Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue

Testing

Court opens road to class action against national testing body over data breach

Issue: Security of test-takers' data and liability of exam providers

When a Chase Amazon Visa card arrived in her mail in 2016, optometrist Nicole Mizrahi was surprised because she had never applied for the card. But the card's use of her maiden name was a tipoff, she eventually realized; the personal information she supplied to take her optometry licensure examination 18 years earlier was compromised, she believed, due to a data breach at the National Board of Examiners in Optometry (NBEO).

In a June 12 ruling, the U.S. Fourth Circuit Court of Appeals held that that optometrist, Nicole Mizrahi, and two others had filed legally sufficient pleadings against the NBEO and have standing to file a class action suit against the national testing body over the alleged data breach (*Hutton v. Nat'l Bd. of Exam'rs in Optometry, Inc.* and *Mizrahi v. Nat'l Bd. of Exam'rs in Optometry, Inc.).*

Rhonda Hutton and Tawny Kaeochinda are the other optometrists who also filed suit after discovering that Chase Amazon Visa credit cards had been fraudulently opened using their maiden names.

*See **Testing**, page 15*

Licensing

State Public Records Act does not require release of anonymized license application and test score data

Issue: Public disclosure of licensing application data

The California State Bar is not required to engage in the significant work of anonymizing data from its bar admissions database that would be needed to release that information to the public while still protecting individual applicants' privacy, a state appellate court ruled August 23 (*Sander v. State Bar of California*).

The amount and type of work needed to ensure an appropriate level of anonymity would constitute the creation of new records, the court held, a duty not imposed by California's Public Records Act.

The case is a continuation of an attempt by the First Amendment Coalition, an organization that advocates government transparency, to use the Act to gain access to admissions database records from the bar.

The bar resisted the Coalition's request, but a 2013 California Supreme Court decision held that the public had an interest in the disclosure of those records and that the bar has a duty to produce them if it could do so while protecting applicants' privacy. The court then remanded the case for a lower court to answer those questions.

On remand, the parties debated whether the information sought by the coalition—applicants' race or ethnicity, law school grades, performance on bar exam, law school graduation, and transfer years—would allow individual applicants to be identified through the piecing together of their information, even if individually-identifying information such as names and Social Security Numbers were removed from each record.

In order to protect the identity of the applicants, the document-seeking plaintiffs proposed several fairly complicated data handing regimens, including physically limiting access to data and using detailed data manipulation, segmentation, and statistical techniques to assure no individuals could be identified from the combination of their different data points.

After a trial court rejected the petitioners' claims on the grounds that the level of work proposed by the petitioners in order to allow the disclosure of the database records would require the creation of new records, the petitioners appealed and the case went back up to the state Court of Appeals for the 1st Division, which issued a decision in favor of the bar.

The court agreed with the bar that the release of the data in a way which would protect the anonymity of the applicants would require the bar to create new records, a duty not imposed by the Public Records Act. "We have found no cases addressing proposals for data manipulations as complex as those proposed by Petitioners," Judge Peter Siggins wrote.

The significant recoding of the original information, the creation of new data classes, and the creation of physical enclaves where the information could be accessed in a restricted fashion required the bar to create new records or take other extraneous steps not contemplated by the Act. Thus, the bar had no duty to take those actions.

Although state agencies could, at times, be required to program or manipulate records in order to remove identifying information for release, Judge Siggins wrote that "segregating and extracting data is a far cry from requiring public agencies to undertake the extensive manipulation or restructuring of the substantive content of a record such as Petitioners propose here."

"Certainly, they have not identified any instances in which courts have compelled a public agency to undertake programming that would assign new or different values to existing data, replace groups of data with median figures or variables, and collapse and band data into newly defined categories."

Having rejected the proposals of the petitioners, the court upheld the denial of their petition.

Veteran's challenge of mental health questions on license application may proceed, court rules

Issue: Licensing applications' questions on mental health

A federal judge refused to dismiss a lawsuit filed by a first-year law student against the state bar of Florida claiming that its mental health evaluation process for bar applicants violated two federal statutes: the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973 (*Hobbs vs. Florida Board of Bar Examiners*) .

The applicant's ADA claims presented legitimate questions, the judge held June 16, and the question of whether the state had waived liability to suit under the Rehabilitation Act had not been adequately answered.

When Julius Hobbs, a first-year law student and military veteran of Afghanistan and Iraq, went to fill out an early-application form for Florida Bar applicants, he found that the application contains a question asking whether the applicant has been treated for mental health or substance abuse disorders within the last five years.

Hobbs, who had recently been treated for anxiety, depression, and alcohol abuse, answered yes, and supplied a letter from a doctor stating that Hobbs's problems would not be a detriment to a career as an attorney.

In response to Hobbs's affirmative answer, the board asked for copies of his complete medical records and required him to undergo both a physical and mental evaluation, the costs of which—up to $5,000, Hobbs was told—he would have to pay himself. Hobbs declined to follow through with the process and withdrew his application, intending to apply again after graduation.

He then brought a lawsuit in federal court against both the board and the Florida Supreme Court, alleging that the mental health evaluation process violated the Americans with Disabilities Act and the federal Rehabilitation Act.

In response to Hobbs's claims, the board claimed immunity from suit under the Rehabilitation Act, asserting the Eleventh Amendment, which prohibits suits by citizens against the states unless the state has waived immunity or the suit alleges a violation of the U.S. Constitution.

The Rehabilitation Act requires that the agency being sued be the recipient of federal funds, a status that includes a waiver.

Judge Robert Hinkle of the U.S. District Court for the Northern District of Florida in Tallahassee wrote the decision. He noted that although the board, itself, does not receive any federal funds, it is part of the same state governmental department as the Florida Supreme Court, which Hobbs claimed did receive such funds.

In addition, because the board had not presented a factual challenge to Hobbs's assertion about the Court receiving federal funds, Judge Hinkle had to assume the truth of the claim for purposes of the board's motion for summary judgment. Thus, the claim could not be dismissed, and the question of whether the Court received federal funding would have to be argued.

Judge Hinkle also rejected the board's motion to dismiss Hobbs's ADA claim, stating that the complaint "plausibly alleges that the scope of the evaluation the Board demanded was not reasonably related to Mr. Hobbs's fitness to practice

law" and that there was no way to know, based only on the allegation, whether the ADA had been violated.

Court rejects sleep apnea excuse in weighing applicant's character

Issue: Moral character determinations for licensure

A law school graduate, appealing the rejection of his application to take the Georgia bar exam due to questions about his character and fitness, argued that his untreated sleep apnea had affected his memory and attention in a way that should excuse his lapses in honestly answering questions on the application. But in an August 27 ruling, the Supreme Court of Georgia found that the state Board of Bar Examiners was justified in refusing to issue a certificate of fitness for the candidate (*In re Montesanti*).

The applicant, John Anthony Montesanti, graduated in 2015 and began a checkered application process including a withdrawal of an application to the Florida bar before a determination was made, a subsequent submission to the Georgia Bar and several amendments to that application. When the Georgia board issued a tentative denial, Montesanti requested a formal hearing, which was held in 2017.

A former supervisor of Montesanti's internship testified at the hearing that the applicant had not shown the professionalism needed to be admitted to the Bar. In addition, the hearing officer found that Montesanti demonstrated a pattern of failing to disclose relevant information to the board and the Florida Bar.

Fitness determinations require the Board to examine an applicant's "innermost feelings and personal views on those aspects of morality, attention to duty, forthrightness, and self-restraint which are usually associated with the accepted definition of good moral character," the court said, quoting *In re Lubojovic*, 248 Ga. 243, 245 (282 SE2d 298) (1981)

For example, Montesanti provided different explanations to the board for his failure to pay a judgment against him in small claims court case; in one explanation, he forgot to pay, while at another point he said he intentionally did not pay because he disagreed with the judgment.

He withdrew his application to the Florida Bar for financial reasons, he said in one letter, but he blamed an "undetermined illness" in another letter.

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The candidate told the Board that his memory and attention were impaired during the application process by the effect of lack of sleep because he found during the process that he suffers from sleep apnea—leading to his inconsistencies and evolving explanations for his conduct. He alleged that the board wrongly failed to make any accommodation for his sleep apnea, a disability.

An affidavit by a physician, which Montesanti submitted to the hearing panel, stated that untreated sleep apnea induces "inattention, . . . induces or exacerbates cognitive deficits, [and] increases the likelihood of errors and accidents." His omissions on his bar applications, Montesanti claimed, were "secondary to" his untreated sleep apnea, which he said was now being mitigated by treatment with a CPAP machine.

The court said it would not decide whether sleep apnea was a disability as Montesanti claimed. But, the judges concluded, even assuming that the sleep condition qualifies as a disability, Montesanti still had to meet the essential eligibility requirements for the profession, and fitness was one of those requirements.

The court affirmed the Board's decision to deny his application for a certificate of fitness.

Federal File

Voluntary IRS certification scheme does not violate APA

Issue: Federal programs to regulate professionals

Addressing a long-simmering controversy over the U.S. Internal Revenue Service's authority to regulate tax preparers, the U.S. Court of Appeals for the District of Columbia held August 14 that the American Institute of Certified Public Accountants (AICPA) does have standing to challenge a voluntary IRS certification scheme for tax preparers, but that the program does not violate the Administrative Procedures Act as the organization charged (American Institute of Certified Public Accountants v. Internal Revenue Serv.) .

The case stemmed from the IRS's adoption of a sweeping rule in 2011 that would have regulated all tax preparers for the first time. The rule was intended to address perceived problems in the market for tax preparation services.

That rule was challenged and the bulk of the rule was enjoined in 2013 and 2014. The IRS then established a voluntary scheme to recognize certain tax preparers known as "unenrolled preparers," as distinguished from "enrolled" preparers, so the unenrolled preparers would have a limited right to represent taxpayers in IRS audits of tax returns.

The AICPA brought suit, challenging the IRS's authority to conduct the program. The organization argued its members suffer harm as competitors because the IRS program created a new credential that confuses consumers and causes them to patronize unenrolled preparers instead of licensed CPAs. (The National Association of State Boards of Accountancy (NASBA) submitted a brief as amicus curiae in support of neither the IRS nor the AICPA.)

The suit hit a roadblock when the district court found the AICPA did not have standing to sue because it did not come within the necessary "zone of interests" protected by statute. "The competitive-harm-by-brand dilution injury is . . . the only relevant 'grievance' for determining whether [the AICPA] satisfies the zone-of interests test," that court said (*AICPA III, 199 F. Supp. 3d at 64.)*

On appeal, the IRS no longer disputed that the AICPA had constitutional standing base upon its competitive injury. But the agency said AICPA could not establish statutory standing because neither it nor its members are regulated or protected by the applicable statute.

The Court of Appeals disagreed with the IRS, finding that the IRS program increases the supervisory responsibility and hence the potential liability faced by members of the AICPA. "It is clear that a member of the AICPA incurs a supervisory burden that confers both constitutional and statutory standing," the court stated.

But the court did side with the IRS on the merits of the AICPA's lawsuit charging that the IRS did not follow proper procedure in adopting its program and should have followed notice-and-comment rulemaking procedures in promulgating it.

Among other reasons that AICPA claim was incorrect, the court said: the IRS properly considered and addressed the AICPA's comment that the program would create a public database of provider credentials that could confuse taxpayers.

The court remanded the case to the district court for the purpose of entering judgment for the IRS.

Discipline

Court reverses discipline of licensee over vague, changing charges

Issue: Due process and disclosure of charges at issue

An Oregon appellate court overturned several counts of board discipline against an Oregon doctor on the grounds that many of the charges initially cited by the board in its notice to the licensee were either too vague or different from the charges actually cited as bases of discipline in the board's final order (*Sachdev v. Oregon Medical Board*).

In 2011, the board began investigating physician Naina Sachdev, concerned about the quality of her patient care and potential misuse of controlled substances and prescription procedures. During the investigation, Sachdev agreed to an interim order from the board according to which she would cease practicing until the investigation ended.

The investigation eventually culminated in several formal charges against Sachdev, including allegations that Sachdev continued her practice despite the interim order; used prescription drugs for inappropriate and unsupported off-label uses; self-prescribed to herself and her family; and engaged in careless storage of drugs like Vicodin and OxyContin.

After an administrative law judge found that Sachdev violated her interim order and violated standard of care and prescription requirements, the board revoked her license and fined her $10,000 plus legal costs.

Sachdev appealed and the case went up to the Court of Appeals of Oregon, which issued a decision in partial favor of Sachdev on July 18. In her appeal, she had argued that, among other things, the board had not given her sufficient notice of all the charges it intended to bring against her, invalidating any discipline based on those charges.

The court agreed. Regarding her challenge to the one board finding—that she provided substandard care in her treatment of her husband—Judge Ortega noted that, although the board's charging notice to Sachdev alleged substandard care to members of her family, it ultimately found that Sachdev instead violated a section of the law that pertains to controlled substances and procedures for examinations and record keeping. And, for several other charges, the court noted, the board failed to provide notice to Sachdev of the particular rules under which it was charging her, making its notice inadequate.

The board also erred in its handling of charges of general unprofessional conduct against Sachdev. For instance, the court held, the board had not provided adequate notice of its charges when it simply cited the general statutory sections prohibiting unprofessional conduct and listed the factual allegations against her.

Judge Ortega wrote that some of those sections of law contained multiple types of unprofessional conduct; the board's failure to specify which types of conduct *within* those sections constituted inadequate notice. In another instance, the board simply found that Sachdev violated the standards of care, despite that

allegation not being listed as a ground for unprofessional conduct under the rules cited by the board in its notice to Sachdev on that particular charge.

"The fact that the board made determinations of unprofessional or dishonorable conduct on a ground not defined by statute—the failures to charge deviated from the standard of care—suggests that licensee could not have learned from the notice on what basis the board would discipline her," concluded Judge Darleen Ortega.

The court did find in favor of the board on the question of whether Sachdev continued to practice medicine in the face of the interim order. Although Sachdev noted that the board had declined to cite the Oregon statute defining the practice of medicine when it issued its final disciplinary order, Judge Ortega noted that the board had both cited the statute under which it was charging Sachdev—a statute that prohibits the violation of board orders—and specified which actions it believed constituted the practice of medicine in violation of the order.

"That allegation," Judge Ortega wrote, "was sufficient to inform licensee that managing and directing patient care in the ways alleged in the notice constituted the 'practice of medicine,' and that is the basis on which the board determined licensee violated the [order]."

"Although licensee disputed that her conduct violated the [order], those disputes focused on contesting the board's factual assertions and the credibility of the board's witnesses; her arguments did not hinge on how the practice of medicine is defined and did not implicate the provisions of [the statute defining the practice of medicine or the meaning of 'practice of medicine' in the [order]."

Having thrown out several of the board's charges, the court remanded the case for the sole purpose of determining the sanction for Sachdev's violation of the interim order.

Six-month suspension not enough for "sexually imposing" on client

Issue: Appropriate severity of disciplinary sanctions

In an unusual action, six justices of the Supreme Court of Maine overturned a decision by a single justice of that court to impose only a six-month suspension on an attorney—recently returned to the profession after spending time in prison for money laundering—who sexually imposed himself on a client in a sex-trafficking case whom he had moved into his own apartment (*Board of Overseers of the Bar v. Prolman*).

In overturning their colleague, the justices wrote that the six-month suspension was so light as to be an abuse of discretion on the part of the single justice.

In 2014, Maine attorney Gary Prolman was sentenced to two years' imprisonment, followed by two of probation, after pleading guilty to federal money laundering charges. In 2016, Prolman, now released from prison, was reinstated to the practice of law, conditioned on his compliance with his parole requirements.

Later that year, Prolman moved one of his clients into his own apartment after the woman's abusive boyfriend was released on parole. While the woman—whom Prolman was representing in a sex trafficking case and who was on parole herself—stayed in his apartment, Prolman demanded and obtained sex from her.

Although Maine does not categorically prohibit attorneys from having sexual relationships with clients, the presence of Prolman's client in his apartment explicitly violated the parole conditions, which prohibited him from associating with felons outside of his legal work. In addition, Prolman supplied wine which the two drank together, in violation of both individuals' parole conditions. Eventually, the client left Prolman's apartment and informed him she was going to terminate their attorney-client relationship.

After learning of the situation, Maine's Board of Overseers of the Bar filed a petition to suspend Prolman's license. A single justice of the Supreme Court hearing Prolman's case found that the attorney had violated several rules of professional conduct and that he had sexually imposed himself on the client, an action that, the justice wrote, "inevitably causes psychological injury to the person subject to such advances and caused psychological injury to the client in this case."

But the justice only imposed a six-month suspension of Prolman's license. The board appealed, arguing that the justice had acted incorrectly in imposing such a light sanction.

On appeal, the full Supreme Court of Maine agreed with the board, reversing the decision of the single justice on the grounds that the six-month sanction on Prolman's license was insufficient and an abuse of discretion, and returning the case to the single justice for further, more punitive proceedings.

Oddly, the case split the remaining six justices of the Court in two concurrences of 3-3, so no precedent was set by the case. Three justices, in their concurring opinion, would have held that a set of Sanction Standards created by the American Bar Association were expressly incorporated into Maine's regulatory framework for attorney discipline.

They drew that conclusion following a lengthy foray through principles of statutory construction and legislative history, intended to decode a specific phrase in Maine's attorney discipline code: "as enumerated in." Once applied, those standards would have acted to require a more serious sanction on Prolman than a six-month suspension of his license.

The other three justices, in a separate concurrence, eschewed the complicated maneuvering of their colleagues, simply holding that the single justice had underplayed the seriousness of Prolman's conduct to such an extent as to constitute an abuse of discretion.

Chief Justice Leigh Saufley wrote that "All that needs to be said is this: When an attorney has been sentenced to federal prison for using his legal talents to commit serious crimes, and upon reinstatement to the Bar engages in behavior that is abhorrent to the profession, including taking sexual advantage of a client he knew to have been the victim of sex trafficking, a six-month suspension, requiring no demonstration of rehabilitation in order to return to the practice of law, is plainly and compellingly insufficient."

90-day deadline to impose discipline not mandatory, court rules

Issue: Timeliness rules and guidelines on disciplinary actions

The state social work board failed to come to a decision in a disciplinary case within a 90-day deadline contained in the board's regulatory code, but the deadline was only "directory" in nature, not mandatory, the Indiana Court of Appeals held August 10, reversing a lower court that had thrown out discipline imposed by board (*Indiana Behavioral*

Health and Human Services Licensing Board v. Thomas). Since the deadline was not mandatory, the appeals court said, it could not act to invalidate an offending board decision.

In June 2017, the state filed a complaint alleging unprofessional conduct against licensed social worker Jenna Thomas. Although the board held a hearing in October of that year, by late February 2018, it had not yet issued a decision. At this point, Thomas filed a motion to dismiss her case on the grounds that Indiana's Administrative Orders and Procedures Act required the board to have filed a decision within 90 days of concluding her hearing, a time period that had now passed.

Indiana Code § 4-21.5-3-27(g): An order under this section shall be issued in writing within ninety (90) days after conclusion of the hearing or after submission of proposed findings in accordance with subsection (f), unless this period is waived or extended with the written consent of all parties or for good cause shown.

The board denied that motion, eventually filing a decision on March 30, 2018, placing Thomas's license on indefinite probation. Thomas appealed.

In her appeal, Thomas reiterated her argument that the untimeliness of the board's order made the discipline it had imposed on her license invalid. The trial court hearing the case agreed, ruling that, by waiting longer than the mandated 90 days, the board lost jurisdiction of the case and had no authority to issue its decision disciplining Thomas.

In response to the board's appeal of that decision, the appeals court cited Indiana jurisprudence, writing that, despite the mandatory language of the 90-day requirement, such time periods are "directory rather than mandatory" and not intended "to be essential to the validity of the ultimate authority's final answer."

Thus, the court found that the board's failure to adhere to the 90-day decision deadline was not fatal to its disciplinary order again Thomas. The court reversed the earlier decision, reinstating Thomas's probation.

Discipline overturned over board's reliance on inadmissible facts

Issue: Due process and use of inadmissible evidence

A sanction imposed by the Delaware Board of Pharmacy on a licensee for egregious drug-storage practice was overturned by a state appellate court because several comments by the board's members during a disciplinary hearing indicated that the board had relied on inadmissible facts not determined by the case's hearing officer in making its decision (*Sekyi v. Delaware Board of Pharmacy*) .

In 2015, the board suspended pharmacist Kodwo Sekyi's license for two years on the basis of several record-keeping, drug-storage, and prescription violations, including storing drugs in unsecured cardboard boxes. In making its sanction decision, the board declined a hearing officer's recommended sanction of only a one-year suspension, saying that it was insufficient to address Sekyi's "significant risk to the public."

Sekyi appealed, arguing that several statements made by the board's member referencing facts not contained in the hearing officer's official record were evidence that the board had based the discipline on inadmissible, unestablished factors. The case went to the Superior Court of Delaware, which issued a decision August 29.

The court, referring to Delaware law directing the actions and recommendations of hearing officers, agreed with Sekyi, reversing the board's decision.

Under Delaware law, explained Judge William Witham, factual findings made by hearing officers in disciplinary cases are binding on the board.

Because of that, the board cannot introduce new evidence or rely on findings of fact not made by the hearing officer when it makes sanction decisions, something the board appeared to have done in this case, as evidenced by the hearing transcript.

"As contended by the Appellant, it is readily apparent from the transcript of the Pharmacy Board hearing that the Pharmacy Board considered additional evidence, not included in the written record, when the board modified the Hearing Officer's recommended sanctions against the Appellant," wrote Judge Witham.

Listing several examples, the judge noted in its deliberations on Sekyi's case, the board commented several times that Sekyi had failed to seek the board's assistance with advice as to his record-keeping responsibilities.

At least one board member brought up the possibility that Sekyi might have been engaging in insurance fraud, and another brought up the possibility that patients had received the wrong prescriptions. All of these allegations had not addressed by the hearing officer, and thus evidence for those allegations was not before the board, as Sekyi's attorney repeatedly asserted in several testy moments during the hearing.

Based on those statements by board members, the court agreed with Sekyi that the board had relied on inadmissible evidence when it decided on a more severe sanction that that recommended by the hearing officer. "The board members may not consider additional evidence outside of the Hearing Officer's finding of fact," Judge Witham wrote. "Yet, the Pharmacy Board members clearly did."

Settling punctuation controversy, court rules that board actions not subject to attorney's fee awards

Issue: Interpreting legislative intent in statutory language

An appellate court in North Carolina threw out a $30,000 award of attorney's fees, agreeing with the state's plumbing and heating board that, despite some confusing punctuation in the state's attorney's fees statute, licensing disciplinary actions are exempt from such awards (*Winkler v. North Carolina Board of Plumbing, Heating & Fire Sprinkler Contractors*).

Winkler, licensed by North Carolina's Board of Plumbing, Heating & Fire Sprinker Contractors only to work on detached residential HVAC units, took a job to work on a hotel pool heater. Determining that the heater was not working because its gas supply had been turned off, Winkler turned that gas supply on and restarted the heater.

The next two months saw the deaths of three guests related to that heater. The week following the repair, a couple staying in a room above the heater died. The hotel management again called Winkler, who determined that the gas system feeding both the pool heater and a gas fireplace in the room was not leaking, although he neglected to check for carbon monoxide.

Hotel staff reopened the room the next month; soon afterwards an 11-year-old boy died and his mother was injured in the room. Autopsies and toxicology reports of the affected guests revealed that all had excessive levels of carbon monoxide in their blood.

The board opened its own investigation into the incidents, determining that carbon monoxide from the pool heater unit was entering the room through openings near the room's fireplace and that the ventilation pipes for the pool heater were suffering from corrosion.

In its subsequent discipline of Winkler, the board suspended his license for one year because he performed work not included within the limited residential purview of his license, including work on both the pool heater and an HVAC system for the hotel's lobby.

Winkler successfully appealed part of the board's disciplinary decision, arguing that the board did not have jurisdiction to discipline him for his work on the fatal pool heater. The Court of Appeals of North Carolina agreed with Winkler's argument that the board lacked jurisdiction for his work on the pool heater, and remanded the case for the board to determine the proper sanction for his work on the lobby HVAC system.

The board then issued a revised order placing Winkler on twelve months' probation. Winkler filed a motion for attorney's fees for defending the pool heater case, and the trial court awarded him nearly $30,000. The board appealed that decision and the case went back up to the appellate court, which issued a decision in favor of the board August 21.

Issue: Section 6-19.1 of the North Carolina General Statutes, governing attorney's fees:

(a) In any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action pursuant to [N.C. Gen. Stat. §] 150B-43 or any other appropriate provisions of law, unless the prevailing party is the State, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees, including attorney's fees applicable to the administrative review portion of the case, in contested cases arising under Article 3 of Chapter 150B, to be taxed as court costs against the appropriate agency if: (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

In its appeal, the board argued that the statute that allows for attorney's fees excludes claims for fees incurred in the defense of disciplinary action by licensing boards.

The court agreed, with Judge Lucy Inman writing that the statute expressly excludes disciplinary actions by licensing boards, despite an unfortunate comma that appears to open the statute's phrasing to a different interpretation in a section referring to "any civil action, other than an adjudication for the purpose of establishing or fixing a rate, or a disciplinary action by a licensing board, brought by the State or brought by a party who is contesting State action…"

The board argued that the placement of the comma (see sidebar) removes license discipline actions from the possible award of attorney's fees, while Winkler argued that the same comma was meant to include such disciplinary actions in the statute.

After a lengthy discussion of the fateful punctuation, the court agreed with the board, holding that the statutory phrase was intended to exclude license disciplinary actions from the award of attorney's fees.

Hearing officer is not required to recommend penalty, court rules

Issue: Role of administrative law judges in setting sanctions

The Supreme Court of Kentucky, in an August 16 decision, reversed a state court of appeals that had overturned a board's discipline of a physician on the grounds that the board's hearing officer failed to recommend a specific penalty and that the board had not considered the case's entire record.

The state Supreme Court held that both decisions were incorrect and chastised the lower court for accepting a poorly-certified legislative record (*Kentucky Board of Medical Licensure v. Strauss*).

In 2009 and 2010, several complaints were filed against physician Jon M. Strauss, including four separate allegations of sexual misconduct. One patient claimed that Strauss had unsuccessfully tried to have sex with her and then threatened her with a mental institution if she left his care.

An administrator at a hospital where Strauss had worked alleged that Strauss had sexual contact with three hospitalized patients and had also threatened one of those patients when she tried to leave his care. And several claims were made alleging Strauss engaged in improper prescribing practices and subjected patients to unnecessary hospitalizations and office visits.

A hearing officer subsequently found that Strauss had sexual contact with two patients, that he had prescribed one patient with controlled substances in exchange for sex, and that he had purposely altered medical records in order to deceive the board.

A hearing panel of the board then took up the case, accepting the recommendations of the hearing officer, but ordering only a five-year probationary period along with $30,000 in court costs and several conditions on Strauss's license, including a prohibition on treating female patients without supervision.

Strauss engaged in a series of appeals, in which he asserted two primary claims: that the hearing officer in charge of his case had failed to issue a recommended penalty and that the board had failed to review the entire hearing proceedings before it issued a final order.

In 2015, a three-judge panel of a state appellate court agreed with Strauss's argument, reversing the board's decision on the grounds both that the hearing officer was required to make a specific recommendation of a penalty and that the board was required to review the full record of the hearing officer's proceedings, but that both had failed to complete these actions.

KRS 13B.110(1): Except when a shorter time period is provided by law, the hearing officer shall complete and submit to the agency head, no later than sixty (60) days after receiving a copy of the official record of the proceeding, a written recommended order which shall include his findings of fact, conclusion of law, and recommended disposition of the hearing, including recommended penalties, if any. The recommended order shall also include a statement advising parties fully of their exception and appeal rights.

KRS 13B.12(1): In making the final order, the agency head shall consider the record including the recommended order and any exceptions duly filed to a recommended order.

On appeal by the board, the justices of the Supreme Court took issue with several aspects of that ruling.

First, addressing Strauss's argument that the hearing officer inappropriately failed to recommend a penalty to the board, the Court found that the officer had, in fact, recommended a penalty, albeit a vague one only finding that Strauss was guilty of statutory violations and exhorting the board to "take any appropriate action" against his license.

Second, and more importantly, the court ruled that, although the statute governing hearing officers' actions "requires factual findings, legal conclusions, and a proposed disposition of the matter," it allows for but does not actually require recommended penalties.

Although Strauss had argued that the statute's phrase "including recommended penalties, if any" simply meant that, if the officer found no violation of law by the licensee, the officer would not have any penalty to recommend,

Chief Justice Lisabeth Hughes wrote that the phrase more probably was intended to provide the hearing officer discretion as to whether to recommend a penalty.

The justices also chastised the Court of Appeals for inappropriately accepting a poorly-certified purported recording of the legislative debate on the statute in question as evidence of legislative history in support of Strauss's argument. Kentucky law "allows a court to take judicial notice but the 'noticed fact must be one not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned,'" wrote Justice Hughes.

"The unsigned, unofficial transcript proffered by Straus fails this test miserably and should never have been considered, even if a true ambiguity had existed in the controlling statute."

Finally, addressing Strauss's argument that the board failed to review the entire record before issuing its decision, the court noted that the relevant statute does not require a full review of the record, but only a "consideration." "A plain reading of the statute simply does not support Strauss's proposition that the Board must review the entire eleven-day hearing and exhibits," wrote Justice Hughes.

"Instead, it requires the Board to think carefully and to take into account the record including the recommended order and the exceptions, leaving to the Board the discretion as to what other parts of the record, if any, need to be examined."

Having reversed the decision of the Court of Appeals, the court returned the case for proceedings on issues that the lower court may not already have considered.

Prisoner's fellow inmates—former doctors—not qualified as experts for malpractice case's medical affidavit, court finds

Issue: Status of revoked licensees as qualified medical experts

A federal judge in South Carolina, in a July 13 decision, dismissed a malpractice suit against the federal prison system because the plaintiff prisoner in the case used three fellow inmates—unlicensed former doctors—as experts on a required medical affidavit (*McLean v. United States*). Because the former doctors were no longer licensed, they could not serve as medical experts for the purposes of a legal document, the court held.

James McLean, a federal prisoner in South Carolina, claimed to suffer from rickets, a bone disease caused by a deficiency of vitamin D. He claimed that he was treating the condition successfully, prior to his incarceration in 2002, by taking sufficient doses of vitamin D. However, in a pro-se malpractice suit filed against the federal prison system, McLean claimed that prison medical staff reduced his dosage after 2004 despite his requests otherwise and that he began suffering physical pain and the loss of his teeth as a result.

In response to McLean's suit, the government argued that he had failed to file a proper expert medical affidavit, as required in medical malpractice cases under South Carolina law, which governed his suit. Although McLean had filed an affidavit from three fellow inmates—all doctors prior to their incarceration—none was still licensed to practice at the time they signed the document.

The court agreed with the government. Under South Carolina law, expert witnesses must be "qualified," explained Judge Bristow Marchant, which requires them to either have a license or be otherwise able—through "scientific, technical, or other specialized knowledge"—to assist a trier of fact. The board argued that, because all three of McLean's witnesses were not licensed, any expert medical testimony they offered would constitute the unauthorized practice of medicine.

Judge Marchant agreed. "None of Plaintiff's three affiants are in the 'active practice of medicine'—they are prison inmates who have had their medical licenses revoked and who under state law are not qualified to express an expert medical opinion." No other special skill or knowledge qualified them for an exception to that rule.

Judge Marchant, perhaps sympathetic to McLean's claims, wrote that McLean could still correct his lawsuit by filing a proper affidavit with qualified experts, and noted that both McLean's doctor before his incarceration and his current physician in prison—assigned to treat McLean after the filing of his suit and treating McLean's rickets claims seriously—could serve as those experts.

The judge closed by giving McLean 30 days to file such an affidavit.

Policy to refer medical marijuana violations to board did not violate open meetings law

Issue: Discipline policy development outside public view

A policy created jointly behind closed doors by Colorado's public health department and medical board to refer physicians who violate the state's medical marijuana rules for prosecution was not in violation of either Colorado's Open Meetings Law or the state Administrative Procedure Act, a state appellate court ruled July 26 (*Doe v. Colorado Department of Public Health and Environment*). The department is not the sort of public body envisioned by those laws, the court found.

The Department of Public Health and Environment administers Colorado's medical marijuana program. As part of that authority, it may refer physicians to the Colorado Medical Board if the department has cause to believe they have violated the state's medical marijuana laws.

In 2013, the Colorado State Auditor conducted an audit of the medical marijuana system and determined that the Department was not sufficiently regulating physicians who were prescribing to unqualified patients. The auditor's office recommended that the Department and medical board work together to establish guidelines for initiating investigations or referring physicians for discipline.

Employees of the two agencies then held a series of private discussions to develop those guidelines, which eventually became a policy for identifying physicians who overprescribe marijuana and referring them to the board for disciplinary proceedings.

The plaintiffs in this case were several doctors referred for disciplinary proceedings by the Department to the board under that policy. After filing a claim for documents on the formation of the referral policy from the two agencies under the Colorado Open Records Act, the physicians brought a claim alleging violations of the state's Open Meetings Law and Administrative Procedure Act, arguing that the referral policy was improperly created in private and seeking to have it invalidated.

A district court dismissed the case against the board, but declared summary judgment in favor of the physicians against the department, holding that the creation of the referral policy was invalid for violating the Open Meetings Law, and ordering the department to cease enforcing the policy, but declining to halt the board's prosecution of the plaintiff doctors.

Both the department and the physicians appealed that decision, and the case went up to the Court of Appeals of Colorado, Second Division, which issued a decision in favor of the Department.

In its appeal, the department argued that the district court incorrectly held that the Open Meetings Law applied to discussions between its employees and those of the medical board, and the judges of the Court of Appeals agreed. Under the plain language of the Open Meetings Law, Judge Stephanie Dunn wrote, the department is not a "state public body" of the kind subject to the Law and its employees are thus not subject to open meetings requirements.

"References to 'members' and 'membership' peppered throughout the OML reinforce our conclusion that the General Assembly intended to limit 'state public body' to an established and defined body with an identifiable membership—not to an entire agency," Judge Dunn wrote. "Had the General Assembly intended the OML to apply to every meeting of two or more agency employees, it would have said so."

Further, reviewing the doctors' Administrative Procedure Act claims, Judge Dunn wrote that "to the extent the Doctors' APA claim is directed to the referrals (versus the Policy) , the Doctors do not explain—and we do not see—how a referral to the Board fits within the definition of 'action,' which the Act defines as 'any agency rule, order, interlocutory order, license, sanction, relief, or the equivalent or denial thereof, or failure to act . . .'"

"Namely, the referrals didn't determine anything, let alone any 'rights or obligations' . . . Nor can we agree that 'legal consequences' will flow from the referrals . . . True, the referrals alert the Board to possible violation of the Medical Practice Act. But nothing concrete flows from the referrals themselves. The Board may investigate, but an investigation is not final."

Finally, although the Administrative Procedure Act requires notice and hearing procedures when agencies adopt rules, the Act exempts "interpretative rules or general statements of policy." These interpretive rules, such as the referral policy, serve only an advisory function, explained the judge, and are not binding on the agency; "they cannot mandate a particular result."

Testing

Class action suit over testmaker's data breach may go forward (from page 1)

After conversation in a shared Facebook page, Hutton, Kaeochinda, and Mizrahi realized that among their shared organizational memberships, only the NBEO possessed both their maiden names and social security numbers—prerequisites to opening a credit card.

In response to this burgeoning discussion, in August 2016 the NBEO issued a statement on Facebook asserting that its databases had not been breached.

Two days later, the NBEO retracted its earlier statement and instead asserted it was investigating whether any data had been stolen. Three weeks later, the NBEO stated again on Facebook that its internal investigation was still underway and could take several more weeks to complete.

Hutton and Kaeochinda joined in a class action complaint against the NBEO asserting five claims, including negligence, breach of contract, and breach of implied contract arising from NBEO's alleged failure to adequately safeguard personal information of the plaintiffs. In September, Mizrahi brought a similar class action complaint against the NBEO, asserting the same claims as Hutton and adding a claim of unjust enrichment.

In her complaint, Hutton stated that she had spent time and money putting credit freezes in place, and faces an imminent threat of future harm from identity theft and fraud. Mizrahi stated she received a notice from her bank that her credit score was dropped 11 points due to fraudulent activity under her name.

In defense, the NBEO filed a motion on October 22 to dismiss the complaints pursuant to Federal Rules of Civil Procedure 12(b) (1) , for lack of Article III (Constitutional) standing to sue. The NBEO also successfully moved to consolidate the Hutton and Mizrahi complaints. In 2017, the District Court issued an opinion dismissing both complaints for lack of subject matter jurisdiction.

The Fourth Circuit Court of Appeals vacated and remanded this holding because the District Court improperly applied the Fourth Circuit's rule concerning a 12(b) (1) dismissal.

Applying the Fourth Circuit's rule from *Beck v. McDonald*, the Court of Appeals held that the plaintiffs possessed good Article III standing because they met the following elements: 1) they suffered an injury-in-fact when their sensitive information was stolen, suffered damage to their credit scores, and had to spend time undoing the damage; 2) there is a causal connection between the injury and the defendant's conduct since both complaints make a clear logical connection as to why stolen information from the NBEO damaged the plaintiffs; and 3) the injury was likely redressable by a favorable judicial decision.

Overall, the Court of Appeal's decision was weighed in favor of the plaintiffs because the trial is still at the pleading stage. At this point in evaluating whether to dismiss a complaint, a court must view factual allegations in the most favorable light to the plaintiff. Verification of any damaging conduct may be carried out during the subsequent discovery phase. Thus, the plaintiffs met the necessary burden to move from the pleading phase to the discovery phase.

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