Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue

Governance

Board directors face salary cuts after Nevada AG says they can't be paid more than governor

Issue: Fee-funded boards' discretion to set staff salaries

Just before the 2018 holiday season, directors of five Nevada licensing board got some less-than-merry tidings from the state attorney general: Their salaries are impermissibly high under the state's laws because they are being paid more than 95% of the governor's salary, currently $141,867 per year.

The AG opinion was requested by Governor Brian Sandoval after an audit showed the apparent violations in June 2018. Based on the opinion, the directors of boards regulating accountants, physicians, contractors, speech therapists, and registered environmental health specialists will get a pay cut. The pharmacy board director, who is paid $181,677 per year, had the highest salary of that group.

The AG rejected arguments by some of the directors that fee-funded boards and commissions' employees do not have to comply with the statutory limitation because the boards are autonomous, the employees do not participate in the state pension fund and they have neither "classified" or "unclassified" designations under the state personnel system.

*See **Governance**, page 14*

Licensing

Federal court: Use of "engineer" label does not imply licensure status

Issue: Title act prohibitions on use of certain labels

The Oregon engineering board may not prohibit non-licensees from referring to themselves as "engineers," a federal court ruled December 28, 2018 (*Järlström v. Aldridge*). The decision was in response to a suit brought by an unlicensed man who had been ordered by the board to stop referring to himself by that title as he urged the board to investigate the accuracy of red-light traffic cameras.

The judge in the case ruled that the term "engineer" is not exclusive to the licensing context, and the board thus had no authority to prohibit its general use.

Mat Järlström, the plaintiff in the case, is an Oregon resident, an electrical engineer by education, and works in electronics, but does not have an Oregon engineering license.

In 2013, he became interested in red-light-camera tickets after his wife received one, and began a course of research into the accuracy of the camera sensors and timing. He discovered that the method used to calculate the duration of a yellow light failed to account for drivers who must slow down to make a legal turn. Following this discovery, Järlström contacted Oregon's engineering board, referring to himself as an engineer and asking for support in his work.

The request did not have the desired result. Far from sharing Järlström's concern about the accuracy of red-light cameras, the board instead took issue with Järlström's reference to himself as an engineer and advised him to stop referring to himself by that title. Unheeding, Järlström continued to reach out to share his discovery, both to engineering entities and the media, at times referring to himself as an engineer.

In 2015, the board opened an unlicensed practice case against Järlström, eventually finding him in violation of several Oregon laws—for both calling the camera timing into question and referring to himself as an engineer—and fining him $500.

Unhappy with this result, Järlström filed suit in federal district court against the board, claiming that its application of Oregon's engineering practice laws violated his First Amendment rights to free speech. Seemingly contrite, the board returned the $500 to Järlström, but the case continued, with both parties filing for summary judgment.

While both Järlström and the Board agreed that the unlicensed practice laws were unconstitutionally applied in his specific case, Järlström also claimed that the language of both the state's practice and title laws was so overbroad and violative of the First Amendment as to make them unconstitutional in all cases.

Järlström's challenge of the two sets laws met with differing results. The court, citing U.S. Supreme Court First Amendment precedent, held that Järlström had not successfully shown that Oregon's Practice laws presented "an unacceptable risk of the suppression of ideas," and thus the court could not reach the question of speech suppression where a narrower ruling—the application of the laws to Järlström himself was unconstitutional—was available.

In Järlström's case, the challenge to the state's title laws differed; he claimed the application of the laws was unconstitutional for every person to which it could be applied, in that it prevented all instances of a person referring to themselves as an "engineer" unless that person was licensed by the state. Such a prohibition was unconstitutionally overbroad, Järlström argued, because the term "engineer" has legitimate applications outside the realm of professional licensing.

After noting that the title laws reached beyond restricting only commercial speech, Judge Stacie Beckerman held that "the Title laws threaten a substantial amount of protected activity," agreeing with Järlström that the laws, as construed, prohibit any non-licensed person from referring to themselves as an "engineer."

Judge Beckerman noted that the board had often targeted people who used the title "engineer" in non-commercial contexts, despite the fact that the use of

the term by non-licensed people was not “inherently misleading. The word ‘engineer’ is different from the other title restrictions courts have upheld in the past because it means something different from “professional engineer, she said.

“Nothing in the record supports the conclusion that a reasonable person would assume that an individual who calls herself an ‘engineer’ is necessarily a registered professional engineer.”

To fix the problem, Judge Beckerman ordered that the term “engineer”—as distinguished from “professional engineer” or “registered engineer”—be stricken from the title laws, and ruled that Järlström could continue in his traffic camera quest and refer to himself in public as an engineer.

Reliance on hospital peer review report—inadmissible hearsay—dooms disciplinary decision

Issue: Use of hearsay as evidence in administrative hearings

A decision by the Pennsylvania Bureau of Professional and Occupational Affairs to rely on a hospital peer review report as the basis for its expert's testimony was improper, causing a subsequent disciplinary decision to be overturned by the Pennsylvania Commonwealth Court February 28 (*Ives vs. Bureau of Professional and Occupational Affairs*).

Because the licensee at issue in the case objected to the use of the report, the document was considered inadmissible hearsay, and could not be the basis of an administrative decision.

After a patient died of blood loss that began when physician William Ives operated to remove a colon tumor, the board began a disciplinary case, alleging that Ives's treatment of the patient fell below the standard of care. An expert witness retained by the Bureau, after reviewing medical and hospital records—including a peer review report on the incident—concluded that Ives erred by disregarding the concerns of other members of his operating team, by continuing the surgery when he should have stopped, and by leaving the patient in the care of another physician following the conclusion of the surgery.

Oddly, there were some discrepancies in that report: the expert reviewer seemingly failed to discover that Ives left the patient because Ives had been called to a different emergency, and the reviewer did not review Ives’s orders during the surgery.

The expert's conclusion was contested by Ives, who, during testimony in defense, explained his responses to his surgical team’s concerns and noting that the patient had an undiagnosed bleeding disorder, which meant that her bleeding could only be stopped with the use of platelets, which Ives ordered but which were never delivered.

Following the hearing, the board publicly reprimanded Ives and ordered him to complete a remedial clinical competency skills assessment. Ives appealed, and the case went up to the Pennsylvania Commonwealth Court.

Ives made several arguments on appeal. First, he argued that both the board and its expert reviewer erred by relying on a transcript of the peer review proceeding—conducted by the hospital after the incident—since the earlier procedure was conducted for a specific purpose with different goals than a

disciplinary investigation, by a group of physicians rather than an official with legal consequences in mind.

Ives argued that the board should have conducted its own evidentiary hearing, having the witnesses cited in the report testify directly, instead of relying on the statements contained in the review, which he contended were inadmissible hearsay.

The judges of the Commonwealth Court agreed. Although the rules of evidence are relaxed in administrative proceedings, Judge Mary Hannah Leavitt explained in her written opinion for the court, under Pennsylvania law if an affected party objects to introduction of a piece of evidence, such evidence cannot be the basis of a board decision.

The board claimed an exception to the hearsay rule which allows for the introduction of previous testimony, but the court noted that the exception is only available if the witness cannot testify. Further, the peer review report was not admissible under hearsay exceptions for business and medical records, the court explained, because those exceptions require certifications from employees who prepared and maintained custody of the documents, a step the board did not take before it used the report as evidence.

Ives also challenged the use of the peer review by the board's expert, arguing that his reliance on that inadmissible document when preparing his own report tainted the analysis. Although expert witnesses are permitted to rely on otherwise inadmissible documents, those documents must be of the sort that experts in their field regularly rely on in the practice of their profession. A peer review, Ives argued, was not such a document, as a doctor would not normally have the need to rely on one in their regular practice.

The court agreed. "The Peer Review transcript goes far beyond Patient's records, laboratory tests, and the observations of attending nurses," and the Bureau presented no evidence that surgeons rely on such reports in their regular work, Judge Leavitt wrote. "Simply, the record does not establish that, as a general rule, surgeons rely on transcripts from peer review proceedings to formulate their medical opinions . . . Absent that proof, [the expert's] opinion lacked a foundation, which was necessary to the formation of a competent expert opinion."

Because the testimony of its expert was the board's primary evidence that Ives had violated the standard of care, and because that testimony had been accepted in error, the board's decision to discipline Ives was thus not based on sufficient evidence. It could not stand, therefore, and the court reversed.

Reciprocal discipline cannot be based on other reciprocal discipline

Issue: Limits on imposition of reciprocal discipline

An appellate court in Arizona, in a February 7 decision, struck down a board decision to discipline a doctor based on reciprocity with a federal Drug Enforcement Administration decision to sanction the doctor's license, because the DEA decision itself was based on an earlier action by the Arizona licensing board (*Ruben v. Arizona Medical Board*).

However, the court upheld the board's ultimate disciplinary sanction against the doctor, ruling that the board had provided sufficient evidence of other bad conduct to warrant punishment.

The case involves a web of different charges and incidents. After the Arizona Medical Board began investigating physician David Ruben's prescribing practices, it learned that the U.S. Drug Enforcement Agency (DEA) had suspended the doctor's prescribing privileges in 2013, based in part on a 2010 consent decree Ruben entered into with the board following an earlier round of disciplinary charges.

As a result, along with other charges for recent conduct unearthed by its investigation, the board charged Ruben with a section of Arizona code that authorizes discipline against licensees who have been sanctioned by the federal government.

In 2016, following a hearing, the board placed Ruben's license on probation and restricted his prescription authority for two years. In making this decision, the board significantly modified the recommended order of the administrative law judge who oversaw the case, rejecting a finding that Ruben had tampered with the prospective testimony of a witness, but also adding that Ruben should be reciprocally disciplined for the DEA sanction, and adding to the recommended discipline of a public censure by placing Ruben's license on probation and imposing practice restrictions.

Ruben appealed, and, after a state superior court affirmed the board's decision, another appeal brought the cause to the Court of Appeals of Arizona, which issued its decision upholding Ruben's discipline.

Ruben made two primary arguments on appeal, with some success, but neither succeeded in actually overturning his disciplinary sanction.

In the first of those claims addressed by the court, Ruben argued that, by disciplining him for being sanctioned by the DEA (which punishment had been based on an earlier sanction imposed by the board itself), the board had improperly disciplined him twice for the same conduct.

The court agreed. The board had attempted to defend that unusual charge decision on the grounds that, because it could not have charged Ruben with having his licensed sanctioned by the federal government at the time of his original 2010 consent agreement, then that charge was not based on the conduct underlying that earlier agreement, and could now be used against Ruben.

However, as Judge Paul McMurdie noted in the court's opinion, the 2010 agreement itself stated that the board would not bring further charges against Ruben based on the patient charts which had been the board's evidence of Ruben's misconduct in that earlier case.

The board had disciplined Ruben based on conduct for which it had already disciplined him, and its discipline on that charge could not stand. "Looking at the plain meaning of the words in the consent agreement . . . the reasonable interpretation of the provision is that the Board agreed not to institute further disciplinary proceedings against Dr. Ruben for conduct that the Board either knew, or had reason to know, from the patient charts," wrote Judge McMurdie.

"It is the *unprofessional conduct* that the Board was sanctioning. If the Board knew or had reason to know of potential federal violations at the time of either consent agreement, it could have determined the federal violations were deserving of increased sanctions. However, the finding by the DEA of unprofessional activity by Dr. Ruben did not change the nature of the conduct already sanctioned by the Board."

Unfortunately for Ruben, the court did not agree that the actual sanction placed on his license in the current case was unwarranted. Defending the ultimate outcome of its case against Ruben, the board argued that no proof existed that its sanctions in this case were actually based on reciprocity with the DEA's decision.

Judge McMurdie noted that the board had actually issued lighter discipline that it seemingly could have, in rejecting a recommendation from state prosecuting authorities that it revoke Ruben's license. The board had discussed and imposed sanctions based on Ruben's current activities, which the board considered a danger to the public. "The discipline was narrowly tailored to curtail the current unprofessional conduct," and could stand without the addition of the reciprocity charge.

In a second argument, Ruben claimed that the board had improperly altered the administrative judge's recommended sanctions without providing adequate written justification for its decision. In particular, Ruben challenged the board decision to disregard a finding by the administrative judge determining that Ruben's seemingly excessive prescribing practices were sufficiently close to a "respectable minority" of other practitioners in his field to not be considered below the standard of care.

In making the change and then holding Ruben responsible for falling below professional standards, Ruben argued that the board failed to actually articulate the standard of care that it believed Ruben had violated.

The court agreed that the Board failed to properly articulate the standard in the Board's decision, but noted that the board's ultimate conclusions were "taken verbatim from its complaint, where it set forth the standard for each charge against Dr. Ruben as established by its experts' reports." By including that information in the complaint, the board had established the standard of care and informed Ruben, and that was sufficient to put the doctor on notice of the disciplinary claims.

The court, while noting the discrepancy, thus upheld the board's decision. "While it may have been preferable for the Board to state the standard, the way Ruben deviated from the standard, and how the deviation was unreasonably unsafe . . . we nonetheless find that substantial evidence supports findings of unprofessional conduct."

Licensee lawsuit seeking damages for state's deactivating his license without warning or authority can proceed

Issue: Potential damages for due process violations by state

A federal lawsuit brought by an Illinois physician who claims the state's Department of Financial and Professional Regulation deactivated his medical license without warning or authority can proceed, the judge hearing the case ruled January 16 (*Phillips vs. Illinois Department of Financial and Professional Regulation*).

According to the physician, Arnold Phillips, in June of 2014 he sent a check for the renewal of his medical license, and, while the check was processed by the Department, Phillips never received confirmation and later discovered that his license was listed as inactive for failure to pay a $10,000 disciplinary fine from 2013.

Phillips hired an attorney and successfully lobbied the agency to reinstate his license in December. He then brought a federal suit against the agency and its staff seeking declaratory judgment and compensation for the business he lost during his period of inactivation. Then, in 2017, while the suit was pending, Phillips's license was placed in an expired status, though Phillips again claims to have made a renewal payment to the Department, this time online.

Judge Virginia Kendall, hearing the case in the federal District Court of the Northern District of Illinois, held that Phillips's claim to declaratory relief against the agency itself was barred by the Eleventh Amendment, which prevents individuals from bringing suit against state agencies in federal court.

However, Phillips had more luck in his claims against the individual agency members. Although the agency defendants argued that Phillips had no property interest—and therefore had suffered no injury—in his license because it had been revoked for the non-payment of his fine, Judge Kendall quickly noted that federal appellate precedent makes clear that physicians in Illinois do, indeed, have such a property interest, and that licenses are subject to due process protections.

Judge Kendall believed that Phillips had a valid case. Phillips had argued that the Department had denied him due process before restricting his license without any statutory authority to do so. And, as detailed in his complaint, "IDFPR reinstated Dr. Phillips' license on December 14, 2014 despite his not having paid the fee, strongly suggesting that it had no valid grounds for inactivating the license in the first place."

And, although the Department defendants pointed to the fact that Phillips never claimed to have actually paid his $10,000 fine, Judge Kendall noted that fact was irrelevant. Neither Illinois's Medical Practice nor the administrative decision that imposed the fine specified a particular date by which it must be paid, nor did the Department have the authority to revoke his license for non-payment.

"Thus," Judge Kendall concluded, "there are no grounds in the facts before this court for finding that Dr. Phillips' property interest in his medical license was contingent on his paying the disciplinary fine."

Turning to the allegations themselves, the judge concluded that Phillips had made sufficient allegations about the involvement of each of the named defendants' participation in the actions against his license to show a viable case, and she ruled that his claims could proceed.

Expert testimony is information, not "tangible property" that would waive board's immunity

Issue: Board members' immunity from lawsuits for monetary damages

A disciplined doctor who filed a negligence suit against the Texas Medical Board saw his case dismissed in January, when a state appellate court ruled that the testimony and report of an expert witness retained by the board do not constitute "tangible personal property" such that any harm caused by those things would not waive the board's normal immunity from lawsuits for monetary damages (*Zawislak vs. Texas Medical Board*).

In 2012, the Board filed a complaint against physician Walter Zawislak based on his allegedly substandard treatment of an emergency room patient. During the

disciplinary hearing process that followed, Zawislak moved to strike the testimony and report of an expert witness, a physician named John Bruce Moskow, retained by the board to evaluate Zawislak's behavior. But the board denied the motion and, after the conclusion of the proceedings, issued a public reprimand of Zawislak and imposed monitoring and education requirements on his license.

In 2017, Zawislak filed a tort claim against the board, claiming that it had acted negligently in its disciplinary prosecution of his license. Although licensing boards, as state agencies, are often immune from damage suits, making such claims rare, the Texas Tort Claims Act, under which Zawislak filed suit, provides a waiver of the state's sovereign immunity against claims for monetary liability where the alleged injury was "caused by a condition or use of tangible personal . . . property if the governmental unit would, were it a private person, be liable."

In a novel legal argument, Zawislak claimed that the testimony and report of the board's expert witness were such pieces of "tangible personal property," and that the personal and economic hardships brought about by the board's use of the expert amounted to negligence, thus exposing the board to liability for monetary damages.

A state district found the board immune from such lawsuits and dismissed the case for lack of jurisdiction, Zawislak appealed, and the case went up to a Court of Appeals of Texas in Austin, which issued a decision affirming the lower court and dismissing Zawislak's claim on January 25.

In explaining its rejection of Zawislak's argument, Chief Justice Jeff Rose, writing for the court, noted that the section of the Tort Claims Act cited by Zawislak requires that the injuring property be "tangible"—"something that has a corporeal, concrete, and palpable existence"—according to the Texas Supreme Court. Zawislak argued that the expert's report and deposition testimony were, in fact, tangible, and thus met the requirements for the exception, but the court did not agree.

"Although the paper . . . on which [the expert's] report and deposition testimony was recorded is tangible, Zawislak does not allege that he was injured by the paper," wrote Chief Justice Rose. "Rather, the gravamen of Zawislak's argument is that the [board] used the *information* in Moskow's expert report and deposition testimony to injure him. . . . Information is intangible and, thus, does not constitute tangible personal property."

Because the expert's testimony and report did not fall under the statute waiving the board's immunity from suit, that immunity continued and the court had no jurisdiction to hear the case.

Reciprocal discipline does not require 'substantially similar' sanctions

Issue: Application of reciprocal discipline

A Kentucky appellate court ruled February 22 that a regulation requiring the state's medical board to issue substantially similar sanctions to licensees who have been disciplined in other states was invalid. The challenged rule, the court held, impermissibly restricted the discretionary authority of the board beyond the intention of the statute that the regulation implemented (*Uradu vs. Kentucky Board of Medical Licensure*).

In 2016, the medical board of Ohio suspended the license of physician Onyinyechi Uradu for prescribing a single opioid—buprenorphine—to more than

the 100 maximum patients allowed under state law for an individual physician. Following that action, the neighboring Board of Medical Licensure of Kentucky, where Uradu was also licensed, moved to discipline her license on reciprocity grounds.

Uradu objected to the Kentucky action, claiming that the regulation under which the board pursued her reciprocity case exceeded the agency's statutory authority. The board nonetheless found that Uradu was subject to sanction based on her Ohio discipline and imposed a stayed suspension of her license. Uradu appealed, again challenging the legitimacy of the reciprocity regulation, and the case eventually rose to the Court of Appeals of Kentucky.

Uradu's challenge centered around an argument that the reciprocity regulation impermissibly expanded the scope of the state legislation on which it was based. The relevant statute allows the board to issue reciprocal discipline if a license has been “revoked, suspended, restricted, or limited or has been subjected to other disciplinary action” by another jurisdiction. The regulation implementing that statute does appear to expand on that language, mandating that the board shall, at a minimum, impose the same substantive discipline as the jurisdiction where the initial disciplinary case was heard.

The language of the statute was permissive, Uradu argued, allowing a licensing body to use its discretion when deciding what sanction was appropriate, and the mandatory language of the regulation was thus an impermissible restriction of the board’s discretionary authority as delineated by the statute.

The court agreed, ruling that the challenged regulation overstepped the bounds of board's authority. The board argued, in a slightly convoluted way, that the very *act* of passing the regulation was a permissible use of the discretion afforded by the statute, but that argument did not sway the judges.

In an underdeveloped section of the opinion, the court briefly addressed a separate Kentucky statute that requires licensing boards to pass regulations mandating mirrored sanctions on licensees disciplined in other states. Although this separate statute would seem to explicitly provide authority to the board to pass the challenged restriction, Judge James Lambert, writing for the court, noted that the board had not filed charges under that particular statute, making that argument inapplicable here.

Having rejected the board’s arguments, the court proceeded to invalidate the section of the reciprocity regulation mandating mirrored disciplinary sanctions. “If such sanctions are to be mandatorily applied,” Judge Lambert wrote,” it is within the province of the General Assembly to amend [the statute] to make that the law in the Commonwealth. But until then. the portion of the regulation requiring [the board] to impose the same sanction is invalid and unenforceable.”

Board failure to challenge timeliness of licensee appeal lets case survive motion to dismiss

Issue: Timeliness of appeals of disciplinary decisions

An Indiana appellate court, in a November 13 ruling, declined to dismiss a late appeal brought against the state's Real Estate Appraiser Board, holding that an earlier state supreme court decision made such errors waivable, and that the board had failed to challenge the petition on timeliness grounds in an earlier decision *(Farmer vs. Indiana Real Estate Appraiser Licensure and Certification Board*).

When real estate appraiser Terry Farmer applied for the renewal of his license in 2016, the board denied his request, based on a longstanding disciplinary case that began in Kentucky. After Farmer requested a hearing, he was informed by the board that it was going to serve as the administrative law judge in his case.

Unhappy with that decision, Farmer filed a request for a different administrative judge, but was denied by the board. Farmer filed two additional requests for a new judge in June and November of 2017, but the board did not respond.

In April 2018, Farmer appealed to the state's judicial system, filing a petition in a state circuit court which faulted the board for not responding to his latter requests to appoint a new administrative judge. However, the court dismissed the claim for failure to exhaust administrative remedies, on the grounds that Farmer had not received a final decision on his request for a new administrative judge. He appealed.

Oddly, in its argument in response to Farmer's appeal, the board reversed its earlier position on whether Farmer had received a final order on his request for a new judge, now conceding that its original decision denying Farmer's request had, in fact, been such a final decision. However, it continued to argue that Farmer's appeal was invalid, now on the grounds that the petition had not been filed in a timely manner.

The appellate court agreed that Farmer's petition for judicial review was untimely—he had filed it after the permissible 30 days following the decision—but held that the error was not fatal to the lower court's jurisdiction, and that Farmer was entitled to have his late petition heard by a court. In making this decision, the court cited a 2006 Indiana Supreme Court decision, *K.S. v. State*, which held that certain errors which formerly would have cause a court to lose jurisdiction to hear a case entirely would now be considered procedural errors only, and thus could be waived by failure to pursue them in an earlier decision.

"In light of *K.S.*," Judge Patricia Riley wrote, "this court has concluded that the failure of a litigant to file a timely petition for judicial review is a procedural error, not a jurisdictional one . . . Because the issue of the timeliness of the filing of a petition for judicial review is a procedural one, it can be waived if not raised at the appropriate time." Thus, because the board failed to raise the issue in the lower court proceedings, it had waived the claim.

The board also claimed that Farmer's appeal was void because he had failed to verify his petition for judicial review, as required by Indiana's Administrative Orders and Procedures Act. However, similar to the board's argument about Farmer's timeliness, the court noted that the failure of party to get a petition verified was not a fatal flaw.

Having rejected the board's arguments, the Court of Appeals concluded that the trial court had wrongly dismissed Farmer's petition, and returned the case for further proceedings.

Court reinstates lawyer's discipline for performing conflicting role in same transaction

Issue: Discipline over licensee conflict of interest

An appellate court in Illinois affirmed a decision by the state Department of Financial and Professional Regulation to discipline a real estate broker and attorney who had acted in both roles while negotiating a

real estate transaction, overturning a ruling by a state trial court that had thrown out the board's discipline on several different grounds (*Curielli vs. Department of Financial and Professional Regulation*).

In 2013, the Department opened a disciplinary case against the real estate license of broker and attorney Peter Curielli, alleging that he improperly acted as both a real estate broker and an attorney in a single property transaction. Before opening formal proceedings, the Department had offered Curielli the chance to resolve the issue through a non-disciplinary, non-public order requiring him to complete a continuing education course.

But Curielli turned them down, instead filing a complaint against the Department claiming that the section of the state's Real Estate License Act prohibiting broker-attorney combinations was in violation of the Illinois Constitution. The disciplinary case against Curielli followed.

Curielli's decision not to take the Department's initial offer backfired. Based on emails from Curielli to parties involved in the transaction, as well as witness testimony, an administrative law judge confirmed that he had acted as both an attorney and broker. The Department followed up by indefinitely suspending Curielli's license and fined him $9,500.

Curielli appealed, arguing, among other things, that the Department had reneged on a second settlement agreement offered after he turned down the first, that the evidence showed that his role in the transaction was only as a broker, that he was denied a fair hearing, that his discipline bore no reasonable relationship to his acts, and that the Department had improperly refused to provide him with records of comparable cases and their final sanctions so that he could compare his potential discipline with similarly-situated licensees.

A trial court reversed the Department's decision, holding that Department witnesses improperly testified as to the legal conclusion—and sole purview of the case's adjudicator—that Curielli's actions in the transaction amounted to the practice of law; that, on substance, Curielli's actions did not constitute the practice of law; and that the disciplinary complaint had been fatally non-specific, failing to provide actual dates or describe specific actions, thus preventing Curielli from preparing a proper defense.

The Department then appealed, and the case went up to an Illinois Court of Appeals for the 2nd District, which issued a November 13 decision reversing the trial court, rejecting the rulings of the lower on several issues, upholding the Department's decision to discipline Curielli, but ultimately rejecting the indefinite suspension of his license.

Addressing the substance of the case—whether Curielli had, in fact, engaged in the practice of law in a matter in which he was also acting as a real estate broker—the justices noted that the question was one of mixed fact and law, and thus the court was required to give deference to the Department's ruling. Based on the evidence in the case, the Department held that Curielli had practiced law while brokering, and it discounted the testimony of Curielli's father, who was the lead attorney at the family firm, that Curielli's attorney-type emails were only relaying his father's advice. Applying deference, the court affirmed those decisions.

The court held that the Department's disciplinary complaint did not need to be so detailed as to specify the activities that constituted the practice of law or the specific dates those activities occurred. Instead, the complaint named an approximate date for Curielli's acts and the general nature of those acts, which

was sufficient for him to prepare a defense. “In our view,” wrote Justice Ann Jorgensen, Curielli “could have reviewed his emails on or about February 11, 2013, and ascertained the conduct—the specific emails—to which the agency would ultimately point that reflected that he engaged in the practice of law.”

The appellate court also affirmed the Department's use of lay witnesses providing their impressions that Curielli had been acting as attorney, noting that testimony as to impressions did not impermissibly veer into legal conclusions, but simply provided relevant evidence on the issue in question.

Curielli also argued that the language of the law that appears to prohibit brokers from acting as attorneys in the same case actually only bars their being *the attorney of record* for their clients; it doe not bar providing general legal advice.

The justices of the Court of Appeals disagreed. “We conclude that the statute is not ambiguous,” wrote Justice Jorgensen. “The only reasonable interpretation of [the law] is that a licensed broker who is also an attorney cannot act as an attorney in the same transaction in which he or she is providing broker services where another attorney at his or her firm is the attorney of record for the transaction. The trial court’s and plaintiff’s reading leads to absurd results that are contrary to protecting the clients’ interests."

"The financial interests of the broker-attorney who is not the attorney of record and another attorney at his or her firm who is the attorney of record are intertwined and, therefore, the inherent conflict of interest that arises when a broker-attorney simultaneously wears two hats in the same real estate transaction is also present in cases where a broker-attorney is not the attorney of record.”

Finally, the justices rejected Curielli’s argument that the Department improperly prevented him from showing he had orally agreed to a second settlement offer that the Department later decided to disregard. The evidence Curielli produced to support his claim was hearsay, Justice Jorgensen wrote, and the Department acted within its discretion in rejecting it.

Curielli did find some success. Although the Court of Appeals held that the fine levied against him was permissible, it also concluded that the Department erred by indefinitely suspending his license. Noting extensive mitigating evidence—Curielli’s lack of disciplinary history, the fact that his clients suffered no tangible harm, the fact that the extent of his improper attorney actions formally amounted to only two emails, and the relatively light discipline meted out to other licensees in his position—the court held that the imposition of an indefinite suspension was an abuse of discretion.

Licensing

U.S. Court of Appeals: Students not entitled to wages for work hours required for licensure

Issue: Employee status of students performing work required for licensure

The U.S. Court of Appeals for the 2nd Circuit held February 5 that cosmetology students working at a salon accepting paying customers, but operated by their cosmetology school, are not entitled to be paid for that work if the school is not requiring them to work more than necessary to acquire the hours needed for licensure (*Velarde vs. GW GJ*).

In 2011, Patrick Velarde enrolled in the Salon Professional Academy of Buffalo, a for-profit cosmetology school, where he took classes and worked in the school's student salon. There, he served paying customers, cleaned, and performed bookkeeping duties, but did not receive financial compensation. New York cosmetology law requires license applicants to have 1,000 hours of coursework, and Velarde spent a large majority of the 1,000 hours he worked in the salon—34 hours a week for 22 weeks—without pay, while paying the school $13,000 in tuition.

In 2014, after completing his program and receiving a state license, Velarde sued the Academy for unpaid wages, alleging that the school had violated labor laws by not paying him for his work in its salon. After a trial court ruled in favor of the school, Velarde appealed, and the case went up to the Second Circuit, which affirmed the lower court.

The judges of the Second Circuit analyzed Velarde's case through the lens of a 2015 Supreme Court decision dealing with unpaid interns at for-profit enterprises. In the decision, *Glatt v. Fox Searchlight Pictures*, the Court held that, if a for-profit enterprise was the primary beneficiary of a relationship between itself and an unpaid intern, than the intern is, in fact, an employee of the company and entitled to paid compensation, but if the intern is the primary beneficiary of the relationship, then that intern is not entitled to compensation.

Velarde, objecting to the circuit court's framing of the case, argued that considerations of who the primary beneficiary of his relationship with the Academy were irrelevant to his case. He was not an "intern," as the worker in *Glatt* had been, and, regardless of whether he benefited from his time in the Academy's salons, the Academy received financial benefit from the work he performed. Velarde argued that the experience and credit hours he gained from his work at the school were not sufficient reason for him to work unpaid for the school's profit.

The judges disagreed, choosing to extend *Glatt*'s intern-based holding to determining the distinction between employees and students. "As with interns," wrote Judge Susan Carney, "disentangling the threads of a complex economic fabric and teasing out the respective benefits garnered by students and their commercial training programs is key to determining whether, for [Fair Labor Standards Act] purposes, a trainee is serving *primarily* as an employee of that school or training program–or is *primarily* a student."

One of the key factors in the court's determination of that, wrote Judge Carney, was the fact that the Academy did not run "a training program whose duration far exceeds the period in which the program provides the student with beneficial learning." The school had seemingly not required Velarde to work more than was necessary to fulfill his 1,000-hour requirement for licensure.

"We find it meaningful that the Academy required that Velarde complete not more than, but exactly the number of hours required by the state of New York to qualify for licensure . . . the bulk of it providing services in the Salon . . . under the supervision of the Academy's instructors."

Although Velarde argued that his inability during his salon hours to choose in which areas of practice to work, and the Academy's requirement that he perform janitorial and bookkeeping services for the salon, indicated that he was not just a student while in the salon, Judge Carney disagreed. Practical vocational skill training may require menial work, she wrote, noting "that a vocational school does not provide the *optimal* learning experience for a student does not necessarily transform it into the primary beneficiary of the relationship."

"Furthermore," the judge wrote, "although Velarde faults the Academy for charging customers fees for his cosmetological services that exceeded the Academy's relevant operating costs . . . the Academy has no obligation not to turn a reasonable profit on its operations." Further, although Velarde provided "tangible benefits" to the Academy, the court held that he had not replaced the work of paid employees.

"This is not a case in which a business uses the facade of a vocational school to deceive students into working unexpectedly long hours without compensation, replacing the labor of its paid employees, or working hours well beyond long-standing state requirements."

Governance

Board execs face salary cuts with AG opinion over statutory cap *(from page 1)*

Under NRS 281.123(1), "The salary of a person employed by the State or any agency of the State must not exceed 95 percent of the salary for the office of Governor during the same period," the attorney general noted.

As a legislatively created "regulatory body" with "the authority to regulate an occupation or profession" within its purview, a fee-funded board or commission derives its authority from, and owes its existence to, the State of Nevada. . . Accordingly, the regulatory activities of fee-funded boards and commissions are inextricably tied to State government both financially and administratively."

The statute applies in general terms to any person who is "employed" by the State or an agency of the State, the opinion said. "And since the meaning of 'employed' is well-settled and commonly understood, its dictionary definition supplies the appropriate standard for interpreting the salary limitation." To employ is 'to give work (to someone) and pay them for it,'" the opinion continued, citing the New Oxford American Dictionary.

As a past participle, the opinion continued, the word 'employed' refers to "the state or fact of being employed for wages or salary." "Accordingly, a person is employed by the State if that person performs works and provides labor in exchange for a salary or wages paid by the State."

On the question of the board's autonomy as a fee-funded agency and whether it broadens the board's authority to set salaries, the attorney general cited several factors in concluding the answer was no:

- Fee-funded boards and commissions receive no distributions from the State General Fund, but they are subject to financial and administrative oversight by both the legislative and executive departments of the State.

- The persons who staff fee-funded boards and commissions are entitled to be defended and indemnified by the State according to the same terms as all other employees of the State.

- The board must adhere to the Nevada Administrative Procedure Act, which is applicable to "all agencies of the Executive Department of the State Government."

- No statutory wording suggests legislative intent to grant boards' unfettered discretion to set their employees' salaries.

About nine years ago, the governor issued a memorandum directing that board salaries be equivalent to similar positions within the state system. but almost two-thirds of boards reported they didn't follow that directive, state auditors said in 2018.

Contracting, confidentiality, and anti-competitiveness problems affect accountancy board, sunset panel finds

Issue: Sunset reviews of board governance and program policies

The Texas Sunset Advisory Commission issued a report on the state of the State Board of Public Accountancy in November, ultimately recommending that the state continue the board for at least the next 12 years, but offering several recommendations intended to correct deficiencies of varying seriousness that the Commission detected in the Board's operating procedures.

First, the Commission found that the board's processes for contracting with outside professionals—accountants to review disciplinary, inspection, and continuing education documents, as well as attorneys to handle board disciplinary cases—do not meet either state requirements or best practices.

The Commission found several problems with the board's contract development and solicitation process. For example, the board lacks a formal process for analyzing its outside accountant needs, and is thus unable to determine what services it could actually provide in house before seeking outside help. The board too infrequently makes public solicitation for its outside help, instead relying on informal word-of-mouth recommendations; not only is this against best practices, Commission staff wrote, but it violates state procurement laws which require a public solicitation for any contract worth over $25,000.

The board departs from required evaluation standards when choosing accountant contractors, the Commission also stated. Although the board is required to consider primarily the quality of services, as long as they will be performed at "a fair and reasonable price," the board was overly concerned about their contractors' rates, which the Commission believed could cause higher-quality providers not to contract with the board.

To fix these problems, the Sunset Commission recommended that the board be directed to develop both a formal process for contract development and solicitation, and to implement periodic review of that process.

On the subject of attorney contracts, the report noted that the board had never sought approval from the state's attorney general office for its contracts with outside counsel, meaning that little oversight existed for the use of such attorneys. The Commission recommended that statutory law be changed to require the board to seek such approval, which it believed would prompt the board to ensure that its attorney contracting follows best practices and would bring it in line with other agencies.

Second, the Commission found that the board's licensing and enforcement processes failed in some cases to conform to statute or common regulatory standards. The board lacks required accommodation procedures for military members or their spouses, a problem that the Commission suggested be addressed by statute. Another concern was the board's lack of authority to require fingerprint background checks of its current licensees, a problem which the Commission recommended be solved by a new statute requiring the board to conduct such background checks of all of its licensees and applicants within two years.

Other notable recommendations the Commission made to the board:

• Stop requiring applicants to provide documentation of mental health problems.

[a] Remove the “good moral character” requirement for licensees—which the Commission found to be “a standard that is unclear, subjective, and difficult to enforce”—in order to make the applicant evaluation process more objective; and

• Create an online application process.

The Commission also found that the board’s peer-review program created a "one-size-fits-all" approach to evaluation. This approach creates unnecessary obstacles to accountants who provide only lower-risk services, which the Commission recommended be subject to lesser inspections requirements than licensee who provide high-risk services.

On another procedural issue, the board failed to protect its complainants’ confidentiality, sending un-redacted copies of complaints to its licensees. This discourages complaints, the Commission found, and should be changed. And it found a large variation in the administrative costs assessed to licensees in disciplinary proceedings, and recommended a formal system for their assessment.

Third, the Commission found cause for concern that the majority of the board’s members were themselves licensed accountants, potentially make the board vulnerable to lawsuits claiming that the board engages in anti-competitive behavior. The report recommended that the board adjust its membership, making board licensees a minority. The report also found that the board unnecessarily restricted public comments on its meetings, requiring members of the public to request permission to comment at least 20 days prior to a meeting.

"Overall, the board does its job ensuring accountants practicing in the state have the knowledge and impetus to perform their work well," the report stated, but "the board has not always scrutinized its own performance in meeting the standards and expectations of a well-functioning regulatory agency with the same effort as it oversees its licensees."

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