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Economic Affairs Interim Committee

RE: SB525 Study of Licensing Boards

Dear Chairman Berry, Members of the Committee and Staff,

Thank you for the opportunity to write concerning Occupational and Professional Licensing Board issues. Today I am writing in my capacity as the legislative liaison for the Montana Health Freedom Coalition. As a point of disclosure, I also sit on the Montana Board of Massage Therapy (MBMT) and am the delegate from Montana to attend the Federation of State Massage Therapy Boards. But I am not writing as a representative of the MBMT, nor are my viewpoints representative of that board. I only mention it, because I think that, having sat on both sides of the unlicensed practice issue that I might have a unique perspective. I've examined the issue as an unlicensed practitioner whose profession was attacked by a licensed one and as a consumer. And through participating in the formation of a state licensing board and newly licensed profession, I have seen the issue from that side too. But again, as I speak about boards throughout this letter, I am speaking only from my perspective and as a private citizen, and in no official capacity as a member of the MBMT.

The SB 525 Study Plan prepared by Pat Murdo is a great place to start this discussion.

**The report: “At what point is board action appropriate against what the board terms unlicensed practice? Are the terms for unlicensed practice clear and nondiscriminatory?”**

Response: These questions are at the crux of the issue. And that was precisely what we were asking the legislature to address when we introduced SB287 in 2009. First of all, the courts and Montana Law MCA 2-8-101(d) make it clear that boards may not regulate in a manner that adversely affects the competitive market. When we look at the language in the statute for unlicensed practice, while MCA 37-1-317 and 37-1-411 allow action against a person practicing a profession that requires a license, **they do not specifically address a situation where the person is professing to practice an unlicensed profession and is not holding themselves out to be practicing a licensed profession.**

And this is precisely where the confusion arises. When I was not licensed, I showed the statutory language to legislators and others, and they agreed with me that it doesn't specifically allow boards to interfere in the practice of a profession that *doesn't* require a license. But then I became a board member and when I look at that statutory language I now see the problem. **Boards have no authority to interpret and determine constitutional issues. All they can do is look at the narrow question: is this person doing what I do (is it in my scope)?** If the answer is yes, than the person is practicing the licensed profession and the board would be shirking its duty if it did not act. Sometimes boards don't act if the

person is licensed in another profession and is performing actions within that licensed profession, as it is thought that public safety issues are dealt with by the other board. Unlicensed alternative health care professions don't have that same protection. Since they aren't regulated, this overlap of practice is seen as a safety issue and stopped. But again, the courts have said that

- restraint of trade is unconstitutional,
- there truly has to be a safety issue involved and
- overlap of scope in and of itself is not always a safety issue.

This interim you've already seen how boards can overstep their boundaries (comments from the review of the Board of Dentistry concerning Board decisions being overturned in court) and I have at various legislative hearings brought up several cases where the Board of Medical Examiners has sent cease and desist orders to those using terms and language that are not "owned" by that board (the word "*medical*" and the word "*nutrition*").

**This issue will not be resolved until statutory language is introduced that clarifies the roles and boundaries of boards in unlicensed practice cases.**

In general, there are two kinds of unlicensed practice:

- those folks who are simply avoiding getting a license and really need one and
- those who are practicing a profession that is not licensed by the state being caught up in the unlicensed practice net.

Without question, boards can and should regulate those who are avoiding licensure and act to the full extent of the law. For those who are practicing a profession not licensed by the state and are caught up in the unlicensed practice net, we are asking you to please clarify the issue in statute.

**When clarifying the issue in statute, I would respectfully ask that such language:**

- Provide guidelines to boards when it is appropriate to act on a complaint against a person working in a profession that is not licensed or regulated by that board.
- Continue providing strong public protections so that bad actors are stopped, but good actors are not.
- Preserve court decisions maintaining the constitutional protections of an individual's right to make a living without fear of restraint of trade by the boards.
- Ensure the right of the public to seek out the health care of their choice (if ethically practicing practitioners are criminalized, forced underground or are afraid to practice, this limits consumer choice).
- Would ensure that boards are not allowed to act against persons from another profession that is not regulated by the state simply and solely because of an overlap of practice, unless there truly are safety issue involved (meaning that certain acts absolutely have to require a license in order to be performed)

And we would note that there is no compelling public interest to license additional alternative and complementary health care practices as these practices are of little or no risk to public safety; those practices that do present a risk to public safety are already licensed by the state.

We believe that we are asking for a fair and equitable solution that ensures public protection while at the same time protects the practitioner's right to practice.

**The report included language regarding who should pay: The licensees/board, the state (taxpayers) or the accused. This phrase caught my attention: "HB 73, which was tabled in the House Business and Labor Committee this year, included provisions to allow a board to charge someone up to \$5,000 for the cost of administrative proceedings if that person had been found "by a preponderance of the evidence" from a board or department proceeding to have engaged in unlicensed practice.""**

We lobbied against these types of bills because it specifically included health care and since the definition of medicine basically includes "doing anything to anybody," alternative health care providers would have been, in effect, shut down by this bill. We lobbied to include language that removed health care professions from the bill. What was concerning was this basic language of ""by a preponderance of the evidence" from a board or department proceeding to have engaged in unlicensed practice." For boards this language is very clear: it's telling them that if there is an overlap of practice, boards can stop it. From the perspective of the profession that is unlicensed (alternative health care), this language is akin to asking that fox to guard the henhouse and that the quasi-judicial entity judging them is certainly not a "jury of their peers" but of those who have an investment in guarding their own profession to the detriment of all others.

**Again, this issue will not be resolved until the legislature steps in.** I have tried personally to have discussions with various boards, professional associations, and department personnel on these issues. Both on SB287 and HB73. When a legitimate concern was raised, I addressed it, as I do believe in public safety and protection. I have tried to come at it with an open heart and a willingness to negotiate. What I've gotten instead is hysteria or a brick wall. The professional associations like things just the way they are, thank you very much.

**The report: "HB 73 and SB 165 indicate two sides of the dilemma of unlicensed practice, with the main question revolving around whether the licensed practice truly protects public health and safety."**

I think that this is the only spot where I would disagree with Ms. Murdo. It seems to simplify the issue too much. Boards do serve important functions, particularly to take those bad actors off the street, and to regulate licensees.

Instead, **the real question is how to define public health and safety.** Right now boards are required to define it as anything that intrudes upon their scope. If they don't, it creates a liability issue for the board

and the state. But that leaves no space for overlap of practice by professions not regulated by that board.

Again, I am respectfully asking that statute be clarified.

**Another issue: Boards must respond to Anonymous Unlicensed Practice Complaints:**

This is another issue that I would like to raise. Before I became a board member, I saw specifically how a licensed person used an anonymous unlicensed practice complaint in an attempt to put his unlicensed competition out of business. That is not right. Anonymous complaints of this nature only hide the motivations of the person filing the complaint, particularly when it comes to alternative health care providers performing an unlicensed profession in competition with a licensed professional. And given the climate that boards have to act, the accused, to keep their job, has little recourse except to enter a costly legal battle (remember, they can't get an impartial judge until well down the line) or submit to the board's cease and desist.

Then, I found out that boards do not have any choice in the matter. Boards do have the choice of not accepting other kinds of anonymous complaints but not when it comes to unlicensed practice complaints. This would require a revision of the statutes. **I would recommend that in addition to the clarifications in the statutes mentioned above, that you also leave it to the boards' discretion whether to accept anonymous complaints, or make it so that these types of complaints may not be anonymous.**

**Conclusion: (Finally!)**

There is confusion in the statutes regarding unlicensed practice which the "warring" parties will not be able to fix on their own, because while we are willing, the other parties are not willing to come to the table.

There are clear constitutional mandates that protect against restraint of trade and court decisions protecting the right of individuals performing unlicensed professions the right to practice.

All we're asking you to do is to tell that to the Boards and the licensed professions through changes in the statutes that clarify the guidelines and boundaries of boards in pursuing unlicensed practice complaints.

I am happy to work with the committee on these issues. I was only sorry that I am not able to present this letter to you in person (I'm out of town teaching). But if you have any questions or would like to speak about this issue with me, please contact me.

Thank you for your serious consideration of these issues.

Sincerely,



Deborah Kimmet  
Health Freedom Coalition Legislative Liaison