

NASBA

108th Annual Meeting

Dana Point, California October 25-28, 2015

Major Current Legal Topics

Noel L. Allen, Esq.

Major Current Legal Topics

Noel L. Allen, NASBA Legal Counsel

Annual Meeting

October 2015

Major Current Legal Topics

Marijuana Legalization & Accountancy Regulation

- The legal landscape
- State agency policies on legalization
- Regulatory challenges

Use of Title & Deceptive Credentials

- The UAA
- Relevant court decisions
- Recent credential litigation

N.C. Dental Board v. FTC

- State executive and legislative responses
- Case updates
- The future

Marijuana Legalization & Accountancy Regulation

Marijuana laws

- Medical and/or recreational marijuana sale/use has been decriminalized or legalized in over 20 states.
- At least 10 states require marijuana businesses to undergo annual audits.
- Federal law has not decriminalized or legalized marijuana.

State agency responses

- Board of accountancy policies on CPAs providing services to marijuana businesses pursuant to state laws.
- Other state agencies' responses to licensees using marijuana or providing services to marijuana businesses pursuant to state laws.

Regulatory challenges

- What is the effect on good moral character?
- Considerations in states where marijuana sale and use continues to be illegal.
- What if the federal enforcement policy changes?

Use of Title & Deceptive Credentials

Court decisions

- Ibanez v. Florida Dept. of Bus. And Prof. Regulation, et al.
- Stuart v. American Express Tax & Business Services, Inc.
- Volin v. Mass. Bd. of Public Accountancy
- Moore v. Cal. State Bd. of Accountants
- Carberry v. Cal. State Bd. of Accountants
- Tx. State Bd. of Accountancy v. American Express
- More recent decisions

The UAA

UAA §2: Prohibits the “use of titles that have a capacity or tendency to deceive the public as to the status or competence of the persons ..”

UAA §14(h)(2) : Non-CPA cannot use “any title or designation that includes the words ‘accountant,’ ‘auditor,’ or ‘accounting,’ in connection with any other language ...that implies that such person or firm has special competence as an accountant or auditor.”

See also: UAA § § 14(c), 14(g), 14(h)(2)

Recent litigation

- AICPA v. IRS
- CPA Australia v. CAANZ
- N.C. Dental Board v. FTC:
“Nothing in this Order prohibits the Board from” investigating, suing, or bringing administrative proceedings against nonlicensees for violations.
- **Other interesting pending litigation**

NC State Board of Dental Examiners v. FTC: Key Outcomes

How do licensee-controlled 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.
- 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
- Pursue administrative remedies against a *licensee*.

Active Supervision - What is Not Required by the Court?

Justice Kennedy, writing for the 6-3 majority, 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.’”

States Begin to Respond at All Levels

State boards taking a close look at practices & procedures

- Enforcement and rulemaking;
- Informal enforcement efforts; and
- Communications with non-licensees.

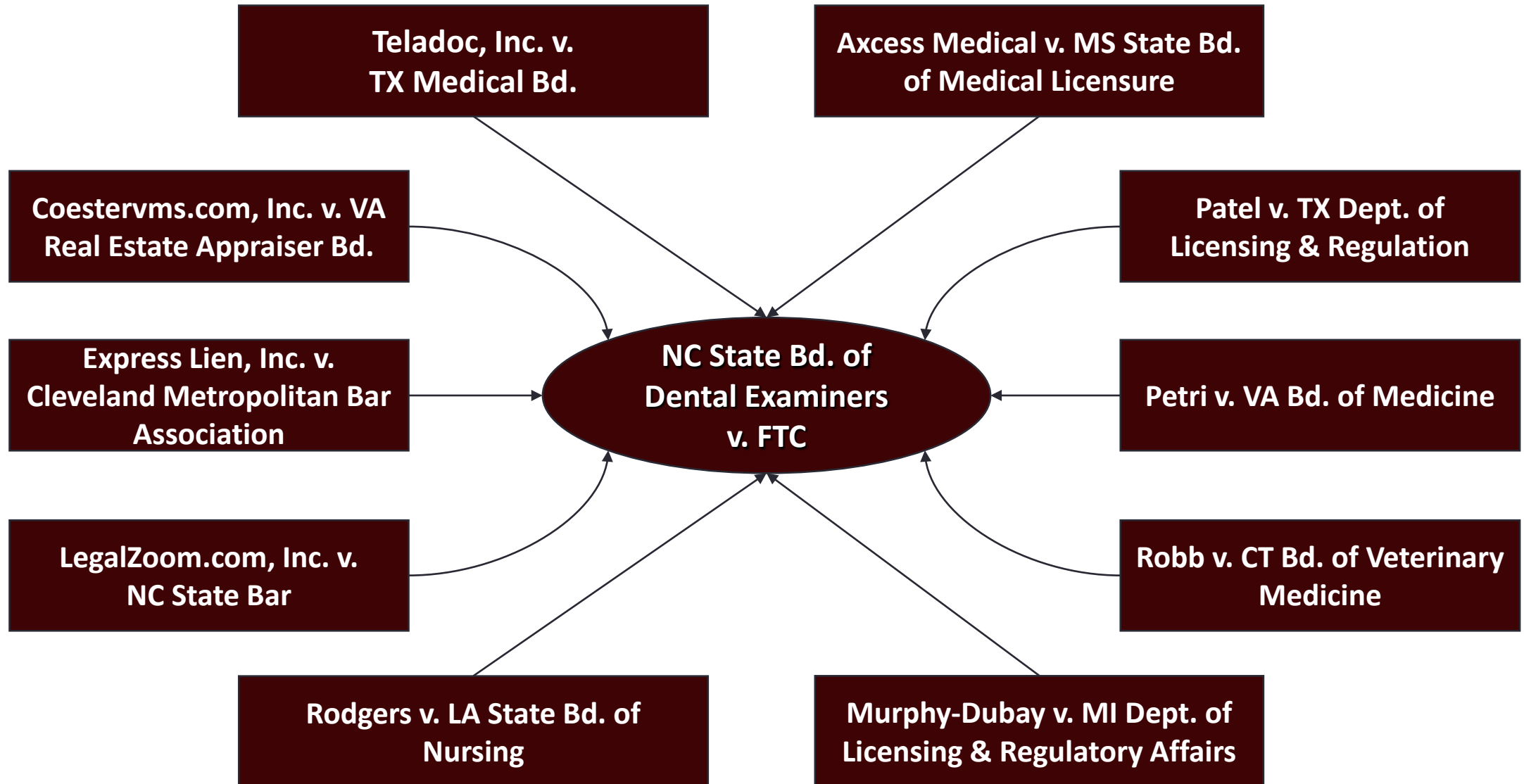
Governors & Attorneys General weigh in

- Several states' AGs have issued their interpretation or an official AG opinion of how their state should respond.
- Some states have proposed the creation of a new body to oversee certain proposed board actions.

State legislatures are beginning to take notice

- When 2016 sessions begin, some states will see bills directly relating to the NC Dental Board case.
- Each state will have to chart its own path with an eye towards how the case is being interpreted by the federal courts

Post-Dental Board Cases Against State Boards



Post-Dental Board Cases Against State Agencies

Who is being sued?

- Medical, Nursing, Vet, & Real Estate Appraisers Boards, Umbrellas;
- Board members in their individual and official capacities; and
- In at least one case, the national association was alleged to have colluded with its member board.

What is the conduct at issue?

- Enforcement, rulemaking, and licensure denial.
- The most notable cases involve enforcement and rulemaking where the restraint of trade involves non-licensees.

What do the plaintiffs seek?

- Declaratory judgments,
- Injunctive relief, and
- In some cases, monetary relief including treble damages