

A BADGER INSTITUTE REPORT JANUARY 2020

ABSENCE AND VIOLATION

Wisconsin licensing boards are routinely in violation
of law requiring public representation

By Julie Grace



**BADGER
INSTITUTE**

President's Note

Hundreds of impoverished children on the Lac du Flambeau Band of Lake Superior Chippewa Indian Reservation in northern Wisconsin went without dental care for over a year because a member of the Wisconsin Dentistry Examining Board determined that a nationally known dentist who had practiced for decades somehow didn't have enough hours of experience to work there.

It was more than ironic.

The board was actively impeding dental treatment — exactly the opposite of the reason they supposedly exist: to protect the health and safety of Wisconsin's citizens.

One of the key reasons these boards stray so far from both their mission and common sense, we've concluded here at the Badger Institute, is that those citizens too often don't have a real voice on these regulatory bodies.

The Dentistry Examining Board, for example, is comprised almost entirely of dentists and hygienists. Only two of the 11 positions are supposed to be filled by members of the public who would speak for citizens and consumers, and only one of those spots is currently filled — a direct violation of state statute.

As you'll see in the pages that follow, the Dentistry Examining Board is in no way unique. Badger Institute Policy Analyst Julie Grace found that no less than 27 licensure boards are in outright violation of laws mandating public representation. At least 11 of those boards have no public representation at all and 25 advisory councils with similar functions are also totally bereft of any public members.

These boards and councils and the politicians who appoint their members should either adhere to the public representation laws or abolish them — and find other ways to make sure Wisconsin's citizens are healthy and safe. Grace points out that other states are starting to use sunset laws to make sure these boards stay on track or are replaced with more reasonable alternatives, and that the public has a say in how and when that happens.

We hope policy-makers will, frankly, be as concerned as we are, and do something about it.

Mike Nichols, Badger Institute President



Board of Directors

CHAIRMAN

Tom Howatt

David Baumgarten

Ave Bie

Catherine Dellin

Jon Hammes

Gail L. Hanson

Corey Hoze

Jason Kohout

David Lubar

Bill Nasgovitz

Jim Nellen

Maureen Oster

Ulice Payne, Jr.

Tim Sheehy

Mike Nichols, President

Contact Information

ADDRESS:

700 W. Virginia St.

Suite 301

Milwaukee, WI 53204

PHONE:

414.225.9940

EMAIL:

info@badgerinstitute.org

WEBSITE:

www.badgerinstitute.org

Social Media

Follow us @BadgerInstitute
on   



The Badger Institute, formerly the Wisconsin Policy Research Institute, is a nonpartisan, not-for-profit institute established in 1987 working to engage and energize Wisconsinites and others in discussions and timely action on key public policy issues critical to the state's future, growth and prosperity. The institute is guided by a belief that competitive free markets, limited government, private initiative and personal responsibility are essential to our democratic way of life.

An overhead view of five people sitting around a white conference table in a meeting room. They are dressed in business attire. The room has a tiled floor and a dark wall in the background. The image is dimly lit, with a dark blue overlay.

Table of Contents

PAGE 4: ABSENCE AND VIOLATION

Wisconsin licensing boards are routinely in violation of law requiring public representation

PAGE 8: A VOICE FOR CONSUMERS

Public members discuss how they view their role on boards

PAGE 17: PROTECTIONIST AND RESTRICTIVE

Decisions from licensing boards are oftentimes arbitrary and unfair

PAGE 24: INFOGRAPHIC

The Inverted Pyramid: A Hierarchy of Less Restrictive Alternatives to Licensing

Executive Summary

Forty-four years ago, Wisconsin legislators passed a law mandating that “public members” be appointed to many of the licensure boards dominated by industry participants. The fear at the time was that board members who work in the same professions they regulate are often more inclined to protect themselves from competition than to protect their fellow citizens from health or safety concerns.

Today, at least 27 professional licensure boards or councils¹ are in outright violation of those laws. Eleven of those rule-making or licensure boards have no public representation at all; and at least 25 other advisory councils with similar functions are also totally bereft of any public members.

A review of meeting minutes by the Badger Institute, moreover, revealed that even the relatively few public members who have been appointed to these powerful boards and councils fail to show up regularly for meetings — further violating the spirit of the 1975 law intended to impose checks and balances on other board members who compete in the industries and professions they oversee.

The implications are troubling. The purview of these boards spans from deciding who can receive a license or certification to determining ongoing education requirements to handing down disciplinary actions. Decisions by board members affect over a million members of Wisconsin’s workforce and nearly every consumer in the state. Actions to curtail competition harm individuals trying to start businesses and careers as well as Wisconsin’s economy.

The laws requiring participation of public members should be adhered to or abolished. Abolishment — in essence, giving up any hope of assuring the public has a voice on these boards — would necessitate an entirely new method of regulation.

But such a system could increase competition and eliminate onerous, counterproductive regulations.

Our examination into Wisconsin licensing boards and councils and how they operate reveals a broken system where interest groups and those in power dominate licensing decisions at all levels of the process. Under the banner of public safety, once a licensing board or council is created, it essentially has the power to control that particular industry indefinitely.

Based on our findings, legislators should consider several policy changes to reform the current system of occupational licensing and reduce the barriers that it poses:

- Boards and councils should be required to be more transparent in their actions and decision-making.
- If the current structure cannot uphold the 1975 “public member law” or it is deemed ineffective, lawmakers should reform the entire licensing system through a sunset review process. Many states have recently passed similar legislation that requires systematic reviews of licensing boards and councils to evaluate whether the current license protects public safety and, if not, whether a less restrictive form of regulation is appropriate. A few examples:
 - In Ohio, all licensing boards expire every six years unless the legislature actively decides to renew them.² Before a board is set to expire, it must petition a legislative committee that there is a “public need for its continued existence.”³ During that review process, legislators determine whether there is a less-restrictive form of regulation than the license.

- Nebraska enacted a similar law that requires a legislative review of one-fifth of all licensing regulations every year.⁴ Lawmakers must first determine whether there are “present, significant, and substantiated harms” that justify the current license; and then determine whether a less-restrictive form of regulation is justified.⁵
- Sunset review laws have also been passed in other states, including Vermont,⁶ Arizona⁷ and Louisiana.⁸ Alternative forms of regulation to licensing that they allow include inspections, mandatory bonding or insurance, registration or certification.⁹

It’s worth noting that in 2017, the Wisconsin Legislature required the Department of Safety and Professional Services to review all licenses in the state and propose ones to be eliminated.¹⁰ In response, DSPS recommended eliminating 28 licenses, permits or certificates — including community currency exchanger, solid waste incinerator operator, music, art and dance therapists and interior designers.¹¹ Since then, none of these have been eliminated.

Introduction

In the U.S. today, nearly one in four people require a license, or government permission simply to work or do their job.¹² In Wisconsin, some 18% of workers require approval from state government before they can practice their desired occupation — up from just 5% in the 1950’s.¹³ A growing body of research has demonstrated the adverse effects that such strict government regulations have on individual workers as well as the economy at large.

In our 2017 report, *Government’s love for licensure*,¹⁴ we highlighted how licensing often fences out individuals attempting to either enter a field or move

up the career ladder. We profiled individuals directly affected by these onerous requirements. Since then, reforms have been signed into law lessening unnecessary requirements for several occupations, allowing thousands of Wisconsinites to practice their professions with greater autonomy and opportunities for success. But many Wisconsinites still struggle with government regulations that impede their ability to pursue or carry out their job.

Wisconsin’s licensing laws still require, on average, \$259 in fees, 214 days of education and experience and an exam.¹⁵ Wisconsin is not an outlier. Detrimental licensing requirements are common throughout the country, and in fact Wisconsin ranks 36th¹⁶ among the most broadly and onerously licensed. But the Badger State does require numerous occupations to be licensed that many states do not. We’re one of only 13 states that license bartenders, for example, one of four that license court clerks and one of 14 that license tank testers.¹⁷ And, as our previous research reveals, there are numerous ways the current structure fences out competitors or impedes job and business growth.

While our previous report and other research on this topic primarily focused on licensing requirements and how they affect workers, this report examines the licensure boards and councils themselves, who sits on them and how licensing requirements are actually determined. Who makes the decision to set continuing education requirements for landscape architects at 24 hours every two years¹⁸ or says that a cosmetologist needs 1,550 hours of education to secure a license? Who decides to discipline a license holder for being a few hours short on a requirement? Are these decisions made with Wisconsin consumers in mind?

In Wisconsin, as elsewhere, these decisions are largely made by occupational licensure boards and

advisory councils — small groups of individuals who are almost always competitors in the very field they regulate. In just Wisconsin alone, these boards and councils have the ability to influence the licensing requirements for hundreds of thousands of workers. One researcher described licensing boards as “the most important labor institution in the country, controlling whether and how almost 30 percent of Americans work.”¹⁹

Until recently, licensing boards and advisory councils were largely invisible to the public and overlooked by state governments. That changed in 2015 with the Supreme Court’s ruling in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*. Prior to the case, North Carolina’s dental board, comprised mostly of dentists, told non-dentist teeth whiteners that they had to be licensed in order to provide that service. By doing so, they essentially fenced out an entire group of workers from the market.

The board claimed to be exempt from antitrust violations since they were a part of the state government. The Supreme Court, however, held that licensing boards are *not* exempt from antitrust violations unless they’re actively supervised by the state. While the court was vague in its definition of “active supervision,” many states have since passed legislation aimed at ensuring their licensing boards comply with this ruling. While Wisconsin’s active supervision is more comprehensive than North Carolina’s was at the time, boards here still have significant discretion and, compared to other states, rule-making authority.

As in many states, moreover, there are questions about whether supervision by the state under the current structure can guarantee that the boards do not stray over time from their primary mission: ensuring the health and safety of Wisconsinites.

In this report, we’ll start by reviewing the composition and makeup of Wisconsin’s licensing boards and councils. We’ll examine who actually shows up to board meetings, the power that these boards are entrusted with, how Wisconsin’s government supervises these boards — and whether there is a better way.

Finally, we’ll compare our board structure and some subsequent licensing requirements to our neighboring states.

Types and numbers of boards

According to Wisconsin state statute, licensure boards (sometimes alluded to as examining boards) are tasked with the following duties and powers:²⁰

- Independently exercise powers regarding rule-making, credentialing and regulation.
- Supervise all involved with licensee applications, exams, accreditations, disciplinary matters, regulatory policy and administrative discretion for those already licensed by the board and licensee applicants.
- Maintain all records related to license.
- Keep track of names and contact information for all those who hold a specific license in Wisconsin.

There are 33 licensing boards or sections of boards that regulate and set licensing standards for numerous industries in Wisconsin — from auctioneering to massage therapy. Sections of boards are smaller groups from a larger board that typically advise the larger board on a specific occupation.

Each of the 33 licensing boards have what’s considered “rule-making authority,” meaning they can propose new requirements that typically become

state rules governing those in that particular field (more on that process in the next section). Nationally, about 78% of licensing boards have rule-making authority.²¹

There are also 30 other advisory councils or sections of boards. DSPS typically oversees these advisory boards or councils, which do not have specific rule-making authority defined in statute, but are tasked with providing insight to DSPS or a larger board on specific industries.²² Just because they do not have rule-making authority via statute, however, does not mean they don't largely influence the licensing and regulations of their particular industries.

The Plumbers Council, for instance, advises the Department on “the qualifications, examination and licensing of master and journeyman plumbers and restricted plumber licensees, the licensing of utility contractors, the registration of plumbing apprentices and pipe layers and the registration and training of registered learners.”²³ Many of these councils are largely inactive and may meet just once a year. Their main role is to advise DSPS whenever a proposed new rule is introduced or an existing one is updated. And while they do not have explicit rule-making authority, their recommendations are taken into consideration by DSPS staff. For the most part, these councils are not required to have any public member at all, even though they wield large amounts of power in setting regulations.

Board composition: market participants vs. public members

Board members are typically appointed by the governor and approved by the Senate to terms of four years.²⁴ There are two types: “market participants” and public members.

According to a 2015 FTC memo on the Supreme Court *Dental Examiners* case,²⁵ active market participants are those who are licensed by the board on which they serve, or those who work in the industry regulated by the board. So, both a dentist and a dental hygienist on the Wisconsin Dentistry Examining Board are considered active market participants. Likewise, an electrologist, cosmetologist or aesthetician are all active market participants on the Cosmetology Examining Board.²⁶ Even those who may have let their license lapse or retired from the industry altogether are still considered active market participants according to FTC guidelines.

Public members, on the contrary, are not allowed to be “licensed, certified, registered or engaged in any profession or occupation licensed or otherwise regulated by the board,” nor can they be married to anyone, employ anyone or be professionally associated with anyone licensed by the board in which they serve.²⁷ Additionally, public members on any of the health-related boards or councils “shall not be engaged in any profession or occupation concerned with the delivery of physical or mental healthcare.”²⁸

Differences between the two types of members’ functions, at least in theory, are well-recognized.

There are oft-acknowledged benefits to having some market participants on the boards. Writing for the majority in the *Dental Examiners* case, Justice Anthony Kennedy noted that states may well conclude “there are substantial benefits to staffing their agencies with experts in complex and technical subjects. There is, moreover, a long tradition of citizens esteemed by their professional colleagues devoting time, energy and talent to enhancing the dignity of their calling.” The same observations no doubt can be applied to licensing boards that are not part of government agencies.



A VOICE FOR CONSUMERS

Public members discuss how they view their role on boards

By Janet Weyandt

As a Wisconsin licensing board public member, Dennis Myers takes his job seriously and is doing his best to ease the vacancy problem. In fact, he's currently serving on five different boards.

"I don't take anything unless I can do it right," said Myers, 76. "But I had some extra room."

Myers spent his career at the Milwaukee Public Schools in the physical plant department. When he retired 20 years ago, he decided to do something completely different and became a public servant. He spent many years as a Washington County supervisor, and then six years ago was appointed by Gov. Scott Walker to the Wisconsin Judicial Council.

continued on page 26

While market participants serve a useful and often essential role, however, they also pose a strong risk of self-dealing — as was the case with dentists in North Carolina. Those who already hold licenses in an industry are less likely to lower or loosen the same requirements they had to meet. Rather, as the recent growth of licensure shows, they often impose higher education requirements, fees, hours of experience or residency requirements. These decisions restrict competition within an industry of licensed professionals and decrease the number of individuals who can afford to pursue a licensed occupation.²⁹

In the *Dental Examiners* case, Justice Kennedy made explicit the "risks licensing boards dominated by market participants may pose to the free market," and not just through intentional, explicit self-dealing.

When power is delegated to active market participants, Kennedy wrote, "established ethical standards may blend with private anti-competitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor."

Such concerns have long prompted states to counter market-participant dominance of licensing boards by including public members or, as they are sometimes called, consumers — individuals who do not work in the field or industry that a board regulates. Public members essentially serve as a check on market participants. In theory, whenever board members propose a new rule that could fence out competition or drive up costs, or discipline a competitor for not adhering to a continuing education requirement or passing a test, the hope has been that public members would represent the views of Wisconsin consumers.

In reality, the role of public members is nominal.

Dearth of public members and lack of influence

Licensure boards are also sometimes alluded to in statute as examining boards. According to Wisconsin state statute, every such board must have at least one public member:

“The membership of each examining board and examining council created in the department of safety and professional services (sic) after June 1, 1975, shall be increased by one member who shall be a public member appointed to serve for the same term served by the other members of such examining board or examining council, unless the act relating to the creation of such examining board or examining council provides that 2 or more public members shall be appointed to such examining board or examining council.”³⁰

In sum, boards are typically required to have just one public member, although some are required to have more than that.³¹

Given the size of most boards, this would have seemed a modest statutory requirement. Only 18% of all members are required by statute to be public members. The other 82% are meant to be active market participants — those practicing in the same field that they regulate.

Lopsided as those numbers are, they substantially overstate the actual presence of public members, because more than half of the required public member positions are vacant. Counting only filled positions, Wisconsin licensing boards and councils are comprised of only 9% (33) public members and 91% (337) market participants. So, while state statute requires about one-fifth of boards to be comprised of public members, the actual tally is closer to half that.

Even more troubling, 18 of those rule-making or licensure boards have no public representation at all; and at least 19 other advisory councils with similar functions are also totally bereft of any public members.

Market participants dominate Wisconsin licensing boards, and the fact that many boards have no public member at all is in direct violation of state law.³² (See Figures 1 and 3, starting on page 11.³³)

We have established that there are relatively few spots on boards that are actually filled by public members.

But the problem is made worse by the fact that public members who serve on these boards do not always show up for meetings.

We examined attendance records for licensure boards we found to be the most active over the past year: the Examining Board of Architects, Landscape Architects, Professional Engineers, Designers and Professional Land Surveyors (and their sections), the Medical Examining Board, the Chiropractic Examining Board, the Dentistry Examining Board, the Accounting Examining Board, the Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board (and their sections) and the Massage Therapy and Bodywork Examining Board.³⁴ This totaled 36 board meetings with final attendance records available online.³⁵

At eight of these board meetings, no public members were present at all, although two of these meetings were for the Architect Section of the larger licensing board, which had no public members appointed at all. The other instances occurred at the Professional Engineer Section of the larger board, the Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board, the Professional Counselor Section of this

board, the Massage Therapy and Bodywork Examining Board and the Medical Examining Board.

When public members did show up at board meetings, their attendance was low compared to market participants. And due to the low number of public members serving on boards in the first place, one or two absent public members largely affected the breakdown of public members to market participants.

While only a small sample of board meetings, the low number or complete absence of public members at these meetings illustrates another way that Wisconsin licensing boards are in violation of the public member requirement written in state statute.

Control of and by market participants

In comparison to public members, market participants who sit on boards wield overwhelming influence — and not just by virtue of their numbers. Many are connected to trade associations, private interest groups and lobbyists.

At times, this influence has actually been incorporated into statute. In 1975, for example, two members of the Board of Nursing were statutorily required to be members of the Wisconsin League for Nursing — one a member of the Wisconsin conference of the Catholic Hospital Association and another from the State Medical Society. While no longer specifically written in statute, this influence of outside groups on licensing boards and subsequent licensing requirements is still apparent today.

In 2001, when the Massage Therapy and Bodywork Therapy Affiliated Credentialing Board was created, the Wisconsin Chapter of the American Massage Therapy Association directly assisted with

the drafting of the legislation. In a memo included in the drafting notes, they write that the 1997 law which required the registration of massage therapists and bodyworkers needed to be “improved and tightened up.” (Registrations are a less restrictive form of regulation than licensing.) They claimed that consumers deserved “greater assurances that the person providing those services is in fact qualified to do so.”³⁶

Individual licensees often hold valuable expertise that help licensing boards and councils, but the power and size of these larger organizations sometimes drown out the voices of aspiring workers or potential competitors. Of course, in North Carolina it was a group of dentists backed by the American Dental Association³⁷ that tried to prevent lower-level professionals from providing teeth-whitening services to consumers.

While there is nothing inherently wrong with board members belonging to associations, the U.S. Supreme Court has cautioned that members of associations vested with regulatory authority “often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm.”³⁸

In Wisconsin, associations do not have direct regulatory authority but do have direct links to rule-makers.

Morris Kleiner, professor and AFL-CIO Chair in Labor Policy at the University of Minnesota, is one of the leading experts on occupational licensing in the country. Kleiner notes that the growth of licensure is largely influenced by such professional organizations.³⁹

“For a professional association, obtaining licensing legislation requires raising funds from members of the occupation to lobby the state legislature,

ABSENCE AND VIOLATION

Figure 1: Public members on Wisconsin licensing boards and councils

Boards in bold are in violation of state statute requiring a specific number of public members

<i>Board or council</i>	<i>Percentage of public members required by statute</i>	<i>Actual percentage of public members</i>
Accounting Examining Board	22%	25%
Examining Board of Architects, Landscape Architects, Professional Engineers, Designers and Professional Land Surveyors	40%	25%
Architect Section	40%	0%
Designers Section	40%	0%
Professional Engineer Section	40%	25%
Professional Land Surveyor Section	40%	25%
Landscape Architect Section	40%	50%
Auctioneer Board	43%	33%
Barbering Advisory Committee	0%	0%
Behavioral Health Review Committee	0%	0%
Cemetery Board	33%	20%
Chiropractic Examining Board	33%	20%
Commercial Building Code Council	0%	0%
Controlled Substances Board	0%	0%
Conveyance Safety Code Council	9%	0%
Cosmetology Examining Board	33%	0%
Dentistry Examining Board	18%	10%
2% Fire Dues Appeals Board	0%	0%
Funeral Directors Examining Board	33%	20%
Hearing and Speech Examining Board	20%	0%
Manufactured Housing Code Council	8%	8%
Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board	23%	10%
Marriage and Family Therapist Section	25%	0%

<i>Board or council</i>	<i>Percentage of public members required by statute</i>	<i>Actual percentage of public members</i>
Professional Counselor Section	25%	0%
Social Worker Section	20%	0%
Medical Examining Board (MEB)	23%	17%
Athletic Trainers Affiliated Credentialing Board	17%	0%
Dietitians Affiliated Credentialing Board	25%	25%
Massage Therapy and Bodywork Therapy Affiliated Credentialing Board	14%	14%
Occupational Therapists Affiliated Credentialing Board	29%	20%
Podiatry Affiliated Credentialing Board	25%	0%
Council on Anesthesiologist Assistants	20%	0%
Perfusionists Examining Council	20%	25%
Council on Physician Assistants	20%	0%
Respiratory Care Practitioners Examining Council	20%	0%
Nursing Board	22%	13%
Nursing Home Administrators Examining Board	20%	0%
Optometry Examining Board	29%	29%
Pharmacy Examining Board	29%	0%
Physical Therapy Board	20%	20%
Examining Board of Professional Geologists, Hydrologists and Soil Scientists	25%	17%
Professional Geologist Section	25%	33%
Professional Hydrologist Section	25%	0%
Professional Soil Scientist	25%	0%
Plumbers Council	0%	0%
Plumbing Code Advisory Committee	0%	0%
Private Onsite Wastewater Treatment Systems (POWTS) Code Advisory Committee	0%	0%
POWTS Technical Advisory Committee	0%	0%

ABSENCE AND VIOLATION

<i>Board or council</i>	<i>Percentage of public members required by statute</i>	<i>Actual percentage of public members</i>
Psychology Examining Board	33%	20%
Radiology Examining Board	29%	0%
Real Estate Appraisers Board	29%	50%
Real Estate Appraisers Application Advisory Committee	0%	0%
Real Estate Examining Board	29%	17%
Real Estate Contractual Forms Advisory Council	0%	0%
Council on Real Estate Curriculum and Examinations	29%	20%
Sign Language Interpreters Council	0%	0%
Explosives, Fireworks, Mines, Pits and Quarries Code Advisory Committee	0%	0%
Electrical Code Advisory Committee	0%	0%
Fire Department Safety and Health Code Advisory Committee	0%	0%
Pools Code Advisory Committee	0%	0%
Substance Abuse Counselors Certification Review Committee	0%	0%
Unarmed Combat Sports Code Advisory Committee	0%	0%
Uniform Dwelling Code Council	0%	0%
Total	18%	9%

especially the chairs of appropriate committees,” Kleiner writes. “In addition, the occupation association often solicits volunteers from its membership to work on legislative campaigns. With financial contributions, political action committees and volunteers, ... occupational associations ... have a significant ability to influence legislation, especially when opposition to regulatory legislation is absent or minimal.”⁴⁰

Through monetary contributions, political pressure and access to a large group of professionals,

these associations often influence the legislation that creates licensing boards — often with minimal or no opposition.

Kleiner also notes that “Most licensing provisions across states require continuing education classes for fees, which are usually administered by the professional association, and generate revenues for the occupation association.”⁴¹

Professional organizations’ budgets and memberships have been found to influence the probability of whether that occupation is licensed.⁴² An organization with a \$750,000 budget has a 50% probability of licensure, for instance, versus one with a \$250,000 budget that has only 23% probability of licensure, one researcher found.⁴³

In addition, the process of appointing members to licensing boards is inherently political. In Wisconsin, most members are appointed by the governor’s office and approved by the legislature to serve four-year terms. Some may have secured their positions by applying online through the DSPS website, but others are often connected to the position by an elected official who seeks them out. In other cases, market participants are often referred to the governor’s office or DSPS directly by trade associations.

The influence of professional associations can be observed in the leadership structure of many boards. Each of Wisconsin’s 33 boards or sections with rule-making authority is chaired by a market participant, often a professional member. None are chaired by a public member. We found that at least 12 board chairs are active in at least one state or national chapter of a trade association directly tied to their profession — such as the American Society of Landscape Architects or the American Counseling Association.⁴⁴ While this

ABSENCE AND VIOLATION

may simply suggest that board chairs are often active members of professional organizations, it also raises the question of whether these larger organizations broaden their influence through these connections. (See Figure 2.)

The screening process for DSPS appointments (which are primarily made to councils) involves an application that asks for basic information, whether someone is licensed in any field, the board or council they'd like to serve on, and who referred them to serve on that board or committee.

Figure 2: Characteristics of board chairs

Boards and sections with rule-making authority	Market participant?	Member of trade organization?
Landscape Architect Section	Yes	Yes, American Society of Landscape Architects
Dietitians Affiliated Board	Yes	Yes, Academy of Nutrition and Dietetics
Examining Board of Architects, Landscape Architects, Professional Engineers, Designers and Professional Land Surveyors	Yes	Yes, American Society of Landscape Architects
Radiology Examining Board	Yes	Yes, American Society of Radiologic Technologists
Psychology Examining Board	Yes	Yes, Association of State and Provincial Psychology Boards
Dentistry Examining Board	Yes	Yes, Wisconsin Dental Association, American Dental Association
Medical Examining Board	Yes	Yes, Liaison Committee on Medical Education
Cosmetology Examining Board	Yes	Yes, National Interstate Council of Cosmetology
Professional Counselor Section	Yes	Yes, Wisconsin Counseling Association, American Counseling Association

Boards and sections with rule-making authority	Market participant?	Member of trade organization?
Massage Therapy and Bodywork Therapy Affiliated Credentialing Board	Yes	Yes, Wisconsin Naturopathic Doctors Association
Auctioneer Board	Yes	Yes, Wisconsin Auctioneers Association and National Auctioneers Association
Chiropractic Examining Board	Yes	Yes, Wisconsin Chiropractic Association
Cemetery Board	Yes	Yes, Wisconsin Cemetery and Cremation Association
Accounting Examining Board	Yes	
Architect Section	Yes	
Designer Section	Yes	
Professional Engineer Section	Yes	
Professional Land Surveyor Section	Yes	
Funeral Directors Examining Board	Yes	
Hearing and Speech Examining Board	Yes	
Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board	Yes	
Marriage and Family Therapy Section	Yes	
Social Worker Section	Yes	
Athletic Trainers Affiliated Credentialing Board	Yes	
Occupational Therapists Affiliated Credentialing Board	Yes	
Podiatry Affiliated Credentialing Board	Yes	
Board of Nursing	Yes	
Nursing Home Administrators Examining Board	Yes	
Optometry Examining Board	Yes	
Pharmacy Examining Board	Yes	
Physical Therapy Examining Board	Yes	
Examining Board of Professional Geologists, Hydrologists and Soil Scientists	Yes	
Real Estate Examining Board	Yes	

ABSENCE AND VIOLATION

Figure 3: Public member vacancies on Wisconsin licensing boards and councils

<i>Board</i>	<i>Number of seats</i>	<i>Number of public members required</i>	<i>Number of public members vacant</i>	<i>Number of actual public members</i>	<i>In violation of statute?</i>
Accounting Examining Board	9	2	0	2	No
Examining Board of Architects, Landscape Architects, Professional Engineers, Designers and Professional Land Surveyors	25	10	6	4	Yes
Architect Section	5	2	2	0	Yes
Designers Section	5	2	2	0	Yes
Professional Engineer Section	5	2	1	1	Yes
Professional Land Surveyor Section	5	2	1	1	Yes
Landscape Architect Section	5	2	0	2	No
Auctioneer Board	7	3	1	2	Yes
Barbering Advisory Committee	5	0	N/A	0	No
Behavioral Health Review Committee	5	0	N/A	0	No
Cemetery Board	6	2	1	1	Yes
Chiropractic Examining Board	6	2	1	1	Yes
Commercial Building Code Council	11	0	N/A	0	No
Controlled Substances Board	9	0	N/A	0	No
Conveyance Safety Code Council	11	1	1	0	No
Cosmetology Examining Board	9	3	3	0	Yes
Dentistry Examining Board	11	2	1	1	Yes
2% Fire Dues Appeals Board	7	0	N/A	0	No
Funeral Directors Examining Board	6	2	1	1	Yes
Hearing and Speech Examining Board	10	2	2	0	Yes
Manufactured Housing Code Council	13	1	0	1	No
Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board	13	3	2	1	Yes
Marriage and Family Therapist Section	4	1	1	0	Yes
Professional Counselor Section	4	1	1	0	Yes
Social Worker Section	5	1	1	0	Yes
Medical Examining Board (MEB)	13	3	1	2	Yes
Athletic Trainers Affiliated Credentialing Board	6	1	1	0	Yes
Dietitians Affiliated Credentialing Board	4	1	0	1	No
Massage Therapy and Bodywork Therapy Affiliated Credentialing Board	7	1	0	1	No
Occupational Therapists Affiliated Credentialing Board	7	2	1	1	Yes
Podiatry Affiliated Credentialing Board	4	1	1	0	Yes
Council on Anesthesiologist Assistants	5	1	1	0	No
Perfusionists Examining Council	5	1	0	1	No
Council on Physician Assistants	5	1	1	0	No
Respiratory Care Practitioners Examining Council	5	1	1	0	No

ABSENCE AND VIOLATION

<i>Board</i>	<i>Number of seats</i>	<i>Number of public members required</i>	<i>Number of public members vacant</i>	<i>Number of actual public members</i>	<i>In violation of statute?</i>
Nursing Board	9	2	1	1	Yes
Nursing Home Administrators Examining Board	10	2	2	0	Yes
Optometry Examining Board	7	2	0	2	No
Pharmacy Examining Board	7	2	2	0	Yes
Physical Therapy Board	5	1	0	1	No
Examining Board of Professional Geologists, Hydrologists and Soil Scientists	12	3	2	1	Yes
Professional Geologist Section	4	1	0	1	No
Professional Hydrologist Section	4	1	1	0	No
Professional Soil Scientist	4	1	1	0	No
Plumbers Council	3	0	N/A	0	No
Plumbing Code Advisory Committee	7	0	N/A	0	No
Private Onsite Wastewater Treatment Systems (POWTS) Code Advisory Committee	6	0	N/A	0	No
POWTS Technical Advisory Committee	9	0	N/A	0	No
Psychology Examining Board	6	2	1	1	Yes
Radiology Examining Board	7	2	2	0	Yes
Real Estate Appraisers Board	7	2	0	2	No
Real Estate Appraisers Application Advisory Committee	6	0	N/A	0	No
Real Estate Examining Board	7	2	1	1	Yes
Real Estate Contractual Forms Advisory Council	14	0	N/A	0	No
Council on Real Estate Curriculum and Examinations	7	2	1	1	No
Sign Language Interpreters Council	10	0	N/A	0	No
Explosives, Fireworks, Mines, Pits and Quarries Code Advisory Committee	6	0	N/A	0	No
Electrical Code Advisory Committee	11	0	N/A	0	No
Fire Department Safety and Health Code Advisory Committee	6	0	N/A	0	No
Pools Code Advisory Committee	5	0	N/A	0	No
Substance Abuse Counselors Certification Review Committee	9	0	N/A	0	No
Unarmed Combat Sports Code Advisory Committee	7	0	N/A	0	No
Uniform Dwelling Code Council	12	0	N/A	0	No
Total	469	84	49	35	

Extent of anti-competitive behavior

To evaluate whether Wisconsin licensing boards engage in anti-competitive behavior, we examined disciplinary reports from each board over the past five years, which are available on the DSPS website.⁴⁵ These documents ranged from a doctor who committed medical malpractice and lost his license to a landscape architect who was a few hours short on his continuing education courses and was forced to pay a fine to retain his license. We were interested in cases where licensing boards essentially fenced out individuals for reasons that were unrelated to promoting health or public safety.

We found that some boards are far more active than others. In most cases, the more active boards were also the ones that disciplined licensees for reasons that seemed outside their scope (or those unrelated to health and public safety).

Figure 4: Wisconsin's most active licensing boards

1. Examining Board of Architects, Landscape Architects, Professional Engineers, Designers and Professional Land Surveyors
2. Chiropractic Examining Board
3. Dentistry Examining Board
4. Cosmetology Examining Board
5. Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board

Three boards produced zero disciplinary cases over the last five years: the Athletic Trainers Affiliated Credentialing Board; the Dietitians Affiliated Credentialing Board; and the Examining Board of Professional Geologists, Hydrologists and Soil Scientists. Three boards produced eight or fewer disci-

plinary cases: the Optometry Examining Board, the Cemetery Board and the Radiography Examining Board. If there were complaints to these first three boards about specific licensees, none required disciplinary actions over the past five years — which undermines the claim that an occupational license is the best form of regulation in these fields.

In contrast, many other licensing boards disciplined individuals for numerous reasons unrelated to the promotion of health and safety. The Examining Board of Architects, Landscape Architects, Professional Engineers, Designers and Professional Land Surveyors, for instance, performed numerous continuing education audits over the five-year period affecting nearly 100 people.

To satisfy these requirements, landscape architects were told to complete courses like: “Crumb Rubber in Athletic Fields,” “Ethical Decision Making,” and others on “the Revitalization of Central Dallas” and “Learning from the Bay Area.” Engineers were required to take courses like “Ethics for Professional Engineers,” or “Laws and Regulations Applicable to the Practice of Engineering in Maryland.”

Everyone who hadn't completed the required courses was fined — usually a few hundred dollars — for their noncompliance. One engineer who was two hours short of the requirements was fined \$390 and told to complete an ethics course or risk losing his license. Another was fined \$140 and told to complete 30 hours of courses, because the hours he submitted could not be verified.

Other boards that performed continuing education audits that affected large groups of licensees were the Chiropractic Examining Board, the Marriage and Family Therapy, Professional Counseling, and Social Work Examining Board and the Medical Examining Board.

Often, individuals who did not complete the required continuing education courses chose to simply surrender their license instead — although they still had to pay a fine to DSPS. In these cases, the individuals usually held their license for a long period of time, may have been near retirement and probably determined that completing hours of courses was not worthwhile. It's hard to imagine that public safety is enhanced because a Wisconsin landscape architect spends a few hours learning about the revitalization of central Dallas. It's disquieting that licensing boards are essentially discouraging seasoned professionals from continuing to work in their fields.

Lack of transparency

We were surprised to discover that most boards conduct their meetings largely in private session, sometimes for hours at a time. This is ostensibly to discuss licensing applications and disciplinary decisions, but meeting minutes do not reveal how decisions are made even in open sessions. Unfortunately, this is not uncommon nationwide, either. Some states don't post minutes online at all, and many others are incredibly vague, like Wisconsin's.⁴⁶

When we examined meeting minutes for attendance records, we also noticed that boards convene more often than their regularly scheduled meetings. Teleconference calls and separate committee meetings occur often and do not include any information on who attended or what was discussed.

Through an open records request, we obtained agenda item requests from 2018. These were generally submitted by members of the public requesting that an issue be discussed by a state licensing board at an upcoming meeting. Only one of the 10 requests submitted to DSPS suggested that a specific license requirement remain unchanged. The rest suggested lowering continuing education requirements or modifying current licensing requirements.

One man who was licensed summarized the issue when he wrote: "We have to stop making rules and doing (work) to satisfy other (members in our field). We need to remember



Protectionist and restrictive Decisions from licensing boards are oftentimes arbitrary and unfair

By Betsy Thatcher

A convoluted mathematical equation used by a Wisconsin state licensing board deprived a tribal dental clinic of a pediatric dentist for nearly a year.

The clinic, located on the Lac du Flambeau Band of Lake Superior Chippewa Indian reservation in the far northcentral part of the state, had been desperately looking for a pediatric dentist to treat its approximately 300 child-age patients.

For most of the year in 2018, only 30 of the 300 children had been able to travel to a referral clinic in Eau Claire — a five-hour round trip — to receive care, according to dental director and dentist Thomas Wheeler at the Peter Christensen Dental Campus, the tribal clinic.

continued on page 29

that we work for the public, and our work that we produce benefits the public ... We need to have a discussion about whether we have a 'standard of practice' or a 'best practices' recommendation. We need to not have some segments of our profession try to make everyone else work to their preferences."

Wisconsin licensing comparisons to other states

To get a sense of whether Wisconsin licensing boards' structure and regulations are out of the norm, we examined how boards operate in four contiguous states: Illinois, Iowa, Michigan and Minnesota. We found there were similarities in board structure and the occupations that are licensed.

According to Vanderbilt University law professor Rebecca Allensworth, who studies the public policy and regulatory infrastructure of professional licensing, each of those states has roughly the same number of boards: Illinois has 37, Iowa 33, Michigan 35 and Minnesota 32.⁴⁷ Each state had similar boards including nursing, dentistry and other medical professions, as well as cosmetology, design, architects and land surveyors. For the most part, boards that these states share are the same that existed when the public member law was signed in Wisconsin in 1975. Boards created since that time have been more varied.

Allensworth also found that the majority of licensing boards in every state (except for California) are dominated by market participants. Seventy-eight percent of Minnesota's boards are professionally dominated, as are 100% of Michigan's boards, for example.

We also compared the education requirements and fees needed to obtain licenses for 42 lower-income occupations in Wisconsin to those of our neighboring four states. According to the Institute for Justice⁴⁸, these lower-income occupations include barber, bus driver, pipelayer contractor and security guard. The data reveals a troubling picture for Wisconsin. Of the 42 lower-income occupations identified by IJ, Wisconsin imposes the highest fees or education requirements among our neighboring states for more than half (28) of them. (See Figures 5 and 6.⁴⁹)

Wisconsin imposes the highest fees among our neighboring states for 18 of these occupations. For instance, it costs \$625 to be an animal breeder in Wisconsin. The next lowest state fee is Iowa at \$175. Similarly, it costs \$391 to get a barber license in Wisconsin, compared to only \$30 in Michigan.

According to the Institute for Justice, Wisconsin imposes the highest education requirements among the other states for three occupations: child care home family, mobile home installer, vegetation pesticide applicator. Of the 42 lower-income occupations examined, Wisconsin is the only state among the five that licenses two of them: bartenders and farm labor contractors.

Previous research indicates that increased licensing requirements restrict the number of people who will enter a field or occupation, thereby increasing the wages of those who are already licensed while driving up the cost of the service provided to consumers. This is especially problematic for lower-income occupations where high education requirements or fees may discourage many Wisconsinites from entering a field or even working at all.

We also examined how Wisconsin matches up to our four neighboring states for some of the most

ABSENCE AND VIOLATION

Figure 5: License requirements for select low-income occupations in Wisconsin

Occupation	States Licensed	Fees	Education
Animal breeder	28	\$625	
Animal control officer	7	\$60	40 clock hours
Animal trainer	9	\$25	
Barber	51	\$391	1000 clock hours
Bartender	13	\$0	3 clock hours
Bill collection agency	31	\$1,200	
Bus driver, city/transit	51	\$124	
Child care home, family	44	\$68	3 credit hours
Cosmetologist	51	\$391	1550 clock hours
Earth driller, water well	51	\$100	6 clock hours
Farm labor contractor	10	\$100	
Interpreter, sign language	22	\$990	4 years
Makeup artist	41	\$391	450 clock hours
Manicurist	50	\$391	300 clock hours
Massage therapist	44	\$345	600 clock hours
Milk sampler	42	\$60	
Mobile home installer	39	\$115	12 clock hours
Pest control applicator	51	\$152	1 day
Pipelayer contractor	27	\$540	
Preschool teacher, public school	50	\$520	4 years
School bus driver	51	\$129	
Security guard, unarmed	34	\$114	
Shampooer	37	\$391	1000 clock hours
Skin care specialist	50	\$391	450 clock hours
Truck driver, other	51	\$124	
Truck driver, tractor-trailer	51	\$124	
Vegetation pesticide applicator	51	\$199	2 days
Veterinary technician	36	\$475	2 years

Figure 6: Select low-income requirements: comparisons to surrounding states

State	Occupation	States Licensed	Fees
Illinois	Animal breeder	28	\$25
Iowa	"	28	\$175
Michigan	"	28	\$18
Minnesota	"	28	\$160
Wisconsin	"	28	\$625
Illinois	Child care home, family	44	\$27
Michigan	"	44	\$110
Minnesota	"	44	\$65
Wisconsin	"	44	\$68
Illinois	Cosmetologist	51	\$210
Iowa	"	51	\$118
Michigan	"	51	\$200
Minnesota	"	51	\$285
Wisconsin	"	51	\$391
Iowa	Pipelayer contractor	27	\$50
Wisconsin	"	27	\$540
Iowa	Shampooer	37	\$118
Michigan	"	37	\$200
Wisconsin	"	37	\$391
Illinois	Vegetation pesticide applicator	51	\$60
Iowa	"	51	\$75
Michigan	"	51	\$75
Minnesota	"	51	\$75
Wisconsin	"	51	\$199

ABSENCE AND VIOLATION

commonly licensed occupations: manicurists, counselors, dental hygienists, radiographers, pharmacists, certified public accountants, real estate salespeople, professional engineers, cosmetologists and registered nurses. Together, there are 203,792 active licenses for these occupations in the state.⁵⁰ (See Figure 7.⁵¹) For the most part, Wisconsin's requirements for these occupations were in line with those of the other four states. Education requirements and fees were roughly the same, and in a few cases, Wisconsin was on the lower end. For instance, the fees required to be a pharmacist, engineer, nurse and professional counselor are all fairly low compared to our neighbors.

There are a few exceptions, however, like the fact that cosmetologists must pay a \$391 fee to be li-

censed in Wisconsin — over \$100 more than any other bordering state's requirement. But even if these requirements mostly match up to those of neighboring states, it's still worth noting that on average, Wisconsin's most common licenses require a \$170 fee and more than 13 hours of continuing education every two years. The 203,792 individuals who work in these fields either comply with these requirements or face the possibility of losing their livelihood.

Extent of active supervision in Wisconsin

While state supervision of any private enterprise or market runs the risk of devolving into over-reg-

Figure 7: Requirements for commonly-licensed occupations in Wisconsin

Occupation	Number of Wisconsin licenses	Licensing Fees	Education	Experience Or Training	Continuing Education Requirement	License Renewal Fee
Cosmetologist	29,472	\$391	High school diploma or equivalent and cosmetology school	1,550 hours		\$82
Counselor	4,038	\$165	Master's degree or an equivalent degree approved by Professional Counselor Section	1,000 for Doctors level, 3,000 hours for Masters level	30 hours	\$85
CPA	11,974	\$118	Bachelor's degree	1 year	No	\$43
Dental hygienist	5,306	\$150	Associate's degree	None	12 hours	\$123
Manicurist	3,310	\$391	High school diploma or equivalent	300 hours	No	\$82
Pharmacist	8,924	\$155	Doctor of pharmacy	1,500 hours	30 hours every two years	\$128
Professional Engineer	16,162	\$75	Bachelor's degree from board-accredited school	4 years	30 hours	\$68
Radiographer	6,361	\$90	Associate's degree		24 hours	\$82
Real estate salesperson	13,822	\$75	10 college credits in real estate		18 hours	\$75
Registered nurse	104,423	\$90	Associate's degree or bachelor's degree		No	\$86

ulation, the Supreme Court essentially ruled in the *Dental Examiners* case that some state supervision is generally necessary to avoid a different problem: small numbers of potentially self-interested market participants banding together without any government oversight to prevent other Wisconsinites from competing on a level playing field.

Including public members on boards was likely seen as a way to mitigate those two different scenarios, each of which is so potentially destructive to a free and fairly functioning market: private actors violating antitrust laws and state entities over-regulating private enterprise.

It is within that context, acknowledging the necessity of some state supervision, that we examined the State of Wisconsin’s interaction with the boards appointed by elected officials.

According to an FTC staff guidance document by the Bureau of Competition on the *Dental Examiners* case, states must fulfill a few key requirements for active supervision: “The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the ‘mere potential for state supervision is not an adequate substitute for a decision by the State.’ Further, the state supervisor may not itself be an active market participant.”⁵²

In order for a proposed rule by a licensing board to be adopted in Wisconsin, it must pass multiple checks aimed to both ensure the legitimacy of the rule and to satisfy the active supervision requirement.

Proposed rules are reviewed by DSPS and sent to the governor for approval.⁵³ If approved, a public hearing is held, and the rules are open for public

comment — although there is typically little to no public input on administrative rule drafts — and are sent to the appropriate legislative committees for review. For instance, proposed changes by the Medical Examining Board are typically sent to the Assembly Committee on Health and the Senate Committee on Health and Human Services. Those committees then have 30 days to review the rule and an additional 30 days if they request a meeting with the board or a hearing on the proposed rule.

Reasons that a committee may object to a proposed rule⁵⁴ include: an absence of statutory authority; an emergency relating to public health, safety or welfare; a failure to comply with legislative intent; a conflict with state law; a change in circumstances since enactment of the earliest law upon which the proposed rule is based; and arbitrariness and capriciousness, or imposition of an undue hardship.

After each legislative committee objects to or approves a proposed rule, or after the 30-day passive review period ends (whichever comes first), rules are sent to the Joint Committee on the Review of Administrative Rules (JCRAR). If JCRAR objects to a proposed rule, that committee must introduce a bill, which must pass the legislature, detailing any objections and proposing changes.

While Wisconsin’s system has multiple checks on licensing boards’ rule-making authority, it’s unclear whether the *substance* of proposed rules is actually being critically examined to determine whether it is necessary to protect health and safety.

Supervision in other states

Since the *Dental Examiners* decision in 2015, many states have proposed and passed new laws to ensure compliance with the Supreme Court’s active

supervision standard. Mississippi, for instance, now requires its Occupational Licensing Review Commission to consider whether less restrictive regulation could be implemented and, further, whether the proposed regulation “increases economic opportunity, promotes competition, and encourages innovation.”⁵⁵ Ohio, Georgia, Idaho, Alabama, Connecticut, Tennessee, Montana and West Virginia have passed similar legislation.

Further, other antitrust lawsuits have been filed against state licensing boards across the country and are working their way through the courts.

In theory, if substantive review occurs at each stage of the process in Wisconsin, it is less likely that a situation as egregious as the *Dental Examiners* case would occur through the administrative rule-making process. Oversight by the governor’s office and the Legislature would make such antitrust violations unlikely. However, policy-makers should be aware that Wisconsin licensing boards could still fence out individuals and act in their own interest, making the state susceptible to an antitrust suit.

Conclusion

Licensing boards in Wisconsin are powerful, and they’re dominated by market participants — first through state statute and compounded by the large number of public member vacancies and the fact that public members often simply fail to show up. This absence of public members not only restricts the consumer perspective in licensing decisions, but it violates state statute.

Market participants’ dominance of decision-making on these boards illustrates perhaps the main problem with occupational licensing: Those who are already in the field control who enters it, often fencing out qualified and capable individuals in

the process and preventing the public from truly understanding what transpires. Many regulatory decisions that affect thousands of Wisconsin workers and nearly every consumer are made behind closed doors and without much public input.

As a first step, boards should be required to be more transparent in their actions and decision-making.

As importantly, the laws requiring participation of public members in Wisconsin should be adhered to or abolished.

Legislators, as part of the process, should examine why there has been so little adherence in the past and whether such public representation would endure and be effective, even if all the public member spots were filled and appointees showed up and took part.

Abolishment is the other and perhaps better option. Abolishment regulations as other states have done through a sunset review process, or other measures that impose less restrictive options to protect public health and safety.

We recognize that it is extremely rare and difficult to entirely de-license an occupation. In fact, the Bureau of Labor Statistics found that only a handful of such instances occurred nationwide over the last 40 years.⁵⁶ (Two were in Wisconsin: The Watchmaking Examining Board⁵⁷ and watchmaker license and the Athletic Examining Board were abolished here in 1979).⁵⁸ To do so, legislators must take on powerful interest groups for specific occupations that are willing to put substantial resources behind maintaining a license.

Yet many states have recently passed legislation that requires systematic reviews of licenses and licensing boards to evaluate whether the current license protects public safety — and if not, whether

a less restrictive form of regulation is appropriate. Many states that have sunset legislation, including Vermont⁵⁹ and Texas,⁶⁰ require public members to serve on these review boards.

Wisconsin should do the same. A standard review of boards and councils, with public members involved in the decision-making, would help determine which licenses serve the public and which could transition to a less restrictive form of regulation, such as inspections, mandatory bonding or insurance, registration or certification.⁶¹

Plus, the mere possibility of a license or licensure board being abolished through a sunset review incentivizes boards to act efficiently and fairly.⁶²

Wisconsin should also consider eliminating the 28 licenses suggested in the 2018 review and report from DSPS. Some of the main justifications listed for eliminating a license were the lack of any disciplinary complaints in the last five years for specific occupations or the fact that Wisconsin was one of only a few states that require certain licenses.⁶³ This reasoning could be expanded to include many more licenses, based on our analysis of disciplinary cases and comparisons to other states.

Unless lawmakers enact comprehensive licensing reform, the number of boards and licenses — supported and controlled by interest groups — will continue to grow. ■

About the Author



Julie Grace

Julie Grace is a policy analyst for the Badger Institute's Center for Opportunity.

The Inverted Pyramid: A Hierarchy of Less Restrictive Alternatives to Licensing

Occupational licensing is the most burdensome way to regulate work. It creates barriers for aspiring workers, limits competition, raises consumer prices and inhibits mobility — with little evidence of improved quality or

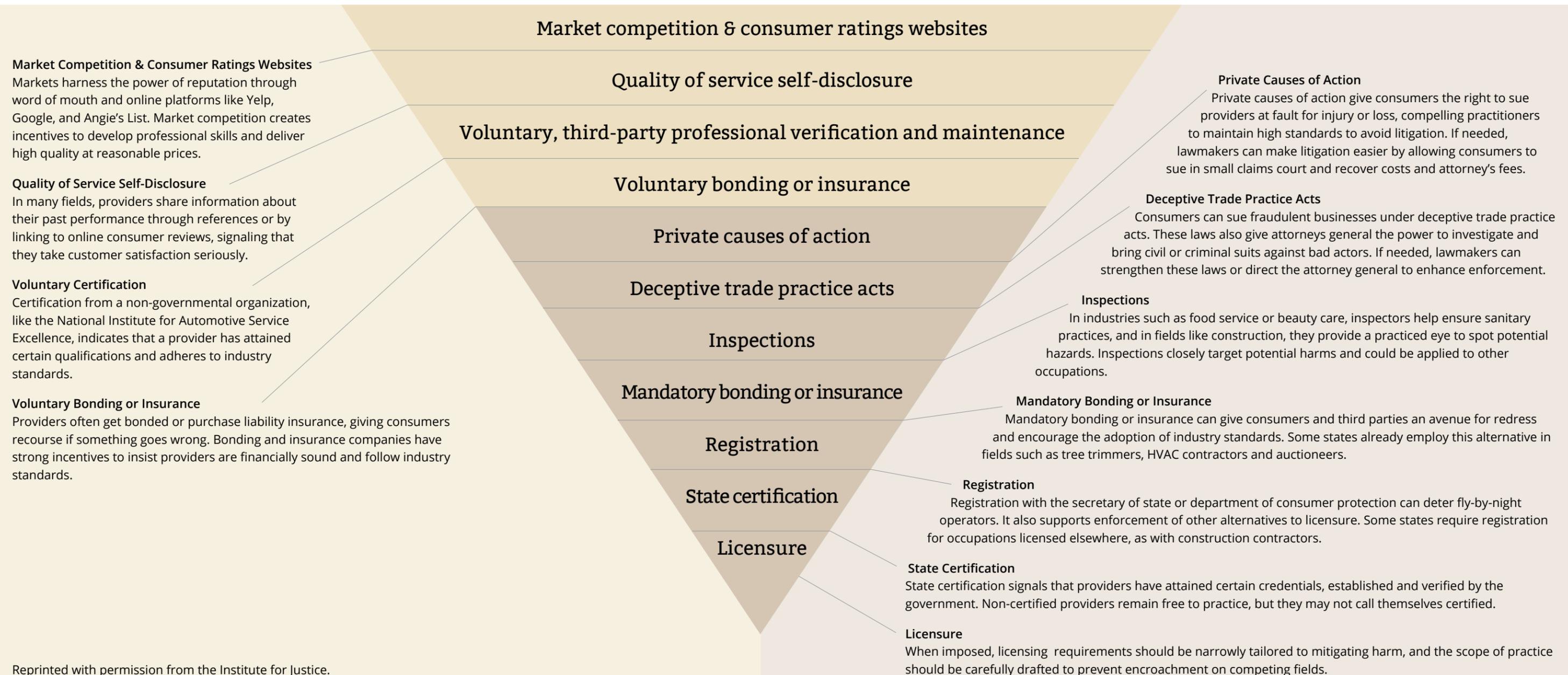
consumer protection. Licensing reform starts by recognizing that there are alternatives, both voluntarily and regulatory, that protect consumers without putting up roadblocks to honest work.

Before licensing — or continuing to license an occupation, lawmakers should demand more than insiders' anecdotes. Licensing should be based only on empirical evidence of widespread, significant and permitted

harm to public health and safety that cannot be addressed by the less restrictive alternatives presented here.

Voluntary or Non-Regulatory Options

Voluntary or Non-Regulatory Options



Reprinted with permission from the Institute for Justice.

from page 8

He's still a member of that body and in the years since has added four more boards to his list: The Council on Library and Network Development (through the Department of Public Instruction), the Real Estate Appraisers Board, the Dentistry Examining Board and the Examining Board of Architects, Landscape Architects, Professional Engineers, Designers and Professional Land Surveyors. In there somewhere, he also found time to serve as a trustee in Germantown.

Walking into his first Judicial Council meeting the first day was "intimidating," Myers said, but the rest of the board welcomed him warmly.

Being a public member of a licensing board is a worthwhile thing to do, he said.

"For all of the residents in the State of Wisconsin, we are the eyes for them," he said. "That's the way I view myself. (The purpose is) to have a spoken voice at these meetings for the general public."

Importance of outside input

That's the primary reason Brian McGrath of New Berlin, an attorney at the Wisconsin Institute for Law & Liberty, wanted to serve as a public member. McGrath was appointed to the Real Estate Examining Board in 2014 and served for approximately two years.



During that time, he said, he learned a lot and felt he was contributing in an important way.

"Do you want real estate brokers being the sole decision-makers for all things relating to real estate brokers?" he said. "Discussing cases, rule-making, setting policy that comes through that board? It occurred to me you don't. You don't want that for any industry; you want some outside input for every industry. That's why I decided to be public member."

Any concerns he had about territorial attitudes from people in the industry turned out to be unfounded, he said. In fact, particularly in cases of discipline, the market participants, as members from the industry are known, were always concerned with what was best for the profession and the public.

"The brokers on the board were anxious to discipline bad actors," he said. "I'd say people really ought to do this, because it gets you involved in state government, which I think is a benefit to the person and to the state."



Brad Kudick found his way onto the Medical Examining Board three years ago by way of a friend who served on another board and recommended him to the office of then-Gov. Scott

Walker. After someone in the office approached him about serving, Kudick started the application process and was ultimately confirmed as a public member.

Kudick, a financial advisor in Milwaukee, doesn't have any personal or professional background in the medical field — and that's exactly how it should be for a public member, he said.

"I come in with a different perspective than the professionals," he said. "I come in from a patient point of view or consumer point of view. I never feel like they're stomping on me or won't listen to my opinion. They're reviewing so much medical information; I review it as well, but I take a different viewpoint. A consumer perspective. I think that's a really a valuable part of the board."

Different perspectives, different priorities



When attorney Matthew Fernholz joined the Architect Section of the Examining Board of Architects, Landscape Architects, Professional Engineers, Designers and Professional Land Surveyors, it was because he wanted to serve the state and had

an interest in the topic. Though he is a civil litigator in Waukesha, his firm had done some construction litigation, and he had some familiarity with the topic.

He also went in with the expectation that he would see eye to eye with the rest of the members of the board. That turned out not to be the case.



Fernholz, who served from 2014 to 2016, said some participants from the profession seemed more inclined to protect their turf than he was as a public member.

For instance, he remembers a lot of discussion about an existing clause in the administrative code allowing college students to take their professional examinations before they graduated.

Some market members thought the rule was a bad idea, but Fernholz said, "Of all the dumb decisions college students can make, is taking an exam to be a landscape architect really something we should be worried about?"

Fernholz served on the board's screening panel, which means he was one of the people charged with reviewing disciplinary cases. There, too, he had a different viewpoint from his industry peers.

"My concern was someone as an architect doing something negligent, threatening the structure or integrity of a building," he said. In contrast, other board members were highly concerned with professionals who hadn't kept up with their continuing education requirements. "There was a sense that this is a real threat to the public, which I did not agree with."

Although he never saw anything that seemed inappropriately punitive, it did underscore for him the importance of having public members on licensing boards.

“If you don’t have outsiders, you wind up having people who are more concerned, I think, with protecting the size of the guild, who are more concerned with enforcing what I would describe as ticky-tack violations,” he said. “I think it’s important for people who are outside the profession to give a viewpoint of what’s really in the public interest.”

Fernholz resigned from the board only because his life got busier — his daughter was born in 2016 and his practice picked up — not because he didn’t enjoy the service.

“No one on the committees was hostile to me in any way,” he said. “I’m glad I did it.”

Difficulty getting them in the door

Public members rarely quit because they don’t enjoy their service, according to Yolanda McGowan, administrator of the Division of Policy and Development in DSPS. On the contrary, once a person is appointed to a board, they tend to stay as long as the term limit of their position allows. The hard part is getting them in the door.



When a new public member joins a board, it’s up to the board chair to make sure every member is treated equitably, McGowan said.

Rosheen Styczinski is one of those board chairs. A landscape architect for 35 years, she’s been a

member of the Examining Board of Architects, Landscape Architects, Professional Engineers, Designers and Professional Land Surveyors for 10 years. Under the umbrella of that board are sub-boards for each of the specialties; Styczinski serves as chair for both the joint board and the Landscape Architecture Section board.

Styczinski said public board members who drop out typically do so for personal reasons: family commitments, job changes requiring relocation, etc. She said she’s never heard anyone suggest that a public member left a board because they weren’t being heard or recognized. And while they can’t talk about technical issues specific to the industry, they bring vital information from their own experiences.

For example, she said, when the board was discussing continuing education requirements for licensed professionals, the conversation turned to professionals who were in the military and unable to meet the requirements because of deployment. A public member who had served in the military suggested a solution that solved the problem.

“That’s always been the nice contribution, they look at things a little differently than the professionals,” Styczinski said. “That kind of balances.”

Janet Weyandt of Sheboygan is a freelance writer.

from page 17

It is difficult for rural and cold-climate clinics to attract dentists, so the clinic thought its prayers were answered when a nationally known pediatric dentist agreed to work there.

In November 2017, Lance Kisby, who has practiced dentistry for 36 years, interviewed for a position at the Lac du Flambeau clinic and filed an application with the Wisconsin Dentistry Examining Board for a license to practice in the state.

“Everybody (at the clinic) told me, ‘We’ve been without a pediatric dentist for years. When can you start?’” Kisby recalls.

Little did Kisby know that it would take more than 13 months.

The North Woods clinic serves the 3,000-member tribe of Chippewa Native Americans. It is in a region that has been identified by the federal government as a “dental shortage area.”

Wisconsin ranked dead last in the nation for providing oral health care to the more than 550,000 children who receive dental benefits through Medicaid, based on 2015 U.S. Department of Health and Human Services.

“We were without a dentist for the children for more than a year,” says Tribal Attorney Jodie Bednar-Clemens. “I’m very bitter about it.”

Bednar-Clemens, a former Oneida County assistant district attorney, worked on Kisby’s case after the Wisconsin Dentistry Examining Board refused to grant him a state license.

Kisby’s distinguished career has included several stints as chief of pediatric dentistry in large American hospitals. He regularly lectures to his peers in seminars around the country and is a noted author on pediatric dental topics.

But the dentistry board denied the license based on a head-scratching determination that Kisby had not “engaged in at least 750 hours of the practice of dentistry within the 12-month period preceding” his Dec. 6, 2017, application.

The board’s practice has been to have one of its members review applications and determine whether the dentist had indeed worked for at least the 750 hours required by the state administrative code.

The board member, a dentist, came up with her own formulation that, in short, eliminated from the equation a whole month of practice if the dentist had worked fewer than 60 hours in that month.

The board denied Kisby’s application on March 30, 2018, almost four months after he applied, simply on the results of this math.

Kisby decided to appeal the decision.

“I sent them proof that I worked all that time,” Kisby says of 1,500 pages of time sheets and emails that showed he had worked at least 1,100 hours in the 12 months prior to his application. “I sent it overnight for \$60 in a big box to the dental board. I didn’t hear from them for two or three months.”

And when he did, it was another denial. That’s when Bednar-Clemens, the tribal attorney, stepped in, and the matter went before administrative law judge Jennifer E. Nashold at the end of July 2018. Kisby waited another 100 days for documents and responses to be filed by both sides and for the judge to review and make a ruling.

Nashold reversed the board’s decision, writing that the board member’s “division, multiplication, rounding up and rounding down exercise (led) to admittedly arithmetically inaccurate results.” But it took almost a full year for the issue to grind

through the bureaucratic process, and all the while the tribal clinic went without a pediatric dentist.

Tribal attorney Bednar-Clemens chastised the board for relying on a system of “made-up, arbitrary rules” that resulted in serious consequences for the clinic — and the children it serves.

“I was unemployed for 13 months while my kid was in college,” Kisby says. “We went through 50 percent of our retirement just to pay my bills. It was a super financial hit.” He was finally able to start his job in January 2019.

Following the resolution of this case, references to the hours worked in the 12 months prior to a license application have been removed from the state administrative code. Phone messages to the Dental Examining Board executive director and the board chairman were not returned.

Unfortunately, cases like this are not uncommon for Wisconsinites who work in licensed professions. According to state statute, licensing boards are authorized to “review, investigate or handle” disciplinary matters for those who are licensed in their designated profession. Boards are also the supervisory authorities “regarding qualifications of applicants for credentials.”

While licensing boards in theory are established to promote public health and safety, they at times deny licenses or discipline practitioners for reasons unrelated to these criteria. As a result, applicants can be stymied in their pursuit of an occupation, and existing license holders can face fines or the loss of the very license that allows them to practice their profession.

Clerical mistakes turned costly

Another case involving professional licensing resulted in months of aggravation and cost for a

southeastern Wisconsin chiropractor who had inadvertently allowed his license to lapse.

The chiropractor had completed all of the continuing education and other necessary requirements, such as bringing his CPR certification up to date, to renew his license in December 2012, except for one thing. The renewal did not get filed with the state Department of Safety and Professional Services in time. He had delegated the task to an employee in his clinic who had renewed his license in a timely manner in the past.

It took a few weeks before the chiropractor learned his license had expired. The doctor alleged that the employee falsely told him that she had filed the renewal. When she attempted to play catch-up, she erroneously stated that her boss had not completed the CPR update.

Ten days later, when the chiropractor learned that his license remained expired, the employee was terminated from her position.

The chiropractor immediately contacted DSPS and provided all the necessary documentation to renew his license. He testified in the disciplinary case that a DSPS employee twice assured him that he had “a grace period” and that it was just a “clerical matter” that would be taken care of.

In a follow-up call to DSPS three days later, the doctor was told that he was compliant.

But when the chiropractor checked the state license website in early February, it still showed an expired license. Concerned, he contacted the state agency and was asked to provide evidence of his CPR certificate because the original copy sent to them had vanished. And, yet again, he was reassured by the state employee that it was just a clerical issue, and it would be resolved.



The chiropractor later learned that he faced disciplinary action that resulted in not only a formal reprimand but also an order to notify every patient he treated between Dec. 14, 2012, and Feb. 4, 2013, that he was not licensed and that he billed for services he was not legally authorized to perform during that time.

The matter escalated to a full investigation by the state, which led to the chiropractor hiring an attorney and spending hours providing information and testimony.

Even the administrative law judge who heard the case admitted she would have preferred to give the chiropractor only an administrative warning, given the snafus committed by the state agency, but she concluded that precedents established in similar cases required a formal reprimand.

The law judge did reduce the time period of unlawful practice to just the month's time between the license expiration and the chiropractor's own call to DSPS.

Any patient treated by the chiropractor during that period could have sought a refund, which could have added up to a substantial sum. The doctor

also was ordered to pay 20% of the costs borne by the state to prosecute the case.

Neither the chiropractor nor his lawyer responded to phone messages and emails seeking comment on the case.

“Very persnickety”

Arthur Thexton, who served as a prosecutor for DSPS for 24 years, and who is now in private practice handling cases for professionals on the other side of the table, called the Chiropractic Examining Board “very persnickety.”

“They are very hard on their disciplinary cases,” Thexton says.

But they're not alone. In a case in 2017 involving the Dentistry Examining Board, a woman who wanted to practice in Wisconsin was denied because the foreign dentistry school from which she received her degree was not accredited by the American Dental Association Commission on Dental Accreditation.

“The case of Dr. (Bonolo) Odirile is extremely irritating to me,” says Thexton, who represented the dentist.

Odirile had graduated with a bachelor's degree in dental surgery from the University College Cork dental school, a university in Ireland that is ranked among the top colleges worldwide. Odirile had also obtained a post-graduate orthodontic certificate from the University of Pennsylvania School of Dental Medicine.

"There was no legitimate reason for believing this woman was not a completely well-qualified, well-trained, excellent dentist," he says. "They decided to take a very conservative view of the rules that they had in place and apply them very strictly."

Thexton calls the rules "protectionist in nature and usually restrictive."

Odirile and her husband had hoped to settle their family in Wisconsin, Thexton says. Instead, Odirile's family moved to Texas, where she is now working as a dentist.

The rules that guide the various professional and occupational licensing boards can often seem overreaching, Thexton says, "but on the other hand, you have to have some kind of standards, and once you establish them and put them in writing you have to stick to them or change them and try to be consistent."

"The rules that they have don't really deal well with the facts of the case," he says, though. "That's always going to be true. You can't predict every possible case."

In Odirile's case, he says, "Wisconsin lost a very good dentist."

Rules and punishment differ

In the case of the chiropractor who had inadvertently been practicing without a license, the consequences regarding his malpractice insurance had the potential to be serious, Thexton says.

"If you are not licensed, then it is very likely that your malpractice coverage will not be effective," he says. "If you're not covered, then your patients are at risk, because if they get hurt or something goes wrong, then they are without legal recourse to get the kind of care they might need to repair damage."

Thexton, the former DSPS prosecutor, says it would be ideal to have across-the-board standards and operating methods among the various licensing bodies, but in practicality the differences in occupations and the levels of potential public harm have to be taken into account.

"Each profession has its own individual rules, of course," Thexton says. "It's one thing if you have an affair with your pharmacist; it is quite another to have one with your psychologist."

"There could be some standardization and rules that could apply to everybody, but, on the other hand, you're never going to achieve total standardization."

Betsy Thatcher of Menomonee Falls is a freelance writer and a former Milwaukee Journal Sentinel reporter.

Endnotes

1 In this paper, the terms “licensure boards” or “examining boards” are used to describe boards that have rule-making authority defined in state statute. The terms “councils” or “committees” refer to those boards that do not have rule-making authority.

2 <https://www.legislature.ohio.gov/legislation/legislation-documents?id=GA132-SB-255>

3 <https://www.forbes.com/sites/nicksibilla/2019/01/09/new-ohio-law-takes-aim-at-occupational-licenses-which-cost-state-6-billion/#4a0d6e576e95>

4 https://nebraskalegislature.gov/bills/view_bill.php?DocumentID=31200

5 <https://ij.org/press-release/nebraska-governor-signs-landmark-reform-occupational-licensing/>

6 <https://legislature.vermont.gov/statutes/fullchapter/26/057>

7 <https://azgovernor.gov/governor/news/2017/03/governor-ducey-takes-new-step-towards-reducing-licensing-arizona>

8 <https://www.legis.la.gov/legis/BillInfo.aspx?i=234567>

9 https://ij.org/wp-content/uploads/2017/11/Inverted-Pyramid_FINAL_cover.pdf

10 <https://docs.legis.wisconsin.gov/2017/related/acts/59>

11 https://dsps.wi.gov/Documents/DSPS%20OLS%20Report_Dec2018.pdf

12 <https://obamawhitehouse.archives.gov/blog/2016/06/17/new-data-show-roughly-one-quarter-us-workers-hold-occupational-license>

13 <https://www.mercatus.org/publications/corporate-welfare/effects-occupational-licensure-competition-consumers-and-workforce>

14 <https://www.badgerinstitute.org/BI-Files/Special-Reports/LicensureReport2017.pdf>

15 <https://ij.org/report/license-work-2/lw-state-profiles/lw2-wisconsin>

16 <https://ij.org/report/license-work-2/lw-state-profiles/lw2-wisconsin/>

17 <https://www.archbridgeinstitute.org/wp-content/uploads/2018/04/Too-Much-License-1.pdf>

18 https://docs.legis.wisconsin.gov/code/admin_code/a_e/11/03/1

19 <https://scholarship.law.berkeley.edu/californialawreview/vol105/iss6/1/>

20 <https://docs.legis.wisconsin.gov/statutes/statutes/440/035?view=section>

21 <https://scholarship.law.berkeley.edu/californialawreview/vol105/iss6/1/>

22 <https://docs.legis.wisconsin.gov/statutes/statutes/440/042/1>

23 145.02(4)(a)

24 Board terms are typically four years, but many board members serve much longer, potentially creating an even greater imbalance of entrenched, long-serving interests and newer member with less power. This is possible because board members whose terms expires typically continues serving until their successor is appointed — sometimes for years. In fact, 97 members of the state’s licensing boards or councils were serving with expired terms in September of 2019.

25 https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf

26 <https://docs.legis.wisconsin.gov/statutes/statutes/15/1/405/17>

27 <https://docs.legis.wisconsin.gov/statutes/statutes/15/1/08/1m/am>

28 <https://docs.legis.wisconsin.gov/statutes/statutes/15/1/08/1m/b>

29 https://research.upjohn.org/up_press/18/

30 <https://docs.legis.wisconsin.gov/statutes/statutes/15/1/08/1m/c>

31 The large, 25-member Examining Board of Architects, Landscape Architects, Professional Engineers, Designers and Professional Land Surveyors, an outlier in size, is required to have ten.

32 <https://docs.legis.wisconsin.gov/1975/related/acts/86>

33 N/A in the “public members vacant” column indicates that the board or councils is not required to have any public members.

34 The Architect Section of the larger licensing board had no public members.

35 <https://publicmeetings.wi.gov/>

36 https://docs.legis.wisconsin.gov/2001/related/drafting_files/wisconsin_acts/2001_act_074_sb_413/02_sb_413/01_3246df_pt01of02.pdf

37 <https://www.ada.org/en/press-room/news-releases/2015-archive/march/supreme-court-ruling-on-nc-dental-board-v-ftc>

38 <https://caselaw.findlaw.com/us-supreme-court/486/492.html>

39 <https://ir.stthomas.edu/cgi/viewcontent.cgi?article=1060&context=ustjlpp>

40 <https://ir.stthomas.edu/cgi/viewcontent.cgi?article=1060&context=ustjlpp>

41 <https://ir.stthomas.edu/cgi/viewcontent.cgi?article=1060&context=ustjlpp>

42 <http://www.lerachapters.org/OJS/ojs-2.4.4-1/index.php/LERAMR/article/view/2834/2810>

43 <http://www.lerachapters.org/OJS/ojs-2.4.4-1/index.php/LERAMR/article/view/2834/2810>

44 One board chair serves in that capacity on both a larger board and a subsequent section of that board.

45 <https://dsps.wi.gov/Pages/SelfService/OrdersDisciplinaryActions.aspx>

46 <https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=4380&context=californialawreview>

ABSENCE AND VIOLATION

- 47 <https://scholarship.law.berkeley.edu/californialawreview/vol105/iss6/1/>
- 48 <https://ij.org/report/license-work-2/ltw-state-profiles/ltw2-wisconsin/>
- 49 Data taken from the Institute for Justice's *License to Work*, second edition.
- 50 https://dsps.wi.gov/Documents/DSPS%20OLS%20Report_Dec2018.pdf
- 51 Data taken from The Knee Center for the Study of Occupational Regulation database. Number of Wisconsin licenses is taken from a 2018 DSPS report: https://dsps.wi.gov/Documents/DSPS%20OLS%20Report_Dec2018.pdf.
- 52 https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf
- 53 https://docs.legis.wisconsin.gov/misc/lc/misc/rule_making_process_flowchart.pdf
- 54 <https://docs.legis.wisconsin.gov/statutes/statutes/227/III/19/5/a>
- 55 [https://www.journalofnursingregulation.com/article/S2155-8256\(17\)30182-5/abstract](https://www.journalofnursingregulation.com/article/S2155-8256(17)30182-5/abstract)
- 56 <https://www.bls.gov/opub/mlr/2015/article/the-de-licensing-of-occupations-in-the-united-states.htm>
- 57 <https://docs.legis.wisconsin.gov/1941/statutes/statutes/125.pdf>
- 58 <https://dsps.wi.gov/Documents/DSPSEconomicImpactReport2013.pdf>
- 59 <https://legislature.vermont.gov/committee/detail/2018/343/Witness#documents-section>
- 60 <https://www.sunset.texas.gov/about-us/sunset-commission-members>
- 61 https://ij.org/wp-content/uploads/2017/11/Inverted-Pyramid_FINAL_cover.pdf
- 62 <https://www.mercatus.org/system/files/Baugus-Sunset-Legislation.pdf>
- 63 https://dsps.wi.gov/Documents/DSPS%20OLS%20Report_Dec2018.pdf

Badger Institute
700 W. Virginia St., Suite 301, Milwaukee, WI 53204
CHANGE SERVICE REQUESTED

NON-PROFIT ORG.
U.S. POSTAGE
PAID
MILWAUKEE, WI
Permit No. 3158

People
pay attention
to the



**BADGER
INSTITUTE**

"The Badger Institute has helped shape and inform public policy in Wisconsin by providing reliable, principled research and in-depth reporting on a wide range of issues. They are an invaluable resource to legislators seeking innovative and impactful policy ideas."

— State Sen. Alberta Darling

"Whenever I travel around the country and visit with my fellow legislative leaders, they now look at Wisconsin as a beacon of conservative thought, and that's due in large part to the efforts of the Badger Institute ... They bring the resources, the research, the knowledge and the firepower to help people like me advocate for the ideas that we know are necessary to keep Wisconsin going in the right direction."

— Assembly Speaker Robin Vos

"One of the things that the Badger Institute does so well is it researches and it reports. It puts together the information that legislators need, that governors need, to be able to make key decisions."

— David French, *National Review*

■ The Badger Institute offers you thoughtful conservative commentary... well-researched reports and analysis...its biannual magazine, *Diggings*... poll results...multimedia content...and information about events that we host.

Click badgerinstitute.org

Follow us on Facebook and Twitter: @badgerinstitute