Professional Licensing Report

Licensing, testing, and discipline in the professions

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Highlights in this issue

Licensing

With universal license recognition law, Arizona aims to reset national standard for portability of all out-of-state licenses

Issue: Reciprocal licensing

Profession by profession and state by state: For better or worse, incremental change has been the norm for decades in setting standards in occupational licensing. And it's made interstate mobility for professionals a constant challenge. But with HB 2569, passed and signed into Arizona law April 10, the Arizona legislature and governor will make moving to Arizona a much easier process for licensed professionals who want to work there.

The new law, taking effect September 1, is the first of its kind in the nation. It is simple in concept but sweeping in effect. For any occupation that requires a license, people will be able to practice in Arizona, if it's their primary residence, with the license they have earned in another state as long as they've been licensed for a year.

With a few provisos—background checks and possible state law exams are required and nobody with pending discipline action can qualify—licenses in occupations from psychology, cosmetology, and

*See **Licensing**, page 6*

Competition

Federal court: Antitrust and constitutional challenges of Internet-based telepractice restrictions may proceed

Issue: Antitrust challenges of restrictions on telepractice

A federal court in Alabama, in an April 2 decision, dismissed most claims of a group of plaintiffs challenging a cease-and-desist letter from the state's dental board informing them that their tele-dentistry practice was violating state unlicensed practice laws.

The court, however, did allow claims brought under the federal Sherman Antitrust Act and the U.S. Constitution's Dormant Commerce Clause to proceed (*Leeds v. Board of Dental Examiners of Alabama*).

The two principal plaintiffs in the case are SmileDirect, a company that operates an Internet-based tele-dentistry business that connects patients with licensed dentists who remotely assess and devise alignment treatment, and dentist D. Blaine Leeds (collectively, the SmileDirectClub). Leeds, who is licensed in Alabama but lives in Tennessee, is one of the dentists working through SmileDirect to provide treatment for Alabama

A patient using SmileDirect first visits a physical location where company employees without dentist licenses take photographs of their teeth. Those photographs are then used to construct a 3D model of the patient's mouth; that model is sent to a licensed dentist who then analyzes the 3D model and writes a prescription for clear aligner therapy (a form of clear braces), which is then fabricated and shipped to the patients.

In September 2018, the Alabama Board of Dental Examiners sent SmileDirect a cease-and-desist letter, explaining that the company's retail employees were engaged in the unauthorized practice of dentistry. Alabama dental regulations limit the use of "digital imaging machines" to licensed dentists or those working under the supervision of a licensed dentist, and actual insertion of a device device into a patient's mouth may only be done under the direct supervision of a licensed dentist, meaning the dentist must be physically present.

Using these definitions, the board had determined that SmileDirect employees taking photographs of patients' mouths—accomplished, in part, through the use of a camera inserted into their mouths—is the practice of dentistry. Because no licensed dentist was present at the facilities, that practice was thus unauthorized

In reaction to the letter, SmileDirect and Leeds brought suit against the board and its individual members, citing the federal Sherman Antitrust Act and the U.S. Constitution's Due Process, Equal Protection, and Dormant Commerce Clauses. The plaintiffs claim that the board's members were wrongly acting to restrict SmileDirect in order to protect licensed Alabama dentists from competition.

The first issue addressed by the court was the potential immunity of the board from lawsuits. Although, under previous Alabama law, the board had been declared an arm of the state and was thus protected by the sovereign immunity provided to the states by the Eleventh Amendment, the plaintiffs argued that the board's actions leading to issuance of the cease-and-desist letter are not subject to that immunity because, under the particular circumstances of this case, the board cannot be considered a protected state entity.

One of the key factors courts weigh when deciding whether a state agency is an arm of the state for purposes of a lawsuit is the amount of control the state's other governmental bodies exert over the agency. The plaintiffs argued that the state had very little control over the board's creation of regulations and enforcement of unlicensed practice.

The earlier case in which the board had been found to be an arm of the Alabama state government was a labor case involving one of the board's employees; it was thus distinguishable from the current case, in which the board was acting as a policymaker, not an employer.

Judge David Proctor, hearing the case, disagreed. "Indeed, if anything, it seems likely that the state exercises *more* control over the Board's rulemaking and enforcement decisions than it does over its wage payments to employees." For instance, the judge noted, Alabama statute exerts considerable control over the board's rulemaking authority, defines the practice of dentistry, and limits the fines that the board may levy for unlicensed practice.

"In short, the state has established a number of mechanisms by which it exercises a degree of control over the Board's rulemaking and enforcement functions." Thus, the board, in its enforcement aspect, was an arm of the state protected by sovereign immunity. The court had no jurisdiction to hear lawsuits against it.

The plaintiffs' suits against the individual board members were a different matter. Under U.S. Supreme Court precedent, Judge Proctor wrote, "the Eleventh Amendment does not bar suit against state officials to prevent them from violating federal law."

Reviewing the substance of the plaintiffs' claims against the board, Judge Proctor ruled that Sherman Antitrust Act claims could thus proceed. Although the U.S. Supreme Court has created a sovereignty-based exception to the Act which allows states to purposely implement anti-competitive behavior, state entities comprised of market participants—such as the board—must be subject to review of any potentially anti-competitive actions in order to take advantage of that exception.

Drawing comparisons to the 2015 decision of the U.S. Supreme Court in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, Judge Proctor held that the Alabama dental board—being comprised almost entirely of dentists—was such a potentially anti-competitive actor and would either need to show that it was implementing an explicit statutory prohibition when it sent its cease-and-desist letters, or was sufficiently supervised by the state to meet the exception to the antitrust laws.

In an attempt to show that the board was simply implementing such an explicit state statutory directive, the board defendants argued that, because state statute requires the supervision of a licensed dentist when dental staff use "digital imaging machines," and because SmileDirect employees used a digital camera inserted into patients' mouths to take the pictures that would be sent to an off-site dentist for analysis, the board was only implementing such an explicit state directive by informing SmileDirect that it was engaged in the unlicensed practice of medicine.

However, Judge Proctor held that the question of whether the cameras used by SmileDirect employees are "digital imaging machines" and thus subject to the prohibition, was a question of fact that could not be determined on the board's motion to dismiss. The level of supervision the state exerted over the board's authority to police such conduct was also an undetermined question of fact.

The board defendants provided documents they claimed showed oversight of the board's promulgation of the relevant regulations. But Judge Proctor did not find them adequate to prove the board's case for summary review, so the case would be heard by a trier of fact.

In addition to the Sherman Act, Judge Proctor also ruled that the plaintiffs had adequately pleaded a potential violation of the Dormant Commerce Clause, the section of the U.S. Constitution that prohibits states from unduly interfering with interstate commerce in order to advantage in-state actors.

Given that the board's policies prohibited out-of-state dentists from practicing remotely even within the state, and that the plaintiffs had raised a sufficient question of whether the board's prohibition of SmileDirect's sought to further a legitimate state interest, the claim could not be dismissed in a summary judgment, explained the judge.

Last, Judge Proctor dismissed the plaintiffs' equal protection and due process claims. The “rational basis” test under which such claims are tested in a case such as the one brought by the plaintiffs is overwhelmingly favorable to state policy decisions: as long as a legitimate goal for the legislation conceivably existed, the state would only need to prove that a rational basis existed for the state to believe that the legislation will further that goal.

As the judge noted, the state was able to identify several conceivable public health and safety goals that could be furthered by the requirement that a licensed dentist be present during SmileDirect’s imaging procedure, thus the state could mandate that dentist’s presence without violating the plaintiffs' constitutional rights.

The court closed the case by dismissing all the complaints except those against the individual board members under the Sherman Antitrust Act and the Dormant Commerce Clause.

Court shoots down revocation over board failure to justify punishment harsher than guidelines

Issue: Due process in setting disciplinary sanctions

The Florida nursing board imposed a disciplinary sanction beyond its own guidelines and failed to explain that deviation, a Florida court found March 27. It reversed a board decision to revoke the license of a nurse who had been convicted of burglary. (*Brewer v. Board of Nursing*).

The Florida Board of Nursing initiated a complaint against nurse Donna Brewer after she pleaded no contest to a burglary charge and then failed to report that conviction to the board. The board eventually revoked Brewer’s license permanently and she appealed.

In disciplining Brewer, the board appears to have violated its own disciplinary guidelines. Those guidelines declare that the disciplinary sanctions for a no contest plea to a first-offense burglary charge—such as that pleaded to by Brewer—range from a simple reprimand to a $10,000 fine and a suspension.

The guidelines do allow the board to deviate from that range, but only “upon a showing of aggravating or mitigating circumstances by clear and convincing evidence.” Among the listed circumstances which can authorize such a deviation from the guidelines is “[t]he deterrent effect of the penalty imposed.”

Unfortunately for the board, the court held that it had failed to sufficiently show the existence of an aggravating circumstance that would allow it to increase Brewer’s punishment beyond the normal maximum of a suspension and fine.

At the hearing in which the board addressed Brewer’s case, Judge Jay Harvey III noted that the board had spent just two minutes on the topic before voting on Brewer's penalty, during which time the board’s legal counsel had simply read the charges, advised the board to find a violation, and then recommended that the board go beyond the disciplinary guidelines and revoke Brewer’s license given "the matter of record,” the fact that “burglary is a serious crime,” and the rationale that license revocations have a deterrent effect. The board then unanimously voted to revoke the license.

“In the present case,” wrote Judge Harvey, “the evidence ‘of record’ upon which the Board relied to find the offense ‘egregious’ and the sanction of revocation a ‘deterrent’ was not just ambiguous, it was nonexistent."

" . . . There was nothing in the record before the Board, or stated with particularity by the Board in its Final Order, elucidating the circumstances of Brewer's offense that would render it more egregious than the offense of burglary already contemplated by the rule. Nor did the Board explain how deviating upward to the revocation of Brewer's license would act to deter her from committing further burglaries any more than would imposing the maximum sanction of a '$10,000 fine and suspension' for a first offense as provided in the Board's rule."

"In short," he concluded. "there was no clear and convincing evidence before the Board to support its departure from the recommended range of sanctions." The board had thus abused its discretion, the court ruled, overturning the decision to revoke Brewer's license.

Board sufficiently justified treatment and referral regulations of non-licensed clinic owners

Issue: Compliance with rulemaking requirements

Regulations that imposed new restrictions on non-dentist dental clinic owners were adequately justified by the board, an appellate court in New Mexico held March 13, dismissing a challenge of the amendments to the state dental code (*Pacific Dental Services, Inc. v. New Mexico Board of Dental Health Care*).

In January 2017, a committee of the New Mexico Board of Dental Health Care gathered to discuss and vote on the regulatory changes at issue in the suit. One change required non-dentist owners of dental clinics to adhere to the same record-keeping requirements as licensed dentists, who are required to maintain patient records for six years after ceasing practice.

A second change stated that no person without a dental license could have control over a dental licensee's treatment decisions, including decisions on where to send referrals or laboratory services.

A third would prevent dental clinic owners, whether licensed or not, from requiring a licensed employee to issue a referral or choose a laboratory based on contractual obligations, if the licensed employee believed another referral or laboratory would be more beneficial to a patient.

Over the objections of Pacific Dental Services, which argued that the proposed rules were redundant in light of already-existing rules and improperly targeted non-dentist owners, the board adopted all three rules at its next regular meeting. Pacific Dental challenged the regulations in court, re-stating its earlier objections and arguing that the board had failed to provide an adequate statement of reasons for passing the amendments.

The Court of Appeals of New Mexico disagreed, finding that the motivations for the passage of the changes had been sufficiently expressed by the board.

Although neither the committee assessing the proposed changes nor the full board had real, substantive discussions about the purpose of the new amendments, members of the board had made comments at the initial public meeting to discuss the proposed regulations, and those comments provided sufficient information about the board's motives.

Before the review committee, board members provided anecdotes of records that were inadequately kept *despite* existing requirements and stressed that any seeming redundancies would help the affected owners be more aware of their responsibilities and ensure that no gaps existed in the requirements. Members

also related incidents in which non-dentist-owned practices pressured licensed dentists into performing extra procedures to increase profits.

Pacific Dental complained that the board had never formally issued any findings or explicitly adopted the reasonings of the board members' statements, but the court noted that the board is not required to expressly enunciate its findings of fact as long as it informs the public and the review committee of its reasoning.

The board members had informed the public during their comments, pointing to several concerns with non-dentist-owned practices that the rules were intended to remedy.

Although Pacific Dental Services argued that the board members' publicly-stated concerns were just "conjecture" and thus insufficient as support for the new rules, the court countered by noting that all of the public commenters, including the board members, were local licensed dental professionals, and many of the comments were based on firsthand knowledge of local dental issues.

"The roots of Plaintiff's argument appear to be that the Board should have given credence to Plaintiff's opinions and not those of the other commenters," wrote Judge Linda Vanzi. "However, we will not reweigh the evidence, nor substitute our judgment for that of the board."

Licensing

Arizona aims to set national standard for recognizing out of state licenses *(from page 1)*

physical therapy to medicine, dental hygiene, and teaching will be recognized in Arizona.

Governor Doug Ducey, using a pair of prop scissors to cut an enormous stretch of literal red tape as part of the bill-signing, declared the measure is "pure common sense."

"Whether you're a plumber, a barber, a nurse or anything else, you don't lose your skills just because you pack up a U-Haul truck and move. If licensing, qualifications, training, and expertise meet Arizona standards, let's grant them an Arizona license and let them work." Governor Ducey's office projects that about 100,000 people will move to Arizona from out of state in 2019.

Although several states have applied a similar concept by passing licensing reciprocity laws that apply to military spouses, universal license recognition is an idea no other state has tried, he pointed out. "We believe this can be a model for the rest of the country to unleash economic opportunity," Ducey said.

Steven Grennhut, a senior fellow with R Street Institute, a conservative think tank in Washington, DC, agrees. "Legislators in capitols across the country should emulate this bill. It's silly to prevent one state's resident from working in another state until that person goes through an entire training process that he or she has already completed somewhere else," Greenhut said in April.

Ducey has taken on occupational licensing regulations in earlier initiatives. In 2017 he issued an executive order requiring that state licensing boards review and provide justification for every rule that the governor's office deemed excessive.

Arizona's new law in brief

To obtain licensure in Arizona under the new law, which amends A.R.S. § 32-4304, professionals licensed by another state must:

--Declare Arizona as their primary state of residence;

--Be currently licensed or certified in good standing, in the same occupation at the same level being applied for in Arizona;

--Hold a license/certificate in another state for a minimum of one year;

--Have a license/certificate in another state that has minimum education requirements and work/clinical requirements, as applicable, and verification by the other state that they have met those requirements;

--Have passed any exam required by the other state;

--Never previously had a license/certificate revoked or surrendered while under investigation for unprofessional conduct;

--Have no prior discipline in any state, unless it has been corrected/resolved. (If not, the application process is suspended until the discipline is resolved);

--Pay all applicable fees;

--Have no disqualifying criminal history pursuant to A.R.S. §41-1093.04; and

--Provide fingerprints and pass a criminal background check through the state Department of Public Safety and Federal Bureau of Investigation.

He also signed the "Right to Earn a Living Act" which prevented states from issuing any new occupational licensing rules that can't be justified on health and safety grounds. "Too many of these boards and commissions exist to stop competition, to stifle and protect the status quo," he said. "We're changing that in Arizona."

In a 2017 study of 102 common licenses for low-income jobs by the Institute for Justice, Arizona was ranked the fourth most "burdensome" state because of the cost of obtaining licenses—on average $612—and the average number of days to obtain the licenses: 765.

The professions governed by Title 32 of Arizona state law, which the new law amends, include accountants, acupuncturists, architects, athletic trainers, barbers, behavioral health professionals, chiropractors, collection agencies, contractors, cosmetologists, dentists, embalmers, engineers, funeral directors, geologists, health professionals, home inspectors, landscape architects, physicians (allopathic, homeopatic, naturopathic, osteopathic, and their assistants), massage therapists, nurses, occupational therapists, opticians, pharmacists, physical therapists, podiatrists, postsecondary school teachers, professional driver training agents, psychologists, radiologists, real estate appraisers and agents, reporters (stenographers), respiratory care workers, surgeons, surveyors, and veterinarians.

But several licensing boards and professional associations have raised concerns about the new law.

Among them is the National Board of Certified Counselors (NBCC), which opposed the bill. The organization, which is working on improving counselor licensure portability along with other professional counselor organizations, says "A person could move to Arizona and be granted a license even if their previous state has much lower licensure requirements. NBCC believes a secure mental health counselor portability licensure process ensures that consumer protections are in place."

The Arizona Board of Technical Registration has requested clarification from the governor and state attorney general concerning the bill, because of fears that architects, engineers, geologists, home inspectors, landscape architects, and surveyors may actually face additional difficulty in obtaining an Arizona license because of the bill's residency requirements. The board licenses some people who wish to work in Arizona but do not live there and will not meet the residency requirement.

The effect of the new law upon large licensed occupations is likely to be sizable. For example, about 39,600 contractors in the state hold a license from the Registrar of Contractors. Under the new law, out-of-state construction workers may move to Arizona and, if they qualify, the Registrar will waive experience requirements and trade examinations, sparking fears of an increase in the construction worker labor pool that might saturate the market, leading to lower wages or increased joblessness.

Arizona's barbers and cosmetologists, however, already have reciprocity with other states. The State Board of Cosmetologists confirmed that it will issue a license approximately two to three weeks after an application is filed if an individual holds a license from another state and is in good standing with that state."

The State Board of Dental Examiners is one that has revamped its application forms to comply with the new law. But many elements of state licensure will not change. The law allows agencies to continue administering

some tests to issue a license. For example, the State Board of Pharmacy charges out-of-state applicants $500 to take an exam on Arizona law, and that requirement will continue. Traditional options for out of state professionals such as nurses remain in place: for instance, a multistate nursing license under the nurse licensure compact will not change, nor will licensure by endorsement.

Misdemeanor disorderly conduct not moral turpitude

Issue: Parameters of conduct implicating character

The Commonwealth Court of Pennsylvania, in an April 10 ruling, overturned a decision by the state's nursing board to discipline a licensee for a conviction of disorderly conduct, disagreeing with the board that the crime—a misdemeanor—was of sufficient moral turpitude (*Dunagan v. Bureau of Professional and Occupational Affairs, Board of Nursing*).

In 2015, nurse Venus Dunagan was criminally charged for growing marijuana in her apartment. In the end, the drug charges were dropped, but she pleaded no contest to a misdemeanor charge of disorderly conduct. The state's licensing authorities followed by filing a disciplinary charge based on that conviction.

During the disciplinary process, the state conceded that Dunagan was capable of safely practicing, and a hearing examiner eventually concluded that the actions that led to her conviction did not constitute crimes of moral turpitude, a category of crime defined—essentially—by heinousness, which would subject her to discipline regardless of whether her particular offense was related to her practice.

Unfortunately for Dunagan, the board disagreed with the decision of hearing examiner, finding that her conviction for disorderly conduct—specifically, disorderly conduct during the execution of a search warrant—was, in fact, a crime of moral turpitude and suspending her license for six months.

Definition of "moral turpitude, 22 Pa. Code §237.9(a): (1) That element of personal misconduct in the private and social duties which a person owes to his fellow human beings or to society in general, which characterizes the act done as an act of baseness, vileness or depravity, and contrary to the accepted and customary rule of right and duty between two human beings. (2) Conduct done knowingly contrary to justice, honesty or good morals. (3) Intentional, knowing or reckless conduct causing bodily injury to another or intentional, knowing or reckless conduct which, by physical menace, puts another in fear of imminent serious bodily injury.

Dunagan appealed, arguing both that the board's decision to discipline her for a disorderly conduct conviction was not related to the public safety or welfare and that the board was wrong to determine that disorderly conduct is a crime of moral turpitude.

The board agreed with Dunagan. The crime of disorderly conduct, as defined in Pennsylvania law, did not rise to the level of abhorrent behavior necessary to be classified as a crime of moral turpitude.

"One may be convicted of disorderly conduct as a misdemeanor in the third degree for a variety of behaviors, including persisting in making an unreasonable noise, using obscene language or gestures, or creating a hazardous or physically offensive condition by any act serving no legitimate purpose to the actor," wrote Judge Patricia McCullough.

"Moreover, disorderly conduct, even graded as a third degree misdemeanor, is wholly unlike the crimes which this Court has previously deemed crimes of moral turpitude, such as mail fraud, theft by deception, conspiracy to possess and distribute controlled substances, etc."

The board having erred, its decision was reversed.

Order for licensee to relate lessons learned, and warn board if he intended to return to practice, not a sanction

Issue: Distinction between disciplinary sanctions and other orders

An Iowa court, in a March 6 decision, upheld the dismissal of an attempted appeal by a doctor who had been ordered to submit a report to the state medical board informing them in advance if he ever intended to return the practice.

The court ruled that, although the letter seemingly imposed certain requirements on the physician licensee, it was, in fact, only advising the licensee to take the listed actions *(Irland v. Iowa Board of Medicine*).

The case began when the Iowa Board of Medicine issued physician Mark Irland a "Confidential Letter of Warning" regarding a questionable incident of treatment, as well as the revocation of his clinical privileges at a hospital, which resulted from that incident. In the letter, the board directed Irland to submit a report within 60 days stating what he had learned from the incident.

Additionally, although the board declined to actually sanction Irland's license because he was currently not practicing, it required him to provide it 60 days' notice before ever resuming practice and it notified him that he would likely have to undertake a comprehensive clinical examination before any return.

Irland filed for a court review of the letter, but a state district court concluded that the document was not subject to judicial review, as the issuance of a letter was not a disciplinary sanction and did not constitute a formal order of the board that would be subject to review. Irland appealed that decision, and the case went up to the Court of Appeals of Iowa.

Irland contended that the letter was, in fact, a disciplinary action because it imposed real requirements on his license in the form of the report to the board and the need to provide early notice to the board if he decided to return to practice. Thus, the letter, Irland argued, imposed disciplinary sanctions while not allowing him to contest any formal charges.

Unfortunately for Irland, the court agreed with the board that the letter was not a disciplinary sanction. The letter, Judge David Danilson explained, was actually the closing of Irland's case *without* sanction, an action that cannot be reviewed by a court. "There is no dispute the Board may issue 'an informal letter of warning' when there has been no disciplinary action taken and, if no such action is taken, the physician may not seek judicial review," wrote Judge Danilson.

Although appearing to impose a requirement that Irland to submit a report on his actions and provide it notice before returning to practice, the board had couched its language by using the word "advise," a seemingly sufficient vocabulary trick to avoid the formal appearance of an order in the eyes of the court.

"We acknowledge the letter of warning is colored with advisories that have the appearance of sanctions," wrote Judge Danilson. "The identification of specific dates when the Board expects action to be completed, as well as identifying a specific sanction—a comprehensive clinical competency evaluation that will occur if Irland returns to the practice of medicine—have the markings of sanctions. However, the paper and the sixty-day notice before practicing medicine are not mandatory; rather the action is simply advised. Further, there is no identifiable repercussion if Irland does not comply with the actions that are 'advised.'"

Last, although the board stated that it would subject Irland to a clinical competency evaluation should he return to practice, the appropriate time for an appeal to the court system would be when he would actually challenge such an order.

The court affirmed the decision of the lower court to dismiss the case.

Board officials entitled to quasi-judicial immunity for disciplinary decisions

Issue: Immunity of hearing officials for licensing decisions

Hearing officials with the state Gaming Control Board are entitled to quasi-judicial immunity for licensing decisions, a federal court in Michigan concluded March 15, dismissing claims that the board violated three licensees' constitutional rights to be free from self-incrimination (*Moody v. Michigan Gaming Control Board*).

The plaintiffs in the case were several harness-racing drivers licensed in Michigan, subpoenaed to appear before the board to face allegations of race fixing in 2010. Before their scheduled hearing, a police detective called the drivers' attorney to inform him that the drivers would be arrested and criminally charged following the hearing.

With potential criminal charges in mind, the drivers then pleaded their Fifth Amendment rights to be free from self-incrimination at the hearing, refusing to answer questions or produce their financial records.

Citing the refusal to cooperate, the panel of stewards conducting the case suspended the drivers' racing licenses following the hearing, and later additionally prohibited them from accessing state-regulated racing facilities. The drivers appealed the suspension and simultaneously filed suit in state court seeking injunctive relief, but initially declined to file an appeal of their ban from state-licensed facilities.

In 2011, the three drivers re-applied for their racing licenses, but were denied on the grounds that the drivers had failed to timely appeal their facilities-access ban and would thus still be excluded from state-licensed facilities, although the board later granted a hearing on that issue after the drivers filed a formal request for review.

The drivers then brought a suit for damages against several Gaming Board officials, alleging violations of their civil rights through the Board's disciplinary case against them. The case eventually reached the U.S. Court of Appeals for the Sixth Circuit on two separate occasions, which eventually reversed a district court's dismissal of the case.

The Court of Appeals held that the state had violated the drivers' rights to be free from self-incrimination by punishing them for their invocation of the Fifth Amendment, and that the question as to whether the drivers had received an adequate chance to plead their case in opposition to the facilities-exclusion order was undecided. The case was then remanded to a federal district court for further consideration.

The drivers' victory was short-lived. On remand, the district court moved on to new issues and granted summary judgment for the board defendants on the self-incrimination issue, on the grounds that the Gaming Control Board stewards were entitled to quasi-judicial immunity, a type of immunity provided to agency officials in positions functionally equivalent to that of judges.

Analyzing the functions of the stewards and the procedural structure under which they make their decisions, the court held that the function of the stewards was similar to that of a judge, and that several procedural safeguards—such as the ability to seek review of their decisions—were sufficient to protect the rights of the licensees subject to those decisions.

"The roles that these quasi-judicial actors played in Plaintiffs' disciplinary proceedings closely resembled that of a judge, and the safeguards in place mirrored those available throughout the judicial process," the court wrote

The plaintiffs also alleged that the board construed their license re-applications as an appeal of their exclusion order, and then failed to schedule a timely hearing on that matter. They sought summary judgment on that question, but the court held that the question involve a genuine dispute of facts which would have to be heard.

Panel not required to prove that applicant intentionally lied about felony conviction

Issue: Standards of proof for disciplinary decisions

The state real estate board was not required to show that a licensee knew his answer to an application question—in which he failed to report a felony conviction for stealing from his clients—was false, a Pennsylvania court held March 6. The decision upheld a disciplinary decision by the state's real estate board to revoke the license of agent Bryan Hawes (*Hawes v. State Real Estate Commission*).

Hawes, licensed in Pennsylvania as an investment advisory and insurance salesman, owned a company called Financial Management Advisory Services. In that capacity, he stole more than $2 million dollars of his clients' investment money, eventually pleading guilty to a felony mail fraud charge in 2004 and receiving a prison sentence.

In 2013, Hawes applied for a Pennsylvania real estate license. In his application, he falsely answered "no" to a question asking if he had ever been convicted of a felony. Pennsylvania's Real Estate Commission granted him a license later that year, but in 2016, the state's Bureau of Professional and Occupational Affairs moved to revoke that license, based on that false statement.

Hawes claimed he mistakenly believed that he did not need to declare the existence of his nearly-decade-old felony conviction, but the hearing examiner in charge of the case, noting that relevant disciplinary law did not require that Hawes's false statement be made intentionally, and also that any reasonable person would have realized that reporting Hawes's felony was mandatory. The hearing examiner recommended that the Commission revoke his license and issue a civil penalty. The board agreed, adopting those recommendations.

Hawes appealed the decision, arguing that the Commission was required to prove that he made the false statement intentionally. He argued that the language of the law governing real estate license discipline, which prohibits the making of a "false representation, or . . . fraudulent act or conduct" to obtain a license, was ambiguous on the question of the applicant's intent, and thus the statute should be interpreted leniently towards a disciplinary defendant.

The court held that the statute's meaning was not ambiguous, and that the board did not have an obligation to prove that Hawes acted intentionally. "False representation," Judge Christine Fizzano Cannon wrote for the court, "has a precise legal meaning" that does not take into consideration the intention or beliefs of the speaker.

"Here," she continued, "there is no dispute that Hawes had been convicted of a felony in federal court and that he responded 'no' to the question on the application asking whether he had ever been convicted of a felony in a federal court . . . Hawes knew that his representation was false when completed his initial licensing application, as he pled guilty to the felonies."

Having rejected Hawes's argument, the court upheld the disciplinary decision of the board.

Court reverses denial of license for applicant's lack of remorse for drug crimes

Issue: Candidate remorse for crimes as factor in approving license

A Pennsylvania court, in a March 27 decision, overturned a decision by the state's medical board to deny a license to an applicant who had been convicted of controlled substances charges, ruling that the board improperly construed the applicant's testimony as to his limited role in the events leading to his conviction as a lack of remorse.

The board also failed to elaborate on a finding that the applicant was no longer technically competent, the court found. (*Elder v. Bureau of Professional and Occupational Affairs*).

In 2008, physician Christopher Elder was convicted of several controlled substance charges for violations concerning his prescription authority while practicing in Texas, and sentenced to 15 months in prison. The case grew out of the illicit use of six prescriptions written by Elder which were duplicated and sent out of state without his knowledge, but Elder was found to have acted with gross negligence.

Citing the conviction—as well as the lack of good moral character that it indicated—the Texas Medical Board suspended Elder's license in 2010 and then refused to renew it in 2014.

That same year, Elder applied for a Pennsylvania license, but the Pennsylvania Board of Medicine denied his application, citing the convictions. At a hearing on that application, he presented a mitigatory case to the board, describing the volunteer work he was undertaking, explaining that he had been duped and used by the other parties in the criminal conspiracy for which he was convicted, and noting that he did not financially benefit from the sale of the drugs and had a very limited involvement in the conspiracy.

Several witnesses testified or submitted letters on his behalf, also noting his work with indigent patients and mentorships to at-risk youth. In addition, the hearing examiner in the case determined that the Elder's federal felony convictions did not constitute felonies under Pennsylvania's Controlled Substance, Drug, Device and Cosmetic Act, and thus those convictions could not authorize a license denial in Elder's case.

In denying Elder a license, the board cited that part of Elder's testimony in which he minimized his involvement in the conspiracy, holding that it underscored Elder's inability to come to terms with the "gross negligence" that he had engaged in, and pointing out that the federal court record portrays Elder as having a greater role in the conspiracy than he claimed at the administrative hearing.

The board also held that, as someone who had not practiced since 2010, Elder would need to complete a skills evaluation and remedial program, and that

he had failed to complete the 100 biennial continuing education hours required of Pennsylvania physicians.

In his appeal, Elder contested the board's finding that his mitigatory explanations of his conduct in the felony case showed that he did not possess the proper amount of remorse. The court agreed, noting that Pennsylvania case precedent dictates that a license applicant may explain the extent of their role in criminal convictions that involved multiple defendants.

The board, Judge Mary Leavitt explained, had thus erred by drawing an adverse inference from Elder's explanation. Noting the ample evidence that Elder had presented of his remorse, Judge Leavitt wrote that "the board simply made a subjective determination that was contrary to that of the hearing examiner, who directly observed Elder and his witnesses, and accepted his evidence on remorse."

Elder also argued that the board incorrectly weighed the negative factor of his conviction against the evidence of his good character and rehabilitation.

The court agreed, describing Elder's conduct leading to his convictions as "remote and . . . an isolated event," and writing that the board "did not take into account its own findings that Elder's conduct since 2004 has been not only free of criminal conduct but dedicated to significant volunteer work and public service activities."

Regarding the board's determination that Elder had not maintained his technical competency during his time without a license, Judge Leavitt wrote that, although the board did not err in finding that Elder was no longer technically competent, it had failed to address what Elder needed to do in order to be competent.

"We recognize that the Board is not required to accept the Hearing Examiner's findings of fact, conclusions of law, or recommendations and has the discretion to impose disciplinary sanctions on applicants . . . However, the Board needed to identify, with specificity, the training Elder needs in order to qualify for a medical license in Pennsylvania."

Further, although the board had recommended that Elder undertake a program of practice assessment and re-education, its final adjudication did not provide any specific directions for him. This was an error, the judge explained. "The Board needs to identify the specific programs that Elder must complete to demonstrate proficiency in medical science."

The court remanded the case back to the board.

State can deny license for licensee's failure to report own daughter's abuse

Issue: Nexus between ethics violation and licensee's actual work

A state appellate court in Colorado, in a March 7 ruling, upheld a decision by the State of Education to deny a license renewal to a teacher who had failed to report her husband's abuse of their daughter, holding that no nexus was required between her failure to report and her work as a teacher (*Heotis v. Colorado State Board of Education*).

The Board denied the license renewal of teacher Sharman Heotis after Heotis was convicted of a criminal misdemeanor for failing to report to authorities that her husband had sexually abused their daughter. The board based the denial on

both Heotis's conviction and on the grounds that her failure to act was unethical behavior punishable under the state's Teacher Licensing Act.

> Colorado law requires that certain professionals, including public school employees, who have "reasonable cause to know or suspect that a child has been subjected to abuse or neglect" must immediately "report or cause a report to be made of such fact to the county department, the local law enforcement agency, or through the child abuse reporting hotline."

Heotis appealed the denial, arguing that provisions of the Teacher Licensing Act cited by the board in her disciplinary decision were unconstitutional because the Act failed to provide for a range of sanctions for misconduct—which would allow the board to issue a lesser sanction than the complete denial of her license—and arguing that the board did not have the authority to discipline her for failing to report the abuse of her daughter because that action was unconnected to her work as a teacher. The case rose to a state court of appeals, which issued a decision affirming the board.

The Act, Heotis argued, differed from other licensing statutes by failing to provide a variety of options to the board from which to choose her disciplinary sanction. By way of example, she pointed out, when choosing to discipline a licensee, the state's dental board has the authority to choose whether to deny the renewal of a license, place a license on probation, issue a letter of admonition to licensee, or levy a fine.

This argument failed to convince the court, who noted that different level of discretion afforded to a different board did not amount to a constitutional violation. "Heotis cites no authority, and we are not aware of any such authority, that supports the notion that the greater disciplinary flexibility in these other licensing statutes represents some constitutional minimum," wrote Judge David Furman.

Moving on to Heotis's argument that the Teacher Licensing Act did not mandate that she report the abuse of her daughter in her role as a parent—as opposed to abuse she encountered in her role as a teacher—the court again found against the teacher. The state's Child Protection Act imposes mandatory requirements on teachers to report child abuse, Judge Furman noted, and did not contain an exception for teachers who encounter abuse in their role as a parent.

Heotis's status as the parent did not create a valid excuse, the judge wrote. The Child Protection Act "imposes a duty to report any known or suspected abuse or neglect on 'any person' who is a public school employee; the statute does not specify any circumstances under which the person must learn of the suspected abuse or neglect to be subject to this reporting duty."

"In other words, the reporting duty imposed on mandatory reporters by [the Act] applies irrespective of the circumstances in which the reporter learns of or suspects abuse or neglect. . . Heotis had a statutory and moral duty to report the abuse of her daughter even though she learned of the abuse in her personal family life and not while working in her professional capacity."

Last, the court determined that the board had not acted excessively in denying Heotis her license. The administrative law judge hearing her case had determined that, by failing to report the abuse, Heotis had subjected her daughter, as well as other children who came into unsupervised contact with her husband, to further risk.

This finding was sufficient to support the board's decision that Heotis engaged in unethical behavior that "offended the morals of the community," the legal standard under which the board could discipline her license.

Having rejected Heotis's arguments, the court upheld the board's denial of her license.

Licensee cannot "contract out" of duties required by state licensing law, court rules

Issue: Practice act duties when contracting out work

An appellate court in Colorado held, in a March 7 decision, that licensed real estate brokers cannot enter into contracts that waive duties delineated by the state's professional broker laws (*Colorado Real Estate Commission v. Vizzi*).

In 2013 and 2014, John Vizzi, a real estate broker licensed in Colorado, entered into brokerage contracts with three clients that limited his responsibilities for their properties to a level below what is usually required for brokers in his position under state regulation.

After the receipt of an anonymous complaint against Vizzi, the state's Real Estate Commission charged him with entering into contracts that improperly waived his responsibility to fulfill the statutory duties that accompany his license. After the disciplinary process concluded, the Commission publicly censured Vizzi, required him to take additional continuing education requirements, and assessed him a $2,000 fine.

Vizzi appealed, arguing that Colorado law permitted him to contractually limit his statutory duties and that the Commission's disciplinary action against him violated federal antitrust law.

Under Colorado law, licensed real estate brokers must act either as a single agent—representing one party—or as what's known as a transaction-broker, who assists with a real estate transaction but is not the agent for either the buyer or the seller. The state defines such a transaction-broker as one "who assists one or more parties throughout a contemplated real estate transaction . . . and the closing of such real estate action without being an agent or advocate for the interests of any party to such transaction."

The statutes and their accompanying regulations go on to define the responsibilities of these brokers, and it was these duties that Vizzi argued he could permissibly contract away.

However, the specific statutory language quoted above caused Vizzi's argument to fail. Judge Diana Terry, writing the court's opinion, stated that use of the words "throughout" and "and" in the statute indicated that the legislature intended a transaction broker to assist throughout an entire transaction, including all the numerous and mandatory duties for such brokers listed elsewhere in the statute. Thus, the sort of unbundled services that Vizzi contracted for, Judge Terry wrote, are impermissible under this statutory law.

Although Vizzi argued that the statutorily-listed duties were merely defaults and thus subject to contractual limitation, the court again disagreed. "If the transaction-broker duties . . . were mere defaults, a transaction-broker . . would be able to contract out of the required statutory duties and, in essence, cease acting as a transaction-broker or single agent as defined by statute," wrote Judge Terry.

"Allowing Vizzi to disclaim the role of transaction-broker would contravene the statutory scheme . . . The relevant statutes were drafted to create the role of transaction-broker and distinguish it from the role of single agent, and not to enable licensed real estate professionals to avoid the statutorily required duties of a transaction-broker."

The court also rejected Vizzi's antitrust claims. Although the actions of the Commission may be anticompetitive, Judge Terry wrote, those actions fall within an exception to otherwise impermissible anticompetitive actions carried out by sovereign state actors under a clearly articulated policy and actively supervised by the state.

That active supervision requirement was satisfied by the statutory provisions which authorize the Commission to discipline brokers who violate state license laws.

The court differentiated the current case from the 2015 U.S. Supreme Court case dealing with anticompetitive board actions, *North Carolina State Board of Dental Examiners vs. Federal Trade Commission* (in which the high court found that board engaged in impermissible anticompetitive behavior by improperly regulating teeth-whitening services).

The earlier case, said Judge Terry, hinged on the lack of proof indicating that the North Carolina legislature intended its dental board to regulate that service. Here, there was no doubt about the Colorado legislature's intention.

The court affirmed the board's decision, ending the case.

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