



TO: The Honorable the Members of the Board of Regents

FROM: Johanna Duncan-Poitier

COMMITTEE: Professional Practice

TITLE: Unauthorized Practice of the Professions

DATE OF SUBMISSION: January 23, 2001

PROPOSED HANDLING: Discussion

RATIONALE FOR ITEM: To inform the Regents of our illegal practice efforts

STRATEGIC GOAL: 3

AUTHORIZATION(S):

EXECUTIVE SUMMARY

This report on illegal professional practice is the sixth in a series of policy reports on emerging issues that affect the future of the professions, consumer safety and professional regulation. We have recently reported on the emerging issues of corporate practice of the professions, telepractice, cross-jurisdictional professional practice, continuing competence, and effective professional regulation. The Board of Regents and the Department, with input from the State Boards, the professional community and consumers, have identified these topics as key horizon issues that will have a major impact on the regulation of the professions in New York State well into the 21st century. Unauthorized practice of the professions without an appropriate license is the focus of this report.

The illegal practice of a profession involves any person or entity who practices one of the licensed professions without a license authorizing him/her to practice, and/or who falsely represents him/herself as authorized to practice such a profession. Someone who has not met New York State's full range of requirements for professional licensure, including: education, experience and examination, regardless of licensure in any other jurisdiction, is considered an unlicensed individual unless the statute authorizing the profession provides for specific conditions or exemptions. These standards constitute the basic threshold needed for safe, professional practice in New York State.

Unlicensed individuals and entities that practice a profession can be prosecuted by the Office of the Attorney General for a felony criminal violation. Licensed professionals who aid and abet the unauthorized practitioner of a profession are subject to charges of professional misconduct by the State Education Department, which has the authority to take action against the professional license. In addition, licensed professionals who aid and abet the unauthorized practice of a profession on three or more occasions are subject to criminal prosecution by the Attorney General's Office. The unauthorized practice of a

profession by an unlicensed person is also distinct from professional misconduct of licensed professionals who practice beyond their professions' scope of practice.

Ensuring that those who practice a profession are properly licensed is one of the most significant professional regulatory responsibilities of the Board of Regents. The Office of the Professions (OP) is statutorily responsible for investigating complaints of illegal professional practice. The Department receives, on average, 700 complaints of illegal practice each year. Approximately 245, or 35%, of these illegal practice complaints are substantiated after investigation.

To resolve these illegal practice cases, the State Education Department annually refers an average of 45 cases to the New York State Office of the Attorney General (OAG) for criminal prosecution and secures approximately 200 compliance agreements. A compliance agreement is a specialized administrative cease and desist warning issued by the Education Department in which the unlicensed individual signs an affidavit, agreeing to immediately stop activities associated with practicing the profession illegally.

The Department's productive relationship with the New York State Attorney General is critical to a comprehensive approach to illegal practice of the licensed professions. That relationship has been strengthened, this year, because of the direct leadership role and involvement of Commissioner Richard Mills and Attorney General Eliot Spitzer who are together seeking a more focused joint collaboration on new illegal practice complaints. The results of the recent collaboration between the Attorney General's Office include:

- Stronger compliance agreements used by the State Education Department. These administrative cease and desist warnings are now made public and automatically forwarded to the Office of the Attorney General. Violation of these agreements will now result in a formal referral for criminal prosecution.
- Agreement for enhanced enforcement of the most serious cases by the Attorney General. This includes greater pursuit of upstate cases.
- Expanded preventative actions to increase the awareness among the public and the professional community of the dangers of unlicensed practice.

BACKGROUND

The Board of Regents oversees a comprehensive professional regulatory system to ensure public access to safe and competent professional services. To protect the integrity of that system, the laws prohibit the practice of a profession by anyone who is not licensed. Section 6512 of the Education Law makes it a felony¹ for any individual or entity to practice a profession without a license. Additionally, Section 6513 of the Education Law provides that the unauthorized use of a professional title is a misdemeanor. Sections 6514 and 6515 of the Education Law provide that the Attorney General shall prosecute all violations or seek an order from the Supreme Court ordering the discontinuance of the

¹ The felony is a Class E-Felony, which is the least serious felony. However, felony violations are much more serious than any misdemeanor violation.

conduct. Representing oneself as a licensed professional without a valid New York State professional license or the qualifications authorized as an exemption in statute, is misleading and potentially dangerous as well as illegal. Such representation is termed "holding oneself out."

There is a distinction between illegal professional practice by a person who is not licensed and a licensed professional who practices beyond the scope of a profession. Practicing a profession beyond a licensed professional's scope of practice is not generally a crime (although it could be), but rather is professional misconduct; for example, a licensed veterinary technician performing minor surgery on an animal or a licensed practical nurse administering a chemotherapy agent. A licensee may, however, also engage in the illegal practice of another profession. For example, a social worker who prescribes and dispenses medication or performs a spinal manipulation.

The State Education Department investigates every report of illegal practice. Since January 1997, the Office of the Professions has opened more than 2,700 illegal practice cases. These illegal practice cases come to the Department through a variety of means, including staff-initiated investigations, reviews of newspaper advertising, consumer complaints, and complaints from professional societies. More than one-third of these complaints are founded.

While significant time, attention, and resources are devoted to the investigation and prevention of illegal practice, the professional disciplinary system is primarily aimed at professional misconduct of the licensed professionals. In the year 2000, we received over 8,200 professional misconduct complaints (a significant increase of 2,500 cases more than four years ago). The State Education Department has streamlined this system to achieve swifter justice for the licensed professionals while protecting the public. At the same time, the State Education Department has placed an increased emphasis on collaboration with the Attorney General's Office on illegal practice.

Over the last four years, 202 of the most serious cases were referred to the Attorney General for criminal prosecution. Historically, the most serious illegal practice cases have included actual, rather than potential, patient harm. Examples of recent cases that led to successful criminal prosecution include: a physician who continued to practice as an anesthesiologist after her license had been suspended by the Department of Health; an individual who tried to use fraudulent credentials to gain employment as a nurse and was admitted to the medical licensing examination using fraudulent nursing and medical credentials; an unlicensed individual who was conducting physical examinations on patients in an apartment; a number of unlicensed individuals who practiced dentistry; and a pharmacy employee who dispensed prescription medication without being licensed.

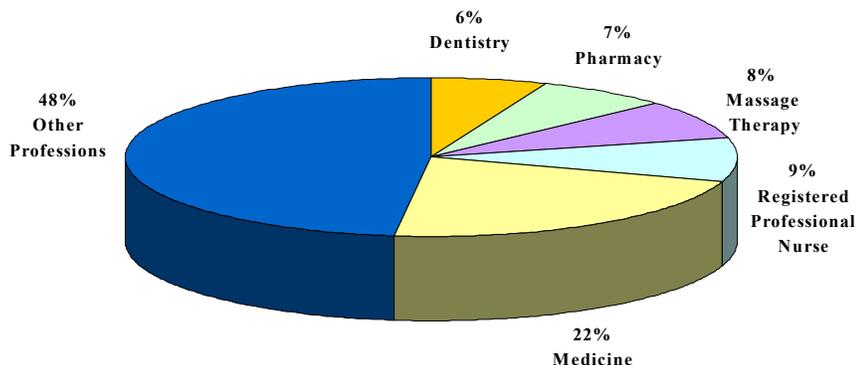
Over 800 of the substantiated cases were resolved by the State Education Department with specialized administrative cease and desist warnings called compliance agreements. These administratively secured agreements, which address less serious conduct, are used by the Department to support the Attorney General's responsibility for the criminal prosecution of complaints. Department investigators seek to have the

individual subject of the complaint sign a compliance agreement that describes the conduct and contains a commitment not to repeat that misconduct. Those who enter into compliance agreements and violate the conditions are subject to prosecution by the Attorney General. As a result of our latest collaboration with the Attorney General's Office, the compliance agreement also informs the subject that the agreement will be forwarded to the Attorney General and will be made public. A copy of a compliance agreement is attached to this report.

Illegal Practice Actions From 1997 through 2000	
Total Cases Opened by SED	2,787
Compliance Agreements Secured by SED	848
Serious Cases Referred to OAG for Criminal Prosecution	202
Number of Cases Unsubstantiated or Inappropriate for OP Action	1,737

In the past, illegal practice has most frequently occurred in the New York City metropolitan area in the professions of Medicine, Registered Professional Nursing, Massage Therapy, Pharmacy, and Dentistry. These five professions account for 52% of the investigations conducted since 1997. Trend data indicate that a wider geographic spread may be found in the future.

**Three-Year Profile of Individuals
Practicing or Advertising as a
Professional without a License
Investigations Conducted
January 1997-December 2000**



Most illegal practice cases involve impostors actually practicing the professions in private office settings. Often, but not always, they are people whose licenses were once

revoked in New York or elsewhere or who studied the professions but never passed the licensure exams. There is, however, a growing trend involving the use of unlicensed assistive personnel to provide licensed professional services in institutional settings, such as hospitals and health care clinics. This practice has expanded as institutions are downsizing in response to pressures to reduce costs. The use of unlicensed assistive personnel to provide professional services is illegal unless specific statute permits it. Prosecution of such illegal conduct is complex because it often involves interpretations and actions by other agencies such as the Department of Health, the Office of Mental Retardation and Developmental Disabilities, and the Office of Mental Health. Prosecution of the results of any investigation depends on the Attorney General's determination that the conduct fits their criteria for prosecution as a criminal violation. Such determinations are influenced by factors such as available resources and court assessments of the impact of Class E-felonies relative to more serious felonies such as homicides or forcible robberies. The Education Department is working with the Attorney General, the above listed State agencies, and the New York State Legislature to clarify the range of permissible services offered by unlicensed assistive personnel and to achieve a solution to this problem.

EDUCATION DEPARTMENT AND ATTORNEY GENERAL PARTNERSHIP RESULTS

The Education Department, with the direct involvement of Commissioner Mills, has strengthened its partnership with the New York State Office of the Attorney General to combat the illegal practice of the professions. In January 2000, Commissioner Mills and Attorney General Spitzer met and agreed to enhance collaboration and strengthen enforcement to curb illegal professional practice in New York State. Those meetings resulted in both agencies agreeing that a high priority must be placed on this issue given the danger to the public and the need to develop mutually acceptable, practical options for addressing that danger. Ongoing meetings between staff of both agencies have identified new options for action and cooperation to enhance public protection and awareness. Our joint efforts have resulted in a renewed interest and greater commitment to address the serious complaints that are referred for criminal prosecution. At the October 2000 Regents Conference on the Professions, Attorney General Spitzer joined Commissioner Mills to announce a three-pronged approach to reduce illegal professional practice. This approach includes:

- **enhancement of voluntary compliance agreements** used by the State Education Department which are **now public information** and shared with the Attorney General's Office, as of October 2000
- agreement for enhanced **enforcement** by the Attorney General's Office
- **increased public awareness** activities to prevent instances of illegal practice

Enhanced Compliance Agreements

The Department has revised and strengthened its compliance agreement to reflect both the new step of sharing the agreement with the Attorney General and to emphasize that a violation of the agreement will result in a formal referral to the Attorney General's Office for criminal prosecution. This enhances our administrative effectiveness with respect to illegal practice. Compliance agreements are used when an investigation uncovers conduct that may be illegal but is not in the category of the most serious cases that the Attorney General's Office has identified as appropriate for criminal prosecution.

Since October 2000, copies of all compliance agreements and summaries of the complaints are now forwarded to the Attorney General's Office for possible criminal penalties. Restraining orders and criminal prosecution will be pursued by the Attorney General upon subsequent violations by the individual. This helps guarantee the effectiveness of administrative compliance.

We have continuously sought ways to make information regarding illegal practitioners public as an important deterrent. As a result of our latest collaborative efforts between the State Education Department and the Office of the Attorney General, we have achieved that goal. Our efforts to address illegal practice activities after October 2000 are now available to the public. As of March 15, 2001, reports of compliance agreements will appear on the OP website, providing information such as: the date of the compliance agreement, the individual's name, and the profession being practiced illegally. The information will also be part of the discipline data that are contained in the Board of Regents press release after each Regents meeting. These steps will substantially enhance the deterrent effect of the compliance agreement by increasing awareness among the public and the professional community of identified activities.

Increased Enforcement by the Attorney General's Office

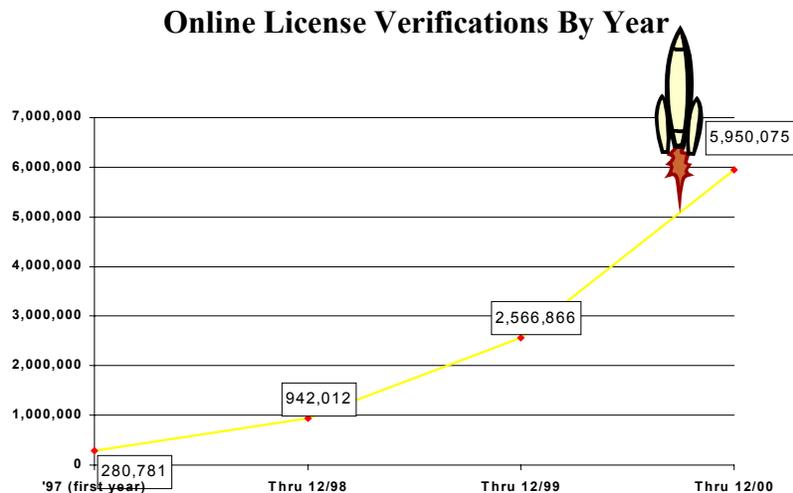
We have pursued all complaints involving the actual practice of a profession, patient/client harm or potential patient/client harm, complaints of individuals "holding themselves out" as licensed professionals or using professional titles without authorization, and cases involving major insurance or Medicaid fraud. While most illegal practice occurs in New York City, data show an increasing number of instances in other areas of the State. As a result, the Attorney General's Office will pursue more illegal practice cases for prosecution from their upstate office.

A comprehensive tracking system has been established to monitor all referrals to the Attorney General's Office and their outcomes. The leadership of the Attorney General's Office is meeting with us on a routine basis to identify the most serious complaints of illegal practice for quick action. Many cases that were previously handled administratively through our compliance agreement may now be considered by the Attorney General's Office for possible criminal prosecution. The Attorney General's Criminal Prosecution Bureau will review these complaints in the early stages of investigation for potential referrals for criminal prosecution. These new important

initiatives will aid in keeping the public well informed and in expediting the prosecution of serious cases.

Increased Public Awareness/Prevention

We have taken additional steps, in concert with our State professional boards and associations/societies, to address concerns of illegal professional practice to assist the Regents in fulfilling their mission of protecting the public, informing the public of the importance of receiving professional services from licensed professionals, and providing them with tools to make those determinations. We provide the public with extensive information about the licensure status of professionals whose services they may seek. In January of 1997, we began providing professional license information on the Office of the Professions' website, which is available 24 hours a day, 7 days a week. Nearly 6 million license verifications were completed from inception through December 2000. This is a clear indication that our Internet services are being extensively used.



Over the last three years, we have released thousands of plain-language consumer brochures on the 38 professions in four languages, including Chinese, English, Haitian-Creole, and Spanish, to more than 700 public libraries, professional associations, public housing authorities, consumer and community groups, and consumer protection agencies. Each brochure provides useful information about who must be licensed to perform professional services, what services are offered by the profession, and what credentials the professional must have, as well as how to verify a license and report professional misconduct and unlicensed practice.

Additional informational materials and outreach activities include the development of “A Consumer’s Bill of Rights” and public speaking engagements, as well as a recent partnership with Verizon (formerly Bell Atlantic) to place public service announcements before listings of most professionals in its Yellow Pages. This is crucial to help the public understand the importance of seeking professional services from only licensed professionals.

Reaching Out to Customers

NOTICE

A MESSAGE ABOUT DENTISTS

The New York State Education Department oversees the licensure of dentists. To verify a license and learn more about who must be licensed and registered to offer professional services and/or use the professional title, contact the New York State Education Department, Office of the Professions at:

**(518) 474-3817 or visit
www.op.nysed.gov**

INFORMATION ON HOW TO VERIFY LICENSURE STATUS IS IN THE YELLOW PAGES

PAST LEGISLATION TO MODIFY GOVERNANCE

Key legislative committees and professional associations/societies have previously suggested modifications to the provisions for the criminal and civil prosecution of illegal practice currently contained in Education Law. Proposals have ranged from conferring upon the Education Department concurrent authority with the Attorney General’s Office for criminal and civil prosecution to enabling the Department to develop a full adjudicatory process that would involve hearings within the Department that could result in issuing an order to cease and desist, combined with fines up to \$5,000 per incident.

Legislation to expand the Department’s jurisdiction for prosecution of illegal practice was vetoed in 1996. Subsequent legislative proposals would have enabled the Department to civilly prosecute licensed professionals for any aiding and abetting of the unlicensed practice of a profession. Currently, the law only allows the criminal prosecution of licensees who aid and abet three or more unlicensed persons in the unauthorized practice of a profession. Additionally, a finding of professional misconduct against a licensee for aiding and abetting now requires showing that the unlicensed individuals have been convicted of the criminal charge of unlicensed practice.

The Department aggressively investigates all complaints of illegal practice. The additional responsibility inherent in all of these legislative proposals could provide overwhelming challenges to the Department's resources. Full responsibility for a complete adjudicatory process, similar to that in place in the Attorney General's Office, would necessitate a redeployment of resources from prosecuting complaints of professional misconduct (with the number of professional misconduct cases growing steadily) to prosecuting illegal practice. This responsibility would require a permanent, substantial commitment of additional funds and authorization from the Division of the Budget for expenditures beyond current levels. In recent decades, fee increase proposals to fund illegal practice initiatives have been considered but ultimately rejected.

NEXT STEPS

The Department is committed to continuing to pursue more aggressive action within the current statutory framework collaboratively with staff of the Attorney General's Office. Any other legislative proposals that surface will need to be analyzed carefully during the upcoming legislative session. Illegal practice continues to be a threat to the public and a challenge to State resources. We are confident that through working closely with the Attorney General and focusing on prevention through information dissemination, we will be able to significantly reduce the occurrence of illegal professional practice by enhancing the effectiveness of existing practices and procedures without additional cost.

We will follow through on each agreement reached between the Education Department and the Attorney General's Office. Additionally, we are developing guidelines for the resolution of these cases and determining consistent criteria for compliance agreements and direct referral to the Attorney General. Our goal is consistent, just resolution, and swift action.

We will continue to focus on public protection as we proactively work in partnership with the Attorney General to effectively and efficiently resolve cases of illegal practice. We will build upon our previous successful cases, such as those listed earlier, using them as models to enhance our investigative and enforcement strategies. We will also continue with the all-important effort to share information with the public and with licensees.

We will continue to keep the Regents informed and seek the Regents guidance on legislative proposals, as well as the issues and approaches reflected above.