



Economic Affairs Interim Committee

62nd Montana Legislature

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Draft for HB 525 Semifinal Report

Proposed Title: *Whose Interests Are At Stake?*
Public Boards for Private Means?
Or
Public Boards for Public Health, Safety, and Welfare?

Sections: Introduction
1) Overview of HB 525 requirements -- The Narrow Sunset Review vs. Board Problems.
2) Private Payment (Board Fees) for Public Health, Safety, Welfare along with concerns about boards' indirect costs and board fees. Does private payment for regulation make sense or is it a trade-off for self-regulation?
3) Concerns about boards as indicated through the EAIC Survey or Committee meetings
4) Other areas for improvement.

Summary to Date: A) Actions by EAIC
B) Recommended options

Appendices: Responses to questions posed for HB 525 reviews by all reviewed boards

Introduction

Implementation of House Bill No. 525, passed in the 2011 legislative session, resulted in a 2011-2012 review by the Economic Affairs Interim Committee of 16 of the 33 professional and occupational licensing boards. The remaining boards are to be reviewed, as indicated in HB 525, in the 2013-2014 interim. The legislation directed that the oldest boards be reviewed first.

The title of this report, albeit cynical, also implies that licensing boards can have many purposes. For the government to be involved, there generally is a perceived need to protect public health, welfare, or safety through restrictions on professions and occupations. But boards also try to protect not only the public but

licensees from competitors who do not agree to follow the rules, whether those rules require licensing itself or professional conduct.

HB 525 was intended to provide a legislative examination of boards to determine if they were serving a public interest and not just a private interest. The review also provided an opportunity for licensees and others to comment on problems that they saw with boards as well as to highlight board benefits.

In the 2011-2012 interim, as the Economic Affairs Interim Committee conducted the first half of its HB 525 reviews of licensing boards, only a few boards had "call-backs" to address concerns. Recurring complaints by two of the three professions on the Board of Dentistry ran through much of the interim. The financial troubles of the Board of Hearing Aid Dispensers brought that board back to the Committee more than once to determine how to deal with the loss of audiologists as licensees and the internal legal costs generated by frequent complaints against just a few of the dispenser licensees. Complaints regarding other boards generally involved competition concerns.

Some boards had few complaints and occasionally drew generous praise as many licensees (and others) took the time to answer an internet-based survey posted by the Economic Affairs Committee, with links from the licensing boards' websites. The Economic Affairs Committee appreciated the time spent by board members to address HB 525 questions and by concerned licensees and others involved with boards.

I. Overview of HB 525 requirements -- The Narrow Sunset Review vs. Board Problems.

The HB 525 review asked for a determination of whether a licensing board met requirements to protect public health and safety. The work plan for the HB 525 reviews also incorporated elements of SB 165, which was enacted in the 2011 session and sought to protect against enforcement of board standards or rules in a way that discriminates against licensees or that restrains trade or competition except when necessary to protect public health and safety.

If a board did not meet the criteria in Table 1, then the Economic Affairs Interim Committee (the Committee) was to determine whether to recommend to the full legislature that the board be terminated. The board's ability to remain solvent also was to be considered as part of the recommendation¹ and each board review included data on the board's revenues and

¹That language reads: 37-1-142(3) After a presentation and public comment during the review before the interim committee, the interim committee shall report to the legislature convening in the next odd-numbered year which boards, if any, fail to meet a majority of the criteria in subsection (2) and may recommend termination. The recommendation also must include information from the department regarding the board's ability to remain solvent or achieve fiscal solvency as provided in 37-1-101.

expenditures in the most recently available fiscal year.

Table 1: HB 525 criteria to determine if board meets a public purpose (37-1-142(2), MCA)

1. Does the unregulated practice of the occupation or profession create a direct, immediate hazard to the public health, safety, or welfare?
2. Is the scope of practice readily identifiable and distinguishable from the scope of practice of other professions and occupations?
3. Does the occupation or profession require a specialized skill or training for which nationally recognized standards of education and training exist?
4. Are qualifications for licensure justified?
5. Does licensure provide a public benefit?
6. Does licensure significantly increase the cost of service to the public?
7. Is there public support for licensure?

The Committee voted to recommend retention of all 16 of the licensing boards reviewed in 2011-2012. The overall support for retaining these licensing boards did not mean that the Committee endorsed all the operations of the boards, and in some cases committee members noted that licensing boards needed to work to address concerns of their licensees. Board problems presented before the Committee are addressed in Section III.

II) Private Payment (Board Fees) for Public Health, Safety, Welfare - does it make sense or is it a trade-off to allow self-regulation?

A frequently heard complaint among licensees and board members is that they have little control over board costs if they want to minimize these costs. Under 37-1-134, a board must set fees that are commensurate with costs (not set costs commensurate with fees). A budget brief prepared by Quinn Holzer, an analyst with the Legislative Fiscal Division, for the June 2011 Committee meeting described board budgets as "driven by two primary factors: 1) the number of licensees associated with the Board, and 2) the costs associated with the Board's administration."²

Administrative costs consist of:

- direct operating expenses of the boards;
- direct hours for staff directly working on a board's activities;
- a combination of indirect hours for activities not specifically attributable to a single board and for activities of the Business Standards Division's bureau chiefs and administration-level

²The memo on board costs is available at:
<http://leg.mt.gov/content/Committees/Interim/2011-2012/Economic-Affairs/Meeting-Documents/June-2011/board-fee-process.pdf>.

positions (the costs for these indirect hours are assigned based on the total number of direct hours divided by the direct hours spent on a board. For example, if there were 10 boards and 100 hours spent on all boards, the percent charged to each board would not necessarily be 10% but rather a percentage based on the direct hours spent on each board.)

- indirect charges, which includes most legal work and a proportional charge for DLI's Central Services and the Commissioner's Office, plus phone lines, rent, and information technology services provided by the Department of Administration and information technology not directly associated with the Business Standards Division. The indirect charges all have similar allocations spread across all boards, programs, and other DLI divisions.

While all the boards are attached for "administrative purposes" to DLI, as provided in 2-15-121, MCA, the result of statutory changes over the years has been to assign duties to the department for which boards must pay. The department tells boards what these administrative costs are and attempts to treat all boards equally in terms of staffing and cost-sharing. For example, all boards have at least two attorneys, with one as board counsel and another who acts as a prosecuting attorney. A board may or may not need the prosecuting attorney (depending on the amount of complaints filed), but the department assigns a prosecuting attorney to make sure there is no conflict of interest for the board counsel. One attorney on staff may be a counsel for several boards but serve as a prosecuting attorney for two other boards.

The number of a board's licensees drive up costs for licensing and, depending on statutory licensing requirements, for compliance costs. Board decisions can increase some of the costs based on budgetary authority. For large boards, such as the Board of Nursing with more than 18,000 licensees, annual budgets may run close to \$1 million. For smaller boards with few complaints, like the Board of Optometry with fewer than 300 licensees, the annual budget might run less than \$27,000. For boards just starting up, DLI has estimated initial costs of \$40,000, which also is a median estimate of board costs.

Costs that boards can determine themselves, for example, may include how many meetings to have by phone, whether to meet at locations other than Helena (which increases staff costs for attending), and whether to pay for board members to attend conferences around the country (or even outside the country). Board members are appointed by the governor. The current governor's website (http://governor.mt.gov/boards_councils/default.asp) has an application for interested persons to send in their name. Public members also may be appointed.

During a 2005-2006 examination of licensing boards under Senate Joint Resolution No. 35, a question was asked: if a licensing board truly is needed for public health, safety, and welfare then should the licensees pay for that board or should the state? The current process in which the licensees themselves pay for the board, determine costs beyond the administrative costs, and regulate their competitors is part of an agreement by which, for self-regulation, the licensees pay the costs themselves.

In terms of alternative approaches to licensing boards, most of the board members who responded to questions asked by the Committee (Does the profession or occupation have one or more associations that could provide oversight without the need for a licensing board? and Why not use the association as the oversight body?) said that associations for the most part are there to lobby, boost the profession, and not necessarily to monitor bad actors. In response to another question (What are the benefits of a board being part of the licensing, and discipline process, instead of the department handling one or both?) most responses indicated that the knowledge of a profession or occupation was important to knowing whether someone had transgressed ethical or professional standards. If there were no boards, professionals would need to be brought in to help adjudicate, probably at higher cost for missing a day of work.

As one way of smoothing the department's administrative role, the Business Standards Division spent much of the 2011-2012 biennium providing a plan to reorganize administrative functions. This was intended to flatten out the previous silos in which each board may have had staff carrying out functions identical to functions handled by other boards. Although some boards voiced concerns that they were losing staff with specialized knowledge, the department pointed out that the revised structure would provide cross-training (to avoid stalled licensing or investigations if the assigned personnel called in sick) while retaining the specialized knowledge and encouraging greater sharing with other staff members.

The reorganization also resulted in three bureau chiefs instead of two with a new bureau chief replacing a position that formerly had been a deputy administrator. The department-drafted Figures 1 and 2 indicate the current functional organization, which in part was suggested by a 2003-2004 legislative audit. Staffing levels and assignments may change, the department noted, as the boards gain experience under the revised plan.

III) Concerns about boards as indicated through the EAIC Survey or Committee meetings

Board problems heard at the Committee meetings

- Professions under the thumb of other professions on the same board³
Denturists and dental hygienists told the Committee that they felt their professions were ignored by the dentists on the Board of Dentistry, who have 5 seats on the 10-member board with dental hygienists having 2 seats, public members having 2 seats, and denturists represented by one board member. Efforts to address the Board of Dentistry concerns became somewhat confused by the HB 525 process, which ultimately involved a vote whether to recommend to the full legislature to keep the board or to terminate it (not change it). Initially, Sen. Joe Balyeat asked at the Aug. 24, 2012, Committee meeting for a bill draft

³This concern included addressing issues raised in Senate Bill No. 165, enacted in the 2011 session, which included a prohibition on discrimination among licensees and restraint of trade by licensees over a trade or profession that is not licensed.

that would separate the Board of Dentistry into one dealing only with dentists and a second bill that provided for representation of dental hygienists and denturists. That bill draft, LCdent,⁴ was not voted on as a committee bill. It was intended, in part, to stimulate discussion about separating into two boards. Instead, at a second review of Board of Dentistry concerns at the Jan. 20, 2012, Committee meeting there was a discussion regarding proposals presented by the Board of Dentistry to have two subcommittees, one of dental hygienists and one of denturists. The subgroups and their associations both supported an idea by which a subcommittee's recommendation for their respective profession would become the standard unless overturned by a supermajority of the board. However, the Board of Dentistry itself recommended only subcommittees whose recommendations would be subject to a regular determination by the full board. The ensuing committee action involved a motion to endorse the Board of Dentistry as is, followed by a failed substitute motion to endorse the supermajority subcommittee approach. The Committee ultimately endorsed keeping the Board of Dentistry as is, for the purposes of the HB 525 review. However, Committee members asked the Board of Dentistry to continue to work with the dental hygienists and denturists. The Board of Dentistry chairman, Dr. Dale Chamberlain, provided a report at the Committee's last meeting.

- Crematory operators, some funeral directors, and a member of the public complained about how the Board of Funeral Service handled complaints. The Department of Labor and Industry has considered a bill draft for the 2013 session to generally revise Board of Funeral Service statutes but this is not yet on the list of governor-approved proposals.
- Hearing aid dispensers raised concerns about their fees more than doubling, in part because legislation in 2011 eliminated the need for roughly 30 audiologists to be doubly licensed as hearing aid dispensers. The remaining 70 or so licensees had to meet high legal fees that board members attributed to hearings generated by complaints against mostly the same few licensees. One proposal investigated by the Committee was to ask the Attorney General's Office of Consumer Protection how much help that office could be in pursuing violations that currently are brought before a screening panel and potentially adjudicated by the Board of Hearing Aid Dispensers. These tend to be consumer complaints regarding a hearing aid dispenser's failure to make good, as provided by law, on returned hearing aids.
- Plumbers and electricians told the Committee that they were frustrated that fines levied against unlicensed practitioners went into the general fund instead of to the respective boards, which could have used the fines to offset the costs of adjudication panels that heard the unlicensed practice complaints. Their comment was that the good practitioners were having to pay through their licensing fees for the cost of investigating unlicensed practitioners

⁴See the draft at: <http://leg.mt.gov/content/Committees/Interim/2011-2012/Economic-Affairs/Assigned-Studies/HB525/LCdentBart.pdf>

attempting to avoid licensure fees. The Department of Labor and Industry has proposed an agency bill that would allow for enforcement of unlicensed practice for not only the Board of Plumbing and the Electrical Board, but the Board of Realty Regulation as well.

- Social workers and professional counselors--among other licensees and members of the general public who complained about licensees--raised concerns about their board's investigation, screening, and adjudication process, which they said did not give them an opportunity to address the complaints.
- Conflicts of interest in screening panels. Boards generally have different board members sit on the screening panel to determine if a complaint is worth sending before an adjudication panel of peers for censure of some type. Small boards may have a board member who is the actual subject of the complaint, which is a situation described by one member of the public who complained about a funeral director who is on the Board of Funeral Service.

Board problems aired through the survey process or otherwise fielded by the Committee

- **Lack of due process in screening and adjudication**

Licensing boards often are considered to provide a process for constructive criticism, monitoring the profession and keeping the practitioners from a bad reputation caused by bad actors in their midst. Sometimes that process also is considered a cheaper alternative than going to court to protect the public health, safety, and welfare -- particularly on the part of the accused practitioner. However, if the screening panels or adjudication panels of the licensing board do not display neutrality and an accused practitioner feels that the screening or adjudication was unfair, the process ends up adding a step to a costly litigation process rather than preventing litigation. According to department officials, the screening process is not intended to be a hearing with both sides given equal treatment; rather the process is designed to filter out serious complaints from those that do not have a basis in law, which is the only basis on which the board can take action.

- **Lack of enforcement**

This complaint surfaced from many licensees. The problem is not only of licensure but of regulation. One alarm installer said he could operate outside the bounds of licensure until someone "tattled" on him because there are no inspectors to determine if he has done the installation correctly and no way for anyone to know whether he is working unless there are required permits or inspectors.

This complaint was raised not only by licensees but by those who otherwise might engage in unlicensed practice. If a licensing board does not have anything more than moral suasion and the threat of an injunction that may or may not be carried out, then what is the purpose of being licensed if a person does not need a license for insurance or other reasons?

- **Unclear recognition of reciprocity, particularly of health care professionals licensed in other states who still must fill out complete forms in Montana for licensure**

As voiced to the Select Committee on Efficiency in Government, there was a suggestion to allow a broad policy of reciprocity to recognize health care professionals who are licensed in neighboring states. Health care representatives have suggested that Montana health care licensing boards should recognize licenses issued in other states and allow those licensed professionals to practice in Montana without obtaining a license from a Montana licensing board. This change would require the drafting of legislation.

Stakeholders say reciprocity would allow Montana to better compete with other states in hiring health care professionals, reduce delays in hiring, and reduce administrative hurdles for health care facilities.⁵ Existing law (37-1-304, MCA) provides for reciprocity but in a permissive manner.

37-1-304. Licensure of out-of-state applicants -- reciprocity. (1) A board may issue a license to practice without examination to a person licensed in another state if the board determines that:

- (a) the other state's license standards at the time of application to this state are substantially equivalent to or greater than the standards in this state; and
- (b) there is no reason to deny the license under the laws of this state governing the profession or occupation.

(2) The license may be issued if the applicant affirms or states in the application that the applicant has requested verification from the state or states in which the person is licensed that the person is currently licensed and is not subject to pending charges or final disciplinary action for unprofessional conduct or impairment. If the board or its screening panel finds reasonable cause to believe that the applicant falsely affirmed or stated that the applicant has requested verification from the other state or states, the board may summarily suspend the license pending further action to discipline or revoke the license.

(3) This section does not prevent a board from entering into a reciprocity agreement with the licensing authority of another state or jurisdiction. The agreement may not permit out-of-state licensees to obtain a license by reciprocity within this state if the license applicant has not met standards that are substantially equivalent to or greater than the standards required in this state as determined by the board on a case-by-case basis.

The Committee took up this issue as related to the Board of Medical Examiners' licensing process and heard both in June 2012 and September 2012 from the stakeholders and members of the Board of Medical Examiners regarding rationale and processes.

- **A concern that all boards are treated the same by the division when not all problems are the same (uniformity vs. particularity).** (more information from the survey will be included here)

⁵<http://leg.mt.gov/content/Committees/Interim/2011-2012/Efficiency-in-Government/Topic-Areas/Medicaid/jan2012-nonmedicaid-ideas.pdf>

IV. Other Areas for Improvement

Table 2: Other Areas for Boards to Consider for Improved Operations

Concern	Discussion	Possible Solutions
1) Board meetings are recorded and when the minutes are approved by the board, the recorded minutes are destroyed, leaving no way to dispute the approved minutes.	Some members of the public have said that the approved minutes contain false information. But they have no way to prove this against the audio recording.	1) Require board recordings to be retained for 30 days after the board has approved the minutes. This would not require much storage. The state's record retention law calls for 3 years, unless otherwise provided.

Other???

Summary

The Committee has recommended retaining all licensing boards reviewed in the 2011-2012 interim. These include the boards listed in Table 3.

Table 3: HB 525 Reviews of Licensing Boards Reviewed 2011-2012

Licensing Board	Review Date	Decision
Chiropractors	Aug. 24, 2011	continue as is
Dentistry	Aug. 23, 2011 Jan. 20, 2012	review again in January 2012 with proposal to split boards January vote: continue as is, endorse committees of denturists/dental hygienists; try to resolve problems among practitioners
Electrical	April 20, 2012	continue as is
Professional Engineers and Professional Land Surveyors	April 20, 2012	continue as is
Funeral Service	Oct. 6, 2011 Jan. 20, 2012	decision postponed to January 2012 January vote: continue as is
Hearing Aid Dispensers	Oct. 5, 2011	decision postponed to April 2012 April vote: continue as is
Medical Examiners	Oct. 6, 2011	continue as is
Nursing	Jan. 20, 2012	continue as is

Nursing Home Administrators	Oct. 6, 2011	continue as is
Optometry	Jan. 20, 2012	continue as is
Outfitters	Jan. 19, 2012	continue as is
Pharmacy	Aug. 23, 2011	continue as is
Plumbers	April 20, 2012	continue as is
Psychologists	June 12, 2012	continue as is
Public Accountants	Jan. 19, 2012	continue as is
Veterinary Medicine	Aug. 24, 2011	continue as is

Scheduled for reviews in 2013-2014 are the Boards of: Alternative Health Care, Architects and Landscape Architects, Athletic Trainers, Barbers and Cosmetologists, Clinical Laboratory Science Practitioners, Occupational Therapy Practice, Physical Therapy Examiners, Private Alternative Adolescent Residential or Outdoor Programs, Private Security, Radiologic Technologists, Real Estate Appraisers, Realty Regulation, Respiratory Care Practitioners, Sanitarians, Social Workers/Professional Counselors, Massage Therapists, and Speech Language Pathologists and Audiologists.

After the remaining boards are reviewed in the 2013-2014 interim, all the boards are to undergo another set of sunset reviews again lasting two interims. Complaints raised about the process used in this interim included:

- Requiring a representative of the board at each review. While the study plan indicated a representative of the profession or occupation and of the board needed to be at each review to explain how the board operates and issues of concern to the profession or occupation, in some cases boards decided to send more than one representative. This was a cost to the board and in many cases to the board member who had to give up income for the time spent traveling to and from the meeting and sometimes for a very brief presentation to the Committee.
- Limiting the time before the Committee to only those boards that have numerous complaints, critical survey responses, or an indication of fiscal problems. This still would require all boards to answer the questions distributed by the Committee but would limit both board members' time and Committee time to only boards with perceived problems.

Another option for the Committee to consider is whether to terminate the process for board review earlier than 2018. LCbrds is a short bill draft that would terminate the process after the review in 2013-2014 of the last set of boards.

Appendices not yet complete. Initial samples included.