

WHO WATCHES THE WATCHMEN?

An Examination of Oversight of
Licensing Boards in West Virginia:
Part One

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INTRODUCTION

Nearly 22% of workers in the Mountain State are licensed, the eighth highest in the nation. [1] Occupational licensing makes it a crime to perform a job for pay without first meeting certain requirements and applying to the government created licensing board. The traditional motivation for licensing a profession is maintaining some minimum quality standard. Unlike tangible purchases, such as a car or home, it is impossible for consumers to inspect the quality of a service they will receive personally until after the service has been performed. For example, you can't know how good of a haircut you will get until after your hair has been cut. In contrast, the provider of the service has some knowledge of how good they are at their job and what level of quality they can provide. In theory, licensing can help address this economic problem of "asymmetric information." [2]

Regulators should have some level of expertise to ensure that regulations are properly designed to achieve their goals. When determining who should sit on the licensing board as experts, the most obvious answer is people who are already practicing in the field. Who knows the job better than someone who is already doing it? A licensing board of individuals who are knowledgeable on the conduct and standards of a profession would appear to be qualified to supervise the creation and administration of exams, review licensing applications, and issue licenses to new individuals. But does this additional layer of protection come with a cost? Licensing boards such as those currently under scrutiny in West Virginia can pose a problem to consumers. [3]

Existing practitioners have their own interests in mind as well—not just the interests of the citizens of West Virginia. When licensing board members are involved in deciding how difficult it is for new practitioners to enter, existing practitioners have very clear economic incentives to prevent new competition. [4]

[1] Morris Kleiner and Evgeny Vortonikov. "At What Cost: State and National Estimates of the Economic Costs of Licensing." Institute for Justice, (2018): <https://ij.org/report/at-what-cost>.

[2] Hayne E. Leland, "Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards," *Journal of Political Economy* 87, no. 6 (1979): 1328–1346.

[3] Associated Press. (2021). "Audit: More Oversight Needed on State Licensing Boards." *US News*. <https://www.usnews.com/news/best-states/west-virginia/articles/2021-11-25/audit-more-oversight-needed-on-state-licensing-boards>.

[4] Milton Friedman, "Occupational Licensure," in *Capitalism and Freedom* (University of Chicago Press, 1962), 137–160.

Who is regulating the licensing boards in West Virginia? Are there other impacts from not providing a layer of oversight to licensing boards in the state? We first turn to a key Supreme Court case and its implications. Then we discuss some avenues for reform to help minimize the consequences of mountebanks in the Mountain State.

BACKGROUND

North Carolina State Board of Dental Examiners v. Federal Trade Commission (FTC)

A very clear-cut and well documented case of a licensing board acting in its own self-interest rather than the interest of consumers occurred in North Carolina 15 years ago. Beginning in 2006, the North Carolina State Board of Dental Examiners began issuing cease and desist letters to non-dental licensed teeth whiteners and product manufacturers. [5] Nowhere in the legislation governing the Board was it specified that teeth whitening was a service that required a dental license. Many dentists in North Carolina, including 8 of the 10 board members, performed whitening as part of their businesses. The Board reached consensus that teeth whitening was part of the practice of dentistry and used that decision to force non-dentists out of practice.

In 2010 the FTC filed a complaint against the board that stated excluding non-dentists from performing teeth whitening was an anticompetitive act and was in violation of the Federal Trade Commission Act and antitrust law. [6] The FTC's decision was supported by an administrative law judge. The Board appealed to the Court of Appeals for the Fourth Circuit who again upheld the FTC's decision, and in 2014, the case was argued before the U.S. Supreme Court.

In the case of North Carolina State Board of Dental Examiners v. Federal Trade Commission, the Supreme Court ultimately decided that the North Carolina State Board of Dental Examiners was acting anticompetitively. The Board claimed immunity to antitrust law under Parker v. Brown, a previous decision that allowed for states to act anticompetitively in using their power to regulate. [7] The Court cited a two-part test under which the board would qualify for Parker immunity. First, the board would have to have clear articulation as to its purpose, in this case the regulation of dentistry in North Carolina. Second, North Carolina would have to have active supervision of the Board's actions. In addition, the State would need to assume political accountability for the Board's actions.

[5] North Carolina State Board of Dental Examiners v. Federal Trade Commission, 135 S.Ct. 1101 (2015)

[6] "North Carolina Board of Dental Examiners, The, In the Matter of. Federal Trade Commission." <https://www.ftc.gov/enforcement/cases-proceedings/081-0137/north-carolina-board-dental-examiners-matter>

[7] Parker v. Brown, 317 U.S. 341 (1943).

Because the Board was not actively supervised by the State, the Supreme Court held that the Board was in violation of the FTC Act. One point the Court made explicit is that when active market participants are involved in the regulation process, State supervision is necessary. Otherwise, the market participants face poor incentives.

Six years after this landmark Supreme Court case, West Virginia, like several other states, still does not provide active oversight of its licensing boards. West Virginia's licensing boards are collecting licensing fees and requesting money from the state budget but spending little. [8] This behavior has led to large excesses of money held by West Virginia licensing boards that (1) could be used elsewhere in the State budget or (2) could be returned to the licensees. Previous research performed by the Cardinal Institute documents how West Virginia's licensing fees for many occupations are higher than its northern neighbors—with initial licensing fees and renewal fees more than \$100 more than Pennsylvania and Ohio. [9] Licensing boards in West Virginia do not appear to be acting in the best interests of West Virginians—aspiring workers are being severely overcharged and are potentially excluded from practicing. A lack of oversight is hurting both consumers and aspiring workers alike.

[8] Associated Press. (2021). "Audit: More Oversight Needed on State Licensing Boards." US News. <https://www.usnews.com/news/best-states/west-virginia/articles/2021-11-25/audit-more-oversight-needed-on-state-licensing-boards>.

[9] Ballengee, Garrett and Edward Timmons. (2019). "Barriers to Work in the Mountain State: A Closer Look at Occupational Licensing in West Virginia." Cardinal Institute, <https://www.cardinalinstitute.com/publication/barriers-to-work-in-the-mountain-state/>.

Moving Forward: Avenues for Reform

There are two key reasons why licensing boards require active supervision. First, licensing boards have an economic incentive to promulgate anticompetitive and self-serving regulations. Second, as described in the preceding paragraph, unsupervised licensing boards are not in compliance with a Supreme Court ruling that is now more than five years old. Occupational licensing prevents new entrants from entering a profession, reducing the supply of professionals and limiting competition, which harms consumers. Redesigning occupational licensing boards can minimize this effect. West Virginia should consider reforms designed to restrict the ability of licensing boards to engage in anticompetitive practices. The Supreme Court's decision did not provide clear guidance on what constitutes active supervision, giving states multiple avenues for reform. Several states have alternative arrangements that can serve as a model for West Virginia. We provide a menu of regulatory reforms ordered from most- to least-effective.

1. Ombudsman

The surest way for states to ensure meaningful oversight of licensing boards is the creation of a licensing ombudsman with the authority to supervise boards. [10] The ombudsman would be empowered to review the structure and all actions taken by the licensing boards in the state. To meet the requirements of active supervision by the state, the ombudsman should have the authority to veto or modify board decisions. The state should give the ombudsman the explicit goal of promoting competition. Rather than rubber stamp actions, all actions taken by the board should be affirmatively approved by the ombudsman.

West Virginia should also charge the ombudsman with conducting an annual review of all existing occupational licensing laws. A review of 20 percent of the licensing laws would allow them to conduct a full review every 5 years. Removing unnecessary licensing laws will help encourage competition and entrepreneurship. Where state regulation is necessary but occupational licensing is too onerous, the ombudsman can recommend an alternative form of regulation.

[10] Johnson, Robert. (2015). "Boards Behaving Badly: How States Can Prevent Licensing Boards From Restraining Competition, Harming Consumers, and Generating Legal Liability Under *North Carolina State Board of Dental Examiners v. FTC*." Institute for Justice, <https://ij.org/report/boards-behaving-badly/>.

The ombudsman's review power would function similar to Mississippi's Occupational Licensing Review Commission (OLRC). [11] Mississippi created the OLRC in 2017 in response to the Supreme Court's decision in NC Dental. The Commission is comprised of the Governor, the Secretary of State, and the Attorney General. All changes proposed by licensing boards must be affirmatively approved by the OLRC before they can be instituted. Additionally, the legislation explicitly tasks the OLRC to use the least restrictive means of protecting consumers. The legislature has since expanded the authority of the OLRC to include conducting a review of all existing regulations by licensing boards.

2. Licensing Boards Function as Advisory Bodies

Because of the likelihood of self-serving regulations being designed by licensing boards comprised primarily of active market participants, the state legislature can retain the power to set standards for occupational licensing and have the boards serve in an advisory capacity. This reform was recommended by the FTC after the NC Dental decision. The boards would continue to be comprised by professionals to retain expertise, but it would transfer the ultimate rulemaking authority from the licensing boards to the legislature. This would remove the board's ability to self-deal while still harnessing their expertise. Those setting the rules in the legislature do not have a direct financial stake in these rules, which would reduce anticompetitive regulations. If the licensing board would recommend actions that were anticompetitive, the legislature could redesign it or ignore their recommendation entirely. However, there is concern that the legislature would rubber stamp the boards' recommendations, diminishing the effect of the oversight. This style of reform is not likely to be as effective as the independent ombudsman.

[11] Occupational Licensing Review Commission," Secretary of the State of Mississippi. Last modified 2021. <https://sos.ms.gov/regulation-enforcement/occupational-licensing-review-commission>.

3. Independent Board Members

Pennsylvania offers another potential reform. Long before NC Dental, in the 1960s, Pennsylvania provided additional oversight of licensing boards. The Bureau of Professional and Occupational Affairs (BPOA) within the Department of State provides administrative, logistical, and legal services for the state's licensing boards. The bureau also has a designee (the Commissioner of the BPOA) serving on those boards who takes part in deliberations, designing the regulations, and voting on board actions. [12] This power gives the state some oversight of the boards and can prevent some anticompetitive practices. West Virginia could use other Departments, for instance the Department of Commerce or Department of Economic Development. Although it is similar to the licensing ombudsman, the independent member of the licensing board does not have the full authority to veto or alter the design of anticompetitive actions taken by the board, making it a weaker reform. FTC guidance developed after NC Dental recommends against relying on independent board members alone to comply with the ruling. [13]

4. Additional Public Members

The greater inclusion of non-industry members can weaken the ability of professionals to enact anticompetitive licensing regulations. Recently, Arizona required all licensing boards to change the ratio of professionals to public members so that public members comprised the majority of the board. The state specifically decreased the membership of professional school owners and teachers, who frequently sit on the board and have a strong financial incentive to increase education and training requirements over time. Increasing the power of public members allows licensing boards to retain relevant expertise but reduces their ability to implement regulations that benefit professionals at the expense of the public. It also increases accountability to the public. However, this change would need to be accompanied by a requirement to fill public seats in a reasonable period of time. Most vacant seats on licensing boards across the country are the public members, [14] so expanding the number of public members without ensuring they are filled would change little. Additionally, while increasing the public representation on the board can prevent some anticompetitive actions by licensing boards, the FTC guidance also recommends against it as a means to comply with NC Dental.

[12] "History of the Bureau," Pennsylvania Department of State. Last modified 2021. <https://www.dos.pa.gov/ProfessionalLicensing/Pages/History-of-the-Bureau.aspx>.

[13] The Federal Trade Commission. (2015). "FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants." Staff Guidance. https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf.

[14] Allensworth, Rebecca, (2017). "Foxes at the Henhouse: Occupational Licensing Boards Up Close." *California Law Review*, Vol. 105(6): 1567-1610.

5. Retired Professionals

While active market participants have a strong incentive to shape licensing regulations to their advantage, retired professionals offer a source of expertise without the ability to directly gain from the regulations they design. Retired professionals have the expertise to understand their profession and can serve alongside public and professional members. This reform is likely to be ineffective on its own, as retired professionals would have reasons to support regulations that protect the active professionals rather than the public. It also would not provide any sort of supervision to ensure that licensing boards are not designing self-serving regulations.

6. Sunrise/Sunset Provisions

Similar to the licensing ombudsman that would review all licensing laws to prevent unnecessary laws from reducing competition, sunrise and sunset reviews would also remove unnecessary licensing laws. Sunrise reviews would require that any new licensing law is necessary, and no weaker form of regulation could achieve the same results at a lower cost. Sunset reviews would require that the legislature review each licensing law after a period of time, assess whether it protects the consumers, and consider less costly alternatives. Both of these can be used to ensure that licensing board membership is properly designed, giving the legislature the opportunity to change the mix of public and professional members. While it would not meet the FTC's guidance, sunrise and sunset reviews could be used to reform licensing boards.

CONCLUSION

West Virginia should not continue to allow active market participants to regulate licensed professions with no oversight. When members of the profession being regulated design the regulations, they tend to be anticompetitive—harming consumers and limiting competition. The practice also violates the Supreme Court’s decision in *NC Dental*. West Virginia has a range of alternatives to provide oversight of licensing boards, encouraging competition and innovation. An independent ombudsman, similar to reform already enacted in Mississippi, would place an important check on the behavior of West Virginia licensing boards—protecting consumers without burdening them with anticompetitive regulations that stifle innovation and restrict economic mobility.

