The International Conference of Funeral Service Examining Boards

Recent Regulatory Cases...and What We Need to Learn From Them

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3:15 pm – 4:15 pm

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- NMTCB
- FARB
**REGULATION...IN THE NEWS**

State funeral board announces Moody Jr. disciplinary action  
http://www.thesylvaherald.com/article_7ce13d04-bb9b-11e4-a6b0-172cd2b998e3.html

Fulton: Need a casket? Supreme Court ruling could give South Carolinians more options  
http://www.thestate.com/2015/03/15/4044268_fulton-need-a-casket-supreme-court.html?rh=1#storylink=cpy

Grove funeral home operator Brian Nichols' license suspended by state board  

China Says Please Stop Hiring Funeral Strippers  

**REGULATION...IN THE NEWS**

Licenses for Toledo funeral home, director suspended over treatment of bodies  
http://www.toledoblade.com/local/2015/06/03/Licenses-for-funeral-home-director-suspended-over-treatment-of-bodies.html

Funeral Home License Suspended  

Hit-or-miss process: Inspector visits Greenfield funeral homes  
http://www.recorder.com/home/17400309-95/hit-or-miss-process

Sunset Memorial Gardens’ owner fined  
http://clevelandbanner.com/stories/sunset-memorial-gardens-owner-fined,15704
**REGULATION – IN THE NEWS**

**FUNERAL DIRECTOR CHARGED WITH ABUSE OF CORPSE AFTER DECAYING BODIES FOUND**

Suit planned against former funeral director who allegedly dumped bodies

4 bodies, 'remains' found in garage of man who worked in funeral business

Pennsylvania Bureau of Professional and Occupational Affairs seeks injunction against Philadelphia funeral directors and facilities

**Funeral homes should put costs online, consumer groups say**

Ohio funeral board director survives vote seeking suspension
http://www.toledoblade.com/State/2015/10/19/Ohio-funeral-board-director-survives-vote-seeking-suspension.html

Local funeral home director surrenders license
http://www.patriotledger.com/article/20151102/NEWS/151109061

Family finds wrong body in casket: 'It was absolutely devastating'
*REGULATION IN THE NEWS*

Newspaper slams Massachusetts funeral board in investigation

Interactive chart of inspection attempts:
https://public.tableau.com/views/FuneralInspections/Sheet1?:embed=y&:display_count=yes&:showTabs=y

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**Grandfathering, Moral Character, Constitutional Claims**

- Applications for licensure
- What is asked? Why? How is it phrased?
- Good moral character
- Criminal convictions
- Who makes initial licensure decisions?
- Who makes renewal licensure decisions?
Crawford v. Moore (California, 2015) #1

U.S. District Court in California dismissed the complaint of a funeral director applicant who claimed his license was denied based upon racially discriminatory policies. The applicant had worked in the funeral industry for 14 years and attempted to obtain licensure under the grandfathering provisions. The application was initially denied due to a 16 year old criminal conviction and, after a hearing, he was notified his license would be granted (and placed on 3 years probation) upon a successful completion of the relevant examination.

Crawford v. Moore (California, 2015) #2

Unwilling to take the exam, the applicant filed a pro se Section 1981 and 1983 action against the Bureau alleging violations of civil rights and equal protection, and due process. The section 1981 action was dismissed with prejudice as the Bureau was never an employer of the applicant. The due process and equal protection claims were also dismissed (with leave to amend) as not alleging deprivation of rights because the applicant was to be granted licensure upon passing the exam.
Statutory Immunity....Civil Case

- Civil case
  - Criminal...civil....administrative cases
- Statutory interpretation
  - Cemetery Act
  - Mortuary Science Act
- Board rulemaking
- Decision making re cremation
- Statutory immunity
- Scope of immunity
  - Applicable to interns/registered trainees

Gately v. Hamilton Memorial Home, Inc.  (New Jersey, 2015) #1

- New Jersey Superior Court of Appeals affirmed lower court and upheld a no cause jury verdict in a civil case for damages in favor of a funeral home and its intern related to a dispute over the cremation of the son of divorced parents. The mother directed the cremation of the decedent which occurred after the funeral. The father alleged that he objected to the cremation to the intern.
Gately v. Hamilton Memorial Home, Inc.  (New Jersey, 2015) #2

- The court held that the statutes authorized the parents of the of a son to have authority over the disposition of the decedent, but that the funeral personnel did not have the obligations to affirmatively seek authorization from all those authorized. Further, the court noted that an intern is covered by the immunity statutes of New Jersey that protect funeral personnel from liability for acting as directed by a duly authorized next of kin.

Post Licensure Exam Score Invalidation

- State Actor vs. Private Actor
- Role of Board...Role of Conference
- Constitutional rights
  - Due process
  - Equal protection
- Property interest in license
- Standing...Ripeness
Mattei v. ICFSEB (Texas, 2015) #1

• United States District Court for the Western District of Texas granted motion to dismiss of the International Conference of Funeral Service Examining Boards (exam owner) of claims filed by examinee alleging violations of numerous rights related to the invalidation of National Board Examination scores. The court found that the Conference was not a state actor and thus not subject to section 1983 claims.

Mattei v. ICFSEB (Texas, 2015) #2

• It also dismissed with prejudice examinee’s claims of breach of contract, defamation, tortious interference with contractual relations. The court also upheld the validity of the non-disclosure agreement signed by the examinee as a condition of access to the NBE. The court further dismissed the individual Conference Board of Director members finding the court lacked subject matter jurisdiction. Finally, the court also granted the Texas Funeral Service Commission motion to dismiss for lack of standing related to the invalidation of the NBE score.
Quorum....Procedural Issues

• What is a quorum?
• Where do you find this answer?
• What are the consequences of not having a quorum?
• Participation in hearing
• Statutory authority
• Waiver of arguments

Wilson FuneralDirs., Inc. v. N.C. Board of Funeral Service
(North Carolina, 2016)

• The North Carolina Court of Appeals reversed the lower court and upheld the revocation of the funeral establishment permit, preneed establishment permit, and ancillary preneed permits and the funeral service license and preneed license of operator. The lower court found the board acted without a quorum present and thus exceeded its statutory authority
Wilson Funeral Dirs., Inc. v. N.C. Board of Funeral Service
(North Carolina, 2016)

- The court of appeals found that the respondents waived the procedural objection by not asserting such right at the second hearing where only 4 of the 9 members were present and noted the respondents were told at the first hearing that 2 members would be rotating off the board. The board consists of 9 members. The court also noted that even if the respondents had not waived their rights, the APA does not mandate a numeric number of board members to participate.

Antitrust Immunity

- State actor defense
- Board actions that implicate antitrust laws/scrutiny
- DO NOT PANIC...DO NOT OVERACT
- Too much attention to this case
- Legal factors
- Political factors
- TAKE HOME POINTS....be regulators!!!!!!!!!!
North Carolina State Dental Board v. FTC

The U.S. Supreme Court held the North Carolina State Board of Dental Examiners (“Board”) was not immune under state action doctrine from antitrust liability for sending cease and desist letters to various non-dentist teeth whiteners and product manufacturers warning that they were engaging in the unlicensed practice of dentistry. The Federal Trade Commission (FTC) had filed an administrative complaint alleging the Board’s concerted action to exclude non-dentists from the teeth whitening market was anticompetitive and an unfair method of competition. The Board sought to dismiss the complaint on the grounds of state-action immunity. The FTC and Fourth Circuit Court of Appeals disagreed, finding that even assuming the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board was a “public/private hybrid” and must also be “actively supervised” by the State to claim immunity and no such supervision had been demonstrated.

North Carolina State Dental Board v. FTC

The Board appealed to the U.S. Supreme Court, which affirmed, and held that because a controlling number of the Board’s decision makers were “active market participants” in the dentistry profession, the Board is treated as a non-sovereign, or private, actor whose conduct does not automatically qualify as that of the sovereign state itself. The Board must show active supervision by the State (the clearly articulated policy to displace competition was presumed). The Court held that the need for supervision turns not on the formal designation given by the states to regulators but on the risk that active market participants will pursue private interests in restraining trade. In contrast, the dissenting opinion argued the majority opinion seriously misunderstands the doctrine of state action immunity and noted that the fact the Board is a state entity should be the end of the matter.
Reinstatement Petitions

• How does one seek reinstatement of licensure?
• Burden?
• Expungement of criminal records
• Basis for adverse action

McNabb v. Kentucky Education Prof. Standards Board

• The Court of Appeals of Kentucky reversed the lower court and held that the state Education Professional Standards Board (Board) abused its discretion when it denied the reinstatement petition of a former teacher (Plaintiff) following the expungement of his criminal conviction. The Plaintiff was convicted of a felony and his teaching certificate subsequently expired. More than a year after such expiration, the Board entered an order permanently revoking the certificate solely based on the conviction (as permitted by statute) and without presenting additional evidence. The conviction was eventually overturned and the Plaintiff successfully sought an expungement of his conviction and all related records in the custody of the court at issue and any other state agencies.
**McNabb v. Kentucky Education Prof. Standards Board**

- The Board, however, did not expunge the related revocation. It denied the Plaintiff’s motion for reinstatement of his certificate without explanation and the Plaintiff filed suit. The lower court remanded to the Board to issue findings of fact, which it did: that the revocation was based not only on the conviction but also the underlying evidence in the criminal case, that no evidence in that case was found to be inadmissible and that his attorney was inadequate, etc. The court held that the Board did not comply with the statutory mandate to expunge its records related to the criminal conviction and that its revocation was based solely on the fact that the conviction existed. Once such conviction was expunged, it is considered as never having existed, thus there was no longer a basis for the revocation. Be that as it may, the court did not grant the Plaintiff’s motion to have his certificate reinstated because it had expired prior to the Board’s revocation. Therefore, the Plaintiff must reapply for a teaching certificate, at which time the Board could seek to introduce evidence independent from that which is the subject of the expungement.

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**Moral Character...Moral Turpitude....**

- DWI / DUI
- Impairment / ADA
- Criminal conviction / Guilty plea
- Duty of court to report
- Self reporting
- Renewal applications / failure to report
- Grounds for discipline
- Grounds for denial of licensure
Owens v. Missouri State Board of Nursing #1

- The Court of Appeals of Missouri affirmed the circuit court and upheld the reversal of the revocation of a nurse's license for a guilty plea of driving while intoxicated. The Missouri State Board of Nursing ("Board") held a hearing to determine whether a nurse should be disciplined after she pled guilty in 2011 to a misdemeanor of driving while intoxicated-drug intoxication (DWI). The Board filed a complaint in 2013 alleging that the nurse should be disciplined because of the guilty plea to DWI and alleged the DWI was an offense involving moral turpitude and was reasonably related to the practice of nursing. The Board further alleged that the nurse failed to report the guilty plea on her 2011 and 2013 renewal applications.

Owens v. Missouri State Board of Nursing #2

- After a hearing, the Board revoked her license, finding the DWI involved moral turpitude and was related to the practice of nursing. The Board did not find the failure to report the guilty plea on the applications was an independent basis for discipline. The nurse appealed and the circuit court reversed the revocation. The appellate court affirmed, finding that DWI was not a crime of moral turpitude or a crime reasonably related to the ability to practice as a nurse. The appellate court defined "moral turpitude" and reviewed jurisprudence from other jurisdictions, noting that no Missouri court had addressed whether DWI is an offense involving moral turpitude. The court found that driving while intoxicated is not a crime involving moral turpitude, especially when dealing with a first offense and a conviction as a misdemeanor. Thus, the Board had no authority to revoke the license under the applicable statutes. In addition, the court found that because the Board did not find cause to discipline the nurse for failing to report the guilty plea on her renewal applications, the nurse's challenge to the revocation on that ground was without merit.
MANY THANKS........&

Questions?

Comments?