

Delaware Professional Licensing Review Committee
September 28, 2016
10:15 a.m.
Georgetown Public Library, Meeting Room A
Georgetown, DE

MEETING MINUTES

Approved 10/27/2016

Committee Members Present: Secretary of State Jeffrey Bullock, Chair; Judy Diogo, Central Delaware Chamber of Commerce; Donald Fulton, Central Delaware Chamber of Commerce; Senator Gerald Hocker; Charles Madden, Executive Director of the Wilmington HOPE Commission; Nello Paoli, Jr. (via telephone), licensed electrician; Senator Karen Peterson; Ryan Tack-Hooper, ACLU of Delaware

Staff Present: David Mangler, Director, Division of Professional Regulation; Patricia Davis, Deputy Attorney General, Department of Justice; Meaghan Jerman, Director's Assistant, Division of Professional Regulation

Public Present: Jennifer August, Cheryl Heiks, Deanna Killen, Meghan Lester

Call to Order

Secretary Bullock called the meeting of the Delaware Professional Licensing Review Committee to order at 10:20 a.m.

Review and Approval of Meeting Minutes

The Committee reviewed the minutes of the August 23, 2016 meeting. Mr. Fulton made a motion, seconded by Senator Peterson, to approve the minutes as written. By unanimous vote, the motion carried.

Review and Discussion Draft Final Recommendation to the Governor

The committee was provided with a draft of the final recommendation report that will be presented to the Governor at the conclusion of the committee's work. Ms. Davis led the committee through the review of the report. Senator Peterson noted an error within the section reviewing the crimes substantially related to professional practice. She clarified that it was in 2004 that Senate Bill (SB) 229 replaced the prior felony bar on licensure. In 2006, SB 403 introduced the waiver process for applicants with prior convictions. This will be corrected in the report. Mr. Tack-Hooper suggested that within this section, the reference to crimes that are pled down to misdemeanor convictions be removed as it is not justifying anything that is being recommended by the committee. The committee agreed that this could be struck from the draft. Mr. Tack-Hooper also suggested the committee's recommendation in

this section concerning the board's review of crimes substantially related to the practice of the profession be strengthened as the current recommendation did not provide any guidance to the boards. Mr. Tack-Hooper suggested the language be strengthened to encourage the boards to take a critical look at the list of related crimes to ensure that every crime listed is justifiable as substantially related to the practice of the profession.

The committee discussed the recommendation to consider statutory changes to limit the "look-back" period for any convictions more than 15 years old. Senator Peterson expressed concern with this recommendation and noted an individual could have committed a terrible crime and could possibly never be eligible for licensure and feels the waiver process provides the boards' the opportunity to make this determination. Mr. Tack- Hooper questioned if Senator Peterson would be more comfortable if the look-back period was not applicable to certain convictions such as murder and sex offenses. Ms. Davis clarified that there is a permanent bar for licensure on felony sex offenses across the board. Senator Peterson further explained that she does not feel someone who is just released from incarceration should be eligible for a license immediately and that a period of time should exist before someone may be granted a license. Mr. Tack-Hooper shared that data suggests if an individual goes a decade without a subsequent conviction, the person is highly unlikely to commit another crime. Ms. Davis provided clarification on the current statutory language where someone may have been incarcerated for 5 years and appear to be eligible for licensure upon release, however individuals on probation and parole are not eligible for a waiver. Typically when released from incarceration individuals are generally placed on probation. Secretary Bullock shared that he believes this is the crux of the problem as individuals can remain on probation for many years and are not eligible for licensure during this time, and therefore as they are unable to return to work the likelihood is raised that they will go down the wrong path once again. After lengthy discussion, the committee agreed to modify their recommendation to place a ten year "look-back" limit on convictions from release of incarceration (when applicable) if there have been no other criminal convictions in the intervening time. Ms. Davis noted that another recommendation includes the ability for the board to grant waivers to applicants on Levels I and II supervision/probation. The committee agreed that this is an important recommendation to include. The committee agreed to include the recommendation to reduce the 5-year waiting period to 3 years following conviction of a crime against a person and to 2 years for a crime against property, as well as to permit for the administrative review and waiver granting of applicants with criminal histories between meetings.

The committee moved on to discuss their findings concerning the analysis of similarities and differences among electricians, HVAC, and plumbing occupations in the region. The committee was in agreement to recommend the boards identify sufficient equivalent experience in the areas of electrician and plumbing/HVAC occupations that allow qualified, experienced individuals to obtain a license in Delaware. Additional recommendations include the Board of Cosmetology and Barbering work with neighboring states through the National Interstate Council of State Boards of Cosmetology,

to develop more consistent educational and licensing criteria. The committee also recommended statutory or associated rules and regulation changes be made to allow students enrolled in cosmetology and barbering programs to sit for the written exam prior to graduation, which is a model similar to what is done in Pennsylvania.

Ms. Davis summarized for the committee the previous discussions concerning board composition and meeting frequency and effectiveness. The committee agreed they find the current board compositions to be adequate and structured appropriately.

Ms. Davis moved on to discuss the committee recommendation summarized in the report regarding the anti-trust review that was recommended as a result of the North Carolina Dental Examiners v. Federal Trade Commission. Ms. Davis explained the recommendations are in line with the legal memo that she distributed to the committee at their previous meeting. The recommendations from the committee include providing the Division Director with the authority to veto any regulations promulgated by a board that serve as a barrier to market participation, and afford the Division Director the same power to review any regulations promulgated by DAPE to ensure they do not serve as barriers to market participation. The committee agreed with all of the recommendations in this section of the report.

Section 6 of the report discusses one of the specific charges of the committee which is to establish best practices when a new profession is seeking licensure. Ms. Davis reminded the committee of the discussion at the committee's first meeting, where groups seeking licensure are referred to DPR and the Division is left with the responsibility of researching the profession, problem, etc. Ms. Davis explained the recommendation includes a proposed draft application that would be made available on the DPR website, which puts the onus on the group seeking licensure. The application asks such information as how many individuals in Delaware are currently working in the profession, what the educational requirements are, and ask for an explanation on the need for licensure. Ms. Davis explained at the end of this review process, DPR will make a recommendation either for or against the creation of this new licensure group. This recommendation, she clarified, in no way ties the hands of the General Assembly. She further explained the General Assembly can still run a bill to establish a new licensure group at any time. Additionally, legislative enactment may occur regardless of the Division's position— it is purely a recommendation. This would only establish a formalized process. Senator Peterson suggested this same process could also be used to deregulate a profession. Secretary Bullock inquired how the form/process addresses the groups seeking licensure for reimbursement purposes. Ms. Davis explained the application asks for a statement as to why they are seeking to become a licensed profession and the explanation must include a statement regarding the public health, safety, and welfare that is resulting from non-licensed practice. Ms. Davis explained she would anticipate this is where the explanation could be made that the public is not being adequately served because they cannot afford services as they are not covered by insurance. Mr. Madden inquired to what extent this

process may be present a barrier to those professions seeking licensure. Mr. Tack-Hooper shared that he feels this procedure provides a transparent procedure for all groups seeking licensure, who may not otherwise have been familiar with the process, and believes it is a good resource. Senator Peterson explained the legislators need to be aware of this suggested process if it is adopted. The committee agreed they were in favor of recommending this process.

Ms. Davis explained that another charge of the committee described in #5 (e) of Executive Order 60 (EO60) is to recommend best practices with respect to the process by which the State considers proposed regulatory or legislative changes that would (ii) with respect to existing regulated professions, would increase the requirements for licensure or certification. Ms. Davis reminded the committee that currently the boards cannot propose statutory changes under the umbrella of the Division. They are first sent to the Division Director's office and then on to the Secretary of State's office. Ms. Davis explained the recommendation is to maintain this same process in order to protect the public from anti-competitive decisions. The committee agreed.

Another charge of EO60 was to examine unnecessary licensing and certification requirements that do not necessarily improve quality or protect the public. Ms. Davis reminded the committee that during the review and discussion of the Division's boards, some boards were found to meet very infrequently, often times only to approve the previous meetings minutes, and to be in compliance with their statute. Ms. Davis read aloud the recommendation from the committee to amend the enabling statutes to allow those boards, specifically Manufactured Home Installation, Pilot Commissioners, and Podiatry to meet annually, or more often as needed. The committee agreed with this recommendation as they feel it will provide an opportunity for cost savings. Additionally, Chapter 9 of Title 24 allows the Division to license such things as deadly weapons dealers, without the existence of a deadly weapons board. Ms. Davis requested the committee consider recommending the restructuring of two of the Division's current boards in this manner. The Charitable Gaming board, Ms. Davis explained, meets monthly to review applications and grant permits for charitable gambling events. It is difficult to determine who is a subject matter expert in the matter of charitable gaming. Ms. Davis explained that complaints related to charitable gaming without a permit are investigated by the Division of Gaming Enforcement under the Division of Lottery as gambling without a permit is a criminal offense. The committee agreed that the Board of Charitable Gaming was a better fit under the Division of Lottery. The committee recommends the Division of Lottery or the Division of Professional Regulation be statutorily empowered to grant permits for charitable gambling. Ms. Diogo inquired how this recommendation would impact many non-profits that obtain permits for their events. Ms. Davis explained this would only expedite the processing time. Mr. Mangler explained the current Division process where the Division administratively issues permits for all established organizations, however all new organizations seeking a permit for charitable gambling event require review of the Board. The Board meetings, he explained, generally are only 15-20 minutes in length and involve reviewing any new applications and ratifying those permits which were issued since the previous Board meeting. With regard to the Adult

Entertainment Commission, Ms. Davis described the Commission issues licenses for adult entertainment facilities, but the subsequent regulation of the licensees is criminal. Ms. Davis shared that she reached out to the head of the Administrative Prosecution Unit regarding the dismissal of previous complaints and was advised that they were sent to nuisance abatement as they are criminal offenses. Ms. Davis reported all the board has done in two years is meet and issue licenses. Mr. Mangler further explained there are only 3 licensees in the state. The licensees are required to attend an annual Board meeting to renew their facility license. The committee confirmed they were all in agreement to recommend the consideration of abolishing the Adult Entertainment Commission and administratively process the facility licenses.

The committee discussed existing boards giving consideration to completing a similar review process as that which new license groups would complete every decade. Mr. Tack-Hooper shared this would be a good exercise to determine if professions should continue to be licensed. Secretary Bullock noted the Sunset Committee review process will review this; however Senator Peterson was not clear if that also included review of scope of practice. Mr. Mangler shared in his experience it depends which profession is being reviewed. He explained the boards selected for Sunset are asked for recommendations and the Division is asked for overall history. Within the recommendation provided to the committee is where the reduction and expansion of scope and licensure would be noted. Senator Peterson explained this is important as sometimes the scope is no longer accurate due to industry changes and changes in technology.

Secretary Bullock requested Ms. Davis make the suggested revisions and circulate the document back to the committee for final review and approval. Senator Peterson made a motion to approve the draft final report with the suggested revisions for submission to the Governor, seconded by Mr. Fulton. By unanimous vote, the motion carried.

Senator Hocker commented that he had prior conversations with the Governor prior to EO60 where he expressed concern that some of the boards appear to have control of their industries and he hoped that this would be addressed by the committee. Secretary Bullock and Ms. Davis explained this is addressed under the anti-competitive section. Senator Hocker shared his concerns are specifically with the electrical and plumbing boards. Mr. Mangler pointed out that on page 12 of the recommendation it is recommended that the boards identify sufficient equivalent experience in the areas of the electrician and plumbing/HVAC occupations that allow the qualified, experienced individual to obtain a license in Delaware. The current statute states “at the discretion of the Board”. He shared this will require the board to clarify exactly what the experience needs to be.

Public Comment

Cheryl Heiks addressed the committee and encouraged the group to give consideration to those union controlled professions, such as electrical, where some decisions may be perceived as biased. She

recommended ensuring that there is always a balance of union versus non-union professional members. Ms. Davis explained the Division could speak with the Governor's office and make this recommendation to ensure this is considered as anything further would require a statutory change.

Jennifer August addressed the Committee. She shared that has she attended all but one of the committee's meetings. She explained that she faxed a 29 page document to the Secretary of State's office on Monday morning. Mr. Mangler and Ms. Davis explained they were just forwarded this document this morning and do not believe they received it in entirety and as a result the committee had not had an opportunity to review the written comment. Ms. August explained this written statement outlined her specific concerns of the requirements of EO60. Ms. August reviewed excerpts her written statement aloud to the committee. Ms. Jerman will send an electronic copy of Ms. August's written statement to the committee for their review.

Adjournment

With no further discussion, the Committee adjourned at 12:10 p.m.

Final Report and Recommendations
Delaware Professional Licensing Review Committee

October 2016

Submitted by the Delaware Professional Licensing Review Committee to
Delaware Governor Jack Markell and the General Assembly

Table of Contents

Committee Members	3
Introduction	4
Reviews, Discussions and Recommendations	
1. Regulated Professions in Neighboring States	6
2. Review of Crimes Substantially Related to Professional Practice	7
3. Comparison of Delaware requirements for Certain Occupations to Those of Neighboring States	11
4. Board/Commission Composition, Meeting Frequency and Effectiveness	14
5. Anti-trust Review	15
6. Adding New Profession or Expanding Existing Profession Requirements	17
7. Alternative Statutory Licensing Model Opportunities	18
Appendixes	20

Committee Members

Committee members or appointed members' designees, as established in Executive Order 60, have contributed significant time and expertise to developing the recommendations set forth in this report.

The Honorable Gerald Brady
Representative

The Honorable Jeffrey Bullock (Chair)
Secretary of State

Judy Diogo
President
Central Delaware Chamber of Commerce

Donald Fulton
Board of Directors
Delaware Chamber of Commerce

The Honorable Patrice Gilliam-Johnson
Secretary of Labor

Debbie Gottshalk, Esq.
Chief Policy Advisor
Department of Health and Social Service
On behalf of The Honorable Rita Landgraf

Alan Grinstead
Chief, Bureau of Community Corrections
Department of Correction
On behalf of The Honorable Robert Coupe

The Honorable Gerald Hocker
Senator

Charles A. Madden
Executive Director
Wilmington HOPE Commission

Nello Paoli, Jr.
Preferred Electric, Inc.

The Honorable Karen Peterson
Senator

The Honorable Nicole Poore
Senator

Joshua Schoenberg
Funeral Director
Schoenberg Memorial Chapel, Inc.

Ryan Tack-Hooper, Esq.
Staff Attorney/Legislative Advocate
ACLU of Delaware

The Honorable Bernice Whaley
Delaware Economic Development Office

Introduction

The Delaware Professional Licensing Review Committee (hereinafter, the “Committee”) was established via Executive Order 60 for the purpose of conducting a review of current requirements for professional and occupational licensing and registration. The purpose of the review was to (1) identify regulatory burdens that may be inefficient or otherwise create an unnecessary barrier to entry into certain professions or occupations; (2) maintain important protections of the health, safety and welfare of Delawareans that are the goal of professional and occupational licensing statutes and regulations; (3) ensure that the State’s professional boards are not at risk of liability for anti-competitive actions; and (4) review the existing regulatory regime to identify areas where improvements might be made. The Committee convened seven times from May to October. As references, the Committee received the 2015 White House Report *Occupational Licensing: A Framework for Policymakers*, the November 2015 Citizen Advocacy Center white paper *Addressing the Supreme Court’s North Carolina Dental Decision: Options for the States*, and from the Council on Licensure, Enforcement and Regulation a chapter titled “Developing Regulations” from its 2015 text *Demystifying Occupational and Professional Regulation*. The Committee was also provided various excerpts of relevant laws and regulations, as well as reports, data, policies and practices in place in Delaware.

The purpose of this report is to describe the current landscape where there possibly exist requirements, either in law or regulation, or by policy or practice, that do little in the way of public protection, add unnecessary burden, or have the appearance of protectionist behavior. Further, this report will outline a clear set of recommendations to reduce or eliminate unnecessary burdens and barriers that cause undue delays in acquiring a professional or occupational license; lower barriers to licensure that prevent or unnecessarily delay individuals from improving his or her employment opportunities; and lastly, make recommendations that will ensure that the State’s professional boards are not at risk for liability for any anti-competitive actions.

The Committee undertook an examination of various aspects of specific Title 24 chapters and their associated regulations to better understand current requirements and recommend strategies and actions to make recommendations for legislative or regulatory action. Recommendations developed were aimed at removing any identified unnecessary or overly burdensome licensing or certification requirements. The Committee also reviewed a detailed comparison of licensing and certification requirements of select regulated occupations relative to the requirements of neighboring jurisdictions of Maryland, Pennsylvania, and New Jersey. Following a review of the various boards’ and commissions’ structure and composition,

the Committee further considered recommendations regarding whether the current system of professional regulation could or should be replaced by an alternative methodology or system of regulation. The Committee discussed the need for a mechanism or process by which the State would consider proposed regulatory or legislative changes that would either add a new profession to the list of regulated professions or increase the licensure or certification requirements for existing regulated professions. Lastly, the Committee discussed other situations within the State that present a potential conflict similar to the now well-known Supreme Court of the United States determination in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*.

The sections of this report that follow will address the areas focused on by the Committee and will contain specific recommendations being made. The licensed occupations of Cosmetology and Barbering and their associated licensed practices of nail technology and skin care; Electricians; and Plumbers/Heating, Ventilation, Air Conditioning and Refrigeration professionals were the focus of review against neighboring state requirements for education, training, continuing education and levels or tiers of licensure and the degree to which reciprocity exists with those states. The lists of crimes substantially related that exist in any of the boards/commission's rules and regulations were reviewed as well as the current statutory language around waivers and requirements. An overall comparison with neighboring states relative to which professions are licensed will also be outlined. Board composition and frequency of meetings for each will be discussed along with any recommendations that would impact efficiency, effectiveness, and operation costs. This report will also identify a professional Board that provides self-administration outside of any state agency oversight or support and provide recommendations relative to concerns, if any, aligned with the findings in the *North Carolina Board of Dental Examiners v. Federal Trade Commission*. A final section will address any opportunity to transfer some of the currently regulated entities to a statutory licensing model.

Reviews, Discussions and Recommendations

1. Regulated Professions in Neighboring States

The list of regulated occupations and professions in Delaware found under Title 24 and administered by the Division of Professional Regulation was compared to neighboring states to determine in what areas the Committee may want to focus review, *i.e.*, are there occupations or professions that Delaware may unnecessarily regulating? Specifically, the Committee looked at these three occupations in regard to license requirements, continuing education requirements, and specific “sub-specialty” areas licensed or registered.

Appendix A provides a high-level comparison with our neighbors – Pennsylvania, New Jersey, and Maryland. The Committee notes that among the four states; all similarly license the same general areas, with the exception of electrician and plumbing/HVAC in Maryland and Pennsylvania. While Maryland licenses one level of the occupation, another level is licensed at the County level. Pennsylvania does not regulate these occupations at the state level at all. A more detailed review flowed from Appendix A with the Committee focusing specific attention on the cosmetology and barbering, electrician and plumbing/HVAC occupations. Additional detail around these occupations and discussion and resulting recommendations follows in section 3.

2. Review of Crimes Substantially Related to Professional Practice

Prior to 2004, an individual with a felony conviction was absolutely barred from obtaining any professional or occupational licensure in Delaware. On June 22, 2004, the 142nd General Assembly's Senate Bill 229 was signed into law, replacing the felony bar with statutory language that precluded professional license applicants with convictions of "crimes substantially related" to the profession from obtaining licensure. That bill further directed each licensing board to determine, in regulation, those crimes deemed substantially related to the practice. In 2006, Senate Bill 403 was introduced to the 143th General Assembly, providing a path to licensure for applicants with crimes substantially related, only if the respective licensing board could find that three requirements were met. One requirement for a waiver to a criminal history disqualifier was the passage of time since all sentencing requirements had been met and that the individual was not on work release, parole, probation, etc. Boards were also required to delineate, in regulation, a list of crimes substantially related to the practice of the profession or occupation. The law did not differentiate between felony or misdemeanor convictions and the "waiting period" and requirement for a hearing before a respective Board was the same across all professions and occupations. In 2013, the language in the statutes was amended to (1) move the "start" of the five-year period to begin at the time of conviction; and (2) allow boards to consider the granting of a waiver based on submitted documentation without holding a hearing on the matter. These two changes had a positive impact on reducing both the statutory waiting period and the administrative processing time for many applicants. On April 20, 2016, Governor Jack A. Markell created a Task Force to further explore possible barriers to licensure that may exist, preventing the disadvantaged and underemployed from improving their lot in life.

The Committee undertook a thorough review of Delaware's licensure laws and concomitant regulations to ferret out unnecessary barriers relating to criminal history that lead to higher prices for services without improving quality or protecting the public. The majority of the license professions contain language similar to the following, and it is from this language that the Committee undertook its review and makes its recommendations:

The applicant must not have been convicted of a crime substantially related to the practice; however, after a hearing or review of documentation demonstrating that the applicant meets the specified criteria for a waiver, the Board, by an affirmative vote of a majority of the quorum may waive this disqualification, if it finds all of the following:

a. For waiver of a felony conviction, more than 5 years have elapsed since the date of the conviction. At the time of the application the applicant may not be incarcerated, on work release, on probation, on parole or serving any part of a suspended sentence and must be in substantial compliance with all court orders pertaining to fines, restitution and community service.

b. For waiver of a misdemeanor conviction or violation, at the time of the application the applicant may not be incarcerated, on work release, on probation, on parole or serving any part of a suspended sentence and must be in substantial compliance with all court orders pertaining to fines, restitution and community service.

c. The applicant is capable of practicing in a competent and professional manner.

d. The granting of a waiver will not endanger the public health, safety or welfare; and

e. The applicant has not been convicted of a felony sexual offense.

The Crimes Lists

Each licensing board then has a list of crimes, misdemeanor and felony, it has deemed to be substantially related to the practice. An applicant with a conviction of a crime “on the list” cannot be granted a professional license unless the licensing board determines that a waiver of this disqualifier should be granted. The Committee discussed the fact that an extremely high percentage of waivers requested are granted following a hearing. However, the Committee is concerned that the psychological barrier of the criminal bar to licensure may be dissuading some applicants from applying in the first place and seeking a waiver. Moreover, the Committee is concerned that the lists of crimes deemed substantially related to the practice of certain professions are too broad. As part of this process, the Committee reviewed every crime list of the licensing boards. Initially, the Committee discussed the possibility of removing all misdemeanor convictions from consideration by any licensing board. This would return all licensing boards to their pre-2004 position, with only certain felony convictions serving as a barrier to licensure; however, unlike the pre-2004 statute, boards would retain the ability to waive a felony conviction as a disqualifier.

During its review, the Committee learned that each licensing board had been recently tasked with culling through its crime list and the Committee is encouraged to learn that the following changes are being made:

- The Board of Dentistry and Dental Hygiene has removed approximately 130 crimes from its list, along with the catch all provisions such as “any crime involving dishonesty;”
- The Board of Mental Health and Chemical Dependency Professionals has removed 20 crimes from its list;
- The Board of Examiners in Optometry has removed approximately 130 crimes from its list;
- The Board of Podiatry removed approximately 140 crimes from its list;
- The Board of Nursing removed approximately 100 crimes from its list, along with the catch all provisions.
- The Board of Real Estate Examiners deleted 24 crimes from its list;
- The Board of Massage and Bodywork deleted 18 crimes from its list; and
- The Board of Physical Therapy deleted 4 crimes from its list of 113.

The Committee recommends that this work continue and that each licensing board continue to narrow down the list of crimes it deems substantially related to the practice of its profession. Each board should be directed to take a critical look at every remaining crime, and ensure that every single listed crime is clearly justifiable as substantially related to the practice of the profession. Licensure should be freely granted, denied in only limited circumstances, and a crimes list should not be a barrier to licensure for a large segment of the population.

Those Applicants Re-Entering the Workforce Following Incarceration

Discussions were held regarding the unique situation of those re-entering the workforce following incarceration. Specifically, training programs in the corrections system may be training inmates for professions that they would be disqualified from obtaining licensure due to their incarceration. This is a clear barrier the Committee was tasked with resolving. The Committee learned of another initiative of the Governor, I-ADAPT. The Individual Assessment, Discharge and Planning Team works to reintegrate exiting inmates into society as a way to reduce recidivism. I-ADAPT, which was created under an Executive Order from Governor Markell, brings together officials from the departments of Correction, Labor, Education, the State Housing Authority, DHSS and the Criminal Justice Council. I-ADAPT has worked with more

than 2,000 inmates as they exit prison to improve their access to such resources as job training, education, social services and housing. The Division of Professional Regulation would be a valuable addition to this group. Currently, the Division is working on a program with the Department of Correction that would permit a barber apprentice program to begin at the Howard Young Correctional Facility. This important work should continue.

The Committee recommends that the Division of Professional Regulation be added to the I-ADAPT membership to assist with reintegration of exiting inmates in regard to obtaining professional licensure.

Statutory Changes for All Licensing Boards

The Committee is encouraged by the work currently being done with narrowing the lists of crimes that licensing boards will be considering with future applicants. Nonetheless, the Committee understands there is currently no “statute of limitations” on when a criminal conviction is considered too stale for consideration. Moreover, the purpose of the criminal conviction consideration in the first place is to ensure the proper protection of the public. The intent was never to be so restrictive that individuals who are capable of practicing in a safe and competent manner were reticent to even apply for licensure in the first place. Finally, because of the high number of waivers that are granted, the Committee would like to see a more streamlined process implemented where applicants would not have to necessarily wait 30 days for a board meeting before a waiver could be granted. The Committee learned that the Board of Nursing is spearheading a pilot program to vet all applicants with criminal histories through an administrative process between board meetings to grant as many waivers as quickly as possible. Assuming this pilot program is successful; the Committee recommends it be expanded to all of the licensing boards.

Therefore, the Committee recommends that the criminal conviction consideration language contained in each Title 24 licensing board’s enabling statute be amended to (1) contain a statutory limit on the “look-back” period, *i.e.*, no consideration of any conviction that is more than 10 years old, or for which 10 years has elapsed from the time of incarceration, if any, if there have been no other criminal convictions in the intervening time; (2) reduce the 5-year waiting period to 3 years following conviction of a crime against a person and to 2 years for a crime against property; (3) allow licensing boards to grant waivers to applicants on Levels I and II Supervision; and (4) permit for the administrative review and waiver granting of applicants with criminal histories between meetings.

3. Comparison of Delaware Requirements for Certain Occupations to Those of Neighboring States

The Committee discussed the detailed analysis of similarities and differences among Delaware, Pennsylvania, New Jersey, and Maryland in licensure of the electrician, plumber, and HVAC occupations. Appendix B represents the differences among these occupations – *e.g.*, what is and is not licensed by the states. The Committee reviewed analyses of the basic license requirements for these occupations, *i.e.*, certain Delaware licensed groups compared to neighboring state licensed and regulated occupations, similarities/differences in periods of licensure – license renewal frequency, and similarities and differences in the requirements for maintaining the license – continuing education or demonstration of competency.

Most notable are the differences between Maryland, Pennsylvania, New Jersey and Delaware in the number of classroom and practice hours required for licensure for cosmetologists and barbers. For cosmetologists, Delaware requires a combination of 1500 classroom and practical hours – the most in our area – to qualify for licensure as a cosmetologist while New Jersey requires only 1200 hours. Barbers are required to complete a combination of 1500 classroom and practice hours in Delaware – the highest number of hours – while New Jersey requires only 900 hours. The number of hours required for a license to practice as a nail technician in Delaware is 300 while Pennsylvania requires only 200 hours. Delaware and New Jersey require estheticians to complete 600 hours of training while Pennsylvania requires half that number, 300 hours. The “scope” of practice is the same or substantially similar across the four states. The National Interstate Council of State Boards of Cosmetology has begun work to open the discussion of establishing consistency in model law and regulation to address the diverse differences in requirements from state to state. Division of Professional Regulation staff that support the Board of Cosmetology and Barbering will participate in this work during the Council’s annual meeting. The Committee also noted that Pennsylvania allows students enrolled in a course of cosmetology studies to become eligible to take the written portion of the licensing examination approximately 300 hours prior to graduation while maintaining the requirement that the individual is not eligible for licensure until completion of the education program. This would most likely increase the success rate on the written examination and is timed to coincide with the completion of most of the classroom portions of the curriculum. By contrast, Delaware requires that the student successfully complete the entire program before becoming eligible to take the written examination.

Another notable difference to the Committee is the various “levels” of licensure in Delaware compared to the neighboring States. As mentioned previously Pennsylvania does not regulate either electricians or plumbers/HVAC. Rather, over 2,000 local and regional

municipalities in Pennsylvania license and regulate these occupations. Many localities do not regulate at all. Safety and code compliance are provided for through inspection of work against building and fire codes.

Maryland, New Jersey, and Delaware license electricians at the Master level while Delaware and New Jersey also license at the journeyman level, too. Delaware further licenses at the apprentice level. The Committee noted the difficulties this variation from state to state causes for licensure applicants in Delaware coming from any of these other states, most significantly an area in Pennsylvania where there is no license required of any type. The applicant in Delaware, in these situations, is often slowed considerably while gathering “evidence” of equivalent competence that the Delaware Board requires.

Likewise in the plumbing trade, if the Delaware Board does not find evidence of significant equivalence in experience, regardless of years of practice the applicant has, the Board will require the individual to first take a “by-pass exam” that is locally administered at a technical high school before allowing the applicant to be made eligible to take the standardized license exam. The by-pass exams and the standardized license exams are offered infrequently due to the low demand for the exams and applicants can wait months before testing and becoming licensed. The impact on small business creation or the ability to relocate to Delaware and become meaningfully employed was noted as a significant barrier by the Committee. The Committee questions why, if someone is coming from another state that requires a Master license for example, and that person can demonstrate a defined number of years’ experience with an unblemished license history, would Delaware require the person to re-take a licensing examination?

Therefore, the Committee recommends changes be made, where necessary to the Delaware Code or associated rules and regulations, to more clearly establish reciprocal criteria that are reasonable and easily understood. Specifically, the Committee recommends that the respective boards identify sufficient equivalent experience in the areas of the electrician and plumbing/HVAC occupations that allow the qualified, experienced individual to obtain a license in Delaware.

In regard to cosmetology and barbering, the Committee recommends that the Board of Cosmetology and Barbering, through participation with the National Interstate Council of State Boards of Cosmetology, work with our neighboring states to develop more consistent educational and licensing criteria. The Committee further recommends changes be made,

where necessary to the Delaware Code or associated rules and regulations, to allow students enrolled in cosmetology and barbering to sit for the written exam in a similar fashion as allowed in Pennsylvania, that is, prior to graduation.

4. Board/Commission Composition, Meeting Frequency and Effectiveness

The composition of a board in regard to the balance between public members and professional or market-place participant members has been a topic of discussion nationally as a result of the Supreme Court of the United States decision in North Carolina Dental. The Committee reviewed the composition of all Title 24 boards under the Division of Professional Regulation in light of this national focus. Discussion included the Committee's understanding that "re-balancing" composition to provide more public members than professional members does not necessarily provide any guaranteed protection against anti-trust or professional protectionist behavior by a board, especially if a board of public member majority were to consistently defer to the professional member(s) for guidance, direction or decisions, or if the minority of professional members consistently exerted undue influence during meetings and decisions. Beyond that, the Committee discussed the risks to boards' decisions if the composition was not tilted heavier toward the professional member makeup. That said, the Committee finds that the majority of boards has a nearly equal professional to public member ratio with professional representation outweighing the public member numbers by one or two seats. The Committee also finds that, on average, the number of board members is fairly consistent at 5 – 7 and where that number is greater, a much larger number of individuals licensed under the authority of the board explained the size.

The Committee, finding the current composition of boards to be appropriate and sufficiently structured, makes no recommendation in this area.

5. Anti-Trust Review

In *North Carolina Dental Examiners v. Federal Trade Commission*, the Supreme Court of the United States held that state licensing boards may enjoy state action immunity from federal antitrust lawsuits when two conditions are met: (1) their conduct is undertaken pursuant to a “clearly articulated” and “affirmatively expressed” state policy to restrain trade or affect competition; and (2) their conduct is “actively supervised” by the state. 135 S. Ct. 1101 (2015).

The purpose of the “active supervision” requirement is “to ensure the State accept political accountability for anticompetitive conduct they permit and control.” [*N.C. Dental*], 135 S.Ct. at 1111. The Court will look for sufficient supervision that “need not entail day-to-day involvement” in the board’s decision making, but sufficient review by a state actor that “provide[s] realistic assurance” that the anticompetitive effect of a board’s actions promote state policy, rather than the board members’ private, protectionist, interests. *Id.* at 1116.

Therefore, not every action of a professional licensing board will trigger a review of the FTC. Discipline of licensees, the decision to grant or deny licensure to an individual applicant based on clearly articulated statutory standards, and most regulation promulgation will not affect the competitive market. The decisions likely to trigger antitrust review are those that create barriers to practicing within the profession within the state. These include: enforcement actions against unlicensed practice; licensing requirements in excess of those created by the general assembly; restrictions on advertising or competitive bidding; restrictions on commercial dealings with suppliers or other third parties; and price regulation, including restrictions on discounts. See *Opinion of the Attorney General of the State of California*, No. 15-402 (Sept. 10, 2015).

The organization of professional licensing boards under the umbrella of the Division of Professional Regulation provides a structure that could easily be adapted to provide the necessary “state supervision” contemplated by *North Carolina Dental*.

Specifically, the Committee recommends the following:

(1) Amend 29 Del. C. § 8735 to empower the Director of the Division of Professional Regulation to review all proposed rules and regulations before they are provided to the Registrar of Regulations for publication, and grant the Director the authority to disapprove any regulations that serve as a barrier to market participation.

(2) Amend 29 Del. C. § 8735 to require decisions of licensing boards that implicate unlicensed practice be reviewed by the Director and afford the Director the ability to modify or reject such decisions, consistent with the public (consumer) interest.

(3) Review existing regulations for any licensure criteria that is in addition to that established by statute. If the General Assembly defines the scope of practicing a particular profession and a board operates only within the confines of that legislative enactment, it is not exercising independent decision-making authority. Consider either removing any regulations that add to the statutory definition of scope of practice of a particular profession, or amend the code to reflect the requirements.

(4) With regard to the Delaware Association of Professional Engineers, created by statute at 24 *Del. C.* Ch. 28, but not organized under the Division of Professional Regulation, the Committee recognizes that the DAPE has not promulgated any regulations regarding licensure. Scope of practice is defined, in its entirety, in the enabling statute. The Director of the Division of Professional Regulation should be afforded the same power to review any regulations promulgated by the DAPE and veto or modify them as necessary, as well as the same power to modify or reject any decisions regarding unlicensed practice as those Title 24 boards organized under the DPR.

6. Adding New Profession or Expanding Existing Profession Requirements

During the course of its review, the Committee heard from individuals interested in creating new licensure categories. Creation of a new licensure category or the expansion of requirements for licensing existing professions rests solely within the discretion of the General Assembly. However, the Committee recognizes that individuals who wish to create a new licensure category are often directed to the Division of Professional Regulation, either prior to or during a legislative session. The Division of Professional Regulation is then put in the unenviable position of having to learn all that it can about the profession's scope of practice, national standards if they exist, current demand for licensure, and the public harm that could result if the new licensure category is not created. If the Division is first approached during the legislative session, all of this must be determined in an expedited manner, without an opportunity for meaningful discussion or review. The Division's review is conducted on a case-by-case basis, placing an inordinate time demand on the overly taxed Division of Professional Regulation.

The Committee therefore recommends the creation of a formalized process of review the DPR should undertake with any new profession that seeks to become licensed. The review process should not "tie the hands" of the General Assembly, but rather provide a structure to fully vet all issues surrounding the creation of a new licensure category, both in favor and against. At the conclusion of its review, the DPR may issue a finding either recommending the creation of a new licensure category, or not recommending such legislative enactment. Legislative enactment may occur regardless of the Division's position, and the purpose of the review process would be to better inform legislators and the public of all relevant, material issues. An application to initiate such a review is attached to this report in Appendix D.

Consistent with the recommendations regarding shielding professional licensure boards from anti-trade scrutiny, increasing the requirements for licensure or certification of existing regulated professions is currently, and should continue to be, a matter of legislative enactment. When initiated by a licensing board, legislation is, and should continue to be, vetted through the Division of Professional Regulation and the Department of State before submitted to the General Assembly. **The Committee reiterates its recommendation regarding the creation of oversight powers, vested in the Division of Professional Regulation, in order to protect the public from anti-competitive decisions.**

7. Alternative Statutory Licensing Model Opportunities

As part of its charge, the Committee was to examine unnecessary licensing and certification requirements that lead to higher prices for goods and services without improving quality or protecting the public. In conducting its review, the Committee discovered that some licensing boards meet so infrequently, and conduct such minimal board business in a given year, that their enabling statute requires a minimum number of meetings per year and when meeting just often enough to comply with their statutory obligations, the boards do little more than approve minutes of the last meeting. Specifically, the boards of Manufactured Home Installation, Pilot Commissioners and Podiatry fall into this category. Permitting these boards to meet annually, and however more often as necessary will help to reduce administrative costs that are passed on to licensees. Most boards have delegated to the Division of Professional Regulation the ability to grant licenses to “clean” applicants between meetings, so licensure granting will not be adversely impacted by reducing the number of meetings. Further, the Freedom of Information Act was recently amended to require all boards that meet four times per year or less to post draft minutes between meetings, so public transparency would not be adversely impacted either.

The Committee therefore recommends that the enabling statutes of the boards of Manufactured Home Installation, Pilot Commissioners and Podiatry be amended to permit those boards to meet annually, or more often as needed.

Moreover, although most licensing boards organized under the Division of Professional Regulation consist of a number of board members who meet on a regular basis to award licenses and regulate practice through regulation promulgation and disciplinary case decisions, one chapter of Title 24 permits the Division to award licenses independent of a composed board. Specifically, Deadly Weapons Dealer licenses are awarded by the Division without the review of a board or commission. *See 24 Del. C. Ch. 9.* Similarly, the Board of Charitable Gaming, Title 28 Chapter 15, awards permits for charitable games and the Division has the authority to review books and records of games once they have been held. The Board, however, has no on-going regulatory authority with regard to any particular licensee and holding applications for board review delays these necessary permits. Similarly, the Adult Entertainment Commission grants initial licensure to adult entertainment establishments and, while that commission has the statutory authority to regulate licensees, a review of the minutes for the past three years indicates that no on-going regulation of licensees is occurring.

The Committee therefore recommends that consideration should be given to abolish the Board of Charitable Gaming, and either the Division of Professional Regulation or the Division of Lottery be statutorily empowered to grant permits for charitable gambling and promulgate any additional regulations needed regarding permissible charitable gambling in

the state of Delaware. The Committee further recommends that the Adult Entertainment Commission be abolished and the Division of Professional Regulation be statutorily empowered to grant licenses to adult entertainment establishments.

Appendix

Appendix A: Regulated Professions, Occupations, Trades

Appendix B: Comparison of Delaware Requirements for Certain Occupations

Appendix C: Board Composition and Meeting Frequency

Appendix D: Instruction Sheet and Application to Initiate Review Request of New Professional Licensure Category

Appendix A - Regulated Professions, Occupations, Trades				
Delaware	MD	NJ	PA	NY
Accountancy	x	x	x	x
Acupuncture	x	x	x	x
Acupuncture Detoxification	x		x	
Aesthetician	x		x	x
Architects	x	x	x	x
Athletic Trainers	x	x	x	x
Audiology	x	x	x	x
Barbering	x	x	x	x
Chemical Dependency Professionals	x	x		
Chiropractic	x	x	x	x
Cosmetology	x	x	x	x
Dental	x	x	x	x
Dietitians	x		x	x
Electricians	x	x	**	***
Funeral Services	x	x	x	x
Genetic Counselor	x	x	x	x
Geology			x	x
Hearing Aid Dispensers	x	x	x	x
Home Inspectors	x		x	x
HVACR	x	x	x	x
Land Surveyors	x	x	x	x
Landscape Architect	x	x	x	x
Manufactured Home Installation	x	x		
Marriage and Family Therapy	x	x	x	x
Massage and Bodywork	x	x	x	x
Nail Technician	x	x	x	x
Nursing	x	x	x	x
Nursing Home Administrators	x	x	x	x
Nutritionist	x		x	x
Occupational Therapy	x	x	x	x
Optometry	x	x	x	x
Paramedic	x	x	x	x
Pharmacy	x	x	x	x
Physical Therapy	x	x	x	x
Physician	x	x	x	x
Physician Assistant	x	x	x	x
Plumbers	x	x	@	x
Podiatry	x	x	x	x
Polysomnographer	x	x		x
Professional Counselors of Mental Health	x	x	x	x
Psychology	x	x	x	x
Real Estate	x	x	x	x
Real Estate Appraisers	x	x	x	x
Respiratory Care	x	x	x	x
Social Workers	x	x	x	x
Speech Pathology	x	x	x	x
Veterinary Medicine	x	x	x	x

**Over 2000 municipalities license electricians

***Local municipalities license unless working out-side of municipality, then Master license only

@ Municipalities license plumbers

Appendix B

Comparison of Delaware Requirements for Certain Occupations to Those of Neighboring States

Profession	License Type				Renewal Frequency				CE Hours Required			
	DE	PA	NJ	MD	DE	PA	NJ	MD	DE	PA	NJ	MD
Electrician		Locally		Locally		Locally				Locally		
Master	x			x	2			2	10			10
Limited	x				2							
Journeyperson	x		x		2		3		5		34	
Apprentice	x				2							
Burglar Alarm							3					
Electrical Contractor			X				3				34	
Fire Alarm							3					
Locksmith							3					
Plumber												
Master	x	Locally	x	x/gas fitter	2		2	2			5	
Medical Gas Pipefitter			cert									
Journeyman Plumber			reg	x/gas fitter				2				
Apprentice Plumber			reg	x/gas fitter				2				
Master Natural Gas Fitter				x				2				
Journey Natural Gas Fitter			cert	x				2				
Propane Gas Fitter			cert	cert				2				
HVAC-R		Locally										
Master	x		x	x	2		2	2			5	
Master Restricted	x			x	2			2				
Heating - Forced Air, ventilation	x											
Heating - Hydronic Systems	x											
Commercial Hood	x											
Refrigeration	x											
Air Conditioning	x											
Gas Piping	x											
Journeyman				x				2				
Apprentice				x				2				
	DE	PA	NJ	MD	DE	PA	NJ	MD	DE	PA	NJ	MD
Cosmetology & Barbering												
Cosmetologist	x	x	x	x	2	2	2	2	0	0	0	0
Esthetician	x	x	x	x	2	2	2	2	0	0	0	0
Nail Technician	x	x	x	x	2	2	2	2	0	0	0	0
Electrologist	x				2				0			
Owner Salon				x				2				
Owner Limited Practice				x				2				0
Cosmetologist apprentice	x			x	varies	21 mos			0			0
esthetician apprentice	x			x	varies				0			0
nail technician apprentice	x			x	varies				0			0
Electrologist Apprentice	x				varies				0			
Barber	x	x	x		2	2	2		0	0	0	
Master Barber	x				2	2			0			
Barber apprentice	x				varies				0			
Cosmetologist Instructor	x				2				0			
Barber Instructor	x	x			2	2	2		0	0		
Nail Tech Instructor	x				2				0			
Electrologist Instructor	x				2				0			
Aesthetician Instructor	x				2				0			
Beauty Culture			x				2				0	
Senior Cosmetologist				x				2				0
Natural Hair Braider		x				2				0		
Limited License Teacher: Nail Tech, Esthetics, & Hair Braiding												
		x				2		2		0		

Appendix C - Board Composition and Meeting Frequency

Board Name	Total Board Members	Professional Members	Public Members	Frequency of Meetings by Statute	Number of Active Licensees
Accountancy	9	6	3	At least once a quarter	11,491
Adult Entertainment	5	na	5	At least once a quarter	3
Architects	9	5	4	At least once a quarter	1,833
Chiropractic	7	4	3	At least once a quarter	357
Controlled Substance	9	8	1	At least once a quarter	5,368
Cosmetology & Barbering	11	6	5	At least once a quarter	8,151
Dental	9	6	3	At least once a quarter	1,542
Dietetics/Nutrition	5	3	2	At least once a quarter	313
Electrical	9	6	4	At least once a quarter	6,125
Funeral Services	7	4	3	At least once a quarter	299
Charitable Gaming	5	3	2	Monthly	varies
Geology	7	4	3	At least once a quarter	353
Home Inspectors	5	3	2	At least once a quarter	95
Plumbing & HVACR	9	6	3	At least once a quarter	2,230
Land Surveyors	7	4	3	At least once a quarter	356
Landscape Architects	5	3	2	Quarterly	258
Manufactured Home Installation	9	6	3	Quarterly	49
Mental Health & Chemical Dependency Professionals	9	6	3	At least once a quarter	655
Massage and Bodywork	7	4	3	At least once a quarter	1,278
Medical Practice	16	9	7	At least 8 times a year	8,160
Nursing	15	10	5	As often as necessary	21,512
Nursing Home Administrators	9	5	4	At least once a quarter	200
Occupational Therapy	5	3	2	At least once a quarter	920
Optometry	5	3	2	Once a year	177
Pharmacy	9	6	3	At least 6 times a year	4,436
Physical Therapy & Athletic Trainers	10	7	3	At least once a quarter	2,277
Pilot Commissioners	7	5	2	At least once a quarter	34
Podiatry	5	3	2	At least once a quarter	105
Psychology	9	5	4	At least once a quarter	541
Real Estate	9	5	4	At least once a quarter	6,096
Real Estate Appraisers	9	6	3	At least once a quarter	770
Social Work	7	4	3	At least once a quarter	900
Speech Pathology	9	6	3	At least once a quarter	851
Veterinary Medicine	7	5	2	At least once a quarter	1,135



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Appendix D

REVIEW REQUEST FOR NEW PROFESSIONAL LICENSURE CATEGORY INSTRUCTION SHEET

Any profession engaging in practice in the state of Delaware that wishes to become a licensed profession through legislative enactment, may avail itself of the Division of Professional Regulation's review process. The review process is initiated by the submission of a completed application and, at the conclusion of its review, the Division of Professional Regulation will issue either a recommendation that a new professional licensure category be created, or a statement that the Division does not recommend the creation of a new licensure category. Legislative enactment may occur regardless of the Division's position, and the purpose of the review process is to fully vet the issues, both for and against, creating a new licensure category in order to better inform legislators and the public.

During the review process, the applicant will be asked to provide information on behalf of the profession as a whole. The Division will evaluate the information submitted and seek out additional relevant information as necessary. The applicant may be asked to:

- Provide additional written responses to clarification questions posed by the Division.
- Provide additional documentation relevant to the Division's review.
- Attend one or more public meetings with representatives of the Division to discuss the application, additional information and documents received, as well as answer questions posed by the Division and receive public comment on the application.

Applicants are encouraged to present any facts that they believe will assist the Division in formulating its position. An applicant's input and cooperation will assist the Division in promptly and thoroughly completing its review. Once the Division has completed its review, the Division will issue its statement of position, either recommending or not recommending the creation of a new professional licensure category by statutory amendment.

INFORMATION REGARDING PROPOSED ENABLING LEGISLATION:

Please take a moment and review current licensing boards' enabling statutes located in the Delaware Code, Title 24 and its various Chapters. Creation of a new licensure category will require the enactment of legislation, most likely in this title, and will be modeled off of existing boards' enabling statutes. The following questions are an attempt to determine what enabling legislation for your professional licensure category will contain.

11. Please identify the qualification for state licensure you propose. Be sure to include information regarding the education, training, experience, national certification, minimum age, and any other requirements you propose for new licensees:

12. Do you propose a single level of licensure, or multiple levels of licensure? _____

13. **If you propose multiple levels of licensure**, please distinguish the relative education or training requirements for each level, as well as the relative scope of practice for each level. Consider whether student, apprentice, trainee, or temporary licenses will be necessary and, if so, explain the where such student, apprentice, trainee, or temporary license would be granted.

License Level	Education or Training Required	Scope of Practice

14. Do you propose adding a licensure type to an existing board (for example, the Board of Plumbing, Heating, Ventilation, Air Conditioning and Refrigeration Examiners regulates different, closely-related, professions under one board), or creating an entirely new board of practitioners? **If you believe your profession fits with an existing board, and could exist as a new licensure type within that board, please specify the Delaware board:**

_____.

15. Identify some providers of continuing education or professional development within your profession, include websites or contact information:

16. Please identify any and all stakeholders you believe support the creation of a licensure requirement for your profession, and the reasons why they support this application. Provide contact information, if available.

17. Please identify any and all stakeholders you believe **will not** support the creation of a licensure requirement for your profession, and the reasons why they will not support this application. Provide contact information, if available.

18. Attach a copy of your proposed enabling legislation. Sample legislation may be obtained by reviewing Delaware Code, Title 24 here: delcode.delaware.gov.

If you need additional space on any question, please feel free to attach additional pages, clearly indicating which question you are responding to. Please feel free to include with your application any additional information you believe will assist the Division in making a determination on whether or not to recommend the creation of a new licensure category. You may be contacted by Division representatives to discuss your application, to request additional information, and a public hearing may be held if deemed necessary by the Division.