

Immunity of Boards: Types and Limits






Road Rage

36th Annual Conference

NCSB

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Why Do We Need Immunity? (Other than BA.2.86 variant)

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|---|--|
|  | Acts of a governmental entity, when taken in good faith, should be protected in order to encourage state officials to protect the public without fear of suit. |
|  | Prevent the chilling effect threat of suit would have on state actors faithfully discharging their duties |
|  | Prevent interference with the ability of state actors to carry out their duties due to the distraction and time consumption of being subjected to lawsuits |
|  | Recruit and retain talent in state government and on Interstate Compact Commissions |
|  | Immunity, when qualified, gives state actors the ability to use their prudent discretion |



Potential Threats to Immunity/Exposure to Liability

Outside Threats

Judicial Narrowing of Immunity

Kisor/Auer line of cases: 5 prong test (*Though these cases utilize federal doctrine, they do provide guidance which state courts can and have utilized to “not defer” to Board decisions too quickly*)

Multiple State Supreme Courts abandoning deference to Boards (MS, MI, WI)

Legislative waiver of immunity

Tort Claims Acts allowing limited liability

State Laws expressly forbidding deference

AZ via 2018 amendment to State Administrative Procedures Act

Constitutional provisions denying immunity

Montana has no immunity pursuant to their state constitution unless a supermajority of the legislature grants it to the Board/Agency

Potential Threats to Immunity/Exposure



Ways to Limit Threats to Immunity/Exposure to Liability in Court

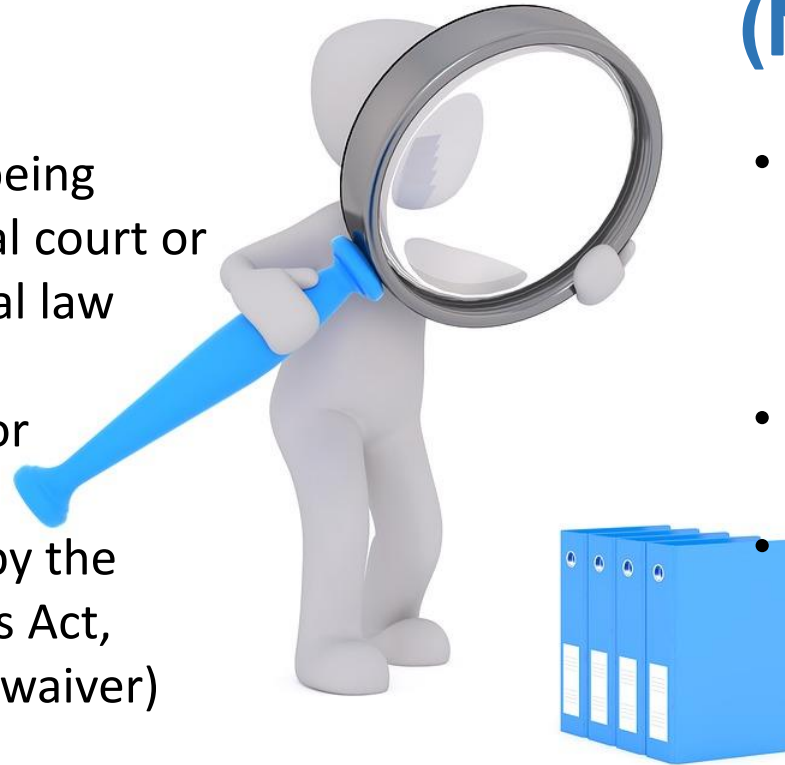
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|---|---|
| ✓ | Best practices, training, transparency |
| ✓ | Qualified immunity |
| ✓ | Eleventh Amendment Immunity |
| ✓ | Tenth Amendment (US Const., Compact Clause, Art. 1 sec. 10 (clause 3) states have traditionally regulated the professions so that right is reserved for the states. |
| ✓ | Exhaustion of remedies-injured party must first exhaust their administrative remedies. |
| ✓ | Tort Claims Act- injured party has a remedy, but damages are limited |



Types of Immunity

11th Amendment

- Prevents private actions from being brought against states in federal court or in state court if based on federal law
- Must prove you are a state actor
- Must not be expressly waived by the state by consent (ie: Tort Claims Act, insurance purchase, legislative waiver)



Sovereign Immunity (Non-11th Am. Immunity)

- Prevents private actions in state courts for appropriate, clearly authorized state action
- NOT Absolute
- Qualified and Functional in Nature

11th Amendment Immunity

“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”.

- ✓ Immunity from Federal court suit CAN be waived by a state, but must be expressly waived by statute, etc.
- ✓ You can't file a suit for monetary damages that would be taken from the state treasury
- ✓ A plaintiff SLP, AuD, etc. CAN sue for injunctive relief

Sovereign Immunity (for state actor)

Qualified and Functional

Judicially Created

Was the state action you took:

Discretionary

An act requiring/ involving exercise of personal judgement

OR

Ministerial

Required by law= state actor must do, no immunity protection if you fail to do it

Was it "lawful"=

- taken pursuant to
- clearly articulated and unambiguous law
- Properly delegated
- Properly supervised (varies state by state)

Sovereign Immunity

NOT Absolute, QUALIFIED and FUNCTIONAL in nature

- **QUALIFIED** (prudent, lawful, authorized)
- **FUNCTIONAL** (flows from your representation on the ICNLCA as a representative of your state in your official, not individual, capacity)
- Originates from common law notions “The King can do no wrong and cannot be sued”
- The authority that makes the law and enacted the enabling statute of BONs, the State Legislature, cannot be sued
- The ASLP Board is an arm of the state, a legislative creation and, thus, a “state actor”
=the Board is entitled to the protection Sovereign immunity provides, but only if...

Qualified And Functional Sovereign Immunity (How to keep it)

...The action you took (or did not take) was **DISCRETIONARY** (*an act involving exercise of personal judgment*), it must also be:

LAWFUL

- taken pursuant to *clearly articulated* and *unambiguous law*
- clearly and properly *delegated task/action*
- taken after/with *proper state supervision* (**only** if required by your state) *Confer with your Board's Legal Counsel

FUNCTIONAL

- done in your official, not individual, capacity as a duly appointed representative of your state on the Board
- **AND your state has not expressly waived your immunity.**

Qualified And Functional Sovereign Immunity

(How to keep it)

- If the action you took or did not take was **MINISTERIAL** (*Expressly required by law*) you **MUST** do it. =**No** immunity protection if you failed to discharge a duty that was required by law, **but** you also have stronger immunity protection when discharging ministerial duties.



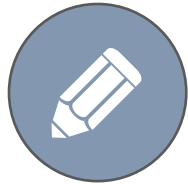
Parting Tips



Share your governance training with legal counsel and staff



Confer with your legal counsel early and often



Get advice in writing



Remain loyal to the entity/organization you are representing when you are representing that entity/organization



Fulfill your duties



Refer to your governance documents and confirm you have clearly articulated authority to act in your practice act, rules

Thank You



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