CHALLENGES TO LICENSURE

Jerry Carter, Chief Executive Officer
Workshop Facilitator
Panel members

• Melissa Cornelius, Esq.—Arizona board
• Robert Manchester IV, Esq.—Oklahoma board
• Linda Capuchino, Esq.—New Hampshire engineering board
Authority to license professions

• In 1889, the Supreme Court in Dent v. West Virginia established the rights of states to license professions.

• Under a line of cases starting with Parker v. Brown, state licensing boards have been assumed to be shielded from federal antitrust liability, in the same manner as state courts and legislatures.
NC Board of Dental Examiners v. Federal Trade Commission

• The North Carolina board issued cease-and-desist orders to nondentists offering tooth-whitening services and teeth-whitening product manufacturers. It warned that the practice of dentistry without a license is a crime.

• In 2010, the FTC filed a complaint alleging that the board’s actions were anticompetitive and unlawful.
The U.S. Supreme Court ruled 6–3 that a state licensing board composed primarily of active market participants has state action immunity from antitrust law only when it is actively supervised by the state.

Immunity exists only if

– The challenged restraint on competition is clearly articulated and affirmatively expressed as state policy; and

– The policy is actively supervised by the state.
Resulting actions

• Regulatory reforms initiated by various governors/legislatures
• Deregulation of various professions
• Review by attorney general of sanctions issued by state board
• Realignment of state boards into one agency
CHALLENGES TO REGULATION IN ARIZONA

Melissa Cornelius, Executive Director
Arizona Board of Technical Registration
February 8, 2016

• Executive Order 2016-03: Internal Review of Administrative Rules; Moratorium to Promote Job Creation and Customer-Service-Oriented Agencies
  – Whereas, burdensome regulations inhibit job growth and economic development;
  – Whereas, small businesses and startups are especially hurt by regulations;
  – A State agency shall not conduct any rulemaking except as permitted by this Order.
  – A State agency shall not conduct any rulemaking without the prior written approval of the Office of the Governor.
2016 Legislative session

- HB 2613: Regulatory Boards, Licensing, Revisions—introduced on last day, February 8, 2016
  - The 91-page bill, sponsored by 7 representatives and 4 senators, proposed deregulation of citrus fruit pickers, athletic trainers, geologists, landscape architects, assayers, cremationists, and yoga instructors.
- Ancillary bill to consolidate health regulatory boards
May 18, 2016

• Letter from the governor to the president of the Arizona Senate

“It will likely rattle some of the incumbent special interests at the Capitol, but we must pass Legislation next session that aggressively addresses needed reforms of our boards and commissions, including increasing transparency, providing appropriate accountability, and protecting the state from liability. In the meantime, I have directed my staff to explore all other options at my disposal to shine a light on this dark corner of state government.”
Executive Order 2016-05, June 29, 2016

• State Government Units; Professional Lobbyist Contract; Prohibition
  – Whereas, the expenditure of public dollars, by state governmental units, on professional lobbyists to lobby the Arizona State Legislature, at the expense of taxpayers, professional license fee-payers, and rate-payers is unnecessary and unjustified; and
  – Whereas, professional lobbyists representing state governmental units often spend public dollars in efforts to expand the regulatory authority of government and impose additional transaction costs for those in the regulated community
  – The Director (of the Department of Administration) shall terminate all existing contracts between a state governmental unit and professional lobbyists.
  – No state governmental unit shall contract for professional lobbyists in regard to legislation pending before the Arizona State Legislature.
Governor’s State of the State address, January 9, 2017

“Arizonans will move forward by rolling up our sleeves and rolling back more regulations that are standing in the way of job growth. To do that, we need to hear directly from the people making the decisions—our job creators. So I’m calling on owners and operators of Arizona businesses—large and small—please, go to our new website, Redtape.az.gov, and help us find these job-killing regulations hidden all throughout government.”
Quotes from the State of the State address (continued)

• “One great success we’ve had is chipping away at onerous licensing requirements—often designed to keep out competition or stifle new, exciting ideas. Because of our reforms, new yoga instructors everywhere are cheering, ‘Namaste.’"

• “There’s much more work left to do in this area. But who would’ve thought, of all the issues we tackled last year—consolidating boards and commissions, and reducing licensing requirements—would be the most contentious?

• “Turns out Washington, D.C., isn’t the only swamp that needs draining. The special interests and lobbyists descended—twisting arms, turning up the heat, clouding the facts. In a perverse irony, some were even funded with taxpayer dollars. So we fired those lobbyists.”

• “Let’s help those most affected by these (licensing) barriers: Arizonans who are struggling to get by and looking to start a new career. Maybe they’ve gone to night school to learn a new trade or skill. Perhaps they want to be a barber, or general contractor, or X-ray technician. Why stand in their way with another tax, another fee—sometimes hundreds of dollars—before they can start earning a living? So for citizens who are living in poverty, I propose the state waive their licensing fee so they can build a better life.”
“Regulation Rollback—a new program aimed at freeing Arizona’s businesses from the burden of harmful and outdated regulations standing in the way of economic growth and job creation.”

“... empowering Arizonans to make recommendations about how to update our state’s regulatory system.”

“Governor Ducey’s goal is to eliminate a total of 500 of these regulations by the end of 2017.”
Executive Order 2017-02, January 11, 2017

• Whereas, burdensome regulations inhibit job growth and economic development;
• Whereas, all government agencies of the State of Arizona should promote customer-service-oriented principles—and undertake a critical and comprehensive review of administrative rules and take action to reduce the regulatory burden, administrative delay, and legal uncertainty associated with government regulation;
• A State agency shall not conduct any rulemaking without the prior written approval of the Office of the Governor.
• All directors of state agencies shall engage their respective regulated or stakeholder communities to solicit comment on which rules the regulated community believes to be overly burdensome and not necessary to protect consumers, public health, or public safety. Each agency shall submit a report regarding the aforementioned information to the Governor’s Office no later than September 1, 2017.
2017 Legislative session

- **SB 1437: The Right to Earn a Living Act**
  - Rules, regulations, practice, or policy or decision preventing any person from using an occupational title or working in a lawful profession, occupation, or trade.

- **HB 2372: Waiving Licensing Fees**
  - An agency shall waive any fee charged for an initial license for any individual applicant whose family income does not exceed two hundred percent of the federal poverty guidelines if the individual is applying for that specific license in this state for the first time.
April 5, 2017, letter from the governor to the secretary of state

• “Evidenced by the numerous stories covered by the media over the past several years, occupational licensing boards are in desperate need of root-and-branch reform.”

• “All too often, occupational licensing boards create fiefdoms demanding individuals face burdensome training requirements, excessive fees and fines, and arbitrary investigations.”
Executive Order 2017-3, March 29, 2017

• Aimed at reducing Arizona’s regulatory system by seeking information from state boards about overly burdensome licensing requirements
• Requiring agencies to conduct an internal review of training requirements, continuing education, fees, and processes for each type of license issued and compare them to the same in other states
• “If twenty-four or fewer states require a license for this profession, the report shall include the Board’s justification for why that profession should be licensed with specific reference to potential harm to individuals in the State of Arizona.”
• “The report shall also include whether applicants with a criminal history are barred from being licensed, for how long they are barred, and why the Board believes the bar is necessary.”
OKLAHOMA EXECUTIVE ORDER
2015-33

Robert Manchester IV, Board Attorney
Oklahoma State Board of Licensure for Professional Engineers and Land Surveyors
Executive Order 2015-33

Mary Fallin
Governor

FILED
JUL 17 2015
EXECUTIVE DEPARTMENT
OKLAHOMA SECRETARY
OF STATE

EXECUTIVE ORDER 2015-33

I. Mary Fallin, Governor of the State of Oklahoma, pursuant to the power and authority vested in me by Section 2 of Article VI of the Oklahoma Constitution, hereby order all state boards who have a majority of members who are participants of markets that are directly or indirectly controlled by the board, to immediately implement and adopt the following procedures.

Attorney General Guidance

Attorney General Scott Pruitt issued a letter to this office on July 6, 2015, recommending reform of certain current practices by Oklahoma licensing boards, in light of the recent opinion of the United States Supreme Court in North Carolina State Board of Dental Examiners v. Federal Trade Commission. The Attorney General advised that any state board that has a majority of its members who are participants of markets that are directly or indirectly controlled by the board would be subject to possible suit for violations of antitrust law. The Attorney General opined that Oklahoma must implement procedures for those boards with a majority of such members that demonstrate active supervision by the State by a politically accountable state actor who has the power to review, veto and modify board decisions.

Administrative Rules

The Attorney General has reviewed the rulemaking powers of such boards and concluded that sufficient statutory safeguards are currently in place to prevent exposure to possible suit for violations of antitrust or other anti-competitive laws. The Oklahoma Administrative Procedures Act and Executive Order 2013-34 clearly establish procedures that demonstrate active supervision by the Governor and Legislature who are compromised of politically accountable actors. Both the Governor and the Legislature have the power to review, veto and modify board administrative rules.

Other Board Licensure or Prohibition Actions

The Attorney General has concluded that licensure or prohibition actions (other than rulemaking) have insufficient procedures to demonstrate active supervision of boards with a majority of members who are participants of markets that are directly or indirectly controlled by the board. The Attorney General recommended that a single state agency be clearly established as the politically accountable actor with the power to review, veto and modify board licensure or prohibition actions.

The agency best equipped to assume these duties is the Office of the Attorney General. It is the Office of the Attorney General that has the ultimate responsibility for review of violations of antitrust statutes. It is the Office of the Attorney General that is charged with the responsibility to enjoin and enforce the Oklahoma Antitrust Reform Act (79 O.S. §§ 201 et seq.) and the Oklahoma Consumer Protection Act (15 O.S. §§ 751 et seq.). The Office of the Attorney General is also the entity that provides legal advice to most boards and agencies. See 74 O.S. § 11c.

Therefore, I hereby order that all non-rulemaking actions proposed by any state board on which, a majority of its members are participants in the same market that the board regulates:

1. All proposed licensure or prohibition actions shall be submitted to the Office of the Attorney General for review and written analysis of possible violation of law;
2. Upon receipt of the written analysis provided by the Office of the Attorney General, the board shall defer to any recommended modification, including rescinding the proposed action; and
3. Failure to follow the written analysis provided by the Office of the Attorney General shall constitute misconduct and shall subject such board member(s) to removal for cause by the appointing authority.

This Executive Order shall be distributed to all members of the Governor’s Executive Cabinet and the chief executives of all state agencies, who shall cause the provisions of this Order to be implemented.

IN WITNESS WHEREOF, I have set my hand and caused the Great Seal of the State of Oklahoma to be affixed at Oklahoma City, Oklahoma, this 17th day of July, 2015.

BY THE GOVERNOR OF THE STATE OF OKLAHOMA

Mary Fallin

Mary Fallin
Governor

A. Martinez
Secretary of State

Executive Order 2015-33 Page 2 of 2
Executive Order 2015-33

• “The Attorney General opined that Oklahoma must implement procedures for those boards with a majority of such members that demonstrate active supervision by the State by a politically accountable state actor who has the power to review, veto and modify board decisions.”
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3. Failure to follow the written analysis provided by the Office of the Attorney General shall constitute misconduct and shall subject such board member(s) to removal for cause by the appointing authority.”
To All Boards and Commissions with Active Market Participant Majorities:

The United States Supreme Court recently decided North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S.Ct. 1101 (2015). Under the law established by the Court’s opinion, a state agency and its board members may be the subject of federal antitrust liability when active market participants make up a majority on the board or commission in charge of the agency and the agency engages in anticompetitive conduct. The Court held that the only way to protect state agencies and their board members in these circumstances and to ensure they have immunity from suit is to see that they operate consistently with state policies through supervision by a politically accountable arm of the state. Absent that supervision, federal antitrust liability—including treble monetary damages—may apply. The possibility that a state agency could become the focus of a federal antitrust suit for ordinary government is a significant risk that the State must avoid.

Several weeks ago I raised these concerns in a letter to the Governor. In that letter, I described with more detail the legal issues raised by North Carolina Dental Examiners and suggested that Oklahoma remedy the problem by changing the composition of boards and commissions or by designating a state agency or officer to supervise actions taken by boards and commissions that implicate antitrust concerns.

The Governor responded with an executive order choosing the latter option, designating my office as the supervisory entity, and directing you to seek a written analysis from my office of all proposed agency actions that may trigger antitrust concerns. The issuance of a written analysis or legal opinion by my Office accords with the traditional power this Office has to issue written attorney general opinions at the request of an agency, 74 O.S.2011 § 11B(A)(5). As you are aware, attorney general opinions are legally binding on state officials unless set aside by a court of competent jurisdiction. State ex rel. York v. Turpen, 1984 Okl. 26, 558 P.2d 763, 765. Under the terms of the Governor’s executive order, agency officials who fail to seek this advice from my office, or who fail to follow my advice, will be subject to removal for misconduct. Additionally, my office can seek a writ of mandamus or prohibition from a court directing agency officials to abide by their duty to abide by the terms of an opinion issued by my office.

According to the Supreme Court, the review my office conducts must constitute “active supervision” over agency action, which means that my office must actually review each decision and have the authority to veto or modify them. In performing this “active supervision,” my office must ensure that actions taken by agencies are not “anticompetitive.” Actions are “anticompetitive” when they could lessen competition by discouraging, deterring, or removing a participant from a market. Anticompetitive actions that include actions such as revoking a license or permit; denying a license or permit; disciplining a licensee; permitting, professional or other market participant through written reprimand, fines, or other means; preparing guidance documents, position letters, or other informal documents stating an interpretation of law that could deter market participation by increasing costs for market participants; or any informal enforcement action such as a cease and desist letter. Action that could reduce the number of market participants and thus reduce competition in a particular market might also be anticompetitive and should also be forwarded for review.

When your agency intends to take actions that are arguably anticompetitive action as described above, it must forward the proposed action to my office for review. In doing so, you should send a description of the proposed action, a short recital of the relevant statutes or other legal authorities supporting the action, a short description of the facts supporting the action, and a short description of the policy justification for the action. The request should also describe any exigent circumstances that require an immediate response. The request for a written analysis for a single action should be no more than a page in length and should be emailed to both jared.haines@oag.ok.gov and karen.bray@oag.ok.gov, with “Request for Review of Agency Action” in the subject line. You may consult directly with Jared Haines by phone prior to developing your request at 405-522-2994.

Preparing these written legal opinions will be a separate function from the ordinary legal counsel provided by attorneys in my Office. An agency whose board or commission has a majority composed of active market participants should submit these requests regardless of whether the agency has counsel from my Office, internal counsel, or private counsel.

Those willing to serve on the State’s boards and commissions should not have to defend against antitrust lawsuits on top of the other responsibilities they have assumed. After taking the steps I have outlined, we can ensure that the antitrust immunity of your agency and board members is preserved.

Sincerely,

E. Scott Pruitt
Attorney General of Oklahoma
Attorney general letter

• “My office must actually review each decision and have authority to veto or modify them. In performing this ‘active supervision,’ my office must ensure that actions taken by agencies are not ‘anticompetitive.’”

• “When your agency intends to take actions that are arguably anticompetitive action as described above, it must forward the proposed action to my office for review.”
Attorney general opinion—disapproved order
Kathy Hart, Executive Director
State Board of Licensure for Professional Engineers and Land Surveyors
220 NE 28th Street, Suite 120
Oklahoma City, Oklahoma 73105

Dear Executive Director Hart:

We received your request for reconsideration of Attorney General Opinion 2016-114A, which related to an order issued in Board case 2014-099. We have carefully reviewed the additional information submitted concerning this case. In the original opinion, we noted that there was only a “tenuous connection between land surveying” and the bank fraud scheme at issue. We also pointed out that the harms from that scheme “occurred almost entirely in Missouri.” In reconsidering Attorney General Opinion 2016-114A, we were particularly concerned with information that would lead us to a differing conclusion on at least one of those two points.

The additional information presented to us has persuaded us of a substantial connection between the licensee’s bank fraud scheme and the licensee’s land surveying practice. The licensee performed land surveying work for the same development projects for which the licensee acted as a contractor. Further, the licensee undertook construction contracting activities through the same entity under which the licensee performed land surveying activities. Finally, the licensee has the opportunity to prepare fraudulent invoices in both land surveying and construction contracting. We are thus issuing a new opinion to address the order in Board case 2014-099.

Sincerely,

E. Scott Pruitt
Attorney General
Attorney general opinion—approved order

OFFICE OF ATTORNEY GENERAL  
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION  
2016-282A

Kathy Hart, Executive Director  
State Board of Licensure for Professional  
Engineers and Land Surveyors  
220 NE 28th Street, Ste. 120  
Oklahoma City, Oklahoma 73105

Dear Executive Director Hart:

This office has received your request for a written Attorney General Opinion regarding agency action that the State Board of Licensure for Professional Engineers and Land Surveyors intends to take pursuant to a consent agreement with respect to Board case 2014-099. The proposed action is to impose a $7500 fine, suspend the license until completion of all terms of the sentence, and require that a course in survey ethics as well as a licensure exam be completed before reinstatement.

The licensee was convicted of felony bank fraud in federal court and was sentenced to imprisonment and restitution. The bank fraud involved the licensee serving as both a land surveyor and contractor for building construction—the licensee directed sub-contractors to inflate charges, retaining some of the inflated amount.

Oklahoma law authorizes the Board to discipline licensees who commit crimes involving fraud or who engage in fraud when practicing engineering or land surveying. See 59 O.S.Supp.2015, § 475.1R(A)(2)-(3). The law also authorizes discipline when licensees engage in conduct “likely to deceive, defraud or harm the public.” Id. § 475.1R(A)(1).

The Board’s action seeks to enforce the statutory policy against deceit and fraud. The licensee engaged in a pattern of criminal fraud that was successfully prosecuted. The Board may reasonably believe that a temporary suspension, additional education and examinations, and a sizeable fine are necessary to prevent and deter fraudulent activity by licensed land surveyors.

It is, therefore, the official opinion of the Attorney General that the State Board of Licensure for Professional Engineers and Land Surveyors has adequate support for the conclusion that this action advances the State of Oklahoma’s prohibition on fraud in the practice of land surveying.

E. SCOTT PRIETT  
ATTORNEY GENERAL OF OKLAHOMA

1 The Office of the Attorney General previously issued an opinion disapproving the Board’s action in case 2014-099. See A.G. Opin. 2016-114A, at 1. The Board went on to request that this Office reconsider that opinion, after which the Board provided additional information establishing a connection between the licensee’s practice of land surveying and the fraudulent activity at issue. Attorney General Opinion 2016-114A is withdrawn.
Governor Mary Fallin and Attorney General Scott Pruitt
Impact of North Carolina dental case

• All cease-and-desist orders are required to have approval by the attorney general.
• The attorney general’s office is hesitant to issue such orders in light of this case.
Regulatory legislation in New Hampshire

• The Legislature proposed a temporary licensure bill allowing for automatic temporary licensure within 10 days of completed application without board approval (significant amendments to bill removed this language).
• On January 5, 2017, the governor issued a moratorium on all rule-making for three months and required justification for all regulatory rules.
• On July 20, 2017, the governor issued an executive order to delete 1,600 regulations and ordered to repeal and not renew any rules that were not justified per his executive order.
Legal challenges

• A cease-and-desist order was issued by the New Hampshire Board of Land Surveyors against a company that was also issued a cease-and-desist order by the Connecticut board.

• The first judicial review upheld the Connecticut board’s decision, but the Connecticut Supreme Court reversed the decision.

• The company disputed the cease-and-desist order through legal counsel.
Legal challenges

- The Board of Architects issued a cease-and-desist order with the approval of the attorney general.
- The respondent disputed the letter, citing the North Carolina Dental case.
- The respondent continued to advertise.
- The case was forwarded to the Consumer Protection Division of the attorney general’s office.
- The respondent was deemed “in violation” and was fined and sanctioned.
- The Consumer Protection Division is now being used as a potential enforcement tool.
Working within the changing regulatory climate

- Remember the mission: protect the public.
- Focus on health, safety, and welfare.
- Work with other regulatory agencies (including Legislative committees).
- Educate Legislators on the need for licensure and regulation.
- Continue to emphasize the importance of regulation and licensure to the general public.
QUESTIONS AND DISCUSSION

CEO Carter, Facilitator
Questions for discussion

- Has legislation been introduced in your state to eliminate or significantly modify your board’s operation?
- Has your board been required to revised administrative rules as a result of the North Carolina Dental Board case?
- Are sanctions issued by your board now required to be reviewed by the attorney general or some other authority before they become final?
- Is your board considering amendments to its practice act to specifically grant antitrust immunity to board members?
- Is your board subject to sunset provisions?