Professional Licensing Report

Licensing, testing, and discipline in the professions

January/February 2020
Vol. 31, Numbers 7/8

Highlights in this issue

Discipline

Texas Court of Appeals

No requirement to erase temporary ban on doctor's treating female patients from federal Data Bank

Issue: Retention of preliminary disciplinary actions in federal data bank

A Texas case centered on the question of whether a temporary restriction of a physician's license should remain in the National Practitioner Data Bank, when the discipline against the physician was later dismissed.

A Texas appeals court said yes, ruling January 9 that the Texas Medical Board only needed to "modify"—not erase—a 2016 report it made to the National Practitioner Data Bank about a temporary license restriction against a doctor after the complaint leading to the discipline was dismissed (*Freshour v. Van Boven*).

*See **Discipline**, page 5*

Licensing

U.S. Department of Defense

U.S. partially bases choice of sites for military bases on states' success in improving reciprocity

Issue: Federal policy and state occupational licensing laws

The U.S. Department of Defense (DOD) confirms that decisions on where to site military bases and allocate other defense spending are being affected by the relative strictness of state policies for reciprocal licensing. The message came through clearly in a report the DOD delivered to Congress February 18 on state best practices and strategies for improving reciprocity for military spouses.

The military wants immediate action by states to assure that military spouses who relocate with occupational licenses from elsewhere get reciprocal licensing in 30 days with minimum hassle. Over the long

term, DOD wants states to approve more licensure-specific compacts as well. "The department intends to track an assessment of states based on commitment to these approaches for all occupations," said Marcus Beauregard, director of DOD's defense-state liaison office, in releasing the report.

Value of defense spending to each state

Included as Appendix B in the Defense Department's "Military Spouse Licensure: State Best Practices and Strategies for Achieving Reciprocity" report is a state-by-state list of the value of defense spending compared to state gross domestic product (GDP).

Defense spending is the largest as a proportion of GDP in Virginia (11.2%), Hawaii (9.8%), Alaska (6.1%), Alabama (5.9%), District of Columbia (5.7%), Maryland (5.7%), Mississippi (4.9%), Maine (4.7%), and Kentucky (4.7%).

States with 1% or less of their GDP based on defense spending are West Virginia (0.7%), Wisconsin (0.8%), Wyoming (0.9%), Illinois (0.9%), Iowa (0.85%), Tennessee (0.8%), Michigan (0.6%), New York (0.6%), Oregon (0.6%), Delaware (1.0%), Vermont (1%), Idaho (1.0%), and South Dakota (1.0%).

The states with the highest numbers of licensed military spouses, based on estimates derived from a survey of military spouses, are:

California	15,724
Virginia	14,454
Texas	13,260
North Carolina	10,988
Florida	8,380
Washington	6,870
Georgia	6,613
Hawaii	5,215
Colorado	4,575
Maryland	3,946
South Carolina	3,017
Tennessee	2,669
Kansas	2,421
Arizona	2,374
Alaska	2,313

Over the last decade, the DOD has been emphasizing that it would like states to adopt more lenient policies for reciprocal licensing of military spouses, who often move to different states and have historically had a high rate of unemployment.

The overall goal is to make reciprocal licenses available to military spouses within 30 days based on minimal documentation and to increase the adoption of state compacts for reciprocal licensing. This agenda has become part of the package of changes that many states, with backing from the National Conference of State Legislatures and the American Legislative Exchange Council, have long been advocating for reducing occupational regulation.

Military spouses, who often need to make interstate moves, generally face a much higher unemployment rate than the general population, about a 24% rate.

The current Secretary of Defense, Mark Esper, has designated taking care of military families as a fourth line of effort to the National Defense Strategy. He identified spouse licensure portability as critical for supporting families and made it a key focus area. About 34% of military spouses need licensure for their work, the DOD says.

After some six years of nudging states to make it easier for military spouses to obtain licenses quickly when they move to a new state, in 2017 the DOD commissioned a study by the University of Minnesota on what the military's campaign for broad change in state laws had produced. The study concluded results were significantly mixed.

The agency stepped up the pressure in 2018 when it sent a memorandum signed by the Air Force, the Army, and the Navy to the National Governors Association stating that military spouse licensure would be considered as part of mission basing in the future, said Beauregard.

Translation: Get the laws on occupational licensing changed and we'll talk about how much defense spending does or will contribute to your state's gross domestic product. "That got the attention of the states, and we saw a lot more activity happen in 2018 and 2019," he added.

So "best practices" on the reciprocity issue took on some financial implications for states, framed by DOD in "stoplight" fashion, with some states' policies such as agreement to compacts conveyed as "green" and no portability

conveyed as "red." In the middle are laws or policies that aren't quite changing military spouses' success rates in obtaining licenses.

These might feature in states where it is difficult for a military spouse to find the appropriate form, find the appropriate location to put that form, and obtain the guidance necessary to get through the licensing process as easily as possible.

Extrapolating from a 2017 survey of military spouses on whether their occupation or field requires certification by a standard-setting organization or a state-issued license (34% said yes), the military estimates that out of 30,865,817 people in the national workforce who are licensed, 132,140 or 0.43 percent of them are active military spouses.

According to the DOD, about 53 percent of the licensed occupations it has identified as relevant to military spouses are health-related, 28 percent are in education, 4 percent in crafts and trades, and 15 percent in other fields.

In practical terms, the DOD communicated that if a military spouse can apply for a license with a minimum amount of documentation and get the license within 30 days, "then that's a good process," said Beauregard.

He singled out five states for special praise:

• Florida and Arizona, for the universal licensing for military spouses (which Arizona then extended to everyone who becomes a resident of the state). Under universal licensing, the state will accept another state's license as long as it is current and in good standing.

• Utah which waives Utah licensing for military spouses with a license from other state.

• Texas, which will give a Texas license for anyone quickly and efficiently who has another state license that is equivalent to the Texas one.

• Ohio, which grants a temporary license to military spouses for six years.

U.S. Department of Education

Professional licensure training programs must disclose which states agree to license their graduates

Issue: Match-up between training programs and state license educational requirements

Beginning July 1, any educational program that is designed or is advertised to prepare a student for a licensed occupation must disclose in which states graduates of the program would meet educational requirements for licensure in that field, under new final rules by the U.S. Department of Education.

The rule uses a "three buckets" approach. Before enrolling students, institutions must disclose (1) all states in which the program meets the educational requirements for professional licensure; (2) all states in which the program does not meet those requirements; and (3) all states for which the institution has not made a determination.

Both prospective and enrolled students must also receive individualized disclosures of the same information. Institutions are required to have a process to track where the student is located and if applicable must notify the student if the requirements changed because of a change in the student's location.

The new rules are intended to simplify complex consumer disclosure requirements for licensure in a particular state. Now the rules will apply to all institutions regardless of whether they offer the programs via distance education, on the ground, or some combination of the two. "Erroneous or inadequate disclosures may constitute misrepresentation under applicable state or federal law," the federal agency warns.

Nevada Governor's Audit Division

Pharmacy board failed to conduct fingerprint background checks

Issue: Background checks for license applicants

More oversight and more stringent enforcement of required background checks and fingerprinting of applicants for wholesale pharmacy licenses are needed, the Nevada Governor's Division of Internal Audits announced in an audit report released in February. The audit was ordered in response to a long-term failure by the Board of Pharmacy to conduct any background check fingerprinting for these licensees.

Fingerprints have been required since 2005 for Nevada wholesale pharmacy license applicants in response to reports of counterfeit drugs in the wholesale market in the early 2000s. The fingerprint cards were to be submitted and checked against the state's Central Repository for criminal records.

But by adding numerous exemptions to the background check law the following year, the state Board of Pharmacy dodged the requirement for nearly 15 years even though the board collected fees for the fingerprint processing, Nevada governor Steve Sisolak announced in fall 2019, expressing shock and alarm at the omission.

it was discovered that no applicants had had to appear before the board for disqualifying events or rejected fingerprint cards since 2006. Imposing a temporary moratorium on wholesale pharmacy licensing in response, the governor ordered an audit. "It is unconscionable that the board and staff simply ignored their statutory obligation to conduct background checks to ensure that professional in the state were properly vetted," he stated in releasing the audit.

New policies to ensure that the board follows through on background checks, as the audit recommends, include more stringent enforcement of fingerprinting, documenting the status of applications, dividing duties of processing the background checks among different people, and requiring applicants with "disqualifying events" in their background to appear before the board.

The audit also recommended that the pharmacy board add fingerprint checks for other licensed fields it regulates, including pharmacists and pharmacy technicians. The board plans to return approximately $53,000, plus interest, in fees paid by license applicants but never used for fingerprinting since 2006.

Scope of Practice

Arkansas Supreme Court

Voters to decide: Keep or cancel law expanding optometry practice

Issue: Ballot initiatives on the subject of licensing scope of practice

In November, Arkansas voters will have the chance to choose whether a state law adopted in 2019 to allow optometrists to perform limited eye surgeries should remain standing. On January 31,

secretary of state John Thurston formally approved a ballot initiative that would overturn the 2019 law known as Act 579.

The controversy over whether optometrists should perform some eye surgeries has pitted Arkansans for Healthy Eyes, led by optometrists, against the ballot initiative sponsor, Safe Surgery Arkansas, led by ophthalmologists. The latter group obtained more than 64,000 signatures to get the ballot initiative on the expanded scope of practice included in the November ballot.

Legal disputes have arisen. Safe Surgery challenged a determination by a county judge that its signatures were insufficient but the Arkansas Supreme Court ruled that the ballot proposal could move forward. Arkansans for Healthy Eyes filed a separate suit charging that proper procedures for signature-gathering were not followed, but that suit was dismissed by a Pulaski County judge in January. However, the optometry group said it planned further challenges of the ballot initiative.

Currently, four states allow optometrists to perform some surgical procedures such as laser surgery: Alaska, Kentucky, Louisiana, and Oklahoma. According to Kevin Waltz, who graduated with an optometry degree but continued to medical school and now practices ophthalmology in Indiana, "The debate between the two professions has been a politically challenging issue for decades. There are economic benefits of being able to perform surgical procedures or prescribe certain medications and, at the institutional level, things are not always amicable."

However, Waltz points out, earlier expansions of optometric practice began with a few states authorizing their use of diagnostic drugs, with all states eventually following; the same later happened with therapeutic drugs, and all states eventually adopted that expansion as well.

Discipline

Temporary license restriction may remain in federal Data Bank *(from page 1)*

The report to the Data Bank, the Texas Court of Appeals for the Third District at Austin found, did not have to be "voided."

The suit against the board, filed by physician Robert W. Van Boven, concerned two separate complaints submitted by patients in 2015, alleging that he had engaged in inappropriate conduct while performing a medical examination. Following an expedited hearing, a disciplinary panel of the board placed a temporary restriction on Van Boven's medical license, prohibiting him from treating female patients; the order was set to remain in effect until superseded by a subsequent order of the board.

As a temporary suspension or restriction on his license, the February 29, 2016, action was reported to the federal National Practitioner Data Bank (NPDB), which collects and maintains information relating to health professionals' competence and conduct.

The NPDB was authorized in 1986 to prevent "incompetent physicians" from "moving state to state without disclosure or discovery of the physician's previous damaging or incompetent performance."

Four types of actions must be filed with the NPDB: initial adverse actions, revisions to actions, correction reports, and void reports. In Van Boven's case, an administrative law judge found the board had failed to prove Van Boven was subject to sanction. Following a four-day hearing, the board's Final Order, stating that it superseded the Order of Temporary Restriction, lifted the restriction on his license.

Federal data bank is a sort of "blacklist," charges physician interest group

In an amicus curiae brief filed in the *Freshour v. Van Boven* case, the Association of American Physicians and Surgeons (AAPS), a non-profit funded by the American Health Legal Foundation, castigated the Texas Medical Board for refusing to withdraw or void its "false and misleading" report to the National Practitioner Data Bank, "despite [Van Boven's] complete exoneration by the legal process."

The AAPS, which argues that the Van Boven entry should be voided, not modified, alleges that the data ban is "a sort of blacklist for physicians, which harms the reputation of all who are in it."

The first question many recruiters or employers want answered by a physician applicant is "Are you in the Data Bank?" the brief states. "If the response is 'yes,' then it often ends any job opportunities for physicians. Many employers do not have the time or interest to learn the details of an applicant's entry in the Data Bank; if there is such an entry, then that is all they need to hear to disqualify a candidate."

The Data Bank, AAPS charges, is akin to a public bulletin board or Internet website that publishes whatever is sent to it, without monitoring or screening the information, because federal regulations generally do not authorize anyone at the Data Bank to modify the reports sent to it.

The director of the Division of Practitioner Data Bank, David Loewenstein, said in a Fall 2017 interview that "it's really not the role of the NPDB to investigate the underlying merits of the peer-review process," AAPS reported. Loewenstein pointed out that the Data Bank may get 100,000 reports a year "and we don't substantively examine the reports unless they are disputed by the subject of the report."

Review of reports by his office is limited to whether the report met NPDB reporting requirements and factual accuracy of the information. "We do not review the underlying merits of the action that was taken nor do we have the authority to substitute our judgment for that of the reporting entity," Loewenstein explains.

The board submitted a "Revision-to-Action" Report to the NPDB. But Van Boven objected, arguing that a Void Report should be submitted instead. He asserted he was completely exonerated by the ALJ's decision and the Board's final order; thus any record of the underlying disciplinary proceeding against him should be removed from his disclosable record in the Data Bank and had to be voided to erase any record of the temporary restriction. Van Boven invoked the Data Bank's dispute resolution process to make the same argument to the Data bank.

But the Data Bank notified the Board that correction was needed to reflect the complete record; it did not require a Void Report. Answering Van Boven's argument, the Data Bank said a Void Report is suitable when an action is overturned or vacated and effectively acts as a withdrawal of the report in its entirety.

Van Boven turned to state court requesting mandamus and injunctive relief requiring the board to withdraw the Revision to Action report and submit a Void report, but the trial court denied his request. He contended the decision to use a Revision to Action report was not only erroneous but intentionally vindictive and damaging to his professional reputation.

Van Boven also argued that board staff made false assertions and failed to investigate unlawful bad-faith reporting, and that he was denied the right to present exculpatory evidence and photographs; the appeals court dismissed those arguments. The court found that state law placed no express limitation on the board's authority to report to the NPDB or on what information It must report. So it found no duty, on the board's part, to submit a Void Report to the NPDB.

Court of Appeals of Ohio

Licensee being treated for bipolar disorder was shown to be permanently unfit to practice

Issue: Board's authority to discipline professionals taking medication for impairment

A physician with bipolar disorder, who was evaluated as unable to practice without treatment and thus unfit to practice, was properly barred from practicing by the state medical board, the Court of Appeals of Ohio, 10th Appellate District held February 4.

The doctor, referred to only as "MM" in court documents, was diagnosed with bipolar disorder while in medical school in 2011. She graduated in 2014 and began working for MetroHealth System in Cleveland.

In 2015, after MM disclosed her illness on a training certificate application, the board ordered her to submit to a psychiatric evaluation. The evaluating doctor declared MM incapable of safe practice, but also found that she was amenable to treatment. MM entered into a consent agreement with the board that required her to enter specific treatment and monitoring.

In October 2017, MetroHealth terminated MM's residency following several behavioral incidents, including accusations by MM that other staff were harming patients to retaliate against her, according to MetroHealth. MetroHealth also cited a July evaluation by MM's psychiatrist stating that MM would likely continue to have behavioral issues and would be better suited to a low-stress environment.

After MetroHealth reported MM's termination, the board ordered her to undergo another psychiatric evaluation and eventually suspended her license. This time, the analyzing physician diagnosed MM with schizoaffective disorder, stating that such a condition rendered MM incapable of practicing medicine and recommending that she not engage in direct patient care. A hearing examiner declared MM unfit to practice and she was permanently barred from inpatient care.

Despite what appears to be a harsh outcome, the board does seem to have tempered MM's discipline. At least one board member tried to convince the others that MM could return to full practice after additional treatment and in an outpatient setting. Other board members, seemingly persuaded, modified the hearing examiner's recommended order to allow MM to treat patients in an outpatient setting once board-approved psychiatrist clear her to resume practicing.

Still, MM appealed the decision, challenging the finding of the board's psychiatrist on the grounds that he based his diagnosis on incomplete information, on the grounds that the psychiatrist had not consulted her own treating psychiatrist or the academic advisor for her residency program before completing his analysis. The board disagreed, holding that the psychiatrist's testimony was still credible, and was appropriately based on his own in-person evaluations of MM.

The case eventually rose to the Court of Appeals of Ohio for the Tenth District. In her appeal, MM argued that no evidence existed that she would be permanently impaired, and that the board had relied on flawed expert testimony.

The court disagreed. Judge Jennifer Brunner noted that the board's case record contained sufficient evidence—in the form of testimony from the physician who evaluated MM—to show that MM's impairment was permanent and that she was unfit to practice.

Citing Ohio law, that physician stated that he considered MM unfit for practice *because* she was taking medication to treat her condition. "My interpretation of the Board rules indicates that . . . this term 'inability to practice' includes an inability to practice . . . without appropriate treatment, monitoring, or supervision . . . And, in fact, she does indeed require medication treatment for the symptoms of her schizoaffective disorder. So because she needs medication treatment to sustain her ability to practice, she is, by definition, unable to practice."

Delaware Supreme Court

Board members possess required expertise to establish standard of care in disciplinary case

Issue: Role of expert testimony in weighing disciplinary cases

Expert testimony is not required to set a standard of care in medical disciplinary cases because the board, itself, possesses the required expertise to make the determination, the Delaware Supreme Court ruled January 8 (*Delaware Board of Medical Licensure & Discipline v. Grossinger*).

In making the decision, the board pointed to significant differences between the standard of care necessary in a medical malpractice case and that required for disciplinary proceedings.

The case concerned pain doctor Bruce Grossinger's treatment of one particular patient, a man who sought pain treatment after a series of car accidents. After a doctor who initially prescribed Oxycodone dropped the patient in 2011 upon seeing signs of drug abuse, the patient, who at some point had become addicted, began to seek out other providers and attempted to detoxify at least once.

In 2014, two weeks after being dropped by a doctor treating him for addiction because he had tested positive for heroin, the patient came to Grossinger's clinic. A doctor doing intake at the clinic noted the patient's addiction to opioids in an assessment, but another physician, apparently unaware of that assessment, began treating the patient for pain.

Then, after the patient missed a drug screen in June 2014, Grossinger, who at this point had never met the patient, issued refills for opioid prescriptions on at least five occasions, even as the patient began missing or cancelling more appointments.

In early December, the patient finally presented at the office and gave a urine sample. Four days later, and two days before his urine sample showed the presence of heroin, the patient died of an overdose of that drug.

Following the patient's death, his mother filed complaints against three of the clinic's physicians and the Delaware Division of Professional Regulation charged them with professional misconduct. A hearing examiner found that Grossinger failed in several mandatory duties regarding addictive pain prescriptions.

Grossinger, the hearing examiner said, had failed to review Michael's records with the state's Prescription Monitoring Program; to review the patient's history with his prior pain care providers; to acknowledge his own intake physician's assessment of the patient's addiction; in a mandatory duty to discuss the risks of opiate use with the patient; to enforce prescription-use agreements signed by the patient when he first entered the clinic's care; to periodically review the patient's treatment; and to maintain proper records of the patient's care.

Following a hearing, the board issued Grossinger a letter of reprimand and a $2,000 fine. Grossinger appealed.

On appeal, a state Superior Court reversed the board's decision on all but the charge that Grossinger had failed to discuss the risks of pain treatment with the patient. The court held that the regulations used to discipline Grossinger were unconstitutionally vague and could not have given Grossinger adequate warning that his conduct was prohibited.

It also agreed with Grossinger that the board had erred by failing to use expert testimony to determine the standard of care for physicians in Grossinger's position.

Additionally, the Superior Court ruled that the Delaware Administrative Procedure Act did not apply to actions of the Board prior to 2017, a position that neither the board nor Grossinger had argued, and which the court based on a 2017 amendment to state law which expressly stated that the board's actions were subject to the Act. Neither party introduced this line of argument, and both later agreed that the Act did apply to their case.

Both the board and Grossinger appealed this decision, and the case went up the Supreme Court of Delaware, which reversed the Superior Court and reinstated the board's disciplinary decision.

Addressing the Superior Court's holding that Delaware's Administrative Procedure Act did not apply to board decisions made prior to 2017, the justices of the Supreme Court simply noted that despite language in the 2017 amendment explicitly applying the Act to board hearings, the Act has always listed the board as an agency it governs.

The Court also rejected Grossinger's claim that the board was required to use expert testimony. Grossinger's argument regarding the board's use of experts, which the Superior Court had endorsed, centered around his claim that the establishment of a standard of care in board disciplinary cases was a matter of contestable fact, and thus required an expert's testimony.

The board countered that the question of the standard of care in a case is a matter of law, and that the board members, professionals themselves, possess the required expertise to determine the standard without input from experts.

The Supreme Court agree with the board. Although Grossinger cited several cases which discuss the standard of care as a matter of factual inquiry, those cases, the Court noted, were malpractice or negligence cases, where the standard of care can differ along with the context of each case. In disciplinary cases, the standard was objective and subject to the analysis of the board's members.

"That is not the case in administrative disciplinary cases, where regulations are designed to apply across the profession with equal force, and where the standard of care is not *itself* what is violated . . . but rather a metric to judge whether a *regulation* is violated," wrote Justice Gary Traynor.

"In other words, the Regulations provide standards of conduct—which are typically absent in tort cases—and the level of care that determines the scope of the Regulations is derived from an interpretation of those standards. Therefore, in administrative cases, the standard of care is an *element* of the regulation, albeit an implicit one . . . The interpretation of an element of a regulation is a question of law, and it is not subject to expert testimony or confrontation."

"To hold otherwise would be to allow the hearing officer, a lay person who is charged with making binding findings of fact, to restrict the Board's decision-making regarding the level of care exercised by reasonable physicians statewide, based only on the testimony of experts proffered in a specific proceeding."

Addressing Grossinger's due process arguments—that the board regulations cited in his discipline, such as the reasonable-physician standard of care—were unconstitutionally vague, the justices again disagreed with the Superior Court, holding that the rules gave adequate notice of what behavior was prohibited. "The reasonable-physician standard of care does not fail to give notice simply because it contains the word 'reasonable' and people can differ as to the meaning of that term," wrote Justice Traynor.

Even in express terms, the justices continued as they rejected Grossinger's appeals, board regulations "clearly require documentation" of patients' history of substance abuse, something Grossinger "failed to do in any fashion." Nor did Grossinger have the mandated discussion with the patient about the risks of opioid medication, have the patient take a mandatory drug screening, or make periodic reviews of the patient's course of treatment—all explicitly required by board rules.

Wyoming Supreme Court

Coroners' board has no power to review misconduct

Issue: Scope of authority of licensing boards setting standards

Regarding the question of what is and what isn't a professional licensing board, the Wyoming Supreme Court removed the state's Board of Coroner Standards from the former category, holding in a January 8 decision that, despite a section of the board's authorizing statute which empowers the board to review and refer coroners' conduct, the board had no authority to enforce its standards, and thus no power to investigate breaches of those standards (*Hayse v. Wyoming Board of Coroner Standards*).

When the two plaintiffs in the case, Bruce Hayse and Paul Cassidy, sought to have the board investigate Teton County Coroner Brent Blue regarding Blue's unusual decision to convene a jury inquest to determine the cause of Hayse's son's death, the board refused the request on the grounds that it had no authority to investigate coroner misconduct.

After a district court affirmed the board's decision, Hayse and Cassidy appealed to the Wyoming Supreme Court.

Hayse and Cassidy based their case on a section of the board's authorizing legislation that authorizes the board to review complaints of coroners' compliance. That section, they claimed, along with another section that requires the board to set official standards for the investigation of coroner cases, provided the board with the authority to investigate.

The Court did not agree. The section of law which allows the board to review complaints only authorizes the board to review complaints based on coroners' failure to comply with one particular subsection of the law requiring coroners to "conduct themselves in a manner consistent with the highest standards of professionalism, compassion, and respect"—not with failures to comply with the board's articulated coroner standards, wrote Justice Kate Fox.

The law's lack of an express authorization to discipline coroners prohibited the board from doing so. "The legislature," Justice Fox wrote, "has incorporated standards or rules violations as a basis for professional discipline in many other contexts and could have done so here, but did not." Additionally, she noted, the

section of law requiring coroners to conduct themselves properly is too vague to lead to any disciplinary measures.

Fox also noted that the plaintiffs' case was undercut by the disciplinary actions that the law *does* authorize the board to take. A section of the statute authorizes the board to make recommendations to the state's Peace Officer Standards and Training Commission regarding the revocation of coroners' certification and "provides the Board no other course of action for a coroner's alleged violation."

The Commission, she wrote, exists to determine compliance with training and education standards, and "it would be absurd to conclude that the Board must 'make recommendations' to a commission designed to enforce training and education standards for conduct unrelated to training and education."

Thus, the board's enforcement functions were limited to initial licensure requirements, and review of a coroner's actions could not be authorized. "It would be far from thoughtful and rational [of the legislature] to authorize the Board to investigate conduct unrelated to education and training, while simultaneously denying it the ability to redress it."

". . . Because the Board is not authorized to take any action in response to alleged instances of coroner misconduct, it would be pointless to require the Board to investigate complaints of coroner misconduct."

One justice, Keith Kautz, dissented on the grounds that the court had misread the statutes governing both the board and the Commission. Kautz noted that, "From the plain words of the applicable statutes, the Board of Coroners . . . has the authority (and obligation) to review a complaint that a coroner failed to comply with the Board's standards dealing with the investigation of coroner cases. There is nothing absurd with requiring an elected official to obtain a license or certification based on education, and then requiring compliance with conduct standards as a condition for keeping that certification or license. A coroner's requirement for a certification based on training is similar to the requirement that a county attorney pass the bar exam."

"Just as a county attorney's bar license may be revoked or suspended for failure to comply with conduct standards, a coroner's certification may be revoked under this statutory approach for failure to comply with conduct standards." Kautz also noted that Peace Officer Standards and Training Commission is authorized to revoke certifications based on non-compliance with professional standards, despite the opinion of the majority otherwise.

U.S. District Court, Northern District of Iowa

Surrendered license subject to forfeiture for federal crimes

Issue: Status of license as property subject to forfeiture

Surrendered professional licenses are subject to forfeiture under criminal conviction laws, the U.S. District Court, Northern District of Iowa, held January 3, rejecting both constitutional arguments and an attempt by a defendant to surrender his licenses to a state board prior to a forfeiture action following his criminal conviction (*United States vs. West*).

In 2019, nursing licensee Christopher West pled guilty to federal criminal charges after he used his nursing licenses to fraudulently acquire narcotic painkillers and replace them in their containers with saline solution. Included in the prosecutor's indictment of West was a requirement that, if convicted, he

would be required to forfeit any property used in the facilitation of his crimes, and expressly listed his nursing licenses as such property.

However, when West pled guilty, his plea agreement stipulated that he and the prosecution would instead litigate the question of whether he would have to forfeit those licenses.

Following his conviction, West had surrendered his licenses to the Iowa Board of Nursing, which barred him from applying for reinstatement for at least a year. In the litigation that followed, West made two primary arguments against the forfeiture of his license: that any attempt to seize his licenses was now moot because he had surrendered them to the state nursing board and thus had no licenses to forfeit, that any attempt to seize his licenses would be in violation of the Eighth Amendment's prohibition of excessive fines, and that federal seizure of professional licenses violated the separation of powers between the federal government and the states.

Although he also challenged whether the licenses were property of the sort that is subject to forfeiture, longstanding legal precedent made clear that they were.

Judge C.J. Williams, presiding over the case, disagreed, noting what he said were the contradictions in West's argument that his licenses no longer existed, but also noting that West had standing to challenge prosecutors' attempts to seize the licenses.

Although West argued that, because he could eventually apply for the re-instatement of his licenses, he did have an interest in them and, thus, standing to bring a case, Judge Williams wrote that, "If defendant has a future property interest, then the Court agrees he has standing to challenge the forfeiture. If that is true, then the matter is not moot . . . The defendant cannot have it both ways."

"Either the licenses no longer exist and the defendant has no property interest in them, in which case he does not have standing to challenge forfeiture, or the licenses still exist in some form and defendant has a property interest in them, in which case forfeiture is not moot. Defendant cannot avoid forfeiture here by claiming the licenses no longer exist but that, simultaneously, he has a future interest in those same licenses."

Additionally, the judge noted, forfeiture of the licenses would be retroactive to the time at which West committed his offenses, and would thus pre-date the surrender of his licenses. Thus, if forfeiture were to apply, West had surrendered licenses he no longer had a right to control, and any surrender would be invalid.

Judge Williams also rejected West's Eighth Amendment claim. Under Eighth Circuit precedent controlling federal courts in Iowa, an excessive fine of the type prohibited by the Eighth Amendment would have to be "grossly disproportional" to the offense. That court has created a factor test to determine such gross disproportionality, and an analysis under those factors was not favorable to West.

West, the court noted, used his licenses to steal painkillers and keep them from patients who needed them for a period of several months. He committed his offenses while possessing several guns, a crime for a person illegally using controlled substances. And several patients suffered from his theft, as the diluted or completely-replaced painkillers they were given had no effect while they suffered at-times agonizing pain. Taken together, the court found the forfeiture of his licenses proportional to his offenses.

The court again rejected West's Tenth Amendment argument as well, finding that forfeiture of his nursing licenses would not usurp the powers governmental authority reserved for the state.

"The State of Iowa is free to reissue a license to defendant in the future, and is free to take whatever other action it wishes to take, if any, about defendant's authority to practice as a licensed nurse in the future," Judge Williams wrote.

Having concluded his analysis of the case, Judge Williams declared West's license subject to forfeiture.

Iowa Supreme Court

"Confidential letter" warning about discipline *is* discipline

Issue: Disciplinary letters/warnings without contested case review

A letter sent by the Iowa Board of Medicine informing a doctor whose license had lapsed that the board would require him to undertake a competency examination if he attempted to return to practice was an unauthorized disciplinary action, the state Supreme Court ruled in February (*Irland vs. Iowa Board of Medicine*).

After the death of one of physician Mark Irland's patients, the hospital at which he was working revoked his privileges based on an internal investigation of the matter, citing "serious concerns about [his] clinical competency, inadequate medical record keeping and poor documentation, disruptive behavior and unprofessionalism, and substandard care which may have contributed to a catastrophic patient outcome."

Irland ceased practicing after the incident, and, instead of opening a formal disciplinary action, the board sent him a confidential letter, explaining that it was choosing not to initiate the disciplinary process.

However, the letter advised Irland to notify it before any return to practice and stated that "the Board will take appropriate action, including but not limited to, issuing an order requiring you to complete and comprehensive clinical evaluation, to ensure you are able to practice medicine with reasonable skill and safety."

Irland, unhappy with this promised competency evaluation, filed for judicial review of the board's decision to send him the letter, arguing that, by imposing on him the requirement for a competency evaluation, the board had inappropriately sanctioned his license without allowing him to contest his case.

After two lower courts upheld the board's issuance of the letter, the case rose to the Supreme Court of Iowa, which issued a decision in Irland's favor February 14, striking the board's letter as an unauthorized disciplinary action.

On appeal, the board argued that its letter to Irland was only a letter of warning, an action allowed under Iowa administrative rules, but the Court disagreed. "The Board's letter went beyond mere warnings, and it made clear that if Dr. Irland resumes practicing medicine, then he must undergo the competency evaluation."

"The Board effectively imposed conditional discipline without formal action or a finding of probable cause . . . The letter by its terms de facto disciplined Dr. Irland by requiring a competency evaluation if he returns to the practice of medicine."

"We will not allow licensing boards to evade judicial review by placing disciplinary action within a 'confidential letter of warning' that purports to close the investigation without initiating a disciplinary proceeding. To do so elevates form over substance and, in fact, allows discipline to be imposed without the procedural safeguards of contested case proceedings and without the reporting obligations that safeguard the public by disclosing disciplinary action."

Justice Waterman noted that the board actually has explicit procedural rules for ordering a competency evaluation; by simply telling Irland that it would order him to undertake one if he returned to practice, it had violated those rules.

"While the Board does have the authority to impose the sanction of a clinical competency evaluation, it may do so over the physician's objection only after a contested case hearing," the judge wrote. Irland, of course, never received such a hearing.

Additionally, the court noted the board's attempt to impose discipline through a warning letter evaded public records and reporting requirements. "Cloaking discipline with confidential warning letters undermines the public's right to know when a physician's competence has been called into question by a licensing board . . . What stops [Irland] from practicing in another state without undergoing the competency evaluation that the Iowa Board of Medicine ordered in secret?"

Treasurer, State of Tennessee

Boards faulted for failure to discipline many opioid over-prescribers

Issue: Professional discipline's role in stemming opioid abuse

Tennessee's proactive program to curb health care providers, including physicians, nurses, dentists, and other licensed practitioners, who avoid discipline despite inappropriate prescribing of opioids has had underwhelming results, a report by the state Treasurer's Office of Research and Education Accountability suggests. Only half of abnormal prescribers had a query opened about them, research findings showed.

The state sought to move from relying strictly on complaints about providers with abnormal prescribing to using data from the state's controlled substances monitoring database to track dispensing of opioids and other medications with potential for abuse.

In 2017, 1,261 state residents died of an opioid-related overdose and providers treated at least 23,600 nonfatal overdoses. A study of opioid prescribing patterns was mandated by law in 2018.

The most prolific and highest-risk prescribers are flagged by the amount of opioids they prescribe, the outcomes of patients (such as fatal or nonfatal overdoses), or other prescribing patterns deemed risky. The prescribers receive a letter from the Department of Health requiring them to justify their prescribing patterns. Then the department decides if further investigation is warranted.

But before that can happen, the report notes, a query must be opened about the prescriber. "Queries are opened by the department after receiving a complaint or when the department identifies a prescribing pattern that is potentially inappropriate, such as through the high-risk prescriber list."

Since queries weren't opened for half of prescribers flagged, the report says an area of potential improvement for the department is the monitoring of specific

types of prescribing patterns, such as having a high number of patients on concurrent opioid and benzodiazepine prescriptions.

Sixty-two prescribers should have been investigated based on their prescribing patterns, the report adds, but the researchers found that 49 of them (76 percent) had not been disciplined by their licensing board since the start of 2017 and are not currently under investigation.

Only 8 of the 62, so far, have received some level of discipline; the five remaining prescribers were under investigation. In four cases, those investigations have been ongoing for at least two years, the report says.
.

Competition

California AG hits teledentistry company SmileDirect executive with fraud charges over practice scheme

Issue: State regulation of professional service delivery by national firms

SmileDirect Club, which has built a thriving national teledentistry practice based on the premise that Americans should not need to visit an orthodontist's office to get their teeth straightened, has been the indirect subject of a two-year investigation by the California state dental board board over actions of SmileDirect's chief clinical officer, Jeffrey Sulitzer.

Based on that probe, the California attorney general filed a 24-page complaint against Sulitzer in November, accusing him of violating state law, defrauding state dental regulators, and acting with gross negligence toward patients while helping SmileDirect build its business.

The complaint alleges Sulitzer committed fraud when applying to operate dental offices in Californai while locations were controlled by SmileDirectClub, which does not have a license to practice dentistry in California and requires customers to sign liability waivers before getting treatment.

The company estimates it has had 750,000 customers for its direct-to-consumer, remotely-fitted substitute for braces,called aligners, which it sells for $1,895. SmileDirect offers refunds to customers who are not satisfied wth their service but, controversially, requires them to stay silent about their criticism of the company.

An attorney for SmileDirect, which is based in Nashville, Tennessee, has responded by accusing the California dental board of retaliating over SmileDirect's lawsuit against the board filed last year; the suit charged that the board engaged in an illegal investigation and anti-competitive campaign against the company.

Last October, California approved a bill requiring practitioners offering aligners to review a patient's dental X-rays before prescribing orthodontic treatment.

Deregulation

Case studies of deregulation campaigns stress coalition building, data gathering, labor union support, & communication

Issue: Strategies for successful licensing reform initiatives

Whether the agenda is to update, streamline, or pare occupational regulation to the bare minimum, what are the best strategies for achieving results? That was one of the questions that National Conference of State Legislatures (NCSL) wished to answer with 11 case studies of states where various approaches to the deregulatory mission had different results. The report on the case examples, released in November 2019, is entitled *NCSL Occupational Licensing Consortium Case Study Reports*.

NCSL grouped the states' strategies into four categories:

• Large scale licensing changes

Arkansas, for example, sought to build a coalition to achieve for its occupational licensing initiative. Kentucky enountered challenges and barriers when attempting to change decentralized occupational licensing in that state.

• Initiatives to benefit targeted populations such as those with a criminal record or minority populations

In Delaware, the focus was on reducing barriers to entry to occupations by justice-involved individuals; Utah developed a Senate bill to reduce barriers to licensing for military spouses; Connecticut chose the tactic of a Minority Teacher Recruitment and Retention bill to seek less regulation of profesionals.

• New legislation

For Illinois, the approach was to pass sunrise legislation to subject new licensing proposals to scrutiny; in Indiana, supporters succeeeded in passing nursing compact legislation but failed to pass Emergency Medical Services compact legislation; in Nevada, the nursing compact legislation did not pass.

• Pursuing licensure efforts with a regulatory approach

In Maryland, for example, supporters were able to reduce regulation of cosmetologists but not regulation of plumbers or heating, ventilation, air conditioning, and refrigeration professionals.

In evaluating action plans for reducing barriers to entry and improving the portability of licenses, NCSL found that building coalitions, robust communication across stakeholders, gathering valid and reliable data, and labor union support were important factors in success or failure.

Professional Licensing Report is published bimonthly by **ProForum**, a non-profit organization conducting research and communications on public policy, 9425 35th Ave NE, Suite E, Seattle WA 98115. Telephone: 206-526-5336. Fax: 206-526-5340. E-mail: plrnet@earthlink.net Website: professionallicensingreport.org Editor: Anne Paxton. Associate Editor: Kai Hiatt. ISSN 1043-2051. Listed, Legal Newsletters in Print.

Subscriptions, which include both printed and PDF copies of each issue, are $228 per year, $447 for two years, $617 for three years, $798 for four years. Online access to PLR content is included in the subscription price; online-only subscriptions are $199 per year. Additional print subscriptions for individuals (within the same physical office or board only) are $40 each per year and include a license to distribute a PDF copy to a single person. Licenses to distribute extra PDF copies only, to individuals within the same physical office or state licensing board, are $20 per recipient per year.