



RESPIRATORY CARE PRACTITIONERS EXAMINING COUNCIL
Room 121C, 1400 East Washington Avenue, Madison
Contact: Tom Ryan (608) 266-2112
September 30, 2015

The following agenda describes the issues that the Board plans to consider at the meeting. At the time of the meeting, items may be removed from the agenda. Please consult the meeting minutes for a description of the actions and deliberations of the Board.

AGENDA

9:00 A.M.

OPEN SESSION – CALL TO ORDER – ROLL CALL

- A) Adoption of Agenda (1-2)**
- B) Approval of Minutes of October 8, 2014 (3-6)**
- C) Election of Officers (7)**
- D) Delegation of Authorities and Liaison Appointments (8-9)**
- E) Administrative Updates**
 - 1) Staff Updates
 - 2) Training Needs
- F) Review of Advisory Function to the Medical Examining Board**
- G) Speaking Engagement(s), Travel, or Public Relation Request(s)**
 - 1) Report from Prior State Licensure Liaison Group Meetings – Lynn Waldera
 - 2) Consider Attendance at the 2016 State Licensure Liaison Group Meeting **(10)**
- H) Informational Items**
 - 1) Supreme Court Decision Regarding the North Carolina Dentistry Board **(11-28)**
- I) Items Added After Preparation of Agenda:**
 - 1) Introductions, Announcements and Recognition
 - 2) Administrative Updates
 - 3) Elections, Appointments, Reappointments, Confirmations, and Committee, Panel and Liaison Appointments
 - 4) Education and Examination Matters
 - 5) Credentialing Matters
 - 6) Practice Matters
 - 7) Future Agenda Items
 - 8) Legislation/Administrative Rule Matters

- 9) Liaison Report(s)
- 10) Informational Item(s)
- 11) Disciplinary Matters
- 12) Motions
- 13) Petitions
- 14) Appearances from Requests Received or Renewed
- 15) Speaking Engagement(s), Travel, or Public Relation Request(s), and Reports

J) Future Items

K) Public Comments

CONVENE TO CLOSED SESSION to deliberate on cases following hearing (s. 19.85(1) (a), Stats.; consider closing disciplinary investigation with administrative warning (s. 19.85(1)(b), Stats. And 440.205, Stats., to consider individual histories or disciplinary data (s. 19.85 (1)(f), Stats.; and, to confer with legal counsel (s. 19.85(1)(g), Stats.)

L) **Review Applications and Conduct Oral Examinations of One (1) Candidate for Licensure – Room 124E at 9:15 A.M.**

M) Deliberation of Items Added After Preparation of the Agenda

- 1) Education and Examination Matters
- 2) Credentialing Matters
- 3) Disciplinary Matters
- 4) Petitions for Assessments and Evaluations
- 5) Remedial Education Cases
- 6) Motions
- 7) Petitions for Re-Hearing
- 8) Appearances from Requests Received or Renewed

N) Consulting with Legal Counsel

RECONVENE TO OPEN SESSION IMMEDIATELY FOLLOWING CLOSED SESSION

O) Vote on Items Considered or Deliberated Upon in Closed Session, if Voting is Appropriate

P) Open Session Items Noticed Above not Completed in the Initial Open Session

Q) Ratification of Examination Scores

ADJOURNMENT

**RESPIRATORY CARE PRACTITIONERS EXAMINING COUNCIL
MEETING MINUTES
October 8, 2014**

PRESENT: Ann Meicher, William Rosandick, Lynn Waldera

STAFF: Tom Ryan, Executive Director; Taylor Thompson, Bureau Assistant; and other Department Staff

CALL TO ORDER

Lynn Waldera, Chair, called the meeting to order at 8:58 A.M. A quorum of three (3) members was confirmed.

ADOPTION OF AGENDA

MOTION: William Rosandick moved, seconded by Ann Meicher, to adopt the agenda as published. Motion carried unanimously.

APPROVAL OF MINUTES

MOTION: Ann Meicher moved, seconded by William Rosandick, to approve the minutes of September 10, 2013 as published. Motion carried unanimously.

ELECTION OF OFFICERS AND LIAISON APPOINTMENTS

A vote was taken to maintain the slate and the appointments in order to comply with the annual election requirement. Vote was unanimous in favor of maintaining the slate and appointments.

MOTION: Ann Meicher moved, seconded by William Rosandick, to retain the current slate of officers, liaisons and committee appointments. Motion carried unanimously.

2014 ELECTION RESULTS	
Council Chair	Lynn Waldera
Vice Chair	Ann Meicher
Secretary	William Rosandick

APPOINTMENTS OF LIAISONS, ALTERNATES, AND DELEGATES

- | | | |
|----|------------------------------|--|
| a) | Credentialing Liaison | William Rosandick, Ann Meicher (alternate) |
| b) | PAP Liaison | Lynn Waldera |
| c) | DLSC Liaison | Lynn Waldera |
| d) | Legislative Liaison | William Rosandick |
| e) | Education and Exams | Ann Meicher, William Rosandick, Lynn Waldera |
| f) | Travel Liaison | Lynn Waldera |

USE OF TEMPORARY LICENSES

MOTION: Ann Meicher moved, seconded by William Rosandick, to recommend the Medical Examining Board eliminate the Respiratory Care Practitioner temporary license. Motion carried unanimously.

SPEAKING ENGAGEMENT(S), TRAVEL, OR PUBLIC RELATION REQUESTS

MOTION: William Rosandick moved, seconded by Ann Meicher, to appoint Lynn Waldera as the delegate to attend the 2015 State Licensure Liaison Group Meeting and authorize travel. Motion carried unanimously.

EDUCATION AND EXAMINATION MATTERS

MOTION: Ann Meicher moved, seconded by Lynn Waldera, to appoint William Rosandick as the Board Liaison to review and update the Oral Exam. Motion carried unanimously.

CONTINUING EDUCATION CREDITS POST 2002 AND EXPIRED LICENSES

MOTION: William Rosandick moved, seconded by Ann Meicher, to request DSPS Staff research the possibility of requiring continuing education credits for all credential holders for license renewal. If the Medical Board is able to create this requirement by rule, the Council requests that it move forward with a 12 credit per biennium minimum. If a statute change is required, the Board appoints Ann Meicher as a liaison to work toward obtaining the necessary statutory authority. Motion carried unanimously.

CLOSED SESSION

MOTION: Ann Meicher moved, seconded by William Rosandick, to convene into closed session to deliberate on case(s) following hearing (Wis. Stat. § 19.85 (1) (a)); consider closing disciplinary investigation(s) with administrative warning(s) (Wis. Stat. § 19.85 (1) (b) and 440.205); to consider individual histories or disciplinary data (Wis. Stat. § 19.85 (1) (f)); and to confer with legal counsel (Wis. Stat. § 19.85 (1) (g)). Council Chair read the language of the motion. The vote of each member was ascertained by voice of vote. Roll Call Vote: Ann Meicher-yes; William Rosandick-yes; Lynn Waldera-yes. Motion carried unanimously.

The Council convened into Closed Session at 10:23 A.M.

RECONVENE TO OPEN SESSION

MOTION: William Rosandick moved, seconded by Ann Meicher, to reconvene in Open Session at 1:00 A.M. Motion carried unanimously.

FULL BOARD REVIEW OF APPLICATION/EXAMINATION CAROL YAHN

MOTION: Ann Meicher moved, seconded by Lynn Waldera, to deny the request of Carol Yahn to retake the CRT Examination. **Reason for Denial:** Remediation plan does not adequately address deficits. Motion carried unanimously.

MOTION: Ann Meicher moved, seconded by Lynn Waldera, to require Carol Yahn take an Oral Examination. Office of Education and Examinations Staff will contact Ann Meicher for guidance on examination content prior to notifying the applicant of the examination requirement. Motion carried unanimously.

MOTION: Ann Meicher moved, seconded by Lynn Waldera, to recommend that the Medical Board write a rule permitting denial of credential after six (6) failed national examination attempts. Motion carried unanimously.

MOTION: Lynn Waldera moved, seconded by William Rosandick, to appoint Ann Meicher as the liaison for all questions related to the motions above. Motion carried unanimously.

RATIFICATION OF EXAMINATIONS

MOTION: William Rosandick moved, seconded by Ann Meicher, to ratify examination scores. Motion carried unanimously.

**VOTE ON ITEMS CONSIDERED OR DELIBERATED UPON IN CLOSED SESSION,
IF VOTING IS APPROPRIATE**

MOTION: Ann Meicher moved, seconded by William Rosandick, to affirm all Motions made and Votes taken in Closed Session. Motion carried unanimously.

ADJOURNMENT

MOTION: William Rosandick moved, seconded by Ann Meicher, to adjourn the meeting. Motion carried unanimously.

The meeting adjourned at 1:01 P.M.

DRAFT

**State of Wisconsin
Department of Safety & Professional Services**

AGENDA REQUEST FORM

1) Name and Title of Person Submitting the Request: Nifty Lynn Dio, Bureau Assistant		2) Date When Request Submitted: 09/21/2015 <small>Items will be considered late if submitted after 12:00 p.m. on the deadline date which is 8 business days before the meeting</small>	
3) Name of Board, Committee, Council, Sections: Respiratory Care Practitioners Examining Council			
4) Meeting Date: 09/30/2015	5) Attachments: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	6) How should the item be titled on the agenda page? Election of Officers	
7) Place Item in: <input checked="" type="checkbox"/> Open Session <input type="checkbox"/> Closed Session	8) Is an appearance before the Board being scheduled? <input type="checkbox"/> Yes (Fill out Board Appearance Request) <input checked="" type="checkbox"/> No	9) Name of Case Advisor(s), if required: N/A	
10) Describe the issue and action that should be addressed: The Council should conduct elections of Officers for 2015. Tom Ryan will assist in the facilitation of Elections. Existing Officers (2014) <ul style="list-style-type: none"> • Chair: Lynn Waldera • Vice Chair: Ann Meicher • Secretary: William Rosandick 			
11) Authorization			
Nifty Lynn Dio		09/21/2015	
Signature of person making this request		Date	
Supervisor (if required)		Date	
Executive Director signature (indicates approval to add post agenda deadline item to agenda)		Date	
Directions for including supporting documents: 1. This form should be attached to any documents submitted to the agenda. 2. Post Agenda Deadline items must be authorized by a Supervisor and the Policy Development Executive Director. 3. If necessary, provide original documents needing Board Chairperson signature to the Bureau Assistant prior to the start of a meeting.			

**State of Wisconsin
Department of Safety & Professional Services**

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3) Name of Board, Committee, Council, Sections: Respiratory Care Practitioners Examining Council			
4) Meeting Date: 09/30/2015	5) Attachments: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	6) How should the item be titled on the agenda page? Appointments of Liaisons, Alternates, and Delegates	
7) Place Item in: <input checked="" type="checkbox"/> Open Session <input type="checkbox"/> Closed Session	8) Is an appearance before the Board being scheduled? <input checked="" type="checkbox"/> Yes (Fill out Board Appearance Request) <input type="checkbox"/> No	9) Name of Case Advisor(s), if required: N/A	
10) Describe the issue and action that should be addressed: First the Chair should appoint liaisons as follows: <ul style="list-style-type: none"> • Credentialing Liaison (2014 – William Rosandick/Ann Meicher – Alternate) • PAP Liaison (2014 – Lynn Waldera) • DLSC Liaison (2014 – Lynn Waldera) • Legislative Liaison (2014 – William Rosandick) • Education and Exams (2014 – Ann Meicher/William Rosandick/Lynn Waldera) • Travel Liaison (2014 – Lynn Waldera) The Council should then consider delegation of Council authority per the delegation language in the attached document.			
11) Authorization			
Nifty Lynn Dio		09/21/2015	
Signature of person making this request		Date	
Supervisor (if required)		Date	
Executive Director signature (indicates approval to add post agenda deadline item to agenda)		Date	
Directions for including supporting documents: <ol style="list-style-type: none"> 1. This form should be attached to any documents submitted to the agenda. 2. Post Agenda Deadline items must be authorized by a Supervisor and the Policy Development Executive Director. 3. If necessary, provide original documents needing Board Chairperson signature to the Bureau Assistant prior to the start of a meeting. 			

Suggested motion language:

MOTION: **Board Member Name** moved, seconded by **Board Member Name**, that the Board delegates authority to the Chair to sign documents on behalf of the Board. In order to carry out duties of the Board, the Chair has the ability to delegate this signature authority to the Board's Executive Director for purposes of facilitating the completion of assignments during or between meetings. Motion carried **unanimously**.

MOTION: **Board Member Name** moved, seconded by **Board Member Name**, in order to facilitate the completion of assignments between meetings, the Board delegates its authority by order of succession to the Chair, highest ranking officer, or longest serving member of the Board, to appoint liaisons to the Department to act in urgent matters, to fill vacant appointment positions, and to carry out other assignments in accordance with the law. Motion carried **unanimously**.

MOTION: **Board Member Name** moved, seconded by **Board Member Name**, to delegate authority to the Credentialing Liaison(s) to address all issues related to credentialing matters in its advisory capacity. **Potential denial decisions should be referred to the full Board for final determination**. Motion carried **unanimously**.

MOTION: **Board Member Name** moved, seconded by **Board Member Name**, to delegate authority to the Continuing Education Liaison(s) to address all issues related to continuing education. Motion carried **unanimously**.

**State of Wisconsin
Department of Safety & Professional Services**

AGENDA REQUEST FORM

1) Name and Title of Person Submitting the Request: Nifty Lynn Dio, Bureau Assistant		2) Date When Request Submitted: 09/21/2015 <small>Items will be considered late if submitted after 12:00 p.m. on the deadline date which is 8 business days before the meeting</small>	
3) Name of Board, Committee, Council, Sections: Respiratory Care Practitioners Examining Council			
4) Meeting Date: 09/30/2015	5) Attachments: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	6) How should the item be titled on the agenda page? Travel consideration for the 2016 State Licensure Liaison Group meeting	
7) Place Item in: <input checked="" type="checkbox"/> Open Session <input type="checkbox"/> Closed Session	8) Is an appearance before the Board being scheduled? <input type="checkbox"/> Yes (Fill out Board Appearance Request) <input checked="" type="checkbox"/> No	9) Name of Case Advisor(s), if required: N/A	
10) Describe the issue and action that should be addressed: The Council should consider designating and authorizing a member to attend the 2016 Licensure Liaison Group meeting. Suggested Motion Language: ...to designate <Council/Staff Member Name> to attend the 2016 State Licensure Liaison Group Annual Meeting, and to authorize travel.			
11) Authorization			
Nifty Lynn Dio		9/21/2015	
Signature of person making this request		Date	
Supervisor (if required)		Date	
Executive Director signature (indicates approval to add post agenda deadline item to agenda)		Date	
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**State of Wisconsin
Department of Safety & Professional Services**

AGENDA REQUEST FORM

1) Name and Title of Person Submitting the Request: Taylor Thompson, Bureau Assistant on behalf of Tom Ryan, Executive Director		2) Date When Request Submitted: 3/30/15 Items will be considered late if submitted after 12:00 p.m. on the deadline date: ▪ 8 business days before the meeting	
3) Name of Board, Committee, Council, Sections: Respiratory Care Practitioners Examining Council			
4) Meeting Date: 2015	5) Attachments: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	6) How should the item be titled on the agenda page? Supreme Court Decision Involving NC Dentistry Board	
7) Place Item in: <input checked="" type="checkbox"/> Open Session <input type="checkbox"/> Closed Session <input type="checkbox"/> Both	8) Is an appearance before the Board being scheduled? <input type="checkbox"/> Yes (Fill out Board Appearance Request) <input checked="" type="checkbox"/> No	9) Name of Case Advisor(s), if required:	
10) Describe the issue and action that should be addressed:			
11) Authorization			
Taylor Thompson		3/30/15	
Signature of person making this request		Date	
Supervisor (if required)		Date	
Executive Director signature (indicates approval to add post agenda deadline item to agenda) Date			
Directions for including supporting documents: 1. This form should be attached to any documents submitted to the agenda. 2. Post Agenda Deadline items must be authorized by a Supervisor and the Policy Development Executive Director. 3. If necessary, Provide original documents needing Board Chairperson signature to the Bureau Assistant prior to the start of a meeting.			

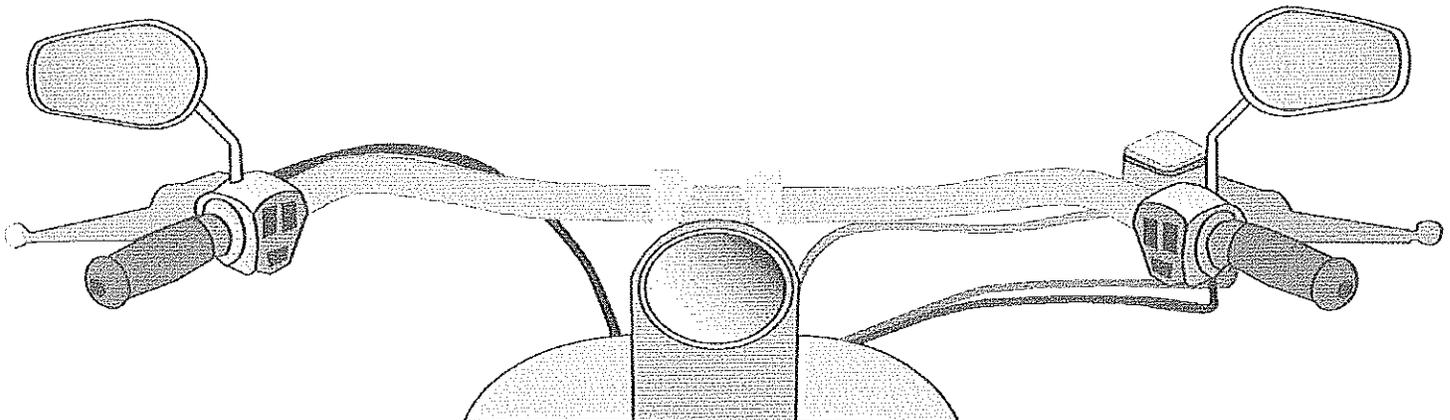
1. The Department is aware that on February 25, 2015, the U.S. Supreme Court issued a decision in North Carolina State Board of Dental Examiners v. Federal Trade Commission.
2. The Department, while continuing to analyze this decision, has developed preliminary opinions and guidance to regulatory boards.
 - a. This decision should not affect regulatory boards who are acting within their regulatory authority. For example, when a regulatory board disciplines a credential holder for unprofessional conduct, such board action is within the acceptable parameters of the board's authority and should not trigger anti-trust issues.
 - b. The investigation and discipline of unlicensed practice should be left to the Department. This has been the Department's long-standing position and should not trigger anti-trust issues.
 - c. The Department is, and has been, aware of potential anti-trust issues concerning regulatory boards. As such, this decision is not a surprise.
 - d. The Department has consistently advised regulatory boards to act within their powers set out in the statutes. This advice remains the same following this decision.
 - e. The Department will continue to analyze the decision and to monitor discussions about the decision especially in areas with potential anti-trust implications such as unlicensed practice, scope of practice and advertising. The Department will update the boards on any important developments.



2015 AAVSB Annual Meeting & Conference
Milwaukee, Wisconsin

BACKGROUND OF THE SUPREME COURT DECISION ON THE NC DENTAL BOARD CASE

Jack Nichols, JD





N.C. Dental Board v. FTC

Jack Nichols
 Allen, Pinnix & Nichols, P.A.
 Raleigh, NC
 (919) 755-0505
 mjn@allen-pinnix.com

You Think You Want Whiter Teeth?

- Your Dentist?
- Spa or Mall?

AAVSB

How Are My Teeth Whitened?

- Both use trays, but:
- Dentists use hydrogen peroxide at 25-40 percent.
- Others use hydrogen peroxide at 6-15 percent, or hydrogen carbamide (which breaks down to 3% hydrogen peroxide)

AAVSB

What Does the Expert Say?

"My conclusions are that bleaching has some risk to the public safety and needs a proper dental exam prior to initiation due to the unknowns of what bleaching does in terms of masking pathology, also that there are concerns about the quality of products and pH issues and acid levels, and there's concern about what things like dental lights do in terms of bleaching." (Emphasis added)

Dr. Van Haywood, DDS

AAVSB

What does the statute Say?

In 1879, the N.C. General Assembly stated: *"The practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry in the State of North Carolina. This Article shall be liberally construed to carry out these objects and purposes."* (Emphasis added)

AAVSB

What does the statute Say?

(a) No person shall engage in the practice of dentistry in this State, or offer or attempt to do so, unless such person is the holder of a valid license or certificate of renewal of license duly issued by the North Carolina State Board of Dental Examiners.

AAVSB

What does the statute Say?

(b) A person shall be deemed to be practicing dentistry in this State who does, undertakes or attempts to do, or claims the ability to do any one or more of the following acts or things which, for the purposes of this Article, constitute the practice of dentistry:

...
 (2) Removes stains, accretions or deposits from the human teeth.
 (Emphasis added).

 N.C. STATE BOARD OF DENTAL PRACTICE

Factual History

- In 2003, Board received complaints about non-dentist providers of teeth whitening services.
- From 2005 – 2009, the Board sent 47 Cease & Desist letters to unlicensed persons or businesses.
- From 2003-2009, the Board conducted investigations of spas and kiosks in malls.

 N.C. STATE BOARD OF DENTAL PRACTICE

Factual History

- Sometime in 2008, the FTC initiated an investigation of the State Board.
- From 2008 – 2010, the FTC interviewed 17 Board members & staff members (some twice) and requested thousands of pages.
- On June 17, 2010, the Commission filed an administrative Complaint alleging that State Board had conspired to restrain trade by enforcing a state statute, N.C. Gen. Stat. § 90-29(b)(2).

 N.C. STATE BOARD OF DENTAL PRACTICE

Factual History

In addition, the administrative Complaint alleged that:

- The Board had engaged in conduct that would have the effect of restraining competition by preventing and deterring non-dentists from providing teeth whitening services in North Carolina.
- That issuance of the C & D letters was without authority.

 N.C. STATE BOARD OF DENTAL PRACTICE

Factual History

- The FTC ALJ conducted a 5 week trial and issued a 130 page Initial Decision on July 14, 2011.
- He ordered the Board to Cease and Desist from issuing Cease & Desist letters, but allowed the Board to file court actions against a non-dentist provider for alleged violation of the Dental Practice Act.

 N.C. STATE BOARD OF DENTAL PRACTICE

Factual History - 4th Circuit

The Board appealed to the Fourth Circuit which affirmed the FTC in a 3-0 decision, with a concurring opinion. The Court held that:

- The Board was a private actor and not a state agency.
- The State did not "actively supervise" the Board.

 N.C. STATE BOARD OF DENTAL PRACTICE

PRESENTATIONS

Factual History – 4th Circuit

- The Board, because it was made up of licensees, had the capacity to conspire.
- The FTC's findings of anti-competitive behavior were supported by substantial evidence.
- The pattern of sending C & D letters was concerted action.

HE 1301, PETER S. MONTGOMERY, EA, 2013



Factual History – SCOTUS

On Oct. 14, 2014, SCOTUS heard oral arguments and considered 17 amicus briefs.

The questions at the oral argument indicated that the Court is likely to establish a new test.

HE 1301, PETER S. MONTGOMERY, EA, 2013



Factual History – SCOTUS

During the oral argument, Justice Breyer asked the salient question, "...what 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."

HE 1301, PETER S. MONTGOMERY, EA, 2013



Factual History – SCOTUS

When the Deputy Solicitor General described the role of the Rules Review Commission as an independent "body of disinterested State actors who could pass on the validity of rules," Justice Scalia responded, "Really, really? ...I don't want that. I want a neurologist to decide that."

HE 1301, PETER S. MONTGOMERY, EA, 2013



Factual History – SCOTUS

BUT, other Court members expressed support for the FTC position. Justice Ginsburg asked, "Why should there be an antitrust exemption for conduct that is not authorized by state law? The objection here was that this board was issuing a whole bunch of cease and desist orders. They had no authority to do that. No authority at all."

HE 1301, PETER S. MONTGOMERY, EA, 2013



Factual History – SCOTUS

Justice Kagan said that the question is:

"Is this party, this board of all dentists, is there a danger that it's acting to further its own interests rather than the governmental interests of the State? And that seem almost self-evidently to be true."

HE 1301, PETER S. MONTGOMERY, EA, 2013



Factual History – SCOTUS

Counsel for the Dental Board and Justice Kagan had a long colloquy about state supervision. Counsel noted that: *"There is a grave risk that if you require too much supervision as a condition of anti-trust [sic] immunity, no one will serve on these boards."*

22 July, 1978 & 1979, CA, 2015



Factual History – SCOTUS

This concern was articulated by several of the amicus briefs. The N.C. State Bar, in its amicus brief, said: *"Lawyers will be reluctant to serve as bar councilors for fear of being sued – and of being held individually liable – in treble damage antitrust actions."*

22 July, 1978 & 1979, CA, 2015



Factual History – AAVSB Brief to SCOTUS

The AAVSB & 18 other associations filed an amicus brief. The Brief argued that:

- The Dental Board was a duly constituted state agency that acted on behalf of the State.
- Congress never intended to subject OLB to FTC oversight.

22 July, 1978 & 1979, CA, 2015



Factual History – AAVSB Brief to SCOTUS

- Subjecting OLB to FTC Oversight would undermine the ability of States to regulate health provisions.
- Risk of antitrust oversight will discourage qualified professionals from serving on OLB.
- AMA argued that allowing FTC oversight would disrupt a 150 year tradition of State regulation.

22 July, 1978 & 1979, CA, 2015



What Happened To Separation Of Powers?

- EXECUTIVE,
- LEGISLATIVE, and
- JUDICIAL

22 July, 1978 & 1979, CA, 2015



Blind Men Examine an Elephant



22 July, 1978 & 1979, CA, 2015



PRESENTATIONS

Formulating the Question Formulates the Answer

- Agency Lawyers say:
- Antitrust Lawyers say:
- Free Enterprise types say:
- Constitutional Lawyers ...


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Possible Outcomes


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Possible Outcomes

1. Affirm the 1948 decision of *Parker v. Brown*, where the Court first articulated the policy of state agency exemption from antitrust laws.
2. Create a new test for State agencies.
3. Accept FTC's suggestion of a "hybrid board of self-interest market participants" with appropriate supervision of "disinterested state official to ensure no anticompetitive behavior."
4. Increase in State Supervision


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Possible Outcomes

4. Increase in State Supervision by:
 - The PED proposed OLC;
 - New legislative oversight committee; or
 - Increased oversight by APO.


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SCOTUS ISSUES DECISION

- On February 25, 2015, the Supreme Court issued its decision.
- By a vote of 6-3, the Court affirmed the Fourth Circuit and the FTC.
- The closing sentence of the opinion neatly summarizes the Court's Decision.
- "If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked."


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SCOTUS ISSUES DECISION

Justice Kennedy, speaking for the majority, said: "A non-sovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity only if it satisfies two requirements:

- "the challenged restraint . . . [is] clearly articulated and affirmatively expressed as state policy,"
- and . . . "the policy . . . [is] actively supervised by the State."


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What is State Supervision?

- Of course, the question becomes, what is "active supervision?"
- Justice Kennedy left that matter open.
- He stated, "Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather the question is whether the State's review mechanisms provide 'realistic assurance' that the nonsovereign's actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests.'"

135 S. Ct. 1911, 1915 (2013)



Dissenting Opinion

- In his dissent, Justice Alito, joined by Justices Scalia and Thomas, indicated he would have upheld Parker.
- "Today, however, the Court takes the unprecedented step of holding that Parker does not apply to the North Carolina Board because the Board is not structured in a way that merits a good-government seal of approval; that is, it is made up of practicing dentists who have a financial incentive to use the licensing laws to further the financial interest of the State's dentists. There is nothing new about the structure of the North Carolina Board."

135 S. Ct. 1911, 1915 (2013)



Dissenting Opinion

The dissent also criticized the new test under *Midcal* and the fact that municipalities

"benefit from a more lenient standard for state-action immunity than private entities. Yet, under the Court's approach, the North Carolina Board of Dental Examiners, a full-fledged state agency, is treated like a private actor and must demonstrate that the State actively supervise its actions."

Dissent, 135 S. Ct. at ___, 1911 L. Ed. 2d at 61.

135 S. Ct. 1911, 1915 (2013)



Dissenting Opinion

In the final part of the dissent, Justice Alito, by asking questions, forecast the uncertainty of the future application of the Decision.

- "What is a 'controlling number'?"
- Is it a majority? And if so, why does the Court eschew that term?"
- Who is an 'active market participant'?"
- What is the scope of the market in which a member may not participate while serving on the board?"
- Must the market be relevant to the particular regulation being challenged or merely to the jurisdiction of the entire agency?"

135 S. Ct. 1911, 1915 (2013)



What is State Supervision?

My view of State Supervision is to consider all 3 branches of government.

- Judicial Branch
- Executive Branch
- Legislative Branch

135 S. Ct. 1911, 1915 (2013)



Going Forward, How Will Occupational Licensing Board Members Be Selected?

- The Fourth Circuit's concurring judge based her opinion on the subject of immunity on the fact that the N.C. Board members were elected by the state's dentists, rather than selected by the Executive Branch.
- But, the oral argument before the Supreme Court seemed to minimize that issue.

135 S. Ct. 1911, 1915 (2013)



PRESENTATIONS

Going Forward, How Will Occupational Licensing Board Members Be Selected?

- The Supreme Court's majority opinion avoided discussion of board selection or composition.
- But the dissent forecast the likelihood that some prospective board members would no longer be willing to serve.



Going Forward, Will Occupational Licensing Board Members Be Liable?

- As noted previously, many of the amicus briefs before the Supreme Court raised the specter of occupational licensing board appointees declining to serve because of their concern about their personal liability.



Going Forward, Will Occupational Licensing Board Members Be Liable?

- Justice Kennedy, speaking for the majority, said: "But this case, which does not present a claim for money damages, does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. . . . And, of course, the States may provide for the defense and indemnification of agency members in the event of litigation." (Emphasis added)



Going Forward, Will Occupational Licensing Board Members Be Liable?

This is no longer an academic discussion.

- On April 24, 2015, a medical clinic, a doctor and the clinic owner sued the MS. Board of Medical Licensure because it forced him to see the clinic since he was not a physician.
- The complaint uses/follows the FTC's administrative complaint issued against the NC Dental Board. In fact, the plaintiffs' complaint accidentally includes this heading: **ANTICOMPETITIVE EFFECTS OF THE DENTAL BOARD'S ACTIONS**



Going Forward, Will Occupational Licensing Board Members Be Liable?

Regarding active state supervision, the complaint alleges:

"The Board is made up of nine (9) physicians, who participate in the provision of healthcare services in Mississippi. Even though the Board is made up of market participants it receives no supervision from a politically accountable state supervisor with veto power who is not a market participant."



Going Forward, Will Occupational Licensing Board Members Be Liable?

Plaintiffs seek:

- injunctive relief,
- declaratory relief,
- treble damages, and
- Attorney fees & costs.



Going Forward, Will Occupational Licensing Board Members Be Liable?

- Does your Board have public liability insurance that will pay the cost of defense?
- Will it also pay damages?
- Probably, any coverage will exclude treble damages.

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Going Forward, the FTC's Position

- In a March 31, 2015, speech to The Heritage Foundation, Maureen K. Ohlhausen, a member of the FTC, commented on the N.C. Dental Board Decision but noted that the comments were her own "and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner."

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Going Forward, the FTC's Position

- Significantly, she noted "that decision represents the culmination of the Commission's efforts in the state action area."
- She also noted that the FTC's work on the subject began with the State Action Task Force, which formulated the goals of "reigning in antitrust exemptions and immunities."

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Going Forward, the FTC's Position

Commissioner Ohlhausen observed that state boards:

- Should be "more cognizant of, and hopefully minimizing, the competitive effects of a board's regulatory decision...";
- "[N]eed not be controlled by active market participants";

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Going Forward, the FTC's Position

- Could be actively supervised by the following methods: legislative committees, umbrella state agencies, rules review commissions, or other disinterested state officials in the event that the State prefers that a board is "controlled by market participants";
- Could be indemnified in the event that antitrust damages are imposed on individual board members;

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Going Forward, the FTC's Position

- Should use the injunctive procedures in court and rely on the *Noerr-Pennington* doctrine.
- She later discussed the need for States to "take a step back to reconsider the composition and oversight of their regulatory boards ... to see if they are on balance helping or harming consumers."

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PRESENTATIONS

What Will the FTC Do Now?

- Continue to work to weaken State Immunity
- Litigate Active Supervision
- Be more proactive in state OLB activity.

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The Last Word....

However your Board operated before 2015, it will **HAVE** to operate differently from **NOW ON!**

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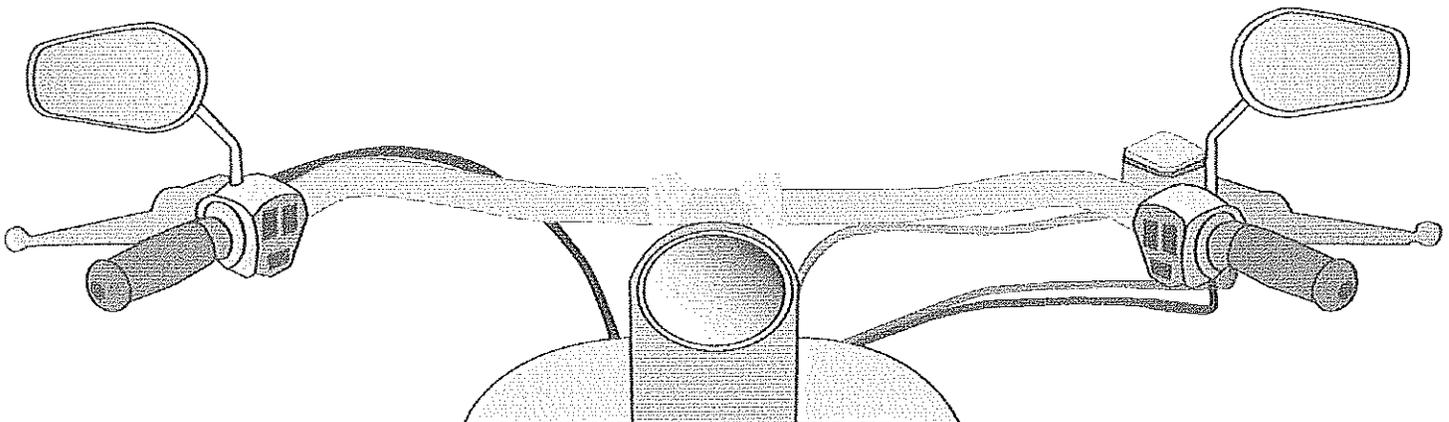




2015 AAVSB Annual Meeting & Conference
Milwaukee, Wisconsin

UPDATE ON EFFECTS OF SUPREME COURT DECISION ON THE NC DENTAL BOARD

Jennifer Semko, JD





**2015 AAVSB Annual Meeting & Conference
September 17-19, 2015
Milwaukee, Wisconsin**

EVOLUTION OF STATE ACTION IMMUNITY: WHAT NOW?
JENNIFER ANCONA SEMKO, ESQ.
BAKER & MCKENZIE, LLP, WASHINGTON, D.C.

Objectives

- Recap of the U.S. Supreme Court *NC State Board* decision
- Potential implications for regulatory boards
- Recent developments
 - Litigation
 - State responses
- Food for thought

Supreme Court's February 25 Ruling

"If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity . . . is to be invoked."



Overview of the Decision

(Brief) Overview of Ruling

- 6 to 3 decision (Alito, Scalia and Thomas dissenting)
- **Majority's Conclusion:** Because a "controlling number" of the Board's decision makers are "active market participants in the occupation the Board regulates," the Board is treated as a private actor and must show active supervision by the State
 - The "active supervision" requirement was not met here
- **Dissent:** The majority seriously misunderstands the doctrine of state-action immunity. Board is a state entity. Period.

Majority's Analysis

- There are limits on immunity
- State agencies are not sovereign simply because of their governmental character
- Active state supervision is required and must be meaningful
- Compared Board to a trade association

Majority's Analysis (cont'd)

Citizens need not be discouraged from serving

- Long tradition of professional self-regulation in US
- States may see benefits to staffing agencies with experts
- No claim for money damages here, so need not address whether board members may be immune from money damages in some circumstances
- State can provide for defense and indemnification
- State can ensure immunity by adopting clear policy to displace competition and (if agency controlled by active market participants) providing active supervision



Majority's Analysis (cont'd)

How much state supervision is required?

- Test is "flexible and context-dependent"
- Don't need day-to-day involvement in operations or micromanagement of every decision
- Review mechanism must provide "realistic assurance" that conduct "promotes state policy, rather than merely the party's individual interests"
- Four requirements: (1) supervisor must review substance, not merely procedures; (2) must have power to veto/modify; (3) mere potential for supervision not enough; and (4) supervisor can't be active market participant



Dissent's Viewpoint

- The NC Board is a state agency "and that is the end of the matter"
- "... until today ... immunity was never conditioned on the proper use of state regulatory authority."
- Majority decision "will spawn confusion" and be difficult to apply
- States may now have to change composition of boards, "but it is not clear what sort of changes are needed to satisfy the test that the Court now adopts."



Dissent: Unanswered Questions

- What is a "controlling number"? Majority? Voting bloc? Obstructionist minority? Powerful agency chair?
- Who is an "active market participant"?
- What is the scope of the market? Must market be relevant to the particular challenged conduct? Would result be different if board members did not provide teeth whitening?
- How much participation makes person "active" in the market?
- Why stop at structure of the board when evaluating "board capture"?



Potential Implications



Why does this matter to you?

- Broader issue of "state action" is relevant to all regulatory boards
- Many boards include practitioner members
- Amount of interface with the state may vary
- Second recent Supreme Court ruling narrowing state-action defense; FTC strongly disfavors state action defense and seeks a high bar for "active supervision"



So now what?

- FTC Commissioner Brill announced in June that FTC would issue guidance
- Talk to AG about your board/state
- Don't forget first prong: clearly articulated state policy to displace competition
- How clear is your enabling statute?
- Remember four requirements for active supervision: (1) supervisor must review substance, not merely procedures; (2) must have power to veto/modify; (3) mere potential for supervision not enough; and (4) supervisor can't be active market participant

Recent Developments

Litigation Consequences

- Likely to embolden private litigants to assert antitrust claims, even when merits not strong
- Does not mean boards will lose . . . But have potentially lost straightforward grounds for early dismissal
- Suits are already being filed . . .



Access Medical Clinic

- Suit filed against Mississippi State Board of Medical Licensure in April 2015
- Challenges new rules imposed on pain management clinics




Access Medical Clinic

- Clinic opened 2010
- In 2011, Board adopts rule requiring clinics to be owned by a hospital or licensed physician
- Plaintiff gives his majority interest to a physician without compensation
- Clinic later forced to close when Board imposes new rules requiring education/certification for physician owners

Access Medical Clinic

- Antitrust Claims:
 - Excluding non-physicians from ownership of pain clinics and requiring approval from board before operating
 - Imposing special education/certification requirements for clinic owners not required of other physicians
- Seeking \$700,000 in damages, treble damages and attorney's fees

Access Medical Clinic

- Board composition: 9 physicians (MDs and DOs)
- Plaintiff alleges board members are "market participants" and acted without a state supervisor with veto authority
 - Must the board members participate in pain management practice to be "market participants"?
- Note: Board oversees MDs, osteopaths, podiatrists, PAs, radiologist assistants and acupuncturists
 - Might state action immunity apply to decisions unrelated to practice of medicine?

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Teladoc, Inc. v. Texas Medical Board

- National telemedicine provider sues Texas Board In April 2015
- Seeking to stop rule requiring doctors to meet in person with new patients before writing prescriptions
- Alleges Board adopted rule only when Teladoc began to be a competitive threat to traditional practices



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Teladoc, Inc. v. Texas Medical Board

- Board includes 12 practicing physicians (voted 13/1 for new rule)
- 203 of 206 public comments opposed the new rule
 - Two favoring statements came from the Texas Medical Association
- Board argues new rule clarifies and expands opportunities for telemedicine . . . Only scenario prohibited is treating unknown patient without objective diagnostic data or ability to follow up with patient

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Robb v. CT Board of Veterinary Medicine

- Complaint filed in June 2015 against CT Board and its members
- DVM (and owner of Banfield Hospital franchise) seeking to block disciplinary action against him, arguing violation of antitrust laws
- Disciplinary action stems from plaintiff's decision to implement his own vaccination protocols



2015 JAMBA 83



Robb v. CT Board of Veterinary Medicine

- Characterizes licensing board as "competitors" seeking to prevent a threat to significant aspect of vet practices
- Application for TRO denied
- Also seeking compensatory and treble damages

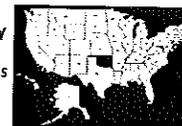


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Oklahoma Response

- Governor issues executive order in late July
- State boards made up of majority of industry participants must submit all non-rulemaking actions (like licensure) to AG for review
- Must defer to AG on any modifications



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Food for Thought

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Potential Strategies in Response to Ruling

- Develop greater state supervision over existing board (e.g., "State Supervision Czar," legislative committee, state court)
 - Oklahoma approach: AG office
- Change board membership so not controlled by active market participants; argue for state entity status (e.g., more public members; remove practitioner majority)
- Combine boards to dilute market participants (e.g., umbrella boards)
- Seek state endorsement of decisions with significant effects on competition
- Abandon boards for certain professions
- Make no changes

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Other Considerations

- Evaluate (establish?) state program for defense and indemnification of board members
- Some activities may be more likely to draw scrutiny than others (e.g., individual disciplinary action vs. broader scope-of-practice question)
- Prepare for potential increase in private antitrust claims in response to board actions
- FTC may be encouraged; complaints brought to FTC's attention may get receptive audience
- Method of board member selection not an express factor in Court's decision

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Questions?

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