Professional Licensing Report

Licensing, testing, and discipline in the professions

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Testing

Board does not have immunity, U.S. court rules in accommodations case

Issue: Damages due for license candidates denied ADA accommodations

The New York State Board of Law Examiners is an arm of an agency that accepts federal funding and the board is thus not entitled to immunity under the Eleventh Amendment of the Constitution for suits under the federal Rehabilitation Act, a federal judge ruled September 18 (*T.W. v. New York State Board of Law Examiners*).

The board denied an aspiring attorney (who is not named in court documents) her requested accommodations when she took the state's bar exam in 2013 and 2014.

The candidate eventually passed the exam in 2015, but brought suit against the board on the grounds that its denials of her requested accommodations were violations of both the Americans with Disabilities

*See **Testing**, page 12*

Licensing

With "Deregathon" Florida changes rules to reduce regulatory burden

Issue: Campaigns to deregulate occupational licensure

Since January 2019, spurred by Governor Ron DeSantis, the state of Florida has been on a deregulatory binge in matters relating to employment—with the emphasis upon occupational licensing.

On October 8, DeSantis announced some of the results of his administration's "Deregathon" in a laundry list of 50+ specific rules adopted across a range of licensing boards.

The rules revised or eliminated provisions DeSantis considered "unnecessary, burdensome regulations and barriers to Floridians looking to pursue their dreams."

Highlights of the new rules:

• A change giving asbestos contractor and consultant applicants three attempts on the licensing exam before they need to reapply.

• A 50% decrease in application fees for the athlete agent license, lowering it from $500 to $250;

Idaho governor Brad Little's variation on Florida's Deregathon in 2019 was a "Red Tape Reduction" executive order that requires boards to specify two rules they can get rid of before they are allowed to adopt new ones.

EO 2019-02 mandates that all Idaho state agencies with the authority to issue administrative rules designate a Rules Review Officer and identify at least two existing rules to be repealed or significantly simplified for every one rule they propose.

The order also requires agencies to submit a business/competitiveness impact statement that identifies the impact any proposed rule will have on individuals and small businesses.

• Elimination of the personal financial statement in the application for electrical contractor licensure;

• Reduced education and experience required for certified residential appraisers from 2,500 to 1,500 hours and replaced four-year college degree requirement with advanced coursework;

• Streamlining of veterinarian licensure by requiring all fees up front, with the application, to allow the Department of Business and Professional Regulation (DBPR) to automatically issue a license within 48 hours upon receipt of a passing examination score by the applicant;

• Loosening of the Boxing Commission's zero tolerance policy for prohibited substances to "reflect world-recognized standards, enabling more athletes to obtain licenses and compete";

• Removal of the cosmetology licensing board requirement that applicants complete remedial hours if they fail the licensure exam two or more times;

• Online, self-printing of licenses for certified public accountants, cosmetology, barbers, landscape architects, auctioneers, and building code administrators and inspectors—also allowing for no-fee renewal;

• Lowering of the biennial renewal fees for real estate licensees by 50%, providing an $8.8 million savings to licensees;

• Expansion of veterinary services authorized to be offered by Limited Service clinics to include micro-chipping of animals.

The governor's "global licensing" bill —which would allow Florida counties to recognize each others' occupational licenses— and sunset bill (eliminating boards that are not specifically reauthorized periodically by the legislature) remain on the wish list until the legislature acts on them.

Oversight and deregulation continue as national themes in state legislatures

Issue: Legislative trends

Throughout 2019, key trends in state legislatures were to open licensure to groups formerly excluded such as people with a criminal record, end the use of student debt to deny a license, join more interstate compacts, bolster sunrise and sunset programs, and adopt several other new mechanisms to deregulate occupational licensing on the premise that much of it reduces competition, restricts worker mobility, and raises costs to consumers.

All states introduced at least one bill on occupational licensing, according to the National Conference of State Legislatures.

Of 1,229 bills considered nationally, 449 were enacted—many concerned with oversight and operation of state licensing boards and paring down the

number of boards through sunrise and sunset bills. The new laws include measures that:

• Prohibit licensing boards from hiring lobbyists to influence state policymakers on behalf of the board (West Virginia).

• Allow “universal reciprocity” for many licensed occupations so that residents with other states’ licenses can practice there (Arizona and Pennsylvania).

• Prevent licensing boards from automatically rejecting applicants due to their criminal history alone (Alabama, Maryland, Illinois, and several other states).

• Prohibit licensing boards from revoking an occupational license based on student loan status (Louisiana).

• Join interstate licensure compacts to accept all states’ licenses (physical therapy and advanced nurse licensure, among others).

WV high court rejects denial of licensure for excessive debt

Issue: Debt as factor in weighing fitness to practice

The Supreme Court of Appeals of West Virginia, in a September 9 decision, overturned a ruling by the state's Board of Bar Examiners to reject the admission of a candidate who had a large amount of debt, ruling that the money owed was not sufficient evidence of poor character or unfitness to practice (*Howell v. West Virginia Board of Bar Examiners*).

In 2010, the same year that Tammy Howell graduated from law school, she also declared bankruptcy to discharge approximately $350,000 in loans taken out to fund her husband's construction business.

Due to that bankruptcy, after she passed the West Virginia Bar Exam the next year, the board decided that it would only license Howell conditionally for two years, a condition that was repeated in 2015 and 2017.

During the second two-year period, Howell accrued tax liens against both herself and the construction business while deferring her law schools loans.

After the third conditional admission, Howell submitted a repayment plan to the board. But in October 2017, the board informed Howell that it intended to not admit her to practice because she had failed to begin making payment on her debts by that time.

Following a hearing, the board followed through on that decision, recommending denial of Howell's unconditional entry to practice on the grounds that her financial difficulties were evidence that she lacked the necessary character and fitness to practice. Howell appealed and the Supreme Court took up the case.

The justices found in favor of Howell, ruling that her financial difficulties were not evidence of her poor character or fitness to practice. However, the language of the opinion indicates that the court was not completely ruling out the possibility of excessive debt as the basis for denial of licensure, seeming to base its ruling on the specifics of Howell's case.

"Although petitioner's fiscal responsibility during each of her periods of conditional admission has not been perfect, she has not engaged in any conduct that indicates she would pose a risk to her clients or to the public," wrote the court.

"Likewise, the totality of the circumstances regarding petitioner's past and present financial situation does not render her unfit to engage in the practice of law. In fact, the record demonstrates that petitioner is making significant progress to satisfy all outstanding debts in compliance with the conditions imposed by the board."

Having rejected the board's reasoning, the court granted Howell unconditional admission to practice.

Discipline

Board not obliged to explain why it revoked license and rejected milder sanction

Issue: Board discretion to impose sanction without providing rationale against lesser options

An appellate court in California reversed a decision by a lower court to throw out a decision by the State Board of Pharmacy in a September 23 ruling. The ruling restored the revocation of the license of a pharmacist who had twice been disciplined for serious lapses in record-keeping.

The lower court was incorrect to reject the board's decision for failing to sufficiently explain why it did not choose a sanction other than revocation, the appellate court found (*Oduyale v. California State Board of Pharmacy*).

Although Solomon Oduyale, the pharmacist at the center of the case, was never charged with a crime, his troubles began with a 2002 arrest after which a police search of his car uncovered a plethora of controlled substances in various containers—some of which were actually recovered from the car's rear floor-boards—as well as over $4,000 in cash and a wooden billyclub with a metal tip.

In the end, however, Oduyale was apparently able to provide sufficient explanations for his possession of the various drugs, and the incident generated no serious immediate consequences. However, in 2004, the board inspected the pharmacy that employed Oduyale and found several errors and missing files in his records, inconsistencies in the pharmacy's record-keeping practices, and other inappropriate conduct.

During this administrative process, an administrative law judge hearing the subsequent disciplinary case seemed to sympathize with Oduyale, writing that he was an otherwise-good pharmacist but "played fast and loose with some of the rules when it comes to helping his poor or elderly customers." In the end, the board placed Oduyale on probation, which he completed in 2009.

When Oduyale applied to the board for a license for a new pharmacy in 2010, the board initially declined his application, but eventually entered into a settlement agreement allowing the new business to proceed with a probational license.

Unfortunately for Oduyale, he had not improved his practices since his earlier disciplinary episode. A January 2013 inspection by the board of Oduyale's found several prohibited practices: Oduyale changed instructions on prescriptions, dispensed drugs for prescriptions that were on incorrect forms, falsified prescription verifications, and expiration dates.

A new round of disciplinary charges based on those and other lapses followed and this time the board revoked Oduyale's personal license.

Oduyale appealed and met with some success, leading to a back-and-forth between the board and the court system. A lower court set aside several of the board's causes for discipline and remanded the case for the board to reconsider the sanction. However, on remand, the board again revoked Oduyale's license, on the grounds that his inability to conform to pharmacy law indicated incompetence and a potential for harm to the public.

Undeterred, Oduyale appealed again, arguing that revocation was too harsh a sanction, and a reviewing court again reversed, holding that the board had failed to explain whether it had explored lesser disciplinary sanctions than revocation and, if so, why those lesser sanctions were rejected.

The board appealed, and Oduyale's case went up to a state Court of Appeals, which issued a decision in the board’s favor.

Rejecting Oduyale's argument that the board had an obligation to explain why it had not issued a lesser sanction than license revocation, Justice Richard Huffman, writing for the majority, held that the board was not required "to outline all the reasons it opted not to impose a lesser form of discipline. It is only required to justify the penalty imposed . . . There is no legal requirement to explicitly discuss, consider, and explain the rejection of all forms of discipline short of the one selected."

Examining the board's stated rationale for the revocation decision, the court found that the board had sufficiently connected its findings and its decision to revoke Oduyale's license. The court had reviewed the professional misconduct found by the board and noted several serious charges, particularly Oduyale's failure to maintain proper records of his controlled substances and the resulting overage of pills in his pharmacy.

Although Oduyale attempted to downplay the seriousness of his misconduct by noting that most of his offenses were only for poor record-keeping, Judge Huffman wrote noted that "poor record-keeping is cause for concern because absent appropriate documentation, there is opportunity for theft, diversion, and abuse."

"The Board's conclusion that Oduyale's responses to these causes for discipline were cavalier and lacked an understanding of the serious nature of the misconduct support its determination that these violations are evidence that Oduyale is unfit to practice," Huffman continued, and a tendency by Oduyale's to lie to board investigators was evidence of his dishonesty.

"Although there is evidence of Oduyale's kindness and generosity, this evidence does not eliminate the potential harm he created or allay concerns about his repeated violations, which occurred even after a previous opportunity for rehabilitation.”

“ The nine sustained causes for discipline, coupled with Oduyale's disciplinary history, demonstrate a reasonable mind could reach the conclusion that revocation was the appropriate disciplinary action here."

The Court of Appeals reversed the lower court and ordered it to restore the board's revocation decision.

Agency must formally set prohibited levels if a substance is banned

Issue: Specificity of disciplinary provisions

An appellate court in Ohio upheld a lower court's rejection of discipline imposed by the state's Racing Commission in a September decision, holding that the Commission was required to formally set a specific amount of a banned substance in order to discipline licensees for its presence in a horse (*Farina v. Ohio State Racing Commission*).

In January 2016, a urine sample from a racehorse trained by licensed trainer Anthony Farina tested positive for 3-methoxytyramine, or 3-MT, a prohibited substance that, when present, indicates a trainer's manipulation of a horse's dopamine levels.

Following a hearing, Commission race judges at the park where the race was held suspended Farina's license for a year and imposed a $1,000 fine.

Farina appealed that decision to the Commission proper and, during a hearing, several potential errors in the judges' decision became apparent. The Commission's director, Sooben Tan, testified both that he was unsure whether the Commission had actually established a prohibited level of 3-MT by formal order and that the substance is not actually included on the prohibited substances chart displayed on the Commission's website.

Additionally, at least two of the track judges who issued the initial decision stated their incorrect belief that 3-MT was a substance that does not naturally occur in horses; the substance does occur in small levels, and jurisdictions that ban the substance prohibit it only at certain concentrations.

The judges who disciplined Farina referred to a four-microgram-per-milliliter cap on 3-MT contained in guidelines from the Association of Racing Commissioners, and Farina's horse tested for 20.2 micrograms. And two judges were also not able to explain how Farina actually violated the specific rules cited in his disciplinary case.

Despite these issues, the Commission upheld Farina's discipline and added an additional $1,500. Farina appealed again, and the case went up to a county court, which reversed the Commission's order on the grounds that the Commission had never actually formally established prohibited levels of 3-MT, and that the track judges based their decision on state rules prohibiting any "foreign" substance, a label they had incorrectly applied to 3-MT.

The Commission appealed this decision, and the case went up to a state Court of Appeals, which issued a decision September 26.

On appeal, the Commission argued that, because tests had detected an amount of 3-MT in Farina's horse more than 14 times the naturally-occurring amount, it had sufficiently established the presence of a foreign substance as that term is defined in state law.

The presence of an unnatural amount of the substance in the horse's system, they argued, obviated the need to formally establish prohibited levels of 3-MT.

The appellate court disagreed with this argument, holding that the Commission was required to set specific levels of the prohibited substance. Although the Commission had argued that it properly relied on recommended guidelines set by the Association of Racing Commissioners International, the court ruled that such reliance could not take the place of a required formal order.

"Because Farina was found in violation of a standard that had not been established by a properly promulgated rule or properly adopted rule, and there is no evidence in the record that the Commission had issued an order adopting the ARCI guidelines as to 3-MT, the Commission's order was not in accordance with law and is, therefore, invalid," wrote Judge Jennifer Brunner.

The judges affirmed the dismissal of Farina's discipline.

Remand decision not subject to appeal, state high court rules

Issue: Status of remand as non-appealable decision

The Supreme Court of Wyoming held October 24 that an appeal of a lower court's decision to remand a disciplinary case back to the state's Board of Medicine was improper, as an order to remand a case to the board cannot constitute a final, appealable decision (*Painter v. McGill).*

In 2007, physician Rebecca Painter formed a personal relationship with an elderly patient, who, before her death in 2015, gave Painter power of attorney and several other formal positions of control in the patient's financial affairs. Painter compensated herself for her time in these matters, paying herself nearly $43,000, including $35,000 after the patient's death.

Following a complaint by the patient's niece, the Wyoming Board of Medicine opened a disciplinary process against Painter, eventually ruling that her relationship with the patient was exploitative and violated professional law. The board suspended Painter for five years and imposed a $15,000 fine plus legal costs.

Painter appealed. A state district court upheld the board's finding that Painter had exploited her patient but reversed a conclusion that Painter had exploited the patient's relatives, a finding that she had violated several sections of law for which expert testimony would have been required but had not been obtained, and the decision to impose legal costs. The court then remanded the case to the board for further proceedings and a re-evaluation of the costs to be imposed.

Both Painter and the board appealed from that decision, and the case went up to the state Supreme Court, which held that the case had been improperly appealed and that the high court had no jurisdiction to hear it.

Under Wyoming appellate procedure rules, a state district court order remanding a case back to an agency for further proceedings is not appealable. For that reason, although the district court, in its order, had written that the decision to remand the case was "final," the Supreme Court held that in fact, it could not be.

Painter argued that, because the lower court had left the balance of the board's decision intact—including the suspension of her license and the imposition of the fine—she was thus entitled to appeal those findings without having to wait for a remanded decision, but the justices disagreed.

Noting that "the ultimate effect of the district court's order is to leave substantial matters unresolved, namely, the number and nature of violations supporting the Board's decision to suspend her license," Justice Keith Kautz wrote that "It is imperative . . . that we allow the Board to resolve all outstanding matters to avoid piecemeal appeals."

Having concluded that the lower court's order was not subject to appeal, the Supreme Court dismissed the case for lack of jurisdiction.

Court rejects attempt by convicted doctor to re-try charges against him before discipline panel

Issue: Status of criminal convictions in disciplinary process

A state appellate court in Ohio, in an October 22 decision, rejected an attempt by a physician to challenge the facts underlying his guilty pleas in several felonies by arguing that he had only pleaded guilty to avoid the risk of conviction on dozens of other charges.

The licensee's time to challenge the allegations against him was during the criminal process, the court said (*Moore v. State Medical Board of Ohio*).

In 2016, physician John Moore III pleaded guilty to several felonies related to his practice, including drug trafficking and Medicaid fraud, and was sentenced to 20 months in prison and ordered to pay $80,000.

When the state's medical board began a disciplinary procedure based on those convictions, Moore argued that he should be able to question the validity of the criminal charges to which he pleaded guilty by introducing mitigating evidence of his plea calculations.

"I thought it was the best way to resolve the mess of a situation at this time," considering the many criminal charges he was facing, he explained. The board, apparently unimpressed with this argument, revoked his license.

Moore appealed, and the case eventually rose to the state Court of Appeals for the 10th District.

On appeal, Moore continued to argue that he should have been allowed to introduce evidence casting doubt on the actions underlying his convictions, claiming that the hearing officer conducting his board case had arbitrarily forbidden his witnesses to testify and excluded his exhibits and objections.

Basically, Moore argued that he had pleaded guilty to seven felony charges only to avoid risking conviction on all 44 for which he was originally charged, and, therefore, the board should take that avoidance motivation into account to cast doubt on the truth of Moore's underlying conduct for that convictions and allow him to introduce evidence on those points.

He also argued that an Ohio law stating that criminal convictions are conclusive proof of the elements of the underlying crimes for the purposes of licensure disciplinary cases is unconstitutional.

This argument did not sway the court, and the judges declined to allow Moore to challenge the validity of his convictions.

"Ohio's court system afforded Dr. Moore the appropriate processes for contesting the criminal charges against him, and the medical board did not need to offer an avenue for collateral attack on his convictions," wrote Judge Frederick Nelson.

Additionally, regarding Moore's rejected witnesses, the court agreed with the reasoning of the hearing officer in Moore's case, who ruled that, even if Moore's witnesses had shown that law enforcement had entrapped him or run a poor investigation, none of it would contradict his guilty pleas as conclusive proof of his actions.

Having rejected Moore's arguments, the court affirmed his license revocation.

Court overturns revocation because complaint filed too late

Issue: Procedural errors and disciplinary actions

The Supreme Court of Idaho vacated a permanent license revocation order by the state's engineering and surveying board October 4 on the grounds that the formal complaint issued by the board to begin disciplinary proceedings was filed after the statute of limitation had passed (*Erickson v. Idaho Board of Professional Engineers and Professional Land Surveyors*).

In 2010, licensed surveyor Chad Erickson made a series of errors while surveying a parcel of land for a client, erroneously attributing ownership to his client of a parcel owned by a local highway district and moving a marking monument on the grounds that it was misplaced, actions which eventually led to litigation between his clients and their neighbors.

In 2011 and 2015, the Idaho Board of Licensure of Professional Engineers and Professional Land Surveyors received separate informal complaints against Erickson from his former client and the neighbors.

Following an investigation, the board filed its own formal complaint and the matter went into disciplinary proceedings.

Erickson's board proceedings were eventful. During those proceedings, Erickson petitioned a district court for review of the case, and, when the court dismissed his case for lack of jurisdiction less than a week prior to the beginning of his board hearing, Erickson requested and was denied a continuance by the board.

He then procedurally fought the board's proceeding, moving to disqualify board members and an expert witness for bias and moving for a mistrial, and asking again for a continuance.

Then, following a denial of that latest motion for continuance, Erickson left the proceedings, stating that he needed a break, and did not return.

Proceeding without Erickson, the board found that he had committed serious professional violations and revoked his license.

Erickson appealed, and a district court found that, although the board's findings were supported by evidence, the revocation it imposed on Erickson was unreasonably harsh, and it remanded the case for reconsideration of those sanctions. Erickson appealed again, and the case went up to the Supreme Court.

On appeal, all of these proceedings became moot when the court threw the case out on the grounds that the board failed to timely file a complaint against Erickson.

More than four years had elapsed between the board becoming aware of the allegations against Erickson and the time it filed a formal complaint.

Under Idaho's administrative regulations, complaints against licensees must be filed within two years after discovery of a matter. The board became aware of Erickson's alleged unprofessionalism prior to May 2011 but did not file a formal complaint until October of 2015. It was, thus, time-barred.

Having rejected the charges against Erickson for lateness, the court vacated his license revocation.

Lower court cannot throw out disciplinary decision by substituting own judgment for board's

Issue: Courts' standard of review in appeals of discipline

The Court of Appeals of Mississippi reversed a decision by a lower court against the state's Board of Nursing September 17, holding that the judge of that court improperly threw out a disciplinary decision of the board after re-weighing the evidence against the disciplined nurse at the center of the case (*State of Mississippi Board of Nursing v. Hobson*).

In 2014, nurse Ann Hobson tested positive for Demerol following an apparent break-in of a narcotics lockbox at the hospital where she worked.

The hospital fired her, and the board followed with disciplinary charges. After disciplinary proceedings, the board suspended Hobson's license for six months.

Hobson appealed, arguing that the board had insufficient evidence to discipline her, specifically challenging the results of the hospital's specimen collection and sampling that found Demerol in her system. The sample attributed to her—which had tested positive—was actually that of a different person, she claimed.

A state chancery court reversed the board's disciplinary decision, noting "concern" with factual elements of the case, including the presence of a birthday party near the lockbox at the time of the theft, issues with the chain of custody of the materials from the drug screening which found Demerol in Hobson's system, and the absence of Normeperidine, a metabolite of Demerol, in Hobson's system.

The board appealed that decision, and the case went up to a state Court of Appeals, which upheld Hobson's discipline.

The appellate court did not find Hobson's arguments persuasive, overruling the lower court's acceptance of her challenges to the board's factual findings. The chancery judge had based his decision to overturn the board his own evaluation of the evidence in the case, and the Court of Appeals found such a re-evaluation of the board's evidentiary decisions improper.

"The question before the court was not whether the agency's decision was subject to 'concerns,' as outlined by the chancellor, but 'whether there was substantial evidence to support the finding of the administrative agency,'" The court said.

"The court[s] may not substitute [their] own judgment for that of the agency which rendered the decision, nor may we re-weigh the facts of the case," wrote Judge Latrice Westbrooks for the court, citing case precedent.

Having held that the board's decision was properly made, the Court of Appeals reversed the judgment of the lower court and reinstated the suspension of Hobson's license.

Court rejects use of lapsed license as loophole to avoid discipline

Issue: Disciplinary authority of boards over lapsed licensees

An appeals court in Minnesota upheld a decision by the state's Board of Psychology to discipline a psychologist who sexually abused a minor patient but then let his license lapse before the disciplinary process had begun. The court held that a failure to renew does not "terminate" a license such that the board no longer has disciplinary authority over that licensee (*In re License of Thompson*).

In 2016, the board received complaints that psychologist Herman Thompson had sexually abused a teenage patient a little over a decade earlier. The following year, the board sent a notice to Johnson's attorney that it was going to take action. Johnson let his license lapse that June, but the board continued with the proceeding, eventually revoking his license.

Johnson appealed, arguing that the board had no authority to discipline him because his license had lapsed before the board served notice that it was initiating disciplinary action against him. Minnesota law authorizes the board to discipline "applicant[s] or licensee[s]," and Johnson argued that he was neither at the time of the board's action.

This is a common argument from disciplined licensees, and most states either have either explicit statutory or regulatory law or case precedent preventing the use of such a loophole.

However, the issue did not appear to be quite settled in Minnesota, and, when the case went up to the Court of Appeals there, the court stated that the law was "ambiguous" and took the question seriously, but ultimately issued a decision against Johnson September 23.

Analyzing board regulations, Judge Matthew Johnson agreed with the interpretation "that the board's disciplinary authority extends not only to psychologists whose licenses have been terminated but also to psychologists whose licenses have not yet been terminated . . . The board's interpretation prevents a psychologist from escaping responsibility for misconduct that occurred while licensed simply because his or her license no longer is valid."

"The board of psychology is authorized to commence and maintain a disciplinary proceeding against, and to impose discipline on, a psychologist whose license no longer is valid because it was not renewed, so long as the license has not been terminated."

Thus, Thompson's decision not to renew did not mean his license had been lapsed when the board's disciplinary proceeding began, and the board still had authority to discipline him.

Thompson also tried to argue that the board's action against him was time-barred, as state law requires board proceedings to be initiated within seven years of the alleged misconduct. However, Minnesota law provides an exception for sexual misconduct by licensees.

Having rejected Thompson's arguments, the court upheld his discipline.

Agency has no power to fine unlicensed person for stonewalling investigation

Issue: State licensing agency authority over non-licensees

A Utah court, in an October 18 decision, overturned a $250,000 fine imposed on an unlicensed financial adviser for his failure to cooperate in an investigation, finding that the state's Department of Commerce did not have the authority to issue such a fine (*Ashton vs. Department of Commerce and Securities Commission*).

The defendant in the case, Steven Ashton, is an insurance agent, but the company he runs, One for the Money Financial, was engaged in giving financial advice. The website for the company declared that one of its services is to "provide financial planning services" and contains at least one testimonial from a client for whom the company handled 401k funds.

Ashton, who is not a licensed investment adviser, also held himself out as such in other places, with a particular focus on retirement planning, and held free seminars in which he recommended against advising in financial securities, then sold annuities as an alternative, for which he received a commission.

When the state's Division of Securities opened an investigation into Ashton in 2014, Ashton did not cooperate. He failed to produce requested documents, continuing to do so even after agreeing to turn over his papers after the Division had filed for a court order.

Following a disciplinary hearing, the state's Securities Commission issued an order prohibiting Ashton from continuing to practice as an unlicensed investment adviser and fined him $250,000 for his obstruction of the Department's investigation. Ashton appealed, and the case rose to a state Court of Appeals, which issued a decision upholding the Commission's basic finding but overturning the fine October 18.

In his appeal, Ashton challenged the Department's finding that he had violated an unlicensed-practice statute but failed to challenge a similar finding that he had violated a board regulation prohibiting unlicensed practice. Either finding was sufficient to incur the sort of penalties the Department applied, and so the court rejected his challenge to the conclusion that he had violated the law.

However, Ashton had more success challenging the Department's decision to fine him for stonewalling the investigation. He claimed that the board did not have power to impose such a fine. On this, the court agreed, noting that the Department simply did not have the authority to issue such a sanction.

The section of law cited by the board to fine Ashton, Judge David Mortensen wrote for the court, "provides no mechanism to fine or sanction an investigated party for noncompliance with an ongoing investigation." As such, that fine could not be based on Ashton's lack of compliance.

The court vacated the fine and returned the case to the Department to determine what portion of the sanction could be based on the finding of unlicensed practice alone.

"Beyond a reasonable doubt" standard of proof an anachronism now, says Scottish panel

Issue: Standards of proof for professional discipline

What should be the standard of proof in disciplinary proceedings? For Scottish attorneys, it should not be the same as the civil standard of proof "beyond a reasonable doubt," said the Scottish Legal Complaints Commission in a 2019 response to the Scottish Solicitors' Discipline Tribunal.

The Commission, which acts as the gateway for all complaints about solicitors, or lawyers, said "our general view is that for all legal complaints, the standard should be "on the balance of probabilities."

The civil legal standard of "beyond a reasonable doubt" is now anachronistic in risk-based professional regulation both in the United Kingdom and beyond, the Commission adds in its report.

Most other professional regulators "moved away from this approach some time ago," the Commission said, citing disciplinary rules in the U.K. for teachers, social services, health professions, and actuaries.

The Commission listed three main benefits of replacing the outdated and far stricter standard of 'beyond a reasonable doubt" with "on the balance of probabilities":

• It ensures that public interests are at the forefront rather than those of legal professionals, who may otherwise evade disciplinary sanctions due to evidential, or what is often perceived as "technical" reasons.

• It would increase public confidence in an process that would deliver a fairer, more cost-effective, consistent and moderate approach to disciplinary regulation , and

• It would facilitate faster resolution of disciplinary matters, allow prosecutions to be more proportionate, and through its efficiency and effectiveness, save costs for the profession as a whole.

Testing

No immunity for board against test accommodations suit *(from page 1)*

Act and the Rehabilitation Act and that, by causing her to lose a job at a law firm, those denials had caused her monetary damage.

In response to the suit, the board claimed immunity under the Eleventh Amendment of the federal Constitution, which bars plaintiffs from bringing suit against non-consenting states in federal court.

Although Congress stated its intent to abrogate this type of immunity when it passed both the Disabilities and the Rehabilitation Acts, the board argued that the Rehabilitation Act, in particular, did not apply to the board because it did not accept any federal funding.

The Rehabilitation Act prevents discrimination on the basis of disability by any program receiving federal funds. Under current state policy, two New York State agencies reimburse bar exam fees for candidates with disabilities and veteran candidates, but no fees are paid directly to the board by those agencies.

Although the board is, in spirit, the intended end-recipient of these funds, Judge Raymond Dearie, hearing the case, held that this second-hand transfer of money to the board was sufficient for the board to avoid being a legal recipient of those funds and, thus, subject to the Rehabilitation Act.

"The Board cannot prevent an eligible individual from being reimbursed [by a state or federal agency] because it is not involved in those agencies' decisions of who and how much to reimburse," Judge Dearie wrote.

"Therefore, if these reimbursements made the Board an indirect recipient of federal funds, the only way it could protect its sovereign immunity would be to prevent anyone potentially eligible for a federally funded reimbursement from taking the bar exam—an absurd result."

However, although the board, itself, does not accept federal funds, Judge Dearie held that, as an arm of a state agency—New York's Unified Court System—that *does*, the board was nonetheless subject to the Act. The board argued that it was only nominally connected to the court system and should thus be considered independent, but the judge disagreed.

"It stands in a unique position within that branch given its responsibilities," Dearie wrote, "but it does not function so independently that it should be considered a separate department from the rest of [the System] . . .It must rely on [the System] and the Court of Appeals to carry out its operations," including such things as payroll and benefits, and for filling job vacancies, and the board's funds must still be appropriated by the legislature as part of the Court System's overall budget."

Additionally, he wrote, "the legislature clearly intended that the Board would function under the supervision of the Chief Judge and the Court of Appeals . . . Such strong administrative ties usually indicate that an entity is not independent."

Having thus ruled, Dearie rejected the board assertion of immunity and returned the case to a lower court for further proceedings.

Competition

Court dismisses monopoly charges against American Board of Internal Medicine

Issue: Private professional certification organizations and antitrust law

A federal court in Pennsylvania, in a September 26 decision, dismissed a complaint by several physicians unhappy with the re-certification process of the American Board of Internal Medicine, rejecting the plaintiffs' claims that the Board certification process is maintained as an improper monopoly and that the board makes misleading claims about the benefits of certification (*Kenney v. American Board of Internal Medicine*).

The Board issues private certification for internists, for which it requires periodic re-certification and continuing education credits, which its certificate holders must purchase from the Board. Doctors licensed when the Board issued life-long certification, prior to 1990, are grandfathered into the system and do not need to participate in continuing education requirements.

Additionally, since the 1990 change, the Board has periodically introduced additional certification maintenance requirements, each requiring an increase in payment or the time spent on maintenance. When a physician does not maintain certification, the Board keeps an entry for the person on its website, but lists them as "Not Certified."

The plaintiffs brought suit against the Board, claiming various inappropriate policies: That they are forced to purchase continuing education credits from the Board or forfeit their certification, meaning that the board has improperly tied its re-certification service to its initial certification, that the Board has created an improper monopoly for itself in those credits, and that the board had improperly induced other medical industry entities to require that physicians have their certification by misleading them about the benefits of certification.

Many hospitals, insurers, and other medical entities require Board certification for employment or participation, the plaintiffs noted, pointing out that they suffered exclusion following either their decisions not to renew their certification or their failure to meet the re-certification requirements.

Judge Robert Kelly of the U.S. District Court for the Eastern District of Pennsylvania issued a decision September 26, dismissing the case.

In response to the claim by the plaintiffs that the Board was improperly tying together two separate products—the initial certification and the continuing education credits—Judge Kelly disagreed, holding that the two were, despite appearances, parts of a single product. In both cases, wrote the judge, doctors are simply purchasing certification from the Board.

"Internists are not buying 'initial certification' or 'maintenance of certification,' but rather ABIM certification," he concluded.

The judge also disagreed with the plaintiffs' assertion that the Board maintained an improper monopoly over its re-certification credits, holding that the Board' control over such programs was the only feasible option. "Through offering its own [Maintenance of Certification] program, ABIM has full control over the standards required to achieve certification," Judge Kelly wrote.

"It would entirely alter the nature of the certification if outside vendors could re-certify internists and potentially disrupt the trust hospitals, patients, and insurance companies place on the ABIM certification." Third-party certification credits were simply not feasible without the permission of the Board, he said.

Finally, Judge Kelly held that the plaintiffs failed to show any anti-competitive conduct on the part of the Board. The plaintiffs' claims were based, in part, on a claim that certification by the Board did not actually have a beneficial impact on medical practice and that the Board had misled other entities in the health professions to believe otherwise.

However, the judge held in dismissing the suit, the facts of the case showed this was incorrect. "The . . . Complaint, itself, provides more reasonable and legitimate explanations as to why hospitals and medical service providers require ABIM certification, such as ABIM's long-established history of certification and its creation of a national standard to compare internists from different states."

Optometrist cannot dodge branch office license requirements by affiliating with ophthalmologist, court finds

Issue: Professional licensing involving different business structures

Optometrists in California who want to open a second office are not exempt from the state's branch office requirements, even if the new business location would combine the services of licensed optometrists and ophthalmologists, a state appeals court ruled in October (*Rudick v. State Board of Optometry*).

The licensee in this case, optometrist Anthony Rudick, is a 49% owner in a clinic chain, Ridge Eye Care. In November 2011, Rudick submitted an application for licensure for a Ridge location in the town of Magalia. The board denied the application.

Rudick, said the board, whose principal place of practice was another Ridge Eye Care location in the town of Paradise, as an optometrist with a financial interest in the new location but his principal place of practice elsewhere, would need to obtain a special Branch Office License. Rudick appealed that decision, and the case eventually rose to a state Court of Appeals.

Under California law, optometrists with an ownership interest in a practice must obtain a branch office license for any "offices" other than their principal place of practice. Rudick, in a somewhat novel claim, argued that the meaning of "office" in the relevant laws encompassed only other offices whose principal activity was the practice of optometry.

Ridge Eye Care, like many offices of its kind, combines both optometrist and ophthalmologist services, and Rudick claimed that such a combined business was thus not subject to the state's branch office requirements. The board contended that any place where optometry is practiced is an "office" covered by branch requirements.

California Optometry Practice Act, Section 3070, requires that:

Before engaging in the practice of optometry, each licensed optometrist shall notify the board in writing of the address or addresses where he or she is to engage in the practice of optometry and, also, of any changes in his or her place of practice. After providing the address or addresses and place of practice information to the board, a licensed optometrist shall obtain a statement of licensure from the board to be placed in all practice locations other than an optometrist's principal place of practice. Any licensed optometrist who holds a branch office license is not required to obtain a statement of licensure to practice at that branch office.

The court, in an October 11 decision, agreed with the board, with Judge Arthur Wick writing that the board's "interpretation is firmly rooted in the actual language of the statute."

"Simply put, 'office' means any office where optometry is practiced. Plaintiffs' interpretation, on the other hand, would have us read additional language into section 3077 . . . We decline to insert any restriction into an otherwise unambiguous provision."

Rudick made a second argument, claiming that, because both a section of California's Business and Professions Code which permits ophthalmologists to employ optometrists, as well as relevant sections of the state's Corporation Code —newer pieces of legislation than the provision requiring branch licenses—do not contain branch restrictions, the board's interpretation requiring a branch office license for combined offices could not be reconciled with those laws.

The court rejected this argument, as well. "The Legislature, when expanding the law to allow for closer business and working relationships between optometrists and other medical or health professionals, could easily have amended section 4077 to narrow the definition of 'office' or to limit or remove its branch office licensing requirements, as plaintiffs now propose," wrote Judge Wick.

The legislature's decision not to do so thus led the court to the conclusion that the new laws were not meant to alter the branch requirements.

Finally, the court acknowledged that the branch office requirement would create burdens on firms wanting to employ an optometrist to work at multiple locations, but concluded the incidental hardship was not within its power to remedy, since that hardship was created by statute.

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