

This update features case law, legislation, and other disciplinary or federal-level actions regarding professional licensing from the past year. Content is divided by topic, including both trends in regulation and updates on basic concerns such as enforcement and licensure. A total of seven topics are covered:

1. Attempts to deregulate professions;
2. Expedited licensure for military personnel and spouses;
3. Increased regulation of mobile and telepractice of professions;
4. Efforts to expand the scope of medical practice for non-doctors;
5. Developments in education and examinations;
6. Developments in licensure and renewal;
7. Developments regarding state boards' regulation of professional practice.

Many of the subjects discussed below have produced case law and legislation in multiple states, and we have included only a sampling of the more recent or noteworthy developments.

1. Attempts to deregulate professions

In recent years, businesses, non-profit organizations, and federal and state governments have been increasingly pushing to deregulate certain licensed professions and more generally loosen regulations on all licensed professions. In April of 2014, the U.S. House's Committee on Small Business held a hearing to examine whether, to improve the economy, certain licensing boards should be eliminated and licensing requirements relaxed. In July of 2014, the Federal Trade Commission appeared before this committee to testify to the need to relax occupational regulations. The ongoing *Federal Trade Commission v. N.C. Dental Board* case is another example of the deregulation trend. The following are several examples of high-profile actions and cases on the subject.

- Tennessee & Nevada: Unsuccessful attempts to eliminate licensure for hair braiders. Two federal courts rejected challenges to state cosmetology board licensure of hair braiders. The challengers claimed that the regulation violated their due process and violated the Constitution's equal protection clause; the courts disagreed. *Bah v. AG of Tenn.*, 2014 U.S. Dist. LEXIS 79121 (W.D. Tenn.

June 10, 2014) & *Waugh v. Nev. State Bd. of Cosmetology*, 2014 U.S. Dist. LEXIS 108223 (D. Nev. Aug. 6, 2014).

- Texas: A sweeping plan to deregulate cosmetologists, barbers, and other professions. In August, then gubernatorial candidate (now Texas governor-elect) Gregg Abbott proposed a scheme to deregulate a number of licensed professions. In addition to deregulating interior designers, barbers, cosmetologists, and a number of other professions, the governor-elect broadly proposes allowing unlicensed practice by any non-health and non-safety related occupation so long as the lack of a license is disclosed and a few other conditions are met. Further, criminal penalties for unlicensed practice would be repealed in most instances.
- Texas: Licensure requirement for eyebrow threading challenged before state supreme court. The Texas Supreme Court will soon hear a challenge to state rules requiring licensure to perform eyebrow threading. Petitioners assert that the state's regulation of eyebrow threading violates the state constitution's due process and privileges and immunities clause.

2. Expedited licensure for military personnel and spouses

North Carolina eased reciprocity and the granting of temporary licenses for military spouses and veterans in 2012. In the years since then, dozens of other states similarly eased entry into practice for military spouses. Below is an overview of some of the military spouse and veteran licensing provisions enacted in 2014. These examples have been selected in particular because they reflect approaches that differ somewhat from the law passed in North Carolina in 2012.

- Massachusetts: Waiving some licensure fees. The Valor Act II was signed in April 2014. It waives professional licensing application fees for members of the armed forces, when they apply for licensure based on education, training, or service completed during their military service.
- Virginia: Expediting the provision of temporary professional licenses to military spouses. In March, Virginia enacted a law to reduce the time for granting temporary professional licenses for military spouses from 30 to 20 days.
- West Virginia: Expediting the provision of temporary professional licensing to military spouses and waiving some licensure fees. In April, West Virginia enacted a law granting state boards the authority to customize licensure and fee waiver procedures for military spouses, and to ensure that licenses would be granted or denied within one month following application.

3. Increased regulation of mobile and telepractice of professions

As in recent past years, state licensing boards continued to respond to instances of telepractice of professions in 2014. Additionally, in the past year, at least two state boards have addressed the legality of the mobile practice of professions. Examples of such regulations and cases appear below.

- Massachusetts: Challenging mobile manicure services. The Massachusetts Board of Registration of Cosmetology opened an investigation in October regarding a mobile manicure provider. At issue is a state law requiring that all cosmetology services be performed by a licensed technician in a "licensed salon." The mobile manicures are performed by licensees, but generally occur at offices, hotels, and similar venues, and not at licensed salons.
- Michigan: Challenging automated eye exams and eyeglass sale kiosks. Michigan enacted a law in September banning automated eye exams and eyeglass sale kiosks. Act No. 269 requires that a licensed optometrist or eye doctor examine and evaluate a patient before glasses be prescribed.
- Utah: Issuing an emergency order to stop the practice of telemedicine. The Utah Division of Occupational Professional Licensing issued an emergency order in July to stop a Utah-licensed doctor based in the U.S.'s Commonwealth of the Northern Mariana Islands from seeing patients via video conference. The doctor surrendered his Utah license soon thereafter.

4. Efforts to expand the scope of medical practice for non-doctors

In recent years, there have been a number of attempts to expand the scope of medical practice allowed by several types of non-doctor medical professionals. For example, in March of 2014, the FTC released a staff report urging state legislatures to expand the scope of practice for advanced practice registered nurses. Sixteen states currently allow nurse practitioners to prescribe medications, order diagnostic tests, and make referrals to specialists; and both the FTC and other parties have been active in the other 34 states, lobbying to expand the scope of activities allowed for certain nurses. The following are several relevant examples from the past year of successful and unsuccessful efforts to expand the scope of medical practice by non-doctors.

- Delaware: Expanding the scope of practice for physical therapists. The Act to Amend Title 24 of the Delaware Code Relating to Physical Therapy and Athletic Training will allow telehealth and "dry needling" by physical therapists and would allow temporary practice by out-of-state licensees in some instances.

- California: A failed attempt to expand optometric scope of practice. SB 492 failed in the California legislature. It was an attempt to expand optometric scope of practice to include therapeutic lasers, pharmaceutical agents, and immunization administration.
- Massachusetts: The FTC advocates for lessening physician supervisor requirements for nurse practitioners and nurse anesthetists regarding certain controlled substances. The FTC wrote a letter to the Massachusetts legislature in March, supporting house and senate bills that would remove supervision requirements from nurse practitioners and nurse anesthetists. Neither bill has passed yet.
- Missouri: The FTC advocates for lessening physician supervisor requirements for advanced practice registered nurses. The FTC wrote a letter to the Missouri legislature in May, supporting two bills that would set forth standards for the scope of practice of advanced practice registered nurses, allowing them to perform certain diagnostic activities without physician supervision, or via electronic collaboration with a physician. Both bills have not progressed further in the Missouri House.

5. Developments in education and examinations

The following three noteworthy cases from 2014 concern state licensing board regulation of nursing schools, and challenges to a state board's approach to disability accommodations in testing.

- Kansas: Board of Nursing allowed to restrict nursing licenses based on testing accommodations. The 10th Circuit Federal Court of Appeals has held that the Kansas Board of Nursing can restrict and limit nursing licenses acquired through testing accommodations where there is a rational basis for such restrictions. The licensee at issue was informed by the Board that if passed his licensing exam with accommodations for dyslexia and test-taking anxiety, he would only receive a limited license. He took the exam without accommodations and failed. The licensee claimed that the Board's decision to tie exam accommodations to a limited license violated the Americans with Disabilities Act and his constitutional right to equal protection. The Board claimed that it was entitled to sovereign immunity. The court noted that Title II of the ADA did not abrogate a state's sovereign immunity in the context of professional licensing. There was also no requirement under the ADA to make special accommodations for the disabled, provided that actions towards such individuals were rational. Here, the district court properly found that there was a rational basis for the restriction. *Turner v. National Council of State Boards of Nursing, Inc.*, 561 Fed. Appx. 661 (10th Cir. Apr. 2, 2014) [unpublished]; petition for certiorari was denied in October.

- Ohio & Delaware: Challenges to State Board Regulation of Nursing Schools.
 - o In Delaware, the Board of Nursing is authorized to review and approve registration of nursing schools. A state court upheld a lower court finding that the Board of Nursing appropriately provided notice and hearing regarding the withdraw of its approval for the school's registration. The Board had repeatedly informed the school of its deficiencies; the Board had no obligation to show good cause or adhere to any other relevant standards, as it is given leeway in making assessments of nursing schools under the law. *Camtech Sch. of Nursing & Tech. Scis. v. Del. Bd. of Nursing*, 2014 Del. LEXIS 373 (Del. Aug. 22, 2014).
 - o The Ohio Board of Nursing attempted to permanently deny education credentials from a newly opened Ohio nursing school. The court concluded that it did not have the statutory authority to do this, as the Board cited a legal provision allowing it to deny licensure to individuals as its only relevant support for banning credit hours from the school. *Ohio Am. Health Care, Inc. v. Ohio Bd. of Nursing*, 2014-Ohio-2422 (Ohio Ct. App., Franklin County 2014).

6. Developments in licensure and renewal

A range of court decisions and state regulations have addressed states' limits on professional licensure, unlicensed practice, license renewal, and associated regulations. The following cases include examples of state courts and an attorney general limiting and protecting board practices on the subject, as well as state laws expanding access to licensure.

- Arkansas: Automatic professional license suspension unconstitutional. Automatic state bar license suspension for delinquent license fees was held unconstitutional by the Arkansas State Supreme Court, because it denies the licensee due process. *Chandler v. Martin*, 2014 Ark. 219 (Ark. 2014).
- Illinois: A claim that professional licensing fees are a state tax. In a case before a state appellate court, the Illinois Association of Realtors argued that the collection of licensing fees by the state amounted to a tax, since some of the revenue from the fees ended up in the state's general fund. The court concluded that the Association lacked standing to pursue the case, and did not decide the question of whether licensing fees are a tax. *Ill. Ass'n of Realtors v. Stermer*, 2014 IL App (4th) 130079 (Ill. App. Ct. 4th Dist. 2014).

- Louisiana: Mental health questions on license applications violate the ADA. In February, the U.S. Department of Justice Civil Rights Division informed the Louisiana State Bar that questions it asks candidates on past diagnoses and treatment for mental health disorders violate the ADA. The Department of Justice stated that such questions can constitute “eligibility criteria that screen out or tend to screen out individuals with disabilities based on stereotypes and assumptions about disabilities and are not necessary to assess applicants’ fitness to practice.”
- Virginia: Regulation of unlicensed practice upheld after Sherman Antitrust Act challenge. A Virginia chiropractor was disciplined by the Virginia Board of Medicine for exceeding the scope of practice allowed by a licensed chiropractor. She sued the medical board and its members, claiming that the board violated federal antitrust law. The board and its members asserted a state action immunity defense (among other defenses). The board’s briefs therefore included a discussion distinguishing their situation from that of the North Carolina Dental Board in the Federal Trade Commission v. N.C. Dental Board case, but the Eastern District of VA district court did not address state action in its opinion. Instead, the court granted the board summary judgment, determining that federal antitrust laws were not violated because the procompetitive benefits of the board’s actions in regulating medical professions outweighed any detrimental restraint on trade. *Petrie v. Va. Bd. of Med.*, 2014 Va. App. LEXIS 137 (Va. Ct. App. Apr. 8, 2014).
- New Jersey: Unintentional misrepresentation of license application is grounds for denial. The New Jersey Appellate Division upheld a license application denial by the New Jersey Board of Massage and Bodywork Therapy. This Board requires license applicants to sign an affidavit stating the truthfulness of the contents of their applications. The applicant at issue did not disclose a prior arrest (for which charges were later dropped), explaining that she misunderstood the application instructions, was not guilty of the crime she was arrested for, and English was her second language. She thus argued that she did not have intent to deceive on the application. The Appellate Division agreed with the Board that an applicant’s unintentional failure to disclose information on a licensure application could be the basis for a denial of licensure. A negligent misrepresentation, rather than an intentional omission/lie, violated the state’s Uniform Enforcement Act for professional boards. *In re Application of Y.L.*, 437 N.J. Super. 409 (App.Div. 2014). No intent to deceive was required for the law to be violated.
- Arizona: Improper licensing procedures uncovered. In November 2013, the Arizona State Ombudsman concluded an investigation of the Medical Board director, determining that she and the Board’s deputy director ordered state employees to violate state laws on numerous occasions. The report concluded

that the director reduced the Board's staff numbers to two people, and then put in place abbreviated licensing procedures, in order to handle the volume of work regularly before the board. These procedures circumvented state law, and resulted in licenses being granted to unqualified candidates. Examples of the shortcomings of the licensing process included:

- Foreign college transcripts were not vetted;
- Candidates with criminal records that should have precluded licensure were admitted;
- And state laws regarding examinations and application procedures were ignored.

As a result of the report, the director and deputy director were terminated. In 2014, the former director files a claim for back salary and legal fees, on the grounds that the Ombudsman report stemmed from her official board duties. The State Attorney General denied this request, concluding that instead of acting under state law, the deputy director repeatedly violated multiple state laws, and thus should not be reimbursed for legal expenses.

- Florida & California: Undocumented immigrants are eligible for admission to the state bar if allowed by state law.
 - The Florida Board of Bar Examiners filed a petition with the state supreme court requesting an advisory opinion as to the following question: Are undocumented immigrants eligible for admission to the Florida Bar? In response, the court held that unauthorized immigrants were ineligible for admission to the Florida Bar. The court noted that the power to determine immigration policy rests with the federal government, which has enacted laws setting the terms for employment for aliens. The Personal Responsibility and Work Opportunity Act (PRAWOA) prohibits specific categories of aliens from obtaining professional licenses. Although there was a provision in the PRAWOA that allows a state to override the federal prohibition and provide a state public benefit to unauthorized immigrants, there were no current Florida laws permitting the Supreme Court of Florida to issue a law license to an unauthorized immigrant. *Florida Board of Bar Examiners*, 134 So. 3d 432 (Fla. 2014).
 - Florida subsequently enacted a law in May to allow undocumented immigrants brought to this country as children to be eligible for admission to the bar provided they meet certain criteria.
 - The California Supreme Court heard a very similar case to the Florida Bar's case in 2014; coming to the same conclusion regarding the PRAWOA. The

difference between the Florida case and the California case is that before the California court ruled, California enacted a new law to allow undocumented immigrants to be eligible for admission to the bar provided they meet certain criteria. *In re Garcia*, 58 Cal. 4th 440 (2014).

- California has since enacted an additional law, allowing undocumented immigrants meeting certain criteria to sit for a wide range of professional licensing exams beyond the bar exam.
- A similar case is currently before the New York Supreme Court.
- Virginia: A company should not be disciplined for subcontracting with a licensed gas fitting contractor who, without the company's knowledge, employed unlicensed individuals. The Board of Contractors attempted to levy a fine and require a remedial class for Best Buy, after the company was found to contract appliance installation to a licensed contractor, who in turn hired an unlicensed individual to do the work. The court concluded that Best Buy had not acted as a contractor in the arrangement, but simply as a business. *Dep't of Prof'l & Occupational Regulation v. Best Buy Stores, LP*, 2014 Va. App. LEXIS 30 (Va. Ct. App. Feb. 4, 2014).
- Texas: The Federal Trade Commission discouraged the adoption of a rule that would discourage dentists from affiliating with Dental Service Organizations. A proposed Texas rule would have limited the ability of Texas dentists to enter into contracts with "unlicensed persons" to provide non-dental services, such as administrative and business support. The FTC noted the potential anti-competitive effect of such rules. The Texas Dental Board has not yet been amended to add the language the FTC has criticized.

7. Developments regarding state boards' regulation of professional practice

The following cases concern state board and state law regulation of trade names and restrictions on unauthorized practice. While upholding some laws and rules setting limits on unauthorized practice, state courts in 2014 have limited the reach of board and state restrictions on practice.

- Pennsylvania: many funeral home regulations allowed to stand, but a ban on trade names is overturned as unconstitutional. A lower state court overturned the state's ban on trade names for funeral homes, as well as restrictions on the number of establishments that a licensed professional may work at or own, commissions for sales agents, and the practice of warrantless inspections of funeral homes. On appeal, these findings were reversed and the regulations

were permitted, with the exception of the ban on trade names. The court did not find sufficient evidence for the board's claim that the banned names would be misleading or fraudulent; the restrictions were found to violate the First Amendment. *Heffner v. Murphy*, 745 F.3d 56 (3d Cir. Pa. 2014).

- Nevada: an out-of-state architecture firm may not practice without a license, despite the fact that one of its architects was licensed. Despite the fact that an architect at the relevant firm was licensed in Nevada, the fact that the firm itself was licensed in Colorado but not Nevada meant that the firm could not provide services restricted to licensed firms. *DTJ Design, Inc. v. First Republic Bank*, 318 P.3d 709 (Nev. 2014).
- Florida: a licensed architect need not be identified by name on a design-build proposal. The court reversed an administrative order by the Florida Board of Architecture and Interior Design finding that a licensed general contractor and licensed architect practiced without a license by collaborating on a design-build proposal without identifying the architect on the proposal. The court interpreted the relevant statute to conclude that licensed general contractor was allowed to hire an architect to assist on a project proposal, even though the proposal did not identify the architect by name. *Diaz & Russell Corp. v. Dep't of Bus. & Prof'l Regulation*, 140 So. 3d 662 (Fla. Dist. Ct. App. 3d Dist. 2014).