

## Proposed Actions to Address Unlicensed Practice

Three changes to the statutes are suggested with regard to addressing unlicensed practice:

- Clarify the unlicensed practice statutes
- Eliminate Anonymous Complaints for Unlicensed Practice
- Remove unlicensed practice complaints from direct board oversight and processes

### Clarify the unlicensed practice statutes.

Rationale: The current statute is vague and unclear. Court decisions have clearly outlined when it is appropriate to pursue unlicensed practice claims, we request that those provisions be codified to reduce the ambiguity of the statutes. The current statute puts boards in an untenable position: act against everyone or risk liability... but in acting against everyone, it opens the board to legitimate charges of restraint of trade. Current statutes also discriminate unfairly against ethically practicing persons practicing an unlicensed profession: there are many hoops to jump through to get to court (MAPA) thereby astronomically increasing attorney fees; practitioners don't understand their rights and, as is pointed out in the FTC ruling, while the boards' cease and desist orders have no legal force of law, practitioners believe they do. This could be construed as a form of restraint of trade. The Montana Health Freedom Coalition is interested in protection of the public, and is not interested in tying the hands of any board in their role of public protection. What we request is legislation that protects the public from bad actors but ensures that ethically practicing persons practicing an unlicensed profession can continue to practice without fear of board action.

**Suggested Changes to Statute: Create a limited exemption so certain persons are not subject to the unlicensed practice statutes. Such an exemption could include:**

- **Provisions that the exemption is for persons who are practicing professions not licensed by the state, not persons who are avoiding licensure.** Someone who really should have a license must still get one, persons who are subject to discipline by the boards are still subject to discipline by the boards, to ensure protection of the public.
- **Strong public protections so that bad actors are stopped, but good actors are not.**
- **A required disclosure of services provided, qualifications, and disclaimer that the person is not licensed.** If the practitioner does not use a disclosure, and it is determined that the person is intentionally avoiding use of the disclosure, they are not exempt (Shelton v. State 377 SW2d 203 (1964) provides a clear rationale for the disclosure idea).
- **A provision 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).** Current board statutes do not clearly delineate what public health safety and welfare means, but statutes concerning legislative oversight of boards and agencies do. We suggest that any language in the statutes match the language found in those statutes, specifically

**2-8-101(2)(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.**

### **Eliminate Anonymous Complaints for Unlicensed Practice.**

Rationale: Currently all boards must accept anonymous complaints for unlicensed practice. Anonymous complaints allow persons to attack their competition and encourage restraint of trade. In 2011, Texas passed legislation prohibiting anonymous complaints against physicians. This action stemmed from a 2007 lawsuit against the Texas Medical Board by the Association of American Physicians and Surgeons. The AAPS claimed that the board "misused anonymous complaints to "harass and intimidate their competitors and adversaries.""

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### **Remove Unlicensed Practice complaints from direct board oversight and processes.**

Rationale: Such a remedy would remove any question of restraint of trade under enforcement of the statutes. Someone who is not licensed is technically not a licensee and is not under the jurisdiction of the board. Since boards are made up of a majority of professional members, the case could be made for restraint of trade, particularly if the complaint is anonymous, there is no discernable harm, and the person is professing to practice a different profession than the board's.

One Possibility: Florida has an office that is run by the same department as boards to investigate and directly interface with law enforcement. There then is no intermediate step of boards declaring that someone is practicing without a license. The department investigates and makes the determination, gives the person the opportunity to get a license if appropriate, and then goes to law enforcement directly.

Within this scenario, the department could consult with experts in the relevant unlicensed alternative health care field to determine if someone is operating outside of that profession's standard of practice and constitutes a risk to public safety.

Another possibility is that since the office of unlicensed practice is working closely with law enforcement, then put it in that department.

Who pays: Each licensee is assessed a fee to cover the costs, plus if the issue does go to court, I think statutes provide for the recovery of costs should the person be found in violation.

It should be noted, that if the other changes to statute are not made, that legislation be enacted for unlicensed practice complaints by persons claiming to practice an unlicensed profession bypass the MAPA process and go directly to court, where constitutional issues may be addressed. MAPA seems to be about procedure and whether boards acted properly within that procedure. So the person must go through a long process before getting to a court than can address constitutional issues.