Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue

Scope of Practice

Court rejects board's notion of GPS use as practice of licensed profession

Issue: Specifying practices restricted to licensees

A company did not engage in the unlicensed practice of engineering when it used a GPS device, or geographic positioning system, to locate and map the location of equipment of a local utility, a Pennsylvania court held May 24 *(Southeastern Reprographics v. Bureau of Professional and Occupational Affairs*). The court reversed a decision of the state engineering and land surveying board.

In 2006, the Davey Resource Group (DRG), formerly known as Southern Reprographics, was hired by a rural electric distribution cooperative in Pennsylvania to create an inventory of the cooperative's electric system field inventory. To accomplish this task, DRG employees fanned out across the several counties in which the cooperative operated, physically locating the equipment and marking their locations on a map using GPS technology.

(*See Scope of Practice, page 3)*

Licensing

Tennessee legislature gets authority to nix boards' licensing regulations

Issue: Deregulation of occupational licensing programs

Committees of the Tennessee legislature will begin reviewing all regulations of the state's licensing agencies that affect entry into or practice of occupations, under the state's sweeping new "Right to Earn a Living Act" (HB 2201/SB2469, now Public Chapter 1053).

Signed into law April 28 by Governor Bill Haslam, the measure allows the house of representatives' and senate's Government Operations Committees to disapprove of existing and proposed regulations and request that they be amended or repealed. Only "entry regulations" are affected—but the bill defines such regulations broadly to include almost

any rule, policy, or practice of a licensing board that affects a person's ability to enter or continue to practice in a field.

The law requires licensing authorities (state board, commission, council, or committee) to submit all existing or pending regulations to the committees by December 31, 2016. Beginning July 2017, all licensing requirements will be subject to a periodic review by the committees.

In its initial form, the bill would have allowed *any person* to submit a petition challenging a regulation, with the licensing board required to repeal or modify the regulation, or justify it within 90 days. That provision was amended to give the legislative committees the authority to disapprove a regulation.

The reviews will include a study of all submitted regulations and, at their discretion, the committees may conduct a hearing regarding any regulation. Five factors will be considered during the reviews: whether an entry regulation is not required by state or federal law; is unnecessary to protect the public health, safety or welfare; has the purpose or effect of unnecessarily inhibiting competition or arbitrarily denying entry into the profession; could be accomplished by less restrictive means; or is outside the scope of the licensing authority's statutory authority.

"Entry regulation" in the "Right to Earn a Living Act" is defined extremely broadly to encompass:

(A) Any rule promulgated by a licensing authority for the purpose of regulating an occupational or professional group, including, but not limited to, any rule prescribing qualifications or requirements for a person's entry into, or continued participation in, any business, trade, profession, or occupation in this state; or

(B) Any policy or practice of a licensing authority that is established, adopted, or implemented by a licensing authority for the purpose of regulating an occupational or professional group, including, but not limited to, any policy or practice relating to the qualifications or requirements of a person's entry into, or continued participation in, any business, trade, profession, or occupation in this state.

If any regulation meets one of those factors, the committees may disapprove it and request that the authority amend or repeal it.

The "request" has some fairly coercive aspects. The disapproval is publicly announced, and if the licensing agency does not initiate compliance with the committees' request within ninety days or does not comply within a reasonable amount of time, the committees may then vote to request that the General Assembly suspend all or part of the agency's rulemaking authority.

Beginning January 1, 2018, each licensing authority must also submit all new entry regulations to the committees prior to a "Sunset" hearing being held.

The committees will issue a joint report containing findings and recommendations by January 1, 2018. Review of regulations is also set as part of the sunset review process to ensure that rules are necessary to protect the public and do not unnecessarily inhibit competition or arbitrarily deny entry into a profession.

Business groups, including the Beacon Center of Tennessee and Americans for Prosperity/Tennessee, backed the measure as part of a broader campaign against entry barriers which they perceive as obstacles to job creation. A key proponent was also the National Federation of Independent Business (NFIB), which has described Tennessee as a "top 15" state for burdensome licensing practices.

The new measure, NFIB says, "is very good news" for workers and entrepreneurs across the state. According to NFIB, an Institute for Justice's 2012 "License to Work" study found that the state licenses 53 of the 102 low- to middle-income occupations studied at an average licensing fee of $218, with an average of 222 days of education required.

Fending off new state licensing bills and paring back existing occupational regulations were two priorities of the NFIB during the 2016 state legislative

session In Tennessee. The organization says it helped defeat or delay at least five new licensing bills this year. The measures would have required continuing education for cosmetologists and other beauty-care licensees, required licensing of HVAC contractors performing work under $25,000, required licensure of persons engaged in lactation care and services, required roof repair or replacement workers to be licensed, and set training standards for executive coaches and life coaches.

Some licensees play odds they won't get audited on CE fulfillment

Issue: Enforcing mandatory continuing education laws

The Arizona State Board of Respiratory Care Examiners won plaudits from the state Auditor General this year for some elements of its performance. It followed rules on issuing licenses and issued most in a timely manner. But the watchdog agency cited one area where the board needs work: ensuring licensees' compliance with mandatory continuing education.

In 2013, the board stopped notifying people that they would be audited before renewal and instead notified them after they had renewed that they were selected for an audit. The board also began opening complaints against licensees who failed to document the 20 hours of CE, and planned to start quarterly audits in 2016

Things have improved since 2013. Before that, the board would audit continuing education compliance of a fraction of licensees coming up for renewal—but the process included posting the names of the licensees to be audited on the board website, giving them advance notice. Board staff found that licensees had little incentive to complete their CE hours unless they were selected for an audit.

However, in a December 2015 audit, the board found that fully 40 percent of current licensees failed to report the required 20 hours of continuing education every two years in order to renew their license. The penalty for failing to meet the requirement, board staff note, is on the lenient side: only $10 per uncompleted credit hour .

The problem with such a low civil penalty is that it is an insufficient deterrent. "In fact, a board member reported that licensees stated that they would rater risk being audited and pay the civil penalty than take the continuing education."

The auditor's recommendation: "The board should consider increasing the civil penalty amount and/or suspending the licensee until the licensee comes into compliance, and increasing the percentage of licensees it audits each quarter." In fact, the auditor said, the board might consider requiring all licensees to submit CE documentation when renewing their licenses, and then auditing a percentage of those renewals.

Another strategy the auditor called for: development and implementation of a disciplinary matrix for its continuing education audit complaints, to reduce the number the board must individually hear and the time needed for adjudication. Offering of consent orders, possibly imposing sanctions such as suspension, escalated disciplinary action for repeat offenders,

Trademark ≠ federal OK of alternative 'nedicine' licensing system

Issue: Weight of trademarked terms in credentialing

A federal court in Connecticut rejected, in a June 20 decision, a lawsuit brought against the state's medical board by the founder of the practice of an alternative medical and licensure system she calls "Nedicine" (*Jackson v. State of Connecticut Department of Public Health*).

The founder, a self-styled naturopath named Beverly Jackson, claimed in her suit that a federal trademark she obtained for "Nedicine" was proof that her alternative licensing board was approved by the federal government and nullified any state laws contrary to that approval.

"Nedicine" is defined on the website of the American School of Nedicine—also founded by Jackson—as "a branch of natural medicine based on the science of information as medicine, related to the study of the cybernetic matrix of the human body," including "the study of subatomic particles like photons and phonons." Jackson appears to have created the practice herself, obtained a trademark, established her own accreditation board, and then issued herself the first license.

Thereafter, Jackson began issuing licenses to others, even forming an investigatory unit to handle complaints against practitioners and creating licensing tests like the United States Nedicine Licensing Examination, or USNLE.

This ambitious program did not go unnoticed by state government. Connecticut, where Jackson is currently based, began investigating her in 2013, after learning that although she was not licensed by any state-approved medical board, she had attempted to treat a patient diagnosed with a brain tumor.

Jackson filed her suit against the Connecticut State Department of Public Health in an attempt to invalidate the state statute prohibiting the practice of medicine without a license. Her primary argument was that, by allowing her to register the trademark for "Nedicine," the federal government had sanctioned her entire enterprise, and any state law conflicting with that approval was invalid.

Regarding Jackson's claims that the state was engaging in unfair trade practices, Judge Height wrote, "In imposing statutory requirements for the practice of medicine, the state protects the lives and health of the people and ensures that only those 'properly qualified person shall undertake [the] responsible and difficult duties' of practicing medicine . . . It thus follows that there can be no lawful competition between the state and a private individual's essentially 'rogue' scheme of issuing licenses for medical practice within the state."

The suit was not Jackson's first. Similar suits had been previously filed in Florida, where Jackson founded an organization called the "Naturopathic National Council" to purportedly license naturopaths through a similar parallel scheme, and Washington State, where a Nedicine licensee brought suit to pre-empt that state's licensing statutes.

Unsurprisingly, Jackson's claims did not meet with much success. Judge Charles Height, adjudicating the case, wrote that many of her claims were barred by the immunity granted to the states by the Eleventh Amendment, and those against Department officials in their individual capacities were barred by the principle of qualified immunity, which shields government officials from money damages unless their actions violated a plaintiff's clearly-established constitutional rights.

The Department officials, Judge Height ruled, had not violated any clearly-established rights. Under qualified immunity, "unless a government official's actions are so obviously wrong, in light of preexisting law, that only a plainly incompetent official or one who was knowingly violating the law would have done such a thing, the government official has immunity from suit." Thus, because the Connecticut officials' conduct was not "obviously wrong," they were protected.

Even if the defendants were not immune from Jackson's claims, Judge Height continued, her suit would still have failed because she failed to make any plausible claims. Jackson could not allege any facts that would prove that any federal trademark law preempts state regulation of the medical professions.

The judge found that "None of [Jackson]'s alleged facts establish that she was deprived of any statutory or constitutional right by Defendants."

Jackson's trademark for Nedicine did not provide her with any right to practice medicine in Connecticut, so she had "lost no interest protected by due process," Height said in dismissing Jackson's claims.

FSMB: "Practice drift" may require board monitoring and response

Issue: Specialization and assurance of competence levels

Increasing numbers of physicians have been changing or expanding their areas of practice, due to various economic and cultural pressures, the Federation of State Medical Boards said in an April policy statement.

The "practice drift" trend means that—even though physician licenses allow them to practice the full breadth of medicine—boards may need new approaches to ensure that licensees can practice competently within their chosen area of practice.

FSMB's new policy position recommends:

• **Monitoring** Where it is feasible, state medical boards can monitor physicians' insurance billing patterns and medical records to determine whether practice areas have shifted to include non-traditional procedures or whether harms may have resulted from the performance of procedures in the absence of adequate qualifications or training.

• **Patient awareness of credentials** Patients should be encouraged to ask physicians about their qualifications to perform particular procedures, and to consult the FSMB's DocInfo website for specific information about physicians' education, board certification and disciplinary actions. Physicians should also supply information about their qualifications to patients as part of the informed consent process.

• **Information collecting** Boards should collect information about licensees' areas of practice as part of the license renewal process. The FSMB provides recommendations for categories of information to collect, and formatting, in its Report on a Recommended Framework for a Minimal Physician Data Set.

Ban on coined terms is a regulation, and is appealable, court finds

Issue: Board "policy" versus board "regulation"

A policy prohibiting licensees from using the terms "osteopractice" and "osteopractor" was a regulation, and a district court wrongly granted a motion to dismiss a complaint about the regulation, the Supreme Court of Nevada held May 26 (*Dunning v. Nevada State Board of Physical Therapy Examiners*). The unpublished opinion reversed a district court's dismissal of the physician's complaint for lack of subject matter jurisdiction, and remanded the case.

Dunning had coined the terms "osteopractic" and "osteopractor" in 2011 in connection with continuing education courses he offers to physical therapists in Nevada. In response, the physical therapy board adopted a policy prohibiting any physical therapist licensed in Nevada from using the terms in any manner.

Suing for injunctive and declaratory relief, Dunning argued that the board's policy was a regulation and had to comply with requirements of the state Administrative Procedure Act before it could be enacted.

On appeal, the state supreme court said it was unclear why the district court had granted the board's motion to dismiss Dunning's complaint. But the court agreed with Dunning that the "policy" was indeed a regulation. "Policies are merely an agency's interpretation or understanding of the law and typically do not hold the legal force of a regulation," the court noted. "Where an interpretive ruling affects other market participants, appears to be part of a general policy, and 'is of such major policy concern and of such significance' that it may be characterized

as being of general applicability," on the other hand, "the ruling is a regulation" subject to the state APA.

"Here, we conclude that the Board's policy is of general applicability. The Board published the policy in the 'Winter 2013 Web New Bulletin' and stated therein that 'the Board has determined that Nevada licenses *may not use* the terms 'osteopractic' or 'Osteopractor' *in any manner*.'. . .The policy reserves for the Board the right to conclude that any physical therapist's use of the terms, in any manner, constitutes a violation of the policy and therefore a violation of the law."

"Under these facts, we conclude that the policy is a regulation," the court said in remanding the case to the district court.

Competition

ALEC model bill promotes "active supervision" via deregulation

Issue: Balance between protecting competition and protecting public

The model "Occupational Board Reform Act" adopted by the pro-deregulation American Legislative Exchange Council (ALEC) in November 2015 was revised in January 2016 and includes a policy that the organization recommends on the "active supervision" required by the U.S. Supreme Court.

The National Federation of Independent Business, which says it represents 325,000 small business owners, has been actively promoting the ALEC model bill as a means of "rationalizing" states' regulatory climate and opening opportunities for entrepreneurs.

People who provide African-American hair braiding, horse massage, and tour guiding have been among those on whose behalf the pro-business Institute for Justice has won lawsuits challenging licensing regulations. However, some consumer groups warn that ALEC's and NFIB's approach could lead to voiding of many licensing regulations that are needed for public protection.

Included within ALEC's model bill is the organization's scale of ten forms of regulation, on which "occupational license" ranks as the "most restrictive":

1. Market competition
2. Private certification
3. A specific private civil cause of action to remedy consumer harm
4. A deceptive trade practice act
5. A regulation of the process of providing the specific goods or services to consumers
6. Inspection
7. Bonding or insurance
8 Registration
9. Government certification
10. Occupational license

The last three of these (registration, government certification, and occupational license) comprise the broader category of "occupational regulation," ALEC says. That term is defined as "a statute, rule, practice, policy, or other state law requiring an individual to possess certain personal qualifications to use an occupational title or work in a lawful occupation."

The ALEC model bill—now being promoted in state legislatures across the country—specifically notes that a government or private attorney providing general counsel to a board does not meet the requirement for active supervision. Instead ,"active supervision" means the attorney general or delegate must independently:

1. Play a substantial role in the determination of an occupational board's rules and policies to ensure they benefit consumers, not serve private interests of providers of goods and services regulated by the board;

2. Disapprove the use of any board rule or policy and terminate any enforcement action outstanding at the time of the act's enactment, and subsequently, that fails to accord with the model bill's goal of promoting economic opportunities, competition, and least restrictive regulation necessary;

3. Exercise control over each of the boards by reviewing and affirmatively approving only rules, policies and enforcement actions that are consistent with the model bill's provision restricting enforcement only to individuals' sale of goods and services explicitly within the defined occupation's scope of practice; and

4. Use the nonpartisan research staff's analysis, and conduct reasonable investigations to gain additional information, including about less restrictive regulatory approaches, to reduce exposure to antitrust litigation.

From the perspective of the Center for Media and Democracy, a media watchdog group, ALEC's recommended regulatory structure threatens licensing boards' traditional independence. The CFMD says ALEC's model bill "puts licensing boards under the thumb of state Attorneys General, as the states' top prosecutors are increasingly beholden to corporations to win their electoral campaigns."

Under this legislation, the CFMD says, "the state's top law enforcement officer is required to create a new 'Office of Supervision of Occupational Boards' and review every new rule coming out of these boards, while another party is required to review whether the legislature is using the 'least restrictive' option in creating new licensing rules."

Home delivery service's lawsuits against board may proceed

Issue: Antitrust challenges of board actions

A company that delivers prescription pet drugs directly to homes, and was ordered to cease and desist its operations by the state veterinary board, may continue its federal antitrust suit alongside the board's civil action against it, the U.S. District Court of Nevada held May 23 (*Strategic Pharmaceutical Solutions, Inc., v. Nevada State Board of Pharmacy*).

The delivery service, which does business as Vetsource Home Delivery, is licensed by the Nevada Board of Pharmacy, but the board believes that Vetsource's business model violates Nevada's anti-kickback statute. The board recently began administrative disciplinary proceedings against the company.

For its part, Vetsource believes the board is a monopoly that violates federal antitrust law. In January 2016, Vetsource filed its antitrust action in federal court; in March the board sued Vetsource in state court for allegedly violating the anti-kickback statute. Then the board moved that the federal action be stayed pending resolution of the state court action.

"In exceptional circumstances," the court noted in its ruling, "the presence of a concurrent state proceeding will allow a court to stay or dismiss a concurrent federal action." But there is a preference against piecemeal litigation where different tribunals are considering the same issue, thereby duplicating efforts and possibly reaching different results. Here, however because the federal and state courts will be considering different issues, "there is no risk that the parties will be forced to relitigate issues." Most importantly, the state court cannot decide on a federal antitrust issue, the court said in denying the board's motion.

Ensuring the "active supervision" ordered by 2015 Supreme Court antitrust ruling: two states' strategies

Issue: Supreme Court curbs on potentially anticompetitive regulations

Officials from two states sketched out potential responses to the need for “active supervision” of potentially anticompetitive actions by state licensing bodies, during a webinar hosted by the Council on Licensure, Enforcement and Regulation (CLEAR) in May. The

webinar was developed in response to the 2015 Supreme Court ruling in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*.

Although states' actors normally possess immunity from antitrust actions, in *Dental Examiners*, the Supreme Court held that a licensing agency composed of a controlling number of market participants can only claim that immunity if it is subject to “active supervision” by the state.

Justice Anthony Kennedy, writing for the Court of the need for such supervision, contended that “entities purporting to act under state authority might diverge from the public good” and engage in “private self-dealing,” whether intentionally or not.

In their presentations on alternative approaches for complying with the U.S. Supreme Court’s Decision, Jared Haines, an assistant solicitor general in Oklahoma, and Brian Tobias, senior policy analyst of the Colorado Department of Regulatory Agencies, laid out what active supervision will require and what potential form that it might take.

The implementation of active supervision programs has two primary objectives, Haines said: reduction of litigation risk to a licensing agency and the reformation of regulatory bodies to reduce potentially economically burdensome behavior and to achieve particular social goals, such as allowing people with criminal records to participate in the professions.

As Haines sketched it out, surveying the case law, there are four constant requirements of such supervision: 1) The active supervisor must review the actual substance of a licensing body’s decisions, 2) the supervisor must have the power to veto or modify those decisions, 3) the supervisor must actually review every decision, and 4) supervisory officials can’t be market participants.

Haines gave examples of systems that did not meet these standards. A system that included a peer review process but did not provide the ability to actually oversee determinations would be insufficient. A system that provides the supervisor with modification power, but where the supervisor did not actually look at underlying facts when reviewing cases, would also not meet the active supervision requirement; systems that provide the supervisory board with the appropriate authority on paper, but which do not meet the requirements in fact will not provide immunity for antitrust decisions.

The FTC has issued its own guidance on these factors, stressing that “independent judgment and control” by the supervisory entity are key. Following case law, the FTC guidance states that active supervision must involve the collection of necessary facts, a substantive decision on the merits of the case, and the production of a written decision with reasons.

Haines also addressed the proper scope of a successful active supervision program, as well as its effects on consent agreements and state Administrative Procedure Act processes.

Legislation creating an active supervision program should identify the set of actions that will be immunized, he said. Ideally, the legislation would focus on high liability risks, like rules that impose burdens on the entry of new market participants and regulate the scope of practice. Other actions, such as individual discipline decisions and unsupervised staff actions, have varying degrees of liability risk.

Consent agreements are effective as a way of saving money and time for licensing agencies, Haines noted, but they can create coercive incentives, particularly in professions with lower incomes, and may be a source of anticompetitive behavior.

However, active supervisory review of consent agreements may undermine their effectiveness, since review raises the possibility they may be overturned. In addition, Haines said, since active supervision programs will affect the timelines of state Administrative Protection Act processes—for example, by determining the date of a final decision for appeal timelines to begin—supervision programs should specify their effects on the APA.

Finally, Haines discussed the location of active supervision entities. If supervisory entities are located in an attorney general's office, this may create a conflict with an AG's advisory role to state licensing agencies. and require a degree of separation. A supervisory entity can also be a new state agency, dedicated to active supervision, an existing agency with specialized expertise, or a branch of the governor's office.

In his presentation, Brian Tobias discussed the possibility of using sunset reviews—a legislative process whereby statutory mandates for government agencies simply end without affirmative action on the part of the legislature—as a means of fulfilling active supervision.

Traditional sunset reviews, Tobias noted, focus on past cases and agency actions, in order to evaluate whether an agency should continue on its course. However, the delay between individual agency actions and a retrospective sunset review may be too long to create effective active supervision.

A modified sunset approach to active supervision will likely need to incorporate many pre-emptive elements, Tobias said. He believes that traditional sunset review may need to be so heavily modified to meet active supervision standards that it may be unrecognizable, and simply closer to the process described by Haines.

Scope of Practice

Using GPS is not practice of engineering *(from page 1)*

This activity brought the company to the attention of the State Registration Board for Professional Engineers, Land Surveyors and Geologists, which determined that the company, not licensed for surveying work, had improperly engaged in an "engineering land survey," an activity that requires such a license. DRG appealed, and the case went up to the Commonwealth Court of Pennsylvania, which issued a decision by Judge Bonnie Brigance Leadbetter.

On appeal, DRG argued that it had neither engaged in the practice of land surveying, which requires measurements for the purpose of setting property or boundary lines, nor performed an engineering land survey, which is done for the purpose of construction or for developing land. By simply locating the equipment of the electric cooperative, the company argued, it had done neither of those restricted acts.

The court agreed. The "practice of engineering," the judge wrote, "is limited to the *application of the mathematical and physical sciences for the design* of projects involving buildings, structures, machines, equipment and engineering services *performed in connection therewith*" (Italics in original)."

Construing the relevant provisions of the law for the first time, the court ruled that this definition also encompassed engineering land surveys, which are limited

to licensed engineers and land surveyors. Such surveys are performed as part of an engineering design project. As such, the mapping done by DRG did not fall under the practice of engineering or land surveying and, therefore, did not require a license.

"Otherwise," continued Judge Brigance Leadbetter, "the use of GPS by a taxi driver to locate the address of a particular building would constitute an engineering land survey."

The board was in error when it determined that the company had engaged in the unlicensed practice of land surveying, the judge concluded. "DRG's field inventory was not performed in connection with the design of any of the items listed in [the engineering statutes], nor performed in connection with a land survey . . . Rather, DRG was simply locating, inventorying, and documenting" the cooperative's equipment.

Chiropractor sanction for unlicensed medical practice not unfair competition

Issue: Jurisdiction of other licensing boards over licensee

In a May 16 decision, a Virginia state court rejected a claim by a chiropractor that a decision by the state's medical board to sanction her for the unlicensed practice of medicine was an unfair restraint of trade (*Petrie v. Virginia Board of Medicine*).

After receiving several complaints that chiropractor Yvonne Petrie was holding herself out as a medical doctor and making dubious claims about her ability to cure medical problems like diabetes and erectile dysfunction, as well as someone who could administer an apparently laser-based "Fat Burning Procedure," the Virginia Board of Medicine held a formal hearing and issued an order finding that Petrie had practiced outside the scope of her license.

The board suspended her license for six months and imposed a $25,000 fine. Petrie appealed to the Virginia court system, but met with no success.

While her appeals were pending, Petrie filed an action in federal court seeking to overturn the board's order, claiming that the board was engaged in a conspiracy to exclude chiropractors from the market for various medical procedures, in violation of federal antitrust law and contrary to Virginia statutes controlling the medical professions. The case eventually reached the Fourth Circuit, which issued a decision by Circuit Judge Allyson Duncan.

The court was not sympathetic to Petrie's arguments. While Petrie was clearly injured by the board's decision in her case, Judge Duncan noted, Petrie was unable to show that the board's decision was an unreasonable restraint on competition. In particular, Petrie "failed to provide evidence that the board's order in her case would have the effect of unreasonably restraining the practice of all chiropractors."

"The record is completely devoid of evidence that any other Virginia chiropractor has sought to provide laser fat removal services or the other services the Board sanctioned Petrie for providing, or that any other Virginia chiropractor was providing those services and ceased doing so after the Board sanctioned Petrie," Judge Duncan wrote.

"Instead of providing actual evidence of negative effects on competition between chiropractors and medical doctors, Petrie simply speculates that the Board's order against her could have such effects. But mere speculation is not enough to withstand a motion for summary judgment." Given the lack of evidence for her argument, the court dismissed Petrie's case.

Discipline

"Excessive" penalty: Court overturns revocation of MD's license for wrongly collecting disability insurance

Issue: Appropriate sanctions for non-practice conduct

An appellate court in California overturned a license revocation issued to a doctor who had accepted several thousand dollars in disability insurance while working for another employer (*Pirouzian v. Superior Court*). In its June 29 decision, the court cited several mitigating factors and held that the revocation did nothing to either protect the public or rehabilitate the affected physician.

The case began in August 2006, when Amir Pirouzian, a pediatric ophthalmologist, took a medical leave from his employer because of problems with depression. After an examination, a psychiatrist certified that Pirouzian's ailment left him temporarily disabled, causing Pirouzian's insurer to begin providing disability payments.

Pirouzian was eventually cleared by his psychiatrist to return to work part-time. However, in 2007, Pirouzian took a position at a Kaiser Permanente hospital in Santa Clara, but did not inform his current employer, who concurrently placed him on unpaid medical leave, his psychiatrist, or his insurer.

In fact, Pirouzian went so far as to intentionally mislead the insurer, telling it that he had been visiting family out of country and omitting any information regarding his pay from Kaiser Permanente on his insurance forms. As a result, he continued to receive disability benefits from his insurer while simultaneously being paid by his new employer.

Pirouzian's insurer eventually discovered this double status, which led to the filing of criminal charges for insurance fraud. Faced with the charges, Pirouzian repaid his insurer, agreed to pay $5,000 in restitution to the state Department of Insurance, and pled guilty to a misdemeanor of delaying a public officer in the discharge of official duties. In return, the prosecutor handling his case dropped more serious charges. The misdemeanor conviction was eventually expunged.

Several years later, in 2013, the board filed charges against Pirouzian, based on the conduct that led to his conviction. After hearings, the board revoked Pirouzian's license. The physician appealed.

In his appeal, Pirouzian argued that the board had abused its discretion when it decided to revoke his license. The court, in an opinion written by Justice Frances Rothschild, agreed.

Although the board's highest priority is the protection of the public, Rothschild noted, it also has a secondary priority that states that discipline should aid in the rehabilitation of a licensee. "In this case," Rothschild wrote, "the Board's imposition of the maximum discipline of revoking Dr. Pirouzian's license to practice medicine is inconsistent with these priorities because it was not necessary to protect the public and did nothing to help make Dr. Pirouzian a 'better physician.'"

Several factors mitigated in Pirouzian's favor. His actions, she noted, were primarily intended to preserve the possibility of employment at his original place of work, and no patients were harmed. His offending actions occurred during a discrete period where he suffered from severe depression, and his record was

otherwise unblemished. Nothing, Justice Rothschild concluded, indicated that Pirouzian would be a danger to the public.

In addition, the board's disciplinary record indicated that more serious offenses were met with much smaller disciplinary sanctions. And the ALJ who conducted Pirouzian's hearings repeatedly stated his belief that Pirouzian had not received adequate criminal punishment for his actions. The court accepted these statements as evidence that the revocation was improperly intended to punish Pirouzian.

With the revocation decision overturned, the court remanded the case to the board to determine another punishment.

Is exclusion from Medicaid program a form of discipline? Courts may be leaning toward 'Yes'

Issue: Non-licensing administrative punishments considered as discipline

Whether a provider's termination from a state Medicaid program is equivalent to a disciplinary action was a question before two courts in June.

In the first case, an Illinois court, on June 10, overturned discipline imposed by the state's Department of Financial and Professional Regulation against a doctor who had been terminated from the Medicaid program.

The court held that termination from the program was not akin to a doctor's being disciplined in another state and could not give rise to reciprocal discipline (*Martin v. Illinois Department of Financial and Professional Regulation*). However, the court implied that a recent change in the law might change that interpretation in future cases.

After the Illinois Department of Healthcare and Family Services terminated physician Howard Martin's participation in the state's Medicaid program, the professional regulation department followed with disciplinary charges, on the grounds that Martin's disqualification from the program was, in the language of state licensing law, a "disciplinary action of another state or jurisdiction," which would automatically lead to disciplinary sanctions in Illinois.

Following a hearing, the Department's Medical Disciplinary Board suspended Martin's license for an indefinite period of time. Martin appealed, and the case eventually made its way to the Appellate Court of Illinois, First District, which issued an opinion written by Judge Mathias Delort.

In his appeal, Martin had argued that the Illinois Department of Healthcare and Family Services was not a "jurisdiction," as meant by the language of the statute used to impose discipline on his license. The court agreed.

Referring to the definition of "jurisdiction" in Black's Law Dictionary, Judge Delort wrote that "DFHS does not exert political or judicial authority within a geographic area, nor is it a political or judicial subdivision within such an area. Thus . . . the act was . . . not that of a jurisdiction," and could not provide grounds for discipline.

The Department's second argument for disciplining Martin also failed to sway the Illinois court. The relevant statute had actually been amended in 2014 to include "any adverse action taken by a state . . . agency that prohibits a medical doctor . . . from providing services to the agency's participants."

That change seemed intended to encompass licensees such as Martin, barred from a state program. However, the court, pointing to language in the amended statute stating it would only take effect after its passage, held that the statute could not be applied retroactively.

This limitation meant that Martin's license could only be disciplined under the language of the act as it existed at the time of his banishment from the state's Medicaid program.

A different, but related, question was before the Superior Court of Maine, Kennebec County, in *Doane v. Maine Department of Health & Human Services*. In its June 30 decision in that case, the court found that exclusion from Medicaid actually was tantamount to "license revocation."

The plaintiff, Stephen Doane, was a licensed physician accused of demonstrating incompetence in the treatment of a patient who died of drug intoxication. The board renewed his license but censured him, imposed probation, and required a practice monitor to review some of his cases. As a result, the state Department of Health and Human Services, which administers Maine's Medicaid program, known as MaineCare, terminated Doane's participation in the program.

Doane argued to the court that HHS's exclusion of him from MaineCare constituted a license revocation which under state law, can only be performed by the Maine District Court. For its part, DHHS contended that it simply terminated a contract it had entered into with Doane.

The court found, however, that Doane had not entered into a contract with DHHS so his termination from MaineCare was more in the nature of revocation of an approval or "license" as defined by the Administrative Procedures Act.

Not many courts have addressed whether the authority to participate in and be reimbursed by a government funded medical assistance program constitutes a license, the court said. But it noted that the plain language of the APA identifies any type of "approval … required by law which represents and exercise of the state's regulatory police powers" is a license.

Furthermore, the court said, it is clear that the Medicaid agency's decision to permit a provider to enter into the program represents an exercise of the state's regulatory or police power. DHHS terminated Doane's participation in the MaineCare program due to public health concerns—i.e. the death of a patient by overdose and subsequent reprimand by the board.

Thus, what DHHS did involved police power rather than enforcement of contractual rights, and it constituted a revocation of license which can only be done by the Maine District Court. The court granted Doane's motion for summary judgment against DHHS.

Twice failing to disclose same conviction does not make a "repeat offender"

Issue: Applicability of aggravating factors in discipline

An appellate court in Massachusetts, on May 9, overturned a sanction against a real estate appraiser after the state appraiser board disciplined the licensee as a repeat offender, despite the fact that he had not been previously disciplined (*Long v. Board of Registration of Real Estate Appraisers*).

After the Massachusetts Board of Registration of Real Estate Appraisers sanctioned licensee Steven Long for failing to disclose a 17-year-old conviction for driving under the influence on a license renewal application and for being a repeat offender, Long appealed, arguing that the board did not have the authority to discipline him for making a statement he claims he did not know was false.

The Appeals Court of Massachusetts, hearing the case, quickly disposed of Long's primary argument, noting that the statute under which he was disciplined did not require that his untruthful nondisclosure be made knowingly.

However, the court rejected the board's decision to discipline Long as a "repeat offender" because Long failed to disclose his conviction on both his initial

application for licensure and on his renewal form. The court held that, because the board had not disciplined Long for his nondisclosure on the initial licensing form, "there is no evidence that he acted in disregard of having been disciplined for similar conduct before," removing any justification for second offender treatment.

Also, while the board is authorized to impose a penalty even for a first offense, the court noted that "it is not clear from this record that the board would have exercised its discretion to impose a public reprimand on a first infraction involving Long's failure to apprise the board of what was, after all, a seventeen-year-old DUI conviction on his application for renewal of a real estate license."

The case was remanded to the board to reconsider its sanctions.

Vacated orders not appealable—even if some complaints were not dealt with

Issue: Due process of appealing disciplinary orders

An appeals court in Kentucky, on June 17, rejected an attempt by a licensee to continue his appeal of a disciplinary order after a court had already vacated the order (*Ward v. Kentucky Board of Embalmers and Funeral Directors*). The licensee had raised several issues in his initial appeal and was unsatisfied with the vacated order because the court issuing the decision declined to address several of his complaints.

After licensee J. Steve Ward pled guilty to one count of sexual misconduct with a minor, the Kentucky Board of Embalmers and Funeral Directors filed disciplinary charges against him. Before the hearing scheduled for his case, Ward took the unusual step of filing a parallel complaint against the board, seeking to prohibit it from proceeding.

The disciplinary process continued anyway. However, during a hearing in the parallel suit, it became known that the chair of the board had engaged in *ex parte* conversations with Ward's wife, who was a witness in the disciplinary case. The case against Ward proceeded nonetheless, and the board eventually suspended his license for five years and fined him $50,000. Ward filed suit challenging the decision, and his two court cases were consolidated. A judge hearing the case, based on the board member's conversations with Ward's wife, wrote that the "integrity of the formal administrative process was compromised" and ordered the board to give Ward a new hearing.

However, that judge did not rule on any of the other claims Ward had made in his appeal and Ward, unsatisfied, appealed its order. The case eventually made its way to a state Court of Appeals, which issued a decision written by Judge Denise Clayton.

During the appeal, the board argued that Ward had improperly appealed the lower court's decision because that decision had not been a final, appealable order.

The court agreed. The trial court hearing Ward's case, wrote Judge Clayton, had addressed only one of Ward's arguments. Because a final, appealable order required the court to have addressed all of a party's arguments, the decision to remand Ward's case to the board could not be considered final, and thus Ward had no right to appeal on the grounds that the court had not addressed his claims.

Because the court's decision had vacated the board's order, no order disciplining Ward currently existed, and, therefore, he had nothing to appeal. In fact, wrote the judge, Ward now stood in the position in which he had found

himself before the board even began the case against him, and the board may choose not to re-file the disciplinary charges. The lower court's decision to remand the case to the board was upheld.

Kicking licensee's attorney out of board meeting not out of bounds

Issue: Due process and misbehaving legal counsel

The removal of a licensee's attorney from a board meeting—for ignoring orders to stop disrupting the proceedings—was not a violation of due process (*Froehlich v. Ohio State Medical Board*), an Ohio appellate court held March 15.

In 2013, the Ohio State Medical Board Board filed disciplinary charges against obstetrician/gynecologist Kurt Froehlich, alleging that he engaged in inappropriate sexual contact with two patients and that he sexually harassed and assaulted a medical assistant in his offices.

Although Froehlich had pled guilty to a criminal misdemeanor for his behavior with the medical assistant, he defended his actions by claiming that the medical assistant had a history of flirtatious behavior with him. The use of this explanation prompted Froehlich to describe to the board the allegedly flirtatious behavior, which included an incident where he asked the assistant to give him a testosterone injection in the buttocks.

Hearings followed, during which Froehlich had trouble defending his actions, even going to far as to explain accusations of inappropriate touching by claiming that he was simply demonstrating for his curious patients where a woman's erotic zones were located. The board voted to permanently revoke Froehlich's license. Then during a later meeting at which the board was to discuss a motion for reconsideration filed by Froehlich's attorney, the board ordered the attorney removed for speaking out of order, and for persisting despite directions to stop. Froehlich appealed, and the case made its way to the Court of Appeals of Ohio in Franklin County.

Froehlich claimed that the removal of his attorney violated his right to procedural process by denying him an opportunity to present his case. However, the court, noting that the board had provided Froehlich with ample notice of the charges and an opportunity to be heard, and had not removed his attorney until the motion for reconsideration, held that Froehlich had been granted adequate opportunity to present his case.

Further, "Froehlich cites no authority to support his argument that his right to procedural due process encompasses a right to have his counsel speak out of turn at the board's meeting," wrote Judge Betsey Luper Schuster for the court.

Froehlich also argued that the board had punished him for conduct it had not mentioned in its notice—specifically, that it had considered evidence of the incident where Froehlich had asked the medical assistant to give him an injection in his buttocks, as well as another incident where he had walked in on the assistant while she was pumping breast milk.

This argument did not succeed. First, noted Judge Luper Schuster, Froehlich himself was the person who first brought those incidents to the attention of the board, as evidence that the assistant had been acting flirtatiously. Second, the board's record shows that, although it considered that conduct in determining the appropriate sanction, it did not improperly use it to determine *whether* to discipline Froehlich.

Because, under Ohio law, a disciplinary body may consider uncharged conduct as an aggravating circumstance when determining sanctions, and because plenty of evidence existed to support the board's decision to discipline Froehlich, the board's consideration of those incidents was not improper.

Last, and implausibly, Froehlich also argued that the assault on his medical assistant did not occur during the "course of practice," a necessary condition of the regulations under which the board had charged him. Noting the many connections to his practice—including the fact that it occurred in his office while he had been working on medical records—the court rejected this argument and upheld the conviction.

"Essential similarity" of two states' statutes can make revocation automatic

Issue: Bases for reciprocal disciplinary sanctions

An attorney who committed a felony in New Jersey was rightfully given an automatic disbarment in New York since the felony statutes in both states had "essential similarity," the New York Supreme Court, Appellate Division, Second Department, held January 20 (*In re DiGiacomo*).

A felony committed in another jurisdiction need not be a mirror image of a New York felony, but it must have "essential similarity," the court noted, citing *Matter of Margiotta*, 60 N.Y.2d 147, 150, 468 N.Y.S.2d 857, 456 N.E.2d 798).

The attorney in the case, Paul David DiGiacomo, admitted to taking part in a money-laundering scheme in New Jersey, which resulted in a second-degree felony conviction and a seven-year prison sentence. The scheme involved DiGiacomo sidestepping the Condor Capital Corporation, which held a mortgage note of approximately $477,000, in order to "allow parties to get the money without paying Condor the full amount due on the mortgage note." The true source of the money was hidden from Condor.

What was left before the court to consider was whether a felony conviction in one jurisdiction can result in an automatic disbarment in another jurisdiction. Pursuant to Judiciary Law 90(4)(a), any attorney convicted of a felony, shall "cease to be an attorney and counselor-at-law." Here, the court found, DiGiacomo's scheme to disguise the true source of funds used to repay Condor was "essentially similar" to New York's felony of money laundering in the second degree.

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