

2018 Education Conference • Halifax, Nova Scotia • May 17-19

# DEVELOPING TOOLS FOR SOCIAL WORK MOBILITY



## Mobility Tool Kit Step 2:

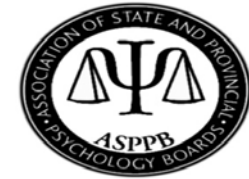
Adapt knowledge to local context:

# Legal lessons learned

Friday, May 18, 2018

10:45am-12:15pm

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# Legal Lessons Learned – U.S.



- What is mobility?



# Legal Lessons Learned – U.S.

The background features a stylized cityscape with a yellow sun, white clouds, and a yellow moving truck labeled 'MOVING & CO.' on a green hill. The truck is positioned in the center, with a house on the left and several buildings on the right. The sun is in the upper right, and the clouds are scattered across the sky.

- **What affects mobility in the U.S.?**

# Legal Lessons Learned – U.S.



# Prior Misconduct

- Attorney held in contempt of court on several occasions, accused of misconduct and publicly reprimanded by the Wisconsin Office of Lawyer Regulation.
- Applied for admission to the Washington bar and Character and Fitness Board found him to have good moral character.
- WA Supreme Court denied admission.
- Applied to Vermont bar but its Character and Fitness Committee declined to certify his good moral character and fitness.
- Vermont Supreme Court upheld denial: inappropriate behavior and misconduct in Wisconsin were likely to continue and he did not possess the necessary character and fitness to enter the practice.

# In re Brittain (2017) (1 of 2)

- The Supreme Court of Vermont (Court) affirmed the decision of the Character and Fitness Committee declining to certify that Eric S. Brittain (Brittain) had the requisite good moral character necessary to admit him to the practice of law in Vermont. Brittain practiced law in Wisconsin where he was in good standing with the state bar, the U.S. District Court and the U.S. Court of Appeals for the Seventh Circuit. After a dispute with his supervisor during his employment in the office of the Wisconsin Public Defender, Brittain was suspended and then resigned to enter the private practice as a sole practitioner. During his practice, he was held in contempt of court on several occasions, accused of misconduct and was publicly reprimanded by the Wisconsin Office of Lawyer Regulation. Brittain applied for admission to the bar of the State of Washington and, after a hearing, was found by the Character and Fitness Board of that state to be of good moral character but was denied admission by the Washington Supreme Court. Subsequently, he applied to the Vermont bar for admission, but the Vermont Character and Fitness Committee declined to certify his good moral character and fitness. Brittain appealed to the Vermont Supreme Court.

# In re Brittain (2017) (2 of 2)

- The Court, under its "unique constitutional responsibility" reviewed the history of Brittain's legal education and legal career in great detail including the review of court transcripts that led to his contempt episodes. It was empowered to reach its own decision irrespective of the Committee's decision. It concluded that, under the facts, his inappropriate behavior and misconduct in Wisconsin were likely to continue and found he did not possess the necessary character and fitness to enter the practice in Vermont. The Court affirmed the denial of the Committee. One judge dissented based on the following: (1) Brittain did not fail to fulfill his obligations to his clients; (2) the Wisconsin Bar imposed a light sentence with a reprimand; (3) the record indicates Brittain accepted blame for his previous problems; and (4) passion and zealous advocacy should not be confused with character.



# Criminal Conviction: State Specific

- Applicant for concealed carry license in Ohio denied based on misdemeanor conviction in Georgia
- Underlying conduct would be “minor misdemeanor” in Ohio and ok for licensure
- The Ohio Court of Appeals determined statutory intent - consistent with the national instant criminal background check system which favors the "fundamental right to possess a firearm."
- Mere fact that another state might classify an offense as a more serious crime than Ohio does not justify the denial of Ohio licensure.

# Fenton v. Fischer (2017)

- The Ohio Court of Appeals reversed the lower court and held that an applicant for a license to carry a concealed weapon was entitled to such license in spite of his Georgia conviction for possession of a controlled substance. In 2016, the applicant applied for the concealed carry license in Ohio, denying any prior convictions for offenses involving the possession of a "drug of abuse". However, a criminal background check revealed a 1999 Georgia conviction for possession of marijuana in an amount less than one ounce, a conviction classified as a misdemeanor in Georgia. The Ohio sheriff denied the application based upon the conviction and, on appeal by the applicant, the lower court affirmed because misdemeanor convictions (other than minor misdemeanors) constitute automatic denials of concealed carry applications. On appeal again, the applicant argued that the possession offense in Georgia was a misdemeanor but, had it occurred in Ohio, such would be a "minor misdemeanor" and he'd be eligible for the license. The court determined the exact issue was not expressly addressed in law, but interpreted the legislative intent to be consistent with the national instant criminal background check system which favors the "fundamental right to possess a firearm". The mere fact that another state might classify an offense as a more serious crime than Ohio does not justify the denial of Ohio licensure.

# Equivalent Education: Precedent

- Endorsement application denied by Florida for psychologist licensed in Puerto Rico because she did not graduate from accredited program
- Florida law: psychology program must be accredited by the American Psychological Association (APA) (applicant graduate of Carlos Albizu University – later accredited but not at the time of application)
- Licensee sought to substantiate educational equivalency through a comparability study as the Board had permitted a previous Puerto Rico candidate to do.
- Board acknowledged it had done so in error
- Court: Board not bound by its previous erroneous decision.

# Prevor v. Dep't of Health, Bd. of Psychology (2015)

- The Court of Appeal of Florida affirmed the decision of the Board of Psychology (Board) to deny the application for licensure by endorsement of Dr. Ruth C. Prevor, licensed in Puerto Rico, on the basis that she was not a graduate of an accredited psychology program. Florida statutes required, among other things, graduation from a psychology program accredited by the American Psychological Association (APA). Dr. Prevor was a graduate of Carlos Albizu University, the psychology program of which was not accredited at the time of her graduation but was subsequently accredited by APA. Dr. Prevor met all the other statutory requirements and sought to substantiate her educational equivalency through a comparability study as the Board had permitted a previous Puerto Rico candidate to do. The Board acknowledged it had done so in error since the Florida statutes did not allow such a procedure. The Court confirmed the statutes did not allow such a procedure and, accordingly, the Board was not bound by its previous, erroneous decision.

# Inflexible

- Medical Board denied application by endorsement because applicant didn't pass one of 8 exam options
- Applicant licensed in New York had originally failed the FLEX by a small margin and was only allowed to retake failed portions of the test.
- Ohio administrative rule required passing the FLEX exam in one sitting.
- Court: Board has the authority, decision was not arbitrary and requiring passing the exam in one sitting was reasonable.

# Vargas v. State Medical Board of Ohio (2012)

- Ohio Court of Appeals affirmed lower court that upheld medical board order denying applicant a license to practice medicine in Ohio by endorsement and without examination based upon Ohio administrative code that required applicants to pass one of 8 specified examinations. Applicant was licensed in New York and had excellent credentials but had originally failed the FLEX by a small margin and was only allowed to retake failed portions of the test. Ohio administrative rule required passing the FLEX exam in one sitting. The court rejected the arguments of the applicant that the rule exceeded the scope of authority of the board by conflicting with the statute; by creating new policy; and by arbitrarily and unreasonably excluding qualified physicians from licensure. The court distinguished cases cited by the physician and emphasized the discretion granted to the board via the enabling statute/practice act. It also noted that a requirement that an applicant pass the exam in a single sitting was reasonable.

# Past “Practice”

- Educated
- Not practicing for many years
- Relocation, seeking licensure via endorsement
- Board denied application
- COURT: Must look to additional avenues for determining eligibility. More discretion

# Yates v. Nova Scotia Board of Examiners in Psychology (2018)

- **Nova Scotia Supreme Court reverses Board of Psychology Examiners' decision to deny application for registration based on inadequate educational component.**
  - Licensed in Saskatchewan, status changed to “non-practising” because she hadn't treated patients for 14 years. In order to change to practising, would have to complete 1500 hours supervised work.
  - Moved to NS 7 years later and applied for registration based on SK registration.
  - Board denied b/c of education issue and because there is no comparable “non-practising” category in Nova Scotia.
  - Court held that Board had other avenues of considering the application and that it failed to exercise its discretion. In fact, the policy used by the Board actually fails to recognize the discretion highlighted by the Court.
  - Court remanded for Board to reconsider the application.



# Substantial Equivalence: Clinical Training

- Missouri State Committee of Marital and Family Therapists denied application for licensure by reciprocity because clinical training hours and certain coursework requirements weren't met by Kansas licensee.
- Administrative Hearing Commission reversed and granted the license, finding licensure requirements substantially the same.
- Court disagreed, finding requirements were too different and that, while applicant scored high enough on the exam to pass in Kansas, her score fell six points below that which was required in Missouri.

# State Committee for Marital and Family Therapists v. Haynes (2013)

- The Missouri Court of Appeals overturned the Administrative Hearing Commission's decision to grant Haynes' motion for summary decision after her application for licensure was denied. Haynes applied for licensure by reciprocity as a marital and family therapist and the State Committee of Marital and Family Therapists denied her request. The Commission reversed and found that the requirements for licensure in Kansas (where she was duly licensed) were substantially the same as those in Missouri. The Court disagreed, finding that where Missouri required 2 years of post-graduate clinical training and a certain amount of coursework in diagnostic systems, Kansas required neither. Additionally, while Haynes scored high enough on the uniform licensure exam to pass in Kansas, her score fell six points below that which was required in Missouri.

# Scope of Practice: Age vs. Grade

- Special education teacher licensed in Iowa held credential allowing her to teach children from birth through grade three.
- Applied for licensure by endorsement in Minnesota and the Board denied based on lack of substantially similar training - the scope of the Minnesota license addressed an age range rather than a grade range.
- Court held that Board misinterpreted the law which states that a person licensed in other jurisdictions need not have similar training as a means of gaining such license, but must merely be licensed in that other state.

# In re Baker (2016)

- Minnesota Court of Appeals reversed and remanded the Minnesota Board of Teaching denial of a license as a special education teacher of an endorsement applicant licensed in Iowa. The applicant was a teacher licensed in Iowa as a special education teacher whose credential allowed teaching children from birth through grade three. The scope of the Minnesota license addressed an age range rather than a grade range. The Board staff processed the application and worked with the Licensing Committee which determined a denial based upon the lack of similar training. The applicant requested a hearing. After a contested hearing the Administrative Law Judge recommended granting the license, but the Minnesota Board denied the application based upon a conclusion that the Iowa license and the Minnesota license were not similar because they did not require similar training. On appeal, the court engaged in an analysis of the statute and concluded that the Board, as a matter of law, misinterpreted the law. In short, the statute, although subject to change during the course of events, states that a person licensed in other jurisdictions need not have similar training as a means of gaining such license, but merely be licensed in that other state. In addition, and although not necessary to the court's decision, the court addressed the issue of the Board executive director acted in both an adversarial and adjudicative nature and noted how it was troubled by such a commingling of duties under a due process analysis. While there was no clear violation of due process, the court referenced the appearance of impropriety and how such thwarts the public's trust in the Board. A concurring judge felt that the commingling did, indeed, violate due process provisions. Importantly, the court also emphasized its need for deference and a presumption of correctness of Board decisions related to the process followed.

# Accreditation & Reciprocity

- Psychologist with masters level license in Minnesota and doctorate degree from a regionally accredited program in Minnesota applied for doctoral level license in Kansas
- Kansas Board denied because the Minnesota program did not meet the Board's standards.
- Applicant then obtained a doctoral level license in Minnesota and applied to Kansas again for the doctoral level license, this time by way of reciprocity.
- Board again denied because he had not been *practicing* at the doctoral level in Minnesota.
- Court found that applicant did not satisfy either method for a reciprocal licensure—based on either substantially equivalent licensure requirements of having practiced at the required level. Board had discretion.

# Caporale v. State of Kansas Behavioral Sciences Regulatory Board (2014)

- The Kansas Court of Appeals affirmed the district court and held that the Board was not required to grant a license by reciprocity to a psychologist because the Board reasonably found that he did not meet the necessary requirements. The plaintiff held a masters-level psychology license in Kansas and obtained a doctorate degree from a regionally accredited program in Minnesota. The Board denied his application for a doctoral level license because the Minnesota program did not meet the Board's standards. The licensee then obtained a doctoral level license in Minnesota and applied to Kansas again for the doctoral level license, this time by way of reciprocity. Again the Board denied his application, because he had not been practicing at the doctoral level in Minnesota. The court sided with the Board, finding that the licensee did not satisfy either method for a reciprocal licensure—based on either substantially equivalent licensure requirements of having practiced at the required level. Also, the Board was not required to grant a reciprocal license, as argued by the licensee, because the relevant statute employed the word “may” as attributable to the Board's grant or denial.

# Military Personnel

- Attorney licensed in Florida and Virginia practiced law for the military and applied to practice by reciprocity in Oklahoma.
- Florida and Virginia are not reciprocal states with Oklahoma, thus Board denied application because he had not practiced law for five of the preceding seven years in a “reciprocal state” (Board rule).
- Issue: whether the U.S. military could be considered a reciprocal “state.”
- Court: Rule should have used the term “jurisdiction” instead of “state” and attorney should be admitted to the bar.

# Green v. Okla. Bd. of Bar Examiners (2016)

- The Supreme Court of Oklahoma admitted an attorney to the state bar without taking the bar exam because his many years of practice as an attorney for the military satisfied the "reciprocal state" requirement. The attorney was licensed in Florida and Virginia, which are not reciprocal states with Oklahoma, and practiced law in a variety of roles for the military. The state Board of Bar Examiners (Board) denied his application for licensure by reciprocity because he had not practiced law for five of the preceding seven years in a "reciprocal state", as required by its own rule. It argued that neither the military nor the federal government are primary bar licensing authorities so admission to practice still depends on prior admission to a state bar. The attorney's prior admissions were both non-reciprocal states with Oklahoma. The court examined whether the U.S. military could be considered a reciprocal "state" and observed that relevant state laws used the terms "state" and "jurisdiction" almost interchangeably. Notably, the "practice of law", as defined in another Board rule, includes practice as an attorney for the federal government and a "branch of the armed services". The court opined that the rule relied upon by the Board should have used the term "jurisdiction" instead of "state" and that the attorney should be admitted to the bar.



# Compacts – South Dakota

- **Governor’s Bill – draft legislation provided to SD licensing boards in Nov. 2017**
  - **Grants 18 month temporary license (24 mos. for military spouses) to anyone with “valid, full, unrestricted license issued by a member state” and whose license is in “good standing” in every state where licensed.**
  - **License must be issued within 30 days of application**
  - **Result of reported consensus at Western Governors Association meeting and drafted with help from U.S. Dept. of Labor**



# Criminal Convictions: Restrictions on Use

- Illinois - HB 5973 – Occupational Licensing and Criminal Convictions
  - Prohibits the Illinois Department of Financial and Professional Regulation from barring former offenders from working in a variety of fields unless they've been convicted of a crime “directly related to the occupation.”
  - Applies to barbers, cosmetologists, hair braiders, estheticians, nail technicians, roofing business owners and funeral directors.



# Criminal Convictions: Restrictions on Use

- **Kentucky SB 120**

- Signed by Governor April 2017
- The bill allows occupational licensing boards the freedom to decide whether a prior offense should preclude an individual from obtaining a license. Denials no longer automatic and a fair appeals process established.

- **Nebraska LB 299**

- Occupational Board Reform Act (follows Governor Ricketts' Executive Order)
- Still pending in Govt., Military, & Veterans Affairs Committee

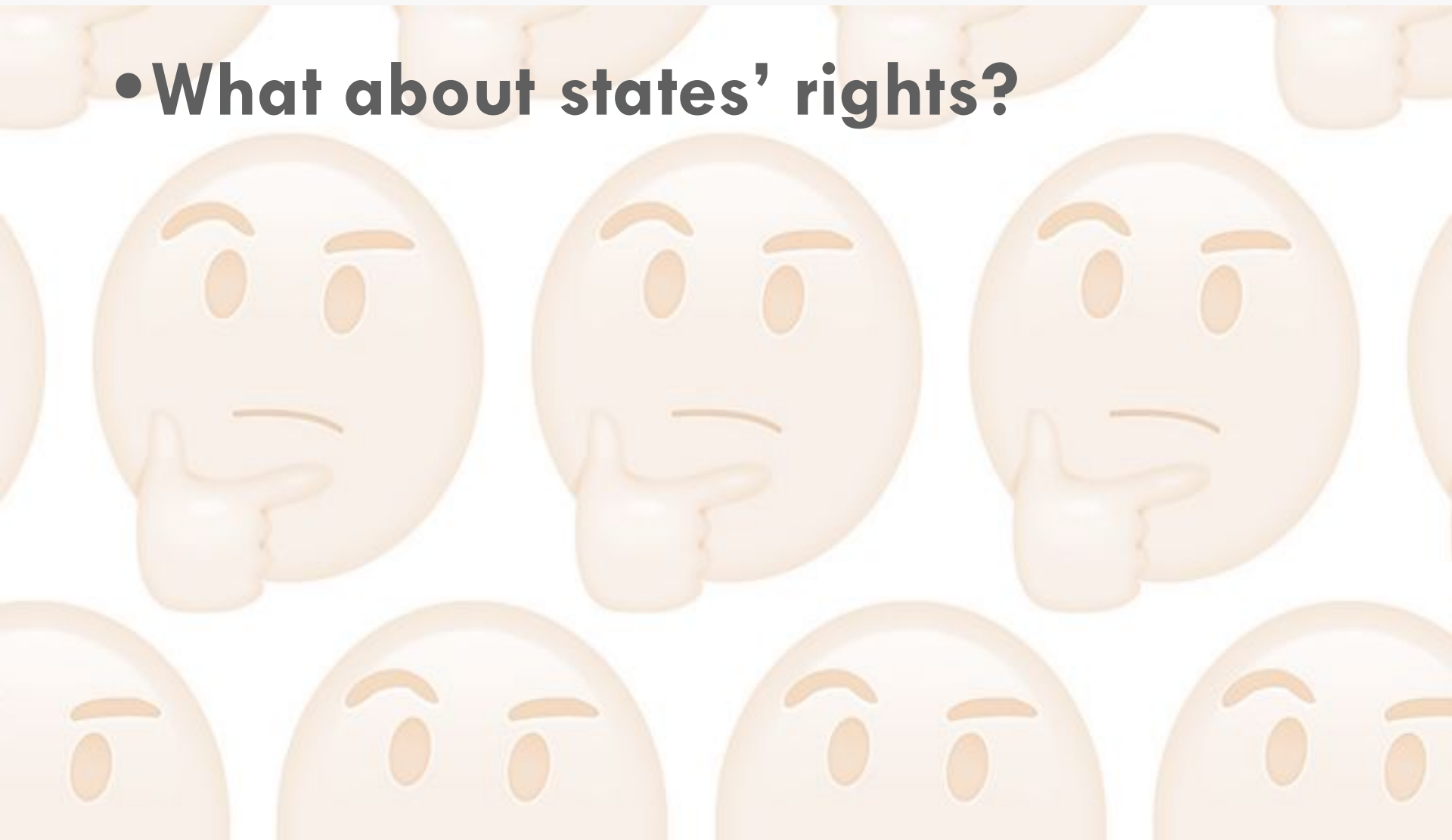
# Concealed Carry Reciprocity Act of 2017



- **H.R. 38 passed House in December 2017 by 231-298; goes to Senate**
- **Requires states to honor out-of-state concealed carry permits, regardless of whether that other state's laws are stricter or looser (similar to driver's and marriage licenses).**
- **Showdown between gun rights advocates, gun control proponents, and states' rights advocates.**
- **<https://www.congress.gov/bill/115th-congress/house-bill/38?q=%7B%22search%22%3A%5B%22concealed+carry+reciprocity+act%22%5D%7D>**

# Interstate Commerce Clause

- **What about states' rights?**



# Many Thanks!!!

