

# **BOARD ABCs**

Report to the Economic Affairs Interim Committee

**August 2005**

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**Published By**



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# Board ABCs

**A = Adoption of Policies and A Look Back**

**B = Board Issues**

**C = Criteria for Board Creation, Maintenance, and Dissolution**

## Summary

Senate Joint Resolution 35 provides an opportunity for legislators to review the purposes of regulation and the purposes of having boards. SJR 35 also allows a look at organizational structure and other issues related to boards to either affirm or revise the public policy objectives underlying current statutes. Finally, SJR 35 addresses issues related to creating new boards and looks at ways to improve policies to avoid cross-jurisdictional disputes or to dissolve boards that no longer meet public policy objectives.

Understanding the history surrounding boards may help to understand current practice and, perhaps, current policies. The following Board ABCs report is intended to provide necessary background for policy direction to be determined by the Economic Affairs Interim Committee as part of the SJR 35 study. Proposed policy choices are examples of policies that the Economic Affairs Interim Committee might want to examine in detail or dismiss as a way of narrowing the scope of the SJR 35 study.

## **A**doption of Policies and A Look Back

This section will intersperse policy questions and reviews of:

- the purposes of regulating professions and occupations;
- who is licensed;
- the definition of a board;
- the purposes of a board; and
- a history of boards in Montana.

### ***Why regulate?***

Determining whether practitioners of a profession or an occupation should be licensed<sup>1</sup> is the Legislature's job. The decision usually boils down to whether the protection of public health, safety, and welfare outweighs a laissez-faire approach of letting competition govern the market. Regulation can result in limiting competition both through costs incurred from regulation and from certain professions or occupations being able to use government as an aide in exercising control over similar professions or occupations. A 1990 report by the Federal Trade Commission found that

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<sup>1</sup>Licensing is one form of regulation. Some states distinguish between various forms. The 59th Legislature adopted uniform references to licensing, removing the term "certification", for example. Because of this change, licensing will be used here as the typical form of regulation.

"occupational licensing frequently increases prices and imposes substantial costs on consumers." <sup>2</sup> Various rationales support the idea of regulation. One scholarly view is that regulation is likely to occur if any of the following may be present: limited information about providers or services, transactions that are involuntary (such as emergency medical services), and unequal distribution of services.<sup>3</sup> A study of Minnesota's occupational regulation provided four criteria for determining whether regulation is needed.

- Whether the unregulated practice of an occupation may harm or endanger the health, safety, and welfare of citizens, and whether the potential for harm is recognizable and not remote;
- Whether the practice of an occupation requires specialized skill or training and whether the public needs and will benefit by assurances of initial and continuing occupational ability;
- Whether citizens are or may be effectively protected by other means; and
- Whether the overall cost effectiveness and economic impact would be positive.<sup>4</sup>

The Legislature through its policymaking role decides whether licensing and regulation provide, on balance, necessary benefits and protections for the public. "Buyer beware" is an opposite approach.

**Policy Choice**

- Does a profession or occupation need to be licensed for public safety or welfare? --
- Is consumer protection a sufficient reason for regulation?
- Does Montana want fixed criteria for determining whether to regulate professions or occupations?

***Who is licensed?***

The Department of Labor and Industry, which handles most licensing duties for boards in Montana, has more than 63,000 Montana licensees on various mailing lists. Some duplication exists. For example, both barbershops and the barber working in the shop must be licensed, even when this is a one-person operation. In some cases, a person may have more than one license. Even if all 63,000 licenses among Montanans were current and assigned to only one person, the licensees represent less than 15 percent of Montana's nonagricultural employment of approximately 422,200 people in July 2005.

To get a sense of the distribution among industries of these workers, see the following chart. Industries like real estate and health care are among the largest that have licensees. They receive their licenses from boards assigned to the Department of Labor and Industry. One of the largest groups of licensed employees are those in education, licensed by the Board of Education through the Office of Public Instruction. In deciding who is regulated and licensed, the Legislature also decides by whom--either a department or a board.

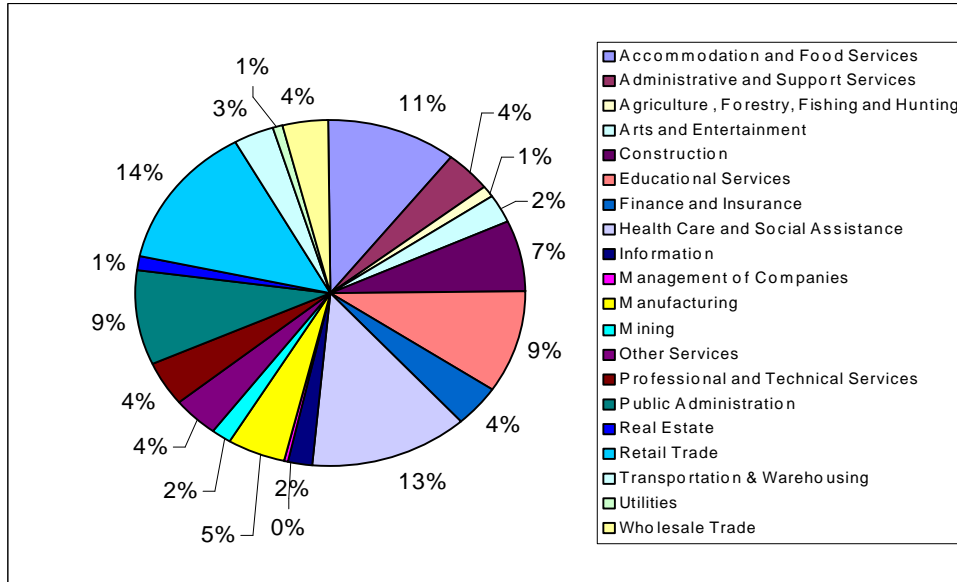
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<sup>2</sup>Carolyn Cox and Susan Foster, "The Costs and Benefits of Occupational Regulation", Bureau of Economics, Federal Trade Commission, October 1990, (Executive Summary, p. v).

<sup>3</sup>Allan Fels, et al., "Occupational Regulation", APEC Regulatory Reform Symposium, September 1998, p. 4.

<sup>4</sup>Office of the Legislative Auditor, State of Minnesota, "Occupational Regulation", February 1999, (Summary, pp. xiv and xv).

**Chart: Montana Employment by Industry Grouping, 2004, Department of Labor & Industry**



***What is a board?***

In deciding who is regulated, the Legislature also decides by whom--either a department or a board. Black's Law Dictionary defines a board as "a group of persons having managerial, supervisory, or advisory powers". The word "or" means that a board does not necessarily exercise all of the powers. In Montana, some boards are managerial and not advisory. For example, the Board of Livestock directs the Department of Livestock. The Board of Investments manages Montana's investment portfolio. The Coal Board and the Hard Rock Mining Impact Board supervise distribution of mining impact grants. These types of boards are not the focus of Senate Joint Resolution 35, which deals with professional and occupational licensing boards.

Of the professions and occupations licensed in Montana, the majority have licensing boards that set competency-to-practice requirements and exercise disciplinary authority for those professions or occupations that the Legislature has determined to be appropriate to regulate. In some cases the Legislature has assigned licensing and disciplinary duties to a department. Among the occupations without boards are those involving addiction counselors, athletic agents, elevator inspectors/contractors/mechanics, athletic agents, and fire prevention officers. Water treatment plant operators have an advisory council that reports to the Board of Environmental Review, under the Department of Environmental Quality. In other cases a board might be authorized but not assigned either licensure or discipline tasks. For example, in creating the Board of Private Alternative Adolescent Residential or Outdoor Programs the 59th Legislature exempted the board from disciplinary provisions that apply to most boards in Title 37, chapter 1, and instead provided for registration of relevant programs and examination of registration data to determine if additional regulation or standards are needed. The board will register but not license.

***What is the purpose of a board?***

The Department of Labor and Industry, to which most of Montana's professional and occupational licensing boards are administratively attached, provides new board members with a *Board Member Training Manual* compiled by the National Clearinghouse on Licensure, Enforcement and

Regulation (CLEAR). The booklet states:

Occupational licensing is an exercise of the state's inherent police power to protect the health, safety and welfare of its citizens. Generally accepted criteria for granting licensure include:

- (1) unqualified practice poses a serious risk to a consumer's life, health, safety or economic well-being;
- (2) such risks are likely to occur;
- (3) the public cannot accurately judge a practitioner's qualifications; and
- (4) benefits to the public clearly outweigh potential harmful effects of licensure (such as a decrease in the supply of practitioners).

Failure to meet these criteria, in general, indicates that licensure is not justified, or that some alternative form of regulation such as registration or certification may be appropriate.<sup>5</sup>

A further declaration of policy regarding the executive branch's use of departments references boards in 2-15-101(1), MCA, before giving the following statement of purpose in 2-15-101(2):

It is the public policy of this state and the purpose of this chapter to create a structure of the executive branch of state government which is responsive to the needs of the people of this state and sufficiently flexible to meet changing conditions; to strengthen the executive capacity to administer effectively and efficiently at all levels; to encourage greater public participation in state government; to effect the grouping of state agencies into a reasonable number of departments primarily according to function; to provide that the responsibility within the executive branch of state government for the implementation of programs and policies is clearly fixed and ascertainable; and to eliminate overlapping and duplication of effort with the executive branch of state government.

Key to this statement of policy and purpose are the considerations for:

- responsiveness to the needs of Montanans;
- flexibility to meet changing conditions;
- greater public participation;
- line of obvious authority; and
- clear-cut boundaries that avoid duplicated effort.

These purposes are similar to recommendations proposed in 1997 to the Pew Health Professions Commission for state regulation of healthcare workers built around the acronym "S.A.F.E.":

- *Standardized* where appropriate;
- *Accountable* to the public;
- *Flexible* to support optimal access to a safe and competent health care workforce; and
- *Effective* and *Efficient* in protecting and promoting the public's health, safety and welfare.<sup>6</sup>

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<sup>5</sup>Business Standards Division, Montana Department of Labor and Industry, *Montana Board Member Training Manual*, compiled by the National Clearinghouse on Licensure, Enforcement and Regulation (CLEAR), copyright in 1987 by the Council of State Governments. Manual updated 4/25/2005. Reference from p. 11.

<sup>6</sup>Christine Gagnola and Elizabeth Stone, *Considering the Future of Health Care Workforce Regulation*, San Francisco, CA: UCSF Center for the Health Professions (December 1997), p. 4.



These activities are not solely the realm of a board. The Pew Health Professions Commission noted the following weaknesses in a system of regulation by peers:

- dominance of boards by professionals, which can limit public accountability and promote self-interest in rulemaking;
- definitions of scopes of practice that may grant some licensed occupations a monopoly or otherwise restrict access by consumers to a range of practitioners;
- lack of reassessment of competencies after the initial granting of a license;
- standards that are state-based rather than national (this criteria diminishes for states that use national standards, as Montana does in many professions/occupations);
- limited information regarding a practitioner's competence;
- regulation of professions and occupations that is not integrated with other public or consumer protection systems.<sup>7</sup>

The benefits of a board are that it can involve members of the public and people who are knowledgeable about the occupation or profession and provide them with the tools to regulate and, perhaps, to offer services intended to benefit the profession. The governor typically appoints board members, which allows for policy cohesion as well as ways to involve political benefactors or constituents in government. A Legislature can decide whether a board of constituent and usually public members is more competent to license, discipline, and otherwise regulate than the department. A board of citizens also provides a reality check regarding what the regulated licensees are willing to pay for being regulated and what they expect to receive in return. Among the services that some boards provide are professional assistance to licensees who have had drug or alcohol problems.

**Policy Choice**

- If the Legislature considers licensing to be necessary, does the occupation need a board?
- Should a board handle both licensing and discipline instead of the department handling one or both?

**History in Montana**

*Board and Department Structure*

Prior to executive reorganization in the 1970s, state licensing boards operated independently of an administrative department. Some of them did so with part-time staff. Concerns about inefficiencies in the operations and inequities resulted in a 1970 Commission on Executive Reorganization recommending an overall administrative structure. In 1971 the Department of Professional and Occupational Licensing (DPOL) became the attached administrative structure for the professional and occupational licensing boards. Operations began August 1, 1972. In 1981, that department was renamed the Department of Commerce. In 2001, the legislature assigned most of the professional and licensing boards and programs to the Department of Labor and Industry, which separated the boards

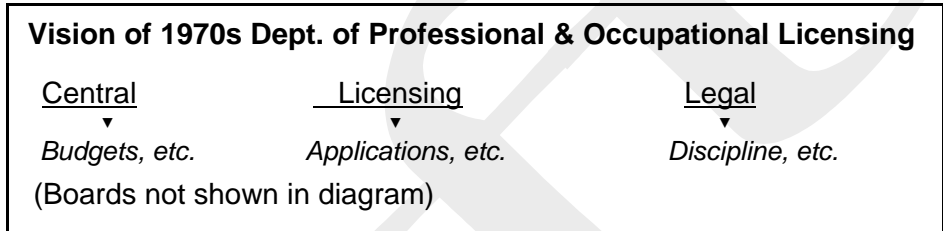
Pre-1970	▼Independent Boards
1971	▼Department of Professional and Occupational Licensing (DPOL)
1981	▼DPOL named Dept. of Commerce
2001	▼Boards transferred to Dept of Labor and Industry

<sup>7</sup>LJ Fioncchio, CM Dower, NT Blick, CM Gragnola and the Taskforce on Health Care Workforce Regulation, *Strengthening Consumer Protection: Priorities for Health Care Workforce Regulation*, San Francisco, CA: Pew Health Profession Commission (October 1998), p. 2.

into two bureaus under the Business Standards Division.

The view among some board watchers is that board reorganizations and restructurings run in cycles. DPOL reorganized in 1980 following a critical legislative audit. The effort to improve efficiencies included proposals to centralize legal services, licensing, and other administrative services. At that time DPOL handled 30 boards, most of which still exist. Others, like the Board of Massage Therapists, the Board of Osteopaths, and the Board of Podiatry Examiners, either no longer have boards (massage therapists) or have combined with other boards.

As indicated in a December 1980 report by the Legislative Audit Committee, the functional form envisioned for the DPOL was nothing like the actual form. Instead of the functional format of three units providing central services, licensing, and legal services, boards continued to operate somewhat



autonomously. The boards appeared to control staffing rather than the department coordinating staffing for

the boards.<sup>8</sup> The problem, according to the 1980 audit, stemmed from lack of departmental management. Even with two organizational changes since the 1980 audit, the structure still differs from that envisioned in the 1970s, although the Department of Labor and Industry reorganization in 2001 has some similarities.

In the wake of the 2001 reorganization, another legislative audit in 2004 reviewed operations and recommended that the department:

- improve its administrative efficiency;
- seek statutory authority to set uniform administrative service fees;
- establish procedures to ensure that the fees are commensurate with costs;
- improve excess cash balances where they exist;
- work with boards to assign routine licensing responsibility to the department;
- standardize license renewal procedures;
- increase consistency in the disciplinary process;
- develop model administrative rules related to professional assistance programs;
- develop standardized procedures for compliance inspections; and
- develop procedures to strengthen supervision of complaint investigations.<sup>9</sup>

The Department of Labor and Industry introduced legislation in the 2005 session addressing standardization related to fees and licensing responsibilities. Department staff have said that they anticipate introducing legislation in the 2007 session implementing other audit recommendations.

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<sup>8</sup>James Gillett, Report to the Legislature, Performance Audit of the Department of Professional and Occupational Licensing, December 1980, pp. 9-10.

<sup>9</sup>Legislative Audit Division, Report to the Legislature on Professional and Occupational Licensing, June 2004.

# Board Issues

Once the decision is made to have a board, the Legislature may consider what type of board, the role or meaning of administrative attachment, membership on the board, whether special staffing is needed, the approach to budgeting, and the role of boards in maintaining the profession's or occupation's integrity through disciplinary actions, continuing education, or other means.

## *Types of Boards*

- *Title vs. Practice Boards*

The boards under the SJR 35 study are professional and occupational licensing boards, which generally means that they have licensing, disciplinary, and regulatory functions for either a profession or an occupation. Depending on how the statutes phrase licensing requirements, Montana boards are either a "title" board, a "practice" board, or both. For example, as originally written and requested, HB 461, introduced in the 2005 session, would have licensed athletic trainers and given licensed athletic trainers the right to call themselves by a certain title. However, the legislation did not require that all athletic trainers be licensed. Similarly, the Board of Landscape Architects is a title board--only those who are licensed may be called landscape architects but landscape designers can do similar work without being licensed if they do not call themselves landscape architects. A title board regulates some members of the profession or occupation and highlights a person's credentials by indicating that a licensee has passed an exam, paid fees, and is willing to adhere to a code of conduct for a person licensed by a board. An argument for a title board is that a profession or an occupation with a title board retains a range of prices for services in the profession and offers some assurance to the public of standards without requiring everyone in the occupation or profession to pay higher fees. An argument against title boards is that the public's health, safety, or welfare is not necessarily protected by a title. Some boards are both "title" and "practice" boards. A board that requires a license in order to practice is a "practice" board and regulates the entire profession. A board that is both a title board and a practice board limits use of the title to those who are licensed and requires a license to practice. Professions and occupations in healthcare-related fields typically are both title and practice boards.

**Policy  
Choice**

- Does a "title" board that does not regulate an entire profession serve a public purpose?
- Should all "title" boards be "practice" boards that require licensing?

- *Quasi-judicial boards*

Certain boards are quasi-judicial, as provided for in 2-15-124, MCA, a statute that requires the qualifications and number of board members to be prescribed by law. Unless otherwise provided, at least one member has to be an attorney. The statute also specifies how the governor is to appoint the members and that membership is subject to Senate confirmation, except that a member may begin serving even before the Senate takes action. Other provisions require the governor to appoint the presiding officer of a quasi-judicial board, allows the governor to remove a member for cause, and spells out vacancy appointments, payment for services, and that a majority of membership constitutes a quorum. Various board statutes may include reference to 2-15-124, with no distinguishing criteria for that reference. A sampling of quasi-judicial boards is below and in Appendix I.

The following boards, including those that are not professional or occupational licensing boards, have a quasi-judicial designation. Professional/occupational licensing boards are in bold.

- **Board of Alternative Health Care** (except no attorney is required to be appointed)
- **Board of Clinical Laboratory Science Practitioners** (except no attorney is required to be appointed)
- Board of Environmental Review (attached to the Department of Environmental Quality)
- Hard Rock Mining Impact Board (except no attorney is required to be appointed -- attached to the Department of Commerce)
- Board of Housing (attached to the Department of Commerce)
- **Board of Respiratory Care Practitioners** (except no attorney is required to be appointed)
- Board of Oil and Gas Conservation (attached to Department of Natural Resources and Conservation)
- **Board of Social Work Examiners and Professional Counselors**
- Board of Milk Control (attached to Department of Livestock)
- Board of Investments (attached to the Department of Commerce)
- Board of Research and Commercialization Technology (attached to the Department of Commerce)

Authority exists under Title 37, chapter 1, MCA, for a licensing board "created under Title 2, chapter 15, that regulates a profession or occupation and that is administratively attached to the department as provided in 2-15-121" to hold hearings, issue subpoenas, and engage in other quasi-judicial activities without having the specific designation of 2-15-124, MCA. A designation of quasi-judicial for licensing boards raises questions about what purpose the designation has for the few licensing boards with that designation.

**Policy Choice**

- Are clear criteria needed for what constitutes a quasi-judicial board? The quasi-judicial function defined in 2-15-102, MCA, has aspects that do not apply to licensing boards and aspects that do.<sup>10</sup>
- Are quasi-judicial designations for licensing boards needed or should the general authority to subpoena, hold hearings, authorize depositions, investigate, convene screening panels, and other actions in 37-1-307, MCA, be sufficient?

***The role or meaning of administrative attachment***

Boards have different purposes. One statute applying to most boards, 2-15-121, MCA, regards administrative attachment to a department and states, in part, that an agency (including a board):

... allocated to a department for administrative purposes only in this chapter shall:

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<sup>10</sup>2-15-102(10) defines a "quasi-judicial function" as "an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies. The term includes but is not limited to the functions of:

- (a) interpreting, applying, and enforcing existing rules and laws;
- (b) granting or denying privileges, rights, or benefits;
- (c) issuing, suspending, or revoking licenses, permits, and certificates;
- (d) determining rights and interests of adverse parties;
- (e) evaluating and passing on facts;
- (f) awarding compensation;
- (g) fixing prices;
- (h) ordering action or abatement of actions;
- (i) adopting procedural rules;
- (j) holding hearings; and
- (k) any other act necessary to the performance of a quasi-judicial function.

- (a) exercise its quasi-judicial, quasi-legislative, licensing, and policymaking functions independently of the department and without approval or control of the department;
- (b) submit its budgetary requests through the department;
- (c) submit reports required of it by law or by the governor through the department.

The statute goes on to outline requirements for the department head and for the department, including the provision of staff for the agency unless otherwise provided in Title 2, chapter 15, MCA. As indicated under the budget section below, the control of a budget may result in more than administrative control. This statute was enacted in 1971, the same year boards were attached to the DPOL.

**Policy Choice**

- Does the administrative attachment language in 2-15-121, MCA, serve its intended purpose or does it create confusion for licensing boards with few managerial functions?
- Should the language be revised to reflect different board types?

**Board membership**

- *Size of boards and representation*

Boards currently vary in size from three members to 11 members. Some boards have representatives from more than one specialization, others from just one. One seven-member board has 226 licensees. Another seven-member board has 1,570 licensees.

**Policy Choice**

- Is there an optimum ratio between licensees and board size? Can this be predicted in advance?
- Should every member of a specialty licensed by a board have a representative on the board?
- Is there an optimum board size and does the size relate to something other than the number of licensees?

- *Public membership*

All licensing boards<sup>11</sup> except for the Board of Water Well Contractors have at least one public member. Some have more than one. Theoretically a public member of a board has at least two functions:

- 1) preventing the board from being self-serving by, for example, restricting the number of licensees to limit competition, and
- 2) representing the consumer or general public.

**Policy Choice**

- Are public members needed?
- Should the number of public members on a board be proportional to the number of members on the board?
- Should the role of public members be enhanced to protect public health and safety?

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<sup>11</sup>The Board of Athletics, which manages and controls semiprofessional wrestling or boxing contests, licenses participants and organizations involved in the contests but a board member may not have a conflict of interest as defined in 23-3-403, MCA.

- *Term length*

If a board is not a quasi-judicial board, which requires the governor to appoint members to staggered terms that coincide with the governor's term, then the length of term varies considerably among boards. Some boards are for 3 years; some are for 5 years. Some terms are staggered so that memberships do not all change at once. For some boards with members that represent more than one constituency, there is no reference to staggering the terms of members of that constituency so they are not all replaced at once. Some boards have no limits on the number of terms a member can serve. Statutes do not clearly indicate if a board member must be appointed for a full term, which would allow short-term appointments of persons who would not have to meet approval from the Senate, if approval is required. Some boards require or allow members whose term expires to continue to serve until a replacement is named.

**Policy Choice**

--Is there a reason to limit terms?

--Is there an optimum number of years for a board member's term?

--Should there be consistency among boards in either the length of terms or a limit on consecutive terms?

--Should there be a requirement for appointments to a full term? Is there a purpose to an expired term if the statute allows a member to serve until a replacement is named?

### **Staffing**

Staffing issues involve questions of autonomy and budgeting, both of which stem from the statute regarding administrative attachment and the history of boards that existed prior to the 2001 reorganization.

- *Questions of autonomy -- executive secretary/director*

For those boards with executive directors or executive secretaries, the role of the department in hiring sometimes has created tension. Evidence of that surfaced in the 2005 session when an amendment to House Bill 182, a bill introduced by the Department of Labor and Industry (DOLI) to help clarify department and board responsibilities in response to a 2004 legislative audit, was amended to address qualifications for the executive director of the Board of Nursing, qualifications that had been removed in 2001 at the same time that the Legislature moved the majority of boards from Commerce to Labor. Frustration with the DOLI hiring process for the Board of Nursing's executive director was evident in a hearing before the Senate Business, Labor, and Economic Affairs Committee.

The following boards, all formed before 1980, have statutory references for either an executive secretary or an executive director:

- Board of Medical Examiners (37-3-211, MCA) -- an executive secretary;
- Board of Nursing (37-8-204, MCA) -- an executive director;
- Board of Realty Regulation (37-51-209, MCA) -- an executive secretary; and
- Board of Outfitters (37-47-202, MCA) -- an executive director.

A statute for the Board of Pharmacy (37-7-104, MCA) provides criteria for an inspector "hired by the department."

**Policy Choice**

--Should the Legislature spell out criteria for when a board is entitled to an executive director or executive secretary?

--If no criteria are needed and the department is allowed to hire and assign staff on an as-needed basis as provided in Chapter 467, Laws of 2005, then are the statutes providing specifically for certain staffing still necessary?

- *Questions of autonomy -- all staffing*

The meaning of "administratively attached" is pivotal for staffing under the current structure because the day-to-day work of boards ends up being done by department personnel rather than personnel whose loyalty is perceived to be solely with one board. The difference between past policy and current policy is somewhat akin to the concept of "hired by the department, work for the board" and "hired by the department, work for the department." Not all boards seem comfortable with the idea that the citizen (essentially volunteer) board members are able to conduct their business without approval or control of the department--as specified in 2-15-121(1)(a), MCA--if department staff is handling all but the decisionmaking for program issues and all of the budgetary concerns--as provided in 2-15-121(2)(a) and (2)(b), MCA. According to Department of Labor and Industry personnel, other boards seem to have no concerns about the arrangement.

Changes instituted by the Department of Labor and Industry after gaining responsibility for most boards after the 2001 session have highlighted some of the staffing concerns by organizing staffing along functional lines rather than board-specific staffing. The reasons for the change are many but the primary ones are that staff can be more efficient if:

- (1) their time is spent on a limited number of functions for either one board or similar boards, and
- (2) the knowledge about board issues is held by more than one person instead of just one program manager, as happened in the past.

Another staffing issue relates to contracted services, either for investigators, hearings officers, or similar services for boards. Board fees pay for these services.

**Policy  
Choice**

--Does the "administratively attached" language of 2-15-121, MCA, create confusion regarding licensing boards in comparison with boards, such as the Board of Horseracing, with their own hiring function?

--Do statutes require sufficient investigations to protect the public health, safety, and welfare, given that the boards pay for the independent, contracted services?

***Budgeting***

Does the entity that controls the purse have ultimate control? As set forth in 2-15-121, MCA, which applies to most boards, the statute regarding administrative attachment says, in essence, that a board can exercise its licensing, investigative, and rulemaking functions "independently of the department and without approval or control of the department". The statute also makes budgeting the responsibility of the department to which the board is attached. The budgeted money comes from board fees and not the general fund. Because the department, according to both 2-15-121 and 37-1-101, MCA, is required to assess its service costs against the board "commensurate with costs", a tension exists between the department's perception of what is needed for a budget and what the board feels it can charge for licensing and other fees. As many grant writers know, indirect costs or what the department calls "recharges" can cover either first-rate or lesser rent, equipment, and administrative costs. Not being in charge of assembling their own budgets saves boards much time but requires an element of trust regarding the department's perception of how to keep costs within a range affordable for each board. The department's adoption of the new organizational structure has worried some boards as they transition to a budget that means they are having to pay more, in line with what the department says are commensurate costs no longer subsidized by other boards.

An added issue, implemented under Chapter 467, Laws of 2005 (HB 182), is that, as amended, 37-1-101, MCA, requires the department to "notify the appropriate legislative interim committee when a board cannot operate in a cost-effective manner". However, no policy suggests what happens next. Notification of budget problems could result, for example, in a directive or a suggestion for boards to merge, an automatic request for an audit of department recharges and board finances, or dissolution of a board with the department assuming licensing and disciplinary functions.

- What is the intent of the Legislature regarding board financing?
- What does the Legislature want to happen if a board is not operating in a cost-effective manner?

### ***Role of boards in maintaining professional or occupational integrity***

- ***Regulation***

As specified in the duties of boards in 37-1-131, MCA<sup>12</sup>, the primary duties are to handle licensing and discipline. The phrase that relates to "conduct of the members of the profession or occupation within the board's jurisdiction" similarly regulates people, and not the profession or occupation. Statutes specific to boards and programs may involve more specific regulation of the profession or occupation. For example, the duties for the Board of Pharmacy include "regulation of the practice of pharmacy". Not all boards have that level of specificity. For example, the State Electrical Board's list of duties says the board may "adopt rules for the administration of this chapter, for the licensing of electrical contractors, and for the examination and licensing of master and journeyman electricians." The general statement of adopting rules of the administration of the chapter, in association with the purpose of the chapter that states protection of "the health and safety of the

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<sup>12</sup>The statute reads:

**"37-1-131. Duties of boards -- quorum required.** A quorum of each board within the department shall:

- (1) set and enforce standards and rules governing the licensing, certification, registration, and conduct of the members of the particular profession or occupation within the board's jurisdiction;
- (2) sit in judgment in hearings for the suspension, revocation, or denial of a license of an actual or potential member of the particular profession or occupation within the board's jurisdiction. The hearings must be conducted by a hearing examiner when required under 37-1-121.
- (3) suspend, revoke, or deny a license of a person who the board determines, after a hearing as provided in subsection (2), is guilty of knowingly defrauding, abusing, or aiding in the defrauding or abusing of the workers' compensation system in violation of the provisions of Title 39, chapter 71;
- (4) pay to the department the board's pro rata share of the assessed costs of the department under 37-1-101(6);
- (5) consult with the department before the board initiates a program expansion, under existing legislation, to determine if the board has adequate money and appropriation authority to fully pay all costs associated with the proposed program expansion. The board may not expand a program if the board does not have adequate money and appropriation authority available.
- (6) A board, board panel, or subcommittee convened to conduct board business must have a majority of its members, which constitutes a quorum, present to conduct business.
- (7) The board or the department program may:
  - (a) establish the qualifications of applicants to take the licensure examination;
  - (b) determine the standards, content, type, and method of examination required for licensure or reinstatement of a license, the acceptable level of performance for each examination, and the standards and limitations for reexamination if an applicant fails an examination;
  - (c) examine applicants for licensure at reasonable places and times as determined by the board or enter into contracts with third-party testing agencies to administer examinations; and
  - (d) require continuing education for licensure as provided in 37-1-306. If the board or department requires continuing education for continued licensure, the board or department may not audit or verify continuing education requirements as a precondition for renewing the license, certification, or registration. The board or department may conduct random audits of up to 50% of all licensees with renewed licenses for documentary verification of the continuing education requirement after the renewal period closes.
- (8) A board may, at the board's discretion, request the applicant to make a personal appearance before the board for nonroutine license applications as defined by the board."



people of this state from the danger of electrically caused shocks, fires, and explosions" and the protection of property from similar dangers might be construed broadly or narrowly. Rules adopted by the State Electrical Board relate primarily to licensing of the various practitioners in the field. Attorneys for both the department to which a board is administratively attached and for the interim committee responsible for monitoring the board's administrative rules under 5-5-215(1)(a), MCA, provide oversight to make certain that a board does not overstep its legislative authority.

**Policy  
Choice**

- Is the legislative intent for a board to regulate the profession or occupation as well as the practitioners?
- Does the Legislature clearly define for each board the limits of its regulatory authority?

• *Discipline*

One of a board's main functions under 37-1-131, MCA, is to discipline wayward members of an occupation or profession. Montana specifically grants disciplinary authority to boards in 37-1-136, MCA. One purpose for discipline is to protect the public from incompetent, fraudulent, or even harmful activities by someone in a regulated profession or occupation. In some views, laws against fraud, sexual misconduct, or even engaging in activities of a regulated profession or occupation without a license can be prosecuted in court. The disciplinary functions allowed by statute are intended to provide an additional assurance that practitioners do not engage in questionable practices elsewhere. Other states that license similar professions can check with Montana for a licensee's disciplinary record and not just rely on self-reporting about misdemeanor or felony convictions handed down by a court.<sup>13</sup> One of the concerns in the 2004 Legislative Audit of the Professional and Licensing Boards related to inconsistencies among the boards regarding disciplinary policies and possible impacts.

Identified examples included use of board screening panels to pursue late renewal applicants or verify compliance with renewal requirements, inconsistent application of sanctions, and procedures for non-routine applications. In some instances, licensees were disciplined when the threat to public safety was limited. For example, we documented cases where licensees were disciplined for failing to display a license correctly in the place of business. ...A member of the public using the department's licensee lookup service cannot distinguish between minor administrative violations and disciplinary actions relative to professional capabilities. This could have a disproportionate effect on the licensee's employment or business prospects when compared with the original violation.<sup>14</sup>

Related to the 2004 Legislative Audit concerns about the difficulty for the public to assess a board's disciplinary actions is a similar emphasis by the Pew Health Professions Commission, which noted the importance of public accountability, through public representation on boards, and public information. One of the Commission's recommendations was:

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<sup>13</sup>Montana does not automatically bar a person convicted of a crime from obtaining a license under 37-1-203, MCA.

<sup>14</sup>Legislative Audit Division, *op. cit.*, 2004, pp. 58-59.

All boards should make publicly available licensee profiles that include such information as education, private certifications, continuing competence assurances, disciplinary actions and sanctions taken by the board, hospital or workplace, criminal convictions and malpractice settlements.<sup>15</sup>

**Policy Choice**

- Does the Legislature want to be more specific in statute about disciplinary provisions?
- Would more information about disciplinary specifics be helpful to the public and to practitioners?

- *Support for licensees*

Duties for boards affiliated with the Department of Labor and Industry include, as listed in 37-1-131, MCA, a requirement to consult with the department before "the board initiates a program expansion, under existing legislation...". Programs initiated by boards and allowed by statute include the professional assistance programs that some healthcare-related boards provide to help or otherwise rehabilitate licensees "who are found to be physically or mentally impaired by habitual intemperance or the excessive use of addictive [or narcotic] drugs, alcohol, or any other drug or substance."<sup>16</sup> The program highlights a question of how the Legislature perceives boards. Should a board provide a variety of services for all licensees as well as regulation and discipline? What is the difference between the board and professional organizations and associations other than that all "practice" boards require licensing and membership in a professional organization is voluntary? Some boards provide assistance with continuing education requirements (see below). That, too, is a benefit that raises a question of whether boards in their pursuit of protecting the public's health, safety, and welfare are also responsible for improving a profession or occupation and its licensees.

**Policy Choice**

- Is the role that the Legislature sees for Boards one that goes beyond regulation and includes assistance to practitioners? Does assistance to practitioners further protect public health, safety, and welfare?

- *Continuing education*

Some license renewals require a certain number of continuing education credits. The general statute on duties says under 37-1-131(7)(d), MCA, that a board or department program "may" require continuing education requirements. Continuing education can help to maintain the skills or knowledge base of a practitioner in an ever-changing landscape. The Pew Health Professions Commission questioned in its 1998 report whether continuing education is sufficient to maintain competence, specifically among healthcare providers. Among other findings, the Commission suggested national standards regarding continuing competence standards.

**Policy Choice**

- Is public protection served if a board does not require continuing education requirements?

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<sup>15</sup>LJ Fioncchio, et al., *op. cit.*, 1998, p. 17.

<sup>16</sup>The language is similar for the Board of Medical Examiners in 37-3-203(4), which was added in 1987, the Board of Dentistry in 37-4-311, and the Board of Nursing in 37-8-202(1)(i), which references narcotic rather than addictive drugs.

- Should the board itself be involved in providing continuing education?
- Should boards set continuing competence standards?

- *Interaction of the board with the public and licensees*

One of the concerns raised in the SJR 35 survey (see Appendix II for a copy of the survey) centered on the difficulty of knowing where to lodge a complaint and where to find information. One of the survey questions asked where licensees (or others) went for information. Newsletters had the highest response (31.53% of respondents) of four positive choices. (The others included: word of mouth at 11.45%, the Internet at 8.42%, and annual meetings at 3.67%. An option for "generally don't care" netted 2.48% responses and "other" was 4.75%.) Given the emphasis by the Department of Labor and Industry on putting information on its website, and the limited number of people who apparently use the website for information purposes, there apparently is a gap in the information process. A common complaint site or phone number might help to solve one aspect of interaction between a board and its licensees or the public.

Another element of the board interacting with the public and with licensees raises the question of the board's role. For boards that do more than license and discipline, how is that effort conveyed? Boards represent, in one sense, both the public and the private element of a public/private partnership, where the public aspect is the administration by the Department of Labor and Industry. Conversely, boards also are composed mainly of members of an occupation or a profession, with perhaps one or two "public" members not involved in the occupation/profession. Is that combination sufficient to provide public accountability?

**Policy  
Choice**

- What is the legislative intent for a board's public accountability?
- Does public membership on the board provide the intended representation?

## **C**riteria for Board Creation, Maintenance, and Dissolution

### ***Board creation***

The Legislature typically creates boards at the request of a professional or occupational constituency seeking to codify the board as a state entity, with the associated credentialing that comes from licensing and other benefits as well as responsibilities. Usually the constituency provides a public rationale for the existence of a board in terms of protecting public health, safety, welfare, or the "common good". On at least one occasion, a constituent group successfully promulgated a statewide initiative to create a state Board of Dentistry through Initiative No. 97 in 1984, which passed 194,285 to 171,448. The 1987 Legislature, following a Legislative Audit requested by the 1985 Legislature, approved a merger of the Board of Dentistry and the Board of Dentistry<sup>17</sup> and also created sunrise laws to control creation of new boards.

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<sup>17</sup>The legislation requesting the audit specified that a merger should be proposed if fewer than 30 denturists were licensed by October 1, 1986.

- *Sunrise laws*

Between 1987 and 1993 the Legislature required a Legislative Audit Committee report to be attached to any legislation reported out of a committee that established a new occupational or professional licensing board. Apparently stung by the Board of Dentistry initiative in 1984, the 1987 Legislature also required a Legislative Audit Committee review of any initiative affecting new or existing licensing boards. The sunrise provisions had a short life, possibly because of the added workload for the Legislative Audit Committee or a department that might be asked to study the need for a new licensing board.

Among the provisions of the sunrise statutes was the intent to establish a licensing board only if:

- the unregulated practice of the profession or occupation directly and immediately endangers the public health, safety, or welfare;
- practice of the profession requires specialized skill or training, and nationally recognized standards of education and training exist;
- a substantial majority of the public lacks the knowledge or experience to evaluate whether the practitioner is competent; and
- the public is not protected effectively by other means.<sup>18</sup>

The sunrise statutes also stated that the purpose of the legislation was "to allow for the smallest number of licensing boards consistent with adequate regulation of appropriate occupations and professions". Applicants for new boards had to demonstrate to the Legislative Audit Committee how the above criteria applied as well as supply information showing that "licensing will not significantly increase the cost of services to the public" and that "no other board licenses a similar or closely related occupation or profession". The Legislative Audit Committee also was to determine the approximate number of future licensees. The legislation establishing sunrise laws also allowed any person or organization to propose consolidation of two or more existing boards. Among the boards that came into being while the sunrise laws were in effect were: the Alternative Health Care Board, the Board of Real Estate Appraisers, and the Board of Respiratory Care Practitioners, all in 1991.

- *Overlapping functions/scope of practice/dual licensure*

Among considerations for the creation of new boards are whether a new entity should be combined with an existing board if those wanting a new board anticipate that their scope of practice will overlap with that of other practitioners. In the 59th Legislature, athletic trainers sought a new board and acknowledged that some of their practices would overlap with practices of physical therapists as well as nurses and various other healthcare practitioners. Discussions ensued regarding the appropriateness of dual licensure for physical therapists trained as athletic trainers and how much to limit the scope of practice to avoid conflicts with other healthcare practitioners. In the end, the discussions came too late in the legislative session to resolve all difficulties. The issues associated with legislative efforts to create this board and related problems associated with expanding the Board of Social Work Examiners and Professional Counselors to include Marriage and Family Therapists were part of the rationale behind passage of SJR 35 requesting a study of professional and occupational licensing boards.

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<sup>18</sup>Section 1(2), Chapter 266, Laws of 1876. The original is written "no new licensing board... unless...".

There is a perception among some people who want to create a new board that the current process gives more power to existing boards whose disapproval of adding new board associates usually translates into a diminished chance of legislation being approved to expand the existing board. Some of those wanting to be licensed see the status quo as a way of limiting competition. A letter from the Business League for Massage Therapy & Bodywork (BLMTB) in response to a survey conducted in relation to SJR 35 pointed out the organization's frustrations with scope of practice issues:

... laws are written to define the differences between the professions, thus creating turf wars in an attempt to protect territory and maintain those boundaries. This protectionism does nothing to protect the consumer, but instead restricts access to services, drives up costs, and stifles development of new professions. From what we have seen in Montana, emerging professions have little chance of entering the legislative arena and emerging unscathed with an intact scope of practice: the legislative process and legislators tend to side with the more established professions and their needs rather than look very carefully at the competencies of the new profession.<sup>19</sup>

**Policy  
Choice**

--Does the Legislature want to provide a process for creating new boards that would include, for example, the use of an advisory council to iron out issues with existing boards such as overlapping functions or expansion of existing boards?

***Board maintenance***

Board maintenance includes dealing with the cross-jurisdictional disputes that arise when existing boards have overlapping scopes of practice or the perception among practitioners of one or the other board having a supervisory line of authority. Also arbitrarily added to this section of board maintenance is the issue of whether licensing of facilities should continue to be separate from licensing of personnel who function within those facilities, as is true, for example, for nursing home administrators licensed by the Board of Nursing Home Administrators, which is attached to the Department of Labor and Industry, while nursing homes are licensed under the Department of Public Health and Human Services.

- ***Cross-jurisdictional disputes/scope of practice***

Cross-jurisdictional disputes affect boards, professions, and occupations nationally, as noted by the Pew Health Professions Commission. The Commission approached the issue of turf battles and overlapping scopes of practice from the perspective of consumer protection and changes in health practice, noting:

This fragmented, competitive and adversarial regulatory activity ignores the fact that clinical practice is no longer based on exclusive professional or occupational domains. Collaborative teams of health care practitioners who often share some elements of practice authority are more the rule than the exception in today's health

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<sup>19</sup>Letter to the Economic Affairs Committee from the Business League for Massage Therapy & Bodywork, August 22, 2005.

care systems.<sup>20</sup>

The scope of practice concern affects many occupations and professions, not just healthcare. For example, one respondent in the SJR 35 survey whose employer is cross-training "instrument people" and electricians urged that "instrument people" be licensed for work that is similar to the work done by electricians. "Although there are a few common tasks," he wrote, "they are two separate trades". His fear is that "instrument people" may end up running conduit for new equipment, which in highly explosive surroundings could result in a catastrophic accident.

The Pew Health Professions Commission recommends creation of a national policy advisory body to develop standards, including uniform scope of practice authority for the health profession. States then "should enact and implement scopes of practice that are nationally uniform for each profession".<sup>21</sup> Until the occasion when a national policy advisory group has a uniform scope of practice authority, the overlapping scopes of practice among certain boards will continue to give rise to turf battles. Cross-jurisdictional disputes can provide many bodies with an opportunity to be heard, if the bodies have similar weight. Disputed issues may result in greater costs in rulemaking and inefficiencies as boards and the department spend more time discussing one issue than addressing other areas of concern.

One option for resolving turf battles is to put disputed issues to an umbrella board composed of representatives of various boards, of consumer representatives, or of both. An umbrella board would be likely to create more bureaucracy and may not necessarily resolve disputes, depending on the legislative authority given to such a board.

**Policy  
Choice**

- Do cross-jurisdictional disputes serve the public interest?
- Would umbrella boards would work to resolve some of these issues in a cost-effective manner?

- *Licensing facilities separately from practitioners*  
One complication that apparently has developed from facility licensure occurring under one department and personnel licensure occurring under another department is that facility accreditation reports may also involve personnel licensure. If communication between departments functions well, then no problems would necessarily arise from a separation of licensing authority. However, a more basic question remains: should professions licensed to work in licensed facilities all be attached administratively to the same department that licenses the facilities? Healthcare boards under this line of reasoning would be administratively attached to the Department of Public Health and Human Services. The Board of Outfitters would be administratively attached to the Department of Fish, Wildlife, and Parks. Recent reorganizations at the Department of Labor and Industry have put most personnel licensing functions under one department to accommodate efficiencies of scale in licensing.

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<sup>20</sup>LJ Fioncchio, et al., *op. cit.*, 1998, p. 24.

<sup>21</sup>LJ Fioncchio, et al., *op. cit.*, 1998, p. 29.

**Policy  
Choice**

--Should personnel and the facilities in which they operate all come within the administrative realm of the same department or should licensing efficiencies for personnel, which requires similar applications, renewals, and investigations, remain more of a personnel issue than an issue for the associated field in which the personnel practice?

***Board dissolution***

The 1977 Legislature enacted sunset provisions for dissolution of boards. Although initially boards automatically faced termination and had to prove their reason for being, the Legislature modified that approach in 1983. Until 1993 one interim committee reviewed all boards but the statutes providing for this review were repealed.

Currently boards are subject to periodic review by the Legislative Audit Committee. The governor is to submit a list of recommended terminations before September 1 in each even-numbered year, pursuant to 2-8-105, MCA. The Legislative Audit Committee then reviews the bodies on that list or among "suggestions from legislators and legislative committees" and recommends "in the form of a bill" to the next Legislature any agencies or programs that should be terminated subject to a performance audit. The statutes in Title 2, section 8, part 1, MCA, provide timelines for action and allow for reinstatement legislatively.

**Policy  
Choice**

--Is the current system of dissolution effective?  
--Would a different system more politically palatable? For example, should the Legislature assign review of suggested board dissolutions to a temporary advisory committee appointed by the department to which a board is administratively attached?

**Conclusion**

The Economic Affairs Interim Committee has the choice of deciding whether current policies for licensing boards are working as intended and whether new ones are needed. The SJR 35 study augments the latest Legislative Audit Committee's performance review that proposed ways to improve effectiveness and efficiency. The policies proposed in this report highlight issues affecting boards and pose suggestions for new board creation or the dissolution of boards. The Economic Affairs Interim Committee can choose among these policies or suggest others and assign them to a work group that has signed up for the SJR 35 study to conduct an in-depth review and provide comments.