

Unlicensed Practice Defined

Unlicensed Practice Statutes for Professions with Boards:

37-1-317. Practice without license -- investigation of complaint -- injunction -- penalties. (1) *The department shall investigate complaints or other information received concerning practice by an unlicensed person of a profession or occupation for which a license is required by this title.*

(2) (a) Unless otherwise provided by statute, a board may file an action to enjoin a person from practicing, without a license, a profession or occupation for which a license is required by this title. In addition to the penalty provided for in 37-1-318, a person violating an injunction issued pursuant to this section may be held in contempt of court.

(b) A person subject to an injunction for practicing without a license may also be subject to criminal prosecution. In a complaint for an injunction or in an affidavit, information, or indictment alleging that a person has engaged in unlicensed practice, it is sufficient to charge that the person engaged in the unlicensed practice of a licensed profession or occupation on a certain day in a certain county without averring further or more particular facts concerning the violation.

(3) Unless otherwise provided by statute, a person practicing a licensed profession or occupation in this state without complying with the licensing provisions of this title is guilty of a misdemeanor punishable by a fine of not less than \$250 or more than \$1,000, imprisonment in the county jail for not less than 90 days or more than 1 year, or both. Each violation of the provisions of this chapter constitutes a separate offense.

(4) The department may issue a citation to and collect a fine, as provided in 37-68-316 and 37-69-310, from a person at a job site who is performing plumbing or electrical work and who fails to display a license or proof of licensure at the request of an employee of the department who bears responsibility for compliance with licensure requirements.

Unlicensed Practice Statutes for Professions without Boards

37-1-411. Practice without license -- investigation of complaint -- injunction -- penalties. (1) *The department may investigate a complaint or other information received concerning practice by an unlicensed person of a profession or occupation governed by this part.*

(2) The department may file an action to enjoin a person from practicing, without a license, a profession or occupation governed by this part.

The Problem with the Definition:

To the person performing an unlicensed profession (ie. Unlicensed alternative health care), this is interpreted as: "I'm not practicing a licensed profession; I'm practicing my own profession, so therefore I am not subject to these provisions."

To a Board member this is interpreted as: "Is the person doing what I do? Is what they are doing fall under the definition of the board's scope? If so, and there is no exemption for it, the person is practicing my profession and is therefore subject to the board's jurisdiction for unlicensed practice" Further, if the board does not act and the person ultimately harms someone, then the board could be liable for not stopping someone when they had the chance.

Definitions of scope of practice for the professions are written intentionally to be very broad, so as to encompass all of the possibilities of what a profession does or could aspire to do. Exemptions are written into board statutes, limiting who boards can cite for unlicensed practice. If a board is limited in this way, they may refer the case to the Board of Medical Examiners for violating the practice of medicine. ***The definition for the practice of medicine is written so broadly that practically anyone doing anything to anybody is subject to its provisions:***

37-3-102. Definitions (8) "Practice of medicine" means the diagnosis, treatment, or correction of or the attempt to or the holding of oneself out as being able to diagnose, treat, or correct human conditions, ailments, diseases, injuries, or infirmities, whether physical or mental, by any means, methods, devices, or instrumentalities. If a person who does not possess a license to practice medicine in this state under this chapter and who is not exempt from the licensing requirements of this chapter performs acts constituting the practice of medicine, the person is practicing medicine in violation of this chapter.

**This broadness is a good thing when the person in violation clearly is a danger to the public.
It is not so good when the person is ethically practicing a profession that is not licensed by the state.**

Court Cases / Federal Rulings Regarding Health Freedom

Excerpts taken from:

"The right to practice herbology, legal history and basis" By Roger Wicke, Ph.D.

State v. Grovett, 65 Ohio St 289, 62 NE (*Northeastern Reporter*) 325 (1901): **licensing standards cannot be used to effectively destroy a profession or to prevent its practice**

The Supreme Court of Ohio ruled that a state cannot impose unreasonable or impossible requirements upon a profession or school of medicine so as to effectively prevent its practice.

State v. Biggs 133 NC 729, 46 SE (*Southeastern Reporter*) 401 (1903):

- **Licensing is valid only to protect the public, not to protect a profession's economic status**
- **Licensing may not arbitrarily regulate private business, under the guise of protecting the public**

A person has a right to be treated by any system he chooses. The law cannot decide that any one system shall be the system he shall use.

[It] quotes a decision in a U.S. Supreme Court case, **Lawton v. Steele**, 152 U.S. 137, 138, concerning the proper exercise of the police powers:

The Legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination of what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts.

Historically, the *State v. Biggs* ruling is important for its clarification of principles of law, but can no longer be cited as legal justification for non-medical practitioners to use the title "doctor" or any of the other medical phrases we have already discussed, because medical practice statutes have been considerably amended since then

- **State v. Bain** 130 Mont 90, 295 P2d (*Pacific Reporter, series 2*) 241 (1954). the Montana Supreme Court upheld Bain's conviction for practicing medicine without a license. Bain, a physiotherapist, referred to himself as "Dr. Bain"
- **Reeves v. State** 36 Okla Crim 186; 253 P 510 (1927). was another case of an alternative health practitioner convicted of practicing medicine without a license solely on the evidence that he referred to himself as "Dr."
- **People v. T. Wah Hing**, 79 Cal App 286; 249 P 229 (1926): reveals that if an herbalist is addressed as "doctor" by a client, and if he then fails to correct the client and clarify that he is not a doctor of medicine, this, also, may be used as prima facie evidence of practicing medicine.

Louisiana State Board of Medical Examiners v. Craft 93 So 2d (Southern Reporter, 2nd series) 298 (1957).

[A] case where statutes narrowly defining the practice of medicine provided a successful appeals argument for Craft, a massage practitioner. Many state courts now interpret medical licensing statutes more narrowly, similarly to the *Craft* decision, to prevent the licensing laws from being used to harass individuals who are clearly not practicing medicine.

Shelton v. State 377 SW2d 203 (1964). reveals how a Texas chiropractor advertised and described his own work in such a manner as to successfully defeat a lower court's attempt to convict him of practicing medicine without a license. Shelton, a licensed chiropractor, was judged by the Texas Court of Criminal Appeals not to have unlawfully practiced medicine, primarily because he had never publicly professed to be an M.D., a physician, or a surgeon. In addition, he advertised his business as offering the following: "Corrective Exercise / Health Instruction / Toxin Elimination Physical Culture / Rational Fasting / Body Moulding / Natural Diet / Sun Bathing / Rest. Not a Medical Institution. NO Medicines, Drugs, Serums, Vaccines, Surgery." Besides this printed disclaimer, Shelton successfully avoided all the prohibited jargon, and his only dubious statement that hinted of a claim to cure illness, as testified by an undercover agent who claimed to have an ulcer, was that "he could get rid of the ulcer if I would stay in this establishment for six weeks." Shelton testified in his own behalf that he had never claimed to anyone to be an M.D., physician, or surgeon, and that he believed the human body could cure its own ills.

Shelton's mode of advertising and presenting himself to his clients serves as a model for alternative practitioners to follow, with the exception of his risky claim to be able to "get rid of the ulcer".

- End excerpts from Wicke -

The FTC Decision: The North Carolina Board of Dental Examiners

As of this writing, January 13, 2012, the FTC decision has been finalized.
It may still be appealed to Circuit Court.

<http://www.ftc.gov/opa/2011/12/ncdental.shtml>
<http://www.ftc.gov/os/adjpro/d9343/111207ncdentalorder.pdf>

The board was found in violation for attempting to stop non-dentists from performing teeth whitening.

- **The FTC justified the jurisdiction of the FTC and Sherman anti-trust statutes via case law:**
California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980), active state supervision of the Board's activities must be demonstrated in order for state action immunity to apply. The Commission further determined that the undisputed facts showed that the state did not actively supervise the Board's conduct, and, therefore, state action immunity did not apply

*[Note: my understanding of the case law in Wikipedia is that, for a state professional board to be immune from Sherman anti-trust violations, it appears that the state can't just set the law the boards enforce, it has to actively monitor the board (part of the Parker immunity doctrine)
For example, one potential question: Is it really state policy for boards to regulate professions that are not licensed by the state, and if so to what extent can boards do so?]*
http://en.wikipedia.org/wiki/California_Retail_Liquor_Dealers_Ass%27n_v._Midcal_Aluminum,_Inc and
http://en.wikipedia.org/wiki/State_action_immunity_doctrine
- **FTC implies that public safety alone is not enough justification to restrain trade. In this case, public safety was not even considered.**
If anti-trust law is applicable, as it is here, then:
A restraint on competition cannot be justified solely on the basis of social welfare concerns, including concerns about health hazards.
In *Wilk v. Am. Med. Assoc.*, 719 F.2d 207,214 (7th Cir. 1983), through various mechanisms physicians were discouraged from cooperating with chiropractors... Defendant physicians argued that their conduct had been undertaken in the interest of public health, safety, and welfare and that their conduct had been non-commercial. 719 F.2d at 216. The court of appeals rejected this argument, holding: ...
They are free to attempt to persuade legislatures and administrative agencies. But a generalized concern for the health, safety and welfare of members of the public as to whom a medical doctor has assumed no specific professional responsibility, however genuine and well-informed such a concern may be, affords no legal justification for economic measures to diminish competition with some medical doctors by chiropractors.
See also Indiana Federation, 476 U.S. at 463 (the argument "that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices ... amounts to 'nothing less than a frontal assault on the basic policy of the Sherman Act. '""); *Patrick v. Burget*, 486 U.S. 94, 105 (1988) (rejecting claim that threat of antitrust liability for physician peer-review activities will discourage participation in the process to the detriment of patient care, stating that such argument "essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch").
Thus, in this case, even if the Board was acting to prevent the public from physical harm that could result from teeth whitening services provided by non-dentists, such an argument does not, under applicable antitrust law, constitute a valid justification for the Board's conduct
- **The Board has no authority over non-licensed persons**
the Board may petition a state court for an injunction,
The Board may not prosecute criminally for unlicensed practice of dentistry; however, it may refer matters to the District Attorney for criminal prosecution

The Board's authority to hold administrative hearings under the Dental Practice Act is limited to addressing conduct of its licensees or applicants for such a license.

The Board does not have authority to discipline unlicensed individuals.

The Board does not have the legal authority to order anyone to stop violating the Dental Practice Act.

- **The Board has a conflict of interest: there is compelling evidence that dentists are attempting to restrict non-dentists for financial gain.**

evidence shows that the Board is controlled by member dentists,

Moreover, at all relevant times, each dentist Board member has been engaged in the full-time practice of dentistry while serving on the Board.

Moreover, the Board is funded by fees paid by dentists. F. 13-14.

Board members have a financial interest in the business of teeth whitening. F. 12 (Board members "may well be influenced by the impact on the bottom line," including the financial interest of dentists, in deciding whether to ban nondentist teeth whitening). Board members are in a position to enhance their incomes and those of their constituents by preventing or eliminating non-dentist teeth whitening services.

- **Since the board's actions are not protected, the board cannot defend its conduct on the ground that the Board is a state agency enforcing state law.**

- **Actions by the board prevented consumer access and affected the market**

The evidence in this case, summarized above, also shows that the stated objective of the Board - to stop unlicensed persons from providing teeth whitening services - had the tendency to prevent consumers from getting a particular service they desire: teeth whitening in a quick, one-time session. The Supreme Court, in *Indiana Federation* held, "[a]bsent some countervailing pro competitive virtue ... an agreement limiting consumer choice by impeding the 'ordinary give and take of the market place,' *National Society of Professional Engineers, supra*, at 692, cannot be sustained under the Rule of Reason." 476 U.S. at 459.

Here, although the Board did not have disciplinary power over non-dentists, it was nevertheless able to impose restraints on the market for teeth whitening services through its course of conduct,

Indiana Federation, 476 U.S. at 463 (the argument "that an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices ... amounts to 'nothing less than a frontal assault on the basic policy of the Sherman Act. '"); *Patrick v. Burget*, 486 U.S. 94, 105 (1988) (rejecting claim that threat of antitrust liability for physician peer-review activities will discourage participation in the process to the detriment of patient care, stating that such argument "essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch").

- **Accused persons will comply with orders by boards, even though there is no legal power to them, thus affecting the market and consumer access.**

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). In *Goldfarb*, the County Bar, which published a minimum fee schedule for common legal services, argued that because the fee schedule was merely advisory, the schedule and its enforcement mechanism did not constitute price fixing

The Supreme Court rejected those arguments, observing that, because of the prospect of disciplinary actions by the State Bar and "the desire of attorneys to comply with the announced professional norms," bar members did, in fact, comply with the schedule.

Although the Board here does not have the power to take disciplinary actions against non-dentists, as summarized in Section III.E.2.b, the Board projected an apparent state power of enforcement.

Furthermore, just as the County Bar's argument that the schedule was "merely advisory" was rejected because the lawyers did in fact comply with the schedule, here the Board's argument that it did not have authority to enforce an order against any nondentist teeth whitening service provider is similarly rejected because non-dentists did in fact comply with the letters directing them to cease and desist from offering teeth whitening services.

arguments as to what the non-dentists "could have done" is not as compelling as the evidence of what they actually did, which was to cease and desist from offering teeth whitening services. The Commission made a similar ruling in *Realcomp*. There, an association of real estate brokers, operated a Realcomp argued that the Search Function Policy did not harm competition "because users of the Realcomp MLS could override the default settings" in order to secure information about discounted listings. *Id.* at *98-100. The Commission rejected this argument, explaining: "[D]ata and broker testimony show that many brokers did not override the default search parameters. On this point we rely upon the record evidence showing what brokers actually do."

The Role of Boards in Unlicensed Practice:

Board Duties and Board authority in the General Provisions pertain to licensees only

The duties for boards concern only licensees.

37-1-131. Duties of boards – quorum required. (1) A quorum of each board within the department shall:

(a) (i) set and enforce standards and adopt and enforce rules governing the licensing, certification, registration, and conduct of the members of the particular profession or occupation within the board's jurisdiction; and

(ii) apply the standards and rules referred to in subsection (1)(a)(i) in a manner that does not discriminate against any person licensed by the board with regard to how the standards and rules are applied to other persons licensed by the board and that does not restrain trade or competition unless necessary to protect public health and safety

The statutes regarding board authority does mention unlicensed practice, but only in the context of being able to contact the department of justice, not asserting authority over an unlicensed person.

37-1-307. Board authority. (3) A board may contact and request information from the department of justice, which is designated as a criminal justice agency within the meaning of 44-5-103, for the purpose of obtaining criminal history record information regarding the board's licensees and license applicants and regarding possible unlicensed practice.

[There is nothing in this statute that allows boards to assert authority over anyone not licensed.]

37-1-312. Sanctions -- stay -- costs -- stipulations. [concern only licensees]

The unlicensed practice statutes allow boards to "file an action to enjoin a person" meaning that they can go to court. Boards do not have the authority to stop anyone from practicing without a license. Boards can threaten, but they cannot enforce the action on their own (the courts must do so). Also see the FTC ruling with regard to the impact board behavior can have on restraint of trade.

What Constitutes the Practice of a (licensed) Profession? What Constitutes a Danger to the Public?

Answering these two questions seems relevant to the discussion.

Defining "Engaging in the practice"

On these issues, the statutes are not specific. There are no clear definitions and the unlicensed practice statutes are vague. The language "engaging in the practice..." does pop up in statutes allowing the board injunctive authority.

37-1-136. Disciplinary authority of boards -- injunctions.

(3) Notwithstanding any other provision of law, a board may maintain an action to enjoin a person from engaging in the practice of the occupation or profession regulated by the board until a license to practice is procured. A person who has been enjoined and who violates the injunction is punishable for contempt of court.

Boards take the view that doing anything within their defined scope is "engaging in the practice"

The problem with this view:

1. Professions overlap. This is very clear when it comes to the turf wars between licensed professions.. There also exists overlap between licensed and unlicensed professions in some actions. But, just as the athletic trainer is not proclaiming to do physical therapy, so too, a Rolwing practitioner is not claiming to do massage therapy.
2. Licensed professions may not even do any of the acts that they claim fall within their definition.
Example: How many doctors do homeopathy or are rolfers?

Defining "Danger to the Public" / "Public Health, Safety, and Welfare"

The role of "health, safety and welfare" is mostly absent from the General Provisions in Title 37. The exception is regarding the equal treatment of licensees (37-1-131(1)(a)(ii)), which does not pertain to the discussion of unlicensed practice. Each licensed profession may speak to how they protect the public's health, safety and welfare in their enabling statutes, however, there is no definition as to what constitutes public protection of health, safety and welfare.

Boards frequently cite the protection of the public in their pursuit of unlicensed practice, but there is no clarity in the board's statutes as to what that means. In general, boards have taken it to mean that if the person doesn't have a license to do anything in the board's scope, then it's a danger.

Barring that, licensed professions will assert how unlicensed alternative health care is a danger to the public, but statistics do not bear this out: there is no basis in fact for the alleged danger unlicensed alternative health care professions present. It is hypocritical for professionals who rely on scientific study and who ordinarily dismiss anecdotal evidence to rely on that same anecdotal evidence to support their contention. The facts instead point to the safety and low risk of alternative and complementary health care.

However, we do have some guidance in Montana statutes on this issue, as well as from the courts.

In the section of law authorizing legislative review of agencies and boards, the guidance is that the harm must be "significant and discernible" and that regulation will not be done in a "manner which will unreasonably adversely affect the competitive market."

Again, there is no definition as to what that means, but, the statute here seems clear: the harm or damage must be significant and discernible to rise to the standard of necessary protection. Another section alludes to showing that "there is evidence of harm from improper practice".

Legislative Review / Periodic Agency Evaluation

2-8-101. Purpose. (2) It is the intent of the legislature, by establishing a system of periodic evaluation of the need for and the performance of agencies or programs preparatory to termination, modification, or reestablishment, to be in a better position to ensure as follows:

(c) No profession, occupation, business, industry, or other endeavor is subject to the state's regulatory power unless the exercise of such power is necessary to protect the public health, safety, or welfare from significant and discernible harm or damage. The exercise of the state's police power shall be done only to the extent necessary for that purpose.

(d) The state may not regulate a profession, occupation, industry, business, or other endeavor in a manner which will unreasonably adversely affect the competitive market.

2-8-404. Interim committee review of licensing boards and programs

(2) The focus of a review under subsection (1)(a) is:

(a) to determine whether a board or program continues to be needed to protect public health, safety, or welfare or the common good by addressing the following questions:

(i) does the improper practice of the profession or occupation pose a physical, financial, or emotional threat to public health, safety, or welfare and is there evidence of harm from improper practice; and

While Montana statutes may not be crystal clear on the issue, the courts have provided some clarity by saying that a simple overlap of practice is not a danger to the public if certain conditions are met. Further the FTC ruling implies that boards might have a conflict of interest when regulating non-licensees that could lead to a charge of restraint of trade if they attempt to invoke public health, safety and welfare as the sole justification for acting against an unlicensed practitioner.

There aren't easy answers to these questions, but it is clear that when a person claims to perform a different (unlicensed) profession and gives no indicators they are performing a licensed one, and has not harmed anyone, a board should not be able to claim jurisdiction over the individual.

The request of the Montana Health Freedom Coalition is that these court decisions be codified in statute to provide meaningful guidance to boards in addressing unlicensed practice.