State of the Union and Regulation

Dale J. Atkinson
Friday, November 18, 2016
11:15 am – Noon
Speaker

Dale Atkinson, Esq.
ASWB General Counsel
1466 Techny Road
Northbrook, Illinois
60062
847-714-0070
847-714-9796 fax
dale@atkinsonfirm.com

AAVSB
ASWB
ASPPB
ARBO
FARB
FSBPT
FSMTB
FCLB
ICFSEB
NABP
ACPE
JRCERT
NMTCB
Agenda

- **Current Events: State of the Regulatory Union**
  ....much activity

- **FARB Advocacy**
  ....Common-sense regulation; Regulation for a reason

- **LGAA**
  .....Professional Licensing Coalition

- **Mobility and Portability Opportunities**
  ....cursory exploration of options
Current Events: *State of the Union*

- **Litigation**
  - 12+ cases
- **Executive orders**
  - 4 EO
- **Attorney General opinions/Advisory letters**
  - 4 AG/Advisory
- **New/pending legislation**
  - Numerous … AZ, CT, GA, IA, VA, MD, MA, MN, NE, NY, WY, CA, NC
FARB Advocacy: Ongoing Evolution

- Campaign with a positive message regarding regulation
- Generative thinking
- Regulation 2.0
- Theme:
  - Common-sense regulation: Regulation for a reason
FARB Advocacy: Ongoing Evolution

- Chief Advocacy Officer: Stephen Nutt, NCARB
  - To develop and support ADVOCACY campaigns on key strategic issues at the national level
  - To assist in the identification and development of key policy areas for FARB
  - To identify new grant opportunities for FARB.

- Theme:
  - Common-sense regulation: Regulation for a reason
FARB Advocacy Efforts

ADVOCACY Committee

- Create an action plan that leads FARB to become the national voice promoting common-sense regulation and public protection.

- Eric Fish - FSMB
- Joel Albizo - CLARB
- Shaun Conway - NBCOT
- Denise Fandel - BOC
- Alex Siegel - ASPPB
- Stephen Nutt - NCARB
ADVOCACY First

ADVOCACY Committee

- ADVOCACY Response Process
- Model to Address Antitrust Issues
- Model Letters
- White Paper development
- Licensing Community Repository
Visibility

FARB on the Road

- Expand presence and brand of FARB
- Promote benefits of membership
- Spotlight FARB’s programs and services
- Reach new members

Arizona BTR

FSMB
San Diego April 2016

NCARB
Seattle June 2016

CLARB
Webex June 2016

NCSBN

CLARB
Philadelphia September 2016
Visibility

NCSL Legislative Summit

- Largest and most substantive meeting of its kind in the nation
- A unique opportunity to interact face-to-face with lawmakers
- Engage with 900 legislative leaders
- Representatives from every state
Local Government Antitrust Act

- LGAA...enacted in 1984 to address monetary damages imposed on local government/municipalities under antitrust liability

- Limits plaintiff relief to equitable remedies (injunctive)

- Prohibits monetary sanctions

Sen Chuck Grassley R-IA
Sen Mike Lee R-UT
Sen John Cornyn R-TX
Sen David Perdue R-GA
Sen Mike Conaway R-TX (Acct)
Sen Amy Klobuchar DFL-MN
Rep Bob Goodlatte R-VA
Rep Jim Sensenbrenner R-WI
Rep Tom Marino R-PA
Rep John Conyers D-MI
Rep Hank Johnson D-GA
Rep Hakeem Jeffries D-NY
Professional Licensing Coalition

• Conglomerate of associations/federations of regulatory boards promoting legislation to expand the reach of the LGAA to cover state licensing boards

• Limit antitrust relief to equitable remedies
Cross section of perspectives

- Independence from a specified profession uniquely identifies FARB
Mobility and Portability Opportunities

- ASWB mission, membership, ability to bring social work regulators together
- Collective opinions, expertise, voice
- ASWB Mobility Task Force
Mobility and Portability Opportunities

- Task force will be identifying numerous issues:
  - Scope...what constitutes practice
  - Activities outside of scope
  - Where practice occurs
  - Legal jurisdiction
  - Confidentiality
  - Applicable law
  - Conflicting law
  - …REMEMBER THE ASWB MODEL PRACTICE ACT
Mobility and Portability Opportunities

• Task force will be exploring numerous options:
  - Status quo
  - Informed uniformity
  - Model act promotion
  - Interstate compacts
  - ASWB contracts with member boards
  - ASWB governance approach
  - Relationship with examinees and licensees
  - ....others
Words of advice.....change is coming

• Open-mindedness
• Your way is not the only way
• What is *required* by law
• What is *allowed* through policy
• What are other SW boards doing
• What are other intra-state boards doing
• Never lose sight of effective and efficient
• Understand the climate
Thank you.....

• Additional slides follow as a resource.
Antitrust & Abstention

Strategic Pharmaceutical Solutions, Inc. v. Nevada State Board of Pharmacy - 2016

- The U.S. District Court in Nevada denied the Nevada State Board of Pharmacy's (Board) motion to stay the plaintiff veterinary pharmacy company's antitrust action against the Board.

- The court held that even if the administrative proceeding finds that the pharmacy company violated the anti-kickback laws, the antitrust questions will still need to be addressed by the federal court, as the federal courts have exclusive jurisdiction over federal antitrust claims. Thus, abstention is not warranted.
Antitrust Litigation…..

• Petrie v. Virginia Board of Medicine
  ▪ Discipline of licensee for unauthorized practice; Board won at district court; oral argument before Fourth Circuit in March 2016.
  ▪ Dismissed chiropractor’s antitrust suit against the Board (May 2016)
Antitrust Litigation......

• Axcess Medical v. Mississippi State Board of Medical Licensure
  ▪ Challenge to rules limiting non-licensees from owning clinics; dismissed

• Coestervms.com, Inc. v. Virginia Real Estate Appraiser Board
  ▪ Applicant challenged denial of licensure due to past conduct; plaintiff voluntarily dismissed

• Collins v. Battle (Georgia Board of Dentistry)
  ▪ Non-licensee claims relevant practice act provisions unconstitutional; Board motion to dismiss granted on Privileges and Immunities Clause claim but denied as to due process and equal protection claims and dismissal denied as to abstention.
Antitrust Litigation.....

- **Henry v. North Carolina Acupuncture Licensing Board**
  - Anticompetitive behavior in excluding physical therapists who perform dry needling; Injunction sought
  - Motion to dismiss granted April 26, 2016

- **LegalZoom.com, Inc. v. North Carolina State Bar**
  - Challenge to rules restricting legal plans by non-licensee; consent judgment entered

- **Rivera-Nazario v. Corporacion del Fondo del Seguro del Estado**
  - Antitrust violations (chiropractors); antitrust claims dismissed, defendants immune and suit dismissed.
And yet even more antitrust litigation....

- **Rodgers v. Louisiana State Board of Nursing**
  - Student challenged termination of university nursing degree program; court held Nursing Board immune under 11th Amendment

- **Rosenberg v. State of Florida**
  - Suspended licensee (lawyer) challenged Grievance Committee and Florida Bar action as anticompetitive; Court dismissed action because FL Bar was a sovereign entity
And yet more litigation....

• **Teladoc v. Texas Medical Board**
  - Non-licensee challenged rule restricting telemedicine practice and requiring “face to face or in-person evaluation.” Injunction granted and Board motion to dismiss denied. On appeal before 5th Circuit.

• **Wallen v. St. Louis Metropolitan Taxicab Comm’n**
  - Uber drivers and customers challenged Commission, members, and cab companies. Injunction sought and motions to dismiss filed; referred to mediation to be done by January 2017.

• **WSPTN Corp v. Tennessee Department of Health, Council for Hearing Instrument Specialists**
  - Employers and licensee-employees claims monopoly and restraint of trade in hearing aid market by Board and members. Injunction sought, motion to dismiss pending.
  - Action stayed pending discussions to resolve, including revisions to licensure examinations.
Proposed Legislation

• Arizona – House Bill 2613
  ▪ Pending legislation to deregulate certain professions (athletic trainers, geologists, landscape architects); committee hearing February 2016

• Connecticut – Senate Bill 15
  ▪ Adds another level of review for boards; decisions are proposed and shall be submitted to commissioner of Consumer Protection for approval, modification, rejection, or further review.

• Georgia – House Bill 952
  ▪ Provides executive oversight of licensing boards to ensure antitrust immunity. Governor has authority to approve/veto any proposed rule; can review/approve any rule challenged by appeal to the Governor; approve, remand, modify, reverse any board action challenged via appeal to the Governor.
Proposed Legislation

- **Iowa – House File 2426, Senate File 2167**
  - Provides for review of board rules on a five-year rotation by legislative services agency; attorney general will engage in active supervision of units regulating professions and will evaluate/rank units activities specified; defines “active supervision” as approval, modification, or rejection of disciplinary action, adoption/amendment to rules or policies; conducting investigations and cooperating with legislative services agency

- **Virginia – House Bill 1388**
  - Gives agency director authority to determine whether board decisions may have potential adverse impact on competition and if so, whether such action consistent with clearly articulated state policy

- **Maryland – Senate Bill 1083**
  - Requires secretary of each department that has boards comprised of market participants to establish regulations for the supervision of such boards
Proposed Legislation

- **Massachusetts – House Bill 4188**
  - Proposed bill grants director of professional licensing boards authority to reject/rescind board decisions to extend antitrust immunity

- **Minnesota – Senate Bill 3311**
  - Establishes the Office of Supervision of Occupational Boards’ Disciplinary Actions to evaluate enforcement actions; review, approve or reject proposed enforcement of licensed or unlicensed practice

- **Nebraska - Legislative Resolution 546**
  - Interim study re: whether boards exposed to antitrust liability

- **New Jersey - Assembly Bill 1057**
  - Allows physicians right to jointly negotiate with insurance carriers and that joint negotiations qualify for state action exemption

- **New York – Assembly Bill 1961**
  - Similar to New Jersey
Proposed Legislation

• **Wyoming – Senate Bill 55**
  - Board shall not take action if not explicitly authorized by statute and if not explicitly authorized, Board shall seek guidance from Office of Attorney General. Bill also provides for joint interim legislative committee to provide further recommendations.

• **California – Senate Bill 1195**
  - Authorizes the director, upon own initiative or upon request of consumer or licensee, to review a decision or other action (except as specified) to determine whether it restrain trade and to approve, disapprove, or modify decision as specified.

• **North Carolina – Draft Legislation**
Executive Orders

• Alabama – Executive Order #7
  ▪ Established Alabama office for Regulatory Oversight of Boards and Commissions; voluntary program for boards to comply with existing law that requires active state supervision as a condition of state action immunity.
    ▪ http://governor.alabama.gov/newsroom/2015/06/executive-order-number-7-2/

• Oklahoma – Executive Order 2015-33
  ▪ All disciplinary actions (not rulemaking) must first be reviewed by AG’s office before formal hearing will occur
Executive Orders

• Massachusetts – Executive Order 567
  - Instructs the director of professional licensure and commissioner of public health to review and approve any act, rule, regulation or policy proposed by a board that may have an anti-competitive effect.
  - Lists boards that are covered and types of actions (scope of practice, advertising restrictions, price regulations, etc.)
Executive Orders

• Delaware – Executive Order 60

• Creates a Committee to conduct a comprehensive analysis of the composition, State oversight and licensing requirements of all commissions, boards and agencies regulated by the Division of Professional Regulation.

• Committee will issue a report by October 14, 2016, to include:
  ▪ Recommendations for legislative or regulatory action that will remove any unnecessary or overly burdensome requirements;
  ▪ An examination of the relative burdens of licensing and certification requirements of regulated professions compared to neighboring states;
  ▪ Recommendations whether current system could or should be replaced by an alternative methodology; and
  ▪ Recommendations regarding the process by which regulation is added to a new profession or the requirements for existing regulated professions are increased.

• http://governor.delaware.gov/orders/EO060.pdf
Attorney General Opinions

• California - Opinion No. 15-402
  ▪ Focuses on question of what is active state supervision and what can boards do to meet the requirement
  ▪ Has good language regarding indemnification of board members
  ▪ [https://oag.ca.gov/system/files/opinions/pdfs/15-402_0.pdf](https://oag.ca.gov/system/files/opinions/pdfs/15-402_0.pdf)
Attorney General Opinions

- Idaho – Opinion 16-1
  - Increase public membership on boards. *This alternative must be strike an appropriate balance between need for subject matter expertise and board controlling market access.*
  - Assign an independent state official the authority to approve, reject or modify market participant-controlled board decisions.
  - Evaluate necessity of boards and commissions.
Other

- **Nebraska - Advisory Letter to Board of Accountancy**
  - Action of boards re: an individual license “when undertaken in accordance with statutes and/or promulgated rules, is unlikely to present an antitrust question….”

- **Ohio *Columbia Dispatch News* article.**
  - Senator Seitz plans to draft legislation to redesign occupational licensure and regulation framework. Three options:
    - Reconfigure boards so not controlled by professionals (this option is disfavored)
    - Create “mega-boards” to consolidate regulation of related fields
    - Empower a single state actor, such as an AG or Lt. Gov., to review and issue board decisions
What’s Next?

- Don’t Panic; Be Informed
- Most day to day operations and decisions do not implicate antitrust concerns
  - FTC Staff Guidance and Supreme Court opinion reinforce that
  - Watch scope of practice and unlicensed practice issues regarding groups/categories of individuals; advertising restrictions; restrictions on bidding or price regulations