

## The Need to Review and Reform Occupational Licensing in Oklahoma

By Byron Schlomach

### Abstract

*Occupational licensing as a policy is a throwback to the medieval guild system whose demise has been called an “indispensable early step in the rise of freedom in the Western world.” It is also ubiquitous and growing in the U.S. In 1950, only 5 percent of the workforce was subject to licensing laws. Today, that percentage is over 29 percent. Yet, there is little evidence that public health and service quality are enhanced by licensing. There is a good deal of evidence that occupational licensing limits work opportunity, redistributes income from lower to higher income individuals, increases the cost of living, limits innovation, and leads to more licensing. Oklahoma is ranked as having the 11th most burdensome licensing laws. Even the Obama White House has recognized the burden of occupational licensing and is exploring ways to turn back the tide. Policy suggestions on regulatory alternatives are provided in this paper.*

This paper, in its entirety, can be found at [www.1889institute.org/cronyism.html](http://www.1889institute.org/cronyism.html)

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Perhaps because occupational licensing is supposed to make us safe, it has become ubiquitous in the United States. Where only 5 percent of the work force was covered by licensing laws in 1950, today about 29 percent of the workforce is governed by licensing laws.<sup>1</sup> Part of this has to do with a higher percentage of the workforce being in historically licensed occupations like law and medicine than in the past. A significant part of the change, however, is due to the increasing prevalence of licensing in occupations that have not historically been licensed.

Thirty states now license geologists.<sup>2</sup> Thirty-eight license athletic trainers.<sup>3</sup> Several license interior designers.<sup>4</sup> It is very common for landscape architects to be licensed. Massagers are often licensed. In every state, cosmetologists and barbers are licensed. In every instance, advocates for a new licensing law have claimed the mantle of public health and safety. While it takes some fevered and extreme imagination, it is conceivable that a horse masseuse

could present a danger to the public health, but it is unlikely. Licensing such an occupation seems extreme, yet it appears necessary in order to allow the few who practice the service to do so unimpeded by veterinary licensing boards.<sup>5</sup>

Licensing is an extremely onerous form of regulation, the most extreme form short of outright banning an occupation. Only a government-issued permission slip – a license – allows an individual to legally practice a licensed occupation. The vast majority of the time, the government agency in charge of issuing the permission slip is a board dominated by members of the occupation the board is charged with regulating. This obvious conflict of interest helps to explain the often-onerous and nonsensical requirements for someone to obtain a license as well as strange regulatory actions, like a veterinarian board seeking to shut down a horse masseuse.

Occupational licensing harkens back to medieval guilds, where associations of craftsmen became monopolistic organizations. This system was largely thrown off as an “indispensable early step in the rise

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of freedom in the Western world.”<sup>6</sup> In fact, despite some early flirtation with licensing in the United States, by 1850 licensing was completely abolished, even in the medical realm. The American Medical Association was organized mainly to bring back licensing and succeeded in doing so in every state by 1900.<sup>7</sup>

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This paper represents a first step in the creation of a Directory of Occupational Licensing by the 1889 Institute. In the future, short pieces reviewing specific licensing requirements for occupations in Oklahoma will be published. These pieces will look at whether there is justification for regulating currently licensed occupations and make specific recommendations accordingly.

### What Licensing Promises

Occupational licensing, as noted above, exists mainly due to the efforts of the medical profession. The ostensible reason for licensing then, and now, is to protect the public from potential harm perpetrated by charlatans posing as knowledgeable professionals when they actually know nothing about the service they claim to provide. Licensing promises to preemptively protect us from harm.

Criminal and civil law are not preemptive. They are justice and compensatory based. If a person suffers harm at the hands of someone in the commission of a criminal act, the criminal is punished as having violated the state. The criminal justice system provides little in the way of relief for crime victims. Civil law, in which a victim of a tort (including criminal acts, a la OJ Simpson and the Goldman family) brings suit against a perpetrator, at least allows a victim to be compensated for harm. The criminal and civil justice systems are intended to discourage harm by charlatans by introducing greater risk for charlatan-like behavior.

So the difference between licensing and criminal/civil law in general is that licensing promises no harm at all while criminal/civil law only promises to punish when harm occurs and then hopes that punishment discourages harmful behavior. The problem with the promise of licensing is that it actually does not work. Licensees are still neglectful.<sup>8</sup> A simple Google search for

“doctor convicted” bears this out. Despite many instances of medical doctors being convicted of serious crimes, it is also common to read complaints of licensees not being disciplined by their own occupation.<sup>9</sup>

Nevertheless, some might claim that despite the imperfections inherent in human institutions, including licensing, it still likely prevents more harm than if licensing did not exist. Conceptually, this may make sense for high-skill, high-risk occupations. Consumers, and potentially even workers, do not necessarily understand the risk inherent in some occupations well enough for that risk to be evaluated accurately enough for it to be assumed. In that sense, licensing could protect workers from assuming unknown risk by requiring training and consumers are prevented from assuming unknown risk by actually lowering risk through licensee training.

In recognition of this last potential benefit and in light of criticisms that follow, evaluations of licensing regimes in various occupations should follow a decision tree that looks at risk and balances costs and benefits of licensing in that occupation depending on market circumstances. This is discussed in Appendix A.

### What Licensing Actually Accomplishes

The evidence that licensing improves health and safety by protecting people from unscrupulous, untrained, and irresponsible practitioners is scant to non-existent. To be sure, thorough comparisons of qualitative results from when occupations are licensed versus when they are unlicensed are difficult to undertake. In the United States, each individual state has its own licensing regime. In principle, it ought to be easy to compare results in states that license certain occupations versus results in states that do not license the same occupations. However,

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many licensed occupations are licensed in every state, making such an analysis impossible for those occupations. Comparisons across nations introduce a lot of “noise” in an analysis given very different expectations on the part of consumers and profound differences in occupational

practices.

Despite these problems, some qualitative comparisons between unlicensed and licensed practitioners of a few occupations have been made. One proxy measure has been to look at occupational liability insurance rates for occupations such as practical and vocational nurses, occupational therapists, pastoral counselors, and family therapists. Some states do not license these occupations while others do. Researchers found no difference in insurance rates for these occupations in licensed states versus unlicensed states, strongly suggesting that licensing, which is purported to reduce charlatanism, actually makes no difference, since the unlicensed occupations would be expected to pay higher insurance rates due to a higher incidence of malpractice.<sup>10</sup>

Licensing does not guarantee quality according to other studies. In nine states, midwifery is illegal. Only two of these have a lower infant mortality rate than the national average. Studies show that certified (not licensed) midwives have a better infant mortality record than do physicians.<sup>11</sup> After Hurricane Katrina, when licensing requirements in Florida were relaxed so as to facilitate roof restorations, complaints over workmanship went up, but far less than the amount of work that got done.<sup>12</sup>

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In fact, licensing can be an impediment to higher quality. A study that looked at physicians who emigrated from Russia to Israel concluded that Israelis would have been better off if the Russian physicians had just been allowed to practice medicine without having to be re-licensed. Instead of bothering, they went into other professions. Not only were Israelis unable to enjoy this imported expertise, they paid higher prices for medical services since they could not benefit from greater competition.<sup>13</sup> Physicians in Britain were so reluctant to police themselves that they lost the right to do so.<sup>14</sup> It has been said that hospital-acquired infections are nearly epidemic, yet they are most easily avoided by having health professionals, nearly all licensed, wash their hands, something these licensed individuals, including doctors, clearly neglect to do as regularly as they should.<sup>15</sup> Despite widespread licensing in medicine, it is claimed that

hospital errors are the third leading cause of death in the U.S.<sup>16</sup>

Teacher certification, which is actually a loose form of licensure (certification is generally a term used for a credential that does not restrict others from practicing the occupation, as certification does for public schools which provide the bulk of education services for children), provides another example of licensing not being what it is qualitatively cracked up to be. Many studies of teacher certification/licensing have been done that show little to no support for the notion that teacher certification/licensing regimes improve student outcomes over having teachers that are simply well-acquainted with the subject matter that they teach.<sup>17</sup>

The economic impact of licensing is to reduce the supply of individuals practicing an occupation compared to what it could be otherwise. This increases the price of licensed services and decreases the amount of these services produced and sold. Either of these effects, by itself, is a negative for a society. Combined, they are especially bad. But, while licensing has negative impacts on society as a whole, the impact for those who practice the licensed occupations, especially for those in an occupation that is newly licensed, is quite positive. They get to charge more for their services than they otherwise could, and the restricted supply keeps licensed practitioners busy, even if less of the service is sold on the whole than could be otherwise.

### Injustices of Licensing

#### *Redistributes to the Rich*

Most licensed individuals earn more than the average income earner. Part of this is probably due to the level of productivity inherent in many licensed occupations, but as just noted, part is simply due to the economic impact of licensing regulation. From 1910 to 1940, the number of medical schools in the United States was cut in half as the American Medical Association used its cartel power from licensing to reduce the supply of doctors. Consequently, from 1910 to 1938, the number of doctors per 100,000 fell from 157 to 130, a ten percent decline that undoubtedly increased the prices of medical services.<sup>18</sup> Similarly, when expensive American Dental Association recommendations caused dental schools to close in the 1990s, dentists' incomes rose significantly relative to physicians'.<sup>19</sup> Physicians earn 40 percent more than people with similar educations but who enter the biological and life sciences

occupations.<sup>20</sup>

There are more examples. Oklahoma does not license interior designers, though there is a registration law.<sup>21</sup> Interior designers in states that license the occupation earn about \$1,600 more per year than interior designers in states that do not license the occupation.<sup>22</sup> A Mercatus study of the optician occupation, which 21 states license, estimates that with each additional licensing exam that must be passed or with each additional 100 days of education required to become licensed, licensed opticians earn an additional two to three percent over unlicensed opticians.<sup>23</sup> Licensed engineers, on average, earn \$5,000 per year more than unlicensed engineers.<sup>24</sup>

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All of the occupations just mentioned are higher-than-average earning occupations, and likely would be even if they were not licensed. Individuals with modest incomes might not directly employ an engineer or an interior designer, but they do indirectly pay through the prices paid for rent and costs built into the prices of other goods and services. They also directly pay physicians, dentists, and opticians. The effect of licensing is to artificially transfer modest incomes to those with already-high incomes.

The higher cost of occupationally licensed services naturally impacts the cost of living. The percentage of each state's population that is occupationally licensed has been calculated.<sup>25</sup> According to statistical analysis and calculations by the author, each additional percentage point added to the proportion of the work force that is licensed erodes spending power per capita by about \$240.<sup>26</sup> If Oklahoma's rate of occupational licensing (25 percent) were lowered to the national average (21.7 percent) Oklahomans' purchasing power would increase by an average of over \$780 per capita.

Although Oklahoma's cost of living is relatively quite low compared to other states, it could be lower still. Already, Oklahoma's cost of living is so low that when personal income per capita across the states is adjusted for each state's cost of living, Oklahoma ranks 10th in how much its personal income per capita can purchase, 6

percent higher than that of Massachusetts, but still \$1,500 behind the per capita purchasing power of Texas, which ranks 7th.<sup>27</sup>

### *Limits Opportunity*

Every occupational license requires a license applicant to have a certain amount of education. The education requirements are often onerous. Take, for example, cosmetology. Oklahoma requires 1,500 hours of study and hands-on experience, equivalent to 188 eight-hour days.<sup>28</sup> To become a licensed paramedic in Oklahoma, 1,394 hours are required.<sup>29</sup> At least this last license requirement is for one in which the licensee's hands will hold someone's life, rather than their hair. Both occupations require exams to show a potential licensee's proficiency. Even if the exams were made much more rigorous to test more thoroughly, they would be far less of a hurdle than the hour requirements, which require considerable expense in tuition and time. The cosmetology requirement speaks for itself. It's clearly to make obtaining a cosmetology license as costly in time and money as possible.

Certified Public Accountants (CPA) (another situation where "certified" is misused and really means "licensed") are required to pass a series of exams. These exams are viewed as quite rigorous, with a fail rate of over 50%. However, before a person can take the exam, they must complete 150 college hours of coursework, 25% more than what is required for a bachelor's degree.<sup>30</sup> However, only 30 of these hours must be in accounting, with the other 120 at the discretion of the applicant or the school the applicant is attending. So, the 150 hour rule significantly increases the amount of time and money required to become a CPA, yet adds no additional degree of protection to public.

Licensing directly impacts the ability to earn a living of individuals with modest incomes. On a regular basis over the years, African hair braiders have been forced out of business for lack of a cosmetology license. This despite the facts that cosmetology schools offer little instruction in braiding and the braiders apply no chemicals. The hours it would take to get a cosmetology license are onerous and inapplicable to the braiding and clearly are intended to limit competition with the occupation.<sup>31</sup> Horse tooth floaters (filers of horse teeth) and horse massagers have been cited by veterinary licensing boards for practicing veterinary without a license. Veterinarians are taught little about either skill, but licensed veterinary claims exclusive domain over paid health services for animals. And, skilled

floaters and massagers are likely to find the educational requirements – years of college and post-graduate work – too onerous to pursue a veterinary credential.<sup>32</sup>

Many specialized tasks that do not require a great deal of training, but perhaps just some instructional time and experience, are out-of-bounds for skilled but not highly educated individuals to perform. The preparation of simple wills and contracts could be done by paralegals, but they can only do these things as an employee of a licensed attorney. Teeth cleaning by a dental hygienist often can only be done only as an employee of a dentist. Experienced nurses can provide services independently, but only if they get additional education to be nurse practitioners, and in many states, they must practice under, and pay a fee to, a licensed medical doctor.

Licensing blocks economic opportunity for many skilled individuals by blocking their ability to sell their skills. In addition, it blocks many from the opportunity to avail themselves of those skills. Some are simply priced out of the market whereas with more competition from people who have acquired skills over the years without the expense of years of college, they could afford to avail themselves of services.

The Institute for Justice provides a list of low-income occupations that Oklahoma licenses. Oklahoma is one of only 7 states that licenses social and human service assistants, one of only six states to license title examiners, one of 13 to license locksmiths, and one of 17 to license animal control officers.<sup>33</sup>

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### *Limits Mobility*

Licensing does not just impact low-income workers. Depending on the occupation, many states recognize occupational licenses issued by other states to individuals who move across state lines. This is not, however, universally true. Consequently, a licensee can effectively be trapped in a state unless the licensee is willing to deal with often-onerous requirements to gain licensure in another state. This gambit, inherent in state-by-state licensing, serves to limit competition within licensed occupations, especially blocking competition from immigrants.<sup>34</sup> The result is economically predictable.

Licensed occupations in states with limited reciprocity can claim higher prices for their services.<sup>35</sup>

### *Limits Innovation*

In a 2005 white paper, the former president of the National Society of Professional Engineers, Neil Norman, wrote:

In many cases, break-through products are interdisciplinary and could not be tied to engineering disciplines alone. These are strong arguments supported by the superior achievement of U.S. industry in so many fields. How then can we convince industry that their best interests are served by ... encouraging the licensing of all engineers?<sup>36</sup>

In essence, this revealing quote indirectly admits that the licensing of engineers is likely to limit innovation by siloing them into sub-disciplines and preventing novel insights and developments.

Licensing prevents other types of innovations. A requirement in Arizona that anyone setting appointments for cosmetologists be, themselves, licensed as a cosmetologist, prevented the facilitation of home appointments for homebound individuals to have cosmetology services.<sup>37</sup> Massage therapists have been prevented from manipulating spines due to chiropractic licensing.<sup>38</sup>

### *Forces More Licensing*

Due to health care's licensing stranglehold, the only way for innovation to occur is often to license another occupation. Chiropractors sought licensing partly to end their harassment by allopathic medical doctors. Osteopathic medical doctors, who now practice shoulder to shoulder with allopaths, had to do the same. Podiatry, yet another unique approach to medicine, is licensed largely for the same reason. There is a huge list of health occupations that are licensed mainly out of legal self-defense against the expansive scope of practice granted to medical doctors. This history, though, does not keep occupations licensed initially for legal defense from harassing others. In Arizona, physical therapists began practicing "dry-needling," which is similar to acupuncture, so the acupuncturists sought to enforce their licensing law against the practice.<sup>39</sup>



## Where Oklahoma Stands

An Institute for Justice inventory of occupational licensing, mainly focused on moderate-income occupations, ranked Oklahoma as having the 11th most burdensome licensing laws where licensing applied. More broadly, Oklahoma fared better, ranking 41st as the “most broadly and onerously licensed state,” or 10th best among the states.<sup>40</sup> A 2007 Reason Foundation study, however, found that Oklahoma licensed 91 job categories, more than 26 other states. By contrast, Texas licensed 78, Kansas only 56, Missouri a mere 41, New Mexico a job-killing 104, and Arkansas a crushing 128.<sup>41</sup>

Twenty-five percent of Oklahoma’s work force is licensed. Contrast this with Texas at 24.1 percent, Kansas at 14.9 percent, Missouri at 21.3 percent, and Arkansas at 20.2 percent.<sup>42</sup> These percentages do not precisely correlate with the number of occupations licensed, and reflect local circumstances. They are, however, associated with a higher cost of living, as noted above. Only 11 states have a higher percentage of their workforces in licensed occupations.

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## Suggestions for Reform

Reduce or Eliminate Education Requirements: Depend Exclusively on Exams

Abraham Lincoln could not become a lawyer under today’s licensing requirements. He studied law entirely by himself using borrowed books. He obtained a license to practice by passing an exam and then learned by doing when he joined an established law firm.<sup>43</sup> There was no real practical need then, and there is no real practical need now, for someone to attend law school in order to become competent in practicing law. The need lies only in requirements established by the legal industry itself – i.e. those already in the practice of law who pushed for licensing requirements that limit competition.

The same could be said regarding any number of licensed occupations, from barbers and cosmetologists

to dental hygienists. The best practitioners have learned by doing. Obviously, they have to start somewhere, and it is likely that some formal education would be required of someone wishing to gain experience as an apprentice. Such a determination should be made organically in response to the real-world requirements of gaining competence, not by government-sanctioned industry insiders putting up needless hoops for prospective practitioners to jump through. The amount and nature of formal education should be up to the applicant. It’s the test that protects the public, not the formal education.

The majority of licensed occupations should have only an examination requirement for individuals to become licensed. By law, exams should only test the skills included in the licensed occupation’s scope of practice. Practical exams, where potential licensees actually demonstrate their skills could occur after written exams have demonstrated knowledge of procedures.

## Replace Licensing with Less Onerous Regulation

The Institute for Justice has produced a list of degrees of occupational regulation from the least restrictive to the most restrictive as follows:

1. market competition (i.e., no regulation beyond general laws against fraud);
2. industry or consumer-created ratings and reviews (market produced, without government);
3. private certification;
4. a specific private civil cause of action to remedy consumer harm;
5. a deceptive trade practice act;
6. a regulation of the process of providing the specific goods or services to consumers;
7. inspection;
8. bonding or insurance;
9. registration;
10. government certification;
11. specialty occupational license for medical reimbursement; and
12. occupational license.<sup>44</sup>

There are two mentions of “certification.” This term means that some organization, government or private, grants a credential on an individual that declares the individual qualified to perform a service to a certain qualitative standard. When the term is properly used, certification means uncertified individuals can still

perform the service.

Medical doctors have relied on a private form of certification for decades. As far as the government is concerned, any physician can perform any surgery. Private institutions such as hospitals and insurance companies, in addition to the threat of litigation, get in the way of a family physician performing brain surgery. Hospitals and insurance companies are unlikely to acquiesce to a doctor performing brain surgery unless the doctor has a board certification. Board certifications in the medical arena are independent of government bodies. There are certification organizations for mechanics,<sup>45</sup> human resources practitioners,<sup>46</sup> youth workers,<sup>47</sup> and a host of other occupations.

Certification, whether it is provided by a government body or a private organization, is simply a signal to consumers regarding a practitioner's expertise. A consumer is still free to patronize an uncertified individual who has simply built a sound reputation, for example, as a mechanic. Government certification, however, generally precludes competing forms of certification. Where there are currently many schools and organizations issuing a plethora of Information Technology certifications, were the government to take on such a certification role, private organizations would be precluded from issuing such a credential, though uncredentialed IT workers who learned on the job could still practice their craft and new ones could enter the occupation in that same way.

The author, while at the Goldwater Institute, proposed a hybrid type of private certification in which private certifying organizations that wished to, could issue certification credentials in competition with government licensing boards. (See Appendix B.) The criteria these certifying organizations would have to meet mostly have to do with transparency to the consuming public.<sup>48</sup> Legislatures should resist the lobbying that has them default to licensing, the most restrictive form of occupational regulation, and look to other forms of less-restrictive regulation, including registration and various forms of certification.

### ***Subject Licensing to Rigorous Sunrise/Sunset Cost-Benefit Analysis***

A sunrise law is one that requires rigorous study before a new regulation is enacted into law. Many states have sunrise laws for rulemaking, at least requiring public notice and hearings. Sometimes, states require some

expert analysis on certain areas of proposed policies before new rules or statutes can be put in place. Sometimes, legislatures subject themselves to sunrise requirements in their own rules. Arizona's legislature enacted a weak sunrise requirement for new licensing laws unrelated to health fields.<sup>49</sup> Oklahoma should have a constitutional amendment that presumes individuals' right to earn a living by requiring a rigorous cost-benefit analysis before any new licensing law can pass out of committee.

Many states put sunset clauses in their statutes wherein laws are automatically repealed unless they are re-enacted in an effort to force periodic reviews of statutes in order to update them. Unfortunately, these efforts are often ineffective since it becomes standard practice for many legislatures to simply change the sunset dates as they come due. States with formal sunset processes are generally more successful in this arena. Oklahoma has no such formal process. Therefore, Oklahoma should pass a constitutional amendment requiring periodic review of existing licensing laws using rigorous criteria to make sure any potential benefits of licensing outweigh the costs as illustrated by Appendix A.

### ***Reform Licensing Boards***

When an occupation is licensed in a state, it is regulated by a licensing board. Licensing boards are, by law, almost entirely made up of individuals from the licensed occupation. This is not unlike regulating the oil industry with a board consisting almost entirely of oil industry executives. Recognizing this inherent conflict of interest versus the general public and interest, the U.S. Supreme Court recently ruled that such licensing entities must be actively supervised by a state in order to receive antitrust protection.<sup>50</sup> Last year, Oklahoma's governor issued an executive order effectively requiring review and approval of licensing board rules by the attorney general to check for antitrust actions.<sup>51</sup>

Making the attorney general a filter for licensing board actions helps and should continue. However, the volume of actions and the cleverness of them could be overwhelming. In addition to the review and approval reform, licensing boards should have a higher proportion of their membership consist of citizens who are not licensed by the board on which they sit and who are not licensed at all. In this way, general consumer interests are more likely to be represented.

## Conclusion

The need to get control of occupational licensing, once a cause pushed by only a handful of economists and right-leaning liberty organizations, has become a non-partisan issue. The Obama Whitehouse recently published a document that identifies occupational licensing as a growing problem to be solved.<sup>52</sup>

In the future, the 1889 Institute will publish short pieces on each occupational license the State of Oklahoma requires. These short pieces will review specific issues a cost-benefit analysis should look at with each license and evaluate the likelihood that the licensing requirement would pass the test. In addition, administrative rules will be reviewed for onerous requirements. Eventually, a full catalog of Oklahoma's licensing laws will be produced.

It has been shown that occupational licensing does little or nothing to protect public health and safety, protects practitioners from competition, blocks economic opportunity, and unjustly redistributes income to the wealthy. A full and complete review of licensing in Oklahoma is way overdue.



# Appendix A

## Policy Maker's Guide to Proposed and Existing Occupational Licensing Laws

By Byron Schlomach and Vance H. Fried

Legislatures are constantly being asked to license more occupations. Rarely does this pressure come from consumers. Instead, the pressure comes from members of the occupations that would be licensed. Their stated desire is to protect the public. Hearing little opposition from the general public, who are too busy with their daily lives to pay much attention and figure they're paying legislators to protect their interests, legislatures generally comply with the wishes of members of occupation who want to be licensed. However, licensing mostly benefits those who practice licensed occupations at the expense of the general public. Thus, licensing proposals should be rigorously reviewed with the presumption that they will be rejected. Existing licensing laws should be rigorously reviewed for possible repeal or reform.

The following is intended to serve as a guide for the review of licensing proposals and existing law. It is a series of questions representing a decision tree. In any deliberations regarding licensing, the default should be to avoid licensing regulation, which is the most restrictive, liberty-violating form of regulation short of banning an occupation for both worker and consumer.

### When to License

*Does an occupation (or service it produces) present a significant health or financial risk to consumers' and/or others' lives, health or property?*

Risk means real risk of harm, not highly speculative risk of harm, not a really good story about how there might be a risk of harm, but real, demonstrable risk. Too often, licensing advocates get away with telling speculative, scary anecdotes that have either never happened, or where cause and effect could be easily disputed, or, if true, the chances of them being repeated are extremely remote.

Significant risk implies a significant probability of real harm. Nearly any endeavor can present some level of risk to someone. Food preparation presents a risk of food poisoning or other contaminants getting into food. Yet, while restaurant kitchens are subject to inspection, chefs are rarely licensed. Risks from a chef in a kitchen are not significant, even if someone inexperienced is involved in food preparation. On the other hand, the risk of harm resulting from surgery is highly significant, both in terms of consequence and probability if the surgeon is not well-versed in what he or she is doing.

If **NO**; the occupation does not present a significant risk, then it is clear that the occupation should not be licensed.

If **YES**, the occupation does present a significant risk, then...

*Does an occupation (or service it produces) present a significant public safety issue, endangering the public at large, beyond individual direct consumers?*

By this criterion, it is more justified to license individuals who dispense herbicides and pesticides than it is to license medical doctors. Medical doctors impact the health of one patient at a time. Chemical applicators can potentially impact the health of hundreds or thousands, most of whom never hired the applicator.

However, this does not necessarily justify a regulation as strict as licensure. Sound technicians who put together large sound systems for concerts, for example, can produce excessive noise beyond what is necessary for the intended audience, but significant harm is unlikely even if it is highly likely others besides the intended audience will be affected. Combined with a healthy tort system that incentivizes care, requiring a simple literacy test to make sure pesticide applicators can read directions might be an adequate requirement under a licensing regime.

If, **YES**, the occupation presents a high level of risk for the general public, then...

*Does the legal system provide an adequate deterrent or avenue of punishment to prevent either bad actors or those with too little knowledge from harming others?*

Licensing is pre-emptive, attempting to protect people before harm ever occurs, while a legal system that punishes bad actors attempts to protect people by creating a deterrent effect. The latter allows for greater freedom. Licensing effectively assumes individuals cannot protect themselves or refuse to do so.

If **YES**, then let the private sector handle the issue.

If **NO**, then...

*Are there low-cost regulatory measures or legal system reforms that would adequately protect the public?*

Bonding requirements are an incentive for service providers to act in a way to reduce risk for the customers and they protect customers from potential harm. Registration can assure that providers can be located. Required transparency on the part of providers lead to greater consumer information. None of these regulations are as harsh or costly as licensing but may do just as much, or even more, to protect the public.

If **NO**, then licensing would appear to be warranted.

If **YES**, then implement the appropriate reform(s).

If **NO**, the occupation does not present a high level of risk for the general public, although it still does present significant risk for individual consumers of the occupation's services, then...

*Is it difficult for consumers to get accurate information about practitioners, their skill levels and the actual risk involved?*

When accurate information cannot be accessed by potential parties to transactions, economists call this information asymmetry. Markets can break down to the point of non-existence if the problem is bad enough.

Information asymmetry is often a market opportunity for those who would become expert and share information for a fee. Legislators should be careful not to short-circuit market-based solutions to the information asymmetry problem such as United Laboratories, Yelp, and Angie's List.

In the vast majority of situations, even if information is not immediately available, it is possible for

consumers to evaluate a member of an occupation performing low-risk services before engaging that same individual in a high-risk service. Practitioners have an incentive to yield information to consumers, so care and circumspection should prevail in answering this question.

If **YES**, information is difficult to come by, then...

*Does the legal system provide an adequate deterrent or avenue of punishment to prevent fraud from harming others or is there a high probability that markets will respond by providing information?*

There are cases where advertising for legal and medical services has been made illegal. Legislators should look for laws that get in the way of information first before they can fully answer this question.

If **YES**, then licensing is not warranted, though it is possible that, given the risk still potentially involved, statutorily-required bonding could be considered.

If **NO**, then...

*Are there low-cost regulatory measures or legal system reforms that would adequately protect the public?*

Bonding requirements are an incentive for service providers to act in a way to reduce risk for the customers and they protect customers from potential harm. Registration can assure that providers can be located. Required transparency on the part of providers lead to greater consumer information. None of these regulations are as harsh or costly as licensing but may do just as much, or even more, to protect the public.

If **NO**, then licensing would appear to be warranted.

If **YES**, then implement the appropriate reform(s).

If **NO**, consumers have ready access to information, then licensing is not necessary.

## How to License

If *licensure* appears warranted, careful consideration should be given to the requirements for licensure, including:

1. Make exams, including practical demonstrations of skills, relevant, by testing for skills actually used, and rigorous.
2. In cases where gaining practical experience could put someone in harm's way, require supervised experience, reasonable in quantity and directly relevant.
3. Impose no education requirements beyond reasonable and relevant experience requirements. Individuals will get the formal education they need in order to pass exams. If exams are sufficiently rigorous, passage of exams should be sufficient for licensure.

Also, if licensure appears warranted, there should be careful consideration of the institutional structure of licensing agencies and boards. Boards should consist mostly of members of the general public who are put at risk by the occupation to avoid conflicts of interest and entanglement with federal antitrust laws. Due process should not be neglected. Scope of practice guidelines should be narrowly tailored with only those practices that present real risk to the general public covered under a licensing law.

## Err on the Side of Liberty

Even when licensure seems to be warranted, the following questions should be given special consideration before requiring government permission to practice an occupation:

1. Is it unlikely that reputation, through word-of-mouth, journalistic reviews, and other information sources like the internet, would adequately discipline bad practitioners by simply driving them out of business?

Increasingly, and undeniably, the answer to this question will be “no.” With the internet and such online services as Yelp and Angie’s List, members of an occupation are arguably better disciplined by customer and expert reviews than by licensing boards.

2. Is the threat of litigation and punitive damages truly inadequate to discipline practitioners?

If this is the case, the wiser course might be to review a state’s legal structure to make sure it is acting as efficiently as it can.

- 3) Is there no other level of regulation, such as bonding requirements, registration, or some type of certification that would adequately protect the public?

A simple but strict registration system could do much to discipline practitioners just by making sure they can be found should someone wish to pursue legal remedies.

- 4) Is it unlikely that the industry itself, through private certification programs and seals of approval, could adequately police itself?

If this is the case, it may well be that a law like the 21st Century Consumer Protection & Private Certification Act (see Appendix B) would help to encourage this type of active private policing of professions.

# Appendix B

## 21st Century Consumer Protection & Private Certification Act

By Byron Schlomach (Goldwater Institute) and Lee McGrath (Institute for Justice)

### Summary

Many state legislators have difficulty conceiving how consumers can be protected without state-enacted occupational licensing. The answer is private certification that does not replace traditional occupational licenses. This legislation allows for the registration of private certifying organizations that would operate in addition to state-run licensing boards. Specifically, this legislation proposes a voluntary system where private certifying organizations (1) may register with the state, (2) privately certify individuals to practice a profession, and (3) employ modern technology, including consumer-rating systems using smartphone applications, to protect consumers. The privately-certified individual will then be free to work in the state regardless of other occupational regulations.

### Model Legislation

{Title, Enacting clause, etc.}

#### Section 1. {Definitions}

- (1) "Government" means the State of \_\_\_\_\_ and its political subdivisions.
- (2) "Lawful occupation" means a course of conduct, pursuit or profession that includes the sale of goods or services that is not itself illegal irrespective of an occupational regulation.
- (3) "Occupational regulation" means a statute, ordinance, rule or other requirement in law that requires an individual to possess certain personal qualifications to work in a lawful occupation.
- (4) "Personal qualifications" means criteria related to an individual's personal background, including completion of an approved educational program, satisfactory performance on an examination, work experience, criminal history, moral standing and completion of continuing education.
- (5) "Private certification" means recognition that an individual possesses personal qualifications that a private certifying organization determines are required to perform a lawful occupation. The recognition may also be based on consumer comments, ratings, and other factors determined by the private certifying organization. The recognition is non-transferable.
- (6) "Private certifying organization" means a nongovernmental organization that allows any individual to apply for private certification regardless of the individual's race, creed, color, ethnicity, national origin, religion, sex, sexual orientation or marital status.
- (7) "Privately certified" means a designated title that an individual may use if the individual is certified by a private certifying organization.

#### Section 2. {Private certifying organizations; bond}



(A) A private certifying organization may voluntarily participate and register with the government under this section.

(B) To participate, a private certification organization shall register with the Secretary of State. It shall provide the Secretary with the organization's name, address, officers, and the names of individuals initially privately certified. The Secretary may impose a registration fee to recoup its costs and promulgate rules and forms to facilitate registration.

(C) A participating private certifying organization shall:

(1) Publish on a publicly accessible website all of the following:

- (a) The scope of practice for each lawful occupation that the organization certifies;
- (b) The personal qualifications that an individual must possess to become certified by the private certifying organization;
- (c) Other factors the private certifying organization uses to certify individuals, which may include consumer comments, rankings and other consumer-initiated elements;
- (d) The names, business addresses and websites of all privately certified individuals; and
- (e) The states in which the private certifying organization is registered.

(2) Require personal qualifications that are related to the lawful occupation for which an individual is certified.

(3) Verify an individual's personal qualifications before certification and periodically verify that the certified individual remains eligible for certification.

(4) Require a privately certified individual to prominently display the private certification and to make available materials about the personal qualifications and other factors required for the private certification on request.

(5) Have at least fifty (50) privately certified individuals in active practice in the United States after one year applying for registration with the Secretary.

(D) A participating private certifying organization may require individuals it certifies to obtain and maintain a bond for liability that is related to the practice of the individual's privately-certified lawful occupation.

(E) A participating private certification organization may require a privately certified individual to pay initial and ongoing fees.

### **Section 3. {Right to engage in a lawful occupation}**

(A) An individual who is certified by a participating private certifying organization may engage in the lawful occupation for which that individual is privately certified regardless of any occupational regulation enacted by the government.

(B) The government shall not prohibit or impose a penalty, fine or fee on an individual who is certified by a participating private certifying organization for engaging in a lawful occupation in compliance with this chapter.

### **Section 4. {Sign; violation; classification}**

(A) An individual who is certified by a participating private certifying organization and who engages in a lawful occupation for which the government has enacted an occupational regulation must prominently display a sign with lettering that is at least one inch in height stating that the individual is not licensed or otherwise occupationally regulated by the government.

(B) An individual who is certified by a participating private certifying organization and who is not licensed, registered or certified by the government shall not use the term "licensed," "certified" or "registered" to describe the individual's credential or any words, titles, abbreviations or letters which would induce a reasonably knowledgeable consumer of such services to believe the privately certified individual using them is occupationally regulated by the government.

(C) An individual who is certified by a participating private certifying organization may use the term "privately certified" to describe the individual's credentials or as part of a title or designation.

### **Section 5. {False claim; violation; classification}**

An individual who knowingly and falsely claims to be privately certified pursuant to this chapter is guilty of fraud and subject to penalties under the state's deceptive trade practices act.†

### **Section 6. {Enforcement}**

(A) The Secretary shall enforce this chapter and has the authority to terminate the government's registration of the participating private certifying organization for failure to continue to meet the requirements in section 2 (C).

(B) The participating private certifying organization that continues to operate 90 days after failing to meet the requirements in section 2 (C) is guilty of fraud and subject to a fine under the state's deceptive trade practices act.

(C) Except to the extent that the laws require a privately certified individual to possess personal qualifications established by the government to perform a lawful occupation, this chapter does not limit the government's authority to enact and enforce laws relating to:

(1) A business license or permit, facility license, building permit or land use regulation; and

(2) Public health, safety and environmental regulations, including the sale and use of substances that endanger public health and safety if mishandled or improperly dispensed, including chemicals, explosives and pharmaceuticals.

(D) Nothing in this chapter shall be construed to:

(1) Change the government's sole authority to require an individual to obtain and maintain a government-issued driver's license and related insurance for personal or commercial vehicle use;

(2) Limit damages in a private civil action against an individual who is privately certified or who knowingly and falsely claims to be privately certified;

(3) Create a right of action against a private party or the government requiring either to do business with an individual who is not licensed, certified or registered with the government;

† Alternatively, this clause could be phrased "An individual who knowingly and falsely claims to be privately certified pursuant to this chapter is guilty of fraud under state law and is subject to a fine of up to an amount equal to the last

twelve months of the individual's revenue from the lawful occupation or \$\_\_\_\_\_, whichever is greater.

(4) Allow for private certification of occupations regulated by the federal government or required by federal law to be occupationally licensed by the government;††

(5) Require a private certification organization to participate and register with the government under this chapter; or

(6) Increase the authority of the government to regulate non-participating private certification organizations.

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† † This would address occupational licensing of professionals in the insurance industry, home appraisal industry, and doctors and other medical professionals who are reimbursed by the federal government.

## End Notes

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- <sup>14</sup> “Doctors to Lose Right of Self-policing,” *The Guardian*, February 21, 2007, <http://www.guardian.co.uk/uk/2007/feb/21/health.publicservices>.
- <sup>15</sup> LeTexier, Ruth, “Preventing Infection Through Handwashing,” *Infection Control Today*, June 1, 2000, <http://www.infectioncontroltoday.com/articles/2000/07/preventing-infection-through-handwashing.aspx>. Pittet, Didier “Improving Adherence to Hand Hygiene Practice: A Multidisciplinary Approach,” *Emerging Infectious Diseases* 7 (March–April 2001): 234–40, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2631736/pdf/11294714.pdf>. Goldhill, David “How American Health Care Killed My Father,” *Atlantic Magazine*, September 2009, <http://www.theatlantic.com/magazine/archive/2009/09/how-american-health-care-killed-my-father/307617/>. The author’s father, a retired general practitioner (MD), did not prescribe antibiotics after surgeries and closing wounds, and he recalls only one patient who developed a traumatic wound infection. He describes his procedure for cleaning wounds as follows:
- “Most people cleanse a wound by pouring a little saline over it. I perform a local anesthetic block first, as adequate cleansing by my definition is almost impossible without anesthesia. Then, vigorous scrubbing with soap and water.[sic] If there is not at least some bleeding stirred up, scrubbing has probably not been sufficient. Then put on gloves and sterile drape, inspect the wound for irregular and non-viable skin and subcutaneous tissue, debriding (cutting out tissue likely to be dead) if necessary, and finally suturing the laceration just tightly enough for the skin edges to touch. A snug pressure dressing is almost equally important as the suturing.”*
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