

## ADMINISTRATIVE RULES COMMITTEE

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## Criminal Penalties for Occupational and Professional Licensing Violations

This Committee is studying criminal penalty sections of occupational and professional licensing laws that broadly define any violation of a practice act chapter or rules adopted under that chapter as a crime. The Committee has asked the Office of Attorney General for advice with respect to the questions the committee intends to study. The Attorney General asked me to provide a response on his behalf.

These questions raise policy issues that are a concern for each licensing board and the Legislature. Although the Attorney General does not establish policy for the licensing boards, we can provide a general discussion regarding these issues. To further this process, our staff sought informal comments from many of the boards.

There is general agreement that the criminal penalty language being studied may be overbroad in some circumstances. But the breadth of the statutes may be mitigated by the fact that state's attorneys are responsible for prosecuting criminal offenses.

State's attorneys have ultimate discretion to decide whether the circumstances of a violation merit criminal prosecution. Thus the primary question really is whether there have been any unjust or unnecessary criminal prosecutions – this office is not aware of any.

Although this office is not aware of any unjust prosecutions, criminalizing every violation of a chapter may be unnecessary. For example, most practice acts require the Governor to appoint a board; that board is required to elect its own officers and many

boards are directed to set fees, continuing education requirements, or renewal periods. Failure to follow the directive may be considered a violation if the criminal penalty statute is strictly followed.

Ultimately, common sense and proper legal advice prevent licensing boards from referring disciplinary matters for criminal prosecution.

A significant concern for the boards that warrants a criminal statute is unlicensed practice because a licensing board may not have jurisdiction over an unlicensed person. Unlicensed practice therefore should be subject to criminal penalties or there will be no way to enforce the licensing law. There may also be other actions which a licensee may commit that should be subject to criminal sanction. Many of these are already prohibited by other laws, such as fraud in obtaining a license or theft from a client.

Several licensing boards reviewed and discussed the Committee's five questions, and I have summarized their responses:

**1. Whether identification of acts that constitute violations subject to penalties should be made more specific. Many penalties are stated to apply to any violation of "this chapter" or "rules adopted under this chapter."**

The consensus of the licensing boards who responded agreed that this penalty language may be overbroad. But the boards would like to reserve the criminal penalty for unlicensed practice.

Several boards expressed the desire to review their practice act and determine whether some other actions which are not otherwise covered by existing laws should also be subject to criminal penalties. Precise or more specific drafting may be able to

satisfy the concerns raised by the few boards that would like to retain the present broad language while meeting the goals proposed by this study.

**2. Whether a uniform degree of culpability should be established for violations subject to penalties. Some statutory provisions use “knowingly” or “willingly” as a culpability standard but most statutory provisions do not address culpability, which may be interpreted as a strict liability offense.**

Criminal statutes outside of Title 12.1 are generally interpreted as strict liability offenses unless a degree of culpability is specified in the statute.

Most of the licensing boards that responded prefer that the crime of practicing without a license remain as a strict liability offense. They do not believe that a person is likely to accidentally or unknowingly go into business without knowing that a license is required. This is especially so in highly regulated fields such as health care, where there is little room to believe a person may be accidentally practicing. By making these crimes strict liability offenses, one issue is removed from the case.

However one board did raise concerns about an instance where an individual thought that all requirements for a license to practice had been met, but had not actually applied to be licensed. This person did everything except for actually applying and submitting a license fee. Upon investigation, it appeared that the person's school, the private organization that administers the licensing exam, and the person's employer each failed to mention the need for this person to also apply to the licensing board. The facts of that case are unlikely to happen again. This was such a rare circumstance that it is reasonable to rely on prosecutorial discretion to refrain from bringing an inappropriate case.

**3. Whether agency rules should be allowed to determine what constitutes a criminal offense.**

Often a board's statutes may not describe with the appropriate detail the various acts that should be considered a violation. In these cases, it may be appropriate for agency rules to expand upon the statutes to determine what constitutes a criminal offense. For example, the actions that define a practice standard for a profession may be established by rule, and this would then be the standard by which unlicensed practice would be determined as a crime. This would be an appropriate use of administrative rules, and should be preserved.

**4. Whether penalties should be made commensurate among professions. Penalties set by statute range from an infraction to a Class C felony.**

Most of the licensing boards that responded to us expressed the belief that the penalty should be based on the potential harm that could be caused to the public. This would vary based on the particular occupation or profession being licensed.

**5. Whether there are instances in which criminal penalties should be replaced by enforcement through disciplinary action by a board or commission.**

Possibly. Depending upon the applicable law and circumstances, each board may already be able to use disciplinary action instead of criminal prosecution.

But a licensing board generally has no jurisdiction over a person who is not licensed. This means that the penalty for unlicensed practice must be a criminal penalty. There are a few exceptions where licensing boards have been given statutory authority to seek a court injunction to prohibit unlicensed practice. This authority is rarely used due to the expense.

In conclusion, the licensing boards stated that they would like to work with the Committee and cooperatively develop any bill draft that addresses these issues. They would like the opportunity to first completely review their practice acts and administrative rules with their attorney. Then they would be able to offer specific advice about how to refine their specific laws if necessary.