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Oregon Senate Committee on Health Care

### **Comments on SB 905**

Senators:

I'm in favor of diversity in our licensing boards, but I believe that, as written, SB 950 is sending you down a blind alley.

Why? Because Oregon law governing professional licensing boards is inadequate to provide our boards immunity from federal anti-trust litigation, as described below. Because a licensing board is *inherently* in the business of limiting competition -- by issuing or revoking licenses and prosecuting unlicensed people who they consider to be on their turf -- it's essential that the Legislature provide the legal structures needed to maintain federal immunity.

This is not a theoretical issue. Federal antitrust complaints are already being filed against Oregon's licensing boards, based on a recent Supreme Court decision that make it clear that Oregon's licensing boards are operating illegally in some cases, especially unlicensed practitioner cases.

The guidelines for immunity are clear -- it's just that we don't meet them. On February 25, the Supreme Court reiterated that "active market competitors" (such as doctors sitting on a medical board) can't suppress competition unless they are provided with "active supervision" by the state.

- *Active market competitors.* The Court doesn't like it when a licensing board has a majority of "active market competitors," which on the medical board means "physicians." Oregon law *requires* that a majority of the Medical Board be actively practicing physicians (7 of 13). If a majority were public members, it would be better.
- *Active supervision.* The Court is okay with a majority of the Board being active market participants only if the Board is under active state supervision -- oversight by an accountable official, who is not an active market participant, and who can veto or modify individual decisions *before* they are imposed. In Oregon, no such official exists.

Because the Legislature has yet to enact the proper structures and safeguards, Oregon's licensing boards (and its individual members) are wide open to federal prosecution if they shut down competition.

(Yes, the State of Oregon can pay board members' legal bills and fines, but some forms of anti-trust prosecution involve jail time, and I doubt the State of Oregon can serve their federal prison sentences for them! I think it's only fair for the Legislature to change the statutes to provide its board members with solid immunity.)

At the very least, these points should be kept in mind anytime a bill affecting licensing boards is considered, in case there's an opportunity to nudge the law in the right direction, as there is with SB 905.

## Thoughts about SB 905 Specifically

I see three areas of risk here:

1. The different professions represented by the Board compete with one another for patients. For example, osteopaths and physicians compete for the same patients. Because MD physicians make up a majority of the Board, decisions that favor MD's at the expense of DO's may be in violation of antitrust law.
2. Anytime the OMB takes *direct* action against non-licensees (as opposed to taking indirect action by complaining to a district attorney or district court), they may be in violation of antitrust law.
3. A related issue: Anytime a Board's staff tries to get someone to shut down a practice or surrender a license in lieu of a hearing, that's a straightforward violation of Federal civil rights law (denial of due process, 42 U.S.C. §1983). I don't know about the OMB, but at least one Oregon licensing board does this routinely: the Oregon Board of Psychologist Examiners. You can hear an example at: <http://unlicensed-practitioner.com/what-does-bullying-from-the-psychology-board-sound-like/>. I estimate that the OBPE has illegally shut down around 300 practices this way.

Regarding #1, reducing the number of MD physicians on the Board from 7/13 to 5/13 as part of SB 905 seems reasonable.

Regarding #2 and #3, these seem to call for more substantial changes than are appropriate for a consideration of SB 905 alone. But the various Boards are in desperate need of active supervision! I don't know can be done to render the Boards' behavior more lawful in the meantime.

## References

- *North Carolina State Board of Dental Examiners v. Federal Trade Commission.*  
[http://www.supremecourt.gov/opinions/14pdf/13-534\\_19m2.pdf](http://www.supremecourt.gov/opinions/14pdf/13-534_19m2.pdf).
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[http://www.fjc.gov/public/pdf.nsf/lookup/Sect1983.pdf/\\$file/Sect1983.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Sect1983.pdf/$file/Sect1983.pdf)