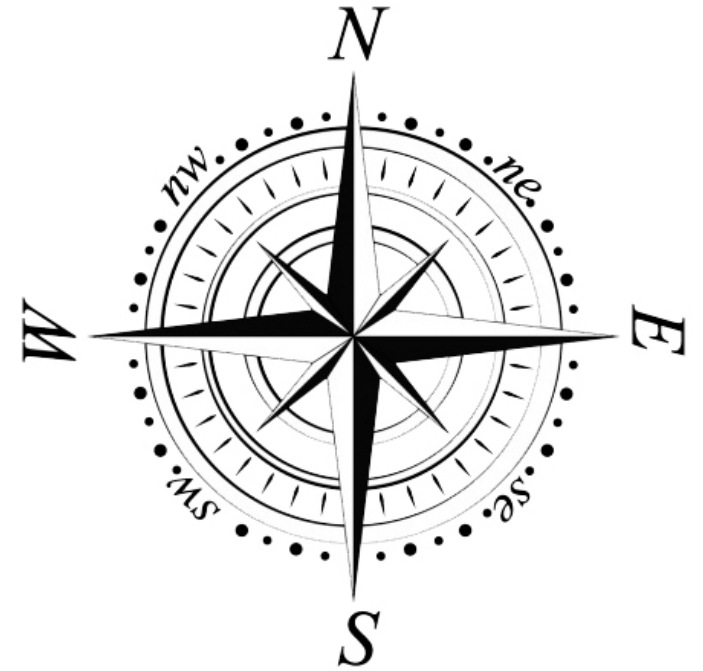


Antitrust and Regulatory Boards: Where Do We Go From Here?

NCSBN Discipline Case Management Conference
June 13, 2017

Nathan E. Standley, Esq.
Allen & Pinnix, P.A.



Where We Stand & Where We Are Heading

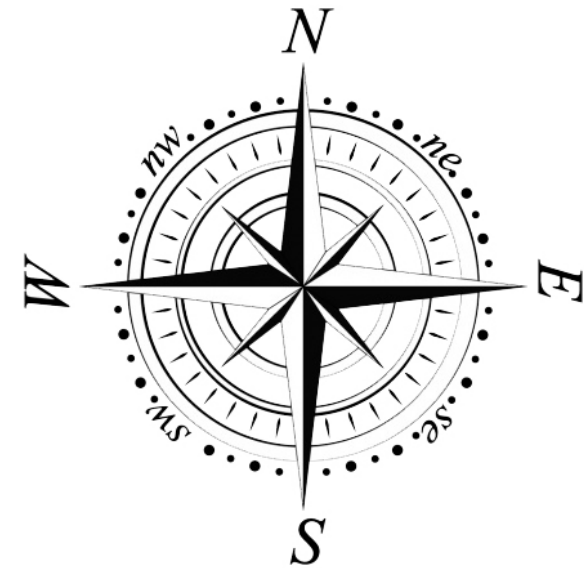
I. Where Are We?

- NC Dental Legislation
- NC Dental Fallout Litigation

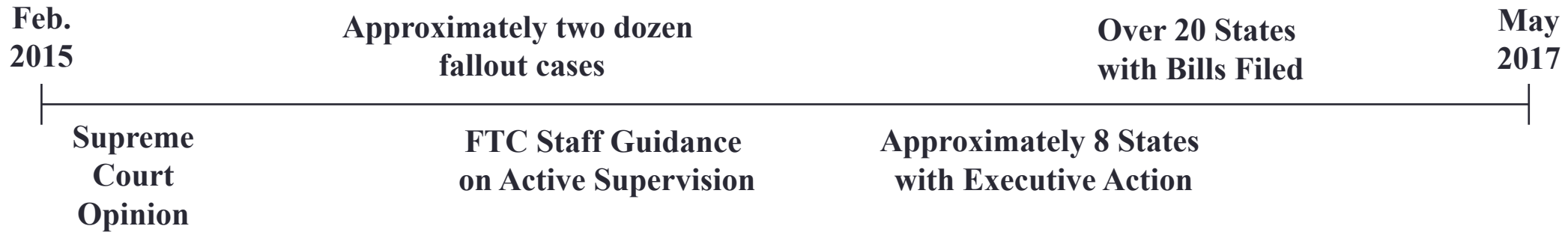
II. Where Do We Go From Here?

- Overview of Federal Efforts
- Efforts at the State and Board Level

III. Questions & Comments



Where Are We?



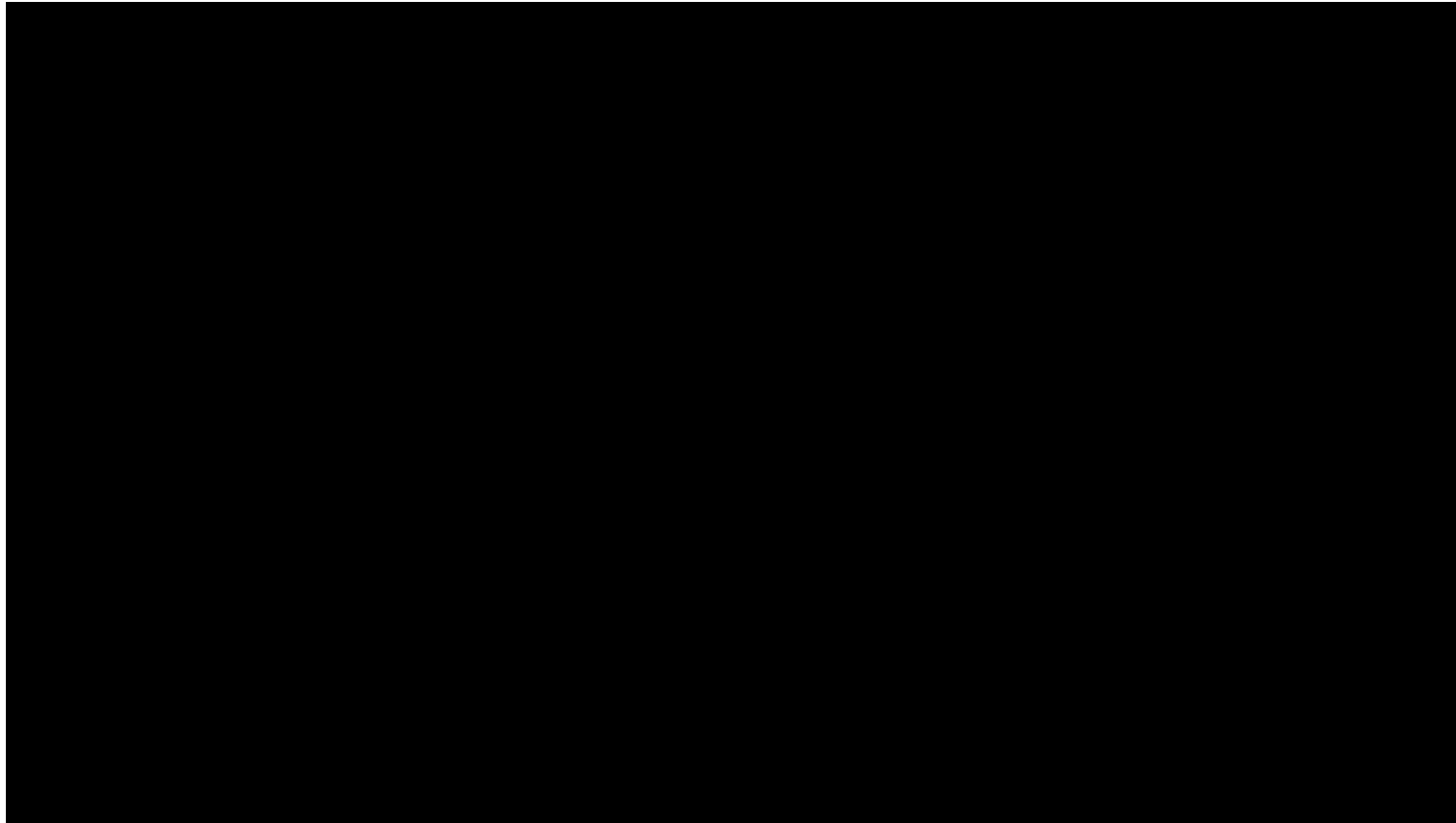
The Sky Is Still Not Falling But Our World Has Changed

As a Result, We Must Remain Informed & Engaged

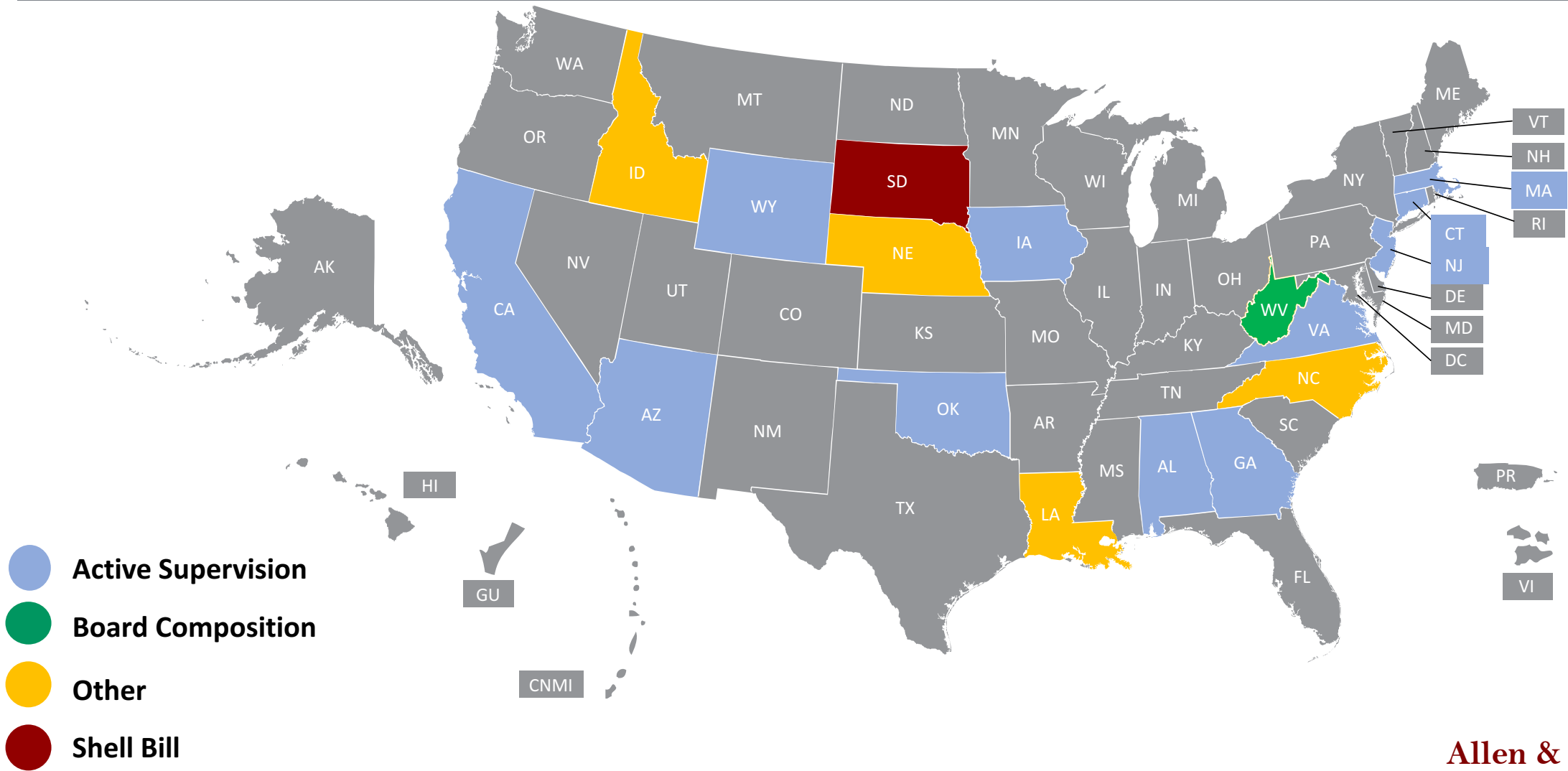
Where Are We?

As was discussed last year, there has been and will continue to be overreaction

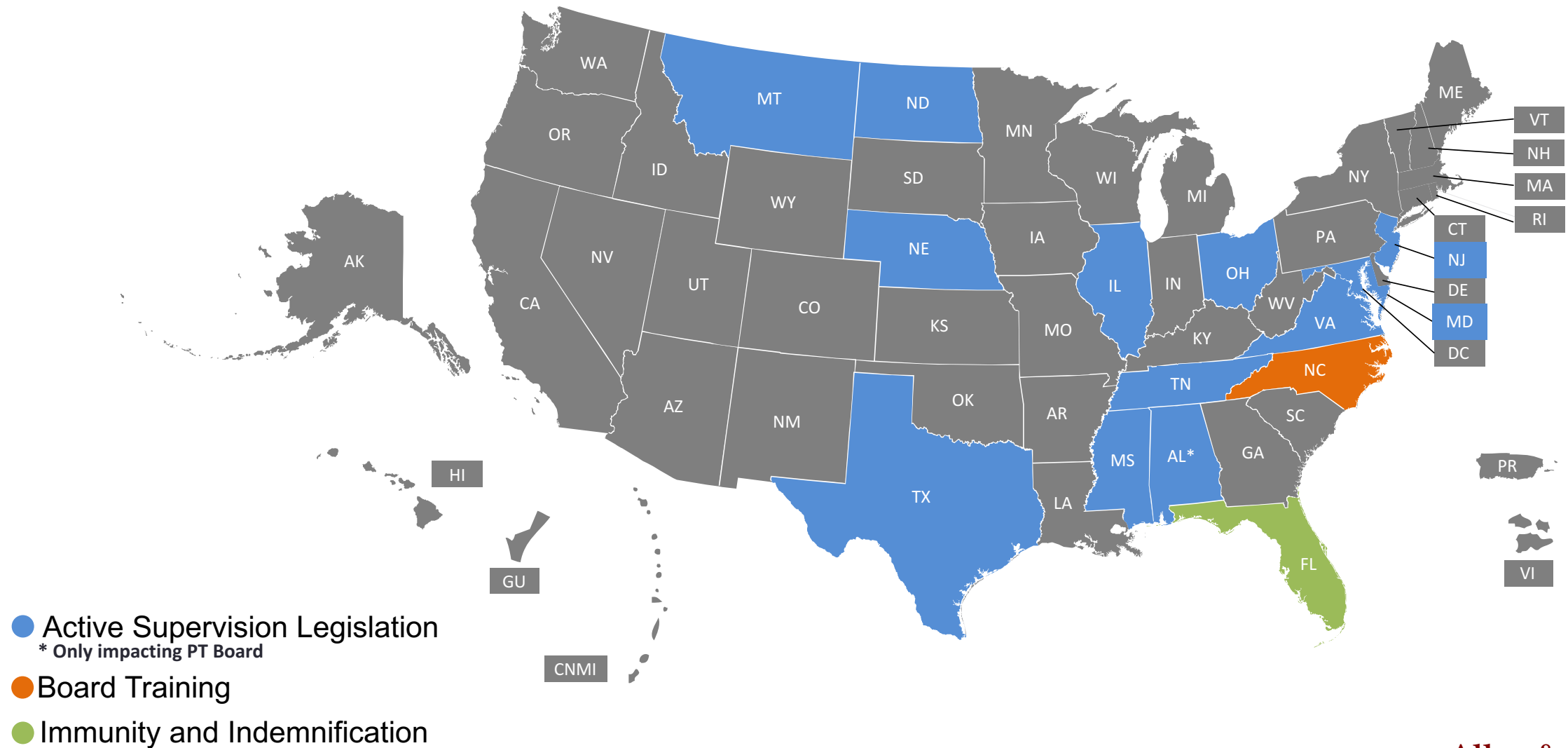
NBC2 (Fort Myers) – “Investigators: Florida business regulators fear lawsuit”



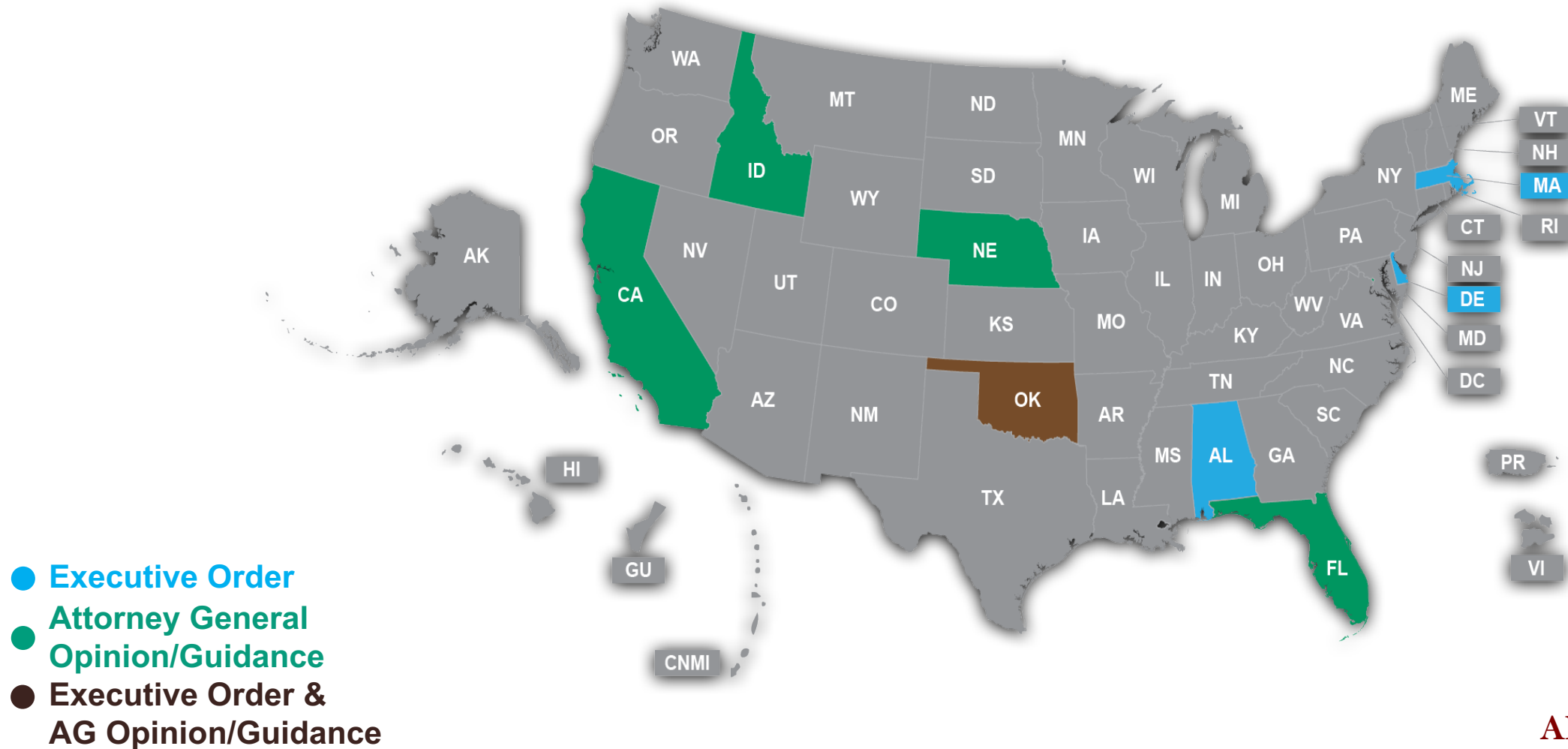
2016 NC Dental Fallout Legislation



2017 NC Dental Fallout Legislation




NC Dental Executive Orders & Attorney General Opinions/Guidance



Active Supervision – Nebraska LB 299

Supervisor  Office of Supervision of Occupational Boards

Scope of What Needs Review  Any proposed rule, regulation, policy, enforcement, action, or other regulatory action prior to its adoption, promulgation, or implementation

Active Supervision – Ohio HB 49

- Supervisor → Director of Administrative Services
- Scope → Action taken or proposed by a board or commission
- Specifically → Action that directly or indirectly has an effect of any of the following:
- Price-fixing, limiting price competition, or increasing prices for goods or services
 - Customer or geographic market allocation/division
 - Excluding present or potential competitors
 - Limiting output or supply of any goods or services
 - Any other activity that could be subject to state or federal antitrust law if the action were undertaken by a private person or combination of private persons

Active Supervision – Ohio HB 49

Except as provided in division (H) of this section, **the following actions are not subject to review** under this section:

(a) Denying an application to obtain a license because the applicant has violated the Ohio Revised Code or the Ohio Administrative Code;

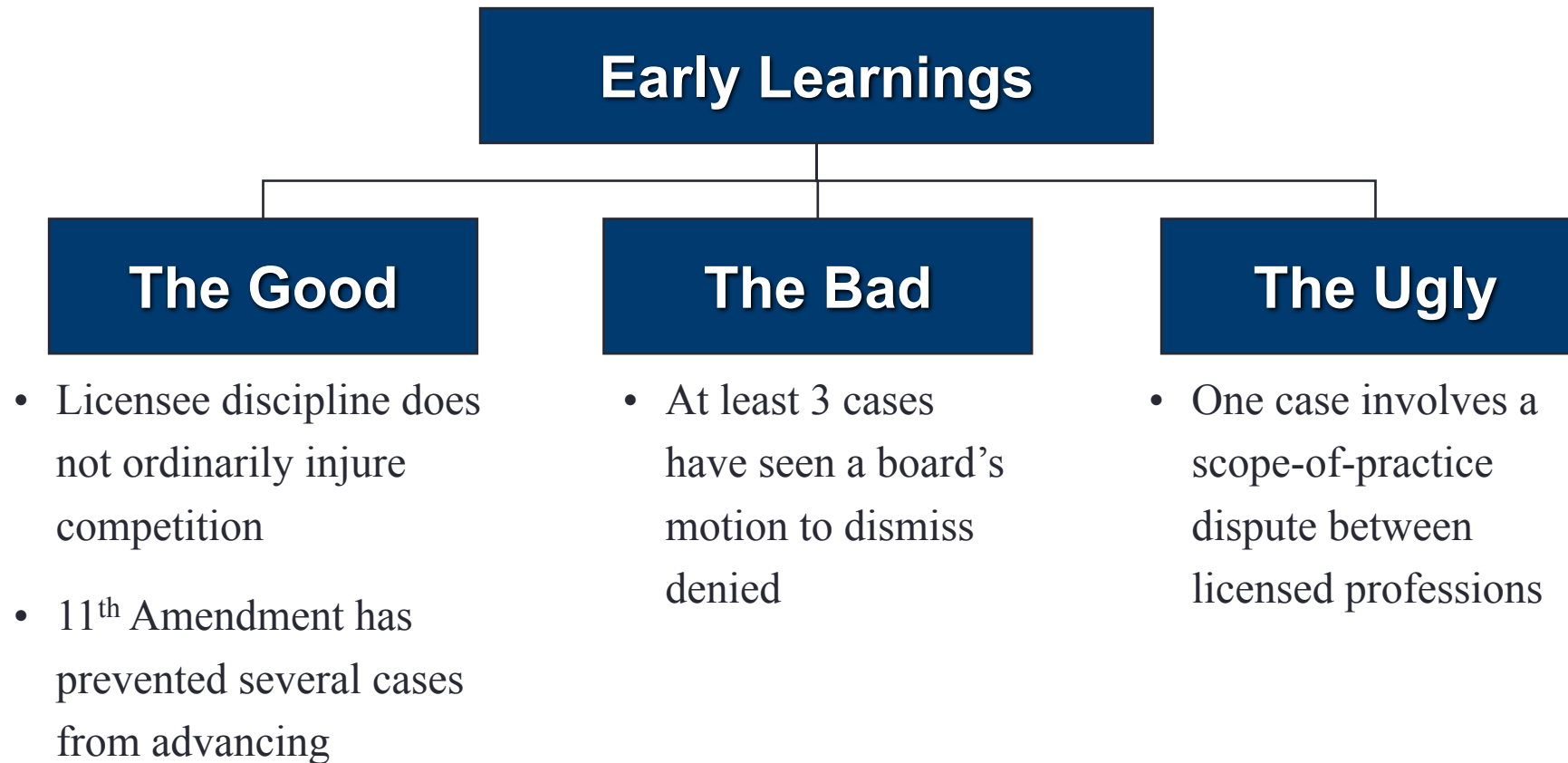
(b) Taking disciplinary action against an individual or corporation that is licensed by a board or commission for violations of the Ohio Revised Code or the Ohio Administrative Code.



NC Dental Regulatory Board Fallout Litigation

- Allibone v. TX Medical Bd.
- Axxess Medical v. MS State Bd. of Medical Licensure
- Ballinger v. OH State Board of Registration for Professional Engineers and Surveyors
- Barry v. State Bar of California
- Bauer v. Pa. State Bd. of Auctioneer Examiners
- Coestervms.com, Inc. v. VA Real Estate Appraiser Bd.
- Colindres v. Battle
- Colonial Downs, L.P. v. VA Racing Commission
- Cooper v. Vaught
- Express Lien, Inc. v. Cleveland Metropolitan Bar Association
- Henry v. NC Acupuncture Licensing Board
- Jemsek v. NC Medical Board
- Kinney v. State Bar of California
- LegalZoom.com, Inc. v. NC State Bar
- Petrie v. VA Bd. of Medicine
- Rivera-Nazario v. Corporacion del Fondo del Seguro del Estado
- Robb v. CT Bd. of Veterinary Medicine
- Rodgers v. LA State Bd. of Nursing
- Rosenberg v. State of Florida
- Strategic Pharmaceuticals Solutions, Inc. v. NV State Board of Pharmacy
- Teladoc, Inc. v. TX Medical Bd.
- Texas v. Melton
- Veritext Corp. v. Bonin
- Wallen v. St. Louis Metropolitan Taxicab Commission
- WSPTN Corp. v. TN Dept. of Health, Council for Hearing Instrument Specialists

NC Dental Fallout Litigation



Petrie v. Virginia Board of Medicine

Underlying Conduct

- Licensee chiropractor disciplined by board for unauthorized practice of medicine



Antitrust Suit

- Sues board and board members in federal district court
- Seeks declaratory and injunctive relief along with treble damages and attorneys' fees



Ruling

- Summary judgment granted in board's favor
- Discipline of single licensee ≠ injury to competition
- 4th Cir. Affirmed
- Supreme Court denied cert. Nov. 2016

Eleventh Amendment Intersects Antitrust

- Eleventh Amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

- Eleventh Amendment is a manifestation of sovereign immunity, which can be waived by the state, or Congress may waive it in certain circumstances.

Rodgers v. Louisiana State Board of Nursing

Underlying Conduct

- Board terminated accreditation of nursing program at university plaintiff attended based on a failure of graduates to attain an 80% NCLEX “First Time Taker Pass Rate”



Antitrust Suit

- Seeks declaratory and injunctive relief along with treble damages and attorneys’ fees



Ruling

- Motion to dismiss granted in favor of Board
- Board was immune from suit under the 11th Amendment
- 5th Cir. affirmed Nov. 2016
- Sovereign immunity and state action immunity separate and independent sources of immunity
- SCOTUS cert. petition pending

No. 16-30023, 2016 U.S. App. LEXIS 20145 (5th Cir. Nov. 8, 2016), aff’g No. 15-615-JJB-SCR, 2015 U.S. Dist. LEXIS 169338 (M.D. La. Dec. 18, 2015) [unpublished]

Jemsek v. N.C. Medical Board

Underlying Conduct

- Licensee (inactive status) physician disciplined for violating standards for treating Lyme Disease patients



Antitrust Suit

- Sues board, current and past board members in individual and official capacities
- Claimed disciplinary action was Sherman Act violation
- Seeks injunctive and declaratory relief

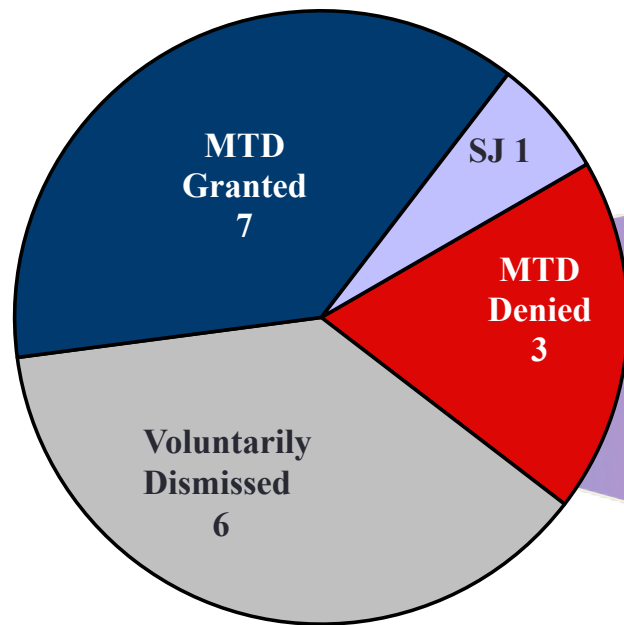


Ruling

- Motion to dismiss granted in favor of defendants because all entitled to immunity under the Eleventh Amendment

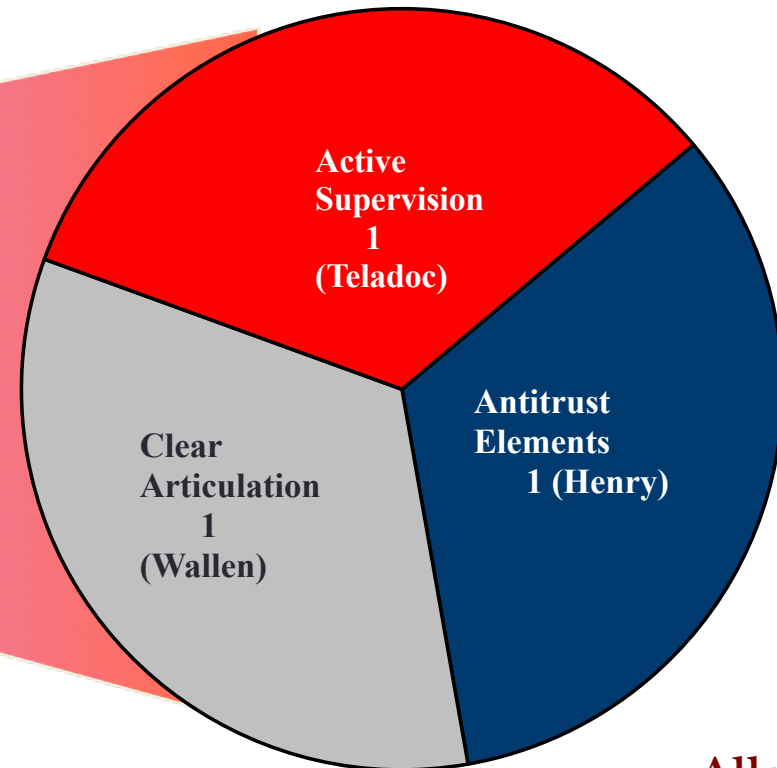
Fallout Litigation By The Numbers

17 Cases with Key Rulings or Resolution To-Date



MTD = motion to dismiss
SJ = summary judgment

3 Cases Where Motion To Dismiss Denied:



Wallen v. St. Louis Metropolitan Taxicab Commission

Underlying Conduct

- Complaint alleges Commission and its members (many of whom work in the taxi cab industry) attempted to prohibit Uber from operating in St. Louis



Antitrust Suit

- Uber, Uber drivers, and riders sue Commission, its members, and their employing taxicab companies
- Seek injunctive relief, treble damages and attorneys' fees



Ruling

- Motion to dismiss denied for lack of clear articulation
- Statutory scheme did not authorize exclusionary conduct
- Claims against members' employers dismissed

No. 4:15-cv-1432, 2016 U.S. Dist. LEXIS 138988 (E.D. Mo. Sept. 30, 2016) [unpublished]

Teladoc, Inc. v. TX Medical Board

Underlying Conduct

- Board adopted rule amendments requiring established, face-to-face relationship prior to telemedicine services being provided unless medical professional present for consultation



Antitrust Suit

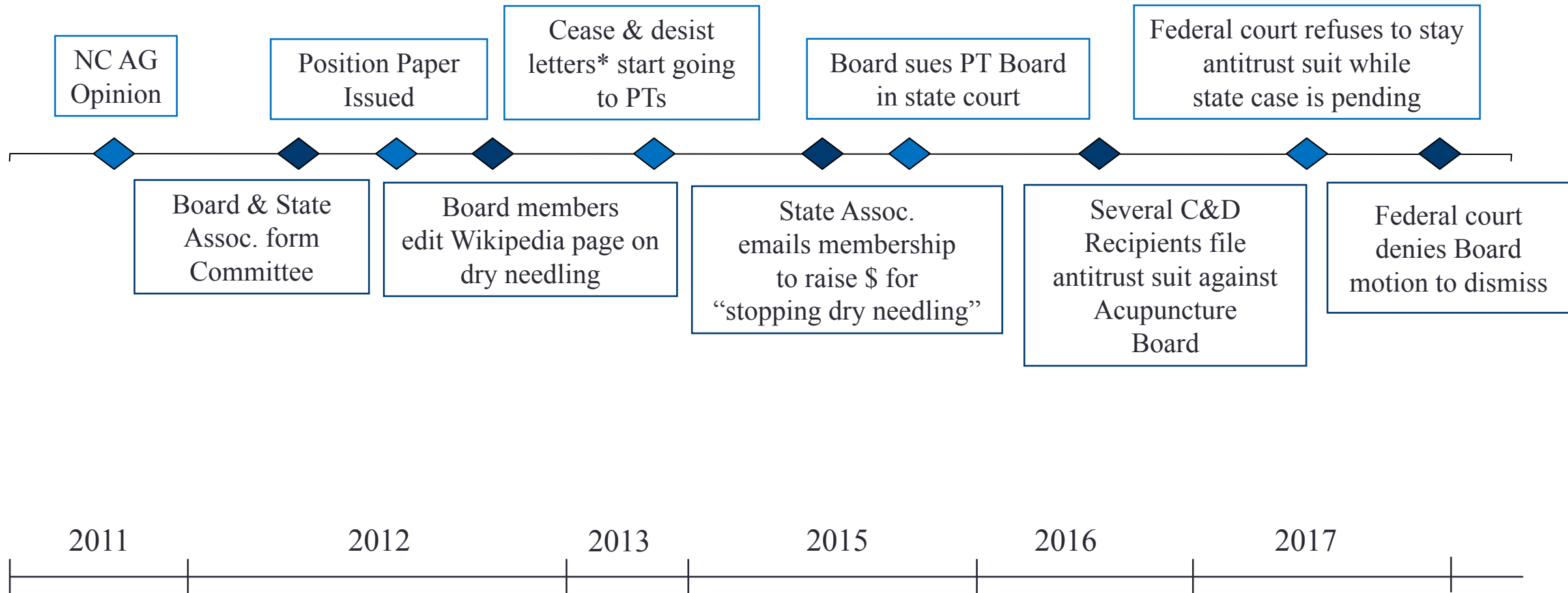
- Sues board and board members in individual and official capacities
- Seeks declaratory and injunctive relief
- Board members in individual capacities and board dismissed by stipulation



Ruling

- Rule enjoined and Board's motion to dismiss denied July 2015
- No sufficient active state supervision over rulemaking
- On appeal to 5th Cir., 15 amici briefs filed, all but 2 supporting Teladoc
- Board voluntarily dismissed appeal in the Fifth Circuit
- Currently stayed before district court

Henry v. N.C. Acupuncture Licensing Board



Henry v. N.C. Acupuncture Licensing Board

Underlying Conduct

- Complaint alleges that board and its members conspired to suppress competition from PTs who offer dry needling



Antitrust Suit

- PTs sue board and board members in individual and official capacities
- Seek declaratory and injunctive relief along with treble damages and attorneys' fees



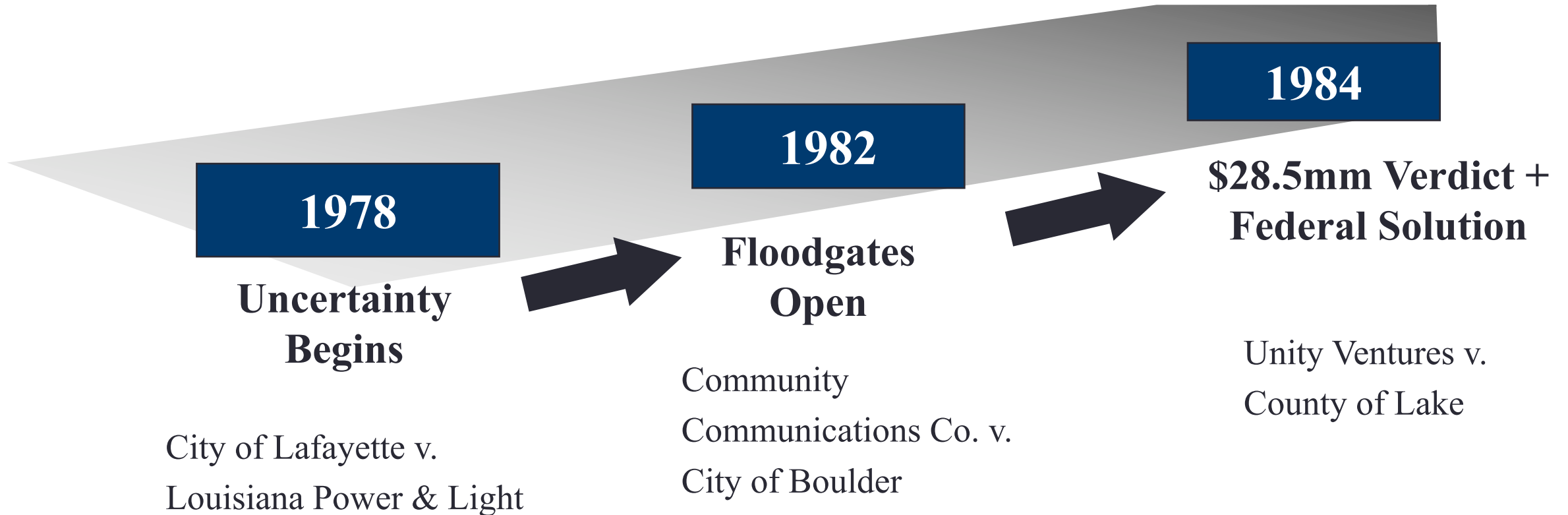
Ruling

- Motion to dismiss based on failure to properly plead antitrust elements denied
- Court found proper allegations regarding conspiracy between board members, effects on interstate commerce, antitrust injury to PTs

Where Do We Go – Federal Efforts



Local Governments Have Seen This Before



Local Government Antitrust Act of 1984

No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.

Local Government Antitrust Act of 1984

Ronald Reagan on Signing the Local Government Antitrust Act of 1984 October 24, 1984:

“Today I am signing into law H.R. 6027, the Local Government Antitrust Act of 1984, which clarifies the application of the Federal antitrust laws to the official conduct of local governments. This bill provides much needed and timely relief for our cities, towns, school districts, sanitary districts, and other similar local governmental bodies from the threat of massive treble damages in the antitrust cases that are being brought with increasing frequency against them. ***While the antitrust laws serve very important purposes, they were never intended to threaten public treasuries and the taxpayers' pocketbooks, or to disrupt the good faith functioning of local units of governments.*** The administration has been a strong supporter of this legislation, and I commend the efforts of the local officials and those in the Senate and House of Representatives who worked so hard for its enactment during the 98th Congress.”

Federal Efforts – Professional Licensing Coalition

American Association of Veterinary State Boards (AAVSB)

American Institute of Architects

American Psychological Association (APA)

Association of Social Work Boards (ASWB)

*Association of State and Provincial Psychology Boards (ASPPB) **

Board of Certification for the Athletic Trainer (BOC)

*Council of Landscape Architectural Registration Boards (CLARB) **

*Federation of Association of Regulatory Boards (FARB) **

*Federation of State Boards of Physical Therapy (FSBPT) **

*Federation of State Medical Boards (FSMB) **

*National Association of State Board of Accountancy (NASBA) **

*National Board for Certification in Occupational Therapy (NBCOT) **

*National Council of Architectural Registration Boards (NCARB) **

** 8 Original Coalition Partners (other joined as momentum built)*

Allen & Pinnix, P.A.

Amending the Local Government Antitrust Act

STATE LICENSING BOARD ANTITRUST ACT OF 2017

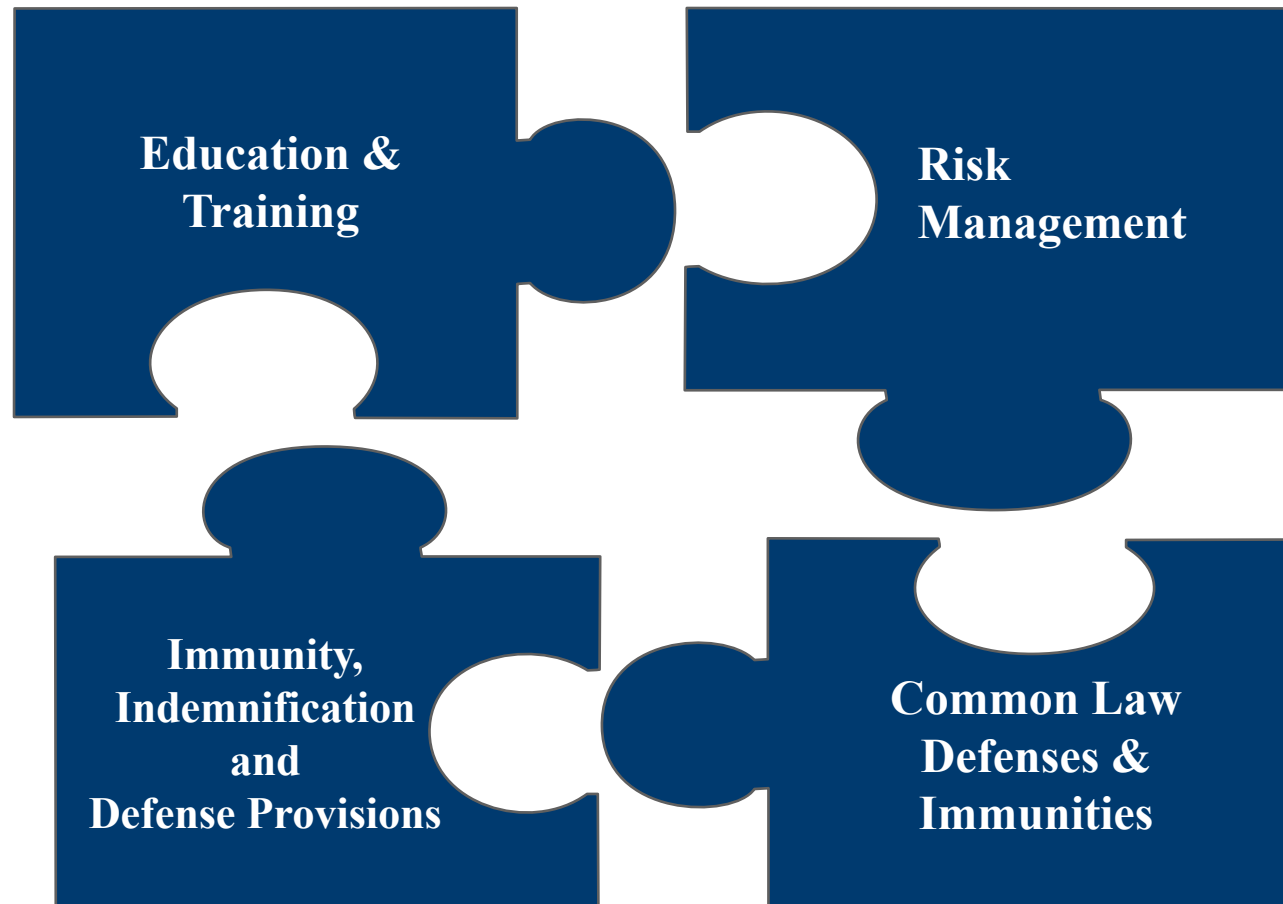
Add Definition of State Licensing Board:

(2) the term “state licensing board” means a board composed of two or more members established by a State for the purpose of: (a) regulating the qualifications and practices of any occupation or profession; or (b) determining whether specific persons are authorized to engage in and/or practice such occupation or profession.

Add “State Licensing Board” to Pertinent Sections:

No damages, interest on damages, costs, or attorney’s fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government **or state licensing board**, or official or employee thereof acting in an official capacity.

Where Do We Go – State & Board-Level Efforts



Immunity & Indemnification of Board Members & Staff

Florida § 456.008(2):

Each board member and each former board member serving on a probable cause panel shall be exempt from civil liability for any act or omission when acting in the member's official capacity, and the department shall defend any such member in any action against any board or member of a board arising from any such act or omission.

Ohio § 9.87(A):

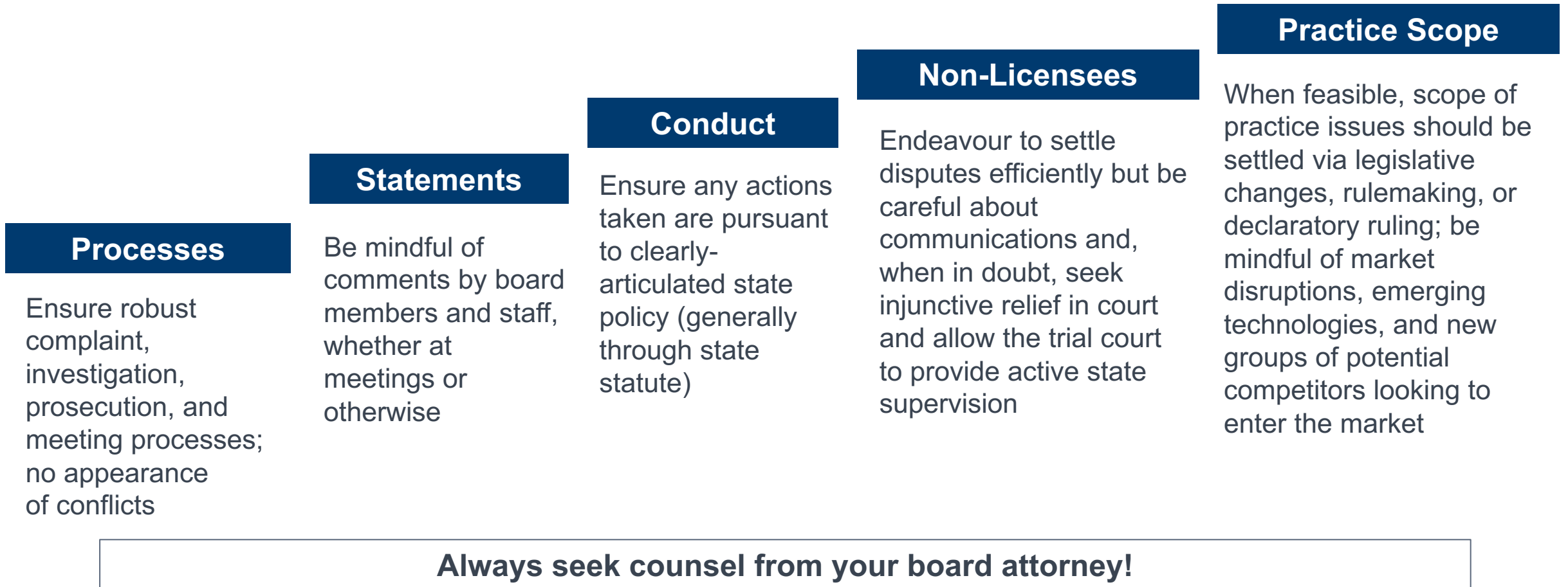
The state . . . shall indemnify an officer or employee from liability incurred in the performance of official duties by paying any judgment in, or amount negotiated in settlement of, any civil action arising under federal law, the law of another state, or the law of a foreign jurisdiction.

Education & Training for Board Members & Staff

WV HB 271 (2016) – requires Board of Accountancy members, staff, and counsel to receive annual antitrust and state action immunity training

NC HB 701 (2017) – requires all boards' members to undergo antitrust and state action immunity training within 6 months of joining a board and every 2 years thereafter

What Can You Do to Minimize Antitrust Risk?



Questions, Comments, or Observations?

Thank You!

