



2017 BOC Athletic Trainer
Regulatory Conference

Regulatory Trends & Solutions Reflect Don't Deflect

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10:45am – 12:30pm

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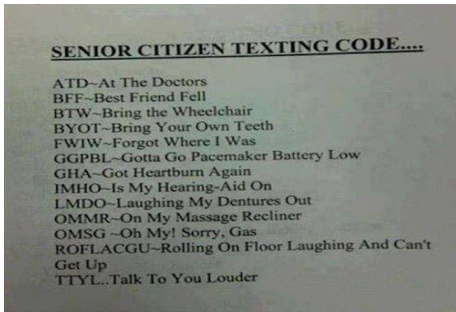


About FARB

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Ground Rules...Cell phones





Why the Title?



• Reflect....Don't Deflect

- Perhaps the regulatory community does not spend enough time reflecting on basic concepts.....
-and too much time defending the status quo.

Why the Title?

• Reflect....Don't Deflect

• Is regulation doing what it's supposed to be doing?

- How do we know?
- Can "we" trust ourselves?

BOC **Agenda**

- Start with WHY
- *North Carolina State Board of Dental Examiners v. Federal Trade Commission*
- Antitrust implications to state based regulation
- Other legal cases related to regulation
- Political climate and trends in changes and challenges to regulation In the News related to regulation of the occupations and professions
- Potential "solutions" to addressing change the view of regulation

BOC **Ask...**

- Is the profession self-regulated?

A hand-drawn diagram with 'COMPLIANCE' in a red oval at the center. Arrows point from 'COMPLIANCE' to 'LAW', 'PROCESS', 'POLICY', 'RULES', 'GUIDELINES', and 'REGULATIONS'.


BOC **Ask...**

- Is the profession self-regulated?

The word 'NO' in large, bold, white letters on a black background.

BOC **Change is Inevitable**

- What are the biggest challenges facing your boards/jurisdictions?

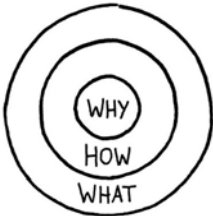



BOC **How Do We Address Challenges?**

- Being informed
- Trained
- Knowledgeable
- Understand role of board
- Understand role of board member
- Separate trade from regulation!
- And more...and more...and more...

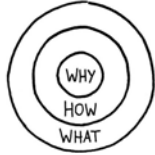
BOC **START**


- Start with **WHY**...
- Why is there government regulation?






-provides consumers with an assurance of the qualifications of licensees along with a means of enforcement for the benefit of the public.



 Why do states regulate athletic trainers?

Criminal vs.
Civil vs.
Administrative processes

Commonalities & Differences

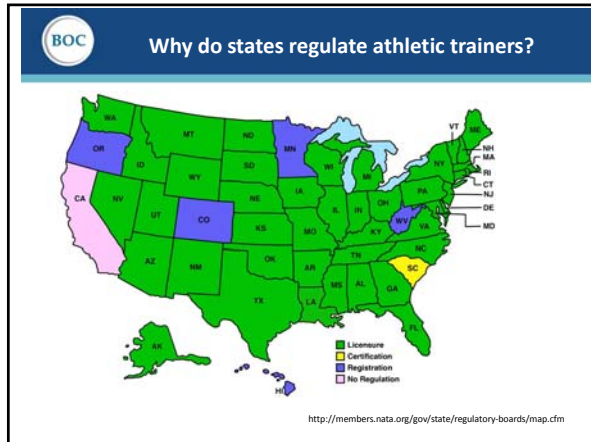
 Why Does the BOC Exist?

The Board of Certification, Inc. (BOC) was incorporated in 1989 as a not-for-profit credentialing agency to provide a certification program for the entry level athletic training profession. The BOC establishes both the standards for the practice of athletic training and the continuing education requirements for BOC Certified Athletic Trainers (ATs). **The BOC also works with state regulatory agencies to provide credential information, professional conduct guidelines and regulatory standards on certification issues.** The BOC also has the only accredited certification program for ATs in the United States and has mutual recognition agreements with Canada and Ireland.

BOC Vision: The BOC exists so that healthcare professionals worldwide have access to globally recognized standards of competence and exceptional credentialing programs that support them in the protection of the public and the provision of excellent patient care.

BOC Mission: To provide exceptional credentialing programs for healthcare professionals to assure protection of the public.

BOC Values: Integrity, Professionalism, Fairness, Transparency, Service



BOC How do states regulate athletic trainers?

Nebraska licensure statute
 38-409. License required; exceptions. **No person shall be authorized to perform the physical modalities set out in section 38-408 on any person unless he or she first obtains a license as an athletic trainer or unless such person is licensed as a physician, osteopathic physician, chiropractor, nurse, physical therapist, or podiatrist. No person shall hold himself or herself out to be an athletic trainer unless licensed under the Athletic Training Practice Act.** Source: Laws 1986, LB 355, § 3; Laws 1989, LB 342, § 27; Laws 1999, LB 178, § 3; Laws 2003, LB 242, § 67; R.S.1943, (2003), § 71-1,240; Laws 2007, LB463, § 181. Operative date December 1, 2008.

BOC How do states regulate athletic trainers?

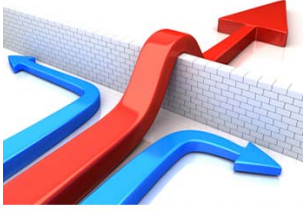
Elevator speech....

BOC How do states regulate athletic trainers?

Elevator speech...

The _____ board is statutorily created and delegated with the authority to regulate the profession of _____ in the interest of protecting the health, safety, and welfare of the public. With necessary oversight by government, the board enforces standards and criteria set forth in statute and adds specificity through the promulgation of regulations. The effectiveness and efficiencies of the board is enhanced by populating the board with a combination of consumer members as well as those with the necessary expertise to address the complexities of the profession specific issues. An administrative regulatory system provides consumers with an assurance of the qualifications of licensees and a means of enforcement for the benefit of the public.

BOC Challenges.....




Institute for Justice v. Department of Financial & Professional Regulation, (Appellate Court Illinois 2017)


- The Illinois Court of Appeals reversed the lower court and held that the Department of Financial & Professional Regulation (Department) need not produce documents under the Freedom of Information Act (FOIA). The lower court had granted summary judgment in favor of the IFJ FOIA request issued to the Department for all complaints regarding licensed cosmetologists and hair braiders. The lower court also awarded the IFJ \$35K in attorneys fees as a prevailing party. While the original lawsuit was pending, a new law became effective that provides that complaints under the Barber's Act against licensees are confidential and for use only by the Department and shall not be disclosed except to law enforcement, other regulatory agencies or under a valid subpoena. The sole issue on appeal was whether the new law was to be applied retroactively, thereby providing an exemption from disclosure. The IFJ argued that retroactive application of the new law impaired its vested right to access to the documents. The court disagreed finding that the exemption from disclosure does not otherwise impair the IFJ right with respect to any completed transaction made in reliance on the prior law, thus has no impermissible retroactive effect. Thus, the disclosure mandate and attorneys fees awards were reversed.

 **INTRO TO ANTITRUST?**


Government regulation is anti-competitive

 **NC State Board of Dental Examiners v. Federal Trade Commission**

The 4th Circuit Court of Appeals affirmed the FTC administrative ruling against the North Carolina State Board of Dental Examiners and held that the Board, as a self governing agency made up of practitioners elected by the licensees is a “private” entity and was not entitled to antitrust immunity. The FTC alleged that the position taken by the Board finding that teeth-whitening was within the scope of practice and, thus, limited to licensed dentists was anti-competitive. The court held that the Board was required to meet both prongs of the test for private actors to enjoy immunity from antitrust liability. The prongs include both a clearly articulated state policy and sufficient oversight by the state. The court noted the oversight by the state was not sufficient to justify immunity from antitrust scrutiny.

 **United States Supreme Court Opinion**

United States Supreme Court affirmed the 4th Circuit Court of Appeals and held that the NCSBDE violated the antitrust laws by interpreting the scope of practice within the practice act to include teeth whitening. The court held that a “non-sovereign” actor whether a state agency or private group must meet the two prong test of clearly articulated state policy AND active oversight by the state. Based upon the fact that the NCSBDE is comprised of market participants, the court held that it was a non-sovereign entity.


 **AntiTrust Implications to Regulation**

What is it that state regulatory boards do that implicates the antitrust laws?

Everything
Most things
Very few things
Nothing


 **Perception is Reality**

- Perception about regulation from....
 - Applicants & Licensees
 - Boards
 - Legislative branch
 - Executive branch
 - Judicial branch
 - Media
 - Economic interests groups
 - Trade associations
 - Consumers
 - FTC.....


 **Public-Private Relationships**

Ask:
Under what conditions can the actions of a private entity affect the public sector?


Education
Examination
Supervised experience
Others....

 **Other Related Cases**


- Rodgers v. State of Louisiana Board of Nursing
 - Student challenged termination of university nursing degree program; court held Nursing **Board immune** under 11th Amendment
 - **March 13, 2017: Rodgers filed Petition for Writ of Certiorari in U.S. Supreme Court.**
- NC Acupuncture Licensing Board v. NC Board of Physical Therapy Examiners
 - Acupuncture Board filed suit seeking declaratory judgment that dry needling within scope of acupuncture and sought injunction against Physical Therapy Board
- Henry v. NC Acupuncture Licensing Board
 - Anticompetitive behavior in excluding physical therapists who perform dry needling; Injunction sought

 **Other Related Cases**


- Rivera-Nazario v. Corporacion Del Fondo Del Seguro Del Estado
 - A public corporation deemed a non-sovereign public actor
- Dept of Transportation v. Association of American Railroads
 - A statutorily identified private corporation deemed a government entity
- U.S. v. Ackerman
 - A private, not-for-profit organization deemed to be a government entity for purposes of the 4th Amendment search and seizure clause

 **Ivy V. Commissioner Williams Texas Education Agency**

- United States Court of Appeals for the 5th Circuit reversed the District Court and dismissed the putative class action case filed by deaf individuals seeking injunctive and declaratory relief to require the Texas Education Agency (TEA) to bring private sector driver education programs into compliance with the Americans with Disabilities Act (ADA) and Rehabilitation Act.

 **Ivy, cont.**

- In order to obtain a drivers license, persons under the age of 25 must submit a **driver education certificate (DEC)** to the **Texas Dept. of Public Safety**. DEC's are only available from private driver education programs that are licensed by the TEA. Plaintiffs contacted numerous private education programs all of whom refused to provide accommodations for hearing impairments. **Plaintiffs filed an action in District Court seeking to require the TEA to comply with the ADA.** The District Court denied the TEA motion to dismiss and certified an interlocutory appeal. **On appeal and after finding the Plaintiffs had standing, the 5th Circuit held that the plaintiffs case failed on the merits.**

 **Ivy, cont.**

- **The court held, "in a close call", that driver education is NOT a service, program or activity of a public entity under Title II of the ADA. The court held that in the absence of a contractual or agency relationship, "courts have routinely held that a public entity is not liable for a licensed private actor's behavior."**
While troubled by the fact that a DEC is mandatory and can only be obtained through a regulated private sector education program, the court held that state regulation of the education program does not transform such program into a TEA program or service.

 **Ivy, cont.**

- Appealed to the United States Supreme Court
- U.S. Supreme Court initially agreed to hear the case
- October 31, 2016, the U.S. Supreme Court vacated the decision as moot, thus rendering the 5th Circuit opinion of no precedential value.
- *Issue remains important to the regulatory community...*

BOC Political Climate and Trends

- Regulation vs. economic growth
- Separation of trade/industry from regulation/public protection
- Legislative reform, executive orders



BOC Political Climate - Legislation

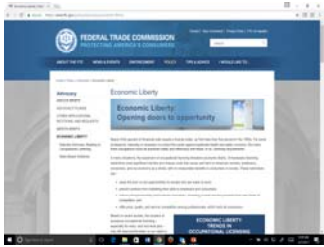
- Virginia HB 1566 – Creates a new agency: Division of Supervision of Regulatory Boards
- New Jersey A4273 – Requires state supervision of certain regulatory boards to provide antitrust immunity
- Mississippi HB 1425 – Requires active supervision by the Governor of certain regulatory boards to provide antitrust immunity
- Arizona SB 1437 Right to Earn a Living Act – restricts issuance of regulations which limit in the entry into a profession or trade, unless they can be shown necessary to the health and safety. *Doesn't address state oversight issue.*

BOC Political Climate – Executive Orders

- Arizona Executive Order 2017-03 (March 2017)
 - Each board must review processes, fees, licensure requirements in a report submitted by June 30, 2017.
- Kentucky Executive Order 2016-859 (December 2016)
 - Relating to Real Estate Commission, Real Estate Appraisers Board, Board of Auctioneers, Board of Home Inspectors and Creation of Kentucky Real Estate Authority
- Oklahoma Executive Order 2016-39 (December 2016)
 - Creation of Occupational Licensing Task Force

BOC Political Climate - FTC

FTC Task Force




BOC Political Climate – Trump Administration

- **Bannon: Trump administration is in unending battle for 'deconstruction of the administrative state' (2/23/2017)**
 - https://www.washingtonpost.com/news/powerpost/wp/2017/02/23/bannon-trump-administration-is-in-unending-battle-for-deconstruction-of-the-administrative-state/?utm_term=.6c879be8145d
- **Leashes Come Off Wall Street, Gun Sellers, Polluters and More (3/5/2017)**
 - <https://www.nytimes.com/2017/03/05/us/politics/trump-deregulation-guns-wall-st-climate.html>
- **Trump Administration and Congress Signal New Priorities for Financial Regulation (2/13/2017)**
 - <https://corpgov.law.harvard.edu/2017/02/13/trump-administration-and-congress-signal-new-priorities-for-financial-regulation/>
- **Trump Signs Order to Enforce Regulatory Agenda (2/27/2017)**
 - <https://www.bna.com/trump-signs-order-n57982084419/>


BOC Challenges and Opportunities

- Legal Climate
- Political Climate
- State Regulatory Board Opportunities
- BOC opportunities




 **Perception is Reality**

- Are the professions self-regulated?
- What role does the private sector play in regulation?
- What role should it play?


 **In the News**

Contractors association, state board join forces to build new downtown office building (Jan 2017)


- <https://www.businessreport.com/article/contractors-association-state-board-join-forces-build-new-downtown-office-building>
- Louisiana Associated General Contractors and the Louisiana State Licensing Board for Contractors are teaming up to develop a new four-story building in downtown Baton Rouge that will house offices for both entities.
- The state LBC is funding the building, and we are providing the property," says LAGC CEO Ken Naquin, who estimates the budget for the building's construction at \$6.5 million. *"It's a true public-private partnership."*

 **Louisiana matter, cont.**


- **Some comments from readers posted to the article:**
 - *So, a lobbying organization and a state board are joining forces to construct a four-story (small) downtown building at the public's expense. What could go wrong with that?*
 - *Has this cleared the ethics commission? Can an entity that represents the regulated industry enter into an ongoing real estate transaction with the regulator (or the reverse it doesn't matter). When a contractor has a potential licensing problem and seeks assistance from the Louisiana Associated General Contractors Association will the transaction be "lets just go down the hall and see what our land lord/tenant (sic) has to say, you know we are very close?"*

 **College Accreditors Largely Staffed by Employees of Schools They Oversee** (Nov. 2016)

- <http://www.wsi.com/articles/college-accreditors-largely-staffed-by-employees-of-schools-they-oversee-1478860210>
- The accrediting agencies are **non-governmental bodies** made up largely of officials in higher education.
- Two-thirds of the officials responsible for policing the quality of the nation's colleges and universities are employed by schools their agencies oversee, highlighting potential **conflicts of interest**.

 **College Accreditors, cont.**


- And while **most accreditors require commissioners to recuse themselves** from deliberations regarding their institutions, commissioners could cast a favorable vote toward a particular school with which he or she has no affiliation **in exchange for a favorable vote** on their school.
- Accreditors have faced criticism from policy makers such as Sen. Marco Rubio (R., Fla.), who says the accreditation system has **acted as a cartel**, blocking nontraditional education providers from gaining access to federal funds and competing against traditional schools.

 **College Accreditors, cont.**

- Mary Ellen Petrisko, President of Western Association of Schools and Colleges Senior Colleges and Universities Commission, said accrediting is a peer-review process for good reason—college officials work in higher education daily and thus are best positioned to set standards. ***"I don't think you would want doctors evaluating whether plumbers are doing a good job,"*** she said.
- In September, Sen. Elizabeth Warren (D., Mass.), Dick Durbin (D., Ill.) and Brian Schatz (D., Hawaii) **co-sponsored a bill that would, in part, restrict conflict of interest in the accreditation process by prohibiting individuals holding administrative and other roles from involvement in the certification process of that school.**

 **Potential Solutions**

- Separate regulation from trade
- Identify state and federal jurisdiction
- Understand legal concepts and consequences
- Train State Board members

 **The Sky is Not Falling**

- Be informed
- Training
- Legal advice
- Be Regulators!!!...not athletic trainers
- Seek changes to statutes
- Promulgate new rules/regs
- Declaratory judgments
- DO NOT STOP DOING YOUR JOBS AS REGULATORS

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Thank You

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