Professional Licensing Report

Licensing, testing, and discipline in the professions

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Testing

COVID-19 pandemic sends many state licensing exams on furlough

Issue: Rise of virtual licensing exams

One side-effect of the national response to the COVID-19 pandemic emergency, which has imposed lockdown conditions in many states, is the indefinite tabling of many exam administrations, and the prospect that "live, in-person" testing could become a thing of the past. Since social distancing requirements, including bans on large gatherings, have made such exams impractical, states have chosen a range of creative measures to manage.

National test developer Pearson VUE, for example, which conducts proctored exams for many occupations, including real estate, appearance enhancement, and barber exams, closed all of its testing centers March 17; PSI Exams did the same March 19. While cancelling .

*See **Testing**, page 12*

Licensing

U.S. District Court, Eastern Pennsylvania

Federal court okays class action over foreign-graduate licensing

Issue: Licensing of foreign-trained professionals

A federal judge in Pennsylvania, on March 23, certified a class of patient plaintiffs in a suit against the Educational Commission for Foreign Medical Graduates, authorizing the plaintiffs' class action to proceed. The patients alleged that the Commission twice improperly certified a doctor, accused of sexual misconduct, who applied using false names (*Russell v. Educational Commission for Foreign Medical Graduates*).

The Commission is a private organization that verifies degrees from foreign educational institutions and administers tests of medical knowledge for the purpose of reciprocal licensure in the U.S. and Canada.

In 1992, license candidate Oluwafemi Charles Igberase applied to the Commission, passing its medical licensing exam on his third try and receiving certification. Two years later, Igberase apparently again applied for certification, this time under a false identity, changing his birth date and switching the order of his name to Igberase Oluwafemi Charles. The Commission approved this second certification as well.

The following year, the Commission discovered the deception and revoked both certifications, but in 1996 Igberase applied for certification yet again, this time using a false passport under the name John Charles. The Commission again certified him.

In 1998, Igberase began a residency at a hospital in New Jersey. Two years into that residency, the hospital asked the Commission to investigate Igberase because it had discovered that he had served in other residencies using his original last name. Igberase, maintaining his identity as John Akoda, contested the investigation, but was eventually dismissed from the hospital anyway for using a false Social Security number.

In 2006, Igberase began a second residency using the Akoda identity. This time he completed the program and successfully applied for a medical license in Maryland using false documents. He then began working at another hospital in that state.

Ten years later, in 2016, law enforcement officers searched Igberase's offices and discovered a trove of fraudulent documents, leading Igberase to plead guilty to a criminal charge of misusing a Social Security number. The Commission again revoked the certification, this time of the certificate issued to the false John Akoda identity. Additionally, Maryland revoked his medical license and he was fired by his employer hospital.

Following these revelations and legal actions, several patients of Igberase, alleging that he had engaged in inappropriate sexual behavior during his years of practice, brought suit against the Commission for improperly issuing its certification, and sought to certify a plaintiff class of all patients seen by Igberase.

The decisions of the court regarding certification of the class were mixed. All of the patients had the same basic claims against the Commission, but because Igberase's history of fraudulently applying for certification was so long, real differences existed between the actions the Commission took to investigate him at the different stages of his deceptions.

Patients of Igberase's prior to the Commission's 2000 investigation, prompted by his employer's inquiries, were in a different position than those who were his patients before that time, and the two groups of patients could therefore not be certified together as a class.

Additionally, Judge Wolson determined that the remaining plaintiffs could not be certified as a class for the issues of causation and damages, as those issues were too individualized for the different plaintiffs. "It is all but impossible to separate question of causation and harm from the individual damages that any plaintiff suffered," he wrote. "There would be little efficiency to be gained from such a certification because the evidence in the class action portion of the case would overlap with the evidence in the individual portion of the case. Presenting the evidence twice would eliminate any efficiency."

However, Judge Wolson did accept class status for the issues of the Commission's potential duties and breach of those duties. The judge noted that, "barring any exceptional circumstances . . . whatever duty (if any) ECFMG owes

to one proposed class member, ECFMG owes the same duty (if any) to the next proposed class member. Moreover, whether ECFMG has breached this duty is a common question of fact for each prospective class member, as the question looks to ECFMG's own conduct and not the conduct of individual class members."

U.S. District Court, Southern Mississippi

Court dismisses board director from eyebrow threading suit

Issue: Lawsuit against state official in official versus individual capacity

A federal court in Mississippi dismissed the executive director of the state's cosmetology board from a lawsuit filed against the board by two eyebrow threaders seeking to invalidate the state's licensing scheme as applied to their practice (*Bhattarai v. Fitch*).

The plaintiffs in the case, Dipa Bhattarai and Tyler Barker, were practitioners of hair threading, a method of hair removal practice that has been the subject of many licensure disputes in the last decade, as people who wish to engage in the practice are often required to obtain a full cosmetology license, something that practitioners claim is not necessary for the limited service they provide.

Bhattarai, despite lacking the required cosmetology license, operated two threading businesses in Mississippi. After the board got wind of her unlicensed business, an investigator issued her a fine and demanded that she cease business. Bhattarai, who says she possesses a "voluntary beautician certification from a private organization in Nepal," then applied for a reciprocal Mississippi esthetician license, but was turned down by the board.

Following that denial, Bhattarai and Barker, a hair threader who wanted to go into business with her, filed suit against the board and its officials, alleging that the state's cosmetology licensing scheme was not reasonably applicable to the practice of hair threading and thus violated their rights under both the federal and Mississippi Constitutions. The case went before the U.S. District Court for the Southern District of Mississippi.

In their suit, the two plaintiffs essentially argued that the burdensome training required by the state's cosmetology laws to obtain a cosmetology license was irrelevant and thus unnecessary to the practice of threading and a violation of their rights under both the state constitution and the U.S. Constitution. They sought a declaration that the licensing scheme was invalid as applied to them and an injunction against the board from enforcing it.

Among other motions that followed the filing of the suit, the executive director of the board, Sharon Clark, filed for dismissal from the case, and the court issued a decision on this issue April 10.

Regarding Clark, Judge Daniel Jordan, presiding over the case, held that, because Mississippi law explicitly includes eyebrow threading in the definition of cosmetology, the executive director of the board had no authority over the state's statutory or regulatory cosmetology regime and, thus, no power to alter it. Thus, she had no power to redress the plaintiffs' complaints and was not a proper subject of a lawsuit.

"The Board—not its Executive Director—has the statutory and regulatory authority over the regime Plaintiffs challenge," wrote the judge. "Said differently, there is no dispute Plaintiffs lacked the statutory and regulatory requirements to obtain a license, and Clark has no authority to amend that process or enforce the current system in any relevant way."

Additionally, listing the various board actions listed by the plaintiff as violations of her rights, Judge Jordan noted that all were actions of the board, not its executive director.

Although under board regulations Clark did have some authority as an "administrative review agent," as part of a screening process for board disciplinary actions, that authority only extended to cases involving complaints against licensees. Bhattarai and Barker were not licensees, and thus Clark had no direct authority over any case involving them, the court said in dismissing her from the suit.

"In sum, Plaintiffs failed to show that 'any act [Clark] has caused, will cause, or could possibly cause any injury to them' . . . Clark's powers are triggered if Plaintiffs obtain a license. Until then, any use of the authority upon which Plaintiffs rely is purely hypothetical and speculative. Plaintiffs failed to otherwise establish any likelihood that their alleged injury would be redressed by a favorable ruling against Clark; under Mississippi law, she is powerless to impact the prospective relief they seek."

Discipline

Arizona Court of Appeals

Licensee may not sue to prohibit investigation of complaint

Issue: Board authority to investigate anonymous complaints

In a rather complicated procedural case, an appeals court in Arizona ruled that a licensee who brought suit against the Arizona Board of Psychologist Examiners—seeking to prohibit it from opening a formal investigation based on an anonymous complaint regarding his practice—must allow a complaint screening committee formed by the board to evaluate the complaint, in order to decide whether the board should take up the case before the licensee can bring suit to stop it from going forward (*Gray v. Arizona Board of Psychologist Examiners*).

The primary practice of the licensee at the center of the case, Steve Gray, is the evaluation and treatment of convicted and accused sex offenders. In 2016, the board received an anonymous complaint alleging that Gray was allowing psychology students to treat those patients unsupervised, a situation the complainer stated was dangerous.

In response to a letter from the board informing him that it was investigating the complaint, Gray denied any misconduct and objected to the board's acceptance of an anonymous complaint as a violation of his due process rights.

The board scheduled a complaint screening committee to evaluate the complaint against Gray and invited him to participate, but Gray instead brought suit against the board before the committee could meet, seeking to force the dismissal of the complaint on the grounds that the board was not authorized by law to investigate the anonymous complaint in his case and additionally that any such investigation would be a violation of his due process rights.

After a state superior court rejected Gray's suit on the grounds that it did not have jurisdiction because he had not exhausted his options in the administrative process, he appealed to the state Court of Appeals. Gray argued that the lower court had erred in deciding that it did not have jurisdiction. He noted that the board's authorizing legislation prohibits the use of anonymous complaints as the

foundation for an investigation of a psychologist treating people charged with sex crimes "unless the court ordering the evaluation has found a substantial basis to refer the complaint for consideration by the board."

Gray claimed that he should be able to challenge the board's own jurisdiction of the case before a court prior to engaging in any formal administrative process.

The Court of Appeals rejected this argument. The board's establishing statute directs it to review all complaints through the use of a complaint screening committee before deciding whether the board should proceed, but Gray had simply brought suit before that committee could do its job. "The superior court got it right," wrote Judge David Weinzweig.

"Dr. Gray could have raised his present arguments directly to the screening committee, which twice asked him to attend and postponed its threshold consideration of the complaint when he did not. He could have explained that much of his practice is devoted to sex offenders and sex crimes, which means the Board must first ensure the complaint can proceed without a court order. Because he did not, the superior court did not abuse its discretion."

Regarding Gray's due process arguments, Judge Weinzweig pointed out that Arizona law forbids the board from disclosing the name of an anonymous complainant "unless this information is essential to proceedings." And, again, the time for Gray to argue that the name of the complainant *was* essential to his defense was before the screening committee, which he had attempted to short-circuit by filing his suit.

"Although an anonymous complaint may harm due process rights, warranting special action relief, Dr. Gray has not shown that's what happened here," wrote Judge Weinzweig. "He did not even attend the complaint screening committee meeting to assert or establish the argument, leaving the superior court and this court without sufficient information to evaluate his generalized due process claim." The board had not even yet decided whether the complaint came under its jurisdiction, the judge noted.

Gray also argued that he should be allowed to challenge the board's acceptance of anonymous complaints under Arizona's Administrative Procedure Act, which allows people to challenge agency rules in court. Although no formal written rule existed allowing anonymous complaints, Gray argued the board's acceptance of them amounted to a "de facto" rule.

The court again disagreed. The board's acceptance of anonymous complaints is not a rule, the court said in dismissing the suit, because "the Board has no written or formal rule of statement on the subject." Citing state court precedent, Judge Weinzweig wrote, "At most, the Board's investigation of anonymous complaints is merely 'part of the information-gathering process necessary to enable the board to make decisions' and a 'method of obtaining data' that 'aid[s] it in exercising its discretion.'"

Court of Appeals of Texas

Reversal of license revocation upheld over board's added findings of fact not backed by evidence

Issue: Board making independent findings of fact beyond those made by administrative law judge

The Court of Appeals of Texas, in a March 3 decision, upheld a lower court's reversal of a license revocation by the state's Real Estate Commission, holding that the Commission had improperly altered several findings by an administrative law judge who conducted hearings

for the case without providing evidence supporting those alterations (*Texas Real Estate Commission v. Riekers*).

The defendant, Josef Riekers, in addition to possessing a real estate license, was employed by the federal government as a special agent and firearms instructor for the Department of Health and Human Services. In that capacity, Riekers commingled some work ammunition—federal property—with his own personal ammunition, then traded some of that commingled ammunition for different calibers of bullets through the internet.

Riekers informed his employer of the trades and was charged with a federal crime for the thefts, eventually pleading guilty to one count of theft of government property, receiving a sentence of three years of probation, 500 hours of community service, and a small fine.

That conviction prompted the Commission to initiate discipline proceedings against Riekers. Following a hearing, an administrative law judge concluded that Riekers was fit to continue practicing under a probationary license. Unfortunately for Riekers, however, the Commission disagreed with the judge's recommended leniency and instead revoked his license.

Riekers appealed, arguing that the Commission's decision was arbitrary and that he had been denied due process. A trial court agreed and reversed the Commission's decision, the Commission appealed, and the case went up to a state Court of Appeals, which issued a decision March 3 upholding the reversal of the Commission's decision.

On appeal, Riekers argued that the Commission had failed to base its rejection of the administrative judge's recommendations on substantial evidence. The court, in an opinion by Justice Margaret Poissant, agreed, noting several questionable findings in the Commission's decision.

For instance, in making a finding that the administrative judge had not, the Commission had determined that Riekers was fired from his federal job. However, Riekers appears to have actually resigned that job, and the Commission had failed to introduce evidence that the resignation was anything but voluntary.

Additionally, the Commission found that Riekers had committed "a serious federal crime," despite the fact that he received no prison time or significant fines, and the fact that a letter from a federal judiciary department described him as a "low risk" offender who had committed a "low severity violation."

The Commission had also declared that Riekers was guilty of "stealing ammunition from a federal armory" and selling it through the internet, despite there being no evidence that he had either sold the ammunition or stolen it from an armory. He had only traded it for other ammunition, and appears to have already been in possession of the offending ammunition as part of his work.

Aside from those factual errors, Justice Poissant also took issue with the Commission's finding that Riekers's conviction was evidence that he was not fit to continue holding a real estate license. Analyzing the case through the use of a multi-factor test—laid in board regulations—for determining whether a criminal conviction indicates a lack of fitness, Justice Poissant found that most all of the test's factors weighed *in favor* of Riekers's maintaining his license.

Among other things, Riekers was a low-level offender with a record of good behavior and he showed willingness to cooperate with all stages of his prosecution and rehabilitation.

Additionally, although following the hearing the administrative judge had praised Riekers in glowing terms, in its final decision the Commission simply struck that passage without substituting any findings of its own about his fitness based on any proven point in the record.

"If the Commission can simply disregard the findings of the ALJ, then there is a lack of meaningful review of the Commission's findings, in contravention of the Legislature's express statutory provision for a . . . hearing," the justice wrote. "While we agree that the Commission has the discretion to modify the sanction, the Commission must provide a specific reason and legal basis for doing so."

"Here, the Commission relied upon facts not supported by the evidence, and other than stating that Riekers's theft conviction correlates to the fiduciary duties and relationship a real estate agent has to his client, did not specify a sufficient factual or legal basis for the modification from a revoked or probated license to complete revocation."

"The ALJ was specific in his findings of fact and conclusions of law as to the evidence presented and the basis for his findings; the Commission, however, was not."

Court of Appeals of Louisiana

Ex-licensee's appeal of loss on defamation claim frivolous, making him subject to sanction

Issue: Defamation charges arising from disciplinary proceedings

A litigious ex-private investigator licensee had no valid legal argument in making an appeal of a case in which he alleged that board members and staff of Louisiana's private investigator board defamed him during an earlier trial on another defamation claim, a state appellate court ruled April 1 (*Alexander v. Louisiana State Board of Private Investigator Examiners*). Given the deficient argument, board defendants were entitled to sanctions against the investigator, as well as all legal costs related to the appeal.

The investigator licensee in the case, Dwayne Alexander, was licensed by the board from 1997 to 2006. In 2000, the city of New Orleans hired him to investigate worker's compensation claims. Then, in 2006, he partnered with a third organization, Cannon Cochrane Management Services, and, despite letting his investigator license lapse in that year, continued his investigative work for the city under contract with that company from 2006 to 2009.

Alexander apparently believed that, under his contract with Cannon Cochrane, he no longer needed to be licensed to investigate claims for the city, although another factor leading to his decision to let his license lapse may have been that, prior to that action, the board had informed Alexander that he was under investigation as the result of two complaints of professional misconduct.

In 2009, another licensee investigator filed a complaint with the board regarding Alexander's continuing investigative work despite letting his license expire. The complainant, true to his profession, had compiled a binder of background information and evidence regarding Alexander's practice, and had sent copies of the binder to Cannon Cochrane, law enforcement officials, and a local television station.

Cannon Cochrane terminated Alexander's contract, and the board issued him a cease-and-desist order for unlicensed practice.

In May 2009, Alexander complained to the board that the cease-and-desist order, as well as its provision of records to the other investigator following a public records request, had been improper and had cost him his job with Cannon Cochrane and the city.

In 2011, Alexander returned to unlicensed private investigating, this time investigating a worker's compensation claim for a local school board. After receiving a tip about Alexander's activities, the New Orleans Metropolitan Crime Commission contacted the school board, prompting the board to ask local law enforcement to investigate Alexander, which in turn led to an arrest warrant for Alexander for unlicensed practice in June of that year. Alexander then turned himself in.

In January of 2013, Alexander filed suit against the investigator board, claiming that it had defamed him by issuing the 2009 cease-and-desist order. A jury found the board liable for defamation and abuse of process and awarded Alexander $300,000 in damages, but an appellate ruling held that his abuse of process and defamation claims based on the cease-and-desist order were time-barred.

Alexander then filed another claim against the board and several board officials, again alleging defamation, but this time his case was based on statements made by the board defendants during the earlier trial. A trial court dismissed the new claims, as well as sanctions motions requested by the board defendants. Both sides appealed, with the board defendants challenging the denial of sanctions and asking for an injunction prohibiting further suits by Alexander and additional sanctions for filing a frivolous appeal.

On appeal, the Court of Appeals of Louisiana for the Fourth Circuit awarded those sanctions. The defendants were entitled to attorney's fees and costs for the additional expense of the appeal, the court held, and the trial court had made additional errors on other sanctions motions.

The Court of Appeals also agreed with the board defendants that Alexander's appeal was frivolous. Alexander had filed at least 19 other state suits in the matter, in addition to numerous federal suits, to the point that a federal judge had actually ordered that Alexander not file any further federal cases and the U.S. Court of Appeals for the Fifth Circuit warned him that further suits would results in "progressively severe sanctions."

Here, the appeals court held that Alexander raised no substantial legal question in his appeal, making it frivolous; the court issued sanctions and appeals costs for each defendant.

U.S. Court of Appeals, Fifth Circuit

U.S. court restores emergency health law authorizing discipline of physicians performing abortions

Issue: Discipline of professionals for violating emergency state order

The U.S. Court of Appeals for the Fifth Circuit, in a pair of decisions on April 7 and 20, overturned a restraining order issued by a federal district judge prohibiting application of an emergency health order issued by the state's governor to prohibit abortions in the state.

The court held that the district judge had erred in finding the potential application of the order to abortion procedures was pretextual (*In re Abbott*). The plaintiffs in the suit had brought their case against the Texas Medical Board—

which had issued an emergency order and guidance implementing the governor's edict—as well as the state's Health Commission.

In response to the COVID-19 pandemic, on March 22 Texas governor Greg Abbott issued executive order GA-09 requiring that all licensed medical providers forgo non-urgent medical procedures. Providers were ordered to "postpone all surgeries and procedures that are not immediately medically necessary to correct a serious medical condition of, or to preserve the life of, a patient who without immediate performance of the surgery or procedure would be at risk for serious adverse medical consequences or death, as determined by the patient's physician."

The order further set out criminal penalties of up to $1,000 and 180 days in jail for violations, and the corresponding order issued by the Texas Medical Board threatened licensure discipline.

In late March, several abortion providers filed suit against the governor, the state attorney general, the state Health and Human Services Commission, and the Texas Medical Board to challenge the order, and a federal district court issued a temporary restraining order, holding that the health edict had the improper effect of banning all pre-viability abortions.

The state appealed, and the case went up to a panel of the U.S. Court of Appeals for the Fifth Circuit, which issued two lengthy decisions in succession, one evaluating the restraining order, and the other a request for a preliminary injunction against the order.

In the first decision, the circuit panel held that "the district court clearly abused its discretion and usurped the state's emergency powers." The panel dismissed any notion that the order was issued to pretextually ban abortions, noting that it banned many types of medical procedures, and ordered the district court to vacate its restraining order.

Following the decision in the first case, the district judge issued a new, more limited temporary restraining order on specific categories of abortion, prohibiting enforcement of the governor's order as "a categorical ban on all abortions," medication abortions, and abortions for any patient who would be more than 18 or 22 weeks pregnant at the expiration of the governor's order. The state again sought a writ of mandamus from the Court of Appeals, and the appellate court again held in its favor.

This time, the circuit panel held that the restraining order was not sufficiently narrow to accomplish its stated ends. The district court's prohibition of the order as a categorical ban on abortions was unnecessary, as GA-09 could not be considered a categorical ban, the panel majority explained, further taking issue with the lower court's application of the restraining order past the stated expiration date of the original health order.

The circuit panel also ruled that the district judge improperly decided that a delay that would require a patient to switch from a medication-induced abortion to a surgical abortion was enough to invalidate the order. "The constitutional right to an abortion does not include the right to the abortion method of the women's (or the physician's) choice," wrote the majority, and thus a 30-day delay in obtaining an abortion does not violate the right of access.

The only case in which the district court was correct, the majority held, was in applying its restraining order to women who would pass the 22nd week of pregnancy—the legal limit for an abortion in Texas—during the ban.

One panel judge, James Dennis, dissented in both cases, explaining that he thought the district court had provided sufficient evidence of a pretextual intent on behalf of the state to ban abortion to support a restraining order, and that the order, as applied by the state, could reasonably be held to be an improper categorical prohibition of all abortions.

Texas Court of Appeals

Law does not waive sovereign immunity for constitutional claims unless they involve challenge of a state statute

Issue: Licensee allegations of selective enforcement of licensing laws

The Texas Uniform Declaratory Judgment Act does not waive sovereign immunity for federal constitutional claims which do not also accompany a challenge to a state statute, a Texas appellate court ruled in a March decision (*Fuentes vs. Texas Appraiser Licensing and Certification Board and The Texas Real Estate Commission*).

The licensee at the center of the case, Eleazar Fuentes, was licensed as a real-property appraiser. In 2018, the Texas Appraiser Licensing Certification Board revoked that license and imposed a $10,000 fine in response to Fuentes's making false statements in appraisal reports.

Fuentes appealed, seeking to overturn the revocation and to obtain declaratory and injunctive relief under the state's Uniform Declaratory Judgment Act. He claimed that the board violated his constitutional rights by selectively enforcing the state's real estate laws against him while simultaneously ignoring similar behavior from its own investigators.

Fuentes's essential claim was that the investigator working on his case made false statements and conducted an incomplete examination of Fuentes's work, and that board investigators had made similar transgressions in cases against other licensees.

A district court dismissed Fuentes's claims under the Act, finding, among other things, that the board was protected from Fuentes's constitutional claims by sovereign immunity under the U.S. Constitution. Fuentes appealed to the Texas Court of Appeals for the Third District, in Austin, which issued a decision in favor of the board on March 20.

On appeal, Fuentes argued that the Uniform Declaratory Judgment Act waives sovereign immunity for Texas for actions involving constitutional issues or those involving the validity of a statute.

While there was merit to the claim, it was only partially true, the court held. "It is true that the UDJA generally authorizes claimants 'whose rights, status, or other legal relations are affected by a statute' to 'have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder,'" wrote Justice Jeff Rose for the court.

"But this authorization is not a grant of *jurisdiction* to entertain such a claim—the UDJA generally 'does not enlarge the trial court's jurisdiction but is 'merely a procedural device for deciding cases already within a court's jurisdiction."

Unfortunately for Fuentes, his selective-enforcement claim did not challenge the validity of the state's Appraiser Licensing Act, only the board's allegedly-selective application of the Act. Because Fuentes was not challenging the validity

of the statute, there was no case to carry along his constitutional claims, and sovereign immunity would continue to protect the state against those claims.

More unfortunately for Fuentes, although normally a court would allow him to replead his case in an acceptable form, the court held that the facts alleged by Fuentes would not through any additional pleading establish jurisdiction over his selective enforcement claims.

Although Fuentes claimed that the board impermissibly treated him differently under the law than its own investigators, he had failed to allege any facts that could actually establish that the board's decision to differentiate between appraisers in his position and appraisers in the position of the board's investigators was unreasonable. He thus had no claim and would not be allowed to replead.

Arkansas Supreme Court

Default discipline of licensee who sent rebuttal letter prior to filing of disciplinary charges is valid

Issue: Procedural omissions by professionals charged with misconduct

The Arkansas Supreme Court, in a March 19 decision, upheld a license suspension imposed by the state Supreme Court Committee on Professional Conduct in a default judgment, holding that a letter of explanation sent by the licensee attorney months before the filing of formal disciplinary charges against him was not a formal response to those charges (*Oliver vs. Ligon*).

This case revolves around a 2017 probate case. When his client died, attorney Charles Oliver probated an older—and superseded—version of his client's will, leading a court hearing to remove Oliver as the estate's attorney, which, in turn, prompted an investigation by the state Office of Professional Conduct.

In July 2017, Oliver sent a letter to the Office that he later characterized as his formal response to the allegations that prompted the investigation, explaining that he chose to probate the earlier version of his client's earlier will because he believed that she was not competent when she asked him to execute the later version. The Office, unsatisfied with this explanation, filed formal disciplinary charges in January 2018.

Oliver never responded, despite a warning in the disciplinary complaint and summons sent to him stating that, if he failed to respond, such a failure would be considered a default admission of the allegations against him. Accordingly, the state Supreme Court Committee of Professional Conduct issued a default judgment suspending his license for five years.

Oliver filed a petition for reconsideration, but under Arkansas Supreme Court procedural rules a failure to respond can be remedied if the attorney can establish "compelling and cogent evidence of unavoidable circumstances sufficient to excuse or justify the failure to respond." Finding that he had no such compelling reason, the Committee upheld the suspension.

Oliver appealed the decision, arguing not that he was unable to respond to charges, but, instead, that the formal letter of explanation that he sent to the Office of Professional Conduct—six months prior to the filing of formal charges—was sufficient as a response.

The Supreme Court of Arkansas, hearing the case, issued a decision affirming the suspension March 19.

The court disagreed with Oliver's contention that his response letter was sufficient to formally contest his disciplinary charges, noting that the letter was sent before the existence of those charges, and could not be considered a response, as such. "Oliver's initial letter was a response to the circuit court's allegations to the OPC, not the official OPC complaint filed after a thorough investigation," wrote Justice Rhonda Wood. "And the initial letter was not a response to the eleven different rule violations Oliver was accused of committing."

"Oliver's reliance on the letter as his response does not itself constitute an unavoidable circumstance. Oliver should have known that his earlier response to the informal allegations would not suffice."

Testing

COVID-19 sends many state licensing exams on furlough (from page 1)

several exams, New York state announced that when testing resumed in July, sites would have reduced capacities to maintain the recommended social distancing of 6 feet. The American Bar Association Board of Governors officially asked state bars to consider allowing new candidates (first-time exam takers only) to engage in limited practice without an examination until at least 2021.

How can licensing examinations be conducted remotely?

The Law School Admissions Council, which administers the standardized test for entrance to law school, the LSAT, may be forging the path for conducting remote exams of all types. The Council has already started offering an online, remotely proctored test it calls LSAT Flex. Test-takers who were registered for the in-person April, June, July, and August 2020 tests that were cancelled were eligible.

After proof of identification for check-in, test-takers must follow strict rules. The exam is shortened and does not allow any breaks or time away from the computer screen; the computer must have a camera allowing a proctor to view the test-taker continuously.

Test-takers cannot wear anything that obscures their face, so hats other than religious items, hoods, sunglasses, and headphones are banned. "Because of the online nature of the test, there are also some forbidden behaviors: for example, you may not communicate with anyone other than your proctor, read aloud, leave your seat, or allow your face to leave the webcam's view, connect to any external storage devices or run any forbidden applications," the LSAC says.

An online tool called ProctorU allows a live person to monitor the test-taker remotely while a video recording of the entire session may later be reviewed by humans and artificial intelligence.

The Wyoming bar exam that was scheduled for July was postponed and the state supreme court in March issued an emergency rule to allow bar applicants to practice in the state under supervision of a Wyoming-licensed attorney while their admission is pending.

In Washington, the chosen solution was made permanent. All candidates who had signed up for the July and September bar exams were waived into practice and became full attorneys.

Prometric testing centers chose a unique way to reduce examination-room numbers: random cancellation of candidates' exam appointments. A random selection of an estimated 33,000 candidates who signed up for the U.S. Medical Licensing Examination were informed by email that they would be taking the exam later.

Some, however, arrived at their exam centers to find the doors locked; they had not been notified that the exam had been cancelled. Others were left without certainty that exams would be held as scheduled.

The Student Doctor Network reported that one occupational therapy student was required to fly from the East Coast to Texas to take a board exam but Prometric reserved the right to cancel the exam as late as one day before.

With phone lines frequently turned off due to a surge in calls from prospective test-takers, online scheduling at Prometric also became overwhelmed, particularly affecting candidates who have testing accommodations under the ADA. At least one student, the UMSC reported, was advised by USMLE Candidate Services to request cancellation of her accommodation to regain access to online scheduling.

Practical issues are also driving some boards to reconsider their clinical exams. The California Dental Board Is requesting a formal review of the legal defensibility of its new mannequin-base examinations, the WREB and ADEX.

A coalition of dental school deans, dental students and California Dental Association representatives sent numerous written testimonies to the board requesting the review. They are requesting that graduating students with a passing score on a mannequin-based WREB or ADEX be immediately permitted to apply for licensure in California.

However, not all states or professions chose cancellation or postponement. In Mississippi, the Board of Bar Examiners consulted with 160 persons registered for the July 2020 bar exam and found a strong desire on the part of applicants to proceed with the bar exam at the earliest date possible.

The exam procedure included:

- Deep cleaning and sanitization of the Jackson Convention Center venue;
- Utilization of assigned seating spacing all applicants 6 feet apart, one examinee per table;
- A flowchart for examinees showing them the routes to take to and from their seats on entering and exiting and during bathroom breaks;
- Five single rooms for ADA accommodation examinees;
- One double room for hand-writers taking the exam;
- Required signing of a waiver of liability and hold-harmless agreement;
- Recruitment of young lawyers to serve as proctors, in place of the usual stable of older proctors who are in high-risk categories;
- Two security guards to assist with physical distancing and enforcement of sanitization requirements;
- Hiring of four registered nurses or licensed practical nurses to screen all examinees by taking their temperature as they enter the test site using four infrared thermometers;
- Allowing examinees to bring their own bottled water and hand sanitizer in clear containers only; and
- Requiring proctors to wear gloves when handling test material.

However, the board advised candidates that it may not be able to continue absorbing the cost of the new protocols since the number of applicants has been declining as legal jobs in Mississippi dwindle.

As to whether professional licensing exams can go completely online and be conducted remotely, there seems to be strong consensus that this would stretch exam security beyond the breaking point. In addition, psychometric issues such as test validity, reliability, and fairness arise from the varying test environments.

Most professional associations continue to support physical in-person exams with health and safety protections or postponement of examinations until the pandemic emergency is over.

But the logistics of allowing an at-home taking of a licensing exam via computer are increasingly under discussion as the safety measures to control the pandemic may make such a format inevitable. The Law School Admissions Council has already started offering its standardized law school entrance exam remotely, employing a raft of security measures (see sidebar above).

Examiners, state boards rethinking traditional use of practical exams, scored exams, and live patients

Issue: Evolution of examination technology and procedures

Even before the COVID-19 pandemic hit, three licensing test practices enshrined in some occupations' traditions for decades got some unexpected demotions in recent months: the use of numerical scores, the use of practical exams, and the use of live patients for testing of clinical skills.

The broadest-impact change occurred with the U.S. Medical Licensing Exam (USMLE). The USMLE decided to change its Stage I exam, administered while prospective physicians are still in medical school, from numeric scoring to Pass/Fail. The move was in line with the goal of emphasizing use of the USMLE, at all stages, to make decisions about competency for licensure rather than to rank prospective medical residents by their USMLE scores.

The second change is significant mainly because it is virtually unprecedented: the Alaska Board of Barbers and Hairdressers decided to drop its practical exam. In its place will be a proficiency exam that graduates of barber or hairdresser training programs must take.

A third testing tradition—use of live patients to test dental practitioners' skills—fell by the wayside with the April 2 vote by the American Board of Dental Examiners to approve a new "manikin tooth" technology to replace human patients for dental licensure candidates to demonstrate their competence at restorative examination.

The format chosen, called CompeDont, is a manufactured tooth viewed as a high-fidelity replacement for a living patient. CompeDont accurately represents infected, affected, and sclerotic dentin, according to the Commission on Dental Competency Assessments (CDCA), which is the largest third-party administrator of dental and dental hygiene assessments in the U.S. "Both examiners and students reported that the tooth mimics decay, stickiness, and tug-back and can be restored as if it were a natural tooth in this way," says CDCA director of examination Guy Shampaine.

CDCA partnered with Acadental, Inc., to develop and produce the new technology. Independent psychometricians, says the ADEX, analyzed pilot data showing the simulated tooth identified the same critical deficiencies in skill that would be typically revealed by treatment of natural teeth.

Competition

U.S. District Court, Western Oklahoma

Continuing injury doctrine no justification for two-decade-late lawsuit challenging specialist licensing ban

Issue: Limitations on advertising by specialists

Two dentists challenging an Oklahoma prohibition on advertising for their dental practice specialties filed their case over two decades late, a federal court

held April 21, and the continuing injury doctrine cannot apply to their case because they were aware of the existence of the prohibition for that length of time (*Seay vs. Oklahoma Board of Dentistry*).

The plaintiffs, Joseph Seay and Lois Jacobs, are general dentistry licensees but specialize in dental anesthesia. However, Oklahoma law does not recognize dental anesthesia as a specialty, and so Seay and Jacobs are prohibited from advertising themselves as specialists in that field.

Seeking to change that limitation, the pair brought a suit seeking a declaratory judgment that the Oklahoma laws prohibiting them from such advertising are unconstitutional, arguing that the laws impermissibly violate their rights to due process, equal protection, and freedom of speech, and that the laws were an impermissible restraint of trade under federal statutory law.

Unfortunately for the two dentists, Judge Timothy DeGiusti, hearing their case in the U.S. District Court for the Western District of Oklahoma, held that their constitutional claims were time-barred under Oklahoma law. Both Seay and Jacobs had graduated in the 1980s and completed residencies by the early 1990s, and Jacobs had already been the subject of a court case regarding specialist advertising back in 1993. The time limit for cases like this one is only two years from the discovery of the alleged injury, and thus Jacobs and Seay had filed over 25 years late.

The pair attempted to counter the lateness of their suit by arguing that their rights have been continually violated by the ongoing existence of the advertising prohibition, but Judge DeGiusti, surveying the legal framework of that potential exception, disagreed. "The facts of this case fail to give rise to the equitable notions upon which the continuing violations doctrine is premised," he wrote.

Even if the violations continue into the present day, Seay and Jacobs were aware of the advertising prohibitions many years ago, and should have asserted their rights at an earlier time, as the doctrine is only meant to preserve action for people who do not learn of the violation of their rights until after a suit would be otherwise time-barred.

Additionally, Tenth Circuit jurisprudence, binding on federal courts in Iowa, is not clear on whether the continuing violations doctrine even applies to lawsuits for deprivation of constitutional rights.

The court did not dismiss the entire complaint. Regarding the plaintiffs' restraint of trade claim, Judge DeGiusti noted that neither party was clear in their filings as to whether that complaint was intended to challenge the prohibition as unconstitutional or as a violation of the federal Sherman Antitrust Act. As such, the judge ordered the parties to submit briefing on the subject for further consideration.

Architects, CPAs, engineers, surveyors push back against licensing deregulation campaigns

Issue: Countering the pro-deregulation narrative against occupational licensing

Thanks to a key Supreme Court antitrust ruling in 2017, generous foundation funding for occupational licensing research with a libertarian bent, state government bids to deregulate, and pressure from the federal government, especially the military, it has become conventional wisdom over the last two decades that occupational licensing is anti-competitive, a needless hurdle for jobseekers, and a depressor of the economy that must be reformed.

Measures to weaken professional licensing standards have five negative effects, contends the Alliance for Responsible Professional Licensing:

• They put the public at risk.

• They leave the public on its own and ill equipped to determine qualifications.

• They ignore the critical role that licensing plays in enforcement, compliance, continued education, and remedies.

• They replace assurance of quality at the front end with case-by-case, costly litigation after the fact.

• They threaten career mobility and destroy good licensing models that are working.

But the Alliance for Responsible Professional Licensing, recently formed by groups representing certified public accountants (CPAs), engineers, architects, landscape architects, and surveyors, disagrees with that narrative when it comes to regulation of highly technical professions.

In brief, the Alliance believes that professions have responsible licensing models that are working and already address many of the outcomes deregulation bills seek, says Skip Braziel, president, state regulation and legislation, with the American Institute of Certified Public Accountants, one of the Alliance members. He spoke in defense of professional licensing during a February podcast hosted by CLEAR, the Council on Licensure, Enforcement and Regulation (available at https://podcast.clearhq.org/e/arpl/).

The Alliance members have in common the "four Es," he says: educational requirements that are very rigorous, examinations, experience, and ethics training. "The boards that regulate the professions we represent perform a duty to protect the public," largely because "the jobs those professionals provide to the public are such high risk that they require rigorous training and oversight."

He expresses concern about some occupational licensing reform bills' potential effects. "One particular model piece of legislation that we've seen in a couple of different states would allow anyone to perform any service regardless of whether or not the service requires the license as long as the consumer receiving those services gives their consent. We think this is just a step way too far."

In addition, the Alliance maintains on its website, although current deregulation agendas are allegedly geared to increasing professionals' mobility, in fact they will affect mobility in a bad way. "Weakening licensing standards on a state-by-state basis will destroy the confidence in qualifications and completely disrupt existing mobility models. States will be less inclined to accept out-of-state licenses if some states have rigorous requirements and some states have weak requirements."

"We're not suggesting that reform is in and of itself a bad idea or not necessary," Braziel says. "We're simply asking people to be thoughtful as they decide whether or not to get rid of or to amend a particular statute or regulation. You need more than just a Yelp review, quite frankly, to make sure that a bridge is built or designed properly."

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