

Professional Licensing Report

Licensing, testing, and discipline in the professions

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Discipline

Only 13 of 64 medical boards subscribe to discipline updates by national data bank

Issue: Interstate reporting of discipline data

A year-long investigation by the *Milwaukee Journal Sentinel* and *MedPage Today* turned up several egregious cases illustrating a now-

familiar national pattern: many physicians sanctioned for misconduct or incompetence in one state are often never discovered to have been disciplined by other states where they hold a license. Summarizing their findings in a series of newspaper articles in February and March, the investigative team wrote: "Like traveling medicine hucksters of old, doctors who run into trouble today can hopscotch from state to state staying ahead of regulators."

But along with the accounts of doctors who eluded practice limitations despite a history of discipline elsewhere, the newspaper series reported that the federal National Practitioner Data bank (NPDB), which has collected more than 1.3 million records of "adverse actions" against health professionals going back to 1990, is barely used by the nation's medical boards.

Hospitals and insurers, which have access to the data bank, log millions of searches each year, but state medical boards searches are only a "small share" of the total number, the *Journal Sentinel* reported—averaging 10 to 20 searches each per year.

See *Discipline*, page 4

Testing

ADA lawsuit on exam accommodations dismissed over jurisdiction

Issue: Exam accommodations for candidates with disabilities

A federal judge in Virginia, in an April 25 decision, dismissed a suit brought by a law license applicant who had been denied disability

accommodations for the Virginia Bar Exam, holding that the court did not have jurisdiction because the applicant had failed to use the state appeals process (*Oliver v. Virginia Board of Bar Examiners*).

The judge also expressed his personal view that "in the context of professional licensing examinations," the ADA "does not enforce a fundamental right" (and is therefore an unconstitutional law). His statement, however, did not form part of the binding ruling of the court.

During his first year in law school, a physician diagnosed applicant Donshur Oliver with attention deficit hyperactivity disorder, anxiety, and depression. In response, his school provided Oliver with accommodations during his exams, including mid-exam breaks and a separate room in which to take the tests.

In preparation for taking the Virginia Bar Exam after graduation, Oliver received a second diagnosis, this time for a reading disorder and depression, and requested accommodations from the Virginia Board of Bar Examiners.

The Board denied Oliver's request on the grounds that the documentation he provided did not support a request for additional time to take the exam. Oliver subsequently took and failed the exam, although he did later take and pass the Michigan bar exam.

Oliver then brought an action against the Board, claiming that it had denied him accommodations in violation of Title II of the American with Disabilities Act. He sought declaratory and injunctive relief, as well as \$100,000 in damages. The case went to the U.S. District Court in Richmond.

The appeal did not go well for Oliver. First, Judge Henry Hudson determined that the court did not have jurisdiction of the case. Federal courts are prohibited from taking cases brought by plaintiffs seeking review of a state action that is judicial in nature and, under existing U.S. Supreme Court precedent, Judge Hudson ruled that the board's decision to deny Oliver's accommodation request was such a judicial proceeding.

If Oliver wanted a review of the board's decision, Judge Hudson wrote, his proper course of action was to appeal to the Virginia Supreme Court, which adjudicates bar admission questions.

Despite the fact that the jurisdiction holding, alone, would decide the case, the court proceeded to analyze the other claims raised by Oliver. To determine whether Congress had abrogated the Eleventh Amendment's Sovereign Immunity—which prevents lawsuits against the states but allows Congress to allow such suits to ensure certain constitutional rights—through the ADA for this particular set of facts, Judge Hudson analyzed whether Oliver's claim implicated fundamental rights.

The judge contended that it did not. "[T]he right to pursue one's chosen profession . . . is not a fundamental right guaranteed by the Fourteenth Amendment," the judge wrote. "[I]n the context of professional licensing examinations, Title II [of the ADA] does not enforce any fundamental right."

Further, in passing the ADA, Judge Hudson wrote, Congress did not identify a pattern of irrational state discrimination against the disabled in the context of professional licensing, indicating that Congress did not mean to abrogate state's sovereign immunity in this context.

Having concluded that professional licensing regulation does not implicate any fundamental rights and that Congress had not identified a pattern of irrational discrimination in licensing regulation, Judge Hudson wrote that the Title II of the ADA was "neither congruent nor proportional to the negligible history of disability-based discrimination in the state-administered professional licensing, and that it

cannot be understood as responsive to, or designed to prevent, unconstitutional behavior in this context."

". . . As a result the Court concludes that Title II, as it applies to the class of cases implicating professional licensing by the states, does not constitute a valid exercise of Congress' . . . authority. Congress therefore did not validly abrogate sovereign immunity with regard to discrimination in the specific field of legal licensing, and the Court lacks jurisdiction over Plaintiff's ADA claim."

While encouraging Oliver to try his hand at the Virginia Bar Examination again, Judge Hudson dismissed the case.

Scope of Practice

Alaska supreme court upholds ban on naturopaths' injecting vitamins

Issue: Agency authority to regulate health providers' scope of practice

The Alaska Supreme Court, in a March 16 decision, upheld a recent regulatory amendment by the state licensing agency which prohibited naturopaths from administering injectable vitamins and minerals, holding that the agency had not exceeded its authority in passing the amendment (*Alaska Association of Naturopathic Physicians v. State of Alaska, Department of Commerce, Community, and Economic Development*).

While Alaska regulations controlling the practice of naturopathy prevent licensees from administering prescription drugs, practitioners and regulators disagreed on whether naturopaths were authorized to administer non-drug substances that required prescriptions: specifically, naturopaths maintained that they were authorized to administer injectable vitamins and minerals, substances that do not require a prescription if given orally.

In an attempt to definitively control such activity, in 2012, the state's Department of Commerce, Community, and Economic Development amended the naturopath regulations to define "prescription drug" as any medicine requiring a prescription, which would prevent licensees from administering injectable vitamins.

The amended regulations also now specifically excluded prescription drugs from the definitions of "dietetics," "herbal remedies," and "homeopathic remedies," substances that licensed naturopaths are allowed to administer.

In 2014, the Alaska Association of Naturopathic Physicians brought suit to challenge the newly-amended regulations. The relevant authorizing statute prevents naturopaths from the use of "prescription drug[s];" the Association argued that the Department's expansion of that phrase to prohibit the use of "prescription medicine" was an impermissible overstepping of its authority.

The words "drug" and "medicine" have different meanings, the Association contended, and changing the regulatory language would prohibit naturopaths from administering substances the legislature had not intended to deny them.

Unable to find a clear solution in the express language of the statute, the Court applied several tenets of statutory interpretation to make a decision. First, it went to a legal dictionary, where it found that the definition of "prescription drug" included natural substances.

It also noted that, for several professions with undoubted prescription authority, the legislature had explicitly conferred that power, something that it had not done for naturopaths. The court took this as evidence that the legislature knew how to empower licensees to write prescriptions, and that in fact it had not done so for naturopaths.

Based on this analysis, the Court upheld the amended regulations.

Discipline

Practitioner data bank barely used by boards from page 1

The newspaper series covered a five-year period from 2011 to 2016 and uncovered up to 500 physicians who were disciplined for medical errors or oversights, sexual misconduct, and other misbehavior but continued practicing with unblemished credentials in other states.

Physician Jay Riseman was a notable example. In Illinois, the state Department of Financial and Professional Regulation temporarily suspended his license in 2002 for "incapacity or incompetence" in pediatric surgery, following multiple instances of overdosing patients and ignoring critical symptoms, resulting in some patient deaths. Despite restrictions when he was on probation, Riseman performed 14 surgical procedures without supervision in Illinois, according to a 2004 complaint by the department. But his indefinite probation was lifted in 2007 anyway.

Colorado later denied his license application but Missouri granted him a license, while Kansas approved him with a ban on practicing surgery. Pressed to have the limitation lifted, Kansas agreed, with the proviso that he not actually perform any surgeries. Today Riseman is registered in Illinois as a partner in a medical marijuana dispensary with a license noting that he has never been disciplined in that state, the investigative team found.

The reporters quoted a former overseer of the data bank, Robert Oshel, who said, "It was very unusual [for the data bank] to get queries from a state board. There were states that maybe didn't submit any queries at all, or one or two." Although the data bank offers automatic updates of any adverse action every 24 hours, only 13 of 64 state medical boards (20%) subscribe to that service, the reporters found.

While other compilations of discipline data are available, including one sponsored by the Federation of State Medical Boards, the NPDB is the only one to which entities imposing discipline are federally required to report their adverse actions against physicians.

However, the information in the NPDB is not open to the public—a feature that has drawn repeated criticism. In fact, the *Journal Sentinel* and MedPage Today had to turn to the private company TruthMD, which has compiled about 1 million physician dossiers based on information from the courts, medical boards, and federal agencies, to obtain data for the investigation.

Oshel told the *Journal Sentinel* investigative team that he believed the advantages of making the adverse actions public would "far outweigh the disadvantages." In the meantime, private information services from companies like TruthMD, LexisNexis, and PreCheck, drawing on the vast resources now available online, are increasingly filling the gap.

Felony drug conviction insufficient to suspend cosmetology license

Issue: Nexus between criminal conviction and licensed practice

An April 16 decision by Pennsylvania's Commonwealth Court reversed an indefinite license suspension placed on an esthetician who had been convicted of selling prescription pain medication. The court held that a felony conviction, by itself, was insufficient evidence to suspend a cosmetician in the state (*Abruzzese v. Bureau of Professional and Occupational Affairs*). The court also found fault with the state cosmetology board's handling of evidentiary procedures.

In 2015, Rosemarie Abruzzese, a licensed Pennsylvania esthetician, was convicted of possessing prescription painkillers with an intent to deliver; she was sentenced to five years' probation. The conviction prompted the state's Bureau of Professional and Occupational Affairs, which had initially granted Abruzzese a license following her arrest but prior to her conviction, to open a disciplinary case.

At a hearing, the Bureau presented evidence of Abruzzese's conviction to support its case, and Abruzzese presented what she believed to be mitigating evidence, explaining that she was a single mother of two and that she had become addicted to prescription painkillers and began selling her prescription medications to obtain other drugs.

Following her arrest, she explained, she cooperated with law enforcement in an investigation into the doctor who was improperly prescribing her prescription painkillers, entered into a detox and rehabilitation program, and had taken steps to maintain her sobriety in the time since. She also introduced testimony from members of her family, who stated that they had seen improvement and consistency from Abruzzese since she completed her rehabilitation.

Despite the mitigating evidence and a hearing examiner's recommendation that the Board of Cosmetology only suspend Abruzzese's license subject an immediate stay which would allow her to practice, the board indefinitely suspended Abruzzese's license in 2017.

The board stated that its rationale for suspending Abruzzese's license was that patrons of salons where estheticians work are separated from their belongings, making them vulnerable to theft. Abruzzese appealed, and the case went up to the Commonwealth Court of Pennsylvania.

Abruzzese's appeal met with success. Judge Mary Hannah Leavitt, writing for the court, noted that Pennsylvania's Beauty Culture Law does not contain licensing restrictions for criminal convictions unrelated to the profession and that the state's Criminal History Record Information Act "authorizes, but does not require, an agency to suspend a license upon the licensee's felony conviction."

In fact, Judge Leavitt wrote, the lack of mandated penalties for criminal convictions of cosmetology licensees led the state Department of Corrections to set up cosmetology training for inmates, to allow them to obtain licensure after release. Evidence of Abruzzese's felony conviction was not, by itself, evidence that she was a danger to cosmetology customers.

The court also found fault with the evidentiary procedures applied by the board. Abruzzese argued that the board, by stating that it was suspending her license out of concern for salon patrons who were often separated from their belongings, had acted on evidence not in the record of her case, as the concept of patrons vulnerable to cosmeticians with criminal records was not actually evaluated during her disciplinary hearing.

When prosecuting the case, the Bureau had not produced any evidence of salon operations and the vulnerability of patrons, and, under disciplinary procedures, board members are not allowed to fill in evidentiary gaps with their personal experience or opinions. Thus, the court held, the board had erred when it had considered this factor.

The court also faulted the board's finding that Abruzzese had not provided sufficient documentation of her rehabilitation and stated rationale that it was unclear whether Abruzzese was safe to practice. The major flaw in this argument, Judge Leavitt explained, was that Abruzzese had not applied for licensure until *after* her initial arrest.

The board had already evaluated her character and potential for abuse based on her admitted drug history, and had awarded her a license, which it could not now take away because Abruzzese had been convicted on those facts.

"The Board's argument that it does not know whether it is safe for Licensee to perform service rings hollow," wrote the judge. "It apparently thought safety was not a concern when it granted her a license with the knowledge of her drug history and arrest."

Lastly, the court held that the board's analysis of Abruzzese's mitigating evidence was flawed. The board had dismissed the testimony of Abruzzese's family as biased despite the fact that, again, the Bureau had not introduced any evidence of bias at the hearing or rebutted their testimony in any way. And, although the board had complained that Abruzzese had not provided documentary evidence of her cooperation with law enforcement, Judge Leavitt explained that documentation was not necessary to prove that point.

"In this reasoning, the Board has violated an important evidentiary principle," the judge wrote. "Written documents are not preferable to oral statements, as the Board mistakenly believes. There is no such evidentiary principle." A rule of evidence cited by the board to require documentary evidence applied only where the contents of such documents are at issue, not when the issue is the existence of facts "independent of written documentation."

Having rejected its arguments, the court reversed the board's decision and returned the matter to adopt the lesser penalty of a stayed suspension recommended by the hearing examiner.

Modification of ALJ's recommended order must be explained

Issue: Overruling of ALJ's recommended orders

The Court of Appeals of Oregon, in an April 18 decision, overturned a decision to revoke the license of a teacher because the agency in charge of the discipline case modified an administrative law judge's recommended order without providing an adequate explanation for the changes (*Robin v. Teacher Standards and Practices Commission*).

The licensee in the case, Jane Robin, was a special education elementary school teacher until she was fired over a series of incidents. In 2009, Robin failed to file required individualized education plans for two of her students and falsely recorded that she had held required reviews of the plans with the students' parents, actions which caused the school district not to receive funding for services it provided to one of the students.

During that same year, Robin also had her students engage in a project in which they wrote short pieces about their lives, which were bound together and copied for each student to take home.

Unfortunately, Robin did not obtain permission from the students' parents to share the writings, and more than a few of them contained stories of a inappropriately personal or embarrassing nature for sharing, such as one child who wrote that their father would get drunk and abusive. In addition, investigators found Robin failed to report the allegations of abuse that a few of these stories contained, despite being required by law to do so. Robin also failed to hold a testing assessment of her students.

After these incidents resulted in the termination of her contract, Oregon's Teacher Practice and Standards Commission charged Robin with "gross neglect of duty" and unfitness, seeking to revoke her right to apply for a new license, which had since lapsed. After an administrative hearing substantiated the charges, the Commission followed through, revoking her right to apply.

Robin appealed, arguing that the Commission had erred, among other things, by applying too low a standard of proof for the charges against her and that the Commission had failed to adequately explain its decision.

Similar to the plaintiff case of *Dixon v. Oregon State Board of Nursing* (also covered in this issue), Robin argued that, while the Commission had applied only a "preponderance of evidence" standard to prove the allegations against her, under both Oregon law and federal constitutional jurisprudence, it was actually required to apply a stricter "clear and convincing evidence" standard.

As in the *Dixon* case, the court held that, under Oregon law, the lesser preponderance standard applies to license discipline cases involving fraud or deceit. However, unlike in *Dixon*, the court proceeded to analyze Robin's federal constitutional due process claims.

Weighing the strength of her right to engage in the teaching profession against the state's interest in sanctioning teaching licensees, the court held that the preponderance standard met constitutional standards. "Petitioner has not directed to—nor do we perceive—any basis for concluding that there is a shared societal judgment that teacher licensing boards should err on the side of allowing unfit or neglectful teachers to remain in their roles," wrote Judge Erin Lagesen.

Robin's "private interests in her license and reputation as a teacher, although significant, do not justify resort to an enhanced standard of proof that would undermine the state's paramount interest in ensuring the safety, welfare, and education of the students entrusted to its education system."

Robin had more luck with her claim that the Commission did not adequately explain its reasons for revoking her license. When making the decision to sanction Robin, the Commission had originally adopted the administrative law judge's recommendation without change.

However, after Robin filed her appeal, the board replaced its original order with a second one, modifying the recommended order in respect to the sanctions. Although Oregon law requires the Commission to explain any substantial deviations from the recommended order in its final decision, the court held that the Commission had not provided such an explanation despite changing the basis for the revised order by inserting reasoning not in the original order. The revised order also added new factual assertions.

Further, Judge Lagesen wrote, the Commission's decision lacked any articulation of why the factors cited by the Commission for imposing sanctions warranted revocation, as opposed to a lesser sanction.

"In a contested case proceeding, [the relevant regulation] entitles a party to an explanation when an agency departs from an ALJ's proposed order by supplying entirely new reasoning—*i.e.*, a new basis for the order," the court said.

"Here, TSPC imposed its most severe sanction, revoking petitioner's ability to apply for a teaching license, and yet it neither identified for petitioner what modification it made to the ALJ's order nor explained why it made those changes. That error requires us to remand TSPC's order that the agency can comply with its obligations."

The court remanded the case to the board for further proceedings.

Licensee's relapse, by itself, insufficient to prove danger to public

Issue: Conditions for reinstatement following license suspension

The Supreme Court of North Dakota, in an April 10 decision, continued the reinstatement of a suspended attorney who had lapsed from his rehabilitation program by getting arrested, drinking heavily, and passing out at a restaurant. The court held that the arrest, by itself, did not prove that the attorney was a danger to the public (*Matter of Reinstatement of Varriano*).

Reinstatement of Varriano).

In 2010, the court reciprocally suspended the license of attorney Richard Varriano after Minnesota disciplined him for misuse of a client trust account, a professional violation Varriano attributed to alcohol problems. In 2015, the North Dakota court, noting that Varriano had been sober since 2011, accepted his request for reinstatement and imposed several monitoring and educational requirements, including an abstinence from alcohol and the completion of an assistance program.

Unfortunately in 2016, Varriano was arrested after drinking heavily and falling asleep at a restaurant. The state's Lawyer Assistance Program subsequently dropped him for violation of its program conditions. Noting this lapse, the state's disciplinary body moved to revoke Varriano's reinstatement.

A hearing panel determined that Varriano had violated conditions imposed on his license that were implemented to protect the public, that those conditions no longer operated, and that Varriano was thus a danger to the public. The panel recommended revocation.

Despite this recommendation, the Supreme Court, making the final decision in the case, determined that Varriano's reinstatement should continue. Before the court, Varriano argued that, while there was clear evidence that he had violated his reinstatement conditions, the hearing panel had erred when it determined that he was a danger to the public.

The justices agreed, holding that the violation of a reinstatement condition does not, by itself, indicate that an attorney is a danger to the public and noting Varriano's otherwise clean record and the fact that his recent lapses did not actually harm a client.

"The primary purpose of the disciplinary process is not to penalize the attorney, but to protect the public and the integrity of the profession," the justices wrote. Listing Varriano's recovery successes next to his lapses, the court said, "[o]n our review of the record, we conclude there is not clear and convincing evidence that Varriano poses a potential for harm to the public."

Having rejected the disciplinary counsel's argument, the Court continued Varriano's reinstatement subject to additional conditions.

Oregon court specifies preponderance evidence standard for fraud

Issue: Standard of proof in disciplinary actions

The Court of Appeals of Oregon, in an April decision, settled uncertain case law regarding the standard of proof necessary to prove fraud or misrepresentation against a licensee, settling on a "preponderance of the evidence" standard, which requires only evidence showing that such conduct is more likely than not (*Dixon v. Oregon State Board of Nursing*).

The disciplined licensee, citing an older case, had argued for a relatively stringent "clear and convincing" standard.

Tamara Dixon, a nurse practitioner, kept a private business providing botox injections as a side job to her employment at a hospital. In her business, Dixon used prescription pads from the hospital without authorization to write prescriptions, at times to supply her friends and family.

After another nurse whom Dixon provided illicit prescriptions was arrested for driving under the influence, Dixon had a physical altercation with the other woman. The altercation was reported to the state nursing board, which led to revocation proceedings against Dixon based on charges of fraud and deceit.

During her disciplinary hearing, Dixon challenged the evidentiary standard the board intended to use to prove fraud and deceit, arguing that the board was required to prove its case against her by "clear and convincing evidence" a stricter standard requiring stronger evidence than the "preponderance of the evidence" standard the board intended to apply.

However, the board rejected her challenge to the standard and ultimately revoked her license. Dixon appealed, and the case rose to the Court of Appeals of Oregon, which issued a decision April 4.

In upholding the preponderance standard advocated by the board, the court analyzed the slightly convoluted case law history of the subject.

In the 1970 case of *Bernard v. State Board of Dental Examiners*, the court had stated that the standard of evidence for a fraud or misrepresentation charge in a license disciplinary case was "clear, satisfactory and convincing evidence." However, the court pointed out that it had only cited that case on that issue once in the years since, and—starting in a 1980 case, *Cook v. Employment Division*—had repeatedly stated that the standard of evidence in fraud cases was a preponderance of the evidence, at times rejecting the clear and convincing standard but never overruling *Bernard*.

Further, in the 1999 case *Gallant v. Board of Medical Examiners*, the court tied the standard of evidence in disciplinary cases to a provision of the Oregon Administrative Procedure Act that requires the result of a contested case to be "supported by . . . reliable, probative, and substantial evidence," a standard that the court interpreted as corresponding to a preponderance standard.

Faced with this conflicting history of case law, the court moved to overrule *Bernard*, definitively setting the preponderance of the evidence standard as the burden of proof necessary in a license discipline case for fraud under the Oregon Administrative Procedure Act.

Having upheld the board's evidentiary standard, the court affirmed Dixon's revocation.

Cruelty to animals does not require criminal conviction to justify discipline of veterinarian

Issue: Scope of boards' authority to set grounds for discipline

A Texas veterinarian who killed her neighbor's pet cat with a bow and arrow and proudly posted a picture of the kill to Facebook, causing a news uproar as thousands of incensed people voiced their opinion to the state veterinary board, can be disciplined for her actions despite not being convicted of a criminal charge of animal cruelty, a Texas appellate court ruled in April (*Lindsey v. Texas State Board of Veterinary Examiners*).

In 2015, veterinarian Kristin Lindsey killed a cat on her rental property with a bow and arrow, apparently in the belief that it was feral. Imagining that she had accomplished a good deed, Lindsey posted a picture of herself holding up the dead animal on Facebook, accompanied by jokey comments.

The cat, it turned out, was not feral, but a beloved, overweight neighbor's pet named Tiger, and the Facebook post went viral, even being covered by *The Washington Post* at one point. The post was not well-received by the public: the Texas veterinary board received over 700 formal complaints and 27,000 emails about Lindsey.

Thus began a series of legal proceedings. Although a grand jury declined to press criminal charges against Lindsey, the Texas veterinary board moved to revoke her license in 2016. Lindsey, in turn, filed a petition for declaratory relief with a state trial court, seeking to prevent the board from disciplining her. In the end, the board suspended Lindsey's license for five years, with all but one probated. Lindsey appealed, the trial court held in favor of the board, and Lindsey appealed again, this time to the Court of Appeals of Texas in Austin, which issued a decision April 27.

On appeal, Lindsey argued that the board did not have the authority to discipline her license because the killing of the cat was neither related to her veterinary practice nor resulted in an actual criminal charge of cruelty to animals. In making this argument, Lindsey pointed to provisions of the Texas Occupations code which subject a licensee to discipline if they are convicted of cruelty to animals, attack of an assistance animal, or any felony.

By *specifying* the necessity of a conviction for the violation of these provisions, Lindsey argued, the Code prevents the board from disciplining licensees for attacks on animals under any standard of proof less than that required for a criminal conviction: beyond a reasonable doubt.

The court did not agree with Lindsey's argument. The language Lindsey cited from the Occupations Code authorizing discipline for certain criminal convictions was intended to do only that; it was not meant to prevent the board from determining that other actions or those with a lower standard of proof should be sanctionable.

"We find compelling the Board's argument that the legislature's inclusion of [the conviction provisions] was not intended to limit the Board's authority over conduct that may not result in a conviction but instead to delineate what the Board must provide if a licensee has been convicted, that is, merely proof of the conviction itself . . . and what it must prove in seeking to discipline a licensee based on conduct that does not result in a conviction," wrote Justice Cindy Bourland.

" . . . There is no statutory basis for concluding that . . . the Board cannot determine that certain conduct can violate the Board's rules for professional conduct even though the behavior might not lead to a conviction under a criminal standard of proof."

Lindsey also challenged the board's promulgation of regulations listing several actions—including cruelty to animals—which could be the basis of discipline, arguing that the board improperly expanded its authority. Again, the court disagreed, holding that the challenged rules did not contradict any specific statutory language and did not add any burdens, restrictions, or conditions inconsistent with the relevant statutory scheme.

Last, Lindsey, in a fairly audacious claim, argued that the board had not provided sufficient evidence to show that she did not have the cat's owners' permission to kill the animal. Citing statements from the owners that they did not think Lindsey should be criminally charged, Lindsey claimed that the owners had impliedly given their permission to shoot their cat with an arrow, or at least had crated enough ambiguity so that the board needed to prove otherwise.

The court did not agree, holding that the board had sufficient evidence to conclude that the owners did not give permission for a neighbor to kill their pet with a bow and arrow.

Having rejected Lindsey's appellate arguments, the court upheld the lower judgments allowing the board to discipline her.

Board may appeal original remand decision after court upholds second order

Issue: *Legal doctrine of reversion*

The Illinois Department of Financial and Professional Regulation was within its rights to appeal a decision by a state circuit court remanding a disciplinary sanction to the board, even though the Department waited until the court had heard and upheld a licensee's appeal of the remanded decision, over a period of time that would normally have caused the board to forfeit an appeal (*Nwaokocha v. Illinois Department of Financial and Professional Regulation*).

A state court of appeals determined that, regardless of whether the board should have appealed the original decision at the time it was made, the legal doctrine of reversion gave the circuit court jurisdiction of the original decision, reversing any issue of the timeliness of the board's appeal.

Nwaokocha was criminally charged with Medicare fraud in 2013; he was accused of taking kickbacks to recommend patients for home healthcare services based on false information. He was eventually sentenced to four years' probation, community service, and a \$5,000 fine. In 2014, the Illinois Department of Financial and Professional Regulation took action, suspending his license for three years.

Nwaokocha appealed, arguing, among other things, that his punishment was overly harsh, and that his suspensions should not have contained a minimum period before which he could re-apply for a license. A circuit court agreed, remanding his case back to the board to enter a suspension without a minimum length.

On remand, the board entered a new set of findings and the board's director stated that he believed the circuit court was incorrect, but the board complied and

placed a suspension with no minimum term on Nwaokocha's license. Nwaokocha appealed again, this time arguing that the board had improperly added findings of fact on remand without allowing him to contest those issues.

The circuit court upheld the new decision, and both parties appealed, with the board challenging the court's earlier decision to remand the case. The case went up to the Court of Appeals of Illinois for the First District, which issued a decision March 15, 2018.

On appeal, the circuit court first made a lengthy analysis of its jurisdiction in the case. The Department argued that the circuit court's remand order had not been a final judgment and, thus, the Department had not been required to file an appeal of that order until the court's second decision affirming the board's second decision. In contrast, Nwaokocha argued that the first order was final, and that that order became permanent once the board let 30 days pass from that time, meaning that the board could not now appeal the remand order.

The court of appeals held that, even if the circuit court's first order was final, a legal doctrine called revestment meant that the lower court again had jurisdiction of the issue when it came before it after the board's decision on remand. This doctrine "revests" courts of jurisdiction in an issue where both parties participating in a proceeding fail to object to the timeliness of a late filing and make arguments that are "inconsistent with the merits of the prior judgment and support the setting aside of at least part of that judgment."

Neither party had made a timeliness objection and both parties had taken positions inconsistent with the original court decision, with the board insisting that a three-year minimum suspension was still appropriate and Nwaokocha arguing that the director of the board, despite issuing a new suspension without a minimum, had acted inappropriately on remand. As such, both parties' appeals were properly before the appellate court.

Turning to the substantive merits of the case, the court held that the Department had not imposed an arbitrarily harsh punishment on Nwaokocha when it imposed a 3-year minimum wait for him to apply for reinstatement.

In his argument, Nwaokocha had cited the punishment of two other physicians disciplined for the acceptance of kickbacks, but the court noted that both of those other doctors had entered into consent orders with the Department, while Nwaokocha had fought the allegations through a hearing. That distinction was enough to allow for differential sanctions.

In addition, the record of Nwaokocha's case indicated that the administrative law judge, given the chance to evaluate Nwaokocha's candor and demeanor during a hearing, determined that those factors should increase Nwaokocha's discipline.

The court reversed the decision of the circuit court and remanded the matter for the imposition of a suspension with a three-year minimum reinstatement period.

Late answer to charges, due to her attorney's death, not basis for disciplining appraiser

Issue: Defense to disciplinary charges

An Illinois appellate court, in a March 23 ruling, overturned a decision by the state's Department of Financial and Professional Regulation to revoke the license of a real estate appraiser after an

administrative law judge held the appraiser in default for her failure to file a timely answer to disciplinary charges against her (*Engle v. Department of Financial and Professional Regulation*). The appraiser's original attorney had died and his partner had retired the last business day before that answer was due.

In 2015, shortly after Elizabeth Engle received a real estate appraiser license, the Illinois Real Estate Appraisal Administration and Disciplinary Board filed 127 counts of charges against her, alleging that her license application contained hundreds of false assertions regarding her work experience hours.

Unfortunately, Engle had procedural difficulties maintaining a defense to the charges. In July 2015, potentially due to confusion after an attorney handling her case passed away earlier in the month, she failed to make an appearance at a preliminary hearing. Then, when the remaining attorney in that firm retired a day before the deadline for Engle to file an answer to the charges, although a successor firm took on the case, no timely answer was filed due amid this lawyerly tumult.

This led the administrative law judge handling the case to rule Engle in default, passing the case along to the board for a final decision.

Although Engle's new counsel, noting the extraordinary circumstances, requested leniency and asked for a vacation of the default order and a remand for a new hearing, the board declined to address those requests and recommended that Engle's license be revoked. The Division of Real Estate of the Illinois Department of Financial and Professional Regulation revoked Engle's license in March 2016, noting Engle's requests for a rehearing and vacation but not stating whether the Department had considered those motions.

Engle appealed, and the case went up to the Court of Appeals. She made several arguments, including that the Department had violated her constitutional right to due process by denying her motions for a rehearing.

The court agreed. Noting that the default *order* issued against Engle for missing her original deadline was not the same as a final default *judgment* in the case as a whole, and that Engle's attorney had made the requests before such a final judgment, Judge Bertina Lampkin wrote that the Department was required—but had failed—to address and make a decision on Engle's requests.

In addition, Judge Lampkin noted that the Department, in violation of agency rules, failed to file a motion with either the Board or the administrative law judge to find that Engle's failure to timely answer the charges constituted an admission of the allegations against her. Because the Department had the burden of proof in the case but had failed to make that motion, no legitimate finding regarding those allegations had thus been made and Engle could not be said to have admitted the allegations.

Last, although Engle had made technical errors in her motions for rehearing, Judge Lampkin noted that the Director of the Department's Real Estate Division had the discretion to grant variances from those requirements and wrote that, "Given the severity of the recommended discipline of license revocation at issue in this case, Engle should have been allowed to cure any technical defect in her answer or motion to vacate with the appropriate verification or affidavit."

"Engle filed a detailed and lengthy, albeit late, answer alleging facts showing a meritorious defense to the many allegations against her. However, no fact-finding hearing was held, and defendants issued a default judgment against her without fully complying with the agency's rules about considering and

adjudicating motions to vacate orders and, in situations involving default orders, obtaining a ruling finding a licensee's failure to file a timely answer to be an admission of the truth of the allegations contained in the agency's complaint,"

"The agency's interest in protecting the public by ensuring that licensed appraisers are competent and honest is substantial," Judge Lampkin wrote. " But allowing Engle to present evidence and cross-examine witnesses at a hearing does not impose any additional procedures that would increase the agency's administrative and fiscal burdens. This is not a matter where defendants had expended time and resources to prepare for and attend a scheduled hearing on the merits but the licensee failed to appear."

On similar grounds, the court also found that the Department's decision to deny Engle's late request for a hearing was an abuse of discretion, considering the trying circumstances surrounding her defense. "Under Engle's alleged facts showing good cause [for her late reply], it was unreasonable to conclude that she was actually or sufficiently represented by counsel during the chaotic period when cases were being transferred to the successor law firm that the failure to file an answer by the November 2 deadline was a matter well within her control."

The court remanded Engle's case to the Department for a hearing on the merits.

Oregon court again reverses revocation based on summary determination

Issue: Limitations on use of summary determinations

The Court of Appeals of Oregon, following on a 2017 case, *King v. Department of Public Safety Standards*, reversed the revocation of a licensee because the state's Board of Licensed Professional Counselors and Therapists determined her sanction through a summary determination issued by an administrative law judge (*Nesbit v. Board of Licensed Professional Counselors and Therapists*).

The board filed disciplinary charges against Nesbit, a professional counselor, based on what it alleged was an inappropriate but nonsexual relationship with a client.

During Nesbit's disciplinary hearing before an administrative law judge, the board successfully moved for two summary determinations, first to find Nesbit guilty of three of the charged violations, and second, to find Nesbit's license should be revoked based on those violations. The board then adopted the recommendation of the judge, revoked Nesbit's license, and imposed \$22,000 in costs.

Nesbit appealed, arguing, among other things, that the administrative law judge and the board acted inappropriately by determining her sanction through a summary determination, and the case went before the Court of Appeals of Oregon, which issued an opinion April 18.

The court agreed with Nesbit, holding that decision to revoke her license could not have been made by summary determination. Under the Oregon statute which empowers the board, "[t]he Board undeniably has authority, as a matter of discretion, to revoke petitioner's license."

"Notably, however, the statute does not mandate that the board revoke petitioner's license based upon her particular conduct or undisputed violations," the court noted. A 2017 decision by the board, *King v. Department of Public*

Safety Standards, determined that a discretionary disciplinary sanction is an inappropriate subject for summary determination.

Under Oregon regulations, parties seeking summary determination must show that they are entitled to a decision as a matter of law, and disciplinary sanctions which are subject to discretion cannot be a matter of law. Therefore, the board's decision to that effect was illegitimate.

The court reversed the revocation order and remanded the case to the board for further proceedings.

Certified mail delivery of revocation order does not require signed receipt

Issue: Proper service of accusations and disciplinary orders

A trial court was in error when it vacated a decision and order revoking a physician's license because the licensing board's service of the documents by certified mail was ineffective without a signed receipt, the California Court of Appeals, First Appellate Dist., Div. 3, held March 1 (*Medical Board of California v. Superior Court of San Francisco*).

The case stemmed from an accusation filed September 28, 2016 by the state medical board against physician Alfred Eugene Adams, alleging that Adams prescribed himself controlled substances, failed to participate in an interview with the board, and failed to provide the board with an accurate address.

The accusation was served by certified mail on Adams' address of record in Emeryville. The unopened mail was returned to the board, stamped "Return to Sender, Unable to Forward." After later notices sent to alternative addresses were also returned, the board issued a default decision January 20, 2017, revoking Adams's medical license, which was served on the same date by certified mail and first-class mail to both addresses.

On appeal, Adams contended that there was no evidence of receipt of the accusations or later decision revoking his license. The trial court agreed that the default decision and order were not properly served and issued an order directing the board to set them aside.

The appeals court, however, cited state law providing that: "Wherever any notice or other communication is required by any law to be mailed by registered mail to or by the state, or any officer or agency thereof, the mailing of such notice or other communication by certified mail shall be deemed to be a sufficient compliance with the requirements of such law." No proof of service in the form of a return receipt signed by the party is required if the notice is sent by certified mail, the court said.

Licensing

We said consolidate four behavioral health boards, Texas sunset panel reiterates to legislature

Issue: Sunset review of licensing board performance

A March report by the Texas Sunset Commission doubled down on recommendations it made two years ago that the legislature failed to follow. Slamming the state's regulation of psychologists, social workers, professional counselors, and marriage and family therapists, the panel called for

consolidation of the four boards now responsible for the licensing and discipline of the fields into one Behavioral Health Executive Council to streamline regulation and to catch up on complaint backlogs.

The sunset panel echoed its own 2016 review in stressing that the structure of the state's behavioral health licensing agencies is "antiquated and inefficient." "Regulating these professions through four separate, independent boards fails to meet the needs of consumers, licensees, and the state," the review said, pointing to "massive backlogs and years-long delays in processing license applications and complaint cases.

Only the psychology board was labeled "well-functioning" by the sunset reviewers, who said it should be used as a foundation for a consolidated agency that would bring administrative economies of scale as well as sharing regulatory efforts in behavioral health.

Other board shortcomings cited by the sunset reviewers:

- Outdated modes for criminal background checks and no proactive effort to ensure out-of-state applicants are safe to practice in Texas. The boards should be required to conduct fingerprint-based background checks, the review said.
- An oral exam in psychology, a measure that few boards now use. Although the oral exam has been discontinued as a licensing requirement, the psychology board's authority to administer an oral exam should be removed, the panel said.
- Requiring a year-long post-doctoral supervised work experience, described as an unnecessary hurdle to licensure and a contributor to mental health care provider shortages in Texas.

The fiscal impact of the consolidation plan upon the state's budget would be large in the first year, requiring an \$857,000 expenditure for six months of an executive director's time plus database transfers, information technology, startup costs, and equipment. But in following years, the sunset panel estimates, the net fiscal impact would be nil compared with 2015 outlays—because the boards are authorized to recover any costs or loss of revenue through adjustments in their regulatory fees.

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