

## Ex-AAMI Student Wins Preliminary Injunction in Disputed Exam Score Case

### Meanwhile, The Conference has Been Settling Cases to Move Forward after Alleged Exam Scheme

A graduate from the American Academy McAlister Institute of Funeral Service in New York City recently won a preliminary injunction barring the Montana Board of Funeral Service from revoking his license based on The International Conference of Funeral Service Examining Board's invalidation of his passing score on the National Board Exam pending the culmination of underlying litigation.

The Honorable Mike Menahan, a district court judge with the Montana First Judicial Circuit, issued the preliminary injunction Jan. 5. His order states that the board, which is administratively attached to Montana's Department of Labor and Industry, can take no further action against Mikel Stevenson until a lawsuit he filed against The Conference challenging the reversal of his score is resolved.

The Conference invalidated the scores of numerous AAMI students, including Stevenson, as the result of an alleged organized campaign to share questions, answers and other "highly sensitive information" from the NBE with AAMI faculty and students.

The alleged scheme was uncovered as the result of an anonymous email sent by a former AAMI student on Sept. 16, 2013. In the email, which was sent to The Conference as well as the American Board of Funeral Service Education and the New York Department of Health Bureau of Funeral Directing, the student stated that they received advance information about the exam.

As a result, The Conference launched an investigation and sued AAMI for copyright infringement, misappropriation of trade secrets as well as tortious interference with test takers' confidentiality obligations. AAMI denied the obligations but agreed to a confidential settlement in January 2015.

Ever since, however, The Conference has been working to identify the students who improperly benefited from the alleged exam question harvesting scheme and/or who illegally shared information about the exam with AAMI faculty and/or fellow students.

About 300 former AAMI students were involved in either receiving or sharing exam content or both, says Jennifer A. Semko, a partner with Baker & McKenzie, which is representing The Conference. "For the most part, they have all been now notified," she says. "It is always possible that as The Conference continues to review the documents it has and continues to talk with the students at issue that more

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people may be identified, but we don't think it's going to change significantly.”

Semko is disappointed by the injunction and notes her firm and the Montana Department of Labor and Industry have filed a motion to dissolve it. The injunction was granted “very quickly” before anyone had a chance to respond to the request, she says.

The preliminary injunction that Menahan signed off on notes, “Here, if the State revokes Plaintiff's license, he will not be able to legally continue earning a living in his chosen profession. He will face financial insolvency, loss of his home and ruin to his credit. In addition, while Plaintiff is prevented from practicing his profession, he will also lose customers, business reputation and goodwill.”

Stevenson is currently a funeral director at Anderson Stevenson Wilke Funeral Home & Crematory, which was established in 2010 in Helena, according to the firm's website.

Tyler Moss, special assistant attorney general with the Montana Department of Labor and Industry, notes that the order – as it was issued – was actually proposed by Stevenson's attorneys, John L. Amsden with Beck & Amsden in Bozeman, Montana, in conjunction with Brian S. Sokoloff and Mark A. Radi with Sokoloff Stern in Carle Place, New York. “It was entered without a hearing, which is just against process,” Moss says. “It has not been entered in a correct, procedural manner.”

Moss notes that after receiving information from The Conference about Stevenson's invalidated test scores, two complaints were generated – one against Stevenson's crematory operator's license and the other against his funeral director license. The complaint against his crematory operator's license was dismissed as someone with that license does not need to pass the NBE, Moss says.

The board declined to move against Stevenson's funeral director's license on the basis of unprofessional conduct. “We know for certainty that his score was invalidated, but the board did not have enough information to say he acted inappropriately at that time, so it declined to act against his license on an unprofessional conduct basis,” Moss says. “That does not mean we can't in the future – we just didn't at the time. We only know that he doesn't have a valid score, and that his score was used to get a license here.”

Semko does not agree with the judge's decision to grant the preliminary injunction. “From The Conference's perspective, the Montana State Board does not yet have the benefit of all the documents reflecting the basis on which The Conference invalidated Mr. Stevenson's score,” Semko says.

She emphasizes that all the injunction means is that the state – if the injunction stands – won't be able to take any action against Stevenson's license while the litigation is ongoing.

### **Status of Other Cases**

Perhaps the bigger news regarding the dispute between The Conference and former AAMI students who have sued it for invalidating their scores is that many of those cases have been settled.

The Conference has settled eight of 16 lawsuits that students have filed as plaintiffs since The Conference began invalidating scores last year. Two more cases are close to being settled, she says. (Semko notes that to be precise, former AAMI students filed 17 lawsuits, but one student filed two separate lawsuits in separate jurisdictions, and one of them was withdrawn).

“Obviously, The Conference does not wish to be involved in more litigation,” Semko says. “We don't think it's in the best interests of the test takers either. The Conference is in active discussions with many students about reaching an amicable resolution comparable to the arrangements with the folks whose lawsuits we've already settled.”

Most of the lawsuits have been filed by students who not only had their passing NBE scores nullified but were told they would not be able to retake the exam for five years – effectively ending their careers in funeral service. This penalty, Semko says, was reserved for egregious cases of actively sharing test information – not just benefiting (sometimes inadvertently) from answers shared by others.

In the cases The Conference has settled, it has agreed to lift the five-year suspension of a former student’s ability to retake the exam as long as they complete remedial steps, including taking an ethics course, writing a letter saying they understand the importance of the security of the exam, providing copies of any documents they have that show the receipt of exam content or of providing exam content while at the school and in some cases making a monetary payment to The Conference to help it defray the cost of replacing compromised test questions, Semko says.

That third component – providing copies of correspondence showing the sharing of exam content – is critical, Semko says. “The Conference has a large number of documents that it seized from AAMI, but we don’t believe we have everything that reflects the stolen exam content,” she says. “By asking the students to provide copies, it gives us an extra way to test for compromised test questions so they can be modified or removed,” she says.

Once the students who have agreed to settlements complete the remedial measures, they will be permitted to take the exam again, Semko says. In the meantime, what happens to their licenses is not up to The Conference but to individual state licensing boards, Semko says.

“I think it’s safe to say the states are all watching this very closely – and they are interested in evaluating the situation themselves under their own standards,” Semko says. “Most of them, to my knowledge, take this quite seriously. I think it’s too soon to know what steps any particular state will take (as a result of The Conference invalidating exam scores).”

Asked how many test questions were compromised by the alleged scheme, Semko says, “certainly hundreds.” She adds, “This activity appeared to be happening at AAMI for almost two decades.”

Many of the now roughly 300 students who had their scores invalidated and were allowed to retake the exam had to make a \$500 contribution to a fund for the development of new test questions.

The students who have settled with The Conference have in some cases been required to pay more than \$500. The amount required was driven by how much information they shared, Semko says. “Some of the individuals involved really provided extensive details about many, many questions, and The

### Broken Agreement?

The International Conference of Funeral Service Examining Boards and the American Academy McAllister Institute of Funeral Service in New York City agreed to a confidential settlement resolving The Conference’s claims against the college, but it’s unclear if both sides have adhered to that agreement – or what the repercussions might be if it’s been violated.

Jennifer Semko, a lawyer representing The Conference, states that it’s her understanding that the college is paying the legal costs of former students who are suing the conference, all of which are being represented by Brian Sokoloff of Sokoloff Stern LLP in Carle Place, New York, in conjunction with local counsels when applicable.

“We understand that AAMI pays (Sokoloff’s) legal bills, and we have been told by some test takers that in exchange for the free lawyer, students are required to relinquish their claims against AAMI,” Semko says.

Semko says The Conference believes that the school is violating the settlement agreement by paying the legal fees of former students. “They’ve informed us they disagree, and The Conference is continuing to evaluate its options on that front,” Semko says. “Our primary focus right now is getting back to the business of administering and developing the test, and that requires us to focus foremost on these lawsuits and the pipeline of additional individuals who we are working to reach resolutions with based on their involvement.