

Combined responses* to Questions for Discussions

*These responses are combined for ease of discussion relating to the topics. Complete responses will be available at the Oct. 12 meeting or by pdf files to be posted on the EAC website under Committee Activities -- SJR 35. The responses are not in any particular order.

Question A: Can improvements be made in reference to types of boards to better meet public health, safety, welfare issues -- title or title/practice boards, quasi-judicial boards, or boards' administrative attachment?

- Yes. A practice board might be able to authorize a standard written exam to be administered at the department when such an exam does not need board member attendance. There would be cost savings to the department (who wouldn't need to import board members) and there would be a time savings to the prospective practitioner and/or his employer.
- For consumer complaints, improvements can be made in the timeliness of the response of board and departmental action. Small narrowly focused quasi-judicial boards, meeting more often (if even by teleconference) may be an effective option.
- Personal contact from board or department to both the consumer and the practitioner to explain the complaint process would reduce stress felt by both parties. As it is, both the consumer and practitioner feel caught up in the system.
- Staff and legal council (sic) to the boards could do more to educate board members how the board system works. New board members take too long to get "up to speed" on how the system works. -- **Pat Fournier, president, Montana Hearing Society**

- There seems to be inconsistent legal definitions and interpretations as to what constitutes title vs. practice law. Legal staff for the Board of Landscape Architects did not feel Montana has a practice act, but a national review and evaluation of all states conducted by the American Society of Landscape Architects determined Montana law was consistent with practice laws in other states. -- **Shelly Engler, chair, MT Board of Landscape Architects**

- Practice licensing better protects the public. However, if state law does not support the practice of the profession then there are no legal teeth. Municipal, county and state codes should be considered for review as to what type of license is required for certain types of services. -- **Jennie Meinershagen**
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- Overall, I'm sure there are improvements that can be made to all regulatory boards. Regarding our Board, the fact that it is governing a practice act needs to be clarified and understood by all parties. There is a belief by the State staff that ours is a title act. This has been substantially refuted by our national professional organization, the American Society of Landscape Architects. -- **Kent Watson**
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- Referencing 2-15-212 (3) (b) The department head of a department to which any agency is allocated for administrative purposes only in this chapter *shall*: (b) allocate office space to the agency as necessary, subject to the approval of the department of administration. -- Did the department of administration approve taking away office space, etc. to the Board of Landscape Architects? If so, is this not an exercise of power beyond legislative intent? -- **Submitter asked for anonymity**

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- As laws, economics and technologies evolve, we currently address board oversight of functions in order to protect public safety. Generally, there is some overlap of responsibility, function, marketability, education and/or perception. These usually require the legislature to intervene in what we often call 'turf battles' which are unproductive and a poor use of legislative time and resources. Policy supported by a mechanism should be in place to allow these activities to occur smoothly and routinely without unnecessarily bubbling up into the legislature. -- **Don Hargrove**

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- Determine what criteria must be met in order to protect the public -- from the Business League for Massage Therapy & Bodywork. Cites, for example, (BLMTB's emphasis):
 - It **is** in the public welfare to protect the "common good". (As a nonregulated profession that would like to be regulated, the threat to our scope of practice by already regulated professions is very real.)
 - It **is** in the public's interest to protect access to a profession with its commonly accepted scope of practice intact, and in fact is necessary to ensure the survival of marginalized or currently unregulated professions. (lists several options)
- Confusion exists on whether some boards are regulating a title act or a practice act.
- Title licensure should be granted to "non-invasive" professions (such as massage therapy). Practice acts should be reserved for the professions that require a high threshold of public safety (for example, the Practice of Medicine).
- Boards should be established no matter if it is a title or practice act.
- The BLMTB also supports establishing voluntary advisory councils consisting of professional members. -- **BLMTB**

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- The Board of Psychologists helps to protect Montana's citizens from emotional and mental harm by precluding licensure to individuals who do not satisfy the Board in their written and oral examinations that they are ready to interact with the public in a safe and professional manner. The Board also assesses the professional expertise of the licensure applicant to assure that even though the applicant has gone through the steps of one of many possible academic and internship programs, the end result of the applicant's training matches what is needed for public safety. Therefore, for sufficient public safety, it is my professional opinion necessary for the Board of Psychologists to continue functioning as it does now. -- **George Watson, for self. Currently serves as vice chair of MT Board of Psychologists.**

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- If the purpose of a particular board is to protect the public health, safety and welfare, perhaps a section could be added to the board’s licensing law, indicating which specific purpose(s) is being served by the creation or establishment of the board. Not all currently enacted licensing statutes provide this type of declaration. In addition, if part of the licensure goal is title protection, perhaps that intent should also be indicated, with the specific titles enumerated which the profession or occupation wants protected. Again, not all of the current licensing statutes contain title protection provisions; and yet, many arguments occur over this matter. This clarification would assist allow and help remind some why the board was actually created.

While any group can submit a bill for licensure, it would be helpful if the bill contained a statement of intent or declaration section setting forth the reasons for the bill (public health, title protection, or both), so the public and affected parties could understand the “goals” of the group seeking licensure. It may be wishful, but if the public understood why a new board and bureaucracy were being proposed, perhaps such an inclusion would lessen the contentiousness during the session.

The status of some board’s “quasi-judicial” authority is unclear. Some statutes clearly state that a board is quasi-judicial, others are silent. Whether a board is quasi-judicial is a matter of law and dependent upon the language creating the board as set forth in Title 2, MCA. While the overwhelming number of licensing boards are actually created in Title 2, the licensing statutes of those professions and occupations governed by the boards, are set forth in Title 37, MCA.

While section 2-15-102(10), MCA, defines “quasi-judicial function”, and 2-15-124, MCA, describes “quasi-judicial boards” however, a review of Titles 2 and 37 indicates that many of the boards *functionally and substantively* qualify as “quasi-judicial”, but do not have such designation in either part of the Code. As a matter of law, a board’s status should be clarified as a board’s duties and obligations are further defined in case law by this designation. -- **Mona Jamison**

- A comprehensive review of all board statutes should be undertaken. (Examples: Is the designation of some boards as quasi-judicial superfluous, given that all boards perform quasi-judicial functions? Do all specific board statutes conform to the provisions contained in Title 37, section 1?)

Boards should participate in all decisions to revise or amend statutes that will affect board operations. Department "housekeeping" bills should be reviewed by and approved by constituent boards prior to their presentation to the legislature.

Boards should be free to present their views on pending legislation without permissions from the Department. The requirement that boards seek Department approval to comment on legislation is contrary to 2-15-121, MCA, which states the Department may not interfere with or control board actions.

Boards should be free to propose legislation and find sponsors without permission from the Department. Again, it is contrary to 2-15-121, MCA, for the Department to determine a board's legislative agenda. - - **Lori Ballinger**

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Question B: How can membership composition be improved or revised to better address boards' public health, welfare, safety mandate? -- ratio of specialists on multispecialization boards and number of public members?

- I witnessed a situation where the use of "floating members" would have been very effective in an adjudication situation. A dispute arose over whether a board member should have been recused. Although the board had other members, none was allotted to this purpose. I don't think the board needed more members. The composition appeared balanced. The allocation of an extra member is a case of possible conflict of interests seemed to be overlooked. A board with a small number of members, wisely used, saves time & money. -- **Pat Fournier, president, Montana Hearing Society**

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- Encourage consistency in number and composition from one board to another. This would make board administration more efficient. -- **Shelly Engler, chair, MT Board of Landscape Architects**

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- I think our Board, (Board of Landscape Architects) of two public and three professional members, provides just the right mix of viewpoints for thoughtful deliberations whenever that is required. -- **Kent Watson**

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- I have worked with 9-member boards and 5-member boards. In my opinion boards larger than 5 members do not work together as well. The State Electrical Board consists of an electrical contractor, two levels of licensed electricians and two public members. It is the public members who bring balance to the board. This board is functioning well as a team. One observation is that too many board members are from the larger cities in the state. Board members from the rural areas bring a more balanced approach and less job protectionism. -- **George Edwards**

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- "Montana Psychological Association (MPA) is monitoring the developments within this committee closely, and its membership is both concerned and interested about these matters. It is MPA's feeling that having a Licensing Board that is both aware of, and has a working knowledge of, the specialized ethics and practice of psychology best insures the public interest. Without this specialized

knowledge, we are concerned that a Board may not be able to protect the public when dealing with matters that are so private and sensitive. We want to assure that the Licensing Board that oversees Psychologists has a basis for reviewing the specialized nature of our discipline with appropriate ethical character, knowledge and expertise. Else, we fear grave harm may befall Citizens of Montana.

We would also suggested that the period for public comment, and even Board comment, be extended and expanded considering the critical nature of these matters to the Citizens of Montana." -- **Michael Butz, for the Montana Psychological Association**

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- Specialists bring expertise to the boards, public members bring public perspective and common sense. It assists a board in implementing its duties to have at least one public member. Public members who by definition do not possess the education, training or expertise of the speciality however, should not possess majority powers over the specialists. -- **Mona Jamison**

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- The membership of the Board of Nursing is appropriately staff (sic) with all levels of nursing practice: LPN, RN, APRN, and Education. In addition, there is adequate public representation to offer the membership the patient's perspective. The board staff, although fractionated into sub-departments, is intended to serve the nearly 16,000 licensees in our state. The board staff requires a structure of communication and cohesiveness to adequately support the work of the board. - **Susan Raph, member of the Board of Nursing, nursing educator**

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- From our perspective, this question folds another topic into it: combining boards.
- Public members are a vital part of any board. Every board should have at least 2, if not more, public members.
- If there is a screen board/arbitration board/umbrella board whose purpose is to mediate cross-jurisdictional issues, that board should be made up of solely public members.
- The needs of the board should determine the numbers on the board, but it could be based on a standardized model.
- A board member's term is standardized to 4 years, with all board members' terms staggered. No Term Limits. -- **Business League for Massage Therapy and Bodywork**

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- The Montana Dental Hygienists' Association requests that the SJR 35 board study group consider legislation to formalize the dental hygiene committee of the Board of Dentistry and give this committee specific authority over the regulation of dental hygiene. Although there is a dental hygiene committee of the Board of Dentistry, no parameterse of responsibility or authority exist, rendering the group ineffective. -- **Judy Harbrecht and Anna Marie Witham - Montana Dental Hygienists' Association**

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- All boards should increase the number of public members. The mandate of each board is to protect public health and safety. An increase in the number of public members would alleviate the perception that boards are engaged in "turf" protection. Also, public members bring the perspective of consumers of the services provided by licensees. All boards should be required to have at least one public member on the screening panel to advocate from the consumer's perspective.

Board composition should reflect the ratio of licensees in each licensed category. (Cites examples)

All boards should limit the number of terms or years any one individual can serve.

Professional organizations should not be allowed to vet or propose board members.

Larger boards should consider mandating geographical diversity by designating districts from which board members can be drawn. Many rural areas are underrepresented on boards.

Licensees on boards should be actively engaged in the practice of the profession or occupation or be currently teaching in the field.

The legislature should remove the boards from the Department and establish independent self-directed agencies under the Governor's Office. Several states use this model with success. (Suggestions of how to divide Health Care Bureau and Business and Occupations Bureau) -- **Lori Ballinger**

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- Rural areas are not represented in the make up of the boards. More public members are needed to discourage "turf wars" and board members personal bias towards others in the occupations/professions. -- **Submitter asked for anonymity**

Question C: Can changes be made to improve administrative attachment -- this section (2-15-121, MCA) affects staffing, budgeting, rule adoption, quasi-judicial and quasi-legislative functions as well as report submission and representation.

- A better understanding of what is in place will be beneficial. Define the relationship between and the roles of the board members and the department. Clarify the difference between the board and the department. Is there an agreement between the department and the professional board members to work together to improve and modify functions as needed. Improve the understanding of staff responsibilities by nondepartment persons, board members and licensees. Explain the role that the board has in determining the annual budget. What control does the board have over the expenses, operation methods and budgeting? Establish accounting and operational procedures that are consistent and do not change without serious review and consideration of the

anticipated impacts. Allow board participation in determining what information is useful and what format for reporting to the boards is most beneficial. Evaluate the application of methodologies across all boards and recognize and accommodate the differences in actual needs. -- **Jennie Meinershagen**

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- Yes. 2-15-121(1)(a) In order to be truly independent board members who are technical practitioners, not government employees, need to be better educated to governmental policies and procedures. As it is, department personnel understand how government works, therefore they have an upper hand to direct boards to what they think should be done. Board members, especially new ones, are easily over-dependent upon department personnel for direction.
- 2-15-121(2)(a) Have a way to determine whether some of the formulas and assumptions used for calculating costs of the board to the department are accurate. Have an agency outside the department check assumptions & formulas if there is a dispute. -- **Pat Fournier, president, Montana Hearing Society**

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- Suggest boards be encouraged/allowed to annually frame their budgetary needs (staffing, investigators, equipment, salaries, benefits, etc.) separate from the recharges required for shared staffing, etc. by the department so that biennial budgets and appropriation requests can be focused on the board's immediate needs, then fitted, as necessary into the department's budget. The purpose here is to control what at least one board has deemed unnecessary and uncontrolled recharges. This board does not argue with the need for recharges - all shared spaces, staffing, benefits, etc., are required for adequate handling of multiple tasks within the division administering to the boards. However, from my experience, the board members have little or no control over how recharges will be calculated, nor any say in efficiency measures they may request to keep their overall budgets/appropriations - and, consequently, recharges - under control. (Cites example from Dept. of Commerce days) ... Still, the specter of a department deciding what measures, administrative or otherwise, are "good" for the boards - at the boards expense - is a decision that should be shared by all boards, especially since board (and department) income rests solely on the fees paid by the licensees, the board's customers.

Interestingly, recharges have long been determined as a percentage of a board's appropriation, not budget, a fiscal feature never voted on by the board. Only recently have recharges been scaled to FTE's working for a board, and most recently scaled to actual shared work-time and workspace. Each successive calculation technique is an improvement, though an appropriate method has yet to be developed by both the department and the board(s) in union.

Given that the average licensee's contact with his or her board is only at year's end licensing time, these "customers" wonder why it costs more and more to do what they consider the only aspect they deem necessary, possibly even a necessary evil. I am

trying to find a way, via annual board budget reviews, and real, hands-on cooperation with the department, to give the board a way to satisfy these licensees, their customers.

Referencing quasi-judicial role - The current setup of screening panels is certainly aiding even-handed decision-making. At the same time, the internal check-and-balance effect of the adjudication panel's ability to deny a (sic) agreed-upon stipulation (a.k.a. plea bargain) can be improved in practice, if not spirit.

Often, the board prosecuting attorney (not to be confused with the board counsel who advises the board on a day-to-day basis) has applied his or her own standards, typically based on their sense of whether the charge and discipline combination is worthy of successful appeal or not, to determine sufficient punishment for a particular defendant's action. Nonetheless, when the board members sitting on the adjudication panel either request leniency or seek increased punishment, these panel members frequently face counsel's arguments against their decision either way.

(see suggestions for improvements in pdf file posted to website) -- **Robin Cunningham**

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- As a member of the Board of Landscape Architects I have observed a critical failure in defining the role of a board in directing budget restraints and defining and prioritizing services. It seems the department "budgets" by establishing what it will spend and then raising revenue to meet expenses, rather than setting expenses to fit within restrictions of the revenue source. Our board has had no success in restricting type and amount of services in order to bring expenses into line with revenue. We also need a method of transitioning from one accounting method to another. ... I would suggest that boards representing smaller number of professionals or professions with fewer judiciary actions might not need the same level of services, staff numbers, legal advisors, etc. as larger boards. - - **Shelly Engler, chair, MT Board of Landscape Architects**

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- This seems to be an area where an improved clarification of what is an administrative duty would greatly help both the boards and the department. - **George Edwards**

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- It is also currently the role of the legislature to carefully examine bills for appropriate administrative attachment of boards to executive departments. I understand that it is your intention to examine the criteria for the appointment of executive staff. I do not see any mention in the description of your study of specifically examining the appropriate administrative attachment of each board to its state agency, unless this is implied in question (2),(A). I believe that it is the responsibility of the legislature to review these issues, case by case, and clarify administrative attachment in the legislation that creates the board. Finally, I would like to say that there will always be "turf battles" between associations, boards and professions as long as economic spheres of influence overlap. I do not believe that it is the role of the legislature to micromanage every conflict of interest or disagreement. Once they have been established, boards are attached to

agencies under the auspices of the executive branch. Disagreements will happen and most can and should be resolved through direct negotiation between the affected parties. Taking other than the most grave disagreements to the legislature impedes any negotiating process that might be employed to resolve issues. With this practice in place, even minor issues will be sent to the legislature for the political resolution of what is actually an executive responsibility. Thank you for your consideration of my comments on these issues. -- **Rep Paul Clark, HD13**

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- The impact of the Department's decision to reorganize the Business Standards Division on the board's ability to meet the objective protecting public health and safety should be examined. Again, the analysis should be: "Has the reorganization furthered the board's objectives and goals?" Cites concerns about reorganization:
 - Program managers with expertise and overall knowledge of board operations have been eliminated. The result is that no one has a global view of board operations and unqualified persons have been licensed.
 - Compliance personnel are not required to be conversant in the statutes and rules of all the boards they serve. As a result, board members are not always provided with all the information they need to make informed decisions.
 - Boards are told that the reorganization was mandated by the 2004 legislative audit. In fact, the audit clearly states that the reorganization was underway and that the Department felt it would result in improved services. This has not proved to be the case.
 - The reorganization has resulted in a loss of financial accountability. Boards have little or no input into the budgeting process and are being asked to increase fees without being provided with the information necessary to determine if a fee increase is justified. Board members asking for itemizations of the funds expended by the Department are not been (sic) provided with that information.
 - Reorganization has increased the number of management positions without any resulting benefits to the boards. (Cites examples)

2-15-121, MCA, states the Department may not interfere with or control the actions of the boards. However, the Department has violated this mandate in many instances. (Cites examples)

Boards, as the Department customers, should set the policies and the Department should implement those policies. When a board makes a decision, the Department should not be allowed to override that decision or refuse to implement the decision. (Cites examples) - **Lori Ballinger**

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- Given that our profession has required practically no enforcement action by our Board, (Board of Landscape Architects) it is unclear why as many six state personnel (April 2005 Board Meeting) are required to attend a board meeting. Why, for example, must a staff attorney be present for all meetings? It would seem more fiscally responsible to have one on-call nearby, should the need arise. Having both presided over and attended many meetings in my career, I see no reason why one staff person, taking notes as needed with a tape recorder running, would not be sufficient for nearly all meetings.

The other particularly troubling issue is the manner by which the staff provides budget information. There needs to be far more transparency with regard to how the budgets are prepared and specifically what some of the various items are. As I stated in my August 30th letter to Keith Kelly, “. . .these documents (provided by staff) are only minimally helpful, since they use codes, abbreviations and methodology that are neither understood by nor adequately explained to the licensees, Board members or public. Even when asked, we have received only partial explanations, which have only left us further confused." -- **Kent Watson**

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- We have read the pertinent sections of MCA and have a few questions/comments:
- How can the board function independently if it is budgeted through the department (who controls the purse strings, controls the board?)
- Can the department represent the board in communications with the governor when the board and department have differences of opinion? What safeguards are there to ensure that the communications are accurate?
- Since some boards have executive staff (director or secretary), it might be helpful to develop guidelines for when executive staff is hired, and guidelines for agency/board input or control over that hiring. Whether that is done legislatively or departmentally should be up to those who have a stake in the process. At this time, the BLMTB doesn't.
- Rule adoption: any rules pertaining to the regulation of the practice itself and are unique to the board should be developed by the board. Other kinds of rules that are common to all (renewals, fees, etc.) could be standardized by the department with board input or exceptions made with compelling reasons.
- In the beginning, particularly when establishing a new board, and particularly in the instance of massage therapy, most licensing should be handled by the board until guidelines are set up. -- **Business League for Massage Therapy and Bodywork**

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- Section 2-15-121, MCA, and its implementation can not be analyzed without reviewing the purposes behind the executive reorganization of 1971 and Title 2, Chapter 15, MCA generally. One of the primary purposes of executive reorganization was to eliminate the large number of boards which were proliferating, were unorganized, and were unaccountable.

In implementing Article VI, section 7, of the 1971 Montana Constitution, Section

2-15-101(1), MCA, requires no more than 20 state agencies be created, among other things to , “strengthen the executive capacity to administer effectively and efficiently at all levels.” The existence of boards, which under section 2-15-121, MCA, exercise their functions independently of the department and without approval or control of the department, diminishes the efficiencies which have been gained under executive reorganization and also diminish the power of the executive to administer the legislature’s statutes effectively. Boards can and do run amok. They are accountable to no one, but the courts. For the most part, removal of a board member is “for cause” only. Under Article VI, Section 4, of the Montana Constitution, it clearly states that the “executive power is vested in the Governor”. Board’s diminish executive authority.

The department to which a board is attached should have some type of management authority over the board. -- **Mona Jamison**

- An agency allocated to a department for administrative purposes only in this chapter *shall*: 2-15-121 (a) exercise its quasi-judicial, quasi-legislative, licensing, and policymaking functions independently of the department and without approval or control of the department . . . This section speaks for itself. As it is now, the department is striving to take control of the administratively attached boards. In essence, the department is attempting to regulate the boards in order to prevent the boards from regulating the occupations/professions. For example [one of many], in some cases, the department is denying board members access to various training and education seminars, even though this travel is approved by the board and within their budgets.

Licensing is not the principal function of the boards, regulating the profession is the statutory mandate. As such, the department should focus on providing boards with the administrative, legal, and clerical support as requested by the boards, not as determined by the department. -- **Submitter asked for anonymity**