Welcome and Introductions
Michelle opened the meeting at 1:30 p.m., welcoming members and guests via the Microsoft TEAMS video conferencing platform.

Approval of Minutes
MOTION: It was moved by Randy Burckhard, seconded by Cynthia Schreiber-Beck to approve the minutes of February 26, 2020, OLR workgroup meeting. Motion carried unanimously.

Survey Roadmap Update
Katie Ralston
The 2020 Occupational and Professional Board Survey, administered by the ND Department of Commerce and the Workforce Development Council is being drafted by the Council on Licensure Enforcement and Regulation (CLEAR), a forum dedicated to improving the quality and understanding of regulation in order to enhance public protection.

By mid-May, the drafted survey will be sent to ten ND licensing boards and commissions. Feedback from those ten initial boards and commissions will help redraft the survey, and then it will be sent to the remaining fifty-one licensing boards and commissions; concluding with a final report by early July this year.

Subcommittee members reviewed survey questions and recommended more clarifying information for some questions, such as including terms for governor appointment for board chair, reimbursement of board member expenses, board and commission policies, and a needed process for complaints.

Boards Structures and Best Practices
Dale Atkinson, Federation of Associations of Regulatory Boards (FARB)
Dale presented on the Federation of Associations of Regulatory Boards (FARB), a not-for-profit corporation promoting public protection and providing a forum for information exchange for associations of regulatory boards and their affiliate stakeholders with interests in professional regulation.

Board Ethics and Responsibilities
Nahale Kalfas, Council of State Government
Nahale presented on Best Practices for Licensing agencies in the handling of meeting, rulemaking, complaints, investigations, hearings and settlements and communications with applicants and licensees.
Ronne presented on Board differences between Autonomous and Centralized along with regulatory models in the United States.

**Universal Licensing**

Zach Herman, National Conference of State Legislatures (NCSL)

Zach presented on the processes covered with universal licensing recognition; an endorsement of licenses in good standing held by an individual practitioner in another state as valid qualification for licensure in the new state.

**Next Steps**

A visual comparison of state licensure vs universal licensure will be created and provided to the subcommittee in the weeks to come from Zach Herman.

The next meeting will take place April 29 via TEAMS video conference call.

**Adjourn**

Meeting adjourned unanimously at 4:30 p.m.
State-Based Regulatory Systems and Regulatory Board Structures

Occupational Licensing Reform Subcommittee TEAMS Meeting
Federation of Associations of Regulatory Boards

American Association of Dental Boards
American Association of State Counseling Boards
American Association of Veterinary State Boards
Association of Regulatory Boards of Optometry
Association of Social Work Boards
Association of State and Provincial Psychology Boards
Board of Certification for the Athletic Trainer
Council for Interior Design Qualifications
Council of Landscape Architectural Registration Boards
Federation of Chiropractic Licensing Boards
Federation of State Medical Boards
Federation of State Massage Therapy Boards
International Conference of Funeral Service Examining Boards
National Association of Long Term Care Administrator Boards
National Association of State Boards of Accountancy
National Association of State Contractors Licensing Agencies
National Association of State EMS Officials
National Board for Certification in Occupational Therapy
National Council of Architectural Registration Boards
National Council of Examiners for Engineers and Surveyors

AADB
AASCBAAVSB
ARBO
ASWB
ASPPB
BOC
CIDQ
CLARB
FCLB
FSMB
FSMTB
ICFSEBNAB
NASBA
NASCLA
NASEMSONBCOT
NCARB
NCEES
Why?

• Role of government in occupational licensing
• Role of boards
• Role of Board Members
• Effectiveness
• Efficiencies

In order to engage in discussions re reform; must address fundamental issues
What do boards do?

• **Carry out the intent of the legislature**

  Carry out the intent of the legislature by enforcing the practice act, promulgating regulations, and regulating the profession in the interest of public protection.
Key Issues re Public/Consumers

• Protection
• Assurances
  • Pre-licensure
  • Continued licensure
• Enforcement
• Societal benefits
Key Issues re Boards

• Intent of the legislature
• **Deference** (legislature to board, board to staff, public-private, other)
• **Criteria set in law** (Law = statutes and regulations)
• **Expertise adds efficiencies** (Composition of board)
• Consumer awareness
• Applicant awareness
• Licensee awareness
Key Issues re Applicants & Licensees

• Efficiencies
• Criteria/qualifications for licensure and renewal
• Due process
• Enforcement
• Consumer awareness
What is the ultimate goal?

Suggestions:

• Public protection
• Respect for states’ rights
• Oversight
• Workforce/labor
• Fair system (for all...)
• Access
• Due process
• Timely
• Effective
• Efficient
• Consistency
• Mobility/portability
• ....
Antitrust Immunity

• Do not be intimidated by antitrust claims and immunity
  • North Carolina State Board of Dental Examiners v. FTC
Remember to consider board functions

• **Content & Decision making**
  • Need expertise
    • Interpretation
    • Rulemaking
  • Timeliness
  • Efficient
  • Effective

• **Operational**
  • Infrastructure
  • Room to share?
  • Timeliness
  • Efficient
  • Effective
How best to achieve these goals?

• What board structure is conducive to best achieving the legislative objectives?

<table>
<thead>
<tr>
<th>Stand alone boards</th>
<th>Composite boards</th>
<th>Departmentalized boards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Occupation specific</td>
<td>Multiple occupations</td>
<td>Most/all occupations</td>
</tr>
<tr>
<td>Generate revenue</td>
<td>Batched by relevance</td>
<td>Advisory boards</td>
</tr>
<tr>
<td>Expend $</td>
<td>Generate revenue</td>
<td>Board recommendations to Dept.</td>
</tr>
<tr>
<td>Decisions final</td>
<td>Expend $</td>
<td>Shared operational components</td>
</tr>
<tr>
<td></td>
<td>Decisions final</td>
<td>Funded via department</td>
</tr>
</tbody>
</table>
BOARD ETHICS & RESPONSIBILITIES

Nahale Kalfas, CSG
Licensing Board Structure
Autonomous

Efficiency
Expertise

Centralized

Cost
Coordination
Oversight
Not a new idea...

- 1892 NY places most of its professional regulatory board under a board of regents
- 1917 - Illinois
- 1921 - Washington
- 1923 - Pennsylvania
- 1929 - California
- 1960s - 70s wave of centralization (16 states)
- 1990 - 33 states
Today:

37 Centralized
18 Autonomous
Models of Board Structure

- **Model A:** No central agency, only autonomous boards
- **Model B:** Autonomous boards with a central agency for routine administrative functions
- **Model C:** Autonomous boards and a central agency with authority for functions such as budgetary, personnel and certain disciplinary activities
Models of Board Structure

▪ **Model D**: Board actions subject to review by a central agency
▪ **Model E**: Central agency has complete regulatory authority. Boards are advisory only.
▪ **Note!** *Some states centralize certain boards while others remain autonomous*
4 Principles of Centralization

▪ Grouping agencies into broad functional areas
▪ Establishing relatively few department to enhance the span of control and pinpoint responsibility to the chief executive and the legislature
▪ Delineating single lines of authority to the top
▪ Administering department by an individual and not by boards or commissions
“At the end of the day, this case is about a state board run by private actors in the marketplace taking action outside of the procedures mandated by state law to expel a competitor from the market,” ~ Judge Shedd
FTC vs. North Carolina Dental Board

- Active supervision by the state
- Boards made up by a controlling number of active market participants
- Possible through centralized and non-centralized models....
Other Reasons to Centralize

- Economies of Scale
- Shared information
- Governance
- One-stop shopping for consumers
- Shared outreach / breadth
- Technology / databases
The grass is not always greener...
Benefits of Independent vs. Central Agencies

**Independent Boards**
- Administrative Efficiency
- Need for professional expertise
- Insulation from political interference
- Accountability

**Central Agencies**
- Coordination
- Administrative Efficiency
- Oversight
- Accountability

*Ultimately reasons to centralize or remain independent are not mutually exclusive.*
Regulatory Models Survey

- Document variety of regulatory structures in the U.S.
- Share information across states
- Track movement and trends

- Authority / Model
- Reach – staff, professions, licensees
- Board Composition
- Fiscal
- Cost
Preliminary Survey Results

- 95 complete responses, representing 33 states and District of Columbia
- Responses received from: AL, AR, AZ, CA, CO, DC, HI, IA, ID, IN, KY, LA, MD, MN, MO, MS, MT, NC, NE, NH, NM, NV, OH, OK, OR, SD, TX, UT, VA, VT, WA, WI, WV, and WY
Preliminary Survey Results

- Model A – 7 states = 20.59%
- Model B – 4 states = 11.76%
- Model C – 6 states = 17.65%
- Model D – 1 state = 2.94%
- Model E – 1 state = 2.94%
- Multiple models in a state – 12 states = 35.29%
- Other model not described above – 3 states = 8.82%
Consider Changing Models?

- Proposed consolidation (4) – impetus: efficiency, free-market support, job creation, NC Dental Board anti-trust concerns, efficiency, cost-savings, reduce bureaucracy, increase efficiency
- Moved from umbrella to more independent – impetus: cost-saving, better customer service
- Change to fully autonomous – impetus: time and cost savings
- Considering Department of Business and Industry having oversight of boards – impetus: small board staff needs more oversight, mismanagement of some boards, lack of education and experience on some boards, efficiency, cost-savings, anti-competitive protections, compliance issues
How many different professions/occupations does your organization regulate?
How many staff members does your organization employ?
Preliminary Survey Results

- How many licensees in each profession?
  - Organizations regulating 1 profession, range is 67 to 120,000.
  - Average is 17,689.

- Percentage of Public Members
  - Range is 0% to 100%.
  - Average is 24.12%
How is your organization primarily funded?
What percentage of the operating budget falls into each of the following categories?
Recent Regulatory Reform Efforts

Model A
Model B
Model C
Model D
Model E
Recent Regulatory Reform Efforts: Michigan

Combine similar occupations under an “umbrella” board. E.g. Barbers and Cosmetologists or Cemeteries, Funeral Directors and Pre-Paid Funeral and Cemetery Contract Providers
Investigate if professions should be deregulated and if boards should be centralized. Recommendation not to centralize but include some deregulation.
Recent Regulatory Reform Efforts: Oklahoma

Require all boards to feed into a centralized licensing database maintained by the Department of Labor.

“The Oklahoma Department of Labor shall become the central coordinating entity for the reporting of occupational licensing information from all state agencies, boards and commissions.”
Create the Occupational Licensing Review Commission comprised of the governor, secretary of state and attorney general, give authority to the commission to review occupational regulations, and emphasize state policy regarding occupational licensing that defines types of occupational regulation, promotes competition, and uses minimal restrictions to protect consumers (active supervision).
Considerations:

▪ What problem are you trying to solve?
▪ Performance or consumer safety outcomes?
▪ Political capital for legislative changes
▪ Cost / Efficiency
▪ Degree of centralization and autonomy
Questions and Discussion

Ronne Hines
Board member
Council on Licensure, Enforcement and Regulation (CLEAR)
Director, Division of Professions and Occupations, Dept. of Regulatory Agencies, Colorado

ronne.hines@state.co.us
303-894-7770
Best Practices for Licensing agencies in the handling of: Meetings, Rulemaking, Complaints, Investigations, Hearings and Settlements and Communications with Applicants and Licensees

Nahale Freeland Kalfas
Of Counsel to the National Center for Interstate Compacts
The Anti-Regulatory Environment

How Regulators View The World

Education

Public Protection

Exam

Experience

Continuing Competency & Enforcement

Courtesy of:
Nathan Stanley
Allen & Pinnix, P.A.
The Disconnect

How Outsiders View Regulatory Community

Barriers
- Overbroad Scope of Practice
- Economic Hardship
- Criminal History Blackball
- State-by-State Variability

Ⓒ Allen & Pinnix, P.A.
116th Annual Meeting – Palm Coast, FL

How They Really View You

Cartels  Price-fixers
Rent Seekers
Competition Stiflers
Self Dealers  Racketeers

©Allen & Pinnix, P.A.
Does Your Rule, Policy, or Action Comply With…

1. The State will increase economic opportunities, promote competition, and encourage innovation.

2. The State will use the least restrictive regulation necessary to protect consumers from present, significant and substantiated harms that threaten public health and safety.

3. An occupational regulation may be enforced against an individual only to the extent the individual sells goods and services that are included explicitly in the statute that defines the occupation’s scope of practice.…

©Allen & Pinnix, P.A.
Board Level - What Can You Do to Minimize Antitrust Risk?

**Processes**
Be mindful of comments by board members and staff, whether at meetings or otherwise.

**Statements**
Ensure robust complaint, investigation, prosecution, and meeting processes; no appearance of conflicts.

**Conduct**
Ensure any actions taken are pursuant to clearly-articulated state policy (generally through state statute).

**Non-Licensees**
Endeavour to settle disputes efficiently but be careful about communications and, when in doubt, seek injunctive relief in court and allow the trial court to provide active state supervision.

**Practice Scope**
When feasible, scope of practice issues should be settled via legislative changes, rulemaking, or declaratory ruling; be mindful of market disruptions, emerging technologies, and new groups of potential competitors looking to enter the market.

Ⓒ Allen & Pinnix, P.A.
Best Practices for Minimizing Antitrust Liability Risk: Policies/Procedures

• Engage in objective, evidence based review and renewal of applications for licensure and renewal

• Engage in thorough and inclusive investigations with ample opportunity for all parties to provide documentation and conduct interviews (more on disciplinary proceedings later)

• Review your rules and regulations thoroughly and voluntarily eliminate repetitive, antiquated or unduly burdensome rules

• Train your board members, staff and investigators early and often on the importance of transparency (and all relevant public records, open meetings laws), avoidance of conflicts and ANY appearance of protection of their market share if they are professional members of the board
Best Practices for Minimizing Antitrust Liability Risk: Policies/Procedures

• Understand what is expected of you at the state level and prepare (i.e.: audits, fiscal notes and other rulemaking requirements, survey and legislative query responses, current, helpful and efficient websites, electronic capability for applications and filing of complaints, ease for military families)

• Have an “elevator speech” prepared for your legislators as to the work your board does to advance and enhance consumer protection in the less restrictive (to your licensees) means possible

• Tell your story to the public, garner earned media
Best Practices for Minimizing Antitrust Liability Risk: Policies/Procedures

- Begin meetings with your purpose statement as a reminder to board members of their duty to narrowly engage in the sole mission of public protection and conduct every meeting with the same care and caution you would if you had public members in attendance.
- Read your legal, valid reasons for going into closed session into the record and resume open session for voting matters.
- Have counsel advise during your meetings and review your agenda.
Best Practices for Minimizing Antitrust Liability Risk: Policies/Procedures

- Settle non-licensee issues and scope of practice issues as amicably as possible and seek AG opinions, injunctive relief in court, or other forms of “active supervision” frequently.

REMEMBER: If your board repeatedly asks itself the question “is this inquiry, action, requirement or denial narrowly based on the sole purpose of public protection, without consideration of protection of professional market share, and are we engaging in the least restrictive, least punitive manner possible to protect the public” you should not run a foul of antitrust laws.
Where Do We Go – Collective Efforts

Engage At All Levels

Interstate Compacts/Portability

Uniformity/Information Sharing

Build Relationships

Tell Your Story with Evidence

©Allen & Pinnix, P.A
Antitrust Liability

- What constitutes “active state supervision” as required by the FTC v. NC Dental Board case remains to be determined by the courts and, in some states, the legislature.
- Recent case law (and legislation) is trending toward the erosion of the deference traditionally given to board member’s expertise, knowledge and interpretation of statutes under the Chevron case.
- Arizona has legislated against Chevron deference and the Mississippi Supreme Court has said they will not give deference to Boards.
- More ambiguous, less clear the statute = less deference given to board interpretation.
Antitrust Liability Contd.

• Review of evidence based criteria of Board requirements (Exams, Experience/Training hours, Supervision, Continuing Education) is trending nationally.

• Boards should determine the objective, evidence-based validity of their requirements and be able to demonstrate that those requirements are necessary and narrowly tailored to fulfill legitimate public health, safety or welfare objectives.
Antitrust Liability Contd.

• Does your Board’s Exam disproportionately disadvantage any examinee or group of examinees on any basis other than the examinee’s lack of knowledge or skill required to safely and competently engage in the practice or profession the Board regulates?

• Does your Board have a disproportionately low pass rate for examinees vs. other similar state regulatory boards or similar professions/occupations?

• Does your Board allow for Board approved interpreters and translators for examinees?

• Are you ADA compliant in your applications and exams?

• Do you review your exam and other requirements for acknowledgement of technological advancements and ways in which those advancements can assist your licensees?

• Do you have statistics to show that your supervision and continuing education requirements have a nexus to previous or ongoing complaints and public safety concerns reported to your board?

• Could your board withstand a legal challenge that you have no evidence basis for your requirement (as it relates to a legitimate public health, safety or welfare objective)?
Best Practices for Handling meetings, rulemaking, Complaints, investigations, settlements, hearings and communications with Applicants, Licensees and the Public

Nahale Freeland Kalfas
Of Counsel to the National Center for Interstate Compacts
Meetings

- Consider opening each meeting by reading your mission or purpose statement
- Conduct each meeting as though you have the public in attendance even if they are not present
- Provide ample notice of your meetings to all required parties and on your website
- Allow for public participation electronically or in person and allow a set period of time for public comment
- Review your agenda with counsel and read into the minutes your allowable reasons for going into closed session
- Read board member recusals into the minutes and have recused board members leave the room
- Encourage public member participation and be helpful to your public members
- Educate new board members about your process during the meeting
- Educate your board about cultural competency
- No water cooler conversation regarding board matters
- Keep it professional
Rulemaking

• Confer with counsel on your state’s rulemaking requirements regarding notice, public hearing, etc.
• Seek input from stakeholders early and often in the drafting process
• Eliminate redundant rules
• Only promulgate narrowly tailored, necessary, least burdensome rules
Investigations

- Do your Boards use investigators to investigate complaints? If so, are the investigators employees of the Board or contractors? Do Board members ever investigate complaints?

- How do the Boards determine which complaints warrant further investigation by an investigator? Are those decisions made by Board staff or a subcommittee of the Board?

- Are investigators asked to generate written reports of their findings?

- What resources have your Boards found helpful to train investigators?

- Do investigators allow all parties involved to provide responses and interview all parties?
Hearings/Settlements

• How many Board members usually adjudicate the hearing (or are cases sent to ALJ or elsewhere) and do Board members ever recuse?

• Do your Boards always have court reporters transcribe the hearing?

• How do your Boards approach settlement discussions? For example, is a Consent Order sometimes provided with the Notice of Hearing? Or, is the licensee given an opportunity to meet with the disciplinary committee prior to hearing to discuss settlement possibilities? What release or waiver (re: ex parte communications) is procured prior to initiation of settlement conference?

• How many of your Boards have separate counsel advising them during the hearings?

• Do your Boards usually render a decision on the record at the conclusion of the hearing, or do they usually take matters under advisement?

• Most Boards have experienced an uptick in complaints filed and hearings needed over the past several decades. How have you seen the hearing process change during your tenure as Board counsel (e.g. more licensees represented by counsel? More prehearing motions? More expert witnesses?)
Settlements

• Make sure your process is transparent, clearly explained to the licensee, and shields board members who may adjudicate the matter if settlement is not reached from ex parte problems

• Have the licensee (and their attorney) execute a detailed waiver and consent to your settlement procedure
  • Confirm the licensee’s understanding of what they signed at the beginning of the settlement conference

• Be cautious about who participates in the settlement

• Be generous in what you allow the licensee to offer in their defense

• Be creative about how to conduct the settlement conference (again, with input from counsel) and be creative with your offer—one size does not fit all
  • Draft a consent settlement agreement that thoroughly details how you arrived at your decision
OCCUPATIONAL LICENSING DEEP DIVE: UNIVERSAL RECOGNITION

Zach Herman
Policy Associate
National Conference of State Legislatures
The endorsement of licenses in good standing held by an individual practitioner in another state as valid qualification for licensure in the state.
What Universal Licensure Recognition Is Not

- **Reciprocity:**
  - Reciprocity is an agreement between two state licensing entities to recognize licenses from each other's states.

- **Interstate Compact:**
  - A constitutionally sanctioned agreement between state governments’ governing issues that cross state lines.

- **Universal:**
  - This doesn’t apply to all licensed professions in the state.

- **Automatic:**
  - The potential licensee must still apply for a license in the new state and meet that state’s requirements for licensure by endorsement.
HOW DOES UNIVERSAL LICENSURE RECOGNITION WORK?

The out of state applicant applies for licensure.

The applicant must have a license in good standing in another state.

The applicant must also meet all other requirements for universal recognition set out in statute.

The applicant is then issued a license in the new state.
WHAT THEY DON’T DO

- They do not establish reciprocity with any other state, and do not prevent any licensing board from entering into a reciprocity agreement with another state.
- They do not affect established licensing agreements set in interstate compacts or existing reciprocity agreements.
- They do not affect the regulation of new applicants applying for their first license.
The implementation of universal recognition is left up to the discretion of the licensing boards.

Applicants must have been licensed in another state for at least a year.

The applicant must be in good standing with their license. This includes no complaints, sanctions or disciplinary actions.

Applicants cannot have a disqualifying criminal history.

Applicants must have a substantially similar scope of practice between their current license and the license of the state to which they are applying.

Applicants must pay all applicable fees.

In many instances, applicants must also take the state examination.
OTHER EXAMPLES OF LICENSURE BY ENDORSEMENT

- Licensure for veterans and military spouses.
- Licensure during a declared state of emergency.
States That Have Enacted
- New Jersey: AB 2018 – 1531
- Arizona: HB 2019 – 2560
- Montana: HB 2019 – 105
- Pennsylvania: HB 2019 – 1172

States With Legislation Pending
- California: AB 2185
- Colorado: HB 1326
- Georgia: HB 773
- Iowa: HB 2470
- Ohio HB 432
- Missouri: HB 2476
- Virginia: HB 982
- Washington: HB 2354
Licensing is still at the board’s discretion.

Vague on “disqualifying criminal history.”

Does not address differences in maintaining licenses across multiple states.

Not every state adopts the exact same piece of recognition legislation.
Questions?

Zach Herman
Policy Associate
Employment, Labor and Retirement Program
National Conference of State Legislatures