

WORKFORCE DEVELOPMENT COUNCIL

Minutes of the
Occupational Licensing Reform (OLR) Workgroup
Thursday, April 8, 2020 1:30 p.m. – 4:30 p.m.
TEAMS Video Conference Call

Members present: Michelle Kommer, Katie Ralston, Representative Cynthia Schreiber-Beck, Senator Randy Burckhard, Senator Scott Meyer, Senator Kristin Roers, Senator Judy Lee, Major Jay Sheldon, Rick Gardner, Adam Martin, Phil Davis

Members absent: Jace Beehler, Matt Gardner, Dirk Wilke

Guest Speakers: Dale Atkinson, Nahale Kalfas, Ronne Hines, Zach Herman

Staff: Sherri Frieze

Welcome and Introductions

Michelle opened the meeting at 1:30 p.m., welcoming members and guests via the Microsoft TEAMS video conferencing platform.

Approval of Minutes

MOTION: It was moved by Randy Burckhard, seconded by Cynthia Schreiber-Beck to approve the minutes of February 26, 2020, OLR workgroup meeting. Motion carried unanimously.

Survey Roadmap Update

Katie Ralston

The 2020 Occupational and Professional Board Survey, administered by the ND Department of Commerce and the Workforce Development Council is being drafted by the Council on Licensure Enforcement and Regulation (CLEAR), a forum dedicated to improving the quality and understanding of regulation in order to enhance public protection.

By mid-May, the drafted survey will be sent to ten ND licensing boards and commissions. Feedback from those ten initial boards and commissions will help redraft the survey, and then it will be sent to the remaining fifty-one licensing boards and commissions; concluding with a final report by early July this year.

Subcommittee members reviewed survey questions and recommended more clarifying information for some questions, such as including terms for governor appointment for board chair, reimbursement of board member expenses, board and commission policies, and a needed process for complaints.

Boards Structures and Best Practices

Dale Atkinson, Federation of Associations of Regulatory Boards (FARB)

Appendix A

Dale presented on the Federation of Associations of Regulatory Boards (FARB), a not-for-profit corporation promoting public protection and providing a forum for information exchange for associations of regulatory boards and their affiliate stakeholders with interests in professional regulation.

Board Ethics and Responsibilities

Nahale Kalfas, Council of State Government

Appendix B

Nahale presented on Best Practices for Licensing agencies in the handling of meeting, rulemaking, complaints, investigations, hearings and settlements and communications with applicants and licensees.

Regulatory Models for Board Licensing Structure
Ronne Hines, Colorado Department of Regulatory Agencies

Appendix C

Ronne presented on Board differences between Autonomous and Centralized along with regulatory models in the United States.

Universal Licensing
Zach Herman, National Conference of State Legislatures (NCSL)

Appendix D

Zach presented on the processes covered with universal licensing recognition; an endorsement of licenses in good standing held by an individual practitioner in another state as valid qualification for licensure in the new state.

Next Steps

A visual comparison of state licensure vs universal licensure will be created and provided to the subcommittee in the weeks to come from Zach Herman.

The next meeting will take place April 29 via TEAMS video conference call.

Adjourn

Meeting adjourned unanimously at 4:30 p.m.



State-Based Regulatory Systems and Regulatory Board Structures

Occupational Licensing Reform Subcommittee TEAMS Meeting



Federation of Associations of Regulatory Boards

American Association of Dental Boards
 American Association of State Counseling Boards
 American Association of Veterinary State Boards
 Association of Regulatory Boards of Optometry
 Association of Social Work Boards
 Association of State and Provincial Psychology Boards
 Board of Certification for the Athletic Trainer
 Council for Interior Design Qualifications
 Council of Landscape Architectural Registration Boards
 Federation of Chiropractic Licensing Boards
 Federation of State Medical Boards
 Federation of State Massage Therapy Boards
 International Conference of Funeral Service Examining Boards
 National Association of Long Term Care Administrator Boards
 National Association of State Boards of Accountancy
 National Association of State Contractors Licensing Agencies
 National Association of State EMS Officials
 National Board for Certification in Occupational Therapy
 National Council of Architectural Registration Boards
 National Council of Examiners for Engineers and Surveyors

AADB
 AASCB
 AAVSB
 ARBO
 ASWB
 ASPPB
 BOC
 CIDQ
 CLARB
 FCLB
 FSMB
 FSMTB
 ICFSEB
 NAB
 NASBA
 NASCLA
 NASEMSO
 NBCOT
 NCARB
 NCEES



Why?

- Role of government in occupational licensing
- Role of boards
- Role of Board Members
- Effectiveness
- Efficiencies

*In order to engage in discussions re reform;
must address fundamental issues*

What do boards do?

- ***Carry out the intent of the legislature***

Carry out the intent of the legislature by enforcing the practice act, promulgating regulations, and regulating the profession in the interest of public protection

Key Issues re Public/Consumers

- **Protection**
- **Assurances**
 - **Pre-licensure**
 - **Continued licensure**
- **Enforcement**
- **Societal benefits**

Key Issues re Boards

- **Intent of the legislature**
- **Deference** (legislature to board, board to staff, public-private, other)
- **Criteria set in law** (Law = statutes and regulations)
- **Expertise adds efficiencies** (Composition of board)
- **Consumer awareness**
- **Applicant awareness**
- **Licensee awareness**

Key Issues re Applicants & Licensees

- **Efficiencies**
- **Criteria/qualifications for licensure and renewal**
- **Due process**
- **Enforcement**
- **Consumer awareness**

What is the ultimate goal?

- Suggestions:
 - **Public protection**
 - **Respect for states' rights**
 - **Oversight**
 - **Workforce/labor**
 - **Fair system (for all...)**
 - **Access**
 - **Due process**
 - **Timely**
 - **Effective**
 - **Efficient**
 - **Consistency**
 - **Mobility/portability**
 -

Antitrust Immunity

- Do not be intimidated by antitrust claims and immunity
 - ***North Carolina State Board of Dental Examiners v. FTC***

Remember to consider board functions

• Content & Decision making

- Need expertise
 - Interpretation
 - Rulemaking
- Timeliness
- Efficient
- Effective

• Operational

- Infrastructure
- Room to share?
- Timeliness
- Efficient
- Effective

How best to achieve these goals?

- **What board structure is conducive to *best* achieving the legislative objectives?**

Stand alone boards

Occupation specific
Generate revenue
Expend \$
Decisions final

Composite boards

Multiple occupations
Batched by relevance
Generate revenue
Expend \$
Decisions final

Departmentalized boards

Most/all occupations
Advisory boards
Board recommendations to Dept.
Shared operational components
Funded via department

BOARD ETHICS & RESPONSIBILITIES

Nahale Kalfas, CSG



**Council on Licensure,
Enforcement & Regulation**

Promoting Regulatory Excellence

Licensing Board Structure



Autonomous

Centralized

Efficiency

Expertise

Cost

Coordination

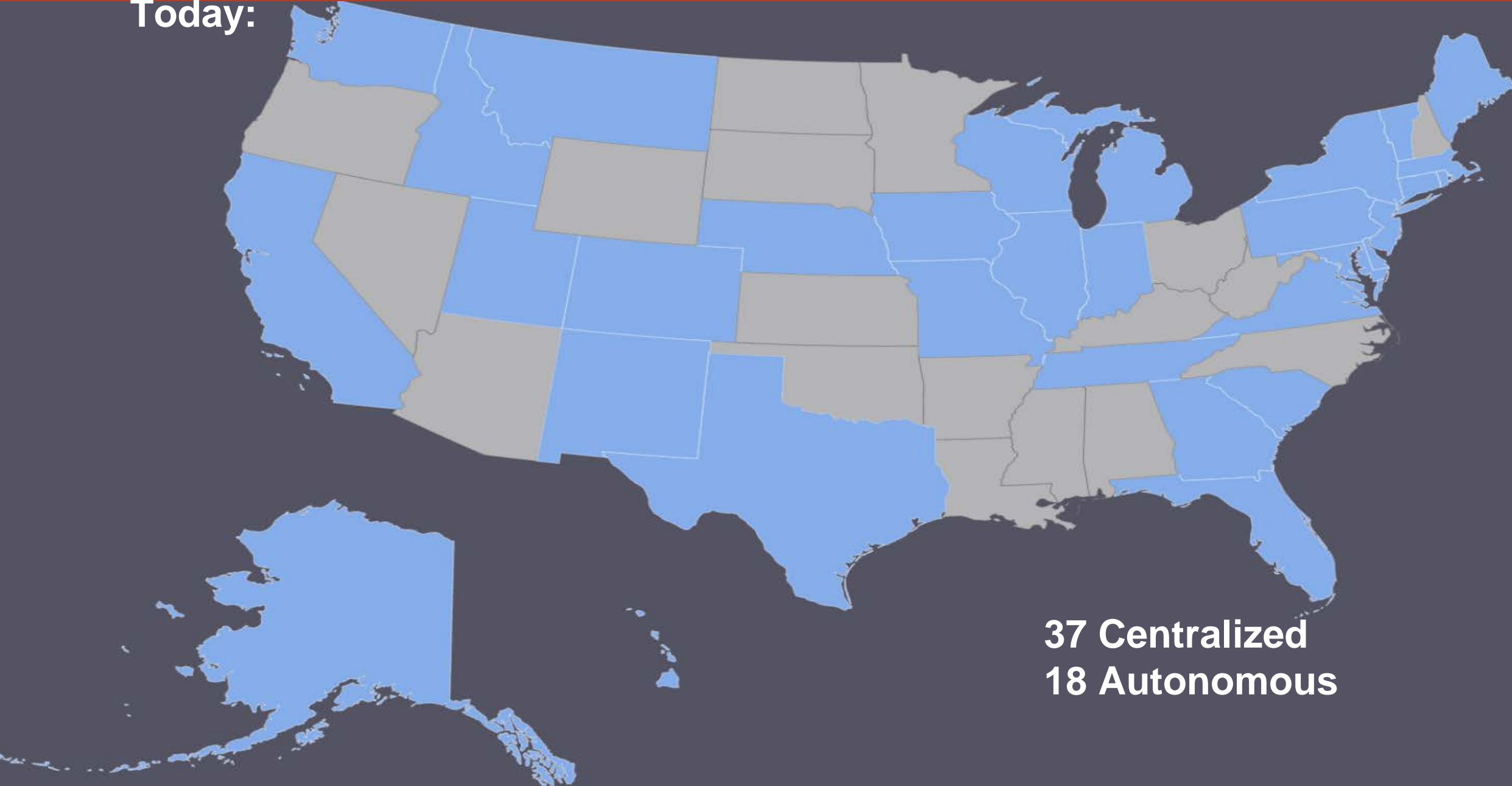
Oversight

Not a new idea...

- 1892 NY places most of its professional regulatory board under a board of regents
- 1917 - Illinois
- 1921 - Washington
- 1923 - Pennsylvania
- 1929 - California
- 1960s - 70s wave of centralization (16 states)
- 1990 - 33 states



Today:



37 Centralized
18 Autonomous

Models of Board Structure

- **Model A:** No central agency, only autonomous boards
- **Model B:** Autonomous boards with a central agency for routine administrative functions
- **Model C:** Autonomous boards and a central agency with authority for functions such as budgetary, personnel and certain disciplinary activities

Models of Board Structure

- **Model D:** Board actions subject to review by a central agency
- **Model E:** Central agency has complete regulatory authority. Boards are advisory only.
- *Note! Some states centralize certain boards while others remain autonomous*

4 Principles of Centralization

- Grouping agencies into broad functional areas
- Establishing relatively few department to enhance the span of control and pinpoint responsibility to the chief executive and the legislature
- Delineating single lines of authority to the top
- Administering department by an individual and not by boards or commissions

“

“At the end of the day, this case is about a state board run by private actors in the marketplace taking action outside of the procedures mandated by state law to expel a competitor from the market,” ~ Judge Shedd

FTC vs. North Carolina Dental Board

- Active supervision by the state
- Boards made up by a controlling number of active market participants
- Possible through centralized and non-centralized models....

Other Reasons to Centralize

- Economies of Scale
- Shared information
- Governance
- One-stop shopping for consumers
- Shared outreach / breadth
- Technology / databases

The grass is not always greener...

Benefits of Independent vs. Central Agencies

Independent Boards

- Administrative Efficiency
- Need for professional expertise
- Insulation from political interference
- Accountability

Central Agencies

- Coordination
- Administrative Efficiency
- Oversight
- Accountability

**Ultimately reasons to centralize or remain independent are not mutually exclusive.*

- Document variety of regulatory structures in the U.S.
 - Share information across states
 - Track movement and trends
- Authority / Model
 - Reach – staff, professions, licensees
 - Board Composition
 - Fiscal
 - Cost

Preliminary Survey Results

- 95 complete responses, representing 33 states and District of Columbia
- Responses received from: AL, AR, AZ, CA, CO, DC, HI, IA, ID, IN, KY, LA, MD, MN, MO, MS, MT, NC, NE, NH, NM, NV, OH, OK, OR, SD, TX, UT, VA, VT, WA, WI, WV, and WY

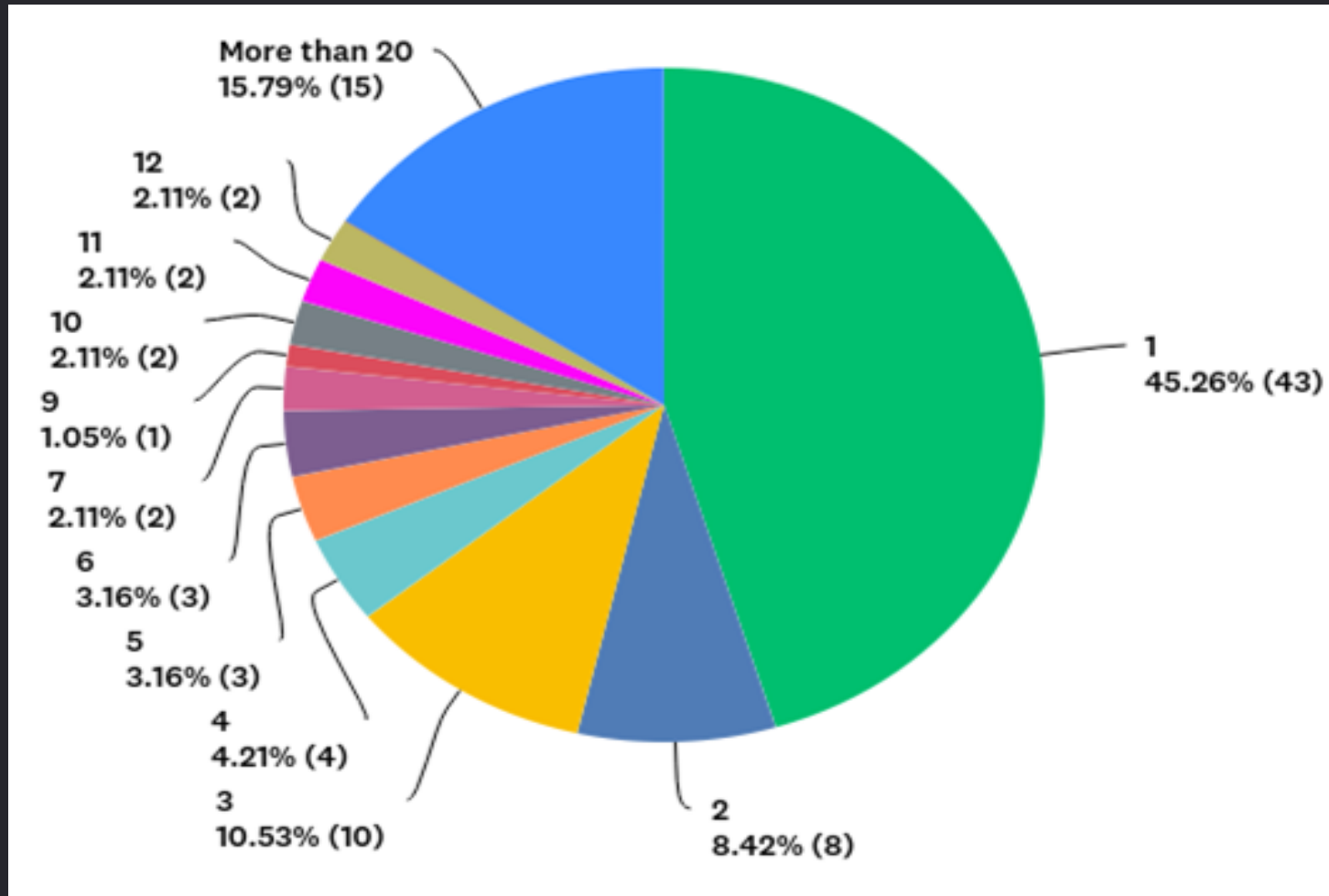
Preliminary Survey Results

- Model A – 7 states = 20.59%
- Model B – 4 states = 11.76%
- Model C – 6 states = 17.65%
- Model D – 1 state = 2.94%
- Model E – 1 state = 2.94%
- Multiple models in a state – 12 states = 35.29%
- Other model not described above – 3 states = 8.82%

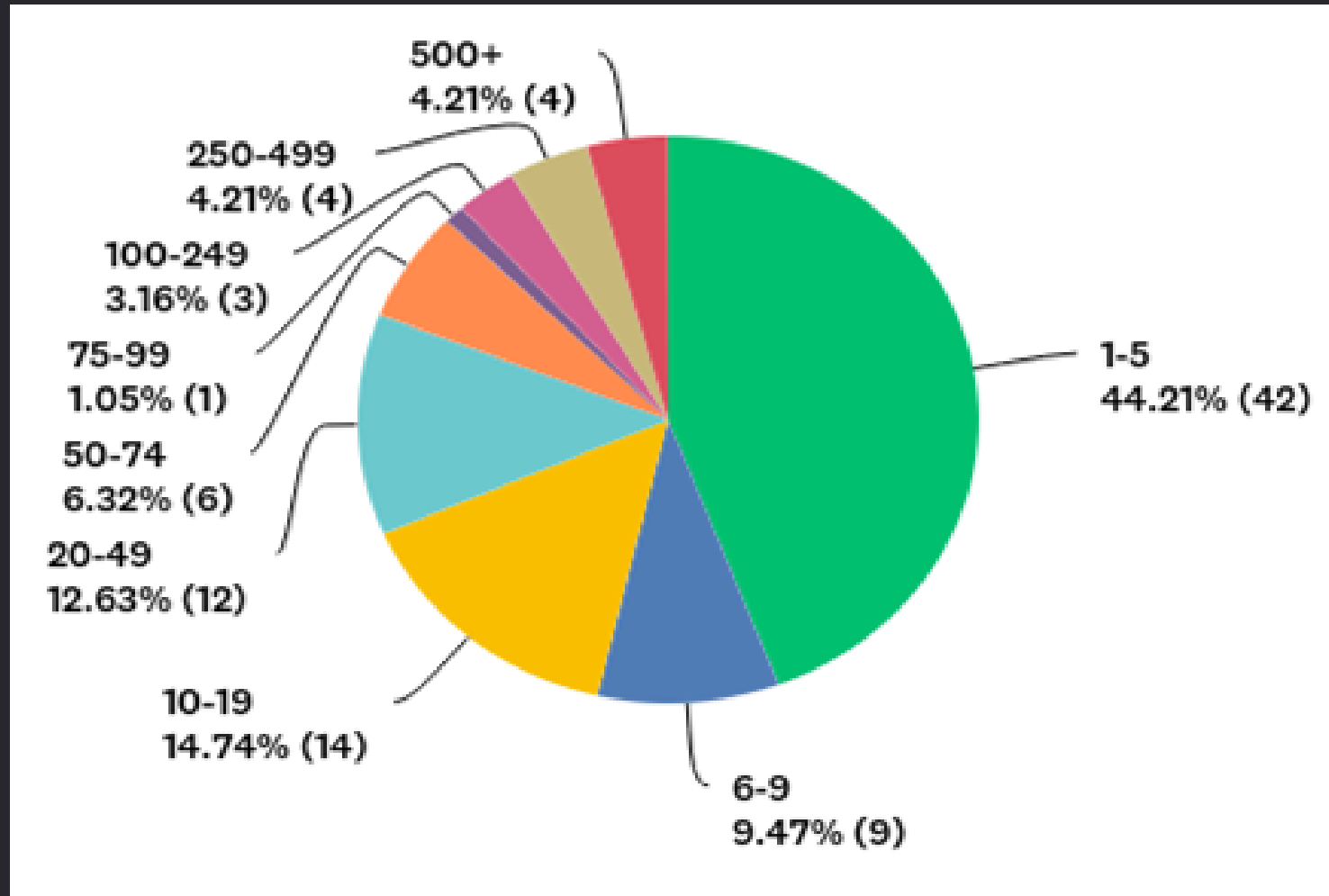
Consider Changing Models?

- Proposed consolidation (4) – impetus: efficiency, free-market support, job creation, NC Dental Board anti-trust concerns, efficiency, cost-savings, reduce bureaucracy, increase efficiency
- Moved from umbrella to more independent – impetus: cost-saving, better customer service
- Change to fully autonomous – impetus: time and cost savings
- Considering Department of Business and Industry having oversight of boards – impetus: small board staff needs more oversight, mismanagement of some boards, lack of education and experience on some boards, efficiency, cost-savings, anti-competitive protections, compliance issues

How many different professions/occupations does your organization regulate?



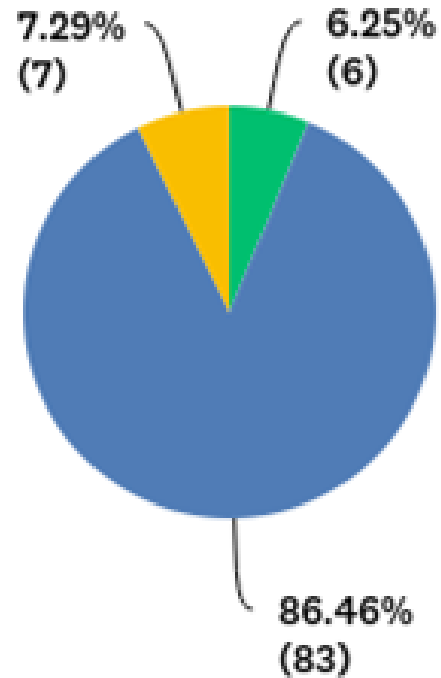
How many staff members does your organization employ?



Preliminary Survey Results

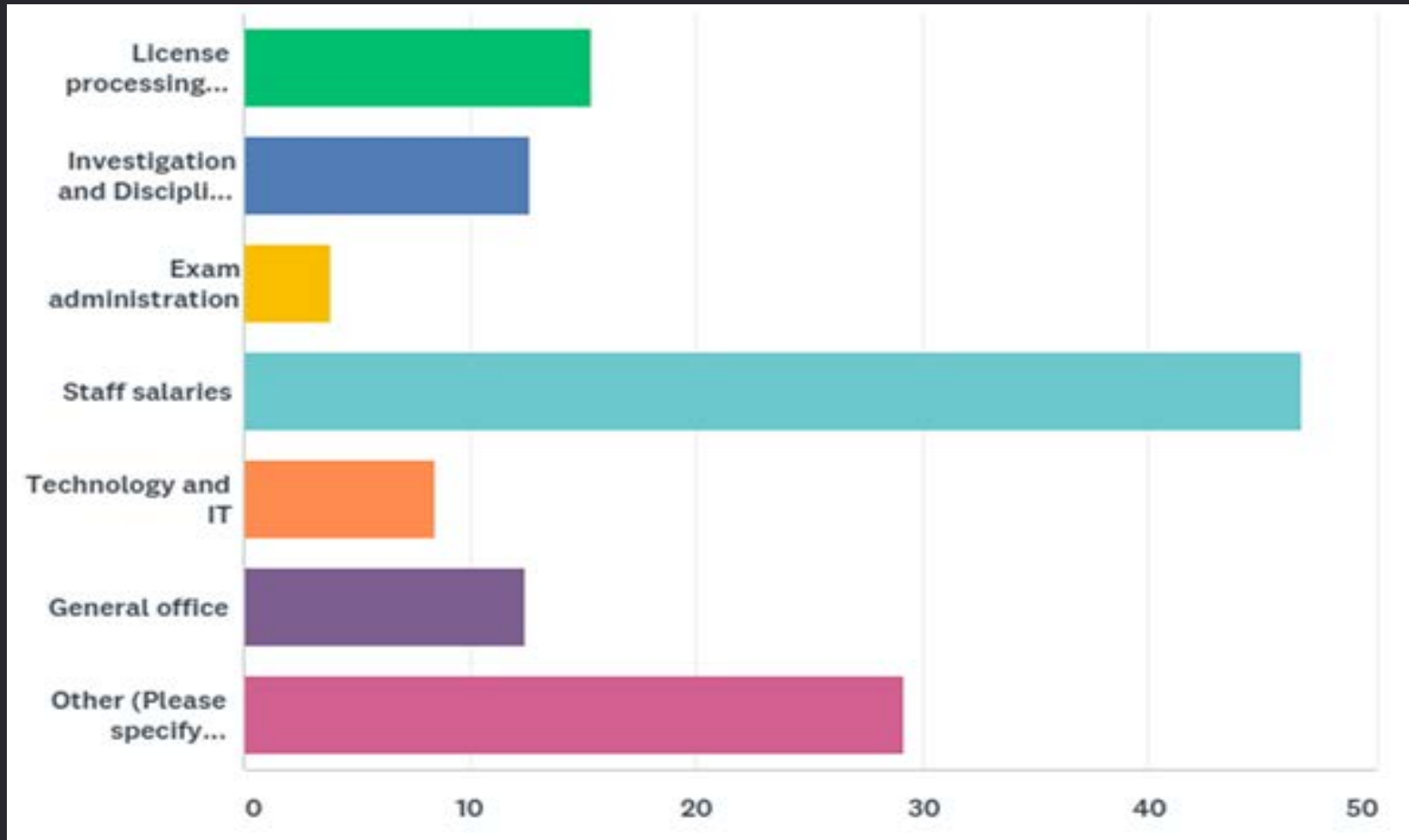
- How many licensees in each profession?
 - Organizations regulating 1 profession, range is 67 to 120,000.
 - Average is 17,689.
- Percentage of Public Members
 - Range is 0% to 100%.
 - Average is 24.12%

How is your organization primarily funded?

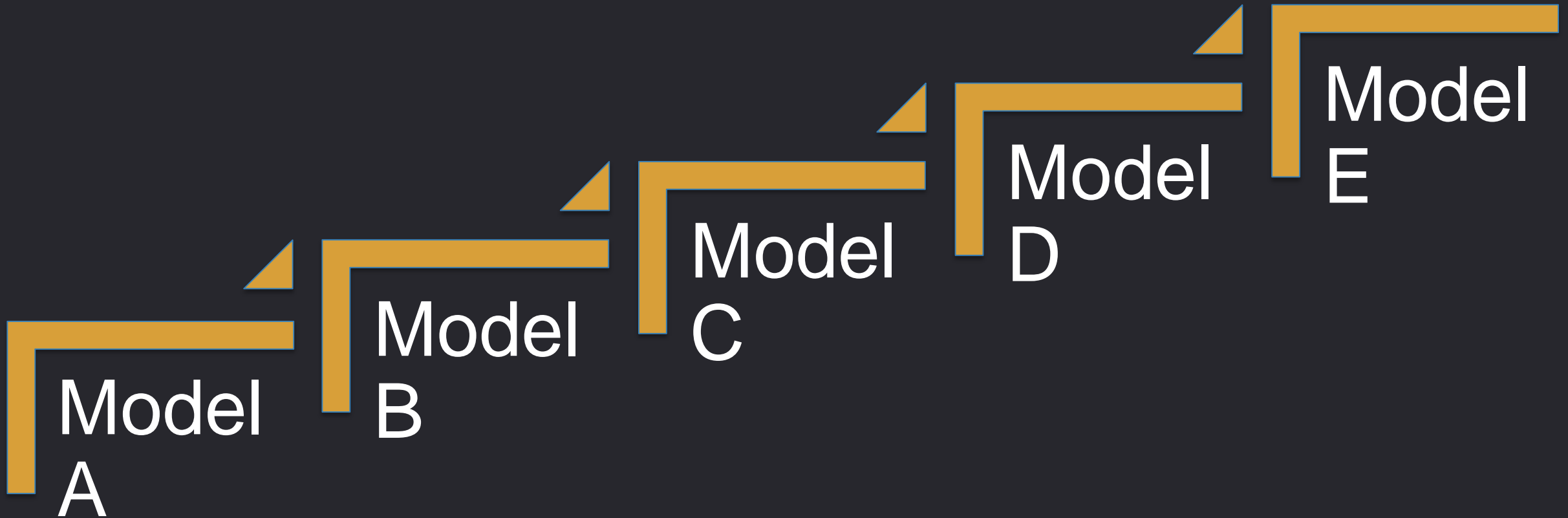


- From the jurisdiction's general fund
- From licensing/renewal fees
- From other sources

What percentage of the operating budget falls into each of the following categories?

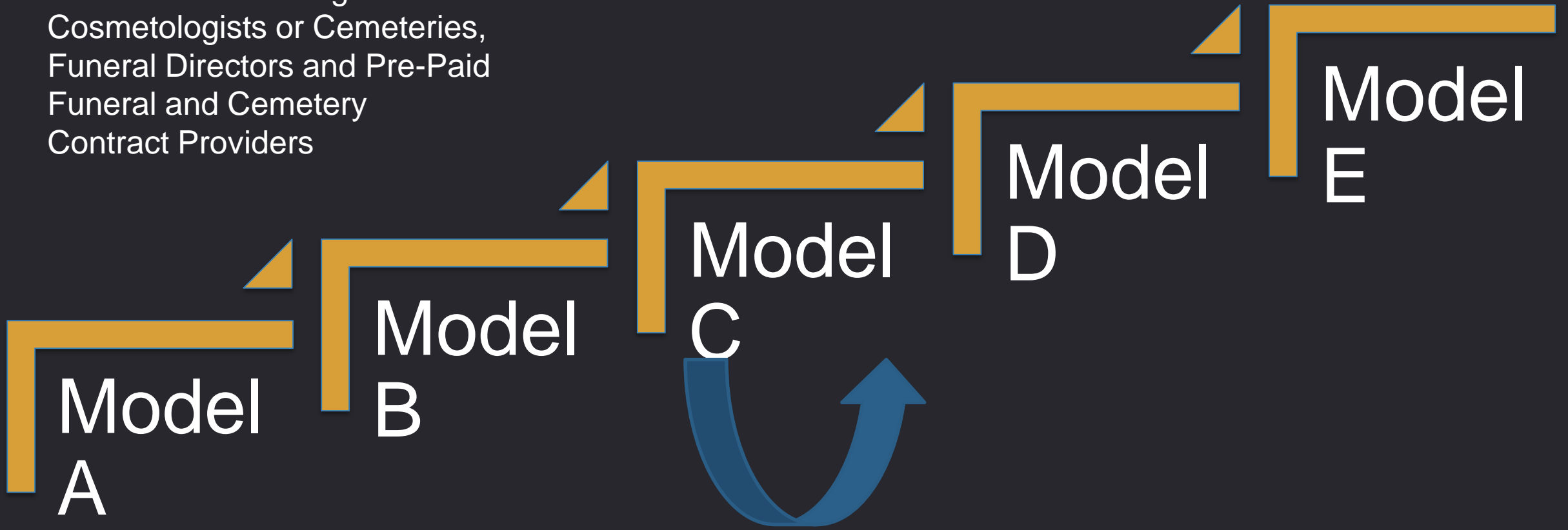


Recent Regulatory Reform Efforts



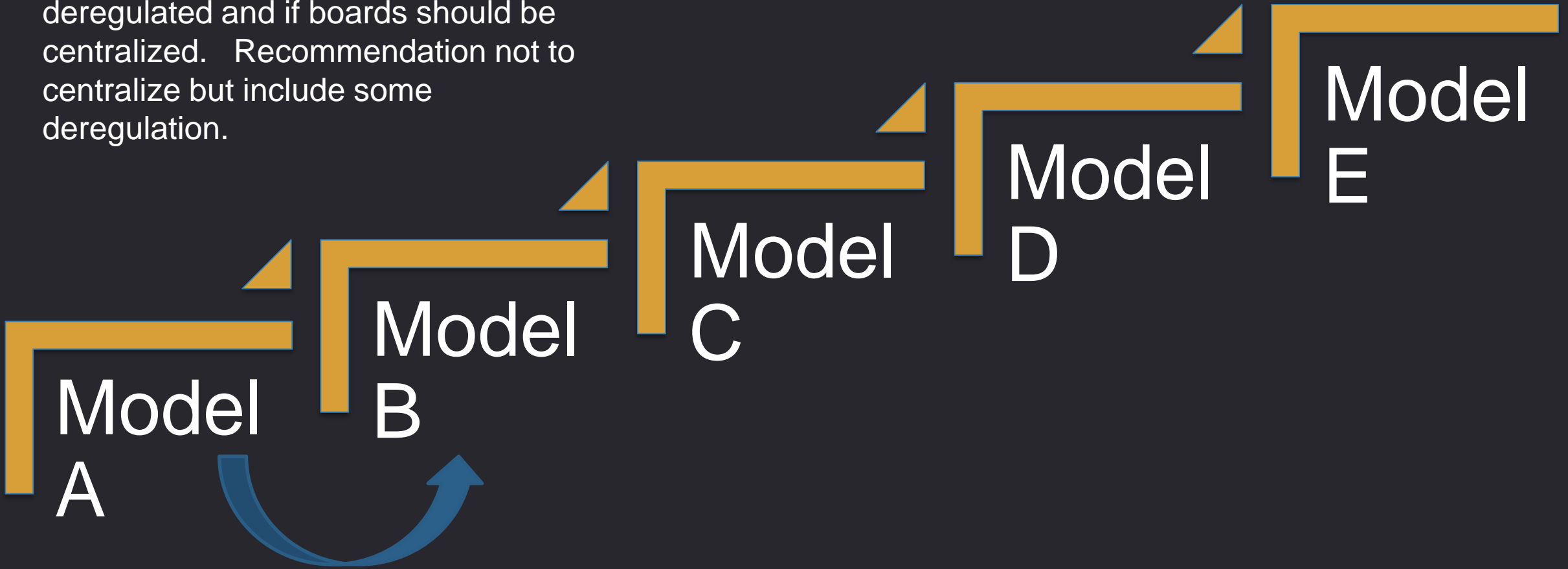
Recent Regulatory Reform Efforts: Michigan

Combine similar occupations under an “umbrella” board. E.g. Barbers and Cosmetologists or Cemeteries, Funeral Directors and Pre-Paid Funeral and Cemetery Contract Providers



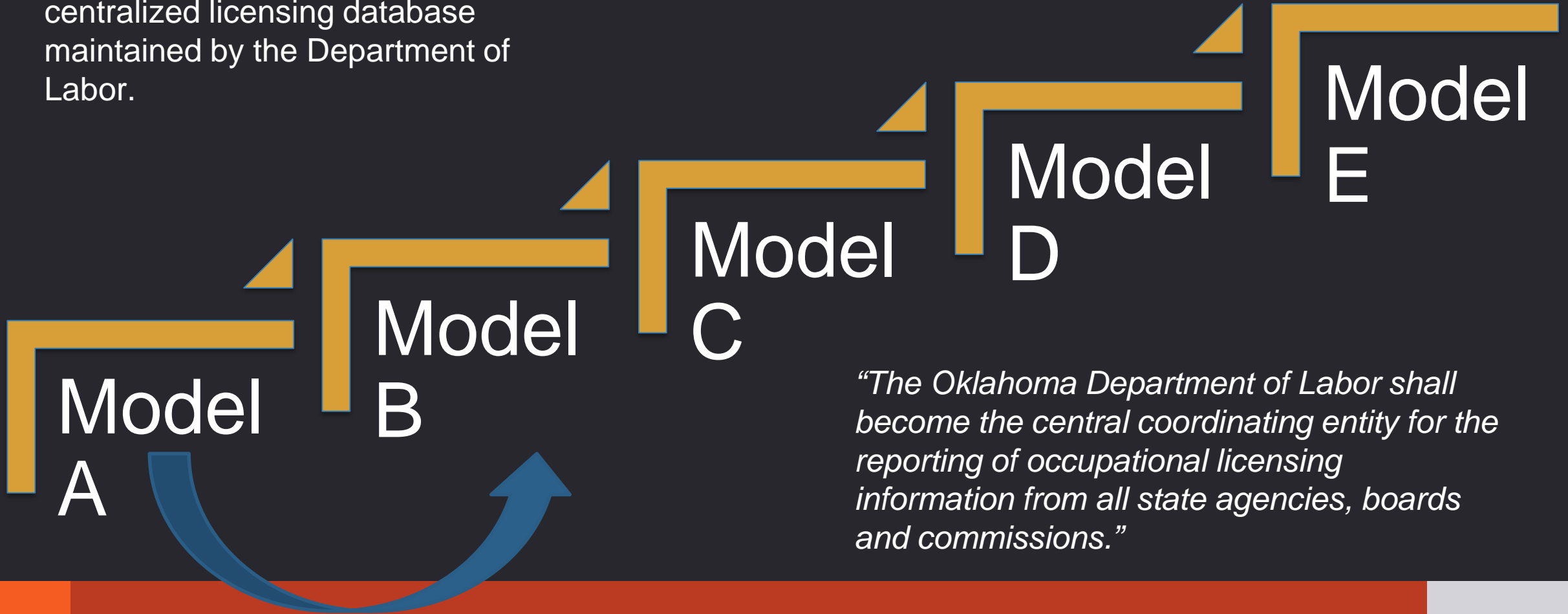
Recent Regulatory Reform Efforts: North Carolina

Investigate if professions should be deregulated and if boards should be centralized. Recommendation not to centralize but include some deregulation.

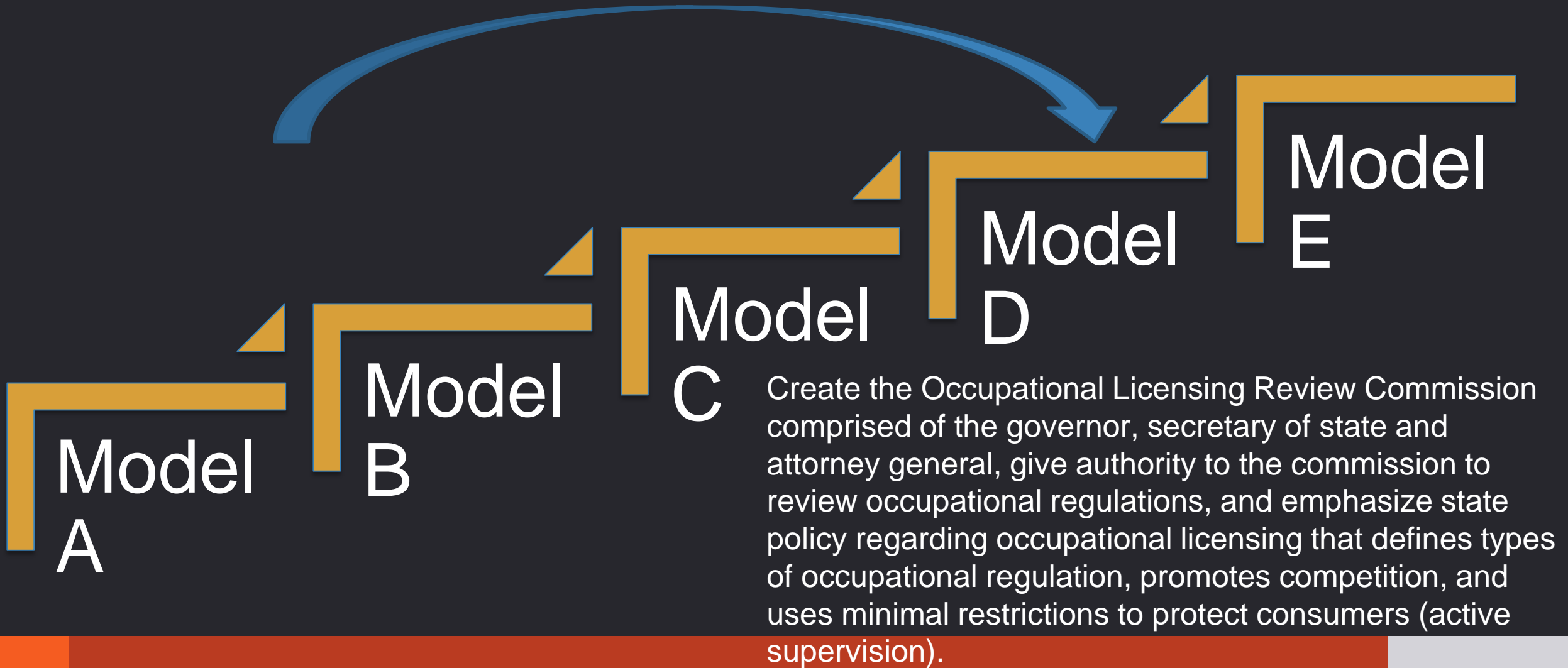


Recent Regulatory Reform Efforts: Oklahoma

Require all boards to feed into a centralized licensing database maintained by the Department of Labor.



Recent Regulatory Reform Efforts: Mississippi



Considerations:

- What problem are you trying to solve?
- Performance or consumer safety outcomes?
- Political capital for legislative changes
- Cost / Efficiency
- Degree of centralization and autonomy



**Council on Licensure,
Enforcement & Regulation**

Promoting Regulatory Excellence

Questions and Discussion

Ronne Hines

Board member

*Council on Licensure, Enforcement
and Regulation (CLEAR)*

*Director, Division of Professions and
Occupations, Dept. of Regulatory
Agencies, Colorado*

ronne.hines@state.co.us

303-894-7770

**Best Practices for Licensing
agencies in the handling of:
Meetings, Rulemaking,
Complaints, Investigations,
Hearings and Settlements and
Communications with
Applicants and Licensees**

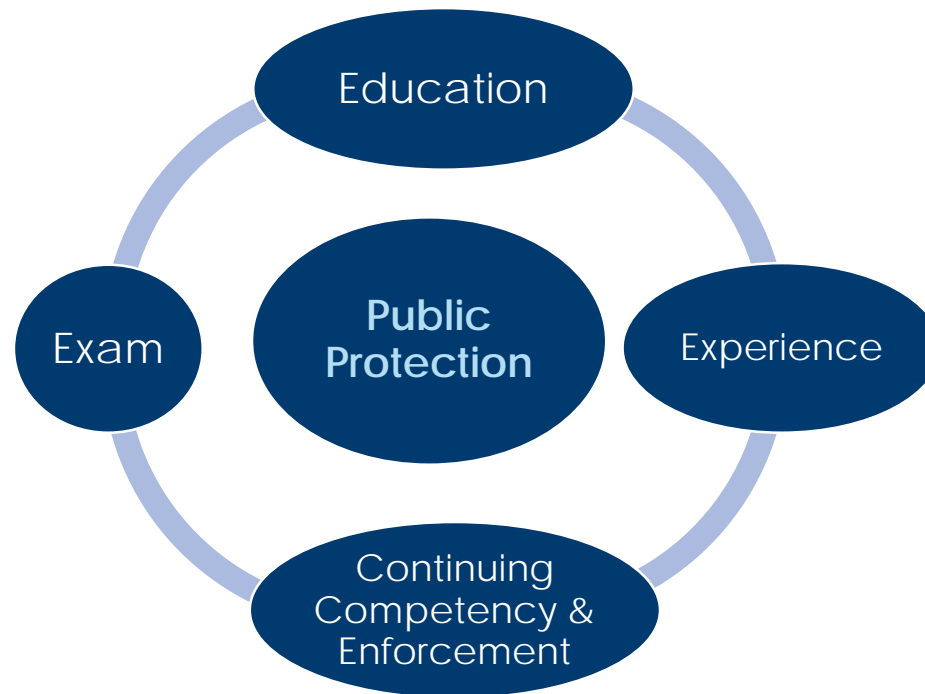
Nahale Freeland Kalfas

Of Counsel to the National Center for Interstate Compacts

The Anti-Regulatory Environment

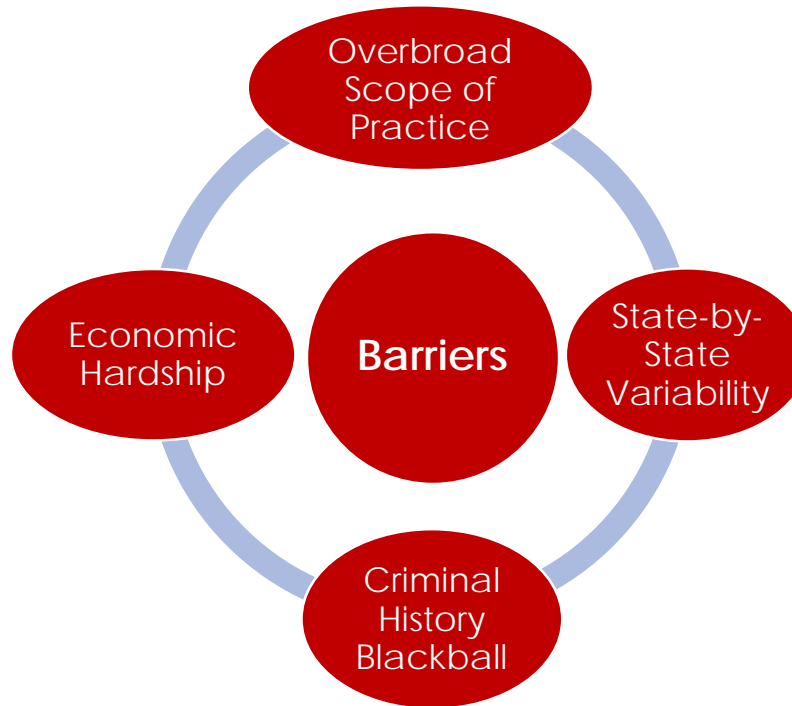
How Regulators View The World

Courtesy of:
Nathan Stanley
Allen & Pinnix, P.A.



The Disconnect

How Outsiders View Regulatory Community



How They Really View You

Cartels Price-fixers

Rent Seekers

Competition Stiflers

Self Dealers Racketeers

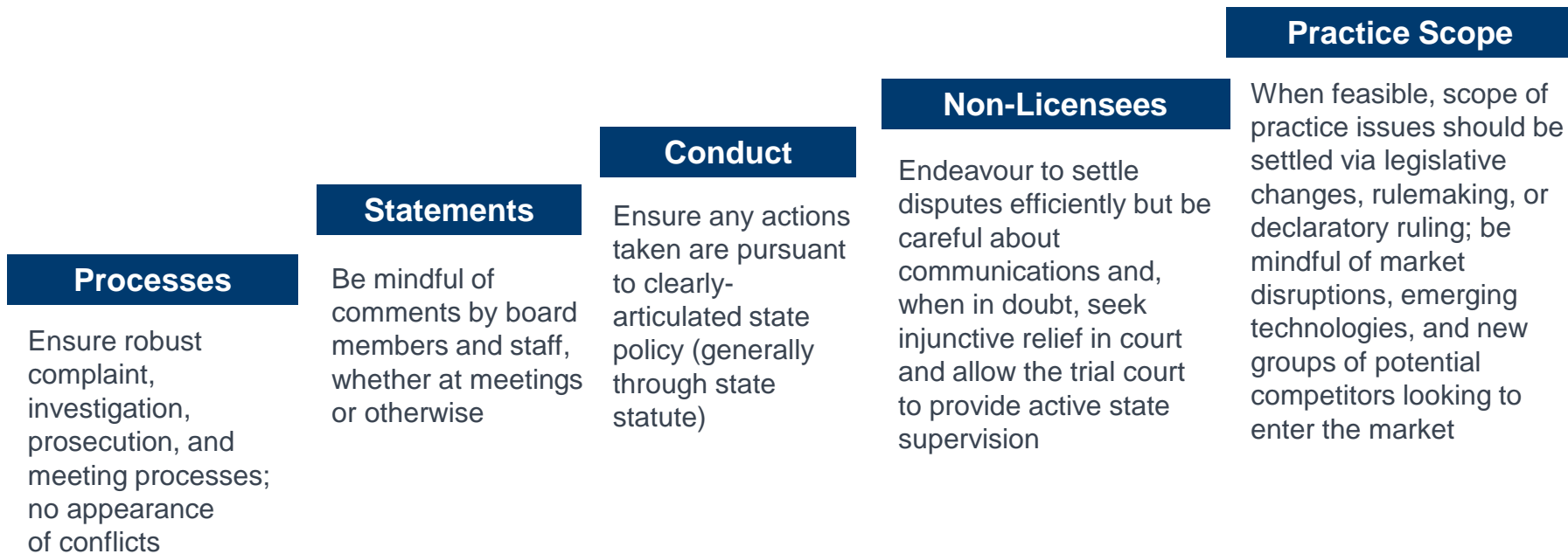


Does Your Rule, Policy, or Action Comply With...

1. The State will increase economic opportunities, promote competition, and encourage innovation.
2. The State will **use the least restrictive regulation necessary to protect consumers** from present, significant and substantiated harms that threaten public health and safety
3. An occupational regulation may be enforced against an individual only to the extent the individual sells **goods and services that are included explicitly in the statute that defines the occupation's scope of practice**....

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Board Level –What Can You Do to Minimize Antitrust Risk?



Best Practices for Minimizing Antitrust Liability Risk: *Policies/Procedures*

- Engage in objective, evidence based review and renewal of applications for licensure and renewal
- Engage in thorough and inclusive investigations with ample opportunity for all parties to provide documentation and conduct interviews (more on disciplinary proceedings later)
- Review your rules and regulations thoroughly and voluntarily eliminate repetitive, antiquated or unduly burdensome rules
- Train your board members, staff and investigators early and often on the importance of transparency (and all relevant public records, open meetings laws), avoidance of conflicts and ANY appearance of protection of their market share if they are professional members of the board

Best Practices for Minimizing Antitrust Liability Risk: *Policies/Procedures*

- Understand what is expected of you at the state level and prepare (i.e.: audits, fiscal notes and other rulemaking requirements, survey and legislative query responses, current, helpful and efficient websites, electronic capability for applications and filing of complaints, ease for military families)
- Have an “elevator speech” prepared for your legislators as to the work your board does to advance and enhance consumer protection in the less restrictive (to your licensees) means possible
- Tell your story to the public, garner earned media

Best Practices for Minimizing Antitrust Liability Risk: *Policies/Procedures*

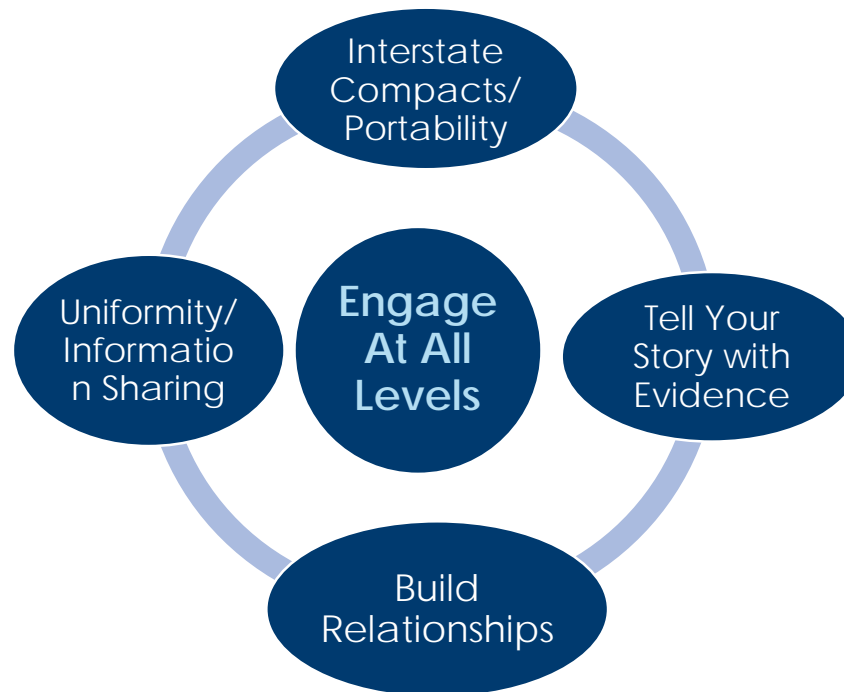
- Begin meetings with your purpose statement as a reminder to board members of their duty to narrowly engage in the sole mission of public protection and conduct every meeting with the same care and caution you would if you had public members in attendance
- Read your legal, valid reasons for going into closed session into the record and resume open session for voting matters
- Have counsel advise during your meetings and review your agenda

Best Practices for Minimizing Antitrust Liability Risk: *Policies/Procedures*

- Settle non-licensee issues and scope of practice issues as amicably as possible and seek AG opinions, injunctive relief in court, or other forms of “active supervision” frequently

REMEMBER- If your board repeatedly asks itself the question “is this inquiry, action, requirement or denial narrowly based on the sole purpose of public protection, without consideration of protection of professional market share, and are we engaging in the least restrictive, least punitive manner possible to protect the public” you should not run afoul of antitrust laws.

Where Do We Go – Collective Efforts



Antitrust Liability

- What constitutes “active state supervision” as required by the FTC v. NC Dental Board case remains to be determined by the courts and, in some states, the legislature.
- Recent case law (and legislation) is trending toward the erosion of the deference traditionally given to board member’s expertise, knowledge and interpretation of statutes under the Chevron case
- Arizona has legislated against Chevron deference and the Mississippi Supreme Court has said they will not give deference to Boards
- More ambiguous, less clear the statute=less deference given to board interpretation

Antitrust Liability Contd.

- Review of evidence based criteria of Board requirements (Exams, Experience/Training hours, Supervision, Continuing Education) is trending nationally.
- Boards should determine the objective, evidence-based validity of their requirements and be able to demonstrate that those requirements are necessary and narrowly tailored to fulfill legitimate public health, safety or welfare objectives.

Antitrust Liability Contd.

- Does your Board's Exam disproportionately disadvantage any examinee or group of examinees on any basis other than the examinee's lack of knowledge or skill required to safely and competently engage in the practice or profession the Board regulates?
- Does your Board have a disproportionately low pass rate for examinees vs. other similar state regulatory boards or similar professions/occupations?
- Does your Board allow for Board approved interpreters and translators for examinees?
- Are you ADA compliant in your applications and exams?
- Do you review your exam and other requirements for acknowledgement of technological advancements and ways in which those advancements can assist your licensees?
- Do you have statistics to show that your supervision and continuing education requirements have a nexus to previous or ongoing complaints and public safety concerns reported to your board?
- Could your board withstand a legal challenge that you have no evidence basis for your requirement (as it relates to a legitimate public health, safety or welfare objective)?

**Best Practices for Handling meetings,
rulemaking, Complaints,
investigations, settlements, hearings
and communications with
Applicants, Licensees and the Public**

Nahale Freeland Kalfas

Of Counsel to the National Center for Interstate Compacts

Meetings

- Consider opening each meeting by reading your mission or purpose statement
- Conduct each meeting as though you have the public in attendance even if they are not present
- Provide ample notice of your meetings to all required parties and on your website
- Allow for public participation electronically or in person and allow a set period of time for public comment
- Review your agenda with counsel and read into the minutes your allowable reasons for going into closed session
- Read board member recusals into the minutes and have recused board members leave the room
- Encourage public member participation and be helpful to your public members
- Educate new board members about your process during the meeting
- Educate your board about cultural competency
- No water cooler conversation regarding board matters
- Keep it professional

Rulemaking

- Confer with counsel on your state's rulemaking requirements regarding notice, public hearing, etc.
- Seek input from stakeholders early and often in the drafting process
- Eliminate redundant rules
- Only promulgate narrowly tailored, necessary, least burdensome rules

Investigations

- Do your Boards use investigators to investigate complaints? If so, are the investigators employees of the Board or contractors? Do Board members ever investigate complaints?
- How do the Boards determine which complaints warrant further investigation by an investigator? Are those decisions made by Board staff or a subcommittee of the Board?
- Are investigators asked to generate written reports of their findings?
- What resources have your Boards found helpful to train investigators?
- Do investigators allow all parties involved to provide responses and interview all parties?

Hearings/Settlements

- How many Board members usually adjudicate the hearing (or are cases sent to ALJ or elsewhere) and do Board members ever recuse?
- Do your Boards always have court reporters transcribe the hearing?
- How do your Boards approach settlement discussions? For example, is a Consent Order sometimes provided with the Notice of Hearing? Or, is the licensee given an opportunity to meet with the disciplinary committee prior to hearing to discuss settlement possibilities? What release or waiver (re: ex parte communications) is procured prior to initiation of settlement conference?
- How many of your Boards have separate counsel advising them during the hearings?
- Do your Boards usually render a decision on the record at the conclusion of the hearing, or do they usually take matters under advisement?
- Most Boards have experienced an uptick in complaints filed and hearings needed over the past several decades. How have you seen the hearing process change during your tenure as Board counsel (e.g. more licensees represented by counsel? More prehearing motions? More expert witnesses?)

Settlements

- Make sure your process is transparent, clearly explained to the licensee, and shields board members who may adjudicate the matter if settlement is not reached from ex parte problems
- Have the licensee (and their attorney) execute a detailed waiver and consent to your settlement procedure
 - Confirm the licensee's understanding of what they signed at the beginning of the settlement conference
- Be cautious about who participates in the settlement
- Be generous in what you allow the licensee to offer in their defense
- Be creative about how to conduct the settlement conference (again, with input from counsel) and be creative with your offer-one size does not fit all
 - Draft a consent settlement agreement that thoroughly details how you arrived at your decision

OCCUPATIONAL LICENSING DEEP DIVE: UNIVERSAL RECOGNITION

Zach Herman
Policy Associate
National Conference of State Legislatures



WHAT UNIVERSAL RECOGNITION IS

The endorsement of licenses in good standing held by an individual practitioner in another state as valid qualification for licensure in the state.

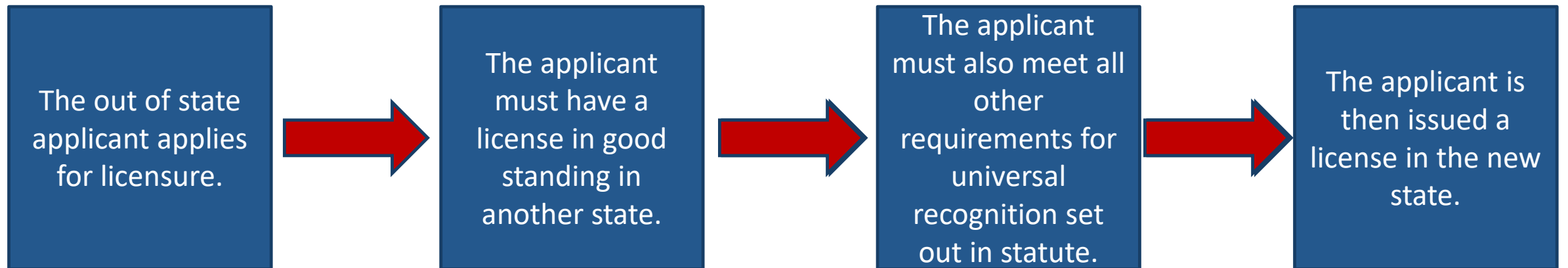


WHAT UNIVERSAL LICENSURE RECOGNITION IS NOT

- Reciprocity:
 - Reciprocity is an agreement between two state licensing entities to recognize licenses from each others' states.
- Interstate Compact:
 - A constitutionally sanctioned agreement between state governments' governing issues that cross state lines.
- Universal:
 - This doesn't apply to all licensed professions in the state.
- Automatic:
 - The potential licensee must still apply for a license in the new state and meet that state's requirements for licensure by endorsement.



HOW DOES UNIVERSAL LICENSURE RECOGNITION WORK?



WHAT THEY DON'T DO

- They do not establish reciprocity with any other state, and do not prevent any licensing board from entering into a reciprocity agreement with another state.
- They do not affect established licensing agreements set in interstate compacts or existing reciprocity agreements.
- They do not affect the regulation of new applicants applying for their first license.

COMMON THEMES OF RECENT UNIVERSAL RECOGNITION LEGISLATION

- The implementation of universal recognition is left up to the discretion of the licensing boards.
- Applicants must have been licensed in another state for at least a year.
- The applicant must be in good standing with their license. This includes no complaints, sanctions or disciplinary actions.
- Applicants cannot have a disqualifying criminal history.
- Applicants must have a substantially similar scope of practice between their current license and the license of the state to which they are applying.
- Applicants must pay all applicable fees.
- In many instances, applicants must also take the state examination.



OTHER EXAMPLES OF LICENSURE BY ENDORSEMENT

- Licensure for veterans and military spouses.
- Licensure during a declared state of emergency.

Enrolled Copy	S.B. 227
1	LICENSING STANDARDS FOR MILITARY SPOUSES
2	2018 GENERAL SESSION
3	STATE OF UTAH
4	Chief Sponsor: Todd Weiler
5	House Sponsor: Brian M. Greene
6	<hr/>
7	LONG TITLE
8	General Description:
9	This bill modifies occupational and professional licensing requirements for certain
10	individuals serving in the military and for certain spouses of individuals serving in the
11	military.
12	Highlighted Provisions:
13	This bill:
14	▶ provides certain exemptions from occupational and professional licensure in a
15	variety of occupations and professions, including for:
16	• an individual serving in the military if the individual has a valid license in
17	another jurisdiction; and
18	• a spouse of an individual serving in the military if the spouse has a valid license

STATE LEVEL TRENDS

States With Legislation Pending

- California: **AB 2185**
- Colorado: **HB 1326**
- Georgia: **HB 773**
- Iowa: **HB 2470**
- Ohio **HB 432**
- Missouri: **HB 2476**
- Virginia: **HB 982**
- Washington: **HB 2354**

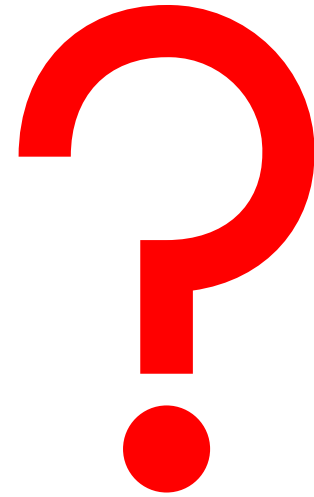
States That Have Enacted

- New Jersey: **AB 2018 – 1531**
- Arizona: **HB 2019 – 2560**
- Montana: **HB 2019 – 105**
- Pennsylvania: **HB 2019 – 1172**



YET TO BE DETERMINED

- Licensing is still at the board's discretion.
- Vague on “disqualifying criminal history.”
- Does not address differences in maintaining licenses across multiple states.
- Not every state adopts the exact same piece of recognition legislation.



Questions?

Zach Herman
Policy Associate
Employment, Labor and Retirement Program
National Conference of State Legislatures

