



## **Citizen Advocacy Center**

**Providing Training and Support for Public Members  
of State Regulatory Boards**

# **ADDRESSING THE SUPREME COURT'S *NORTH CAROLINA DENTAL DECISION:* OPTIONS FOR THE STATES**

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# TABLE OF CONTENTS

PREFACE .....	3
GOALS OF THIS WHITE PAPER.....	3
THE LEGAL FRAMEWORK .....	4
Anti-Trust Law.....	4
State Action Immunity .....	5
WHAT IS NORTH CAROLINA DENTAL ABOUT? .....	5
THE SUPREME COURT DECISION.....	6
CONSEQUENCES AND CHALLENGES FOR STATE LEGISLATURES.....	6
WHO SHOULD BE INTERESTED IN THIS WHITE PAPER? .....	10
OPTIONS FOR STATE LEGISLATURES .....	11
OPTION #1 – PUBLIC MEMBER MAJORITY .....	11
OPTION #2 – MULTI-PARTY BOARD MEMBERSHIP .....	16
OPTION #3 – UMBRELLA BOARD WITH POLICY OVERSIGHT .....	20
OPTION #4 – AN INDEPENDENT REVIEW BOARD TO OVERSEE RULEMAKING .....	22
OPTION #5 – MAJORITY PUBLIC REVIEW BODY FOR SCOPE OF PRACTICE ACTIONS .....	24
OPTION #6 – MAKE BOARDS ADVISORY ONLY .....	26
OPTION #7 – EXPAND THE POWERS OF SUNRISE / SUNSET REVIEW .....	28
OPTION #8 – GIVE ATTORNEYS GENERAL ADDITIONAL OVERSIGHT POWERS.....	29
CONCLUSION.....	30

## **PREFACE**

Since 1987, the Citizen Advocacy Center (CAC) has served the public interest by enhancing the effectiveness and accountability of health professional oversight bodies. A not-for-profit 501 (C) (3) organization headquartered in Washington, D.C., CAC offers training, research and networking opportunities for public members and for the health care regulatory, credentialing, and governing boards on which they serve.

CAC's mission is to increase the accountability and effectiveness of these boards by:

- Advocating for a significant number of public members;
- Improving the training and effectiveness of public and other board members;
- Developing and advancing positions on relevant administrative and policy issues;
- Providing training and discussion forums; and,
- Performing needed clearinghouse functions for public members and other interested parties.<sup>1</sup>

It is not surprising that CAC would closely monitor the fallout from the U.S. Supreme Court's decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission* (135 S. Ct, 1101; \_\_\_\_ U.S. \_\_\_\_). "The decision makes us reexamine the fundamentals of professional self-regulation: the composition of licensing boards, the potential for conflicts of interest when members of the regulated profession dominate, the impact of board actions on access to safe, affordable healthcare services, and the prerequisites for anti-trust immunity for licensing boards" says Rebecca LeBuhn, Chair of the Board of CAC. "We need to challenge traditional ways that may not make sense any more. *North Carolina Dental* raises big questions." Among those questions:

- Should state legislatures change the way boards are composed?
- Should state legislatures arrange for more active supervision of the conduct of licensing boards?
- Should boards more carefully guard against anti-competitive behavior in the first place?

Not Since the Pew Health Professions Commission's recommendations in the 1990's have regulators been this seriously challenged to re-think how they go about business.

## **GOALS OF THIS WHITE PAPER**

This paper explores eight approaches states might take to retain immunity from federal anti-trust liability, given the *North Carolina Dental* decision. The discussion reflects the views of state actors, including attorneys general, who have grappled with the ramifications of the Court's decision.

The authors' intent is to be informative, educational, and instructive to the stakeholders involved in state-based occupational and professional regulation. The paper *does not* advocate for any particular approach. CAC has its own views about how to reform state laws in this area, but we leave advocacy for another time and strive to keep this paper non-partisan and non-confrontational.

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<sup>1</sup> Find more information about CAC at [www.cacenter.org](http://www.cacenter.org)

## THE LEGAL FRAMEWORK

### Anti-Trust Law

In 1998, the Federal Trade Commission issued a 20-page guide to anti-trust laws entitled, *Promoting Competition, Protecting Consumers: A Plain English Guide to Antitrust Laws*. In a press release announcing this publication, the FTC provided a succinct description of the three major antitrust laws:

Congress passed the first antitrust law, the Sherman Act, in 1890 as a “comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.” In 1914, Congress passed two additional antitrust laws: the Federal Trade Commission Act, which created the FTC, and the Clayton Act. With some revisions, these are the three core federal antitrust laws still in effect today.

The antitrust laws proscribe unlawful mergers and business practices in general terms, leaving courts to decide which ones are illegal based on the facts of each case. Courts have applied the antitrust laws to changing markets from a time of horse and buggies to the present digital age. Yet for over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up...

The Sherman Act outlaws “every contract, combination, or conspiracy in restraint of trade,” and any “monopolization, attempted monopolization, or conspiracy or combination to monopolize.” Long ago, the Supreme Court decided that the Sherman Act does not prohibit *every* restraint of trade, only those that are *unreasonable*. For instance, in some sense, an agreement between two individuals to form a partnership restrains trade, but may not do so unreasonably, and thus may be lawful under the antitrust laws. On the other hand, certain acts are considered so harmful to competition that they are almost always illegal. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids. These acts are “*per se*” violations of the Sherman Act; in other words, no defense or justification is allowed...

The Federal Trade Commission Act bans “unfair methods of competition” and “unfair or deceptive acts or practices.” The Supreme Court has said that all violations of the Sherman act also violate the FTC Act. Thus, although the FTC does not technically enforce the Sherman Act, it can bring cases under the FTC Act against the same kinds of activities that violate the Sherman Act. The FTC Act also reaches other practices that harm competition, but that may not fit neatly into categories of conduct formally prohibited by the Sherman Act. Only the FTC brings cases under the FTC Act.

The Clayton Act addresses specific practices that the Sherman Act does not clearly prohibit, such as mergers and interlocking directorates (that is, the same person making business decisions for competing companies)... As amended by

the Robinson-Patman Act of 1936, the Clayton Act also bans certain discriminatory prices, services, and allowances in dealings between merchants... The Clayton Act also authorizes private parties to sue for triple damages when they have been harmed by conduct that violates either the Sherman or Clayton Act and to obtain a court order prohibiting the anticompetitive practice in the future.

In addition to these federal statutes, most states have antitrust laws that are enforced by state attorneys general or private plaintiffs. Many of these statutes are based on the federal antitrust laws.<sup>2</sup>

### **State Action Immunity**

Immunity of states from federal antitrust lawsuits is known as the “state action doctrine,” which the Supreme Court espoused in *Parker v a Brown* (1943) 317 U.S. 341. The doctrine assigns different levels of immunity to three distinct tiers of decision makers:

- Tier 1, or absolute immunity, extends to state legislatures, governors, and supreme courts.
- Tier 2 immunity extends to subordinate state agencies (executive departments and administrative agencies) if their conduct is undertaken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition. A state policy is sufficiently clear when displacement of competition is “inherent, logical, or (an) ordinary result” of the authority delegated by the state legislature.
- Tier 3 immunity extends to private parties acting on behalf of a state, such as the members of a state-created professional licensing board, when two conditions are met: (1) their conduct is undertaken pursuant to a “clearly articulated” and “affirmatively expressed” state policy to displace competition, and (2) their conduct is “actively supervised” by the state.

Occupational and professional licensing boards have been thought to enjoy the second tier of state action immunity, requiring a clear and affirmative policy, but not active state supervision of every anticompetitive decision. The *North Carolina Dental* decision challenges this assumption.

### **WHAT IS NORTH CAROLINA DENTAL ABOUT?**

Attorney General Kamala Harris of California offers this succinct explanation of the case:

The North Carolina Board of Dental Examiners was established under North Carolina law and charged with administering a licensing system for dentists. A majority of the members of the board are themselves practicing dentists. North Carolina statutes delegate authority to the dental board to regulate the practice of dentistry, but did not expressly provide that teeth whitening was within the scope of the practice of dentistry.

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<sup>2</sup> <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>.

Following complaints by dentists that non-dentists were performing teeth-whitening services for low prices, the dental board conducted an investigation. The board subsequently issued cease and desist letters to dozens of teeth-whitening outfits, as well as to some owners of shopping malls where teeth-whiteners operated. The effect on the teeth-whitening market in North Carolina was dramatic, and the Federal Trade Commission took action.

In defense to antitrust charges, the dental board argues that, as a state agency, it was immune from liability under the federal anti-trust laws. The Supreme Court rejected that argument, holding that a state board on which a controlling number of decision-makers are active market participants must show that it is subject to “active supervision” in order to claim immunity.<sup>3</sup>

### **THE SUPREME COURT DECISION**

The effect of *North Carolina Dental* is to put professional licensing boards on which a controlling number of decision makers are active market participants in the third tier of state action immunity. That is, they are immune from antitrust actions as long as they act pursuant to clearly articulated state policy to replace competition with regulation of the profession, *and* their decisions are actively supervised by the state.

### **CONSEQUENCES AND CHALLENGES FOR STATE LEGISLATURES**

This case has significant implications for how occupational and professional licensing boards go about their business. Attorney Robert Fellmeth, formerly a state and federal antitrust prosecutor, wrote in the *Harvard Law Record* that the Supreme Court decision in *North Carolina Dental* is “the most important new precedent for public interest, administrative, antitrust, and state government law since 1943.” He called the case “the equivalent of *Brown v. Board of Education* for education and civil rights.”<sup>4</sup>

State Attorneys General have also commented on the significance of *North Carolina Dental*. Oklahoma’s Attorney General, E. Scott Pruitt, sent a letter to Governor Mary Fallin in which he said:

In February of this year, the U.S. Supreme Court issued a ruling in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S. Ct. 1101 (2015), which held that State licensing boards controlled by market participants active in the market being regulated by those boards are not immune from federal antitrust liability unless they are subject to active State supervision. Because many of Oklahoma’s hundreds of boards and commissions are controlled by participants in the markets that the boards themselves regulate, *they have the incentive to engage in economic protectionism* and, as a result of the Supreme

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<sup>3</sup> California Attorney General Opinion 15-402, issued 9/10/15.

<sup>4</sup> Fellmeth, R., What Harvard Law Students Should Know About the Recent Supreme Court North Carolina Dental Case: Arguably the Most Important New Precedent for Public Interest, Administrative, Antitrust and State Government Law Since 1943, *Harvard Law Record*, Print edition, April 3, 2015.

Court's recent decision, may be subject to suit if their actions violate antitrust law... (Emphasis added)

For example, the Oklahoma Board of Dentistry consists of eleven members: eight dentists, one dental hygienist, and two members of the public. Each dentist member is elected by the licensed dentists in eight geographical districts. As in North Carolina, it does not appear that Oklahoma's Board of Dentistry is subject to active state supervision for many of its actions aside from the general provisions of the Oklahoma Open Meeting Act, Open Records Act, and Administrative Procedure Act. These characteristics are shared by many other state boards and commissions... All such boards and commissions are currently at risk of antitrust liability if they choose to engage in anticompetitive behavior, and cannot cloak themselves in the State's immunity.

Although most, if not all, state boards and commissions are subject to the Oklahoma Administrative Procedure Act (OAPA), the OAPA does not provide adequate active state supervision to ensure blanket antitrust immunity for all commission or board decisions. OAPA requires the Legislature to approve or disapprove certain formal rulemakings (with Gubernatorial veto and override possibilities), and for the Governor to approve or disapprove certain rulemakings. Thus, to the extent that some formal actions of the boards and commission may be subject to veto or modification for failure to accord with state policy by the Governor or the Legislature, those actions may be immune from antitrust liability. Even so, because many actions by state boards and commissions are *not* contingent on Legislative or gubernatorial approval, they are not immune from liability if the active market participant-controlled board acts in an anticompetitive manner. Indeed, this was the case in North Carolina: although the Supreme Court recognized the Board at issue was subject to North Carolina's Administrative Procedure Act and its formal rules were reviewable by an independent Rules Review Commission, the challenged Board actions (cease and desist letters) were not subject to any state supervision and thus were not shielded by State immunity... I suggest that the Office of the Governor carefully consider its options to ensure that the Executive Branch and its agencies remain in compliance with federal antitrust laws.

Attorney General Pruitt concluded his letter with these words of caution:

The Office of the Attorney General is concerned that many State boards and commissions present the risk of appearance of protecting private monetary interests rather than advancing sound public policy because they are controlled by active market participants, and this risk leaves the boards and commissions open to antitrust liability.<sup>5</sup>

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<sup>5</sup> Letter from Oklahoma's Attorney General to Governor Mary Fallin, July 6, 2015.

On May 6, 2015, the CAC, Consumers Union (CU), and the Center for Public Interest Law at the University of San Diego School of Law (CPIL) sent an Open Letter to all state Attorneys General (AGs) asking them to recount what they have done or plan to do to respond to the *North Carolina Dental* decision. Several of the AGs who responded expressed similar thoughts about the significance of the Court's decision.

California Attorney General Kamala D. Harris sent us a copy of AG opinion 15-402, dated September 10, 2015, in which she wrote:

Before *North Carolina Dental* was decided, most state licensing boards operated under the assumption that they were protected from antitrust suits under the state action immunity doctrine. In light of the decision, many states – including California – are reassessing the structures and operations of their state licensing boards with a view to determining whether changes should be made to reduce the risk of antitrust claims.

The office of Iowa's Attorney General sent us a copy of a memorandum distributed on March 23, 2015, to all the licensing boards in that state. It says in part:

By statute, a majority of Iowa's board members are *required* to be active, licensed practitioners in one or more of the professions or occupations regulated by each board... (Emphasis added)

The risk of not being afforded state action immunity is real and should be taken seriously. When assessing risk the first step is to consider the nature of the activity at issue. Is the action anticompetitive? Does it restrict competition? If so, are a majority of the decision-makers on the board active market participants...

Determining whether the board's actions reflect a clearly articulated state policy starts with the board's enabling act. Boards' enabling acts vary. Some are quite detailed as to activities that require licensure and the prerequisites for licensure. Others are more general in defining the scope of practice or licensure requirements. Many broadly delegate discretionary authority to boards to interpret and enforce statutory provisions. Some enabling acts confer precise administrative authority over unlicensed persons... Others solely authorize injunctive actions or referrals to other officials. Any action not soundly rooted in statute escalates risk, especially where statutes are light on supervision by "politically accountable" state actors.

Maine's Attorney General forwarded several informative documents, including a memo from an Assistant Attorney General, which says, in part:

The full implications of this decision will not be known until they are worked out by lower federal courts in future cases. Nonetheless, it seems clear that boards in which a majority of the members are actively practicing in the regulated field – which would include most if not all of Maine's professional licensing boards – will not be immune from potential antitrust liability unless they can demonstrate



that potentially anticompetitive actions are subject to the active supervision of the state.

Fortunately, in the case of unlicensed practice – the most obvious area of antitrust concern – Maine’s current system appears to meet the active supervision requirement. These cases are currently referred to the Attorney General, who independently decides whether action against an alleged unlicensed practitioner is appropriate. That practice should continue.

*However, enforcement of unlicensed practice laws is not the only way in which boards could act in anticompetitive ways.* (Emphasis added) In theory, board rules, interpretations, or enforcement strategies that limit competition or raise prices in the market the board regulates could be vulnerable to challenge. Such actions could raise antitrust concerns for which the boards would not be immune. In addition, disparities in enforcement could also be problematic.

Another document provided by Maine’s Attorney General is entitled, *Examples of Board Rules or Policies that Could be Scrutinized Under Anti-trust Laws*. The list of examples includes:

Rules regulating scope of practice

- Rules restricting what services particular types of licensees may offer
- Rules requiring supervision of one type of licensee by another
- Rules restricting how many subordinates a licensee may employ

Restrictions on advertising solicitations

- Rules prohibiting disparagement of competitors
- Rules against “poaching” customers
- Rules restricting truthful advertising
- Rules restricting solicitation
- Rules regulating use of specific terms or phrases in advertising

Price regulation

- Price floors or caps
- Fee schedules
- Restrictions on discounting

Restrictions on market participation

- Rules restricting competitive bidding by licensees
- Rules regulating commercial dealings with non-licensees (e.g., suppliers, third-party payers, etc.)

Licensing requirements

- Apprenticeship requirements
- Other licensing requirements imposing high burdens on applicants

The letter from Maine goes on to say:

There are two important things to keep in mind: (1) the loss of immunity, if it is lost, does not mean that an antitrust violation has been committed, and (2) even when board members participate in regulating the markets they complete in, many – if not most – of their actions do not implicate the federal antitrust laws.

In the context of regulating professions, “market sensitive” decisions (that is, the kinds of decisions that are most likely to be open to antitrust scrutiny) are those that create barriers to market participation, such as rules or enforcement actions regulating the scope of unlicensed practice; licensing requirements imposing heavy burdens on applicants; marketing programs; restrictions on advertising; restrictions on competitive bidding; restrictions on commercial dealings with suppliers or other third parties; and price regulation, including restrictions on discounts.<sup>6</sup>

On October 21, 2015, the West Virginia Joint Committee on Government Operations held a meeting to discuss the implications of the Supreme Court case. Committee co-chair Delegate Gary Howell reported that the Joint Committee was briefed on the case, and Delegate Howell reported, “As a result of this court case, nearly all West Virginia regulatory boards... will have to be reconfigured or some eliminated to bring the State into compliance with the Supreme Court ruling.”<sup>7</sup>

### **WHO SHOULD BE INTERESTED IN THIS WHITE PAPER?**

This White Paper is addressed primarily to state legislatures. Our goal is to inform and stimulate discussion among legislators and staff about options available for responding to the U.S. Supreme Court’s *North Carolina Dental* decision. There are many additional stakeholders who will have a keen interest as legislatures consider, debate, and ultimately choose a course of action:

- Governors can be expected to include proposals related to *North Carolina Dental* in their legislative packages.

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<sup>6</sup> On October 14, 2015, the FTC Bureau of Competition issued a 13-page document entitled *FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants*. In it, the FTC Staff confirms what Maine’s Attorney General stated and adds one other board activity that could be impacted. The FTC said: “Note that a disciplinary action taken by a regulatory board affecting a single licensee will typically have only a de minimus effect on competition. A pattern or program of disciplinary actions by a regulatory board affecting multiple licensees may have a substantial effect on competition,” (FTC Staff Guidance, [https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active\\_supervision\\_of\\_state\\_boards.pdf](https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf), page 12).

<sup>7</sup> <http://www.newtribune.info/article/20151021/NEWS/151029909>.

- Professional associations are likely to support retaining the current system to the extent possible, since it is these associations that have long supported self-regulation.
- Consumer and public interest groups may well advocate for more public members on licensing boards.
- Academics and think tank scholars will want their views taken into consideration.

## **OPTIONS FOR STATE LEGISLATURES**

The *North Carolina Dental* decision presents two avenues to pursue to secure antitrust immunity for professional and occupational regulatory boards:

- One option is to change the composition of regulatory boards so that “active market participants” no longer constitute a “controlling number” of board members. To meet this test, states will need to determine what constitutes a “controlling number,” and pinpoint the identity of “active market participants.”
- The second option is to ensure that there is “active state supervision” of regulatory board actions. The Court’s decision specifies certain requirements:
  1. The state supervisor who reviews a decision must have the power to reverse or modify the decision.
  2. The “mere potential” for supervision is not an adequate substitute for active supervision.
  3. When a state supervisor reviews a decision, he or she must review the substance of the decision, not just the procedures followed to reach it.
  4. The state supervisor must not be an active market participant.<sup>8</sup>

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The following pages explore eight possible approaches states might choose to pursue in response to the *North Carolina Dental* decision. Two deal with board composition and six deal with active state supervision.

### **OPTION #1 – PUBLIC MEMBER MAJORITY**

More than 50 years ago, California Governor Pat Brown began appointing public members to the state’s licensing boards. Public members actually comprised a majority on some boards regulating occupations and professions in fields other than healthcare. The idea of appointing public members to health professional boards spread rapidly across the country, but the idea of public member majorities went nowhere. Public members continue to be a minority on boards regulating healthcare professions in California and most other states.

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<sup>8</sup> *North Carolina Dental*, *supra*, 135 S.Ct. at pp. 1116-1117.

Would CAC support public member majorities? Of course it would. Is this likely to happen? That is another question. California Attorney General Harris' office is skeptical about the viability of public member majorities:

Over the past four decades, California has moved decisively to expand public membership on licensing boards. The change is generally agreed to be a salutary one for consumers, and for underserved communities in particular. There are many good reasons to consider continuing the trend to increase public membership on licensing boards – but we believe a desire to ensure immunity for board members should not be the decisive factor. As long as the legal questions raised by *North Carolina Dental* remain unresolved, radical changes to board composition are likely to create a whole new set of policy and practical challenges, with no guarantee of resolving the immunity problem.<sup>9</sup>

Justice Alito raised some of the policy and practical challenges in his dissenting opinion:

What is a “controlling number”? Is it a majority? And, if so, why does the Court eschew that term? Or does the Court mean to leave open the possibility that something less than a majority might suffice in particular circumstances? Suppose that active market participants constitute a voting bloc that is generally able to get its way? How about an obstructionist minority or an agency chair empowered to set the agenda or veto regulations?<sup>10</sup>

The *FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants*.” includes these points about active market participants:

**Active Market Participants:** A member of a state regulatory board will be considered to be an active market participant in the occupation the board regulates if such person (i) is licensed by the board or (ii) provides any service that is subject to the regulatory authority of the board.

- If a board member participates in any professional or occupational subspecialty that is regulated by the board, then that board member is an active market participant for purposes of evaluating the active supervision requirement.
- It is no defense to antitrust scrutiny, therefore, that the board members themselves are not directly or personally affected by the challenged restraint. For example, even if the members of the North Carolina Dental Board were orthodontists who do not perform teeth whitening services (as a matter of law or fact or tradition), their control of the dental board would nevertheless trigger the requirement for active supervision. This is because these orthodontists are licensed by, and their services are regulated by, the North Carolina Dental Board.

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<sup>9</sup> California Attorney General Opinion #15-402, September 10, 2015.

<sup>10</sup> *North Carolina Dental*, *supra*, 135 S.Ct. at p. 1123 (dis. Opn. of Alito, J).

- A person who temporarily suspends her active participation in an occupation for the purpose of serving on a state board that regulates her former (and intended future) occupation will be considered to be an active market participant.

**Method of Selection:** The method by which a person is selected to serve on a state regulatory board is not determinative of whether that person is an active market participant in the occupation that the board regulates. For example, a licensed dentist is deemed to be an active market participant regardless of whether the dentist (i) is appointed to the state dental board by the governor or (ii) is elected to the state dental board by the state’s licensed dentists.

**A Controlling Number, Not Necessarily a Majority, of Actual Decision-makers:**

- Active market participants need not constitute a numerical majority of the members of a state regulatory board in order to trigger the requirement of active supervision. A decision that is controlled, either as a matter of law, procedure, or fact, by active participants in the regulated market (e.g., through veto power, tradition or practice) must be actively supervised to be eligible for the state action defense.
- Whether a particular restraint has been imposed by a “controlling number of decision makers (who) are active market participants” is a fact-bound inquiry that must be made on a case-by-case basis.<sup>11</sup>

Attorney General Harris’s Office raised additional concerns about diluting professional presence on licensing boards:

Most observers believe that there are real advantages in staffing boards with professionals in the field. The combination of technical expertise, practical judgment, and orientation to prevailing ethical norms is probably impossible to replicate on a board composed entirely of public members. Public confidence must also be considered. Many consumers would no doubt share the sentiments expressed by Justice Breyer during oral argument in the *North Carolina Dental* case: “(W)hat the State says is: We would like this group of brain surgeons to decide who can practice brain surgery in this State. I don’t want a group of bureaucrats deciding that. I would like brain surgeons to decide that.”<sup>12</sup>

In addition, delays in identifying suitable public-member candidates and in filling public seats can result in de-facto market-participant majorities. In the wake of *North Carolina Dental*, many observers’ first impulse was to assume that

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<sup>11</sup> FTC Staff Guidance, [https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active\\_supervision\\_of\\_state\\_boards.pdf](https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf), pp 7-8.

<sup>12</sup> *North Carolina Dental*, *supra*, transcript of oral argument p. 31, available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/13-534\\_16h1.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-534_16h1.pdf).

reforming the composition of professional boards would be the best resolution, both for state actors and for consumer interests. Upon reflection, however, it is not obvious that sweeping changes to board composition would be the most effective solution.<sup>13</sup>

In defense of changing the balance of power on regulatory boards, consumer advocacy organizations point out that many non-health licensing boards have had public member majorities for many years without experiencing the dire consequences opponents predict. Furthermore, the board that regulates physicians in Rhode Island has operated effectively for many years with fifty percent public members.

In the view of Lisa McGiffert, Director of the Safe Patient Project of Consumers Union, the advocacy division of Consumer Reports:

The arrangement of licensees controlling the licensing and regulation of their fellow professionals too often interferes with protecting the interests of the public. The implications of the *North Carolina* case have not been widely recognized as an opportunity to finally establish unbiased oversight of professionals of all types that puts the consumer first. While trade associations may well resist adding public members or submitting to review from a neutral body, that is exactly what should happen.

The editorial board of the *Tulsa World* weighed in on this topic on May 26, 2015:

The website of the Oklahoma Board of Medical Licensure and Supervision – which licenses medical doctors – shows that seven of the current nine members are medical doctors, roughly seventy-eight percent. The two public members of the board are the president of a Shawnee hospital and the founder of a Chickasha home health-care company.

A separate *Tulsa World* report found that from 2011 to September 2013, the board had only taken seven actions involving quality of care, negligence or incompetence by doctors.

We don't discount the need for medical expertise on medical licensing boards. Obviously, the technical demands of investigating complaints against medical professionals requires education and experience.

We also won't wade into the technical legal question of whether the structure of the state's many licensing boards does or does not risk violating antitrust laws. That is for lawyers and judges to work out.

But it is clear that there must also be a substantial role for the public in the licensing process. You don't need a medical degree to know right and wrong, and you can't maintain public confidence in a system that doesn't adequately value the public's perspective.

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<sup>13</sup> California Attorney General Opinion, p. 10.

Legislatures that choose to mandate a public member majority on regulatory boards may wish to consider specifying in statute affirmative qualifications for the individuals appointed to public member positions. Currently, most state laws specify only *disqualifying* criteria for public members on regulatory boards. Typical statutes say a public member cannot be a practitioner of the regulated profession or be related to someone who is, or derive income from the regulated profession.

Enacting positive criteria for selecting public members would go a long way toward ensuring that a public member majority would constitute a positive change. CAC and others have long favored such an approach:

Not everyone is cut out to be an effective public member of a licensing board. Over the years, a consensus has emerged as to the more important qualities to look for when selecting public members. The following list of attributes reflects the views of both governors' appointment secretaries and people who have themselves served as public members:

- A track record of consumer and/or public interest advocacy;
- Communication and negotiating skills;
- A willingness to commit the time necessary to fully participate in all board activities;
- An interest in healthcare, including access and quality of care issues;
- An awareness of the healthcare concerns of diverse population groups within their community;
- Connections to, or a willingness to cultivate connections to grassroots organizations representing diverse population groups; and
- “Boardsmanship” skills gained from experience serving on civic, educational, benevolent, or similar organizations.<sup>14</sup>

Another reason legislatures may decline to mandate a majority of public members on all of the health professional regulatory boards in their states is the difficulty of locating qualified and committed individuals to fill even a token number of public member positions. Organizations like CAC acknowledge this difficulty. Being an effective public member requires a huge time commitment in addition to the attitudinal and experiential qualities listed above. And, as CAC knows well from its decades of experience, it requires training, technical support, and resources for public members to help establish parity with licensee members, who enjoy institutional support from their professions. Regardless of the challenges involved, conforming to the spirit of the *North Carolina Dental* decision surely requires a renewed commitment to oversight in the interests of the general public and that includes the involvement of well-qualified public members in the regulatory structure. One alternative to locating a majority of public

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<sup>14</sup> Citizen Advocacy Center and Center for Public Interest Law, *Vetting and Nominating Public Member Candidates for California's Health Professional Regulatory Boards*, a publication funded by a grant entitled *Strengthening the Community's Voice on California's Health Care Licensing Boards* funded by The California Endowment, 2009.

members on multiple licensing boards would be to include a substantial proportion of public member input on the entities state legislatures designate to provide active state supervision over the activities of regulatory board actions.

## **OPTION #2 – MULTI-PARTY BOARD MEMBERSHIP**

Imagine board membership including a variety of stakeholders, moving beyond the current two-dimensional model (i.e., licensees and public members). Not only would this mean that a variety of perspectives would influence board decisions, it could result in a much broader understanding by interested parties of the important work done by licensing boards and the impact board decisions have upon access to quality, affordable goods and services. Including multiple stakeholders on boards could lead to broader support when boards seek legislative improvements in their practice acts or an increase in appropriations to support their work.

Controversial issues would not go away under such a model, but broadly based boards are less likely to be polarized or inflexible confronting touchy issues such as scope of practice disputes between professions. Multi-stakeholder participation on licensing boards would be in keeping with the emerging expectation of a new generation, one that is not as accepting of command and control type regulation at any level of government as were previous generations.

The Institute of Medicine has expressed support for this kind of regulatory model. Its 1989 report, entitled *Allied Health Services: Avoiding Crises*, recommended that:

Licensing boards should draw at least half of their membership from outside the licensed occupation; members should be drawn from the public as well as from a variety of areas of expertise, such as health administration, economics, consumer affairs, education and health services research.<sup>15</sup>

There is precedent for the multi-stakeholder approach in non-health fields. In Iowa, for example, the eleven-member electrical board has a very diverse membership:

- Two members shall be journeyman electricians, one a member of an electrical workers union covered under a collective bargaining agreement and one not a member of a union.
- Two members shall be master electricians or electrical contractors, one of whom is a contractor signed to a collective bargaining agreement or a master electrician covered under a collective bargaining agreement and one of whom is a contractor not signed to a collective bargaining agreement or a master electrician who is not a member of a union.
- One member shall be an electrical inspector.
- Two members, one a union member covered under a collective bargaining agreement and one who is not a member of a union, each of whom shall not be a members of any of the groups described in paragraphs “a” through “c,” and shall represent the general public.

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<sup>15</sup> <http://www.nap.edu/catalog/769/allied-health-services-avoiding-crises>. See page 256.



- One member shall be the state fire marshal or a representative of the state fire marshal's office.
- One member shall represent a public utility.
- One member shall be an engineer licensed pursuant to chapter 542B with a background in electrical engineering.<sup>16</sup>

It would be enlightening if more states were to experiment with a multi-stakeholder regulatory model -- in keeping with the American tradition of states acting as laboratories that test bold new governing concepts.

\* \* \* \* \*

The next six options suggest ways state legislatures might provide for active state supervision of some of the activities of professional and occupational boards. These options are not mutually exclusive. Some states may wish to adopt one approach for rule-making activities, another for scope of practice actions, and still another for enforcement activities. Some may choose a single approach, such as the creation of an umbrella entity charged with policy oversight.

Remember that the *North Carolina Dental* decision established the following requirements:

- The state overseer must review the *substance* of an anti-competitive decision, not merely the *procedure* followed;
- The overseer must have the power to *veto* or *modify* a particular decision to assure it is in accord with state policy;
- The mere potential is not enough – there must be *active* oversight; and
- The overseer must not itself be an active market participant.

Explaining the purpose of its *FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants*, the FTC wrote:

In the wake of this Supreme Court decision, state officials have requested advice from the Federal Trade Commission regarding antitrust compliance for state boards responsible for regulating occupations. This outline provides FTC Staff guidance on two questions. *First*, when does a state regulatory board require active supervision in order to invoke the state action defense? *Second*, what factors are relevant to determining whether the active supervision requirement is satisfied?

Our answers to these questions come with the following caveats:

- Vigorous competition among sellers in an open marketplace generally provides consumers with important benefits, including lower prices, higher quality services, greater access to services, and increased innovation. For this reason, a state legislature should empower a

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<sup>16</sup> Iowa Code, Sect. 103.2(2)(a-h).

regulatory board to restrict competition only when necessary to protect against a credible risk of harm, such as health and safety risks to consumers. The Federal Trade Commission and its staff have frequently advocated that states avoid unneeded and burdensome regulation of service providers.

- Federal antitrust law does not require that a state legislature provide for active supervision of any state regulatory board. A state legislature may, and generally should, prefer that a regulatory board be subject to the requirements of the federal antitrust laws. If the state legislature determines that a regulatory board should be subject to antitrust oversight, then the state legislature need not provide for active supervision.
- Antitrust analysis – including the applicability of the state action defense – is fact-specific and content-dependent. The purpose of this document is to identify certain overarching legal principles governing when and how a state may provide active supervision for a regulatory board. We are not suggesting a mandatory or one-size-fits-all approach to active supervision. Instead, we urge each state regulatory board to consult with the Office of the Attorney General for its state for customized advice on how best to comply with the antitrust laws.
- This FTC Staff guidance addresses only the active supervision prong of the state action defense. In order successfully to invoke the state action defense, a state regulatory board controlled by market participants must also satisfy the clear articulation prong...
- This document contains guidance developed by the staff of the Federal Trade Commission. Deviation from this guidance does not necessarily mean that the state action defense is inapplicable, or that a violation of the antitrust laws has occurred.

In his book entitled *Occupational Licensing: A Public Perspective*, Ben Shimberg, a leading expert in the field, a founder of the Conference on Licensure, Enforcement and Regulation (CLEAR), and the first chair of CAC's Board of Directors, described five regulatory models employed by the states:

- Model A – Boards are autonomous. They hire their own staff, make decisions about office location, purchasing, and procedures. Each board receives and investigates complaints and disciplines licensees...
- Model B – Boards are autonomous, but less so than in model A. They set policy and determine standards regarding licensing and professional practice. They prepare or approve exams and decide who is qualified for licensure. They handle complaints and discipline licensees. The board has responsibility for hiring and supervising staff. A central agency may be responsible for housekeeping matters such as providing space, answering routine inquiries, collecting fees, issuing licenses and renewals.
- Model C – Boards are autonomous and have decision-making authority in many areas. The central agency, however, has greater authority over certain functions than in Model B. Its powers go beyond housekeeping. For example, board budgets, personnel, and records may be subject to some control by the agency.

Complaints and investigations and adjudicatory hearings may be handled by a central staff, even when boards continue to make final decisions with respect to disciplinary actions.

- Model D – Boards are not fully autonomous. That is, they do not have final decision-making authority on all substantive matters, as do boards in the preceding models. While the central agency provides a wide range of services, in practice, boards may be delegated responsibility for such functions as preparing or approving exams, setting pass/fail points, recommending professional standards, and recommending disciplinary sanctions. A crucial distinction, however, between Model D and the preceding models is that certain board actions are subject to review by the central agency.
- Model E – the regulatory system is run by an agency director, commission, or council, with or without the assistance of a board. Where boards do exist, they are strictly advisory... Boards may be delegated such functions as preparing or approving exams, setting pass/fail points, recommending professional standards, and recommending disciplinary sanctions. A crucial distinction between this model and Model D is that where boards exist, they serve only in an advisory capacity.<sup>17</sup>

California Attorney General Kamala Harris prepared a thoughtful summary of the options available to state legislatures for increasing state supervision:

Observers have proposed a variety of mechanisms for building more state oversight into licensing boards' decision-making processes. In considering these alternatives, it may be helpful to bear in mind that licensing boards perform a variety of distinct functions, and that different supervisory structures may be appropriate for different functions.

For example, boards may develop and enforce standards for licensure; receive, track, and access trends in consumer complaints; perform investigations and support administrative and criminal prosecutions; adjudicate complaints and enforce disciplinary measures; propose regulations and shepherd them through the regulatory process; perform consumer education; and more. Some of these functions are administrative in nature, some are quasi-judicial, and some are quasi-legislative. Boards' quasi-judicial and quasi-legislative functions, in particular, are already well supported by due process safeguards and other forms of state supervision (such as vertical prosecutions, administrative mandamus procedures, and public notice and scrutiny through the Administrative Procedure Act). Further, some functions are less likely to have antitrust implications than others: decisions affecting only a single license or licensee in a large market will rarely have an anticompetitive effect within the meaning of the Sherman Act. For these reasons, it is worth considering whether it is less urgent, or not necessary at all, to impose additional levels of supervision with respect to certain functions.

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<sup>17</sup> Shimberg, B., *Occupational Licensing: A Public Perspective*, Educational Testing Service, Princeton, NJ, 1980, pp 20-21.

Ideas for providing state oversight include the concept of a superagency, such as a stand-alone office or a committee within a large agency, which has full responsibility for reviewing board actions de novo. Under such a system, the boards could be permitted to carry on with their business as usual, except that they would be required to refer each of their decisions (or some subset of decisions) to the superagency for its review. The superagency could review each action file submitted by the board, review the record and decision in light of the state's articulated regulatory policies, and then issue its own decision approving, modifying, or vetoing the board's action.

Another concept is to modify the powers of the boards themselves, so that all of their functions (or some subset of functions) would be advisory only. Under such a system, the boards would not take formal actions, but would produce a record and a recommendation for action, perhaps with proposed findings and conclusions. The recommendation file would then be submitted to a supervising state agency for its further consideration and formal action, if any.

Depending on the particular powers and procedures of each system, either could be tailored to encourage the development of written records to demonstrate executive discretion; access to administrative mandamus procedures for appeal of decisions; and the development of expertise and collaboration among reviewers, as well as between the reviewers and the boards that they review. Under any system, care should be taken to structure review functions so as to avoid unnecessary duplication or conflicts with other agencies and departments, and to minimize the development of super-policies not adequately tailored to individual professions and markets. To prevent the development of "rubber-stamp" decisions, any acceptable system must be designed and sufficiently staffed to enable plenary review of board actions or recommendations at the individual transaction level.<sup>18</sup>

### **OPTION #3 – UMBRELLA BOARD WITH POLICY OVERSIGHT**

Shimberg's Models D and E and Harris' Superagency concept are often described as "umbrella agencies." In the 1990's, the Pew Health Professions Commission supported the idea of umbrella agencies with *policy* oversight. Some states (Texas, for example) have umbrella agencies with purely administrative functions. Other states (California, for example) have created umbrella agencies with some policy oversight, but not the full extent of powers called for in the *North Carolina Dental* decision.

Attorney General Harris' opinion offered the following suggestions for strengthening the oversight powers of California's umbrella agency, the Department of Consumer Affairs:

As it stands, California is in a relatively advantageous position to create these kinds of mechanisms for active supervision of licensing boards. With the boards

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<sup>18</sup> California Attorney General Opinion, p. 11-13.

centrally housed within the Department of Consumer Affairs (an “umbrella agency”), there already exists an organization with good knowledge and experience of board operation, and with working lines of communication and accountability. It is worth exploring whether existing resources and minimal adjustments to procedures and outlooks might be converted to lines of active supervision, at least for the boards’ most market-sensitive decisions.

Moreover, the Business and Professions Code already demonstrates an intention that the Department of Consumer Affairs will protect consumer interests as a means of promoting “the fair and efficient functioning of the free enterprise market economy” by educating consumers, suppressing deceptive and fraudulent practices, fostering competition, and representing consumer interests at all levels of government. The free-market and consumer-oriented principles underlying *North Carolina Dental* are nothing new to California, and no bureaucratic paradigms need to be radically shifted as a result.

In addition, the Director must be provided a full opportunity to review all proposed rules and regulations (except those relating to examinations and licensure qualifications) before they are filed with the Office of Administrative Law, and the Director may disapprove any proposed regulation on the ground that it is injurious to the public. Whenever the Director (or his or her designee) actually exercises one of these powers to reach a substantive conclusion as to whether a board’s action furthers an affirmative state policy, then it is safe to say that the active supervision requirement has been met.

It is worth considering whether the Director’s powers should be amended to make review of certain board decisions mandatory as a matter of course, or to make the Director’s review available upon the request of a board. It is also worth considering whether certain existing limitations on the Director’s powers should be removed or modified. For example, the Director may investigate allegations of misconduct in examinations or qualification reviews, but the Director currently does not appear to have power to review board decisions in those areas, or to review proposed rules in those areas. In addition, the Director’s power to initiate audits and reviews appears to be limited to disciplinary cases and complaints about licensees. If the director’s initiative is in fact so limited, it is worth considering whether that limitation continues to make sense. Finally, while the Director must be given full opportunity to review most proposed regulations, the Director’s disapproval may be overridden by a unanimous vote of the board. It is worth considering whether the provision for an override maintains its utility, given that such an override would nullify any “active supervision” and concomitant immunity that would have been gained by the Director’s review.<sup>19</sup>

Many occupational and professional licensing boards and state-level professional associations take a dim view of powerful umbrella boards. In 2014, the Legislative

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<sup>19</sup> California Attorney General Opinion, p. 13-14.

Services Office of the North Carolina General Assembly completed an “Evaluation of the Structure, Organization, and Operation of the Various Independent Licensing Boards.” Fifty-five Independent Occupational Licensing Agencies (OLAs) were reviewed. Collectively, they license 703,870 individuals at a cost of slightly more than \$67 million. The reports’ major conclusions include:

- The General Assembly *should not* transfer regulatory authority or administrative responsibilities from OLAs to a central state agency. (Emphasis added)
- There is insufficient state-level oversight to ensure OLAs are efficiently and effectively protecting the public.

Instead of a powerful central umbrella agency, the report recommends that the North Carolina legislature “establish an occupational licensing commission that would *not* function as a central licensing authority, but would assist the General Assembly and OLAs in improving effectiveness and resolving disputes.” (Emphasis added)<sup>20</sup>

Explaining its reasoning, the Legislative Services Office wrote:

**OLAs have expressed strong opposition to transferring operations to centralized state agency.** To effectively transition the administration and regulation of licensed occupations to a centralized agency, the cooperation and commitment to success of the participating OLAs would be essential. (Emphasis provided)

Based on survey responses and interviews, the Program Evaluation Division concluded that OLAs are adamantly opposed to transitioning the administration and regulation of licensed occupations to a central state agency. Generally, OLAs view any initiative to establish a more centralized regulatory model as a threat to their autonomy and contend that any initiative to centralize regulatory services would be a waste of funds without benefit to the public or licensees. Given the intensity, breadth, and depth of opposition it is unlikely that affected parties would readily cooperate, compromise, or cede resources or authority to a centralized agency.<sup>21</sup>

#### **OPTION #4 – AN INDEPENDENT REVIEW BOARD TO OVERSEE RULEMAKING**

Several state legislatures, including those in Iowa, North Carolina, and Pennsylvania, have created independent regulatory review commissions to review, delay, suspend, or reject rules proposed for enactment by licensing boards. Iowa’s Attorney General explains that state’s system this way:

Iowa’s formal rulemaking procedures afford an avenue for active supervision by politically accountable officials who are not controlled by active market participants in the regulated activity. Rulemaking exposes board interpretations

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<sup>20</sup> Legislative Services Office of the North Carolina General Assembly, Evaluation of the Structure, Organization, and Operation of the Various Independent Licensing Boards, Report #2014-15, December 17, 2014, Available at: [www.ncleg.net/PED](http://www.ncleg.net/PED), Executive Summary.

<sup>21</sup> Report, p. 14.

to multiple layers of scrutiny through the Governor's office, the Administrative Rules Review Committee (ARRC), and potentially the entire legislature through the rule nullification process or other forms of legislation. The ARRC may delay, suspend, or object to rules. The Governor's office informally screens rules in advance of formal notice. The Governor or Attorney General may object to a rule. The Governor may rescind a rule... Rules are also subject to judicial review in the courts.

To the extent feasible, boards should use formal rulemaking procedures when construing statutes that restrict the legal rights of others, especially when the legislature conferred discretionary authority in areas impacting those who wish to become licensed or are practicing in areas that may require licensure... The North Carolina experience certainly underscores the risks if boards do not take steps to invite such oversight before embarking on enforcement initiatives that might be challenged as unfair trade practices intended to clear out the competition. Boards should be careful to follow statutory procedures.<sup>22</sup>

A former commissioner of Pennsylvania's Bureau of Professional and Occupational Affairs told the audience at a CAC Conference convened to discuss the *North Carolina Dental* decision that in his state:

The process all of Pennsylvania's boards must follow to enact a regulation and rule is a long, tedious procedure that takes anywhere from a year to eighteen months, or more. There are a number of checks and balances built into the regulatory review process. It turns out to be very frustrating for our board members. They want to get things done much quicker. But there is a method to the madness because it is all designed to produce a regulation or rule that makes sense in real-world application. Everyone needs a say to accomplish that goal.

As it turns out, Pennsylvania's regulatory review process has "real" not "potential" stop gaps and checks and balances as the *North Carolina Dental* decision directs. Pennsylvania's regulatory review also includes "veto" power as Justice Kennedy went on to note in his decision.

If a Board wants to enact a regulation or rule, it has to get the proposed regulatory package approved by the Governor's policy office. Then it has to go out for an "informal" round of public comment pursuant to executive Order 96-01. Thereafter the regulatory package comes back to the board for review and modification. Then it goes out for formal regulatory review and another round of public comment. Also, at this time, the legislative committees weigh in with their comments and the Independent Regulatory Review Committee (IRRC) has its say.

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<sup>22</sup> Letter to the Center for Public Interest Law dated May 26, 2015.

IRRC could be very irksome at times, but having a state agency responsible for reviewing proposed regulations can be key to passing muster under the active supervision test.

The next step in the Pennsylvania process is that the board reviews all of the comments submitted by IRRC, the public, other stakeholders, and the legislative committees. It can accept and reject comments, but it must explain the rationale for its decisions.

After this initial review, known as *proposed regulation*, the proposal goes back to the Governor's policy office for one last review. Then, the Attorney General's Office signs off on legal form. Thereafter, the regulation package goes back out to IRRC and legislative committees for what is referred to as *final* regulatory review and possible adoption and enactment. If the IRRC and the Committees still have questions related to a particular regulation, the board drops that regulation.<sup>23</sup>

It is ironic that had the North Carolina Board of Dental Examiners chosen to go the rule-making route in its attempt to prohibit commercial teeth whitening, the proposed rule would have been subject to review by the North Carolina Independent Regulatory Review Commission and the case most likely would not have proceeded to the U.S. Supreme Court.

## **OPTION #5 – MAJORITY PUBLIC REVIEW BODY FOR SCOPE OF PRACTICE ACTIONS**

State level scope of practice laws govern the nature of services various health care professionals are permitted to provide, either independently, under the supervision of another professional, or under the terms of a collaborative practice agreement. The original rationale for these laws was to protect patients from unqualified practitioners. However, in many instances the laws have not kept up with changes in health care professional training, in the demand for health care services, and in health care delivery. Outmoded scope of practice laws containing unjustified practice restrictions interfere with the efficient and effective deployment of the health care workforce by preventing non-physician professionals from practicing to the full extent of their training and skills. Consequently, these laws impede the public's access to safe, affordable primary care – an outcome all the more intolerable given that the Affordable Care Act has increased demand for services from an already overtaxed healthcare workforce. The *North Carolina Dental* decision introduces another element: board imposed scope of practice restrictions could raise antitrust issues.

There is a clear need to take a long look at scope of practice restrictions. Non-physician professions regularly seek changes to modernize the laws governing their scope of practice. It is estimated that as many as 300 scope of practice bills are introduced in state legislatures annually and when legislation is passed, it is typically licensing boards that

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<sup>23</sup> Remarks by Basil L. Merenda, Esq. at a CAC conference in Washington, D.C., June 23, 2015.



are charged with promulgating rules to implement the scope of practice statute. Very few states have gone beyond the case-by-case approach and grappled with scope of practice in a broader context, but those that have done so demonstrate that there are a variety of workable approaches to creating state-level oversight of scope of practice decision-making.

As part of a comprehensive health reform in 2007, Pennsylvania lifted limits on collaborative agreements and expanded the types of services that can be delivered for physician assistants, advanced practice nurses, physical therapists, pharmacists and other health professionals.<sup>24</sup> In 2008, Colorado Governor Ritter commissioned a Scopes of Care Advisory Committee charged with reviewing evidence with respect to quality, safety, and cost-effectiveness, and exploring aspects and settings of care that offer the potential for improving access to quality care from non-physician providers. The Scopes of Care Advisory Committee Final Report became the basis for scope of practice policy revisions in Colorado.<sup>25</sup>

In New Mexico, an Interim Legislative Health and Human Services Committee was established in 2007 to provide legislators with objective information to help evaluate proposed changes to scope of practice regulations. In 2005, Iowa began experimenting with a review committee under Department of Public Health charged with making recommendations on proposed scope of practice changes.<sup>26</sup> In Minnesota, the Council of Health Boards reviews broad health regulations that affect all health professions, including scope of practice.<sup>27</sup> Finally, some years ago, California established a Health Workforce Pilot Project (HWPP) under Office of Statewide Health Planning and

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<sup>24</sup> Office of Rural Health & Primary Care, Minnesota Department of Health. (2007, December). Expanding Scope of Practice to Allow work at the Top of a License. Available at <http://www.health.state.mn.us/divs/hpsc/hep/transform/dec10documents/expandscopeofpractice.pdf>.

<sup>25</sup> Scopes of Care Advisory Committee (2008, December). *Collaborative Scopes of Care Advisory Committee: Final report of findings*, Denver, CO, available at: [http://www.coloradotrust.org/attachments/0000/9371/CollaborativeScopesCare\\_final\\_report.pdf](http://www.coloradotrust.org/attachments/0000/9371/CollaborativeScopesCare_final_report.pdf).

<sup>26</sup> Christina S., Dower, C., & O'Neil E., Center for the Health Professions, University of California. (2007). *Promising Scope of Practice Models for the Health Professions*. Available at: [http://futurehealth.ucsf.edu/Public/Publications-and-Resources/Content.aspx?topic=Promising\\_Scope\\_of\\_Practice\\_Models\\_for\\_the\\_Health\\_Professions](http://futurehealth.ucsf.edu/Public/Publications-and-Resources/Content.aspx?topic=Promising_Scope_of_Practice_Models_for_the_Health_Professions)

<sup>27</sup> Office of Rural Health & Primary Care, Minnesota Department of Health. (2007, December). Expanding Scope of Practice to Allow work at the Top of a License. Available at: <http://www.health.state.mn.us/divs/hpsc/hep/transform/dec10documents/expandscopeofpractice.pdf>.

Development (OSHPD). This office oversees experiments with new models of care, and reports to the legislature on implications for potential policy changes.<sup>28</sup>

States might want to study and perhaps adapt a version of the process used in Ontario, Canada. Ontario's Regulated Health Professions Act (RHPA) adopted in 1991 established a framework that is followed by all twenty-one colleges that regulate healthcare professionals in the province. A Health Professions Regulatory Advisory Council (HPRAC) advises the Minister of Health and Long-Term Care on whether to regulate a profession and the content of regulatory acts. The HPRAC is independent of the health ministry and the regulatory colleges. Notably, its members are not healthcare professionals.

Among other things, the HPRAC advises the Minister of Health on scope of practice matters. Ontario's approach to scope of practice differs from that taken in the United States. Rather than associating a scope of practice with a professional title, Ontario identifies "controlled acts," which are defined as "procedures or activities, which may pose a risk to the public if not performed by a qualified practitioner." Taking this approach means that two or more professions may share the authority to perform certain controlled acts, thereby helping to avoid any anti-competitive implications.<sup>29</sup>

#### **OPTION #6 – MAKE BOARDS ADVISORY ONLY**

This approach is similar to Shimberg's Model E in which licensing boards are advisory only. Under such a system, boards would not take formal actions, but could produce a record and a recommendation for action. The entire record would be submitted to a supervising state agency for its consideration. The power to take formal action would be vested in a supervisory state agency.

Nebraska has such a system. The health professional licensing boards are housed in the Department of Health and Human Services (DHHS). DHHS investigators investigate complaints and send completed investigatory files to the appropriate licensing boards. The licensing boards *recommend* a resolution to the Attorney General's Office, which has the power to accept or reject a licensing board's recommendation. The ultimate authority rests with the AG, not the licensing board. What took place in *North Carolina Dental* could not have happened in Nebraska, nor in any other state where boards are advisory and ultimate authority resides in a "supervising state agency (in Nebraska's case, the Attorney General).

New York State has an even more complete system of advisory boards. The website of the New York State Education Department (NYSED) Office of the Professions (OP) makes clear the advisory nature of licensing boards:

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<sup>28</sup> Dower, C. and Christian, S., Center for Health Professions, University of California, San Francisco (2009). Improving Access to Health Care in California: Testing New Roles for Providers. California Health Care Foundation. Available at: <http://www.chcf.org/publications/2009/12/improving-access-to-health-care-in-california-testing-new-roles-for-providers>.

<sup>29</sup> <http://www.hprac.org/en/index.asp>.

Depending on the particular board, members of the State Boards advise on licensing requirements, licensing examinations and practice issues, and provide community outreach, as well as participate in licensure disciplinary and/or restoration and moral character proceedings.<sup>30</sup>

Another section of the website explains further:

In 1891, medicine became the first profession licensed by the New York State Board of Regents. New York's unique system of professional regulation, recognized as a model for public protection, has grown to encompass nearly 750,000 practitioners and over 30,000 professional practice business entities in more than 50 professions.

Guided by the Regents, a citizen body, the professions are within New York State's unified system of education – the University of the State of New York. This recognizes the key role education plays in both preparing licensed professionals and in ensuring their continuous development.

The State Education Department, under Regents direction, administers professional regulation through its Office of the Professions, assisted by the twenty-nine State Boards for the Professions... 100% of registration renewal fees from physicians, physician assistants, and specialist assistants are redirected to the State Department of Health's Office of Professional Medical Conduct, which investigates complaints against physicians, physician assistants, and specialist assistants...<sup>31</sup>

The licensing boards advise the Office of the Professions as it carries out the following functions:

#### Licensure and Registration

- Reviews over 3,300 programs that prepare students for professional licensure
- Designs and administers licensing examinations
- Processes applications, reviews qualifications, and issues credentials
- Evaluates educational credentials of candidates from over 100 counties
- Registers entities such as professional corporations, pharmacies, continuing education providers, providers of courses in infection control and the identification and reporting of child abuse, and others

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[http://officeofprofessions.custhelp.com/app/answers/detail/a\\_id/40/kw/Are%20the%20lic](http://officeofprofessions.custhelp.com/app/answers/detail/a_id/40/kw/Are%20the%20lic)

<sup>31</sup> <http://www.op.nysed.gov/aboutop.htm>.

## Professional Discipline

- Investigates and prosecutes professional misconduct and unlicensed practice throughout New York State
- Maintains a hotline for reporting professional misconduct and unlicensed practice
- Assists professionals who have substance abuse problems

## Public and Professional Education and Information

- Advises the public on professional services through the consumer brochures on the professions, the Consumer's Bill of Rights, and more
- Assists professionals in staying current with regulatory developments and emerging issues through advisories, publications, and events
- Verifies and archives licensure and professional disciplinary actions.

In his book, *Occupational Licensing, A Public Perspective*, Benjamin Shimberg wrote about the uniqueness of the New York system:

New York's system of professional regulation is unique 1) because it uses professional boards in an advisory capacity under a lay Board of Regents, which has final decision-making authority for all aspects of the program and 2) because of the role played by the State Education Department staff, which provides services to all boards and the Regents. The authority of the Regents provides linkages among professional education, licensure, discipline, and practice.<sup>32</sup>

## **OPTION #7 – EXPAND THE POWERS OF SUNRISE / SUNSET REVIEW**

Colorado adopted a sunset review process in 1976. It is the responsibility of the legislature and the Department of Regulatory Agencies' (DORA) Office of Policy Research and Regulatory Reform. The General Assembly sets dates at which a regulatory board, an agency, or a function of government will cease, unless the legislature reauthorizes it. DORA conducts a sunset review that evaluates whether a particular board or regulation is necessary to protect the public. DORA seeks input from stakeholders and other interested parties and determines whether regulation should continue as is, be modified, or be terminated. If the decision is that regulation is needed, DORA recommends the least restrictive level of regulation that will achieve the intended purpose.<sup>33</sup>

In Washington State, the Joint Legislative Audit and Review Committee (JLARC) conducts sunset reviews. As in Colorado, the sunset reviews assess the need for and effectiveness of programs and agencies. JLARC may consult outside experts for advice in determining whether a program or agency should continue to exist, whether it should be modified, or terminated. The process is described this way:

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<sup>32</sup> Op.cit., pp 25-30.

<sup>33</sup> <https://www.colorado.gov/dora/node/91131>.

- JLARC gets assignments and mandates for studies in both budget and policy legislation.
- JLARC also initiates Committee-approved studies through requests and suggestions from JLARC members, other legislators, legislative staff, OFM and the State Auditor. These studies reflect JLARC criteria for its work program.
- JLARC does a biennial work plan and schedules its studies.
- JLARC staff develop “scope and objectives” for studies for Committee review.
- For major studies, advisory groups, made up of legislators and legislative staff and stakeholders, as appropriate, give advice to JLARC staff.
- JLARC members review and comment on preliminary reports of JLARC studies. Reports are the work of JLARC staff and reflect its professional standards of thoroughness, objectivity, and completeness. Findings and proposed recommendations are the centerpieces of these reports.
- Committee takes action on final reports: approving reports for distribution, adding Committee addenda in line with JLARC’s statute if and when appropriate.
- JLARC recommendations flow to the overall legislative process. JLARC itself sometimes initiates legislation, however, with the consensus of its members.
- JLARC staff follow up with agencies and the legislature to track implementation of report recommendations and to track cost savings from these recommendations.<sup>34</sup>

The recommendations contained in sunset review reports in all states may be adopted, rejected, or modified by state legislatures. In light of the *North Carolina Dental* decision, states might choose to strengthen the authority of sunset review bodies by enacting legislation that would make their recommendations binding unless rejected by the state legislature within 30 days. Sunset review bodies could also be empowered to amend and approve licensing board-initiated rules and regulations. Finally, some states may find it attractive to enlist an existing state agency, such as the sunset review body, to be the independent rule review entity described in option #4.

## **OPTION #8 – GIVE ATTORNEYS GENERAL ADDITIONAL OVERSIGHT POWERS**

Many if not most professional and occupational licensing boards have an attorney assigned to them by the State’s Attorney General. They serve as the board’s attorney, advising on the legality of a wide variety of board activities. The key idea here is “advising.” Policy decisions are vested in the board, not in the board’s attorney.

The FTC Staff guidance document has this to say about relying on the advice of the Office of the Attorney General:

**The following do not constitute active supervision of a state regulatory board that is controlled by active market participants: ...**

- The state attorney general or another state official provides advice to the regulatory board on an ongoing basis.

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<sup>34</sup> <http://leg.wa.gov/jlarc/Pages/StudyProcess.aspx>.

State legislatures would need to require boards to follow the advice of board attorneys, not just *consider* their lawyers' advice, which is currently the case in many states. In some states a different set of attorneys, also often provided by the office of the Attorney General, are responsible for prosecuting cases, and/or defending the board when a board action is challenged in court. In some states, the Office of the Attorney general investigates complaints and has the power to decide whether to file charges against a licensee based on the investigatory report.

Most if not all AGs issue opinions on a wide variety of issues, including scope of practice disputes between different licensing boards. For example, Maryland's Attorney General issued an opinion stating that physical therapists may perform so-called "dry-needling," an activity the acupuncture board found was not within the scope of practice of physical therapists. While these opinions carry great weight, they are not necessarily binding on the licensing boards.

AGs offices may on occasion find themselves at odds with licensing board activities that potentially violate state or federal law, including antitrust laws. As the state's chief law enforcement official, the AGs office is obliged to enforce the laws that a proposed board action might violate.

State legislatures might choose to clarify and strengthen the AG's oversight role. They might make some or all AG opinions binding on licensing boards; they might place enforcement responsibilities in the AG office, with the power to decide whether or not to dismiss a complaint or proceed with a case; they might be the independent state agency that has the power to review, modify, or reject a proposed board rule.

## **CONCLUSION**

The authors of this white paper hope to stimulate discussion among interested parties about the various options available to state legislatures to secure antitrust immunity for professional and occupational licensing boards. We anticipate that stakeholders will have diverse viewpoints about what types of laws their state legislatures should enact. This white paper will have achieved its goal if it generates healthy discussion and debate about the merits of the options presented here and any other proposals introduced in state legislatures in the coming months. The Citizen Advocacy Center (CAC) will gladly share its opinions about which options would offer the greatest consumer protection with any who ask for our input.