

The Ethos of Public Protection The Conference's Story of Doing the Right Thing

Much has been written in various association trade journals about the long-running test question-harvesting scheme at American Academy/McAllister Institute of Funeral Service (AAMI) and more directly, the subsequent invalidations of hundreds of test scores on the National Board Examination (NBE) for funeral service. Almost without fail, coverage of this scandal has been written in an accusatory tone that the students were unfairly targeted, that The Conference acted inappropriately by invalidating test scores, and that it overstepped its authority within the licensure process. This article offers another perspective for your consideration and asks: *what else would you have The Conference do when faced with the most sophisticated item-harvesting scheme in funeral service licensing history?*

Public protection is the mandate of every regulatory board that makes up The Conference and, without exception, is the foundation of all regulation. Licensure laws typically require both education from an accredited program and a national examination, both of which have the underlying purpose of facilitating public protection through increased knowledge of the requirements of the profession and an ability to demonstrate that knowledge on a minimum competency exam. A valid NBE score is paramount to the funeral service profession's collective agreement that certain basic standards should be universally met prior to the issuance of a license. It was only after the exam breach at AAMI was publicized that some in the profession began to question that premise. The Conference greatly appreciates the tremendous support it has received from those who understand the importance of protecting the legitimacy of the NBE and the licensure process. But it is perplexing that a very vocal minority in the profession are raising questions about The Conference's actions, showing deference to those who had prior access to the very exam that they themselves presumably worked hard to pass without the benefit of having seen the content in advance.

How Did We Get Here?

In the fall of 2013 The Conference began investigating the existence of a systematic, coordinated, and longstanding effort at AAMI to gather and share highly confidential NBE content within the school, which was designed to give AAMI students an unfair advantage on the NBE. The Conference presented its preliminary findings to a federal judge in New York, who ordered an unannounced raid of AAMI's campus and authorized federal marshals and The Conference to seize thousands of pages of emails and documents. As a result of its extensive investigation and review of those documents, The Conference concluded that there was a good faith basis to invalidate the NBE scores of roughly 300 individuals based on the scheme at AAMI.

The seized documents showed that AAMI faculty and staff for many years had been strategically and systematically soliciting and obtaining NBE content from AAMI students after they had taken the exam. The conduct at AAMI was discovered when an anonymous AAMI student contacted The Conference, state regulatory officials, and the accrediting agency for funeral service education programs. The student explained that, in the weeks leading up to an administration of the NBE, AAMI students would receive materials containing specific questions, direct answers and other

highly confidential information regarding the content of the NBE from AAMI's President, Mary Margaret "Meg" Dunn. As the student explained (and as the seized documents later confirmed), Ms. Dunn, AAMI faculty, and students euphemistically referred to this highly sensitive exam content as "visions" that had appeared to them.

Based upon the information provided by the anonymous student, The Conference initiated litigation against AAMI and Dunn in October 2013. The lawsuit alleged copyright infringement, misappropriation of trade secrets, and tortious interference with The Conference's confidentiality agreements with AAMI test takers. It appeared to The Conference that faculty, staff and students copied and shared the copyrighted exam materials with other AAMI students in order to ensure a high passing rate for AAMI graduates on the NBE.

The seized documents revealed that more than a dozen AAMI faculty and hundreds of AAMI students were involved in this conduct over a period of at least 17 years. The seized materials also reflected the pervasive nature of the scheme—confidential examination content (including exam questions and answers) was regularly solicited and circulated over many years, was distributed to students as they prepared for the NBE, and was incorporated directly into AAMI's own curriculum and internal tests and quizzes.

Ironically, at the same time this theft and sharing of NBE was occurring, the administration and faculty at AAMI stressed the importance of academic honesty with respect to school-related tests. AAMI's own internal rules, including its "Policy on Honesty," warned students that they would face significant consequences for improper behavior on school work and tests:

It is only through complete honesty during testing that you discover your academic strengths and weaknesses. Success in license exams depends upon individual performance. It is in your own best interest to keep this ultimate objective in mind.

I agree to take this exam without the benefit of books, notes and papers, cell phones or other electronic devices. I agree to submit my own work without assistance or information from any other person.

I understand that if I am found cheating during this exam I will receive a grade of zero for the final exam. I also understand that the decision of the proctor is final.

Citation from AAMI "Policy on Honesty."

It is no surprise that an academic institution would demand such integrity and honesty from its students—or that those found to have violated these policies would face serious consequences. Why then has The Conference been criticized for policies that are comparable to those of the very school from which this item-harvesting scheme originated?

What This Meant for Those Involved

Some have asked why The Conference did not demand the resignation of involved AAMI faculty or the revocation of AAMI's accreditation or authorization to operate. The answer is very simple:

The Conference does not possess the authority to take these measures, nor did it have the right to demand personnel changes as part of its civil litigation.

Others have asked why the resolution of the federal copyright lawsuit with AAMI did not include provisions related to AAMI graduates and their NBE scores. At the time of the settlement, The Conference's investigation of involved individuals was ongoing. Moreover, The Conference did not believe it was appropriate to discuss those investigations with AAMI representatives, because the validity of individual test scores is a completely separate issue from the intellectual property rights litigation against AAMI. Many have also wondered how AAMI was able to keep its accreditation if this really happened. That question is more appropriately posed to the American Board of Funeral Service Education's (ABFSE) Committee on Accreditation (COA), which accredits AAMI and other funeral service schools. Like The Conference, the COA was contacted by the anonymous AAMI student in 2013, and The Conference itself submitted a formal complaint to the COA once it completed its investigation. Nonetheless, the COA reported that it would be taking no action against AAMI's accreditation because of (1) a lack of strict standards prohibiting this type of behavior by a school and (2) assurances by AAMI that the conduct had ceased. The Conference understands that the COA has since updated its accreditation standards to ensure that, should something like this happen again, it will have greater authority to act.

The Basis for The Conference's NBE Invalidation Decisions

Following the court-ordered raid and seizure of materials from AAMI, The Conference found itself in possession of thousands of documents reflecting the receipt and sharing of NBE content among AAMI faculty, administrators, students and graduates. Because of its obligation to its member boards, test takers, and the public to ensure that passing scores on the NBE are validly earned, and because the sharing of NBE content represents a clear breach of a test taker's contractual promise to The Conference not to share NBE content with anyone, The Conference initiated investigations of the individuals whose names appeared in the seized documents. The Conference did not make a sweeping decision to investigate all AAMI students—to the contrary, it only issued investigation notices to specific individuals whose potential participation in the conduct at AAMI was apparent from the face of the seized documents.

Some have suggested that these individuals were not informed of the allegations against them and did not have an opportunity to defend themselves. That is simply not the case. As the first step, each individual identified in the documents as having potentially participated in the sharing or receipt of NBE content was sent a written notification of The Conference's investigation and a description of the issue. This notification included an invitation to respond to the allegation of their participation in the conduct at AAMI and to provide any information or documents relevant to The Conference's investigation. Though many test takers responded to the notices of investigation, others chose not to provide a substantive response or respond at all. When test takers asked for more time to respond, their request was always granted.

After evaluating the available evidence and the test-taker's response (if any) pertaining to each individual, if The Conference had a good faith basis to question the validity of an individual's NBE score, that score was invalidated. The same is true of individuals who improperly shared exam content with others, in violation of their test-taker agreement with The Conference. The

relevant state(s) were notified. A common misperception is that a score invalidation means an individual's license would be revoked or denied. This is not the case, because only the state licensing boards, not The Conference, have any authority to take action against an individual's license.

During this process, a large number of test takers have engaged attorneys—most have hired an attorney in New York whose fees The Conference understands are being paid by AAMI. In 2016, *nearly two years ago*, The Conference shared with this attorney thousands of pages of the documents seized from AAMI, so that the more than 150 test-takers he represents could evaluate the evidence against them. Documents were provided to other attorneys and individuals who asked for the evidence as well. Most individuals, however, never asked to see The Conference's evidence.

As a general matter, all individuals whose scores were invalidated are permitted to re-take the NBE if they choose, but only upon the completion of certain remedial measures—for example, signing a sworn statement that they acknowledge the importance of the security of the NBE, and providing copies of any documents they have containing NBE content (so that content can be removed from active use on the exam). For test takers who violated their contractual obligation to keep exam content confidential, a short online ethics course is required, as well as a nominal monetary payment. The purpose of these requirements is to ensure the test taker understands the obligations of confidentiality and non-disclosure of NBE content and to make a small contribution toward the tremendous cost of replacing the hundreds of NBE test questions that have been irreparably compromised by the activities at AAMI. These measures are minimal, and continued reports that candidates are completely barred access to the exam are untrue.

Litigation Brought by Test Takers Against The Conference

In 2015, as the first invalidation decisions were made, approximately 16 AAMI graduates whose NBE scores were invalidated filed lawsuits against The Conference challenging their score invalidations—all using the same attorney previously mentioned, who was selected and funded by AAMI. In their lawsuits, these individuals admitted that sharing of exam content occurred while they were a student at AAMI and that Dunn encouraged students who took the NBE to report back with feedback and information about the exam so AAMI could better prepare its students for the NBE. Their lawsuits alleged that students would willingly do so because Dunn was influential, and because students were expected and required to comply with her instructions. These lawsuits were filed in federal and state courts, available to anyone who is interested to read them. Although these lawsuits concede that this type of behavior was not only commonplace but was done at the direction and request of the faculty and Mary Margaret Dunn herself, it seems there are those still set on continuing the narrative that The Conference's allegations were unfounded.

Only one of these lawsuits is still active. Federal courts in Texas and New York, and two state court rulings in New York, dismissed the test-takers' claims against The Conference. The remaining lawsuits have been settled on terms that uphold the score invalidations and allow the test takers to re-test after completing the remedial measures mentioned above. These are the very same terms that are offered to any other test taker. Thus, it seems clear to The Conference that the

very high cost and distraction of litigation has been wholly unnecessary. Unfortunately, the attorney funded by AAMI has recently initiated a new lawsuit against the Conference bringing a single claim under a particular New York statute that has twice been dismissed by a New York state judge. The Conference remains ready and willing to offer the same re-testing terms to the plaintiffs in that lawsuit.

In Conclusion – Doing What Is Right Is Not Always Easy

The Conference has been criticized by some for taking action in response to this security breach, for reasons that are not entirely clear but which appear to be based upon a misunderstanding not only of the seriousness of the conduct at AAMI, but of the important role The Conference plays in protecting the integrity of the profession and licensure process. Because The Conference was confronted with overwhelming evidence that a large number of individuals had access to exam content and/or improperly shared what they saw on the NBE, The Conference had an obligation to its member boards, the public, and to the profession itself to take action to ensure the integrity of exam results and preserve the security and validity of the NBE. These decisions were not made lightly, and The Conference has done everything in its power to treat affected individuals fairly, while also standing firm in its protection of its member boards and to protect the health, safety and well-being of the public.

