

# Legal Heads Up

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Noel L. Allen, NASBA Legal Counsel

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# Noteworthy Cases Re Board Discipline

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*Gustafson v. Board  
of Accountancy  
(Oregon 2015)*

Board's reference to past disciplinary cases to impose a longer suspension than that recommended by Administrative Law Judge was not unfair or abuse of discretion.

*Simic v.  
Accountancy Board  
of Ohio (Ohio 2014)*

Board did not have the authority to personally discipline a CPA for his firm's failure to abide by a cease and desist order without required notice.

*Dow v. Steward  
(Texas 2015)*

CPA could not sue for unpaid fees after Board disciplined the CPA for breach of duty of professional care when representing the client.

# ***NC State Board of Dental Examiners v. FTC:***

## **Key Outcomes**

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**How do state boards qualify for state action immunity?**

- Act pursuant to a clearly articulated state law and
- Demonstrate active state supervision.

**What constitutes active supervision?**

- State supervisor must review the substance of the anticompetitive decision, not merely the procedures;
- State supervisor must have the power to veto or modify decisions to ensure they accord with state policy;
- Mere potential for state supervision is not an adequate substitute; and
- State supervisor may not itself be an active market participant.

**What does the FTC Order permit the Dental Board to still do?**

- Investigate unauthorized practice;
- Seek an injunction in court against an unlicensed party; and/or
- Pursue administrative remedies against a licensee.

# Recent Board Antitrust Immunity Cases

	Defendants	Plaintiffs	Conduct at issue	Status of case
<i>NC Dental Board v. FTC</i>	Board	The FTC	Enforcement against non-licensees	U.S. Supreme Court concluded the Board was not immune
<i>Axcess Medical v. MS Medical Board</i>	Board and 10 John Does	Clinic's licensee and non-licensee owners	Rules limiting non-licensees from owning clinics	Complaint filed
<i>Teladoc v. TX Medical Board</i>	Board and its members	Licensees and non-licensees	Rule restricting telemedicine practice	Complaint filed; court issued preliminary injunction against rule
<i>Petri v. VA Medical Board</i>	Board and its members	Licensee	Discipline of a licensee for unauthorized practice	Board won before state court; on appeal to federal court
<i>LegalZoom v. NC State Bar</i>	Bar, its leadership, and attorneys	Non-licensee	Rules restricting legal plans	Complaint filed

# More Immunity Developments

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## State responses

States considering board composition, statutory authority, and super agencies

Alabama Office for Regulatory Oversight of Boards and Commissions

## FTC plans

Comment letters  
Policy paper

## The Future

Just a bump in the road?  
Or a new direction for public protection?

# NASBA Amicus Activity

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*CommScope v.  
Butler & Burke*

*AICPA v. IRS*

Issue

Can a CPA owe a fiduciary duty to a client in the context of an audit engagement?

Could the IRS's new tax preparer credential create confusion and lead to public protection issues?

NASBA's  
Position

No. Laws, rules, and codes of conduct require auditor independence.

Yes. The District Court was incorrect in concluding that the credential is not inherently confusing.