

House Professional Licensure Committee Hearing on House Bill 1364

March 18, 2024

**Testimony of Acting Commissioner of the Bureau of Professional and
Occupational Affairs Arion Claggett
Pennsylvania Department of State**

Good morning. Thank you for your invitation to appear before the Committee to discuss House Bill 1364. The Department welcomes the opportunity to provide testimony on the impact this bill would have on the Bureau of Professional and Occupational Affairs (BPOA) and our 29 licensing boards and commissions. Should the bill become law, it would have two significant impacts on our boards and commissions – (1) it would saddle board staff with a new burdensome responsibility and (2) it could have unintended consequences on the existing disciplinary process or unintended collateral consequences on criminal and civil proceedings.

First, BPOA already receives a substantial number of opinion requests, and we expect that number would increase significantly. Researching and drafting responses to advisory opinion requests would fall on board counsel and staff. Our board staff and attorneys already answer questions—short of providing advisory opinions—from licensees, applicants, and the legislature where they can; the expected increase in requests for opinions would overwhelm our board staff and attorneys. This cannot be accomplished by the current staff for BPOA, and the Office of Chief Counsel and additional staff would be required, resulting in a fiscal impact of over \$1 million annually. In addition, licensing processing times would increase, as staff resources would be stretched to research and issue advisory opinions.

In addition to the increased responsibilities for our board staff, board members would need to share their expertise when drafting advisory opinions, all of which would ultimately need to be reviewed and approved by each of the boards and commissions. We anticipate that many of the opinion requests would involve technical questions that require knowledge and training that only the board members possess. Board members would now be required to review and provide their input on advisory opinions in addition to their other responsibilities, such as reviewing certain license applications. This would necessarily slow down the review of these applications. Since the beginning of the Shapiro Administration, many of our boards have seen processing times decrease by at least 50%, and we do not want to undo that progress.

In addition, with the exception of public members and designees, board members are active licensees, and most are still practicing. Finding qualified licensees who are willing to serve as board members can be challenging. Increasing their workload would make it more difficult to retain current board members and attract new ones.

The second major impact from the bill would be on board disciplinary matters. The current draft provides: "No person who acts in good faith on an advisory opinion issued by a licensing board or commission upon the person's request shall be subject to criminal or civil penalties or any disciplinary action by the licensing board or commission, provided that the material facts are as stated in the opinion request." The proposed bill notes that licensees may rely on advisory opinions if the "material facts" are consistent, which would no doubt be an area of dispute if a licensee faces disciplinary action after seeking an advisory opinion. Further, if an opinion is requested for ongoing conduct that is violating the law, the board may be obligated to refer that

matter to the Prosecution Division. It may not be clear in a request for an advisory opinion if the conduct is planned, ongoing or has already occurred. The legislation, while well intended, builds in areas of uncertainty and may negatively impact the boards in their ability to protect the health and safety of the public through the administrative process. Further, the boards' decisions cannot absolve someone of criminal conduct or civil liability not under the boards' jurisdiction.

Licensure requirements exist because the General Assembly determined that there was a need to protect the health and safety of the public. This is a responsibility BPOA takes very seriously. I'm pleased to provide an overview of the disciplinary process to provide context of how advisory opinions would impact it.

BPOA is a complaint-driven agency. Complaints can come from the public, peers, law enforcement, news stories, or licensee self-reporting. Some complaints contain within themselves all the information that is necessary to determine whether a violation of the licensing law has occurred, and those complaints do not require a significant investigation. Most complaints, however, require an investigation by the Department's Bureau of Enforcement and Investigation.

Once the investigation is complete, the Bureau of Enforcement and Investigation forwards the investigation report to the Prosecution Division for a prosecuting attorney to review and determine whether formal disciplinary charges should be filed. Where appropriate, the prosecuting attorney initiates the disciplinary action by preparing an Order to Show Cause. The Order to Show Cause sets forth allegations and directs the licensee to file a written answer to those allegations within 30 days. Prosecutors may also file citations, Petitions for Immediate Temporary Suspension, Petitions for

Automatic Suspension, and Petitions for Appropriate Relief, all forms of initiating potential disciplinary action against licensees.

Either party may approach the other about a possible settlement called a consent agreement. In reaching a settlement, the parties agree on a penalty that they believe would be acceptable to the applicable licensing board or commission. All Consent Agreements and Orders must be presented to and approved by the applicable board or commission in order to become final.

If an agreement cannot be reached, the matter is generally scheduled for hearing before a hearing examiner. After the case is heard by a hearing examiner, a proposed decision known as a Proposed Adjudication and Order is rendered. That decision must be reviewed by the relevant board and can be adopted, rejected, or amended by the board as well.

It is important to note when considering requiring advisory opinions that all investigations are confidential and privileged. Only final actions of the agency, including disciplinary proceedings, may be revealed upon the final disposition of the case. The handling of complaints and subsequent investigations is not completed by the board or its staff. The board and its staff are not made aware when a complaint is filed or an investigation is underway. This makes providing advisory opinions problematic for the boards; licensees or those on their behalf could attempt to take advantage of advisory opinions to thwart or interfere with the investigative and disciplinary processes.

For example, if a complaint is filed against a licensee and an investigation is underway, that licensee could request an advisory opinion from the board on that set of circumstances, effectively looking to get ahead of any potential disciplinary action or

have the board prejudge the case. Should a licensee request an advisory opinion and the board determine that a set of circumstances would be a violation of their practice act or regulations, and then a disciplinary action came before the board for that exact violation by the same licensee, the licensee may be able to argue that the board has already prejudged their case. This could lead to a potential violation of the Pennsylvania's Supreme Court's decision in *Lyness v. State Board of Medicine*, requiring separation of the prosecutorial and adjudicative functions of the boards. It would also insert issues of whether all "material facts" were part of the advisory opinion request and decision, and what impact that has on the ability of the Prosecution Division, on behalf of the boards, to protect the health and safety of the public.

Additionally, as this committee is well aware, there are many areas where the professionals under BPOA's jurisdiction at times have conflicts over what practice areas fall under the scope of one board versus another, in cases where the law is not explicit or does not contemplate that particular service or activity. One board could provide an advisory opinion that says a licensee under their jurisdiction could provide a particular service, while another licensing board may disagree and believe such a practice should only be done by their licensees. For example, a licensee under the State Board of Cosmetology may request an advisory opinion on providing teeth whitening in a salon. The State Board of Dentistry may issue a conflicting advisory opinion on where teeth whitening can be provided.

We understand the intent of this legislation and that it was drafted to provide licensees with a source of guidance when an opinion is requested. Currently, we strive to point licensees to the relevant sections of the law and regulations when an advisory

opinion is requested. Further, inquiries related to practice issues may best be answered by employers, in-house counsel for medical establishments, or private counsel, while inquiries related to business decisions or transactions would best be addressed by private counsel, federal authorities, or municipal authorities, as appropriate.

We also strive to conduct outreach to stakeholders and professional associations and schools to try to ensure open communication and transparency. However, we have concerns about the administrative burdens and legal repercussions advisory opinions have on BPOA's operations. We would be interested in working with the General Assembly to make their constituents and our licensees better aware of the laws of each board and we encourage attendance and participation at all board meetings. Open dialogue with the boards in that public setting may prove to be a suitable alternative to the legislative initiative at this time.

Thank you for the opportunity to appear before you.