

This update features North Carolina case law regarding professional licensing from the past three years, 2011-2014. In some instances, these case summaries focus selectively on the most significant parts of the case; but we can provide further details regarding any of the cases included in this document, as needed. These case summaries can be categorized as addressing three general subjects:

1. State agency challenges to the unauthorized practice of law;
2. Questions arising regarding the interpretation or validity of a board's authorizing statute; and
3. Challenges to boards' enforcement powers and procedures.

4. Challenges to the unauthorized practice of law

- LegalZoom.com, Inc. v. N.C. State Bar, 2014 NCBC 9 (N.C. Super. Ct. 2014). At issue in this case is whether legal document templates offered by a prepaid legal services plan constituted the unauthorized practice of law. Additionally, the question of whether the Bar has a monopoly on the practice of law likewise may be addressed by a court, going forward. The court addressed several questions in its decision, concluding that LegalZoom had not yet exhausted its administrative remedies; and concluding that the Bar's sovereign immunity barred any claims of commercial disparagement.

The case arose from an inquiry by the Bar, beginning in 2003, regarding whether LegalZoom's activities constitute the unlicensed practice of law. This inquiry was subsequently closed without any disciplinary action taken, but then the issue was addressed again in 2007, resulting in a cease and desist letter. LegalZoom responded with a letter challenging the cease and desist letter's findings, but the matter did not proceed further at that point. Subsequently, in 2010, LegalZoom unsuccessfully attempted to register one of its prepaid legal document plans with the state bar, resulting in the exchange of several letters and legal counsel discussions, but without a final result from the Bar. Then, without any resolution from the Bar, LegalZoom filed its complaint resulting in this court decision.

Regarding the exceptions to the practice of law, the court held that LegalZoom cannot rely on self-help exception (i.e., simply providing documents to fill out); but a more developed record was needed to determine whether LegalZoom's

online software might fit within the scrivener's exception (simply recording information without giving advice or expressing legal judgments). Barring settlement or statutory or enforcement changes, this case will likely proceed on the issue of the scrivener's exception to the practice of law.

- Kindsgrab v. State Bd. of Barber Examiners, 763 S.E.2d 913 (N.C. Ct. App. 2014). The Board of Barber Examiners imposed fines and demanded that an unlicensed individual cease advertising barber services and take down a barber pole. On appeal, a trial court concluded that the Board did not have statutory authority to impose fines. The court of appeals overturned this decision, finding that the Board has such authority.

N.C. Gen. Stat. §§ 86A-5 & -27 grant the Board the power to assess civil penalties of up to \$500 per violation of the act or rules, but the law does not explain whether this power is limited to just levying fines on licensees, or unlicensed persons as well. Thus, the court concluded that fines against unlicensed persons were allowed because the law did not specifically exclude unlicensed persons from the application of N.C. Gen. Stat. §§ 86A-5 & -27, as it did in other sections of the act. Further, the court noted that such reading was consistent with the overall public protection aim of the act.

5. Statutory interpretation

- N.C. State Bar v. Wood, 209 N.C. App. 454 (N.C. Ct. App. 2011). The State Bar disciplined a licensee based on a judgment against him in a criminal case. A question before the court of appeals was whether the Bar's act, which calls for discipline based on "conviction" of criminal conduct by a licensee, allows the Board to discipline based on a court judgment alone, without the imposition of a sentence having occurred. The defendant argued that sentencing, together with a judgment, would constitute conviction and trigger the Bar's disciplinary powers. The court of appeals concluded that North Carolina law, which recognizes a judgment as a conviction, would allow the Bar to act upon a judgment only.
- 2013 NC OAH LEXIS 164 (NC OAH 2013). The administrative law judge decided that a new provision in the Board of Funeral Services' authorizing statute could not have retroactive effect. Beginning in 2002, the respondent repeatedly applied to the Board of Funeral Services for re-licensure following a criminal conviction in Virginia. Between 2002 and 2012, the relevant statutory language in the Board's authorizing Act required licensees to be of good moral character. Regardless of this language and other statutory grounds to deny the respondent's application for re-licensure, each year the Board granted re-licensure. In 2012, the Board's authorizing statute was changed to make re-licensure decisions contingent on the lack of criminal convictions, rather than leaving the decision to the Board's

discretion. Evidence suggested that this change was made partially as a reaction to the circumstances of the respondent. Thus, the court concluded that if the stricter language of the new authorizing statute was applied retroactively, it would constitute an unconstitutional bill of attainder, as it would effectively serve to legislate against the respondent as an individual.

6. Enforcement powers and procedures

- N.C. State Bar v. Barrett, 219 N.C. App. 481 (N.C. Ct. App. 2012). The court of appeals overturned the State Bar's disciplinary order against a licensee. The court concluded that the attorney's due process was violated because the complaint against her centered on one single alleged false representation, which was not adequately substantiated by the facts. The facts set forth in the complaint against the attorney differed from the facts set forth at the hearing against the attorney; as a result, the attorney could not be prepared to respond to them.
- In re Suttles Surveying, P.A., 742 S.E.2d 574 (N.C. Ct. App. 2013). The court of appeals upheld the Board of Examiners for Engineers and Surveyors' decision to suspend a surveyor's license and reprimand his company. The disciplinary matter primarily concerned discrepancies in billing regarding one of plaintiff's projects. The plaintiff contended that the Board lacked statutory authority to discipline him concerning a contractual fee dispute. The court concluded that the issue before the Board had not been a contractual dispute between two parties, but the conduct of the surveyor in regards to the contracted work and billing. The board was not resolving a contractual claim, but was disciplining a licensee for unethical conduct.
- In re Jemsek, 761 S.E.2d 755 (N.C. Ct. App. 2014). Plaintiff doctor appealed a trial court order dismissing his petition for review of a Medical Board disciplinary order. The order was based on a finding that the doctor treated multiple patients for Lyme disease without acceptable evidence that they had the disease. The order subjected the plaintiff to a 12 month suspension, stayed pending the plaintiff's cooperation with several conditions imposed by the board, regarding verification and review of patient diagnoses. The plaintiff did not appeal the order, but years later instead sought a declaratory ruling to find that the order was moot, and in violation of several Board policies and state regulations. The Board denied the petition; the plaintiff appealed and the Board's decision was upheld by the trial court. The court of appeals reviewed the grounds under which the Board may issue a declaratory ruling; one such ground is that there has been "a similar controlling factual determination made by the Board in a contested case." In this instance, the similar determination came from the Board's previous order against the Plaintiff.

- Spencer v. N.C. Bd. of Nursing, 727 S.E.2d 405 (N.C. Ct. App. 2012). The Board of Nursing disciplined a licensee based on multiple convictions for driving under the influence. The nurse argued that the Board's ability to discipline only extended to substance abuse findings that would impact the nurse's ability to practice nursing. The court concluded that discipline was appropriate under statutory language that allowed the Board to discipline based on the "commission of any crime which bears on a licensee's fitness to practice nursing."
- In re McGee, 217 N.C. App. 325, 326 (N.C. Ct. App. 2011): Defendant filed suit seeking the reversal of a State Bar disciplinary order, rather than appealing that order. The court characterized the suit as a collateral attack on a final order, agreeing with the Bar's conclusion that the petitioner should have filed a petition for reinstatement instead of filing a separate suit.
- N.C. State Bar v. Badgett, 212 N.C. App. 420 (N.C. Ct. App. 2011). The defendant disbarred attorney unsuccessfully raised several challenges to the State Bar disciplinary process that resulted in his discipline. Upon appointment as a judge, defendant leased his firm's offices to an attorney. The attorney then represented multiple clients before the defendant without either party disclosing their relationship; conduct arising from this relationship lead to an investigation by the Bar. Additionally, the Bar filed a complaint regarding inappropriate conduct in the courtroom by the defendant. Questions before the court included:
 - o The defendant argued that newspaper stories regarding his conduct, entered into evidence before the Bar, constituted prejudicial error by the Bar. The court disagreed, finding that the disciplinary committee's decisions were not based on the newspaper articles, and thus, no unfair prejudice occurred.
 - o The defendant also argued that the newspaper stories constituted hearsay. The court concluded that they were properly entered as evidence of the damage defendant's conduct could cause to the reputation of the legal profession and judiciary.
 - o The defendant argued that disbarment was disproportionate to his conduct. The court concluded that based on the seriousness of the defendant's actions, disbarment was appropriate.
- Wimes v. N.C. Bd. of Nursing, 2014 N.C. App. LEXIS 1328 (N.C. Ct. App. Dec. 16, 2014). The Board of Nursing decided to reinstate the plaintiff's license, subject to probationary conditions, after a period of six months following the reinstatement hearing. The nurse was originally subject to a consent-to-surrender in 2005 because of findings of a chemical dependency and at least one incident of being

impaired while on duty. In the years following that, the plaintiff repeatedly requested reinstatement, but when being informed of the drug treatment program necessary for reinstatement, did not choose to pursue the program. Eventually, the plaintiff participated unsuccessfully in the program. The Board then decided to approve reinstatement, subject to several conditions. The plaintiff appealed the conditions, which were for the most part affirmed on appeal by a trial court. On appeal to an appellate court, the Board's conclusions were once again generally upheld.

N.C. Gen. Stat. § 90-171.37 was the basis for the plaintiff's claim; it sets forth 8 bases for disciplinary action by the Board. The plaintiff claimed that none of the 8 bases were met. No case law exists regarding this statutory provision; the court concluded that language in N.C. Gen. Stat. § 90-171.37 allowing discipline if a licensee's conduct endangered public health, or if drug use interferes with practice, applied. The court similarly rejected the plaintiff's appeal on several other grounds, concluding that the Board's discipline was not arbitrary and capricious, and that all of its findings of fact were supported by competent evidence.