

# ADMINISTRATIVE RULES COMMITTEE

The Administrative Rules Committee is a statutory committee deriving its authority from North Dakota Century Code (NDCC) Sections 54-35-02.5, 54-35-02.6, 28-32-17, 28-32-18, and 28-32-18.1. The committee is required to review administrative agency rules to determine whether:

- Administrative agencies are properly implementing legislative purpose and intent.
- There is dissatisfaction with administrative rules or statutes relating to administrative rules.
- There are unclear or ambiguous statutes relating to administrative rules.

The committee may recommend rule changes to an agency, formally object to a rule, or recommend to the Legislative Management the amendment or repeal of the statutory authority for the rule. The committee also may find a rule void or agree with an agency to amend or repeal an administrative rule to address committee concerns, without requiring the agency to begin a new rulemaking proceeding.

The Legislative Management delegated to the committee its authority under NDCC Section 28-32-10 to distribute administrative agency notices of proposed rulemaking and to establish standard procedures for agency compliance with notice requirements, its authority under NDCC Section 28-32-07 to approve extensions of time for administrative agencies to adopt rules, and its responsibility under NDCC Section 28-32-42 to receive notice of appeal of an administrative agency's rulemaking action.

The committee is authorized under NDCC Sections 54-06-32 and 54-06-33 to approve rules adopted by Human Resource Management Services authorizing service awards and employer-paid costs of training to employees in the classified service.

The Legislative Management assigned to the committee a study directed by House Concurrent Resolution No. 3026 (2017). The resolution provided for a study of the membership and state supervision of the state's occupational and professional licensing boards in order to retain antitrust law immunity.

Committee members were Representatives Bill Devlin (Chairman), Randy Boehning, Joshua A. Boschee, Kim Koppelman, Scott Louser, Brandy Pyle, Mary Schneider, Jay Seibel, Nathan Toman, and Robin Weisz and Senators Howard C. Anderson, Jr., Kelly M. Armstrong, Joan Heckaman, Ralph Kilzer, Jerry Klein, Scott Meyer, Nicole Poolman, and David S. Rust.

## ADMINISTRATIVE AGENCY RULES REVIEW

Administrative agencies are those state agencies authorized to adopt rules under the Administrative Agencies Practice Act (NDCC Chapter 28-32). A rule is an agency's statement of general applicability that implements or prescribes law or policy or the organization, procedure, or practice requirements of the agency. Properly adopted rules have the force and effect of law. Each rule adopted by an administrative agency must be filed with the Legislative Council office for publication in the North Dakota Administrative Code (NDAC).

Under NDCC Section 54-35-02.6, it is the standing duty of the Administrative Rules Committee to review administrative rules adopted under NDCC Chapter 28-32. This continues the rules review process initiated in 1979.

For rules scheduled for review, each adopting agency is requested to address:

- Whether the rules resulted from statutory changes made by the Legislative Assembly.
- Whether the rules are related to any federal statute or regulation. If so, the agency is requested to indicate whether the rules are mandated by federal law or to explain any options the agency had in adopting the rules.
- A description of the rulemaking procedure followed in adopting the rules, e.g., the time and method of public notice and the extent of public hearings on the rules.
- Whether any person has presented a written or oral concern, objection, or complaint for agency consideration with regard to the rules. Each agency is asked to describe any such concern, objection, or complaint and the response of the agency, including any change made in the rules to address the concern, objection, or complaint and to summarize the comments of any person who offered comments at the public hearings on these rules.
- The approximate cost of giving public notice and holding hearings on the rules and the approximate cost (not including staff time) used in developing and adopting the rules.
- The subject matter of the rules and the reasons for adopting the rules.

- Whether a written request for a regulatory analysis was filed by the Governor or an agency, whether the rules are expected to have an impact on the regulated community in excess of \$50,000, and whether a regulatory analysis was issued. If a regulatory analysis was prepared, a copy is to be provided to the committee.
- Whether a regulatory analysis or small entity economic impact statement was prepared as required by NDCC Section 28-32-08.1. If a small entity impact assessment was prepared, a copy is to be provided to the committee.
- Whether the rules have a fiscal effect on state revenues and expenditures, including any effect on funds controlled by the agency. Copies of any fiscal note are to be provided to the committee.
- Whether a constitutional takings assessment was prepared as required by NDCC Section 28-32-09. If a constitutional takings assessment was prepared, a copy is to be provided to the committee.
- If the rules were adopted as emergency rules under NDCC Section 28-32-03, the agency is to provide the statutory grounds from that section for declaring the rules to be an emergency and the facts that support the declaration and a copy of the Governor's approval of the emergency status of the rules.

During committee review of the rules, agency testimony is required and any interested party may submit oral or written comments. If no representative of the agency appears before the committee to provide testimony, the rules are required by statute to be carried over for consideration and may be delayed in taking effect until a representative of the agency appears before the committee.

### CURRENT RULEMAKING STATISTICS

The committee reviewed 3,736 rules sections and 4,047 pages of rules changed from January 2017 through October 2018. Both the number of sections reviewed and the number of pages of rules were substantially higher than the comparable amount from the previous biennial period, primarily due to extensive rules adopted to implement the newly created Department of Environmental Quality. Table A at the end of this report shows the number of rules amended, created, superseded, repealed, reserved, or redesignated for each administrative agency that appeared before the committee.

Although rules differ in length and complexity, comparison of the number of administrative rules sections affected during biennial periods is one method of comparing the volume of administrative rules reviewed by the committee. The following table shows the number of NDAC sections amended, repealed, created, superseded, reserved, or redesignated during designated time periods:

Time Period	Number of Sections
November 1986-October 1988	2,681
November 1988-October 1990	2,325
November 1990-October 1992	3,079
November 1992-October 1994	3,235
November 1994-October 1996	2,762
November 1996-October 1998	2,789
November 1998-November 2000	2,074
December 2000-November 2002	1,417
December 2002-November 2004	2,306
December 2004-October 2006	1,353
January 2007-October 2008	1,194
January 2009-October 2010	1,451
January 2011-October 2012	907
January 2013-October 2014	1,383
January 2015-October 2016	2,108
January 2017-October 2018	3,736

For committee review of rules at each meeting, the Legislative Council staff prepares an administrative rules supplement containing all rules changes submitted for publication since the previous committee meeting. The supplement is prepared in a style similar to bill drafts, with changes indicated by overstrike and underscore. Comparison of the number of pages of rules amended, created, or repealed is another method of comparing the volume of administrative rules reviewed by the committee. The following table shows the number of pages in administrative rules supplements during designated time periods:

Time Period	Supplement Pages
November 1992-October 1994	3,809
November 1994-October 1996	3,140
November 1996-October 1998	4,123
November 1998-November 2000	1,947
December 2000-November 2002	2,016
December 2002-November 2004	4,085

Time Period	Supplement Pages
December 2004-October 2006	1,920
January 2007-October 2008	1,663
January 2009-October 2010	2,011
January 2011-October 2012	2,399
January 2013-October 2014	2,116
January 2015-October 2016	2,938
January 2017-October 2018	4,047

### Rule Review Schedule

Since September 2005, NDAC supplements have been published on a calendar quarter basis. The deadlines and effective dates are as follows:

Filing Date	Committee Meeting Deadline	Effective Date
August 2-November 1	December 15	January 1
November 2-February 1	March 15	April 1
February 2-May 1	June 15	July 1
May 2-August 1	September 15	October 1

## COMMITTEE ACTION ON RULES REVIEWED

### Repealing Obsolete Rules

Under NDCC Section 28-32-18.1, an agency may amend or repeal a rule without complying with the normal notice and hearing requirements relating to adoption of administrative rules if the agency initiates the request to the committee, the agency provides notice to the regulated community of the time and place the committee will consider the request, and the agency and the Administrative Rules Committee agree the rule amendment or repeal eliminates a provision that is obsolete or no longer in compliance with law and that no detriment would result to the substantive rights of the regulated community.

### Voiding or Carrying Over Rules

Under NDCC Section 28-32-18, the committee may void all or part of a rule if that rule is initially considered by the committee no later than the 15<sup>th</sup> day of the month before the date of the NDAC supplement in which the rule change appears. The committee may carry over consideration of voiding administrative rules for not more than one additional meeting. This allows the committee to act more deliberately in rules decisions and allows agencies additional time to provide information or to work with affected groups to develop mutually satisfactory rules. The committee may void all or part of a rule if the committee makes the specific finding that with regard to the rule there is:

- An absence of statutory authority;
- An emergency relating to public health, safety, or welfare;
- A failure to comply with express legislative intent or to substantially meet the procedural requirements of NDCC Chapter 28-32 for adoption of the rule;
- A conflict with state law;
- Arbitrariness and capriciousness; or
- A failure to make a written record of an agency's consideration of written and oral submissions respecting the rule under NDCC Section 28-32-11.

Within 3 business days after the committee finds a rule void, the Legislative Council office is required to provide written notice to the adopting agency and the Chairman of the Legislative Management. Within 14 days after receipt of the notice, the agency may file a petition with the Chairman of the Legislative Management for Legislative Management review of the decision of the committee. If the adopting agency does not file a petition, the rule becomes void on the 15<sup>th</sup> day after the notice to the adopting agency. If within 60 days after receipt of a petition from the agency, the Legislative Management has not disapproved the finding of the committee, the rule is void.

### Obsolete Rules Repealed by Committee

The committee approved a request from the State Board of Nursing for the repeal of administrative rules regarding the 2004 RN and LPN Licensure Compact, which were superseded by the Nurse Licensure Compact. The Nurse Licensure Compact was passed by the Legislative Assembly in 2017 and implemented on January 19, 2018.

The committee approved a request from the Industrial Commission for the repeal of rules that provided for a workover certification to the Tax Commissioner. The rules became obsolete as a result of 2017 legislation that eliminated the extraction tax reduction for a workover well and the need for a workover certification.

### **Rules Carried Over or Amended by Committee Approval**

The committee carried over consideration of rules of the Industrial Commission to address concerns regarding whether a bond is required for existing crude oil and produced water gathering pipelines, issues regarding the regulation of underground gas gathering pipelines, whether the rules required berms on existing well sites, and whether adopting rules regarding leakage detection was contrary to legislative intent. The committee and the Industrial Commission agreed on amendments offered by the Industrial Commission to address each of the issues.

The committee carried over for consideration a request of the Superintendent of Public Instruction to repeal rules providing for a school accreditation process. The committee and the Superintendent of Public Instruction agreed to replace the repealed rules by adding language adopting by reference the AdvancED Accreditation Policies and Procedures.

The committee carried over for consideration a rule of the State Board of Chiropractic Examiners prohibiting a chiropractor from offering free items or services to induce patients to receive care. After receiving further information and clarification from the board, the committee took no further action on the rule.

At the request of the Department of Human Services, due to a delay in the approval of a federal waiver, the committee carried over the consideration of rules relating to developmental disability ratesetting. Upon receiving a subsequent report from the department indicating the ratesetting rules did not comply with the requirements of the Centers for Medicare and Medicaid Services, the committee, at the request of the department, withdrew the rules from consideration.

The committee carried over for consideration a rule of the State Board of Pharmacy relating to a pharmacist consultation requirement for new prescriptions dispensed to a patient by mail. The committee and the Board of Pharmacy agreed to an amendment requiring the pharmacist to assess on a case-by-case basis whether telephone contact or written materials accompanying the prescription was the more appropriate option.

The committee carried over for consideration a rule of the Peace Officer Standards and Training Board regarding the requirements of confidential informant agreements. The committee and the Peace Officer Standards and Training Board agreed adding an in-person requirement to the process resolved the concerns of the committee and other interested parties.

### **Rules Voided by Committee**

The committee voided rules adopted by the North Dakota Board of Medicine relating to telemedicine. The rules required the initial telemedicine consultation to be conducted via video, regardless of the nature of the consultation. In voiding the rule, the committee found the rules failed to comply with express legislative intent, were in conflict with state law, and were arbitrary and capricious.

## **STATE SUPERVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING BOARDS**

The Legislative Management assigned to the Administrative Rules Committee a study directed by House Concurrent Resolution No. 3026 (2017). The resolution provided for a study of the membership and state supervision of the state's occupational and professional licensing boards in order to retain antitrust law immunity. According to the testimony in support of this resolution, the request for the study is in response to the 2015 United States Supreme Court decision, *North Carolina Board of Dental Examiners v. Federal Trade Commission*, 135 S. Ct. 1101 (2015). In *North Carolina Dental*, the Supreme Court held when a controlling number of a state's occupational or professional licensing board members are market participants, the board must be "actively supervised" to be immune from antitrust law.

### **BACKGROUND**

Licensing boards are a creation of state law. The laws governing licensed occupations and professions often provide for regulation and oversight of the licensees through the appointment, often by the Governor, of members of the occupation or profession to licensing boards. The board is responsible for ensuring the licensees maintain high standards of professionalism and quality of care to safeguard public health and safety. Licensing boards adopt administrative rules, discipline licensees, and respond to consumer complaints. Most licensing boards have the statutory authority to sanction licensees for unprofessional or unlawful conduct, by way of reprimand or suspension or revocation of a license.

When a majority of the members of any state licensing board are competitors of the individuals regulated by the board, board decisions and policies that restrain trade may raise antitrust issues. Licensing board members often are either unaware of the applicability of the antitrust laws to their board or are inadequately educated to recognize the type of actions that may expose the board to antitrust risk. Even if board members believe competition restraining policies are necessary to ensure high professional standards, quality services, or quality patient care, a court may find the policies do not justify the restraint of trade.

## **Antitrust Laws and the State Action Doctrine**

Antitrust laws exist to ensure a competitive marketplace. The Sherman Antitrust Act of 1890 [15 U.S.C. §§ 1-7] is a federal law that attempts to maintain free and orderly markets by prohibiting monopolies and other efforts in restraint of trade. When businesses, commonly referred to by the courts as "market participants," engage in prohibited anticompetitive behavior, the businesses expose themselves to liability under federal antitrust law. The Sherman Act does not expressly distinguish state agencies from private parties when it comes to restraining trade; however, since 1943 certain forms of state action have been immune from the antitrust laws as the result of case law.

State-action immunity is a doctrine created by the United States Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943). This doctrine exempts from prosecution under the antitrust laws certain activities the state has decided to regulate rather than allow the marketplace to discipline itself. The rationale behind the *Parker* immunity is that in enacting the Sherman Act, Congress did not intend to restrain state behavior. The state action doctrine provides immunity to states, state actors, and private actors from liability for violations of federal antitrust laws if the actor's anticompetitive actions are actions of the state.

For the doctrine to apply, the United States Supreme Court has extended its state action doctrine of antitrust immunity to cover three sets of circumstances:

1. **State conduct.** Actions taken by the state's lawmakers or state supreme court, which result in anticompetitive effects, enjoy immunity from federal antitrust laws.
2. **Private parties acting under the active supervision of the state.** Under the two-prong test in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), private parties may claim state-action immunity if the parties' actions are: (a) pursuant to a clearly articulated and affirmatively expressed state policy; and (b) actively supervised by the state.
3. **Municipalities acting pursuant to a clearly articulated state policy.** The United States Supreme Court has held municipalities need not show active state supervision as a prerequisite to securing the protections of the state action doctrine.

The case law in the area of antitrust laws and application of the state-action immunity doctrine, which has been evolving since 1943, led to the question raised in *North Carolina Board of Dental Examiners v. Federal Trade Commission*: If the state agency in question is a professional licensing board comprised of private industry members, must another state actor supervise the agency for it to be immune from the antitrust laws?

### ***North Carolina Board of Dental Examiners v. Federal Trade Commission***

The North Carolina Dental Practice Act (N.C. Gen. Stat. §§ 90-22 through 90-48.3) grants the North Carolina Board of Dental Examiners (board) broad authority to regulate the practice of dentistry. The board's primary function is to create, administer, and enforce a licensing system for practicing dentists. If the board suspects an individual of engaging in the unlicensed practice of dentistry, the board may bring an action to enjoin the individual from continuing the unlawful practice.

In the 1990s dentists in North Carolina began offering teeth whitening services. Around 2003 many nondentists entered the teeth whitening market, offering whitening services at considerably lower prices than dentists who offered the same service. Practicing dentists complained to the board about the nondentist providers offering whitening services. The board investigated the provision of teeth whitening services by nondentists and indicated its intent to stop the nondentist providers.

At the conclusion of the board's investigations, the board issued 47 cease and desist letters, on official board letterhead, to the nondentist teeth whitening providers. These letters requested the providers cease and desist "all activity constituting the practice of dentistry." The letters indicated providing teeth whitening products and services by nondentists is a misdemeanor under North Carolina law. The board also contacted the North Carolina Board of Cosmetic Art Examiners and requested that board warn cosmetologists to refrain from providing teeth whitening services. The result of the board's efforts was to end the provision of teeth whitening services by nondentists and to cause manufacturers and distributors of teeth whitening products for nondentist providers to leave North Carolina or to decide not to do business in North Carolina.

On June 17, 2010, the Federal Trade Commission (FTC) issued an administrative complaint against the board for violating the Federal Trade Commission Act [15 U.S.C. § 45]. The board moved to dismiss the complaint, arguing as an agency of the state, the board's actions were that of the state itself and, consequently, the board was exempt from federal antitrust liability under the state action doctrine. An administrative law judge denied the board's motion to dismiss and FTC affirmed the administrative law judge's decision. Finding that the board's actions to exclude nondentist providers

from the teeth whitening market were not actively supervised by the state, FTC declined to extend immunity to the board under the state action doctrine.

The board filed a federal declaratory action in the United States District Court for the Eastern District of North Carolina to enjoin the FTC's administrative proceeding. The district court dismissed the board's declaratory action, reasoning it lacked subject matter jurisdiction to render a judgment. After the federal district court dismissed the board's declaratory action, an administrative law judge held a trial on the merits. The administrative law judge found that the board violated the Federal Trade Commission Act through its anticompetitive actions to exclude nondentist practitioners from the teeth whitening market. On appeal, FTC affirmed the administrative law judge's findings on the same grounds.

The board appealed to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit, in *North Carolina Board of Dental Examiners v. Federal Trade Commission*, 717 F.3d 359 (4th Cir. 2013), upheld the FTC's conclusion that the board was a "private actor" because the board consisted primarily of market participants. According to the Fourth Circuit, to invoke state-action immunity as a private actor, the board could take anticompetitive actions to benefit its own membership; however, the board first must satisfy both the "clear articulation" and "active supervision" requirements of *Midcal*. The Fourth Circuit further concluded the board's anticompetitive actions did not have the sufficient supervision to meet the active state supervision prong of the *Midcal* test. The Fourth Circuit determined the board could not invoke state-action immunity protection from antitrust laws. The United States Supreme Court granted certiorari to decide whether, to invoke state-action immunity, the board's anticompetitive actions should be subject to the active supervision requirement.

On February 25, 2015, the United States Supreme Court affirmed the Fourth Circuit's decision in a 6-3 decision. The Supreme Court rejected the board's arguments and held "a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity." The majority also found because a controlling number of the board's decisionmakers are active market participants in the occupation the board regulates, the board is treated as a private actor and must show active supervision by the state. The Court concluded the board did not meet the active supervision requirement.

The Court also reaffirmed the active supervision requirement is "flexible and context-dependent." The Court did not address what procedures would be sufficient to show active supervision. The Court, however, indicated the four basic requirements for active supervision are:

1. The review must be substantive, not merely procedural;
2. The supervisor must have the power to veto or modify the particular decisions;
3. The mere potential for review is not enough, it must actually occur; and
4. The supervisor may not be an active market participant.

### **North Dakota Professional and Occupational Licensing Boards**

North Dakota law provides for the licensure of certain occupations and professions. The primary method of licensing individuals engaged in occupations and professions is by statutory licensing boards; however, some are licensed by state agencies.

Most statutes regulating occupational and professional licensing boards are contained in NDCC Title 43, and most of the occupations and professions licensed and regulated in Title 43 are health care and counseling related. Other professions licensed under Title 43 include abstractors, accountants, architects, social workers, trade professions (such as electricians and plumbers), and certain service industry workers (such as barbers and cosmetologists). Professions regulated by licensing boards contained in other titles include teachers (Title 15) and attorneys (Title 27).

The membership of the occupational and professional licensing boards varies from board to board. The Governor appoints most members of licensing boards in North Dakota. Requirements for board membership among the many regulated occupations and professions include criteria such as age, residency, education, licensure in that regulated profession or occupation, and membership in a particular professional organization.

## **TESTIMONY AND COMMITTEE CONSIDERATIONS**

In its study of the membership and state supervision of the state's occupational and professional licensing boards in order to retain antitrust law immunity, the committee received testimony from the Attorney General's office and representatives of licensing boards. The committee also received information from the National Conference of State Legislatures.

Testimony from the Attorney General's office emphasized the primary question facing North Dakota as a result of *North Carolina Dental* is whether the state provides enough active state supervision to ensure the occupational and professional board members are protected by state action immunity. The Attorney General's office provided preliminary insights to the committee following the issuance of *North Carolina Dental* in 2015. However, because substantially more information has become available since 2015, the Attorney General's office noted it has refined its insights into the impact of the decision.

The testimony indicated an overwhelming majority of licensing board actions and decisions never involve, invoke, or violate federal antitrust laws. For example, the denial of a license to an applicant who fails to submit the materials required for licensure does not expose a licensing board to antitrust liability. Only "unreasonable" restraints on trade give rise to the antitrust liability. The Federal Trade Commission has issued guidance recognizing a licensing board that takes disciplinary action affecting a single licensee generally is not going to be "unreasonable." It was emphasized very few licensing board decisions ever raise antitrust issues.

According to the testimony, the initial reaction after *North Carolina Dental* was the belief that replacing a majority of licensing board members with public members would solve the issue. Additional FTC guidance has dissuaded states from this reaction for two reasons. First, the United States Supreme Court based its decision on the "controlling" number of licensing board members, not a majority. Thus, even one market participant on the board could be the "controlling" number if all public members look to the active market participant for advice that guides the board's decisions. Second, there are benefits of having market participants who bring expertise from the profession to the regulatory board.

The testimony indicated North Dakota has several layers of active state supervision in place to limit a licensing board's ability to carry out anticompetitive efforts:

1. State's attorneys provide active state supervision. With a few exceptions, licensing boards in North Dakota do not have the authority to prosecute nonlicensees for practicing without a license. Instead, licensing boards must rely on state's attorneys for prosecution. Only three North Dakota licensing boards have cease and desist authority.
2. The Legislative Assembly provides active state supervision. While licensing boards can propose legislation, the Legislative Assembly provides active state supervision when it passes laws. Furthermore, while licensing boards can engage in rulemaking, the Legislative Assembly similarly has oversight of the rulemaking process.
3. The Governor provides active state supervision. Executive Order 2015-05 allows boards to obtain "review and written approval from the Attorney General of all actions designed to enforce or implement regulatory policies when such enforcement or implementation actions may have an anticompetitive effect upon the professional market in question."
4. The Attorney General provides active state supervision in several ways, including:
  - a. Issuing opinions related to a licensing board's scope of practice or other legal issues. These opinions direct the acts of government entities, until and unless a court determines otherwise. (NDCC § 54-12-01(19)).
  - b. Directing assistant attorneys general to provide licensing boards with legal advice that cautions boards against taking any actions that may give rise to an antitrust claim. It was noted assistant attorneys general have attended numerous trainings regarding the *North Carolina Dental* case, and the Attorney General's office is developing training for all attorneys who advise regulatory boards so all are knowledgeable about the implications of the case.
  - c. Overseeing any litigation a licensing board may seek to bring, and in doing so, refusing to initiate legal action that would result in unreasonable restraint on trade. (NDCC § 54-12-02)

The testimony from the Attorney General's office also provided options for additional layers of protection the Legislative Assembly may consider to ensure the appropriate level of state supervision exists. The testimony identified two categories of persons that could bring claims of anticompetitive conduct against a licensing board--licensees and nonlicensees.

Most licensing boards have statutory authority to take disciplinary action against a licensee. The licensee may agree to the discipline, such as by signing a settlement agreement. The board and the licensee also may opt to have the matter heard before an administrative law judge (ALJ). The law provides at the conclusion of the administrative hearing, the ALJ issues findings of fact and conclusions of law which may include proposed discipline. Boards, however, can decline to follow the ALJ's proposed discipline. (NDCC § 28-32-39) The testimony of the Attorney General's office suggested the state could increase active state supervision through the ALJ if the law was amended to grant the ALJ the authority to decide what discipline is appropriate and to remove the board's authority to decline to follow that decision. It was noted the increased authority would have little, if any, fiscal effect, because the Office of Administrative Hearings is conducting

hearings already on these matters and the change simply would give the ALJ more authority when arriving at a conclusion. It also was suggested a more drastic modification of the administrative procedure would be to require all licensing boards to go before the Office of Administrative Hearings to discipline a licensee, thus increasing active state supervision for all boards.

Anti-competitive claims against boards also may be raised by nonlicensees, as was the case in *North Carolina Dental*. As previously discussed, most, but not all, licensing boards in the state do not have jurisdiction over nonlicensees. If one of those licensing boards observes activity it considers the unlicensed practice in the profession, that licensing board refers the matter to the state's attorney, who in turn decides whether to pursue the matter. It was noted a statutory change is not required to retain that substantial level of active state supervision for those licensing boards. If, however, statutory changes were made to remove the jurisdiction of those several boards over nonlicensees, thus requiring all decisions related to nonlicensees be referred to a state's attorney, all licensing boards in the state effectively would be "actively supervised." It was suggested this option should be considered carefully as some boards, such as the State Board of Pharmacy, may want to retain authority over unlicensed practice to allow the board to act quickly on matters of public health and safety.

Testimony from a representative of the State Board of Pharmacy noted the board rarely issues cease and desist orders; however, it is an important tool for the board to have if there is a specific threat to public health. The testimony emphasized it was the Legislative Assembly that gave the board the authority to issue cease and desist orders.

Other testimony from representatives of licensing boards expressed concerns about some licensing boards that exceed statutory authority by advocating for the profession rather than regulating it. The testimony emphasized the advocacy role is best performed by the professional association representing the profession and not the regulatory board. The committee was encouraged to review the state's occupational and professional licensing laws in NDCC Title 43 to clarify the board's function is to regulate, not advocate. The testimony also cited violations of open meetings and open records laws and the administrative rule process as reasons why more active state supervision is necessary.

The committee received information from the National Conference of State Legislatures regarding state occupational licensing policies and trends. The information indicated states must find the balance between the autonomy of licensing boards to regulate their industry and state supervisory authority over licensing board decisions. The information indicated to comply with *North Carolina Dental*, some states have reorganized occupational licensing boards to have fewer current professionals as members or have established stricter oversight authority within a designated state agency. Other states have sought to create a legal cause of action for potential licensees to bring cases against licensing boards believed to be acting in an anticompetitive manner and against the public interest.

The committee also received information the United States Department of Labor, as part of the department's ongoing efforts to encourage occupational licensing reform, awarded a \$450,000 grant to Job Service North Dakota to assist the state in reviewing and streamlining its occupational licensing rules.

Committee members agreed while there is little evidence of antitrust activities by occupational and professional licensing boards in North Dakota, the ruling in *North Carolina Dental* serves as a reminder to the state's boards not to take actions that might trigger antitrust concerns. It was suggested to prevent a situation similar to what happened in North Carolina, North Dakota may want to consider requiring the Attorney General to review all board-issued cease and desist orders. The consensus of the committee was major statutory and procedural changes as the result of *North Carolina Dental* are not necessary.

## **Conclusion**

The committee makes no recommendations as a result of its study of the membership and state supervision of the state's occupational and professional licensing boards in order to retain antitrust law immunity.

**TABLE A**

**Statistical Summary of Rulemaking  
January 2017 Through October 2018 - Supplements 363 Through 370**

<b>Title</b>	<b>Supplement No.</b>	<b>Agency</b>	<b>Amend</b>	<b>Create</b>	<b>Supersede</b>	<b>Repeal</b>	<b>Special</b>	<b>Reserved</b>	<b>Total</b>
3	368 - Apr 18	Accountancy, Board of	24	0	0	0	0	0	24
4	363 - Jan 17	Management and Budget, Office of	1	0	0	0	0	0	1
10	367 - Jan 18	Attorney General	9	4	0	4	0	0	17
	370 - Oct 18		17	0	0	0	0	0	17
11	368 - Apr 18	Audiology and Speech-Language Pathology, Board of Examiners on	5	1	0	0	0	0	6
17	363 - Jan 17	Chiropractic Examiners, Board of	7	2	0	0	0	0	9
	364 - Apr 17		1	0	0	0	0	0	1
20	365 - Jul 17	State Board of Dental Examiners	15	2	0	0	0	0	17
24	364 - Apr 17	State Electrical Board	0	0	0	22	0	0	22
24.1	364 - Apr 17	State Electrical Board	0	34	0	0	0	163	197
	367 - Jan 18		3	0	0	0	0	0	3
25	370 - Oct 18	State Board of Funeral Service	2	0	0	0	0	0	2
30	366 - Oct 17	Game and Fish Department	3	5	0	16	0	0	24
	367 - Jan 18		13	0	0	0	0	0	13
32	363 - Jan 17	Cosmetology, Board of	43	0	0	0	0	0	43
33	365 - Jul 17	State Department of Health	1	1	0	0	0	0	2
	367 - Jan 18		15	2	0	226	0	0	243
	368 - Apr 18		52	55	0	0	0	0	107
	370 - Oct 18		39	2	0	1	0	0	42
33.1	370 - Oct 18	Environmental Quality, Department of	0	1238	0	0	0	1054	2292
42	367 - Jan 18	Indian Scholarships, Board for	10	0	0	2	0	0	12
43	363 - Jan 17	Industrial Commission	5	1	0	0	0	0	6
	368 - Apr 18		25	1	0	4	0	0	30
45	364 - Apr 17	Insurance, Commissioner of	23	4	0	0	0	0	27
49	363 - Jan 17	Massage, Board of	14	0	0	2	0	0	16
	368 - Apr 18		5	0	0	0	0	0	5
50	367 - Jan 18	North Dakota Board of Medicine	1	2	0	0	0	0	3
	368 - Apr 18		0	1	0	0	0	0	1
55	363 - Jan 17	Nursing Home Administrators, Board of Examiners for	12	0	0	0	0	0	12
61	364 - Apr 17	State Board of Pharmacy	1	0	0	0	0	0	1
	365 - Jul 17		2	1	0	0	0	0	3
	366 - Oct 17		0	1	0	0	0	0	1
67	363 - Jan 17	Public Instruction, Superintendent of	1	1	0	32	0	0	34
	367 - Jan 18		6	15	0	21	0	0	42
67.1	368 - Apr 18	Education Standards and Practices Board	13	0	0	2	0	0	15
69	365 - Jul 17	Public Service Commission	11	0	0	0	0	0	11
	366 - Oct 17		6	0	0	0	0	0	6
69.5	363 - Jan 17	Racing Commission, North Dakota	2	0	0	0	0	0	2
	365 - Jul 17		0	1	0	0	0	0	1
	368 - Apr 18		7	0	0	0	0	0	7
	370 - Oct 18		2	0	0	0	0	0	2
75	363 - Jan 17	Department of Human Services	12	0	0	3	0	0	15
	367 - Jan 18		6	0	0	1	0	0	7
	368 - Apr 18		164	21	0	43	0	0	228
	370 - Oct 18		2	0	0	12	0	0	14
89	368 - Apr 18	State Water Commission	6	0	0	0	0	0	6
92	365 - Jul 17	Workforce Safety and Insurance	11	2	0	0	0	0	13
	367 - Jan 18		6	3	0	0	0	0	9
94	363 - Jan 17	Corrections and Rehabilitation, Department of	0	23	0	0	0	0	23
96	365 - Jul 17	Board of Clinical Laboratory Practice	9	0	0	0	0	0	9
101	367 - Jan 18	Real Estate Appraiser Qualifications and Ethics Board	0	18	0	0	0	0	18
109	370 - Oct 18	Peace Officer Standards and Training Board	1	1	0	0	0	0	2
111	367 - Jan 18	Marriage and Family Therapy Licensure Board	12	0	0	0	0	0	12
112	365 - Jul 17	Integrative Health Care	4	23	0	0	0	0	27
114	368 - Apr 18	Medical Imaging and Radiation Therapy Board	0	34	0	0	0	0	34
<b>Total</b>			<b>630</b>	<b>1497</b>	<b>0</b>	<b>391</b>	<b>0</b>	<b>1216</b>	<b>3736</b>