dispensed medical advice without a physical examination of the animals themselves.

Unfortunately for Hines, Texas law prohibits the remote practice of veterinary medicine unless a veterinarian has either first physically examined the animal or the premises on which it lives; the law explicitly prohibits telemedicine without this initial consultation.

When it learned of Hines's activities, the board informed him that he had violated Texas law. Hines entered into a consent agreement with the board, which placed his license on probation with a temporary suspension and fined him $500, but he also filed suit against the board in federal court, claiming that the requirement of a physical examination violated his First Amendment free speech rights and Fourteenth Amendment Due Process and Equal Protection Rights.

The court, in an opinion by Circuit Judge Patrick Higginbotham, rejected Hines's First Amendment argument, noting that the Texas law requiring a physical examination of an animal does not regulate the content of speech or require veterinarians to deliver any particular message.

The "narrow requirement" on speech that the physical examination requirement does impose, is, Higginbotham wrote, if anything, incidental to the requirement, and not in violation of the First Amendment.

The court also rejected Hines's Fourteenth Amendment claims, ruling that, because the physical examination requirement was rational and does not restrict fundamental rights, the law was valid.

Unlicensed Practice

Texas: Revoked licensee violated rules by wearing "D.D.S. Retired" nametag

Issue: Violation of title act provisions

A dentist who, despite having had his license revoked, wore a nametag identifying him as "D.D.S. Retired" and took patient money was guilty of the unlicensed practice of dentistry, a state appellate court ruled April 9 (*Akin v. State Board of Dental Examiners*).

The court found that the Texas dental board validly denied the reinstatement of the dentist's license.

Originally licensed in 1962, Charles Akin practiced dentistry until 2001, when the Texas dental board revoked his license after Akin was convicted of fraud and false Medicare charges and sentenced to five years in prison.

After his release, Akin spent time working at a dentist's office where, patients testified, he performed dental fittings and where patient checks were deposited in his name for work that patients claimed was never performed, and also at his daughter's denture shop, where he wore a name tag that identified him as "D.D.S. Retired."

In 2010 and again in 2011, Akin applied for a new dental license, but the board denied his application each time, explaining, after the second application, that Akin had violated the state's Dental Practice Act by wearing the nametag and thereby representing himself as a licensed dentist, and by performing dental work without a license.

Akin requested a hearing, and an administrative law judge subsequently recommended that the board reinstate his license. Undeterred, the board affirmed its earlier decision, overrode the ALJ's decision, and denied the application again.

After this second denial, Akin appealed, and the case eventually rose to the 3rd District Court of Appeals in Austin, which upheld the board's decision.

The board, the court ruled, was justified in claiming that Akin had practiced dentistry without a license as the result of wearing his “Retired” name tag.

Because Akin's license was revoked, the board noted, he could not claim it had been retired because specific provisions actually allow for the retirement of a non-active dentist's license, a status that allows for the active practice of dentistry in limited circumstances. Akin's claim that he was a "D.D.S. Retired" was therefore false.

This determination by the board enabled its other serious findings against Akin. Because Akin received patient money while holding himself out as a dentist, the board concluded that he was practicing without a license.

The board also determined that Akin had committed a dishonest or illegal act—both through his unlicensed practice and by depositing checks for work that was not performed—and was not fit to perform the duties of a dentist, all of which could be used to deny him a new license.

After evaluating the sufficiency of the evidence against Akin, the court upheld the discipline.

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