

## Unlicensed Practice in Montana: What's Really Going On? – Testimony of Susan Good Giese 1/20/2012

Allow me to play the Red Queen in Alice in Wonderland: Verdict first; trial later. Or maybe more accurately, Answer first; discussion to follow.

So the short answer to the question of what's really going on out there with unlicensed practice is: no one really knows. There are several good reasons for this and today I will try to lay them out for you.

It is the policy of the State of Montana, as expressed by the Legislature that there be boards that regulate certain activities so that the health and safety of our citizens be assured.

The Department of Labor is the agency to which licensing boards are attached. The Boards exist for the sole purpose of ensuing public safety, which for the purposes of these boards, is exceptionally widely construed. Safety can be physical health and well-being, or financial well-being. In some sad cases “public health” serves as a fig leaf to cover naked greed and brute protectionism. We'll take a closer look at each of these as we proceed.

The Occupational and Business licensing boards regulate activities that do not directly human health. Examples would Architects, Certified Public Accountants, Electricians, Plumbers and Realtors. You can add in the boards that oversee boxing and beauty salons into the mix as well. You get the picture.

Healthcare licensing boards regulate those individuals who seek to diagnose, treat, heal, rehabilitate or remediate some physical or mental condition. Among those boards are Boards of Medical Examiners, Dentistry, Nursing, Speech Pathologists and Audiologists and Optometry, just to name a few.

It's important to remember, that, as a rule, the Boards themselves do not seek out non-licensees to “bust”. Board deal with complaints, specific and discrete issues that are filed with the Department of Labor. So far, so good. But one of the problems is that complaints can be filed anonymously. Some boards accept anonymous complaints, and others do not.

This is just my opinion, but the nature of the anonymous complaint seems contradictory to one of America's first rights: the ability of the accused to confront his accuser. Unlicensed practice can be divided into two distinct groups: those individuals who have let their licenses lapse, most likely due to an oversight or perhaps lack of money, if their renewal fees are really high, and those scofflaws who knowingly do not become licensed.

There are several reasons people don't become licensed to do their job. One is ignorance; they don't know their occupation is subject to licensure. Those cases get solved very quickly: one informed of the law they comply right away. Setting those folks aside, there are others who actively choose not to get licensed. Here are few reasons; they are unlikely to get caught. They quietly go about their business in hopes that they never get called out. Of those, some, if caught, will comply. Others fear that they may not be able to pass the competency or jurisprudence exams specified by the boards. Still others fear the background check about actions taken against their licenses in other states. They hope to cruise under the radar. Some don't have the means to fulfill the education requirements mandated by rule or statute. Some few don't get licensed because they believe it to be government intrusion. And there are those who figure that the cost of unlicensed practice is worth it if they get caught: the penalty is a

misdemeanor of not less than \$250 nor more than 1000. In some cases this is a small price to pay. While criminal charges are possible, they are highly unlikely.

To digress for a moment. It is important to take a good hard look at the screening panels whose membership comes from within the board. These 3 member panels are the “boots on the ground” that handle the the complaints. The accused is called before the panel. Most often they come, but not always. They may listen, but not speak unless in answer to a question posed by a member of the screening panel. It is nearly always an extremely frustrating process for the licensee. He most likely envisions a hearings process or debate, or to be given a chance to defend himself. Some chairmen allow for that; but certainly not all, and I daresay not most. The screening panel, especially in a case where the number of licensees is small may very well be in direct competition with the person against whom the complaint is filed. In these cases, conflicts of interest are nearly unavoidable.

Now, add to the screening panel mix the public members of the various boards. Clearly intended to be a no-nonsense, practical, unbiased presence, public members are on every board. But they are clearly outgunned and intimidated by the professionals on the boards. Our intention is not what is most likely the reality. Imagine a screening panel examining alleged wrong action by a neurosurgeon. How likely is even the most intelligent and dedicated layman going to vote against the experts on the panel?

Public members come to the boards most likely come to boards in one of two ways: while all are appointed by the governor, there are two main avenues to getting there. The first is that the governor, ANY governor, often appoints an individual who has played a part in their campaign. This is especially true if the appointee is from one our far flung communities. Getting to Helena several times a year is a real treat for some people. Over the years, I have had public board members tell me how much they love to shop and dine here and what a welcome break it is. One woman loved that she could fly here for the meetings.

Some members, both public and professional are suggested by the professional associations whose members they regulate. That can certainly be problematic.

I would not go so far as to suggest doing away with public members on boards, but I think you need to look at them realistically.

Back to the original question about unlicensed practice: So how much of a problem is it? Well, it depends. It depends on the boards themselves. Some are very aggressive. But all complaints are expensive. The average cost of an unlicensed complaint is \$1,300 if it is dismissed. If the board issues a Cease and Desist letter, the cost is \$1,400. When it gets really expensive is when an injunction is issued by the District Court, \$3,500 is the average, although they can much more expensive. Currently these costs are borne by the licensees of that profession or occupation.

Some boards, like Plumbers and Electricians have numerous complaints. So did the Board of Architects a few years back. The Board of Medical Examiners has the most from the Healthcare licensing side. But the trend is that complaints are on the rise: 109 in 2006 to 210 in 2010.

HB 73, tabled last year in the House Business committee sought to address the issue of unlicensed actors by allowing fees from their prosecution to go back to the board that sought the action.

Conversely, the bill provided that if the unlicensed individual prevailed, the board would have to pay all associated costs. This was the loser pay concept. HB 73 was drafted at the request of the Department of Labor. It would have provided for due process to those accused of acting without a license. Among the opponents' more potent arguments was the lopsided nature of screening panels.

So long as the Legislature continues to define scope of practice issues among the competing professions and occupations, these "turf battles" will challenge the elected officials. Some groups are extremely well funded; the medical association, the dentists, trade unions will exert their first amendment rights to heavily lobby you. Smaller, less organized entities will do their best to persuade you with logic, facts and personal experiences. Their opponents can be counted on to sneer something along the lines of "anecdotal evidence". One person's anecdote is another person's eyewitness account, depending on your point of view.

Tightening up the definitions in all these sections of code will be both tedious and contentious. I believe it is necessary, because the rules that the boards write must be rooted in the code. Rules that run roughshod over licensees are written in defiance of MCA 34-14-104 that clearly states that the state of Montana laws and rules be in concert with those of the Federal Trade Commission vis a vis unfair competition. Montana boards, ALL OF THEM would do well to heed that warning. Recent FTC rulings are at odds with at least the rules of some boards, making the board themselves violators of Montana law.

Balancing the public safety and health of Montanans with avoiding unfair competition is precarious, but necessary. Failure to attain this elusive goal puts Montana boards at odds with state and federal statutes. Not a comfortable place to be.